31385-9-III Consolidated with No. 313981

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

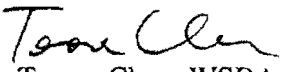
DANIEL DODD,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the trial court properly exclude inadmissible and unsubstantiated hearsay allegations against a third party?
2. In finding unsubstantiated accusations against third parties to be inadmissible on relevance grounds, did the trial court impermissibly comment on the evidence?

IV. STATEMENT OF THE CASE

On the evening of June 12, 2011, Kevin Myrick was shot and killed in front of his home at 1123 South Third, Walla Walla, Washington. RP 4, 18. Kristina Devaney, Mr. Myrick's girlfriend and the mother of his child, was sitting behind the wheel of her disabled car when she saw a man dressed all in black and approximately Mr. Myrick's height jump up

from the passenger side and approach Mr. Myrick who was leaning over the car's engine behind a raised hood. RP 155-60. From inside the car, she heard a noise, saw Mr. Myrick fall, and then watched the killer jump a fence. RP 158.

Manuel Ramirez was on the street that night and heard the gunshot. RP 187-88. A few seconds later, Mr. Ramirez saw someone sprint from an alley and up the street. RP 159, 188-89, 199. Police believe that the assailant had waited in the alley near the residence, where they found a device which had been used for smoking marijuana. RP 173-76. The man passed Mr. Ramirez and used his right hand to try to hide something. RP 190-91. The man was tall and wearing a black sweater with a design like a skull on the back; his hair was covered. RP 189-90, 198.

Detective Christina Ruchert was the first law enforcement officer to arrive, responding to a 10:23 pm dispatch. RP 199-201. Mr. Myrick was alive but unable to communicate. RP 201-02, 321. He was drenched in blood from the wound in his mouth and struggled to breathe. RP 202, 319. He was flown to Harborview in Seattle where he died from the close range gunshot to his face. RP 221-22, 225-26, 229, 323. The bullet went through the lip, tongue, face bones, and cervical spine, severing the right vertebral artery. RP 223. There were bullet fragments in his mouth, the

back of his neck, and in his stomach. RP 224, 229, 320. Another part of the bullet was also recovered from a bush. RP 383-85.

Mr. Myrick was 24 and had a two-year-old child. RP 155. He had been struggling to overcome a pill addiction and was working with police as an informant, wanting to "burn all his ties to the narcotics world." RP 326-27, 358.

At the time of his death, Mr. Myrick was an informant in a pending narcotics case against Tina Taylor. RP 8, 328, 620-21. A few weeks before Mr. Myrick's death, his house was fire bombed, and Ms. Taylor's son-in-law Charles Wilson was suspected. RP 353, 357-58, 404. Ms. Taylor and her mother had been assisting Mr. Wilson in hiding evidence of his crimes from police. RP 615-16. However, Mr. Wilson was in the Benton County jail at the time of Mr. Myrick's shooting. RP 168, 212.

Pending her own narcotics trial, Ms. Taylor made phone calls from jail to her boyfriend (common-law husband) Daniel Dodd, the Defendant in this case. RP 329-30, 365-66. Police monitored these calls and noticed that as her trial date approached, Ms. Taylor became more and more frantic in her communication with the Defendant. RP 329-30. Ms. Taylor was scheduled to plead guilty on June 10, 2011. RP 331. She changed her mind at the last minute; her then scheduled trial date was June 12, the day

Mr. Myrick was shot. RP 331.

On June 16, 2011, the Defendant Daniel Dodd was arrested on a warrant for failing to serve his sentence on a misdemeanor offense. RP 4, 626. The Defendant agreed to speak with Detective Buttice, but denied having any information related to the murder investigation. RP 9-10. He claimed that he was home on Wooden Road in Clyde, WA at the time of the shooting. RP 9-10, 625. On July 1, the Defendant spoke with Det. Steve Harris detailing his whereabouts in the days around the killing. RP 624-26. He said that on Sunday the 12th, he never entered Walla Walla and left the house in Clyde, WA only to travel a short distance in order to receive a phone call from Ms. Taylor. RP 625.

Although the best practice is to have a confidential informant testify in a controlled buy case, in the end, the State was able to proceed against Ms. Taylor without Mr. Myrick's testimony. RP 355, 361-62, 382. At the close of the State's case, when she finally realized that the evidence would not be suppressed on confrontation grounds after Mr. Myrick's death, Ms. Taylor pled guilty. RP 352-53, 361-63, 382-83.

On July 12, 2011, the Defendant attempted to escape while serving work crew. RP 24-25, 548, 551-56. He was recaptured and several hours later asked to speak to police. RP 25, 27, 556, 627. The Defendant asked

to view the investigative report and offered to confess to the killing in exchange for a more lenient sentence for his girlfriend Ms. Taylor. RP 27, 628. Detective Harris refused to provide the report to the Defendant, who was then returned to his cell. RP 27-28, 629.

Phone records showed that at the time of the shooting the Defendant's cell phone had received a four second call which went to voicemail. RP 253, 262, 299. Police determined that the Defendant's cell phone had pinged off a tower (496) near Third Street around the time of the killing. RP 29, 32, 50, 259. There are 5-6 towers concentrated in Walla Walla, arced to optimize heavier downtown phone usage. RP 289-90. FBI and Walla Walla police jointly field tested calls in the vicinity of the shooting and determined that all the calls pinged off this same (496) tower. RP 282-86, 661-62. The FBI specialist estimated that, at the time of the missed call, the Defendant's cell phone had been within a two-mile long area which encompassed the shooting site. RP 311-12.

Tower 512 on Harvey Shaw Road is a cell tower closest to the Defendant's Wooden Road home in Clyde, Washington, where the Defendant said he had been at the time of the shooting. RP 292, 303. Field tests showed the signal was not strong enough from this tower for a cell phone call to be made to or from the Defendant's home. RP 304-05.

In fact, the Defendant was in the habit of driving a distance from his home in order to get a cell phone connection, because there was no cell phone service from the Wooden Road home. RP 332, 431, 625.

On July 19, 2011, police spoke with the Defendant about the discrepancy between his statement that he had been on Wooden Road on the day of the murder and the cell phone evidence which suggested he was on Third Street at that time. RP 29. The Defendant could not explain the discrepancy, but expressed that he was upset that Ms. Taylor was facing prison time. RP 32.

Police investigated Ms. Taylor's brother Rick Avery, however, he was not in the state at the time of the shooting. RP 366-67, 375-76. Mr. Avery's girlfriend Jennifer Perkins wrote a note to Rick's brother Michael Avery in which she said police "need to know who shot that guy cuz Rickey isn't going down for Dan's shit." RP 363-371, 376. She believed that the Defendant Daniel Dodd, who had access to Rick Avery's possessions, was planting evidence in an attempt to frame Mr. Avery. RP 372-73.

Michael Avery testified that he saw the Defendant the night before the shooting. RP 564. The Defendant was carrying a gun in a backpack and asked Mr. Avery if he thought the gun would be loud. RP 565.

The Defendant was living with methamphetamine dealer Clayton Sibbett out on Wooden Road, Clyde at the time and was hiding from a warrant. RP 578-80. In June of 2011, the Defendant asked to borrow Mr. Sibbett's Smith and Wesson .357. RP 581. He was distraught about Ms. Taylor's narcotics charge and intended to kill the informant with Mr. Sibbett's gun. RP 582. The loaded gun was sitting next to Mr. Sibbett's computer. RP 582-83. The Defendant took it and returned it three days later. RP 583. When Mr. Sibbett noticed the gun had been returned, he asked the Defendant if he was done with it. RP 584. The Defendant replied, "yes, it was a done deal." RP 584. Then he asked Mr. Sibbett to check his computer for news about "the guy," whom he believed had been taken to the Tri-Cities. RP 584. Mr. Sibbett read that the victim had been injured in the face and taken to Kadlec Medical Center in the Tri-Cities. RP 584.

Mr. Sibbett then gave the gun to another friend Donald Cummings who lived in Kennewick. RP 428, 585. Donald Cummings testified that Mr. Sibbett gave him two unloaded guns, including the Smith and Wesson .357, in an exchange of goods. RP 431-33, 437, 456. Mr. Cummings asked if they guns were "hot" and was told they were not. RP 433.

When the Defendant noticed the gun was gone, he asked about it.

RP 586. Mr. Sibbett explained that he had given it to Mr. Cummings. RP 586. The Defendant told Mr. Sibbett to give Mr. Cummings a call to tell him to "get rid of it, it's no good." RP 586. Mr. Sibbett contacted Mr. Cummings and told him he should probably get rid of the .357, because something wasn't right with it. RP 433, 586-87. The three of them met at Hood Park in Burbank on June 14, and Mr. Cummings dumped the gun in the Snake River where it was recovered by law enforcement the next March. RP 421-22, 424, 433-34, 458, 586-87, 595. Both Mr. Sibbett and Mr. Cummings identified the recovered gun. RP 455-58, 589.

Mr. Sibbett's testimomy was arranged as part of a federal plea deal. RP 588-90. Mr. Sibbett's counsel did not inform him that immunity had been arranged as to possible state charges related to Mr. Myrick's murder. RP 592, 596-97. Mr. Cummings denied receiving any benefit for his testimony (RP 437), apparently not informed by his attorney as to communications between his counsel and the state (RP 453) and federal (RP 454-55) prosecutors. RP 437-55.

At trial, the Defendant attempted to accuse Charles Wilson (RP 168, 356-58, 404, 406) and Clifford Donald Fauver (CP 192-93; RP 87, 692-94) of the murder.

Forewarned by the State's motion in limine (CP 191-200) as to

defense's intention to accuse Mr. Fauver, the court squarely ruled that the accusation was inadmissible. RP 88-89, 698-700. Mr. Sheyne Thrall intended to testify that Mr. Fauver had confessed to the killing. CP 192; RP 693. The State noted that the proposed testimony was inadmissible as hearsay. CP 198; RP 695. Moreover, it did not satisfy the law requiring that a defendant first establish a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party. CP 194, *citing State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932) and *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Both in pretrial motion and before the defense case began, the trial court agreed that the testimony was inadmissible as hearsay, and also found it to be uncorroborated (not establishing a nexus between Mr. Fauver and the crime) and suspect. RP 88-89, 698-700. The Defendant appeals this ruling.

Despite the court's pretrial ruling, the Defendant attempted to accuse yet another person of the murder, Mr. Wilson, with even less supporting evidence. RP 168, 356-58, 404, 406. On appeal, the Defendant challenges the court's ruling on the State's objections to these attempts as being improper comment.

V. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT UNCORROBORATED, INADMISSIBLE HEARSAY EVIDENCE SUGGESTING A DIFFERENT PERSON COMMITTED THE CRIME.

The Defendant challenges the trial court's evidentiary ruling to exclude Sheyne Thrall's proposed hearsay testimony. The testimony is inadmissible hearsay. If that hurdle could be overcome, the next question would be one of general relevance. A trial court's decision to admit or refuse evidence is addressed to its sound discretion and is **reviewable only for manifest abuse of discretion**. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

Although hearsay and relevance are simple evidentiary decisions, occasionally criminal defendants may attempt to bolster their argument for admissibility by invoking the constitutional right of a fair trial. 5 Wash. Prac. Evidence Law and Practice, § 402.19 (5th ed.). A defendant's constitutional right to a defense "is not absolute" and "does not extend to irrelevant or inadmissible evidence." *State v. Strizheus*, 163 Wn. App. 820, 830, 262 P.3d 100 (2011).

The issue of whether or not to admit evidence implicating a different person is well addressed in *State v. Strizheus*. There the

defendant Anatoliy Strizheus was charged with the attempted murder of his estranged wife. His wife Valentina identified Anatoliy as her attacker. *State v. Strizheus*, 163 Wn. App. at 823. When police arrived, the defendant had wounds which he blamed on his wife. *Id.* At trial the defendant attempted to blame his adult son Vladimir for the assault on Valentina, although the son had not been present at the time. *Strizheus*, 163 Wn. App. at 825-26. The trial court found that the evidence did not tend to clearly point to someone other than the defendant as the guilty person. *Strizheus*, 163 Wn. App. at 827. The court of appeals upheld the ruling, noting that a defendant's constitutional right to a defense "is not absolute" and "does not extend to irrelevant or inadmissible evidence." *Strizheus*, 163 Wn. App. at 830.

The Defendant here complains because he was not allowed to present irrelevant and inadmissible evidence. Because there is no constitutional right to the presentation of such evidence, the court did not abuse its discretion in excluding Mr. Thrall's testimony.

Mr. Thrall was not a witness to the crime. RP 698. His proposed testimony was only inadmissible hearsay, i.e. information which Mr. Thrall would say that Mr. Fauver told him while under the influence of drugs. CP 193. Absent an exception under ER 803 or ER 804, Mr. Thrall

is not permitted under the hearsay rules to testify to another's out of court statement for the purposes of proving the truth of the matter asserted. ER 801(c); ER 802. The Defendant did not then and does not now offer any hearsay exception. **On this hearsay basis alone, the court's ruling is the only reasonable ruling to be made. It must be upheld.**

If the evidence offered were not already barred under the hearsay rule, it would still have to meet the relevance bar. So, for example, Mr. Wilson's motive (or indeed anyone else's motive) to harm Mr. Myrick has no relevance to the murder investigation if Mr. Wilson (or another party) had no opportunity to harm Mr. Myrick.

The relevance rule is limited by ER 403 which excludes even relevant evidence if its probative value is outweighed by the danger of unfair prejudice; by a tendency to confuse the issues and mislead the jury; or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This rule prohibits pointing the finger at a third party without admissible evidence establishing a nexus between the other suspect and the crime. Such testimony is unfairly prejudicial and confuses and misleads the jury. Because it is insufficiently relevant and significantly prejudicial, its admission would also be a waste of time.

The court's ruling to abide by the rules of evidence is neither "arbitrary" nor "disproportionate." *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). An arbitrary rule serves no legitimate interests. *Holmes v. South Carolina*, 547 U.S. at 325. The evidentiary rules serve legitimate interests. The hearsay rules require that out of court statements only be admitted when certain indicia of reliability are present. The Defendant has presented no indicia of reliability to satisfy a hearsay exception. The relevance and prejudice rules serve legitimate interests of promoting an orderly presentation of evidence that instructs a jury, but does not confuse or mislead a jury.

Mr. Thrall intended to testify that Mr. Fauver confessed that he was motivated by money. Another party's mere motive is of borderline relevance and need not be admitted absent a nexus between the person and crime. *State v. Strizheus*, *supra*. The burden is on the Defendant. *State v. Strizheus*, 163 Wn. App. at 830. But the Defendant offered no or insufficient nexus between Mr. Fauver and the crime.

The Defendant argues that Mr. Thrall's proposed testimony "went far beyond motive or opportunity." Brief of Appellant at 18. In fact, his proposed testimony was inadmissible hearsay without any corroborating evidence.

The Defendant argued that Mr. Fauver possessed a gun. The possession of a gun in America is not enough for nexus. Moreover, the State demonstrated that the Mr. Fauver's .380 was not the murder weapon. RP 388-91, 393-95. While the defense attorney asserted that Mr. Fauver's .380 could have fired the .38 caliber bullet which caused Mr. Myrick's death (RP 87-88), the expert testimony explained that a .380 caliber semiautomatic handgun can only shoot a .380 caliber auto cartridge. RP 390-91. (The defense expert only spoke to whether the partial bullet recovered from the bush was of a *weight* consistent with a .380 weapon, not the length or rim. RP 769-70. However, the defense expert also admitted to not taking into account the additional weight of other fragments recovered from the body and did not dispute that only a single bullet was shot such that the total weight of the bullet should have included all fragments. RP 774-77.)

Mr. Thrall's testimony would have implicated both Mr. Fauver and Mr. Sibbett. CP 193. But both deny the allegations. CP 193. There is no evidence that either man threatened Mr. Myrick. CP 196. There is no motive for Mr. Sibbett to commission this murder. CP 196. Mr. Fauver does not match the physical description of the shooter. CP 196. Therefore, there is no witness or evidence to corroborate Mr. Thrall's

allegations. The court found that there was no foundational evidence to suggest that anyone other than the Defendant committed the crime. RP 88.

In addition, the trial court found Mr. Thrall's testimony "suspect." RP 698. Mr. Thrall "seems to waffle back and forth whether or not he is cooperating with the police or cooperating [defense counsel]" and "seems to recant in part, at least in my opinion, what he has told both of those individuals." RP 699. The witness claims that he learned the information in July of 2011 (CP 193), but he did not disclose it to police until September of 2012 after he was arrested and while he is facing a prison term. CP 19; RP 6932. He denies that he is asking for a "deal" in his felony drug case, yet delays resolution of his own case and asks for a residential DOSA deal. CP 192. The defense claims the witness could have only acquired information from Mr. Fauver, and yet admits Mr. Thrall and the Defendant have known each other since high school and were incarcerated together over the summer. RP 693-94.

The Defendant relies on *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995). The case does not suggest that inadmissible hearsay implicating a different suspect would be admitted, but instead notes that evidence must be admissible ***under the rules of evidence***. *State v. Clark*,

78 Wn. App. at 477. The case also notes the standard of review places decisions of admissibility within the sound discretion of the trial court. *Id.*

In discussing, *State v. Clark*, the Defendant argues that the court of appeals overturned the trial court because the evidence of the defendant's involvement was weak. Brief of Appellant at 21-22. This is inaccurate. The opinion notes that where the State's evidence is "largely circumstantial," the defendant may neutralize this evidence with equivalent evidence against another. *State v. Clark*, 78 Wn. App. at 479, *citing Leonard v. The Territory of Washington*, 2 Wash. Terr. 381, 396, 7 P. 872 (1885). So in *Leonard*, the state's case was circumstantial and the defendant was permitted to show that someone else had motive, had previously threatened the victim, and resided in the vicinity. *Id.*

But this is unlike the evidence the Defendant proposed to admit. He proposed to admit inadmissible and unsubstantiated hearsay that someone else had confessed. This newly accused person would not testify to the same on the stand. Mr. Fauver had never threatened the victim and there was no corroboration of this hearsay confession to demonstrate that either Mr. Sibbert or Mr. Fauver had motive. Moreover, the State did not have a purely circumstantial case. *See* WPIC 5.01; CP 79. There were witnesses to the shooting; and the Defendant confessed to Mr. Sibbert.

The Defendant claims that, as in the *Clark* case, here the evidence of the shooter's identity was weak. Brief of Appellant at 20. The State's evidence was that Mr. Dodd was motivated to assist his common-law wife Ms. Taylor in her narcotics case; that another family member was suspected of making an attempt on Mr. Myrick's life only weeks before, but had been arrested; that Ms. Taylor, who was in constant communication with the Defendant, changed her mind about pleading guilty two days before the shooting; that the Defendant told Mr. Sibbett he was going to kill Mr. Myrick for Ms. Taylor; that he brandished a gun in front of Michael Avery the night before the shooting; that he had lied about his location at the time of the shooting as evidenced by his cell phone activity; that he had been within two miles of Mr. Myrick at the time of the shooting; that he matched the description of the shooter; that he took a gun from Mr. Sibbett shortly before the killing, returned it soon after the killing, confessed that it was a done deal, and then asked Mr. Sibbett to research the news on the shooting; that he told Mr. Sibbett to have Mr. Cummings get rid of the gun, that it was no good; that the retrieved gun was consistent with the ballistics; that Ms. Taylor went to trial believing that the audiotape of the controlled buy with Mr. Myrick would be suppressed; that Ms. Taylor pled guilty only at the close of the

State's case when the evidence was admitted against her after all; and that the Defendant had offered to confess to the murder in exchange for a reduction of Ms. Taylor's sentence. Contrary to the Defendant's assertion, the State's evidence of the shooter's identity is extremely strong.

Based on the evidence presented to the trial judge, the court did not abuse its discretion in excluding inadmissible and unsubstantiated hearsay evidence.

B. THE DEFENDANT RECEIVED A FAIR TRIAL, NOTWITHSTANDING THE COURT'S RULINGS AGAINST THE DEFENDANT AND RECITATION OF AN UNDISPUTED FACT.

The Defendant challenges the trial judge's rulings on objections to defense questions implicating Charles Wilson. Brief of the Appellant at 13-14.

A trial judge may not convey his or her personal attitudes or opinion towards the merits of the case. *State v. Levy*, 156 Wn.2d at 721. When a judge comments on a fact in dispute, the state must show that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d at 723.

Because Mr. Wilson's location at the time of the murder was not in dispute, the judge's ruling was not a judicial comment. *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006). Nor was the recitation of the the

undisputed evidence prejudicial. RP 357, ll. 4-7 (defense counsel admitting that Mr. Wilson was in custody at the time of the shooting).

The prosecutor provided the law in significant detail. CP 194-95. And the court made a clear ruling – excluding testimony implicating a third party (Mr. Fauver) in the absence of sufficient foundational evidence.

> I don't think there has been foundational evidence presented
> ....
> So it looks to me that he's simply pointing the finger at somebody else. And I don't think under the cases cited by the State that is sufficient to allow this other [witness] to testify as to the possibility that somebody else committed this particular crime.
> ....
> You just can't come into court and point the finger at somebody else or have somebody else come in to the court and have somebody else point the finger at somebody else and say that's enough to raise a reasonable doubt, that's enough to make the evidence relevant.

RP 88-89.

Despite this ruling, the defense attempted to accuse yet another third party, Charles Wilson, of the murder. RP 168, 356-58, 404, 406. Police had considered Mr. Wilson as a suspect, but determined after consulting with the Benton County Jail that he was incarcerated at the time of the shooting. RP 211-12. The court sustained the State's first objection on the grounds of relevance, explaining again that motive alone was an

insufficient to be relevant. RP 168-70. Another party's mere motive is of borderline relevance and need not be admitted absent a nexus between the person and crime. *State v. Strizheus*, 163 Wn. App. 820, 262 P.3d 100 (2011).

Nevertheless, the Defendant made a second attempt with a different witness. RP 355-56. Again, the State objected on relevance grounds. RP 356. The court inquired of counsel, "How now does this become relevant if your theory is that he might have had a motive to do this, if he didn't have opportunity?" RP 357. Counsel's answer made clear that he was inviting the jury to speculate. "Well, I don't think simply because Mr. Wilson himself was in jail and didn't pull the trigger, he could not have been responsible for the homicide. We know this happens." RP 357. The court reminded counsel a second time of the legal standard, "you have to have some additional tying in or other evidence that would connect that." RP 357. The court offered, "I'll let you revisit this if you can tie that in at some point." RP 357.

When defense counsel asked Det. Sgt. Bolster about the number of controlled buys in which Mr. Myrick participated, the prosecutor objected on relevance grounds. RP 405. Defense counsel argued in front of the jury that he was trying to show that Mr. Myrick had been threatened by

others. RP 406. It was in response to this argument that the court for the fourth time instructed counsel that mere motive will not make an accusation against another suspect legally relevant.

> I'll overrule the objection as to that. But for instance, the question about Charles Wilson threatening Mr. Myrick, there has been testimony establishing that Charles Wilson was in custody in another county at the time of this incident.
>
> So whether or not he -- There wasn't an objection made, but whether or not he threatened him seems to me, ***unless you can tie that in to some other evidence*** is irrelevant.
>
> But I will allow this question because it doesn't pertain to a specific individual so --

RP 406 (emphasis added).

It is this final reminder to counsel about the legal standard that the Defendant finds to be impermissible judicial comment. Brief of Appellant at 24.

First, the Defendant argues that, by observing that there was "testimony establishing that Charles Wilson was in custody" at the time of the shooting, the judge "unfairly bolstered the officers' credibility. Brief of Appellant at 24. But the statement is a recitation of the testimony, not a comment. There *was* testimony establishing that Mr. Wilson was in custody at the time of the shooting. That was a simple fact. And the testimony was uncontroverted. The defense never attempted to prove

otherwise. Rather, the defense agreed that Mr. Wilson had been in jail, but he wanted the jury to speculate that Mr. Wilson had commissioned the shooting from behind bars. RP 357 ("I don't think simply because Mr. Wilson himself was in jail and didn't pull the trigger, he could not have been responsible for the homicide"). There was no evidence to support such speculation.

A recitation of the uncontroverted and agreed fact of Mr. Wilson's incarceration at the time of the shooting is not a comment on the evidence or any fact in controversy.

Second, the Defendant claims that a ruling sustaining an objection on relevance grounds "undermine[s] the credibility of defense counsel's theory." Brief of Appellant at 25. If this were true, then a judge would not be allowed to rule on any objection.

The Defendant relies on *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006). In that case, the Washington Supreme Court ruled that some, but not all, "to-wit" instructions were improper judicial comments. *State v. Levy*, 156 Wn.2d at 723. One "to-wit" instruction improperly suggested to the jury that the apartment was a building as a matter of law. *State v. Levy*, 156 Wn.2d at 721. Another "to-wit" instruction identifying a crowbar as a deadly weapon was problematic, because it was the jury's

job to determine whether a crowbar had the capacity to inflict death from the manner in which it was used. *State v. Levy*, 156 Wn.2d at 721-22. However, there was ***no dispute*** as to whether jewelry was personal property (only whether it was taken), therefore that to-wit instruction did not qualify as a judicial comment. *State v. Levy*, 156 Wn.2d at 722. The instruction naming the victim was not a judicial comment, because the name is not an element of the offense. *Id.* And the instruction naming the revolver as the deadly weapon was not a judicial comment, because the pattern instructions permit the court to instruct that a revolver is a deadly weapon as a matter of law. *Id.*

Under this analysis, because Mr. Wilson's location at the time of the shooting was not in dispute and certainly not an element of the offense, this does not qualify as a judicial comment.

The Defendant conducts a review of several older cases. In *State v. Lampshire*, 74 Wn. 2d 888, 447 P.2d 727 (1968), the trial judge implied the whole of the defendant's testimony had no value. In *State v. James*, 63 Wn.2d 71, 76, 385 P.2d 558 (1963), the court's instructions to the jury indicated that the court was satisfied with the co-defendant testimony, and therefore indicated approval of his credibility. In *State v. Vaughn*, 167 Wash. 420, 424, 9 P.2d 355 (1932), the judge commented that the witness

(who was also the prosecutor) would not testify to anything he shouldn't, clearly opining on the credibility of the witness. *State v. Vaughn*, 167 Wash. at 426.

These are all unlike the instant case. Unlike in *Lampshire*, the testimony here came from State's witnesses, not the Defendant. And the evidentiary rulings regarded defense counsel's questions, not any witnesses' responses. The judge did not approve or disapprove of anyone's credibility, but only noted the uncontroverted and agreed (RP 357) evidence. Mr. Wilson was in custody at the time of the offense.

In *State v. Bogner*, 62 Wn.2d 247, 251-52, 382 P.2d 254 (1963), the court's comment ("don't you think we are getting a little ridiculous?") suggested that the offense had been proven. No such thing can be said in this case. The court did not imply that the defense theory had no value and did not suggest that the State had proven its case. Rather, the court ruled, repeatedly, that unsubstantiated accusations against a third party were, as a matter of law, inadmissible *unless and until* the defense could offer additional evidence to connect the third party to the crime. This ruling is precisely the province of the court.

Because the fact of Mr. Wilson's incarceration was agreed by defense counsel (RP 357), it is affirmatively proven that the Defendant

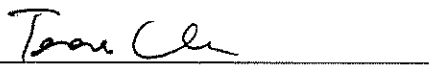
could not have been prejudiced by the court's words. The court's ruling was not improper judicial comment deserving or reversal. The Defendant received a fair trial.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: November 18, 2013.

Respectfully submitted:



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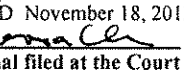
Jared B. Steed <steedj@nwattorney.net> Nielsen, Broman & Koch, PLLC 1908 East Madison Seattle, WA 98122 Daniel Dodd, # 959414 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 99326	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 18, 2013, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**