

69925-3

69925-3

NO. 699253

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

HAILU MANDEFERO., Appellant,

BRIEF OF APPELLANT

Mitch Harrison
Attorney for Appellant
Harrison Law Firm
101 Warren Avenue N
Seattle, Washington 98109
Tel (253) 335 - 2965

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL -7 PM 1:36

TABLE OF CONTENTS

I. ASSIGNMENT OF ERRORS.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS.....1

III. STATEMENT OF THE CASE..... 1-26

IV. ARGUMENT 26-51

A. Standard of Review, Burden of Proof, & Summary of Argument 24-28

1. Standard of Review..... 24-25

2. The State’s Burden of Proof25

3. Summary of Argument 25-28

B. No Rational Jury Could Have Found that Two People Shot at Gary Beyond a Reasonable Doubt. Such a Finding Would be Pure Speculation..... 28-31

1. The Citrus Shooting 28-29

2. The Evidence of Two Shooters is Equivocal at Best..... 29-31

C. No Rational Jury Could Find that Mr. Mandefero was Even Present When Hubbard Shot Gary..... 32-37

1. How T-Mobile’s Cell Phone Tower Logs Work 32-34

2. The Cell Phone Records Conclusively Disproved the State’s Theory that Mr. Mandefero was Even Present When Hubbard Shot Gary 34-37

D. The Other Evidence Does Not Overcome the Overwhelming Evidence of Mr. Mandefero’s Innocence 38-46

1. Gary’s Statements to Deputy Glasgow Naming Mr. Mandefero were Unreliable, Speculative, and Equivocal 38-46

E. The Evidence Does not Even Support a Conviction Based Upon Accomplice Liability 46-48

V. CONCLUSION 48-49

TABLE OF AUTHORITIES

United States Supreme Court Cases

Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314
(1935).....38

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368
(1970).....24, 26

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560
(1979).....24, 25

Federal Appellate Court Cases

Brown v. Keane, 355 F.3d 82 (2d Cir. 2004).....40

Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005)26

United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971).....43

United States v. Orduno-Aguilera, 183 F.3d 1138 (9th Cir. 1999)26

Washington Supreme Court Cases

State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995)29

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....25

State v. Hanna, 123 Wn.2d 704, 871 P.2d 135 (1994)30

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).....25

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997).....30

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 43-45

State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005).....25

Washington Appellate Court Cases

State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (2009)47

State v. Davis, 177 Wn. App. 1017 (2013)25

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999)30

State v. Hendrix, 50 Wn. App. 510, 749 P.2d 210 (1988)43

State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007).....25

State v. Sandoval, 123 Wn. App. 1, 94 P.3d 323 (2004)30

Additional Authorities

State’s Sentencing Memorandum23, 24, 29

I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S *KNAPSTAD* MOTION AT THE CLOSE OF THE STATE'S CASE.
2. THE TRIAL COURT ERRED WHEN IT ENTERED CONVICTIONS FOR THREE CRIMES—ALL OF WHICH REQUIRED THE STATE TO PROVE THAT MR. MANDEFERO POSSESSED A FIREARM—WITHOUT ANY FACTS FROM WHICH THE JURY COULD INFER THAT HE ACTUALLY POSSESSED A FIREARM.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. WHETHER THE EVIDENCE IS SUFFICIENT TO PROVE THAT MR. MANDEFERO POINTED A FIREARM AT GARY AND PULLED THE TRIGGER.

III. STATEMENT OF THE CASE

A. BACKGROUND

In early 2012, Kevin Hubbard was looking to settle a score with some rival gang members. Though not much is known about the exact reasons why, what is known is that Hubbard did settle the score by gunning down multiple rival gang members in two separate drive-by shootings in King County, Washington.

The first happened on January 28, 2012 outside the Citrus Nightclub in Seattle, Washington. But the investigation into that shooting went cold until May, when Mr. Mandefero was arrested on the belief that

he was involved in a similar shooting that happened outside of Ezell's chicken on May 1, 2012, in Skyway, Washington.

On May 1, 2012, Mr. Mandefero received a desperate phone call from a friend, Kevin Hubbard, asking for help: "Someone shot me," Hubbard told him. "I am near the 76 station in Skyway. Can you pick me up and give me a ride to the hospital?" Hubbard asked Mr. Mandefero.

Unbeknownst to Mr. Mandefero, Hubbard had just opened fire on at least two unsuspecting victims, Gary and his cousin, as they both sat unsuspectingly in Gary's Cadillac. Just before 9:00 PM that day, Hubbard located Gary's Cadillac parked outside of Ezell's chicken, a restaurant located just off of Renton Avenue in Skyway, Washington.¹

Gary was sitting in the driver's seat of the car, which was parked only feet from the entrance to Ezell's chicken. Suddenly from behind the vehicle, Hubbard pulled out a pistol and opened fire on Gary and his Cadillac.² Several bullets intended for Gary flew through Ezell's restaurant, luckily missing each of the occupants inside the restaurant.

At some point during his shooting spree, something went wrong and Hubbard accidentally shot himself in the left buttocks.

Hubbard then contacted Mr. Mandefero, one of his most reliable friends, to ask him to pick him up. And Mr. Mandefero did just that. "Of

¹ 10.24.14 RP at 16-19.

² 10.24.14 RP at 35-36.

course,” Mr. Mandefero said. “I am on my way.” Mr. Mandefero left his original location in south Seattle, which was several miles away, to pick up Hubbard. Sometime after 9:20 PM, Mr. Mandefero finally entered the city of Skyway and picked Hubbard up from his new location on Renton Avenue in Skyway, Washington.

At 9:09 PM, an Ezell’s employee called 911 to report the shooting, but no one, including Gary himself, actually saw Hubbard shoot Gary. Immediately after the shooting, Gary was interrogated by a King County Deputy. This Deputy refused to cease the interrogation until Gary named someone in the shooting. After giving several false names, Gary gave vague descriptions of someone named “Hailua” or “Hailu” as possibly being involved in the shooting.

Based upon this identification, police would later arrest the defendant, Hailu Mandefero, after he took Hubbard to a local hospital to have a gunshot wound treated. The State charged Mr. Mandefero with three crimes: first degree assault on Gary, second degree assault on Torres (a restaurant worker who was unharmed), and unlawful possession of a firearm.

The State did not charge Hubbard initially, apparently believing that Mr. Mandefero was the sole gunman. But, as the investigation developed, the evidence began to point towards Hubbard as being the sole

gunman. In fact, Gary would later recant his interrogated identification of Mr. Mandefero and explain that he never actually saw who shot him: he explained that he was only guessing about who shot him. Ultimately, the only evidence that arguably connected Mr. Mandefero to the shooting was this out-of-court recanted identification.

B. GARY’S INTERROGATED “IDENTIFICATION” OF “HAILUA” OR “HAILU”

During the shooting, four bullets struck Gary as he sat in the car. Each of the bullets came from behind the Cadillac on the driver’s side. Three bullets entered directly through Gary’s back and one entered through the car and struck him in his left hip.³ Gary was soon found at a bowling alley next door to Ezell’s, a short distance away from the shooting.⁴

Within minutes of the shooting, police arrived at the scene. Aside from Gary, police were unable to locate anyone who claimed to have any knowledge of what happened during the shooting. King County Deputy Glasgow was one of the first officers to arrive at the scene. Deputy Glasgow found Gary outside the bowling alley next door to Ezell’s.

Upon discovering Gary outside the bowling alley, Deputy Glasgow jumped right into his investigation, trying desperately to find out “who

³ 10.24.14 RP at 35-36.

⁴ 10.24.14 RP at 35-36.

shot [Gary]?” Even though no one witnessed the shooting, Deputy Glasgow refused to accept that answer.⁵ Instead, he repeatedly asked Gary who shot him. Gary repeatedly gave him the same response: Gary did not know.⁶ Again, Deputy Glasgow did not like that answer, so he continued his interrogation.

Deputy Glasgow asked Gary such questions as, “Who shot you?”; Was the shooting “gang related?”; What gang are the shooters associated with?⁷ But Gary could not answer any of these questions because he was shot in the back. He did not see who shot him. Still, Deputy Glasgow continued to interrogate Gary, asking him these same questions over and over until Gary finally gave some speculative answers.

Deputy Glasgow would later explain why that he repeated these questions over and over again: he had simply assumed that Gary was lying to him, after first assuming that Gary was in a Gang, and thus, per Deputy Glasgow’s reasoning, Gary must have “kn[own] who shot him.”⁸

But Deputy Glasgow did not know who shot Gary. Nor did he know whether Gary was lying, or, if he was lying, why he would have been lying. In fact, Deputy Glasgow could not have “known” any of that information prior to questioning Gary. After all, Gary was ambushed by a

⁵ 10.24.14 RP at 43-44.

⁶ 10.24.14 RP at 44-45.

⁷ 10.24.14 RP at 44-45.

⁸ 10.24.14 RP at 44-45.

surprise shooting from behind and he suffered three bullet wounds in his back.

And, prior to interrogating Gary, Deputy Glasgow knew nothing about the shooting or about Gary himself. Had he done some kind of investigation, Deputy Glasgow would have realized that such knowledge was a near impossibility. Deputy Glasgow's conduct was not the product of a solid police investigation. He was acting on a hunch, prejudice, and unfounded assumptions. He saw a young black man, who had just been shot multiple times, and simply assumed—without a factual basis—that he was lying.

As a result of this assumption, Deputy Glasgow conducted an entire investigation under the belief that Gary somehow “knew” who shot him. Deputy Glasgow stubbornly adhered to this belief even though Gary was shot multiple times in the back while he sat in the driver's seat of his own car facing away from the shooter during a surprise shooting.

Throughout Deputy Glasgow's interrogation, Gary was in extreme pain—a “nine out of ten,”⁹ “losing color” in his face,¹⁰ and “going into shock.” In fact, the pain was so bad that Gary even admitted that all he wanted to do “was get put to sleep.”¹¹ Deputy Glasgow knew all of these

⁹ 10.24.14 RP at 144-46.

¹⁰ 10.24.14 RP at 184.

¹¹ 10.24.14 RP at 44-45.

facts, yet he continued to interrogate Gary, endangering his life with every additional minute of questioning.¹²

And even when the medics arrived to treat Gary and take him to the hospital, Deputy Glasgow continued his interrogation and intentionally delayed Gary's medical treatment, jeopardizing Gary's life. Before medics were able to stabilize Gary's condition, Deputy Glasgow told the medics to "hold on" until he could finish interrogating Gary about who shot him.¹³

The evidence was not at all clear about whether Gary actually named the defendant—first name "Hailu"—or whether Gary was trying to make up a person—by a fake name "Hailua." Just before naming Mr. Mandefero, Gary began to fear that he would die if he did not tell Deputy Glasgow the name of someone—even though he clearly did not have a chance to see who shot him—so Gary "made up a name": either "Little Rue" or "Old Blue."¹⁴

Gary also gave conflicting statements about the assailants' gang status. He first said it was "some bloods from the central district." And only after Deputy Glasgow denied Gary life-saving medical treatment did Gary name the defendant.

¹² 10.24.14 at RP 184.

¹³ 10.24.14 at RP 44-45.

¹⁴ 10.24.14 at RP 44-45.

Deputy Glasgow said in his report—written after Mr. Mandefero was arrested—that Gary said “Hailu.” However, the recording of the statement confirms Gary gave Deputy Glasgow a different name or at least a mispronounced version of it—“Hailua”—which Deputy Glasgow said sounded Samoan, not African, as was Mr. Mandefero.

Finally, the evidence was also unclear about whether Gary had seen anyone shoot him, or whether he was just guessing because Deputy Glasgow demanded that Gary identify someone before he would allow the medics to treat him. Deputy Glasgow said in his report that Gary named multiple people in the shooting, specifically quoting Gary pinning the shooting on “Hailua and some niggers” from “Money Gang.”¹⁵

C. HUBBARD’S SELF-INFLICTED GUN SHOT WOUND

During the shooting, Hubbard’s firearm accidentally discharged in his back pocket. After the shooting, in a rushed attempt to holster his gun in his back pocket, Hubbard accidentally discharged the firearm, sending a bullet through the top of his left buttocks and out the bottom of it.¹⁶

Though the State tried to argue that Mr. Mandefero could have been the one to shoot him, the medical evidence established that it was almost certainly a “self-inflicted wound.”¹⁷ The firearm was discharged from very

¹⁵ 10.24.14, RP 145.

¹⁶ 11.06.12 at RP 41-42.

¹⁷ 11.06.12 at RP 41-42.

close range and at an angle that the only practical explanation for Hubbard's injury was a self-inflicted shot.¹⁸

D. MR. MANDEFERO'S DETENTION AND ARREST AT VALLEY MEDICAL

Hubbard suffered a gunshot wound to his left buttocks during the shooting. Mr. Mandefero took Hubbard to Valley Medical so Hubbard could be treated for the gunshot wound. The two arrived at the hospital at 11:37 PM. Though his injury was not life-threatening, Mr. Mandefero decided to stay with Hubbard at the hospital for several hours until finally deciding to leave.

During that time, several Renton police officers and King County Sheriff's arrived at the hospital to investigate Hubbard's gunshot wound. Yet, despite noticing this significant police presence, Mr. Mandefero stayed at the hospital for several hours to make sure Hubbard was going to be okay.

Once Mr. Mandefero finally decided to leave, however, Deputy Barden of the King County Sheriff's Office intercepted Mr. Mandefero as he walked out the door of the hospital.¹⁹ Deputy Barden had received a report that someone—Hubbard—had been admitted with a gunshot wound

¹⁸ 11.06.12 at RP 41-42.

¹⁹ Notably, Deputy Barden knew nothing about Mr. Mandefero except what he could observe physically, such as his first or last name, his exact age, his country of origin, or why he was at the hospital.

and Deputy Barden believed that Hubbard's wound may have been related to the shooting at Ezell's.²⁰

On two separate occasions, Deputy Barden questioned Mr. Mandefero about why he was at the hospital. In the first conversation, Mr. Mandefero appeared to be upfront with Deputy Barden, but after Hubbard spoke with him in between the two conversations, Mr. Mandefero then changed his story to protect Hubbard.

During the first conversation, Mr. Mandefero was frank with Deputy Barden about his reasons for being at the hospital. Mr. Mandefero also acknowledged his presence near the scene of the shooting at Ezell's and even admitted to picking up Hubbard at a location near the shooting.

Deputy Barden testified that one of the first questions he asked of Mr. Mandefero was why he was at the hospital. Deputy Barden testified that he asked Mr. Mandefero "How he came about being at the hospital?" Paraphrasing Mr. Mandefero's response, Deputy Barden said that Mr. Mandefero openly admitted that, "he had received a phone call from" his "friend" Kevin Hubbard "who had been shot" and "needed to go to the

²⁰ 10.25.12 at RP 75-78.

hospital.”²¹ He also candidly admitted that Kevin Hubbard was his friend.²²

Not only did Mr. Mandefero admit to visiting Hubbard, Mr. Mandefero also admitted that he had picked Hubbard up from near the scene of the crime shortly after it occurred. Deputy Barden testified that Mr. Mandefero admitted that Mr. Hubbard had placed himself close to the scene of the crime—at “76 station” located only feet way from Ezell’s—either by admitting to being there or asking to be picked up there only minutes after the shooting occurred.²³

But after Hubbard had a chance to speak with Mr. Mandefero, his story began to change. Two significant parts of the new story were different. First, Mr. Mandefero changed his story so Hubbard was no longer near the scene of the shooting.²⁴ Instead, Mr. Mandefero now claimed that Hubbard was shot in Renton, next to a Chuck-e-Cheese, nowhere near Ezell’s.²⁵ Also, Hubbard told Mr. Mandefero to remove his sister—Julie Mandefero—from the original story because she was the only

²¹ 10.25.12 at RP 88-92.

²² 10.25.12 at RP 88-92. Though he testified that Mr. Mandefero “appeared nervous,” this statement contradicts Deputy Barden’s testimony during the pre-trial suppression hearing and his written report, in both of which he said the opposite was true: that Mr. Mandefero was not nervous and had “no problem” speaking to him during his first interaction.

²³ Deputy Barden could not recall whether Mr. Mandefero identified the 76 Station as the location “where Mr. Hubbard was calling from” or instead the location where Hubbard “was supposed to be picked up from.” 10.25.12 at RP 90-91.

²⁴ 10.25.12 at RP 88-92.

²⁵ 10.25.12 at RP 88-92.

one who could have corroborated Mr. Mandefero's original and true story: that he and his sister picked up Hubbard very close to the scene of the shooting.²⁶

Based upon Gary's Pretrial identification of someone named "Hailua" or "Hailu" and Mr. Mandefero's inconsistent statements, police arrested Mr. Mandefero at the hospital and booked him for assault in the first degree.

E. TIMELINE BASED UPON UNDISPUTED CELL PHONE RECORD

EVIDENCE (MAY 1, 2012 TO MAY 2, 2012)

The cell phone evidence was introduced at trial and proved to be important. The following is a timeline of the evidence.

12:00AM to 8:20 PM - Mr. Mandefero's cell phone hits off the same cell phone tower 25 different times.

8:00 PM - Gary's cell phone pinged off the cell tower located near Ezell's chicken.

8:31 PM - Hubbard calls Mr. Mandefero at 8:31 PM. Mr. Mandefero answers the phone and the two have a brief conversation.²⁷

At 8:43:36 PM - Both Mr. Mandefero and Hubbard try calling each other—within the same minute—from different cell phone towers located miles apart from each other.²⁸ Mr. Mandefero called Hubbard's cell phone,

²⁶ 10.25.12 at RP 88-92.

²⁷ 11.26.12 RP at 53-55.

²⁸ 11.26.12 RP at 54-56.

which pings off a cell phone tower located on Monter Road, Southwest, in Seattle Washington. At that time, Hubbard had reached his final destination on 5913 Rainer Avenue South, in Skyway. As the State pointed out in closing, this is the cell phone tower closest to Ezell's chicken.²⁹

9:00 – 9:08 PM - Estimated time frame in which the shooting occurred.

9:05 PM - Mr. Mandefero answers an incoming call. At the same time, the cell phone pings off of a cell phone tower to the south of Mr. Mandefero's home in Seattle but still north of the Skyway Ezell's.³⁰

9:09 - 9:10 PM - Moments after the shooting, three Phone calls are made.

- 1) An Ezell's employee calls 911 to report the shooting
- 2) Hubbard uses his cell phone to call someone and the signal pings off of the tower closest to Ezell's.
- 3) Mr. Mandefero uses his cell phone to call someone and the signal pings off of a different cell phone tower, miles away from Ezell's.

9:10 PM - Hubbard's cell phone hits off a tower just south of Ezell's. Neither cell phone has yet hit off the same cell phone tower.³¹

9:10 to 9:20 PM - Hubbard calls his brother "Cody Wage" "five times in six minutes" but none of those calls go through.³²

9:20 PM - 10 to 20 minutes after the first shots are fired, Mr. Mandefero's cell phone finally hits off the same cell phone tower as Hubbard's cell phone.

²⁹ 11.26.12 RP at 54-56.

³⁰ 11.26.12 RP at 27.

³¹ 11.26.12 RP at 33.

³² 11.26.12 RP at 33.

9:33 PM - Hubbard and Mr. Mandefero finally meet up on Renton Road, the same road that Mr. Mandefero originally told Deputy Barden he picked up Hubbard from before taking him to the hospital.³³

7:20 to 11:37 PM - Sometime between his first phone call with Mr. Mandefero and arriving at the hospital, Hubbard accidentally shoots himself in the buttocks.

11:37 PM - Mr. Mandefero and Hubbard arrive at Valley Medical Center in Renton Washington.

11:37 PM and 12:20 AM - Several Renton police officers respond to a report of Hubbard's gunshot wound at Valley Medical Center.

12:20 AM - Deputy Barden arrives at Hospital to investigate a report that someone (Hubbard) had been admitted to the hospital with a gunshot wound.

12:30 and 1:30 AM - Deputy Barden questions Mr. Mandefero about Hubbard. Mr. Mandefero gives two different descriptions of events:

1) **First conversation:** Mr. Mandefero tells Deputy Barden that he picked up Kevin Hubbard on "Renton Avenue" (confirmed by cell phone tower logs as the first time they were together that night).

After this first conversation, Deputy Barden left the hospital. Before leaving, he told Mr. Mandefero to wait at the hospital for him to get back. While he is gone, Hubbard finds Mr. Mandefero and tells Mr. Mandefero what really happened (or some variation) and asks Mr. Mandefero to lie for him.

2) **Second conversation:** After speaking with Hubbard, Mr. Mandefero changes his original story. Now, Mr. Mandefero claims that he picked Hubbard up miles away in Kent.

³³ 11.26.12 RP at 54-57.

Approximately 1:30 AM - Deputy Barden Arrests Mr. Mandefero

F. AN INVESTIGATION BASED UPON ASSUMPTIONS RATHER THAN FACTS.

After the shooting, the police took inventory of the physical evidence located at the scene of the crime. At first, investigators arrested Mr. Mandefero based entirely on the assumption that Gary had actually seen Mr. Mandefero shoot him. At that time, however they did not have the benefit of a thorough police investigation. As the investigation progressed, serious doubts began to arise about Gary's identification and whether it was even possible that Mr. Mandefero was present at Ezell's when Gary was shot.

1. GARY'S GUNSHOT WOUNDS ALL CAME FROM BEHIND HIM

Gary's wounds and the shooter's position were not fully known until after the shooting was fully investigated. That investigation showed that Gary was shot from behind in a surprise ambush. It was very unlikely that Gary could have seen who shot him from that position.

2. NO DNA EVIDENCE CONNECTED MR. MANDEFERO TO THE CRIME

No DNA evidence connected Mr. Mandefero to the shooting, the shell casings involved in the shooting, or any other physical evidence found at the scene. In fact, some DNA evidence physically excluded Mr.

Mandefero from the shooting. His DNA was not on the 40 caliber shell casings at the scene, and one DNA sample was found on the 9mm used in the shooting, which conclusively excluded Mr. Mandefero as a contributor.

3. NONE OF THE FIREARMS USED IN THE SHOOTING WERE LOCATED.

In addition, no evidence connected Mr. Mandefero to any of the firearms used during the shooting. Police did locate several shell casings that surrounded Gary's Cadillac. But, the State's own DNA testing did not connect Mr. Mandefero to either of the two guns used during the shooting.

Police also located a handgun at the scene. But it could not have been used by Mr. Mandefero, as it was located in Gary's own glove box when it was found.³⁴ Apart from the alleged victim's own firearm, no gun was ever located at the scene nor was one ever even connected to Mr. Mandefero.³⁵

4. LACK OF INVESTIGATION INTO GARY'S OWN CRIMINAL ACTIVITIES

Strangely, despite several pieces of evidence that suggested that Gary and his cohorts were also involved in some criminal activity, the record reveals that no charges were sought against Gary or anyone else associated with the shooting.

³⁴ 11.06.12 at RP 45.

³⁵ 11.06.12 at RP 45.

Police located a firearm in the glove box of Gary's Cadillac after the shooting. Gary was in possession of the vehicle and easily could have been charged with having constructive possession of that firearm. Yet, Gary was apparently never charged for that crime, even though the evidence certainly supported such a charge. Even more notably, it does not appear that any efforts were made to tie that gun to any of the shell casings located at the scene of the shooting.

Similarly, investigators located a backpack containing fake crack, the sale of which is a felony, next to Gary's Cadillac after the shooting. But, yet again, no criminal charges stemmed from finding that contraband and no direct connection was ever made between the fake crack and the shooting, even though it is entirely plausible that Gary sold Hubbard or someone else fake drugs, sparking retaliation.

5. JAIL PHONE CALLS

Since the day he was arrested, Mr. Mandefero has professed his innocence in the crime. And in fact, phone calls he made the day he was arrested supports this claim.

The day after the shooting, Mr. Mandefero made a phone call from the jail to his sister, Julie, and told her to "Call 'Kev'" (referring to Kevin Hubbard). Then in a call later that day, Mr. Mandefero and Julie talked again, this time with one of Hubbard's associates, who spoke on

Hubbard's behalf. During that conversation, Mr. Mandefero expresses a great deal of concern about being convicted of a crime that he did not commit.

In the call, he can be heard saying, "I can't take the rap" for Hubbard's crime. Hubbard's friend tells Mr. Mandefero that he just needs to "stick to the script" to protect Hubbard. And that he would be fine because Mr. Mandefero—unlike Hubbard—"had nothing to hide."³⁶ Despite these statements, the State continued to detain Mr. Mandefero, but did not charge Hubbard for his involvement in the shooting until after it got a conviction against Mr. Mandefero.

G. GARY'S TRIAL TESTIMONY

Gary testified under order of the court. Prior to testifying, Gary accepted a very limited immunity agreement that—conveniently for the State—only immunized Gary from liability for the one crime that fit the State's chosen motive: the chain-snatching incident. In exchange for immunity, the State agreed to not prosecute Gary for stealing Mr. Mandefero's chain.

Notably, however, the State did not offer Gary any immunity from prosecution for the contraband that police located in and around Gary's Cadillac following the shooting. Police found a hand gun locked in Gary's

³⁶ 11.26.12 RP at 59-60.

glove box—which Gary of course denied was his—as well as counterfeit drugs in a backpack located outside of the Cadillac after the shooting. But Gary was not granted immunity for his involvement with any potential crimes associated with that contraband, even though each were directly linked to the scene of the crime when it occurred.

But, the State decided to ignore these likely motives—seeing that it could implicate its star witness—in the very crime that he was supposed to be the victim in. Unsurprisingly, once Gary accepted the immunity agreement, he speculated that the chain-snatching incident could have been a reason why Mr. Mandefero and he would have a “beef.” And of course, Gary did not implicate himself in any other criminal acts throughout his testimony.

Gary testified consistently that he did not know who shot him and that he did not see “who pulled the trigger.”³⁷ The State asked Gary whether he had told Deputy Glasgow that he was shot by “Hailu and some niggers,” Gary admitted to naming Mr. Mandefero, but could not specifically recall whether he implicated other people along with him.

And when questioned about why he falsely identified Mr. Mandefero, Gary offered two explanations.

³⁷ 10.24.14 RP at 115-20.

First, Gary testified that he only offered Mr. Mandefero's name when Deputy Glasgow refused to stop questioning him and delayed his medical treatment. Gary named "Hailu" only after Deputy Glasgow refused to believe his first two statements: (1) that he simply did not know who shot him, and (2) that a "Blood" from the "Central District" named "Little Rue" had shot him.

Then, Gary was essentially forced to speculate about who may have shot him. Apparently, in the heat of the moment, Gary named Hailu because he "figured" that Mr. Mandefero was the one who shot him because the two "had some beef."³⁸ This gave Gary an "idea" about who shot him, but it was still pure speculation.³⁹

Second, Gary testified that he was still adhering to his no-snitch code when he gave Deputy Glasgow the name "Hailu" or "Hailua." Thinking that Mr. Mandefero's name was only a nickname, Gary believed that providing only a nickname would prevent the police from "catching on."⁴⁰ In reality, according to his testimony, Gary said that he thought the real shooter was Hubbard, and he only named Mr. Mandefero because he was "trying to keep [Hubbard] out of trouble."⁴¹

³⁸ 10.24.14 RP at 54.

³⁹ 10.24.14 RP at 43.

⁴⁰ 10.24.14 RP at 50-52.

⁴¹ 10.24.14 RP at 50-52.

All parties agreed that Gary was not a credible witness. Initially, Gary refused to show up to trial. Only after he was apprehended on a material witness warrant did Gary make it to court. And even then, Gary continued to follow the “code” of the streets. In fact, he openly admitted that he would commit perjury if forced to testify.

And the trial record certainly confirms that he did. It also shows that he repeatedly lied to police about his knowledge of the shooting. During the trial, Gary openly admitted that he lied to Deputy Glasgow throughout every stage of his post-shooting interrogation. During the interrogation, Gary lied to Deputy Glasgow when he told him that he was shot by “some Bloods.”⁴² He lied when he told him that the shooters were from “the Central District.”⁴³

Explaining these lies to the jury, Gary claimed that he was following the “code” because “in the streets, you gotta stick to it.”⁴⁴ That’s why, according to Gary’s testimony, he gave Deputy Glasgow several false pieces of information about his attackers: he told Deputy Glasgow, for example, that the attackers were “some Bloods from the

⁴² 10.24.14 RP at 40-41.

⁴³ 10.24.14 RP at 43-44.

⁴⁴ 10.24.14 RP at 43-44.

Central District” because he wanted to throw deputy Glasgow a “curveball” to get him off the scent of the true shooters.⁴⁵

In closing, the State argued that Mr. Mandefero must have shot at Gary based upon these two statements. While conceding that these statements “told a pretty different story” about what happened during the shooting, the State encouraged the jury to believe Gary’s identification of Mr. Mandefero, which he gave to “Deputy Glasgow in that ambulance.”⁴⁶

According to the State, Gary told the truth one time throughout this entire investigation, and that was only after Deputy Glasgow interrogated him for at least 30 minutes and then denied him medical treatment. Once he began to worry that he might die—because Deputy Glasgow denied him immediate medical care, Gary felt compelled to “tell the truth,” so he named Mr. Mandefero as the shooter.

E. CITRUS NIGHTCLUB SHOOTING.

After the Ezell’s shooting, authorities connected Hubbard to a previously unsolved shooting that occurred less than three months prior, on January 28, 2012. The original information in that case charged Kevin Hubbard with three counts of assault, each with firearm enhancements, and unlawful possession of a firearm.

⁴⁵ 10.24.14 RP at 43-44.

⁴⁶ 11.06.12 RP at 17-18.

In that case, Hubbard had got into an argument with three men in Citrus Nightclub, located in downtown Seattle. After the altercation inside the nightclub, Hubbard left with a score to settle, but didn't waste any time settling it. Using a borrowed car, Hubbard decided to leave the Nightclub to retrieve an AK-47 and a 9mm handgun. He then returned to the nightclub with a friend, and waited outside for his rival gang members to come out and arrest him.

Hubbard then “moved to the perfect ambush position”—as the State would eventually argue at Hubbard’s sentencing hearing—thus, “concealing his presence.”⁴⁷ Hubbard then waited for his victims to leave. When they approached Hubbard’s position, Hubbard unloaded at least 25 military-grade rounds from his AK-47, leaving the shell casings in different locations around the scene of the crime.

Police also found a second firearm at the scene: a 9mm handgun along with five 9mm shell casings. Like in the Ezell’s shooting, investigators noticed that the each firearm was fired from different locations, based upon the grouping of the shell casings and that there were two separate firearms used.

Certainly, these facts were nearly identical to those in the Ezell’s shooting, but unlike with the Ezell’s shooting, surveillance video of the

⁴⁷ See State’s Sentencing Memorandum Page 7 (King County Superior Court--12—1-03903-4 SEA; 13-1-01003-1).

shooting and later eye-witness testimony confirmed that Hubbard was in fact the only gunman. This evidence allowed the State to argue that Hubbard was conclusively the only gunman, though he did in fact use two separate firearms and he did in fact fire each of them from multiple locations. In fact, as the State argued at Hubbard’s sentencing, this evidence confirmed that Hubbard was likely the lone gunman because he could be seen “actually charging firing positions” from his originally concealed position “to ensure he had rounds on target.”⁴⁸

IV. ARGUMENT

A. STANDARD OF REVIEW, BURDEN OF PROOF, & SUMMARY OF ARGUMENT

1. STANDARD OF REVIEW

To find Mr. Mandefero guilty as charged, the jury must find every “fact” required to convict “beyond a reasonable doubt.”⁴⁹ Once challenged, this court has a duty to review the jury’s guilty finding to make sure that the facts *rationaly* support the verdict.⁵⁰ To fulfill that duty, this court must apply the well-known standard stated *Jackson* and adopted by this court in *Green*.⁵¹

⁴⁸ State’s Sentencing Memorandum Page 7 (King County Superior Court--12—1-03903-4 SEA; 13-1-01003-1).

⁴⁹ *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

⁵⁰ *Jackson*, 443 U.S. at 319.

⁵¹ *State v. Green*, 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980).

The test is best applied in two parts. First, we must consider all of the evidence in the light most favorable to the State.⁵² Second, we ask whether that evidence would allow the jury to rationally find each material fact beyond a reasonable doubt.⁵³

2. THE STATE'S BURDEN OF PROOF

The jury found Mr. Mandefero guilty of three crimes: first degree assault on Gary, second degree assault on Torres, and unlawful possession of a firearm. Whether the evidence is sufficient to prove these crimes must be viewed in light of the trial court's instructions to the jury.⁵⁴ When the jury is not instructed on accomplice liability, the jury verdict can only be sustained if the defendant acted as a principal in each of the charged crimes.⁵⁵

Thus, to sustain the jury's verdict, the jury must have been able to rationally conclude that Mr. Mandefero possessed a firearm, pointed it at Gary, and pulled the trigger.

3. SUMMARY OF ARGUMENT.

⁵² *Jackson*, 443 U.S. at 319.

⁵³ *Jackson*, 443 U.S. at 319.

⁵⁴ *State v. Nam*, 136 Wn. App. 698, 705–06, 150 P.3d 617 (2007); *State v. Hickman*, 135 Wn.2d 97, 102–03, 954 P.2d 900 (1998).

⁵⁵ *State v. Davis*, 177 Wn. App. 1017 (2013) *review denied*, 180 Wn.2d 1002, 321 P.3d 1206 (2014) (citing *State v. Willis*, 153 Wn.2d 366, 374–75, 103 P.3d 1213 (2005)).

As the trial court observed, the State's case against Mr. Mandefero was "highly circumstantial"⁵⁶ to say the least. Circumstantial evidence and rational inferences from that evidence can certainly be sufficient to convict. But, those inferences must still be rational and not mere speculation.⁵⁷ "Mere speculation dressed up in the guise of evidence," which is what convicted Mr. Mandefero, is insufficient to prove any fact beyond a reasonable doubt.⁵⁸

Despite several glaring holes in the State's case, the jury found Mr. Mandefero guilty. The State's case depended entirely upon proving three facts beyond a reasonable doubt: (1) that Hubbard *and* someone else shot Gary; (2) that Mr. Mandefero was present at Ezell's when the shooting occurred; and (3) that Mr. Mandefero did in fact possess a firearm and shoot at Gary. But no reasonable jury could have found any of these vital facts without acting irrationally or without speculating about facts that were never proved.

First, the majority of the evidence suggested that there was only one shooter: Hubbard. And even though it was theoretically possible that someone else joined him in the shooting, no facts made the State's two-

⁵⁶ 11.05.12 RP at 105-06.

⁵⁷ *United States v. Orduno-Aguilera*, 183 F.3d 1138, 1141 (9th Cir. 1999) citing *In Re Winship*, 397 U.S. at 364.

⁵⁸ *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005), opinion amended, 2005 WL 1653617 (9th Cir. 2005).

shooter theory any more likely than the defense's one-shooter theory. At best, this evidence was patently equivocal and therefore insufficient to support a criminal conviction.

Second, the cell phone record evidence conclusively excluded the possibility that Mr. Mandefero was even present when Hubbard shot Gary. Both the State and the defense agreed that this evidence was good for one purpose: excluding "large areas" where the defendant could have been at the time of the shooting. But the State misstated the relevant evidence to the jury to convince it to convict Mr. Mandefero. In fact, just as defense counsel argued, the cell phone tower logs conclusively ruled out the possibility that Mr. Mandefero was with Mr. Hubbard at Ezell's when he shot Gary.

Finally, even if the jury could have found that there were two shooters beyond a reasonable doubt, no rational juror could have concluded that Mr. Mandefero was that second shooter. The only evidence that could have put a gun in Mr. Mandefero's hand was Gary's recanted pretrial identification of someone named "Hailua" or "Hailu" and his other unnamed accomplices. Even taking this identification in the light most favorable to the State, no jury could have rationally believed that Mr. Mandefero shot Gary when (1) Gary did not and likely could not have seen who shot him; (2) Gary only named Mr. Mandefero after being

thoroughly interrogated and denied lifesaving medical treatment; and (3) the State's own cell phone tower evidence proved that Gary's identification must have been a lie or merely speculation.

B. NO RATIONAL JURY COULD HAVE FOUND THAT TWO PEOPLE SHOT AT GARY BEYOND A REASONABLE DOUBT. SUCH A FINDING WOULD BE PURE SPECULATION.

1. THE CITRUS CLUB SHOOTING.

After the State obtained a conviction on Mr. Mandefero for the Ezell's shooting, Hubbard was also found guilty of a shooting outside of Citrus Nightclub in Seattle, a shooting that occurred under remarkably similar facts to those of the Ezell's shooting, in which it was undisputed that Hubbard was the sole shooter. In both cases, Hubbard located his prey and planned out a surprise ambush, so that he could conceal his presence from his intended victims. To pull off the Citrus shooting, Hubbard hid behind a set of cars, much like he hid behind Gary's Cadillac here, to protect himself from being seen and from potential gunfire.

Similarly, Hubbard used two separate firearms in each shooting and he fired them from two separate locations. In fact, the State even had conclusive evidence that during the Citrus Nightclub shooting, someone else was present with Hubbard when the shooting occurred. At the sentencing hearing for the Citrus Nightclub Shooting, the State argued that Hubbard was the only gunman, but he was "actually changing firing

positions” from his originally concealed position “to ensure he had rounds on target.”⁵⁹

But, unlike here, video surveillance footage surfaced of the Citrus Nightclub shooting that confirmed that Hubbard was the only shooter. Unfortunately for Mr. Mandefero, no such video evidence surfaced in this case. Without such evidence, the trial court allowed the State speculate that there may have been a second gunman, even though Hubbard had already committed the same crime—by himself—under remarkably similar circumstances.

Despite the State’s willingness to simply guess that Mr. Mandefero could have theoretically been a second shooter, the evidence, when viewed in context of both shootings, clearly points to Hubbard being the lone gunman in both shootings. Under all of these facts, no reasonable jury could find that there were two shooters beyond a reasonable doubt.

2. THE EVIDENCE OF TWO SHOOTERS IS EQUIVOCAL AT BEST.

The jury is free to choose between conflicting inferences.⁶⁰ Generally, the jury may reject the defendant’s non-criminal explanation (an inference that favors the defense). Likewise, the jury is usually free to adopt the state’s criminal explanation (the inference that favors the State).

⁵⁹ State’s Sentencing Memorandum Page 7 (King County Superior Court--12—1-03903-4 SEA; 13-1-01003-1).

⁶⁰ *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995).

But, the jury’s ability to decide between each of those choices—one to reject the defense theory and one to adopt the State’s theory—is still tempered by Due Process in two ways: (1) what a rational juror could have concluded from the proven facts, and (2) the State’s burden to prove each fact beyond a reasonable doubt.

Thus, whether an inference is permissible depends upon probabilities in light of the State’s evidence. If the inference is not needed because other evidence establishes that material fact, the inference need only be “more probable than not.”⁶¹ But that inference is required to establish guilt—the “sole and sufficient” proof of a material fact—then the jury must be certain that the inference is true “beyond a reasonable doubt.”⁶²

Here, the evidence does not allow the jury to conclude that there were two shooters beyond a reasonable doubt. In closing, the State told the jury that the shell casing evidence conclusively proved that there were two gunmen. But this argument conflicts directly with the State’s concession in an earlier pre-trial motion before the court.

⁶¹ *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997); *State v. Hanna*, 123 Wn.2d 704, 710–11, 871 P.2d 135 (1994).

⁶² *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997); *State v. Hanna*, 123 Wn.2d 704, 710–11, 871 P.2d 135 (1994); *State v. Sandoval*, 123 Wn. App. 1, 5, 94 P.3d 323 (2004) (referring to opinions that have discussed a higher standard of reasonable doubt, but noting that the state Supreme Court has not yet applied it); *State v. Farr-Lenzini*, 93 Wn. App. 453, 469 n.7, 970 P.2d 313 (1999) (same).

After opening statements, the State tried to admit evidence of a third gun that may have been present at the scene. The State argued that this third gun was essential to prove its two gunman theory because “obviously we can’t say anything about the number of people necessarily. An individual could have had two guns but certainly not three.”⁶³ But the trial court correctly denied the State’s motion because there was no evidence connecting that gun with the crime charged.

Yet, despite making this concession to the court, the State took the opposite stance in front of the jury, and argued that the evidence was *not equivocal*. In closing, the State argued that because there were two firearms and they were fired from two different locations, there must have been two shooters. But that inference is irrational without more evidence about the shooting. If, for example, we knew that the guns had to be fired at the same exact time, the jury could infer that two people must have fired the guns because one person could not fire the guns from ten or more feet apart simultaneously. But no such evidence existed.

Even if we ignored the facts surrounding the Citrus Nightclub Shooting, at best, no rational jury could conclude that there were probably two shooters involved in the Ezell’s shooting. The evidence is thus insufficient as a matter of law.

⁶³ 10.24.14 RP at 5.

C. NO RATIONAL JURY COULD FIND THAT MR. MANDEFERO WAS EVEN PRESENT WHEN HUBBARD SHOT GARY.

To place Mr. Mandefero at the scene of the crime with Hubbard, the State relied heavily on cell phone tower logs and cell phone calls to and from Mr. Hubbard's cell phone and Mr. Mandefero's cell phone. As the State conceded, the cell phone tower logs could not place Mr. Mandefero in an exact location at an exact time. Thus, the cell tower logs could not place Mr. Mandefero at the exact location of the shooting when it occurred.

But, the State admitted that the one thing these logs were helpful for was "ruling out large portions of areas" where Mr. Mandefero might have been during the shooting.⁶⁴ The State tried to argue to the jury that these logs showed that Mr. Mandefero was with Hubbard when Hubbard shot Gary at Ezell's in Skyway.⁶⁵

But, in fact, the undisputed cell phone evidence conclusively excludes the State's theory that Mr. Mandefero was with Hubbard before and during the shooting at Ezell's on May 1, 2012.

1. HOW T-MOBILE'S CELL PHONE TOWER LOGS WORK

The State called two expert witnesses to explain how T-Mobile's cell phone tower logs could assist the jury in this case. To know the

⁶⁴ 11.26.12 RP at 10-12.

⁶⁵ 11.26.12 RP at 24-26.

significance of the cell phone tower logs, the expert gave several general rules of thumb, which are described in detail below.

First, each tower has a maximum signal radius of three to five miles.⁶⁶ If someone pings off a particular tower, we at least know that the person is within three miles of the location of the tower. Thus, cell phone tower pings do not give us an exact location of the cell phone when used, but they are very helpful for excluding large areas where the defendant could not have been at any particular moment in time.

Second, multiple towers will sometimes overlap with each other, resulting in double coverage of some areas. When that happens, the cell phone will typically use the cell phone tower that is closer, because it will provide the better signal. Thus, if the caller makes a phone call in an area that is within three to five miles of two different towers, then you may be able to exclude areas that are part of an area that is closer to another cell phone tower.⁶⁷

Third, when a caller is moving during an active phone call, the call may be automatically transferred from one tower to the next mid-call.⁶⁸ Thus, if a caller is driving during an active phone call, his phone will automatically be transferred to a new tower as he moves out of range of

⁶⁶ 11.05.12 RP at 88-89.

⁶⁷ 11.05.12 RP at 39.

⁶⁸ 11.05.12 RP at 20.

the original one. This would result in two cell phone pings off two different towers.

Finally, phone calls made from different phones on the same network tend to use the same towers when they are made from the same location. Thus, if two T-Mobile users—such as Mr. Mandefero and Hubbard—make a call from the same location at about the same time, they will probably use the same cell phone tower for those calls.⁶⁹

2. THE CELL PHONE RECORDS CONCLUSIVELY DISPROVED THE STATE’S THEORY THAT MR. MANDEFERO WAS EVEN PRESENT WHEN HUBBARD SHOT GARY.

Based upon the cell phone tower logs, it was so improbable that Mr. Mandefero was at Ezell’s when the shooting occurred that no reasonable juror could have found he could have shot Gary.

First, the State argued that Mr. Mandefero and Hubbard were together before the shooting occurred, but the cell phone records conclusively show that the opposite is true. Both Mr. Mandefero and Hubbard used their cell phones dozens of times to make phone calls and send text messages before the shooting. Yet, where the cell phones were used and who they called makes it irrational to believe that they were together before and during the shooting.

⁶⁹ 11.05.12 RP at 45.

Part of the State's theory was that Mr. Mandefero and Hubbard were consistently together for an hour or more before the shooting, during which time they essentially pre-planned this attempted murder together. Yet, the two made numerous calls to each other. At 8:31 PM, for example, Hubbard called Mr. Mandefero and the two had a conversation.⁷⁰ Then, at 8:43, both Hubbard and Mandefero tried calling each other, but neither of them were able to get a hold of each other. If they were in fact together at this point, they would have no need to call each other.

But even more importantly, each call pinged off of different cell phone towers: Hubbard pinged off the cell phone tower closest to Ezell's and Mr. Mandefero pinged off a tower that was miles north of it.⁷¹ In fact, despite each of these uses and both of them using the same cell phone network (T-Mobile), they never pinged off the same tower until fifteen minutes after the shooting, when Mr. Mandefero finally picked Hubbard up to take him to the hospital.⁷²

Just minutes before the shooting, Hubbard's phone pinged off of towers just south of Ezell's and just after the shooting, it pinged off of the tower that was closest to Ezell's. Mr. Mandefero's cell phone, on the other hand, consistently pinged off of towers to the north of Ezell's in South

⁷⁰ 11.26.12 RP at 53-55.

⁷¹ 11.26.12 RP at 54-56.

⁷² 11.05.12 RP at 86.

Seattle (near his home) and in the surrounding areas, but not until 9:20 PM did Mr. Mandefero's cell phone finally ping off the same cell phone tower as Hubbard's phone.⁷³

Second, not only were they not together until well after the shooting occurred, the cell phone record evidence shows that Mr. Mandefero was miles away from Ezell's when Hubbard shot Gary. The shooting occurred only minutes before 9:09 PM, when the 911 call was made. But, the cell phone pings show that Mr. Mandefero was not anywhere near Ezell's at that time. Two phone calls made, one during the shooting and one immediately after, conclusively prove that Mr. Mandefero was not at Ezell's when Hubbard shot Gary.

The first phone call happened at 9:05 PM. Mr. Mandefero would have made this call, only minutes before the call to 911, directly in the middle of the gunfire. But that call did not ping off the cell phone tower closest to Ezell's. In fact, it pinged off a tower that was several miles north of Ezell's.⁷⁴ If Mr. Mandefero's was in fact at Ezell's when Hubbard shot Gary, his phone would have pinged off the cell phone tower closest to Ezell's, just as Hubbard's cell phone did using the same network. But that did not happen.

⁷³ 11.05.12 RP at 86.

⁷⁴ 11.26.12 RP at 27.

The second phone call, made five minutes later at 9:10 PM, fills any gaps in the story. This phone call again pinged off a different cell phone tower that was also miles north of Ezell's. The State may argue that Mr. Mandefero may have already fled the scene and that is why he pinged off a different tower. But Hubbard made a phone call during the very same minute which *did in fact* ping off the cell phone tower closest to Ezell's. Had the two actually been together at that time, as the State argued, it is highly unlikely that those two calls would ping off different towers.⁷⁵ Any argument to the contrary is pure speculation and contrary to the State's own witness testimony.

When viewed in context, the State's theory that Mr. Mandefero was with Hubbard when he gunned down Gary in cold blood is not merely just speculation, it is in fact fiction. The State argued that the cell phone towers could conclusively disprove Mr. Mandefero's alibi—that he was in Kent when the shooting occurred—while at the same time ignoring the very same blatant flaw in its own case theory. The State cannot simply have its cake and eat it too. In the end, the cell phone evidence—one of the few completely undisputed sources of evidence in this case—conclusively proves that it was practically impossible for Mr. Mandefero to have committed the crime charged.

⁷⁵ 11.05.12 RP at 45.

D. THE OTHER EVIDENCE DOES NOT OVERCOME THE OVERWHELMING EVIDENCE OF MR. MANDEFERO'S INNOCENCE.

In response to the above arguments, the State will likely argue that the jury could have credited other evidence to find Mr. Mandefero guilty, such as Gary's lone identification of "Hailua" or "Hailu" and "some "niggers" and Motive. This evidence is insufficient however to overcome the overwhelming weight of evidence that shows that Mr. Mandefero did not shot Gary outside of Ezell's on May 1, 2012.

1. GARY'S STATEMENTS TO DEPUTY GLASGOW NAMING MR. MANDEFERO WERE UNRELIABLE, SPECULATIVE, AND AT BEST EQUIVOCAL.

a) DEPUTY GLASGOW BULLIED GARY INTO IDENTIFYING SOMEONE.

It would have been clear and unmistakable misconduct for a prosecutor to interrogate Mr. Gary as Deputy Glasgow did. As stated over 80 years ago, it is improper for a prosecutor to "assume prejudicial facts not in evidence" and put words "into the mouths of . . . witnesses [that] they had not said."⁷⁶ And finally, it is improper for a prosecutor to "bully" a witness into giving coerced testimony.⁷⁷

But looking at the undisputed testimony from Deputy Glasgow, regarding exactly how he got Gary to eventually name "Hailua" or "Hailu," Deputy Glasgow (1) repeatedly asked questions that assumed

⁷⁶ *Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

⁷⁷ *Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

prejudicial facts without knowing they were true, (2) by putting words in Gary's mouth that he had repeatedly denied, and (3) bullied Gary into giving an answer that Deputy Glasgow personally decided to believe.

First, Deputy Glasgow continuously asked Gary questions that assumed vital and prejudicial facts without any factual basis, which ultimately put words in Gary's mouth that he never really said. Before questioning Gary, Deputy Glasgow knew nothing about the shooting. He did not know how the shooting occurred, who was involved, how many shooters there were, or whether Gary himself was merely a victim or an actual participant.

Yet, despite this lack of knowledge, he interrogated Gary, pretending to know exactly what happened during the shooting and assuming that Gary saw who shot him. Deputy Glasgow admitted to interrogating Gary based upon the unfounded assumption that he somehow "knew that [Gary] knew who shot him." He also repeatedly asked Gary if the shooting was "gang related," but never explained how he could have known such a thing. Finally, Deputy Glasgow testified that he also simply assumed that Gary was lying because he "didn't want to be considered a snitch."⁷⁸

⁷⁸ 10.24.14 RP at 143-45.

Second, Deputy Glasgow “bullied” Gary into naming someone, without any reassurances that Gary actually saw who shot him. From the beginning, Gary repeatedly denied seeing who shot him or having any idea who shot him. But Deputy Glasgow refused to believe him. So he bullied him into giving an answer by asking him the same question over and over again—“who shot you?”—until Gary finally coughed up an answer the deputy personally believed.⁷⁹ And even more alarming is the fact that Gary did not mention Mr. Mandefero until Deputy Glasgow delayed Mr. Mandefero’s life-saving medical treatment in the back of the ambulance.⁸⁰

b) GARY’S IDENTIFICATION WAS BASED PURELY ON SPECULATION.

When a declarant, alarmed by the sound of gunshots, speculates in a state of excitement as to the identity of a shooter she does not see, that speculation is not reliable.⁸¹

Both Gary’s own statements to Deputy Glasgow and the circumstances surrounding the making of those statements conclusively show that Gary never actually saw who shot him.

Until Deputy Glasgow bullied Gary into finally identifying someone, Gary had consistently denied any knowledge about who had shot him. And again, when Gary testified and was finally given the chance

⁷⁹ 10.24.14 RP at 143-45.

⁸⁰ 10.24.14 RP at 183.

⁸¹ *Brown v. Keane*, 355 F.3d 82, 89-90 (2d Cir. 2004) (citing Fed.R.Evid. 602).

to explain why he identified Mr. Mandefero, he honestly told the jury that he was just guessing. He never did actually see who shot him.

Gary never told anyone that he actually witnessed who shot him. In fact, he consistently told multiple people at various times that he did not see who shot him. In his first statements about the shooting to anyone, Gary told Deputy Glasgow that he did not know who shot him. And he repeated this to Deputy Glasgow numerous times until finally, Deputy Glasgow's interrogation broke Gary. At first, Gary gave at least one fake name and some false information about what gangs were involved. Then, once in the back of an ambulance, after Deputy Glasgow delayed Gary's lifesaving medical treatment, Gary responded to Deputy Glasgow's question, "Who shot you?" with, "Hailu and some niggers." Deputy Glasgow did not ask him, "Did you see who shot you?" or "How" Gary supposedly "knew" that "Hailu and some niggers" shot him.

Gary would later explain that he never actually saw who shot him. Gary admitted that, when he gave Hailu's name, he "had an idea" about who shot him.⁸² Once he was finally forced to explain why he identified "Hailu and some niggers," Gary said that he was merely guessing, "I didn't see him shoot me. I just kind of -- me and him had some beef. So I

⁸² 10.24.14 RP at 43.

kind of figured that's who had shot me, but I didn't see him shoot me.”⁸³

Gary explained that he never actually saw anyone with a gun,⁸⁴ nor did he see “who pulled the trigger.”⁸⁵

And Gary’s testimony is not the only evidence that leads to this conclusion. In fact, all available evidence would lead any reasonably jury to believe that Gary did not actually see who shot him.

First, the location of Gary’s injuries strongly suggest that Gary did not see who shot him. Gary was hit by four bullets: three in the back and one in the hip.⁸⁶ Each of those bullets and those that barely missed him, came from behind his vehicle as Gary faced the entrance of Ezell’s. When someone is shot in the back, it is much less likely that they would have seen who shot them.

Second, the location of the shooter—from behind Gary’s car—and the nature of the shooting—a surprise attack from behind—also suggests that Gary did not actually see who shot him. Both parties agreed that the pattern of shell cases suggested that the shooting was a surprise attack from behind. The shell casings were found in two separate locations, both of which indicated that the attack was pre-planned rather than spontaneous. In such an attack, Gary would have had very little time, if

⁸³ 10.24.14 RP at 54.

⁸⁴ 10.24.14 RP at 43.

⁸⁵ 10.24.14 RP at 115-20.

⁸⁶ 10.24.14 RP at 115-19.

any, to try turn around and get a look at the shooter's face. Gary even testified that the shooting happened so quickly that his "head was facing down" throughout most of the shooting.⁸⁷

Third, even if he did have an opportunity to briefly look for the shooter, the circumstances surrounding the shooting make a positive identification nearly impossible. The shooting happened at night. It was 9:00 PM and dark outside. Gary's windows were also rolled up and tinted when the shooting occurred. As the undisputed testimony confirmed, "When it is dark [outside] you can't really see out the tint[ed]" windows of Gary's car.⁸⁸

c) AT BEST, GARY'S IDENTIFICATION WAS EQUIVOCAL.

Evidence—including witness statements pertaining to identification⁸⁹—that is "patently equivocal" violates Due Process.⁹⁰ When, for example, a witness is presented with an ambiguous question, and his answer does not indicate "precisely" what he meant, his answer to that question is "patently equivocal" and cannot support a criminal conviction.

⁸⁷ 10.24.14 RP at 115-20.

⁸⁸ 10.24.14 RP at 20-21.

⁸⁹ See *State v. Hendrix*, 50 Wn. App. 510, 515, 749 P.2d 210 (1988); *United States v. Musquiz*, 445 F.2d 963, 965-66 (5th Cir. 1971) ("Nonetheless, when there are no other connecting or corroborating facts or circumstances, the identification becomes critical and this Court has held that, notwithstanding a jury verdict of guilty, *when the identifying witness is unsure*, the conviction must be reversed.").

⁹⁰ *State v. Vasquez*, 178 Wn.2d 1, 4, 309 P.3d 318 (2013).

Vasquez illustrates this rule. In *Vasquez*, the defendant, an illegal alien was convicted of forgery after being arrested while in possession of two forged pieces of U.S. Identification.⁹¹ A security guard located the forged ID cards—a social security card and a permanent resident card—in Vasquez’s wallet. Believing they might be fake, the guard interrogated Vasquez about the cards, where he got them, and about working in the area. Vasquez ultimately admitted to purchasing the cards illegally from a friend in California and was arrested for fraud.

The State’s sole proof of Vasquez’s intent to defraud relied upon several statements Vasquez made during the guard’s brief interrogation. Most notably, the guard testified that he asked Vasquez “if the [ID] cards were his,” to which Vasquez responded “yes.”⁹² From this response, argued the State, the jury could infer that Vasquez “meant to persuade [the guard] that the cards were his legitimate social security and permanent resident cards,” thus committing fraud. But, the defense argued that Vasquez merely “meant to respond that he simply owned the cards” themselves but not the identities named on those cards.⁹³

But, the court rejected both explanations as “equally plausible” and “patently equivocal” in light of the statements themselves and the known

⁹¹ *Vasquez*, 178 Wn.2d at 4.

⁹² *Vasquez*. 178 Wn.2d at 14-16.

⁹³ *Vasquez*. 178 Wn.2d at 15.

intentions of the declarant. The court recognized, for example, that the guard's question—"are these cards yours?"—and Vasquez's response—a simple "yes"—did not tell the jury "precisely" what Vasquez was trying to communicate. Without such precision in the question, or an explanation in the answer, the jury could not rationally draw the inference advanced by the State, i.e. that Vasquez intended to defraud the Guard.⁹⁴

Gary's statements in this case suffer from the same legal ambiguity as those in *Vasquez*: no jury could rationally draw the inference suggested by the State without engaging in pure speculation.

Mr. Mandefero's guilt depends upon a few out-of-court statements and what meaning, if any, the jury could assign to those statements, just as in *Vasquez*. And both statements were made in response to direct questioning during an in-custody-like interrogation. Here, the most crucial of Gary's statements came in through Deputy Glasgow's testimony, who recalled asking Gary a direct and specific question: "Who shot [you]," to which Gary answered, "Hailu and some niggers."

As stated above, to prove its case, the State needed to prove that Mr. Mandefero possessed a firearm, pointed it at Gary, and pulled the trigger. As noted in *Vasquez*, the jury could not infer Vasquez's intent to

⁹⁴ *Id.* The *Vasquez* Court also added its concern that the security guard's "shaky recollection," which cast further doubt on the reliability of the statements and whether or not the jury could possibly ascertain the meaning at trial.

defraud based upon his mere possession of the forged cards. Similarly, the jury could not infer that Mr. Mandefero actually shot at Gary, even if it found that Gary was present at Ezell's when the shooting occurred, and even if Gary saw Mr. Mandefero in the presence of the actual shooters.

But in both cases, the out-of-court statements utterly failed to prove either of those sets of facts required to convict. Both of the critical statements came in response to direct questioning much like an interrogation. But neither the questions asked, nor the witness's answers to those questions, indicated "precisely" what the witness's answers truly meant.

E. THE EVIDENCE DOES NOT EVEN SUPPORT A CONVICTION BASED UPON ACCOMPLICE LIABILITY.

As stated above, the jury was not instructed on accomplice liability and, therefore, it only could have found Mr. Mandefero guilty if he actually pulled the trigger. An accomplice instruction would have allowed the State to prove guilt merely by showing that Mr. Mandefero helped Hubbard in the planning or commission of the shooting.

But no such evidence supported that theory, as the trial court correctly observed when it refused to instruct the jury on that theory. But even if the instruction was given, the State still failed to prove that theory. No jury could have inferred the required facts to convict—such as

knowledge and criminal aid, before the crime occurred. Any such inference would be pure speculation.

In a somewhat similar gang shooting case, *Asaeli*, Division II dismissed a murder conviction based upon accomplice liability under facts that are worse than those here.⁹⁵ In that case, the shooter, Asaeli, and some friends, including Vaielua, tracked down a rival gang member to exact revenge for a gang-related “beef.” After locating Fola, in a park in Tacoma, they shot and killed him. The facts are remarkably similar to those we have here in many respects.

First, Asaeli’s co-defendants had already been involved in a drive-by shooting with the victim approximately one week before the shooting, just like Hubbard and Gary here. But, again, this shooting has no significance here because no evidence connected Vaielua or Mr. Mandefero to those prior shootings.

Second, in both cases, the State relied heavily on so-called “links” between the defendants, the other participants in the crime, and innocuous facts showing that they were all “acting in concert” on the night of the shooting.⁹⁶

Third, both prosecutors urged the jury to consider each defendant’s presence at the scene as evidence that each defendant participated at in the

⁹⁵ *State v. Asaeli*, 150 Wn. App 543, 569, 208 P.3d 1136 (2009).

⁹⁶ *Id.*

shooting. In fact, Vaielua's undisputed presence at the scene of the shooting makes the case against him far more damning than the State's case against Mr. Mandefero, in which such links to the scene were tenuous and speculative at best. And not only was Vaielua's presence undisputed, Vaielua was seen interacting with the shooter and his accomplice moments before the shooting occurred.

In the end, the evidence that now supports Mr. Mandefero's assault conviction—which the jury found based upon principal liability—is far less convincing than that failed to support Vaielua's assault conviction, which was based upon accomplice liability.

V. CONCLUSION

Mr. Mandefero did not shoot Gary on May 1, 2012. Hubbard did. The State agrees with the second fact, but tried to pin the shooting on Mr. Mandefero. The State refused to drop the charges even when its investigation clearly warranted it. After Mr. Mandefero was arrested, the evidence began to point to only one shooter: Hubbard.

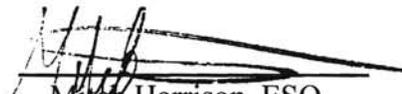
But the State refused to drop the charges. Instead, it chose to proceed to trial. It rested its case entirely on the perjured testimony of a known liar and obstructor of justice. To explain why the jury should trust just one statement of a self-proclaimed perjurer, the State knew that he was telling the truth when he identified Mr. Mandefero because

apparently, “the truth is [always] what you tell” when you think you are going to die. The State also ignored the fact the Gary most likely could not, and did not see who shot him. After all, he was shot three times in the back, facing away from the shooter.

And finally, the cell phone tower evidence, that almost always places the truly guilty within a mile or two of the crime scene, actually exonerated Mr. Mandefero in this case. But, this time, because it did not favor the State, the prosecutors chose to ignore it and ultimately misconstrued it in front of the jury.

This court has a duty to overturn convictions when the State fails to prove that the defendant committed the charged crime, even if he may have in fact done it. Here, not only did the State fail to prove that Mr. Mandefero shot Gary, the evidence actually affirmatively confirms Mr. Mandefero is truly innocent.

Dated July 3, 2014


Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

I, MILENA VILL, mailed a copy of the appellant's brief to the following three addresses on July 3, 2014:

King County Prosecutor's Office
Appellate Division
516 Third Avenue Room 554
Seattle, WA 98104

Washington State Court of Appeals-Division 1
600 University St.
One Union Square
Seattle, WA 98101

Hailu Mandefero, DOC # 364843
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Signed this day, the 3rd of July, 2014



Milena Vill
Law Clerk
Harrison Law Firm
101 Warren Avenue N.
Seattle, WA 98109