NO. 102800-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY LOUIS DONALDSON,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chuschcoff

No. 17-1-04275-9

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

When a personal restraint petition is consolidated with a direct appeal, the danger for the State is that the courts may confuse the different legal standards in each. Here, however, the court of appeals applied the correct legal standard, requiring a showing of prejudice for the issue raised only in collateral attack. This lack of confusion is Donaldson's complaint. It is frivolous.

II. RESTATEMENT OF THE ISSUES

A. Whether petitioner has demonstrated any RAP 13.4(b) consideration in the court's application of the long-standing prejudice requirement in a collateral attack of a judicial ruling?

B. Whether any authority precludes consideration of the witness' familiarity with the defendant when assessing the reliability of an identification?

C. Whether cases which prohibit actual improper comments on silence conflict with the unpublished opinion which found there was no comment on silence but only a discussion of statements admitted under an unchallenged CrR 3.5 ruling?

III. STATEMENT OF THE CASE

Randy Donaldson's direct appeal is consolidated with his personal restraint petition (PRP).

A jury has convicted the Defendant Donaldson of the second-degree murder of Daquan Foster, the first-degree assault of Olivia Brown, and the second-degree assault of Wyatt Percell. CP 56-58, 847, 853, 857, 863-70, 875-76.

A. Donaldson and Wilson fired 17 bullets at club patrons in the parking lot.

The shootings took place in the parking lot of a Tacoma bar in the early morning of October 29, 2017. RP 632, 1058, 1060-61, 1071-74. An inebriated Marshall Wilson had thrown a punch at soldier Daquan Foster. RP 1072-74, 1079-81, 1087, 1867-69, 1093. Foster punched Wilson in return, knocking him to the ground with a single blow. RP 1078, 1081. Olivia Brown was pushing her husband Foster to leave when Wilson trod on her boot. RP 1078, 1081, 1089. She turned and saw Wilson reach behind his back. *Id*. Brown asked Wilson what he was reaching for while Foster turned to ask Wilson why he hit him in the first place. RP 1089. Before Foster could finish the question, Donaldson came around a corner and began shooting at Foster. RP 985, 1081-82, 1084, 1089. He shot 13 rounds from a 9mm

handgun. RP 636, 2941-42 (the 9mm casings were covered along his path of movement). Wilson also shot at Foster—four times with a 40-caliber weapon. RP 637, 1082, 1509. Wyatt Percell was nearly hit by a bullet, but Foster pushed his friend out of the way. RP 1079, 1156, 1173-74. As Brown screamed for the shooters to stop, Foster took off running. RP 1084-85.

Seven bullets struck Foster, one tearing through his heart. RP 636, 1567, 1572. Foster collapsed dead after half a block. RP 1085, 1090, 1574, 1886. Bystanders immediately attempted CPR. RP 2798. As Brown was holding her husband's chest, she noticed that one of the bullets had torn through her thumb, splintering it. RP 1089-90, 1101-02. She fainted from hyperventilation and was taken to the hospital. RP 2799-800.

The State's theory and evidence was that there were exactly two shooters. "I suppose in Mr. Donaldson's calculation there might be other folks, too." RP 2895. "Anything is possible. But we have no evidence" except that there were two shooters, no fewer and no more. RP 2910.

B. Donaldson was identified by a combination of eyewitnesses' testimony, ballistic evidence, and video evidence.

Police recovered shell casings from two different guns. RP 2020. Wilson shot at Foster—four times with a 40-caliber weapon. RP 637, 1082, 1509.

Video evidence and Tamika Williams' testimony established that, prior to the shooting, Donaldson was one of a few people who had entered a blind zone off camera. RP 645-46, 1988-89, 2912. He then came out of the blind zone shooting many times before fleeing in a silver car. RP 646-50 (shooting more than the four bullets fired from the .40 caliber weapon), 1519, 2912.

A trail of 13-9mm shell casings was consistent with Donaldson's movement of running up behind a stationary Wilson. RP 985, 987, 1002-03, 2941-42. He shot until there was nothing left in the magazine. RP 646-50, 991, 999, 1004, 1519, 2912. Johnasha Manning described Donaldson's gun which was consistent with the apparent 9mm Glock handgun

Donaldson can be seen holding in a music video released around the same time. RP 100-01, 999 (black with a magazine visible at the bottom). A 9mm bullet was recovered from the Foster's corpse. RP 2942-43.

Olivia Brown, Johnasha Manning, and Wyatt Percell identified the shooters Wilson and Donaldson from videos inside the club. RP 985, 987, 1001-04, 1093, 1944-45, 1948-50, 2807-08, 2821-22. Brown and Manning both made courtroom identifications of the Defendant. RP 1010, 1083-84 ("100 percent sure").

Kristina Rios, who helped Wilson escape, was unwilling to name Donaldson as a shooter. RP 637, 1834, 1836, 1851-55, 1871. However, she admitted that she had been talking to Donaldson shortly before the shooting and that she had previously testified that Donaldson ran with Wilson toward the fray. RP 1877-78, 1880, 1882.

Johnasha Manning saw Donaldson come around the corner shooting at Foster. RP 985, 987, 1002-03. She described

him as light-skinned Black man wearing a black hoodie with dreads braided to the back and "nappy-ish" facial hair above the lip and on the chin. RP 996-98, 1031. He was so close to her that she could feel the fire from the gun shots on her face. RP 995-96. She described his handgun as black with a magazine visible at the bottom. RP 999.

Brown had described Donaldson to police three times in the early morning hours of October 29, 2017, shortly after the shooting. RP 859-65 (in the emergency room at 2:24 am), 1213 (at the scene of the shooting at 1:40 am), 1217, 1228-29 (in the emergency department at 3:45 am), 1240-42; Ex. 232. She described a "a light complexion, high yellow, black male five-foot nine to six-foot in height; approximately 170 pounds; late 20s in age; shoulder-length dreadlocks pulled back into a ponytail; gold grill[] in his mouth; and wearing a black hoodie." She had been face to face with Donaldson twice that night. The first time, she had observed Donaldson from mere feet for 20 seconds inside the club as she watched her friend Larissa Battle

ask him to lift his foot so she could retrieve a dollar bill. RP 1093-97, 2804, 2828. The second time was when she pleaded with Donaldson, now wearing a hoodie, during the shooting of 17 bullets, standing so close to the Defendant that she noticed the gold grill he had inserted over his teeth after exiting the club. RP 106, 863, 1778-79, 2927-28.

Two days later, Brown identified Donaldson from a photomontage although his appearance in the old photo was rather different. RP 1676, 1678-79, 1783, 1794, 2929. Her recollection was confirmed by videotape and other witnesses. RP 1912-15. The Defendant made no objection to Brown's identification of him at trial or the admission of the photomontage or the screen grabs. RP 1083, 1660, 1788.

C. At his arrest, Donaldson spoke unprompted, acknowledging that he was law enforcement's "prize" and expressing resignation.

Donaldson was arrested two weeks after the shooting. RP 1407-09. Without prompting, he volunteered, "You've got your prize. Let's go." CP 739. RP 1414-15. He added with

resignation, "I'm 30. I did everything that I wanted to do." RP 1415-16. The trial court's decision admitting these statements is unchallenged on appeal. CP 739-41; Am. Br. of Ap. at 5-6; Unpub. Op. at 29.

The prosecutor discussed these remarks in closing without objection. RP 2938-39.

D. Donaldson filed a collateral attack of the superior court's denial of his mid-trial motion to suspend the trial.

In cross-examining Brown, Donaldson attempted to mischaracterize one of her earlier identification statements as excluding Wilson as a shooter. RP 868-69, 873, 1147. In fact, the officer who took Brown's statement, testified that he obtained ***both*** Wilson's and Donaldson's descriptions in response to his query for a description of the subjects involved in the shooting. RP 872. Brown had described Wilson, the person "standing next to" Foster, as a shooter. RP 862. And she had described Donaldson, the "person who ran up behind later and was shooting at them as well." RP 863. Brown explained that, if

counsel found her early morning statements not perfectly precise, she had been on painkillers for her broken thumb after watching her husband get murdered and after having herself been shot. RP 1148.

On redirect, Brown testified that she began to see a therapist a month after her husband's death and that her memory had improved with "bilateral therapy" or EMDR (Eye Movement Desensitization Reprocessing) therapy. RP 1189-91.

At this point, Donaldson asked for a "one-month recess" "to learn about EMDR," a request the court denied. RP 1193-96.

More than a year after the jury's verdict, Donaldson filed a personal restraint petition (PRP) challenging the court's denial of his motion for delay and requesting a vacation of the judgment in order to permit him to depose Brown's therapists to better prepare to cross-examine Brown. CP 875; PRP at 2, 29, 52.

The PRP appends a declaration from Dr. Henry Otgaar explaining that he only reviewed portions of the transcript. PRP CP2 at 2. Based on that limited review, Dr. Otgaar is under the

misimpression that Brown did not recall Wilson's involvement until after EMDR[1] and that the physical evidence supports a theory that there was only a single shooter.[2] *Id*. at 9, ¶¶34-35.

Dr. Otgaar identifies that the main problem with EMDR is that it can reduce the emotionality of a witness causing a jury to discredit her unfairly. *Id*. at 6-7, ¶24. In this case, he makes no conclusions: "I do not have enough information to be able to form an opinion as to whether or not Ms. Brown's receipt of EMDR actually did cause the creation of any false memories such that her testimony regarding her husband's death was inaccurate." *Id*. at 9, ¶33.

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[1] Donaldson was arrested two weeks after the shooting. RP 1407-09. Before he was arrested, Brown had provided an additional statement fully describing Wilson's role in the shooting. RP 1189-91, 1407-09. Brown did not enter treatment until a month after the shooting, i.e., long after she had fully described Wilson's role as a shooter. RP 1189-91.

[2] Police recovered shell casings from two different guns. RP 2020.

IV. ARGUMENT

A. The court of appeals applied the proper standard for a collateral attack.

Donaldson argues that the court of appeals should not have applied the prejudice standard for a collateral attack in resolving an issue raised only in his collateral attack. Pet. at 16-18; PRP at 28-34, 36-37, 45-48. The claim is facially frivolous.

In the PRP challenge of the denial of his motion for delay, Donaldson relies upon *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984) and *United States v. D.W.B.*, 74 M.J. 630 (N-M. Ct. Crim. App. 2015). Pet. at 1-3, 16-20. But both cases regard matters on direct appeal. The unpublished opinion recites the correct legal standard for the context:

> A personal restraint petitioner claiming constitutional error must demonstrate that they were actually and substantially prejudiced as a result of that error. *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 807, 383 P.3d 454 (2016). To demonstrate actual and substantial prejudice, the petitioner must show that the outcome of the proceeding "would more likely than not have been different had the error not occurred." *State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018).

Unpub. Op. at 22-23.

It is this portion of the opinion that Donaldson challenges. Pet. at 17 (citing Unpub. Op. at 23). He argues that the court "shifted the burden of proof." Pet. at 18. But the court did not do this; the law did. In a personal restraint petition, the burden of proof shifts to the petitioner. *In re the Pers. Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990); *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). It is a "threshold burden" which, if not met, requires dismissal. *Cook*, 114 Wn.2d at 810 (quoting *In re Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984), *In re Reismiller*, 101 Wn.2d 291, 298, 678 P.2d 323 (1984), and *Hews*, 99 Wn.2d at 88).

Because the legal standards for a direct appeal are not the legal standards in a collateral attack, there is neither a conflict of law nor a matter of public interest in the court's application of the proper standard of review. Pet. at 4 (citing RAP 13.4(b)(1) and (4)).

B. Where Donaldson is challenging a court ruling, the *Grantham* rule, regarding challenges never before considered by a court, does not apply.

Donaldson argues that a personal restraint petition that is consolidated with a direct appeal is exempt from the prejudice requirement. Pet. at 21-22. He relies upon *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011), a case which in turn relies upon *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 227 P.3d 285 (2010). Pet. at 5 (citing RAP 13.4(b)(1) and alleging a conflict with *Sandoval*). The unpublished opinion does not conflict with either *Sandoval* or *Grantham*.

The *Grantham* case regarded a challenge to prison discipline wherein the complaint had never been before any court until the personal restraint petition. Commissioner Goff raised the concern that the actual and substantial prejudice standard should not apply "where the petitioner has had no previous opportunity for judicial review." *Grantham*, 168 Wn.2d at 208. The court agreed, holding that "a petitioner seeking relief via a personal restraint petition from prison discipline where *no prior*

judicial review has been afforded is not required to make a prima facie case of constitutional error and actual and substantial prejudice, or nonconstitutional error and total miscarriage of justice, as a precondition to relief." *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285, (2010) (emphasis added).

Sandoval challenged the voluntariness of his plea based on a claim of ineffective assistance that *had never been before any court*. *Sandoval*, 171 Wn.2d at 169. In that specific context, the court applied the *Grantham* rule.

That rule does not apply here where Donaldson is challenging a *judicial* ruling. His complaint, that the court should interrupt a jury trial indefinitely for Donaldson to engage in further discovery, has been before a disinterested judge, namely the trial judge.

The requisite premise for the application of *Sandoval* and *Grantham* does not exist here. Therefore, the rule does not apply,

and the court of appeals' application of the standard prejudice rule is not in conflict with an inapplicable rule.

C. The court of appeals' finding regarding prejudice does not conflict with any authority.

Donaldson argues that the court should have relied upon *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012) rather than *State v. Buckman*, 190 Wn.2d 51, 61, 409 P.3d 193 (2018) for its definition of prejudice. Pet. at 23-24 (citing Unpub. Op. at 23). The argument is frivolous as the standards are the same.

Buckman clarified that "at the guilty plea stage," the *Strickland* prejudice standard should be used. *Buckman*, 190 Wn.2d at 61-62. However, in all other contexts,

> … we have continued to apply the reasonable probability standard in collateral challenges based on inadequate assistance of counsel.[10] See, e.g., *State v. Jones*, 183 Wash.2d 327, 339, 352 P.3d 776 (2015) ("To show prejudice, the appellant need not prove that the outcome would have been different but must show only a "reasonable probability"—by less than a more likely than not standard—that, but for counsel's unprofessional errors, the result of the proceedings would have been different."); *see also In re Pers. Restraint of Crace*, 174 Wash.2d 835,

> 846-47, 280 P.3d 1102 (2012) ("We hold that if a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice.").
>
> [10] We also adopted the United States Supreme Court's use of the "reasonable probability" standard for collateral attacks based on a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). *See In re Pers. Restraint of Stenson*, 174 Wash.2d 474, 487, 276 P.3d 286 (2012) (applying the "reasonable probability" standard to a collateral attack alleging a *Brady* violation).

Buckman, 190 Wn.2d at 63.

Regardless of how that standard is expressed, Donaldson did not show prejudice of any kind. Brown never faltered in her identification of Donaldson. The alleged discrepancy regarded *Wilson* only. Unpub. Op. at 24. Brown's multiple identifications of Donaldson were recorded *before* she entered therapy. *Id.* The description and identification were the *same* after therapy. *Id.* Donaldson's expert cannot say EMDR affected Brown's memory or testimony in any way. *Id.* at 25.

The court's conclusion regarding the absence of prejudice is not in conflict with any case. Pet. at 5 (citing RAP 13.4(b)(1));

D. *Brathwaite* does not prohibit consideration of the witness' familiarity with the defendant prior to identifying him.

Donaldson argues that Brown's familiarity with him prior to the shooting is irrelevant to the reliability of her identification. Pet. at 25. Not only is the argument irrational but it also finds no support in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Pet. at 28-29.

Brathwaite had two holdings, neither of which exclude the consideration of any evidence. *Brathwaite*, 432 U.S. at 98-99. First, *Brathwaite* determined that *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) applies to identifications made both before and after the decision in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). *Brathwaite*, 432 U.S. at 98-99, 104-07. Second, it held that the identification at issue was admissible. *Id.* at 99, 117.

Brathwaite answered a knock at an apartment door and then sold heroin to an undercover officer who later identified the defendant. *Id.* at 100-01. The court noted that Brathwaite's regular presence at the apartment did not play a part in its analysis of the reliability of the identification, although the fact "hardly undermined" the court's conclusion. *Id*. at 116. Note there is no holding which determines which information is or is not relevant.

More importantly, there is no comparability between Brathwaite's regular presence at the situs of the crime and Brown's familiarity with Donaldson's appearance. The fact that Brown had seen Donaldson previously, for a decent period of time, and without the interference of trauma gives reliability to her later recognition and identification of him. This is common sense. *See e.g., State v. Hardy*, 76 Wn. App. 188, 191, 884 P.2d 8 (1994) (finding a witness who has had more contact with a suspect is in a better position to identify that suspect).

Brown recognized the shooters as men she had observed inside the club. RP 1093.[3] She testified "Randy Donaldson had stepped on a dollar." RP 1093. "I saw [my friend] go to pick up the dollar, and he had stepped on it. And she was like, 'Excuse me.'" RP 1094. Brown had tried to stop her friend. RP 1093-94. She was then "very close" to Donaldson. RP 1094. The interaction was captured on different videos. RP 1095-99, 2927 (playing Ex.s 170 and 188). "[Y]ou can watch Olivia stand there face to face with the defendant for 20 seconds." RP 2928. "She remembers him from inside the club because she was face to face with him." *Id.*

The unpublished opinion makes no error in considering this fact among many, many others which establish the reliability of the identification. Unpub. Op. at 20-21. The decision neither

[3] The State's citation to this record in the original brief was overlooked in the opinion. Br. of Resp. at 4; Unpub. Op. at 19 n.7.

conflicts with any case law nor presents an issue of public interest. Pet. at 5 (citing RAP 13.4(b)(1) and (4)).

E. The court of appeals decision which found speech is not silence does not conflict with any authority.

In a heading only, Donaldson argues that the unpublished opinion is in conflict with *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Pet. at 25. This argument is not developed in the argument, and therefore does not warrant attention.

Rather, Donaldson's argument relies upon state cases. Pet. at 25 (citing *State v. Easter*, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996); *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *State v. Belgarde*, 110 Wn.2d 504, 510, 755 P.2d 174 (1988); *State v. Knapp*, 148 Wn. App. 414, 421, 199 P.3d 505 (2009)). "None of those cases addresses commentary on statements that were admitted under CrR 3.5." Unpub. Op. at 30. All of these cases are distinguishable as they regard actual comments on silence, something that did not occur here.

Donaldson was not silent; he spoke. The prosecutor discussed his speech, not his silence.

While speech may be said to involve also choosing what not to say, "*Doyle* does not require any such formalistic understanding of 'silence,' and we find no reason to adopt such a view in this case." *Anderson v. Charles*, 447 U.S. 404, 409, 100 S. Ct. 2180, 2182, 65 L. Ed. 2d 222 (1980) (referencing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)). A defendant who speaks "has not remained silent at all." *Charles*, 447 U.S. at 408.

Donaldson has not demonstrated a conflict with any published case. Pet. at 6 (citing RAP 13.4(b)(1) and (2)). There is no consideration which would permit discretionary review.

V. CONCLUSION

The State requests this Court deny the petition for review.

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Respectfully submitted this 18th day of March, 2024.

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3/18/2024	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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