No. **73440-7-I**

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ERICK WALKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

The Honorable Judge Wynne

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Contrary to the State's assertion there was not a mountain of evidence presented to the jury that established Mr. Walker's guilt. State's brief at page 46. The evidence that tied Mr. Walker to the drive by shootings, other than the shooting that resulted in the death of MC, was circumstantial and consisted of paint chips and pieces of plastic found near the shooting in Marysville and recovered bullets that arguably were fired by a gun owned by Mr. Walker. There was no direct evidence that linked Mr. Walker to the death of MC.[1]

II. THE SCOPE OF CROSS EXAMINATION OF CRIME LAB WITNESSES

The State's case rested upon its forensic evidence. The strength of the prosecution's case rested on the credibility of the work done by the crime lab. In order to convict Mr. Walker of

[1] The lack of any evidence linking Mr. Walker to the death of MC is set out in greater detail in his opening brief.

any of the counts alleged by the State[2] the jury had to be convinced, beyond a reasonable doubt, that Mr. Smelser was correct when he testified that the bullets recovered at the various crime scenes were fired by Mr. Walker's guns. While Van Wyk's testimony may have put Walker's vehicle on 56th Ave. NE, Marysville, only Smelser linked his gun to the shots fired in the drive by shootings.

The testimony offered by the State was that the crime lab has a protocol that requires confirmation of the results reached by one of its scientists. The State offered no evidence that the crime lab followed this protocol with regard to Smelser's work. No one testified that another criminalist reviewed and agreed with Smelser's results. To properly defend Mr. Walker it was essential that counsel be allowed to question Mr. Smelser's proficiency through cross-examination.

[2] Since the police failed to locate any trace evidence at the scene of the homicide the testimony of the forensic scientists has less significance to that count.

Washington follows a three-pronged approach to determine the limitations of a defendant's confrontation clause right to cross-examination. State v. Darden, 145 Wash.2d 612, 622, 41 P.3d 1189 (2002). First, the evidence sought must have at least minimal relevance. Id. Second, if relevant, the burden is on the State to show that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. Third, the court must balance the State's interest in excluding prejudicial evidence against the defendant's need for the information; "only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." Id.

The fact that Mr. Smelser made mistakes in his handling of DNA evidence has at least minimal relevance to his proficiency as a criminalist.[3] While the State posits that the jury may have concluded that Mr. Smelser was a wonderful scientist

[3] The offer of proof showed that while working in the DNA section of the crime lab, Mr. Smelser contaminated three tests. See Exhibit 421, example 21.

having made only three mistakes in his career, it is equally likely that the jury may have found Mr. Smelser's sloppiness in three cases indicative of his work habits and caused them to reject his testimony. Admission of his past mistakes would not have disrupted the fairness of the fact-finding process at trial. The defendant's need to provide the jury with this information outweighed any claim of prejudice that might be raised by the State. It was error to limit the defendant's cross-examination of Mr. Smelser. And, this error was not harmless. In determining whether this error was harmless the Court should consider: "the importance of the witness' testimony, whether the evidence was cumulative, the extent of corroborating and contradicting testimony, the extent of cross-examination otherwise permitted and the strength of the State's case." State v. Portnoy, 43 Wash. App. 455, 462, 718 P.2d 805, review denied, 106 Wn.2d 1013 (1986) (citing Delaware v. Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431, 1438 (1986)). Since Smelser's credibility was central to the State's case and was not

corroborated the Court's limitation on cross-examination was not harmless.

III. THE RE-ENACTMENT TESTIMONY AND EXHIBITS

The State argues that the photographs of Det. Lewis, seated in Mr. Walker's car, holding Mr. Walker's firearm in his right hand and pointing it out the window is not a re-enactment, but demonstrative evidence designed to assist the jury in understanding Det. Wells's testimony. [4] The State's argument is erroneous and its reliance of State v. Finch misplaced. In Finch, the police returned to the scene the following day to determine what the defendant could have seen from the window of the house from which the shots were fired. Establishing this was relevant to the defendant's intent and premeditation. The State

[4] The State never addresses Mr. Walker's assertion that the Court should not have allowed Det. Wells to testify concerning his opinion that a person seated in Mr. Walker's car, pointing a Blackhawk revolver out of the passenger window could have inflicted the wound that killed MC. If the Court erred in allowing the admission of his "opinion" testimony, then the admission of the photographs used to "illustrate" his testimony certainly was error.

needed to convince the jury that Mr. Finch knew that he was shooting at police officers and that Sgt. Kinard was visible from Mr. Finch's vantage point. In allowing the admission of the videotape the Supreme Court stated:

> We find that the conditions during the videotaping were substantially similar to those on the night in question and any differences were brought out in testimony and cross-examination. What could be seen from the bedroom window was relevant to questions of intent and premeditation, and therefore the officers' testimony and the video had probative value.

State v. Finch, 137 Wash. 2d 792, 818, 975 P.2d 967, 985 (1999).

In Finch the evidence established the Finch fired the shots through the bedroom window. The police were reasonably certain as to their positions outside of the home at the relevant times. While there was a question concerning lighting, the police in creating the video, elected to err on the side of less light (favorable to the defense) rather than more light. In the case at bar while the police knew the relative order in which the

girls were walking when the shot was fired, there was disagreement as to whether the shot was fired from a car or from the bushes. No one described Mr. Walker's car. The position on the road of the car that passed by the girls was unknown. No one saw the gun so it was unknown whether it was a handgun or a rifle that fired the shot. The caliber of the gun was unknown. The police knew that Walker was left-handed, yet Lewis held the gun in his right hand. The photographs were taken during the daytime though it was pitch black in the area where the girls were walking at the time the shot struck MC.

The photographs taken in August, 2013 arguably were admitted to demonstrate the testimony of Det. Wells who opined that it was possible for the shot that killed MC to have been fired from a car. With that as the justification (whether the State's theory was possible) the photographs should not have been admitted. Wells testimony was an attempt to see if it was possible for the shot to have been fired from Walker's car. The

Court committed error when it admitted his testimony over defense objection. He did not have the requisite foundation on which to state an opinion as to the trajectory of the bullet nor could he state his opinion to a reasonable degree of certainty. This was not an opinion based on any specialized knowledge, it only was his theory of how the crime may have occurred.

To try to justify the State's theory of the case he had to place the car in a certain position (though if the shot came from a car, the car's exact position on the road was unknown), hold the gun so that its barrel was pointed at the actress portraying MC at a specific angle (though the caliber of the gun and the length of the barrel was unknown) and stage the anatomical position of the actress to get the wound path to line up with that described by the medical examiner (though her anatomical position was unknown). Det. Wells admitted, and Dr. Adams, the medical examiner who conducted the autopsy, corroborated that it was impossible to determine the position of the gun that fired the shot that struck MC. There were simply too many

unknown variables to allow anyone to opine to any degree of certainty her anatomical position when the bullet struck her. If her anatomical position was unknown the position of the gun relative to her body also remained unknown. The manipulation by those producing the photographs to corroborate the State's theory of the case was far from "substantially similar" to that which occurred on the night in question. The Court should not have permitted the State to introduce photos of what possibly may have happened that were not based on "known facts."

The State's ineffectual attempt to distinguish the cases cited by the Appellant on the bases that those cases involved video tapes rather than still images must fail. Its argument ignores the fact that the photographs in question were introduced together with a video tape that showed what a person driving toward the girls would have seen and for how long before the car passed them the girls would have been visible to driver of the car. This video tape is similar to that offered in the Finch case. The police produced the video at

night (similar lighting conditions), on the same portion of the road at which MC was shot, driving the car at various speeds. The fact that the police used Mr. Walker's car which may have had headlights different from the car that passed the girls was at best a minor dissimilarity. As in Finch this video may have been relevant to the issue of intent and premeditation. It is not the video tape that forms the basis of this assignment of error. Had the Court limited the State to the introduction of the video tape there would be no complaint by Mr. Walker. However, not satisfied with providing the jury with the potential view of the driver as he or she drove toward the girls, the police stopped shooting video and went to still photos, freezing in time the image of a man pointing what had been identified and admitted as Mr. Walker's handgun, from what had been identified as Mr. Walker's car, at an actress looking into the face of the shooter. It was the addition of the still photos, taken during the day, with all of the other dissimilarities that are discussed earlier, that violated Mr. Walker's right to a fair trial.

IV. THE MIRANDA ISSUE

Mr. Walker's request for counsel was not equivocal. See, State v. Nysta, 168 Wash. App. 30, 34, 275 P.3d 1162, 1165 (2012)("I gotta talk to my lawyer," was an unequivocal request for counsel.); Sessoms v. Grounds, 776 F.3d 615, 626 (9th Cir. 2015) (the question—"There wouldn't be any possible way that I could have a—a lawyer present while we do this?"—was an unambiguous request for an attorney.); State v. Edler, 2013 WI 73, ¶1, 350 Wis. 2d 1, 3, 833 N.W.2d 564, 565 (2013) (defendant's statement, "can my attorney be present for this," in the squad car on the way to the second interrogation was a valid invocation of the right to counsel.); In re Art T., 234 Cal. App. 4th 335, 336, 183 Cal. Rptr. 3d 784, 786 (2015)(the 13-year-old juvenile defendant's statement—"Could I have an attorney? Because that's not me"—made during the course of a custodial interrogation after watching a video of a shooting was an unequivocal and unambiguous invocation of his Miranda rights); Commonwealth v. Champney, 619 Pa. 627, 629-31, 65

A.3d 386, 387-88 (2013)("I think I want to talk to Frank Cori [his attorney] before I make a statement," was an unequivocal request for counsel.)

The State fails to address Appellant's contention that there was not a valid waiver of his Miranda rights due to the refusal of the police to advise him why he had been arrested and detained in the interrogation room. Its response treats appellant's contention as if he was arguing that the police had made him a promise that overcame his free will. See Respondent's Brief at pages 35 and 36. It cites State v. McDonald, 89 Wash.2d 256, 265, 571 P.2d 930 (1977) in support of its contention that the only requirement is that the suspect understand that he has the right to remain silent. McDonald does not support the State's position. The issue in McDonald was whether an individual incompetent to stand trial could waive his protections under Miranda. The McDonald court held that he could.

Appellant maintains that Det. Pince's statements to Mr. Walker mislead him to the degree that he cannot be said to have made the necessary knowing, intelligent and voluntary waiver of his rights to remain silent and to counsel. The Pennsylvania courts, in interpreting Miranda, have held that, in order for an accused to exercise his Miranda rights intelligently, he must have knowledge of the particular transaction under investigation. This does not mean that the accused need know the technicalities of the offense or every conceivable consequence which might flow from a Miranda waiver, but he does have a right to know of the general nature of the incident giving rise to the investigation. Commonwealth v. Brown, 341 Pa. Super. 138, 491 A.2d 189, 190-191 (Pa.Super. 1985). See also Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553, 556 (Pa. 1977).

In Dixon, the defendant was arrested on a warrant regarding nonpayment of restitution. After signing the Miranda waiver, the questioning officers immediately began to

interrogate the defendant regarding the death of the defendant's son and did not question her regarding the subject of the warrant for which she was taken into custody. The Pennsylvania Supreme Court determined that because the defendant's arrest "was based upon grounds unrelated to the basis of her interrogation and she learned of the nature of the criminal investigation only through the questions which she was asked," that the inculpatory statements made with regard to her child's death were the subject of suppression.

The police arrested Mr. Walker at gun point as Mr. Walker drove to work. They did not advise him why he was under arrest. The lead investigator told the officer who transported Mr. Walker from the scene of the arrest to the Sheriff's Department not to Mirandize him or engage in any conversation with him. After being advised of his right to have an attorney present Mr. Walker asked if there was an attorney present. Told that it would be awhile before an attorney would be made available Mr. Walker next asked why he was being

detained. The police refused to answer his question telling him that they could only do so if he waived his Miranda rights. Of course, this was blatantly false and designed to make Walker waive his right in order to learn why he was in custody.[5]

This Court should not hold that the police can coerce one to waive important constitutional rights in a void. That a decision to waive one's right to remain silent and to counsel can be said to be knowing, intelligent and voluntary where the accused has not been told why he is being held in custody and/or the nature of the crime under investigation cannot and should not be deemed a valid waiver of a constitutional right. The Court erred in admitting Mr. Walker's taped interview.

V. THE SEARCH WARRANTS

In his Opening Brief Mr. Walker argues that the warrants issued and executed were overly broad and failed to state with particularity items for which there was probable cause. He contended that some of the information contained in the warrant

[5] The portion of Det. Pince's testimony given at the CrR 3.5 hearing and relevant to this issue is attached in Appendix A.

affidavits had been obtained illegally and that the affidavits failed to establish probable cause for the crimes under investigation, other than the crime of hit and run. Although the warrants were limited in part to certain ranges of dates, other parts did not contain such limitations. In response to his contention that the search of the defendant's smart phone was overly broad and lacked specificity, the State directs this Court to the testimony of Detective Quick. See BOR 41. This Court should not consider extrinsic evidence such as the trial testimony of Detective Quick in determining the validity of the Verizon records. The validity of a search warrant is limited to a review of the "four corners of the search warrant affidavit." See State v. Neth, 165 Wash. 2d 177, 182, 196 P.3d 658 (2008). The search warrant affidavit fails to justify the general search authorized by this warrant.

The State next argues that even if the warrants were unconstitutional because of their scope and lack of specificity that portions should be validated by this Court under the

severability doctrine. BOR at 42. State v. Maddox, 116 Wash. App. 796, 807-09, 67 P.3d 1135 (2003), sets out five factors for determining whether invalid parts of a warrant can be severed: (1) the warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search, i.e., one in which they "flagrantly disregarded" the warrant's scope.

Mr. Walker maintains that any valid part of the challenged warrants are insignificant when compared to the warrant as a whole. Additionally, for the reasons set out in his Opening Brief he asserts that the challenged warrants authorized a prohibited "general search." Finally he reminds

this Court that the severability doctrine is far less broad where the items seized are protected by the First Amendment. Mr. Walker previously discussed how the warrants intruded into his First Amendment rights. See BOA at page 45-6. In State v. Perrone, 119 Wash. 2d 538, 560-61, 834 P.2d 611, 623 (1992) the Court addressed severability with regard to material protected by the First Amendment. It stated:

> At a minimum, where materials presumptively protected by the First Amendment are concerned, the severance doctrine should only be applied where discrete parts of the warrant may be severed, and should not be applied where extensive "editing" throughout the clauses of the warrant is required to obtain potentially valid parts. The substantial editing required here to reach the point at which the State urges us to test the particularity of this warrant is flatly inconsistent with the mandate from Stanford v. Texas, 379 U.S. 476, 485, 13 L. Ed. 2d 431, 85 S. Ct. 506, reh'g denied, 380 U.S. 926, 13 L. Ed. 2d 813, 85 S. Ct. 879 (1965): the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms.

(Footnote and citations omitted.)

In this case the warrants seek material that falls within the First Amendment (i.e., Mr. Walker's associates/contacts and his email and text messages). The warrant failed to provide the police with the "most scrupulous exactitude" demanded by our First Amendment freedoms. Because the warrants were improperly issued, any evidence obtained and/or derived during their execution must be suppressed.

VI. SENDING THE HOMICIDE CHARGES TO THE JURY

In response to Appellant's assignment of error regarding the Court's decision to allow the homicide charge to go to the jury, the State suggests that there was no error as the jury did not convict Mr. Walker of Murder in the First Degree.[6] BOR at page 30. The deficiency in the State's evidence at trial was not the mental state of the person who fired the shot the killed MC;

[6] The jury did not acquit Mr. Walker of Murder in the First Degree. Rather being unable to arrive at an unanimous decision it followed the Court's instructions and went on to consider the lesser included crime of Manslaughter in the First Degree.

it was linking Mr. Walker to the shooting. If the State failed to introduce sufficient evidence to show that Walker fired the shot the jury should not have been allowed to decide whether he committed the homicide, whether it was on the charge of Murder in the First Degree or Manslaughter in the First Degree.

VII. CONCLUSION

For the reasons set out in the Appellant's Opening and Reply Briefs this Court should reverse the trial court, vacate the verdicts and the Judgment and Sentence, dismiss the Homicide charge with prejudice and remand the remaining counts for a new trial.

DATED this 25 day of APRIL, 2016.

Respectfully Submitted,

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Attorney for Appellant

VIII. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by electronic filing, addressed to:

1. Court of Appeals
   Division One
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   One Union Square
   Seattle, WA 98101

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by United States Postal Service, addressed to

1. Snohomish County Prosecuting Attorney
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2. Erick Walker, DOC#
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DATED this 25 day of April, 2016.

Brandy L. Ellis

Brandy L. Ellis, Secretary