NO. 72726-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY GILES,

Appellant.

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

The Honorable Bruce Weiss, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The state's expert improperly commented on appellant Daniel Giles' guilt and violated his right to a jury trial.

2. The trial court violated Giles' due process right to present a defense by prohibiting other suspect evidence.

Issues Pertaining to Assignments of Error

1. The state's key evidence against Giles for the death of Patti Berry was a partial mixed DNA profile said to be consistent with that of Giles located on the steering wheel of Berry's car and on the opening of her reported handbag and the bottom of her reported jeans. However, none of the experts who performed the DNA tests could definitively say the DNA was that of Giles. In fact, the Y-STRA DNA testing that was done could merely include or exclude a certain individual.

Where the state's expert crime scene reconstructionist testified that based on the forensic scientists' DNA reports, it was likely appellant touched the decedent's car and her belongings rather than explain the evidence was merely consistent with that conclusion (as the court had limited), did the expert's testimony improperly lend a "scientific certainty" to the evidence and amount thereby amount to an improper opinion on guilt?

2. Identity was the main issue at Giles' trial for first- degree murder of Patti Berry. Although a partial DNA profile obtained from the steering wheel of Berry's car reportedly matched Giles', he was excluded as the major contributor of male DNA obtained from underneath Berry's fingernails at the time of her death.

Berry worked as a topless dancer and was known to prostitute. There was evidence suggesting she was on her way to meet a client the night of her disappearance.

Giles sought to introduce evidence inculpating three other individuals as Berry's killer. Each had motive, opportunity, ability and a character linking each to Berry's death. Did the trial court violate Giles' due process right to present a defense by precluding him from presenting evidence that one of these three other individuals committed the murder?

B. STATEMENT OF THE CASE[1]

1. Trial Testimony

Following a jury trial in Snohomish county superior court in October 2014, appellant Danny Giles was convicted of first degree murder for the death of Patti Berry, which occurred approximately twenty years

[1] This brief refers to the transcripts as follows: "XRP" – 6/20/14 (motion to compel); "1RP" – 7/30/14; "2RP" – 7/31/14; "3RP" – 8/6/14; "4RP" – 8/14/14; "5RP" – 8/21/14; "6RP" – 9/4/14; "7RP" – 9/18/14; "8RP" – 9/22/14; "9RP" – 9/23/14; "RP" – 9/29/14, 9/30/15, 10/1/14, 10/2/14, 10/3/14, 10/6/14, 10/7/14, 10/8/14, 10/9/14, 10/10/14, 10/13/14; 10/14/14, 10/15/14, 10/16/15, 10/20/14; and "10RP" – 11/5/14.

earlier in 1995. CP 34-44. Berry was a topless dancer who was last seen leaving Honey's strip club around 1:45 a.m. on July 31, 1995, heading north on Highway 99 in search of an air pump to fill up her leaking left front tire. RP 12-20, 40, 47, 1400.

One of Honey's doormen testified Berry appeared to be in a rush, like she had somewhere to go.[2] RP 12, 21, 276. Another doorman testified dancers were not allowed to leave with customers. RP 34, see also RP 279. If a dancer and customer planned to meet, they would have to leave separately. RP 35. There was evidence Berry sometimes met customers outside of Honey's to perform acts of prostitution. RP 173-74, 1200. A fellow dancer told police Berry had been talking to a customer just before she left. RP 279.

Maria McRae was dancing at an affiliated club in Texas with Berry before just before Berry flew back to Washington at the end of July. RP 1972-73. McCrae testified Berry said she was going to blackmail "her sugar daddies" to continue seeing her. RP 1973. Berry also said she was going to blackmail someone in particular. RP 1973. The parties stipulated Berry was in dire financial straits when she disappeared. RP 2041.

Roy Nichols left Honey's just after Berry and drove behind her north on Highway 99. RP 51. He testified Berry turned into a

convenience store at the intersection of Highway 99 and Airport Road, possibly a Circle K. RP 54. When Nichols made a right at the light onto Airport Road, Berry was just getting out of her car. RP 54. Before, while driving behind Berry on Highway 99, Nichols observed a black Corvette behind him also driving north. RP 71. He had seen a black Corvette earlier at Honey's as well. RP 71.

When Berry did not pick up her daughter as expected from the babysitter at 9:00 a.m. on July 31, Berry's family contacted the Snohomish county sheriff's office. RP 81-87, 100-101, 116. Berry's mother went to Honey's and learned of Berry's flat tire. RP 108, 110. The next day, Berry's sister, Lisa Berry,[3] decided to try to retrace Berry's steps. RP 95, 117-18, 147.

Lisa drove to the Circle K north of Honey's but learned its air pump was broken. RP 119, 147. Looking for the next closest place with an air pump, Lisa drove east on 128th Street (Airport Road becomes 128th Street Southwest). RP 119, 147. Around 9:30 p.m., Lisa found Berry's gray Honda Prelude down a small alleyway off of 128th, tucked between two U-hauls, adjacent to a car wash with an air pump. RP 95, 120-23, 187, 231. Lisa went to a nearby business and called 911. RP 123.

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[2] Berry had a daughter but was not expected to pick her up until 9:00 a.m. the following morning. RP 78, 82.

Lisa testified that when she returned, Snohomish county sheriff's deputy Michael Beatie stepped on the fender of Berry's car, and after bouncing it up and down, remarked that Berry wasn't in there.[4] RP 124, 150-51. Beatie had been in Honey's many times. RP 191. Before responding to the car site, Beatie had been at Honey's investigating Berry's disappearance. RP 193. He did not ask for Honey's surveillance tapes or interview any dancers, however. RP 194, 1202.

The sheriff's office eventually served Honey's with a search warrant for the tapes on August 9. RP 286. When they tried to make copies, however, the tapes were blank. RP 283, 285.

There was a significant amount of blood in Berry's car. RP 124, 188. The driver's side window was down and the left front tire was flat. RP 236. Lisa stayed until the police towed the car to the county garage. RP 125, 237, 560.

The next day when Lisa returned to the car site, Beatie was also there. RP 151. Lisa observed Beatie was rubbing his leg. RP 153. Beatie testified he did not remember returning the next day, speaking to Berry or

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[3] To avoid confusion, Lisa Berry will be referred to as Lisa.

[4] Beatie denied rocking the car or saying Berry was not in it. RP 195.

rubbing his leg. RP 197-98, 202. He did not recall looking for Berry's body other than in the open field near where the car was found.[5] RP 197.

On August 2, the police searched the area west of the U-hauls, where Berry's car was found, and recovered a number of items, including: a handbag with pink, yellow and green coloring; as well as a pair of jeans and a pillowcase with blood on them. RP 241, 243, 245, 267, 338, 342. Snohomish county sheriff's sergeant Kevin Prentiss testified Beatie was there when the items were recovered. RP 269, see also RP 303.

At 5:00 p.m. on August 8, 1995, Everett police detective James Massingale responded to a report of a dead body at the Country Club Apartments just south of Everett Mall. RP 251-54, 425-26. Some kids came across it while playing in the woods. RP 481.

Massingale encountered a group of people and a man walked him down a path though the trees; they stopped 25-30 yards from a small service road and a woman's body was visible five to eight yards off the trail to the south, in the brush. RP 427. The woman was unclothed from the waist down. RP 399.

Massingale escorted the man back and waited for officer Carter to arrive; Massingale returned with Carter to the body location and confirmed it was a white woman in her early 20s. RP 428. Massingale

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[5] In 1997, Beatie resigned as a sheriff's deputy in lieu of being fired. RP 205.

and Carter returned to the paved road and encountered sergeant Decker. RP 428. After escorting Decker to the body, they returned and put up crime scene tape; Massingale protected the perimeter. RP 428-29.

At 6:00 p.m. Everett police radioed that they had found a woman's body. RP 251-54. Sergeant Prentiss responded at 6:30 p.m. RP 252. When Prentiss arrived, the Everett police sergeant told him no one had approached the body to see if it was Berry. RP 288. Prentiss testified that once detectives arrived, there would be no reason for a deputy to respond to the body site. RP 287, see also RP 459.

Prentiss and other officers cut a path through the brush to the body so as not to contaminate the scene. RP 258, 394. Prentiss assumed it was Berry but the sheriff's office waited until the following day to process the scene. RP 258-601.

Snohomish County sheriff's detective John Padilla was the lead detective assigned to Berry's disappearance. RP 308-09. When he responded to the body site, the scene was already secured with yellow barrier tape. RP 345. Padilla testified no one to his knowledge had approached the body to look for a teddy bear tattoo, which Berry was known to have. RP 355.

Despite this, Beatie claimed to have gone close enough to the body to observe Berry's teddy bear tattoo. RP 2034. According to Beatie, he

also advised an Everett officer he believed the woman was Berry. RP 2034. Beatie testified he went to the body site, after hearing the Everett police call on the radio. RP 2034. According to the police log, he signed in at 7:15 p.m., which would have been after the crime scene tape was in place. RP 428-29, 2036. Beatie failed to write a report about his actions, despite such a direction on the sign-in sheet. RP 2039.

Police began processing the scene the next day on August 9. RP 388. Deputy Joseph Ward helped to enlarge the path that had already been cut through the brush to the body. RP 394. Ward testified that when they cut the path to within two to three feet of the body, he could see a small teddy bear tattoo on the woman's upper thigh, which confirmed to him it must be Berry.[6] RP 345, 421.

Forensic pathologist Dan Selove examined the body. RP 402, 653. Fingerprints confirmed it was Berry. RP 681. Selove testified Berry was stabbed 17-18 times on the left side of her face and neck, suffered a severed right carotid artery and bled out. RP 655-56, 668. She had a "defensive wound" through her left hand. RP 656. Selove estimated the knife blade to be at least two inches. RP 673. In Selove's estimation, the rate of decomposition was consistent with death occurring on July 31,

[6] An Everett police lieutenant who assisted testified that even at that location, the teddy bear tattoo was not immediately visible when they first got up to the body. RP 530.

1995. RP 684. During the autopsy, right and left fingernail clippings were collected. RP 748.

On August 7, 1995, the day before Berry's body was found, detective Shawn Stich began processing her vehicle. RP 559. He removed the front seats and detective Jim Scharf bagged the front passenger side seat cover and a bloody handprint from the fabric of the passenger seat. RP 590, 610-14. Scharf also bagged the headrest from the driver's seat. RP 617. A shop technician removed the steering wheel for Stich to submit for DNA testing. RP 598-99.

Police had a number of suspects early on – none of which were Giles – but made no arrests. RP 1195-97, 1206, 1223-24, 1580-81. The then-lead detective John Padilla testified he received a tip about someone Berry spent a lot of time with at Honey's the night of her disappearance. RP 1195. Padilla testified the man gave several statements that were internally inconsistent and not corroborated by other witnesses. RP 1197. Padilla was interested in this person. RP 1197.

In 2004, the case was assigned to the "cold case" unit and items taken into evidence in 1995 were re-submitted for DNA testing. RP 1573-75, 1580. Among these items was the steering wheel. RP 1062, 1580. Reportedly, a partial male profile consisting of 7 loci was obtained and

identified as "individual A" and input into the state's CODIS database.[7] RP 1066-68.

In 2008, police received a "CODIS hit" when the partial profile of "individual A" was found to match that of Giles at those 7 loci. RP 1096. When interviewed by police, Giles denied any involvement in Berry's death. CP 208. However, he acknowledged he had sex with many women when he was younger, possibly Berry, although he did not remember specifically. CP 210-11; RP 1449-50. He could have been inside one of these women's car. CP 211; RP 1449-50.

Police had evidence Berry was a prostitute, as well as topless dancer. RP 1200. Giles also had a history of breaking into cars in the mid-1990s. RP 2088.

In June 2010, the sheriff's department sent several items of evidence to a private lab in Texas for DNA testing, among them the handbag and jeans found near Berry's car. RP 756, 768, 776. The handles and edges of the opening of the handbag were swabbed and DNA extracts were taken and tested. RP 771.

[7] "CODIS" is an acronym for the Combined DNA Index System maintained by the FBI. There are separate state and national databases. While the national database requires a minimum of 10 loci, the state database only requires 6. RP 1044, 1069. A full profile consist of 16 loci. RP 1670.

Scientist Aimee Rogers testified a partial mixed DNA profile from the opening of the handbag was obtained. RP 773. She testified the profile of the major contributor was consistent with Berry's. RP 773. According to Rogers, Giles could not be excluded as a potential minor contributor. RP 773. However, statistical analysis showed the frequency that a random, unrelated person from the Caucasian population also could not be excluded was 1 in 72. RP 774-75.

A partial mixed profile was also obtained from the handles of the handbag. RP 799. The profile of the major contributor was consistent with Berry's. RP 799. The minor profile was consistent with that of a male, but Rogers could not draw any conclusions as to whether it was consistent with Giles' profile. RP 800.

Similarly, swabs were taken of the outside-bottom legs of the jeans and a mixed DNA profile was obtained. RP 782. Rogers testified the profile of the major contributor was consistent with Berry. RP 782. Although the "minor alleles present in the mixture" were consistent with Giles' profile, statistical analysis showed the probability of a random, unrelated Caucasian individual also not being excluded was one in three individuals. RP 783.

Because male DNA was detected from the opening of the handbag and its handles, as well as the jeans, Rogers sent them for Y-STR testing, a

specialized type of DNA testing that seeks to isolate and identify male DNA from a mixed source sample. RP 816, 792-93.

Scientist Barbara Leal performed the Y-STR testing. RP 819. Leal testified she obtained a partial Y-STR profile from the handbag opening and Giles could not be excluded as a contributor. RP 822. According to the Y-STR database, which gages how common a Y-STR profile occurs within a particular ethnic group, the profile was common to two men in a population of 4,114 Caucasian males. RP 826.

Leal obtained a partial Y-STR profile from the handles, but there was not much DNA there. She testified Giles' profile was consistent with what was obtained. RP 833-34.

Leal obtained a mixed Y-STR profile of at least two males from the bottom of the jeans. RP 827. Giles could not be excluded. RP 827. According to the database, the profile was common to 15 men in a population of 4,114 Caucasian men. RP 828.

In 2012, police submitted other items of evidence for Y-STR testing. Fingernail clippings taken from Berry's body at the autopsy were submitted. RP 1606-1608. Previous DNA testing revealed the presence of blood with DNA consistent with that of Berry. RP 1055, 1061. However, previous testing also indicated the presence of DNA from two potential male contributors. RP 1319.

In October 2012, Y-STR testing of the right fingernail clippings revealed DNA of mixed origin consistent with coming from two males. RP 1607-1609. Giles could be neither included nor excluded. RP 1609. Y-STR testing of the left fingernail clippings yielded the same results – except Giles was *excluded* as a potential contributor. RP 1609.

After receiving this fingernail evidence excluding Giles, detective James Scharf investigated further. RP 1651-52. In July 2011, Scharf interviewed Karl Seeber. RP 1254. Seeber and Giles grew up together and were still friends in the mid-1990s. RP 1258-59. Giles frequently visited Seeber at his house and the two would sometimes go out to the bars on 128th Street. RP 1259-60. According to Seeber, Giles carried a pocket knife. RP 1262. Seeber remembered Giles broke into cars and was arrested for breaking into a locker room in Bellevue. RP 1266.

Another of Giles' friends in the mid-1990s, Wade Walthew, testified Giles liked to go to Kodiak Ron's, a bar on the corner of Highway 99 and 128th Street. RP 1706. Walthew also testified Giles asked him to go to Honey's one time. RP 1707-08.

Seeber recommended Giles for a job with Rod Coslett, who owned a landscaping business. RP 1262. Coslett testified he had a maintenance contract with the Country Club Apartments in 1995, when Giles was working for him. RP 1713, 1726, 1730, 1736.

Scharf also interviewed Tawny Dale. RP 1289. Dale testified Giles was a friend of her husband's and spent time at his house in 1993, before they were married. RP 1278. Dale testified Giles liked to go to a bar on 128th Street. RP 1280. According to Dale, Giles had a 7-8" long knife with a wooden handle and fixed blade. RP 1281. She described it as a fillet knife for hunting and fishing. RP 1287.

Dale claimed Giles made disparaging comments about prostitutes. RP 1282. On one occasion when she expressed sadness for the families of the victims of the Green River killer, Giles reportedly said the person was doing society a favor. RP 1283. Dale admitted she pled guilty to making a false statement in 2011. RP 1277.

In November 2012, Scharf interviewed Todd Horton. RP 918. Horton had given police a statement in 1999, after reading an article in the paper about Berry. RP 953-55. Horton testified that around 1:30 a.m. on July 31, 1995, he and his friend Dan Simons went through the drive-through at Taco Bell on 128th Street. RP 928. They looped back around the building and parked at the car wash just west of Taco Bell. RP 930.

According to Horton, a car was parked on the curb between the car wash and the tire store and a man was washing off a trunk mat or spare tire cover and possibly the trunk itself. RP 935. Horton claimed he thought the man was washing off blood and had either killed someone or poached

an animal. RP 938, 982. Horton also claimed he alerted Simons, but Simons dismissed it. RP 939.

Horton described the man as white, six feet tall and 200-220 pounds. RP 935-36. When interviewed by Scharf in November, 2012, Horton picked Giles out of a photographic montage as the person he saw at the car wash that night. RP 963, 1545. He also identified Giles in court. RP 964.

But when he first spoke with police, Horton described the man as 5'9", 160-180 pounds and Native American. RP 948, 993, 1020. Horton also picked Brian Petitclerc out of a photographic montage as the man he saw at the car wash and said he was 99% certain of his pick. RP 961, 1042, 1221.

Horton also incorrectly described a number of features about the car wash. RP 976, 1969-70. And significantly, Simons did not recall seeing anyone at the car wash or Horton saying anything about seeing someone. RP 1995. Simons testified Horton had a poor reputation for truthfulness. RP 1996.

In November 2013, the police conducted additional Y-STR testing of various items. RP 1662. Previously, a number of DNA extracts had been taken of various bloodstains in Berry's car. RP 1663-1670. Among them was a DNA extract of blood taken from the underside of the driver's

headrest. RP 1670. A partial profile of 11 of 16 loci was developed and reported to match the Y-STR profile of Giles. RP 1671, 1682. According to the Y-STR database, the chances of a random match are one in 1,400 males in the United States. RP 1682-83. But Giles was excluded as the major male contributor of a bloody handprint on the back of the passenger seat.[8] RP 1674-75, 1870-72.

2. State's Expert

The state sought to call Christopher Kern, a crime scene reconstructionist, to offer opinion evidence about the blood evidence in Berry's car. For instance, he was expected to testify that blood on the bumper was consistent with Berry being near the left front tire when attacked. RP 1481.

However, defense counsel moved to preclude the expert from giving an opinion that Giles was likely in the car, as even the DNA experts could not offer such an opinion. RP 1489-90. For instance, Aimee Rogers – who testified male DNA obtained from the hem of the pants and the handbag opening was consistent with Giles' profile (RP 773, 783) – agreed she could not say whether it was in fact Giles' DNA:

> Q. [defense counsel]: . . . I want to clarify on when you make scientific conclusions, as a forensic scientist looking at DNA, what you can say is whether the result is

[8] No conclusion could be made as to potential minor contributors. RP 1674-75.

> consistent with a profile, but you can't say for sure that is his specific DNA; correct?
>
> A. Right. I'm comparing the profiles here, and there was a few minor profiles that were consistent with the profile that was obtained for Danny Giles.
>
> Q. But you can't say for sure, scientifically certain, that that DNA, in fact, in that sample, was his; correct?
>
> A. Right. This is the mixtures. It has more than one person's DNA present. So an individual could not be identified, per se, in a mixture sample.

RP 803; <u>see</u> <u>also</u> RP 782, 800.

Barbara Leal – who testified the Y-STR profile from the jeans, handbag opening and handbag handles was consistent with Giles' – similarly testified Y-STR testing does not allow for a specific identification:

> Well, with Y-STR testing, because you cannot uniquely identify somebody with a Y-STR profile, the conclusions are either that someone can be excluded or they cannot be excluded.

RP 822.

Forensic scientist William Stubbs who compared the mixed DNA profile from the steering wheel to the known reference samples of Berry and Giles similarly testified:

> The mixed DNA profile is consistent with originating from the known profiles of Patricia Berry and Danny Giles.

RP 1100. Stubbs acknowledged he could not opine on how the DNA got on the steering wheel. RP 1101.

Finally, Kristina Hoffman who compared the DNA extract obtained from the underside of the driver's headrest could only say that Giles could not be excluded as the donor of the male DNA in the sample. RP 1670-71. Hoffman agreed she could not say with certainty the DNA was in fact Giles'. RP 1690.

The court agreed with defense counsel the expert could not say it was "likely" Giles was in the car, but could say the evidence was "consistent with." RP 1490.

Kern testified he is a forensic scientist, as well as a Washington state patrol crime scene response team manager. RP 1797. His specialty is crime-scene reconstruction and bloodstain-pattern analysis. RP 1798. Kern testified he has a bachelor of science degree in biology and a masters in forensic science. Before joining the Washington state patrol crime lab, he was a DNA analysis with the Cuyahoga County Coroner's Office. RP 1800. He also underwent extensive scientific trainings. RP 1800. He testifies as an expert 2-3 times a year. RP 1801.

As part of his work in this case, Kern reviewed all the DNA crime laboratory reports and police reports detailing the investigation. RP 1802. He examined any physical evidence that still remained. RP 1802. He also

looked at numerous photographs. RP 1802. All together, Kern put six weeks' worth of time into reviewing the case. RP 1804.

Kern testified the blood on the bumper was consistent with Berry being on her knees trying to put air in her tire when attacked. RP 1849. The amount was consistent with the attack starting outside. RP 1849. The blood in the front was consistent with Berry being in the driver's seat for part of the attack. RP 1851. According to Kern, the evidence was consistent with Berry bleeding out in the backseat. RP 1851. The evidence was also consistent with Berry being removed from the driver's seat and being placed in the backseat. RP 1852-53.

As indicated, Kern also reviewed the DNA reports. RP 1854. Based on these reports, the prosecutor asked: "is it likely that the defendant, Danny Giles, was inside of that car, touching the steering wheel?" RP 1854. Defense counsel objected on foundation grounds, but the court overruled the objection. RP 1854. Kern responded, "At some point prior to the vehicle being recovered, yes." RP 1854. The prosecutor next asked about the reports detailing the DNA obtained from the handbag and jeans: "do you have an opinion whether it was likely that Mr. Giles touched those items, prior to their recovery?" RP 1854. Defense counsel objected again but was overruled. RP 1855. Kern answered, "Yes, prior to them being discovered." RP 1855.

At the break, defense counsel reminded the court of its earlier ruling limiting Kern's opinion testimony to whether a certain conclusion was "consistent with the evidence," not whether it likely happened. RP 1856-57. The court acknowledged Kern's testimony violated its ruling and advised the jury to disregard Kern's testimony "that it is likely that Mr. Giles was inside the car, touching the steering wheel." RP 1858, 1861-62. The court also advised the jury to disregard Kern's "opinion that it was likely Mr. Giles touched the belongings of Patti Berry, prior to their recovery." RP 1861-62.

3. Other Suspect Evidence

Due to ongoing investigations, the defense obtained and related new information implicating Michael Beatie, Frank Colacurcio, Jr., and James Leslie as potential "other suspects" as the pre-trial proceedings progressed. See e.g. 5RP 101-144 (first other suspects hearing); 7RP 22-39, 117-131 (further offers of proof); CP 659-677 (Defense Motion in Support of Other Suspect Evidence, 8/19/14); Supp. CP __ (sub. no. 73, Defense Witness List, 8/14/14); Supp. CP __ (sub. no. 74, State's Motion to Prohibit Other Suspect Evidence, 8/15/14) (also containing information about the other suspects). Accordingly, defense counsel's offer of proof evolved over time.

However, the court was ultimately appraised of all the facts described below before it made a final ruling excluding the other suspect evidence. 5RP 101-144; 7RP 22-39, 117-131. For brevity, this brief will set forth the facts as ultimately known by the court at the time of its final rulings, rather than present them piecemeal as they were relayed to the court.

(i) Michael Beatie

Before Giles became a suspect, police had a number of other suspects. In 1995-96, the then-lead detective John Padilla suspected fellow officer, deputy Michael Beatie. CP 304, 375, 665.

Before becoming a sheriff's deputy, Beatie had worked as a doorman and DJ at Déjà vu, a club owned by Frank Colacurcio, Jr., who also owns Honey's (through his company Talents West). CP 371; 7RP 23-24. As a deputy, Beatie's beat included Honey's and the area surrounding it. CP 371-75. Beatie also lived in the area and was not on duty the night of Berry's disappearance. CP 665; 5RP 129; 7RP 25.

At the time of Berry's disappearance, Beatie was under investigation for inappropriate interactions with Honey's dancers. CP 375, 665. The defense had witnesses including sheriff's administrators who would testify Beatie had been found guilty of various offenses involving Honey's dancers. CP 665; 5RP 129. The state acknowledged,

"He used his badge to have sex with dancers, as well as rape victims." 5RP 129; see also 7RP 25-27.[9]

Beatie was the first responder when Berry's car was discovered by Lisa Berry at the car wash. CP 257. Lisa said that when Beatie arrived, he put his foot on the bumper of Berry's car and after bouncing the car up and down, said that Berry could not be in the trunk, as she was a bigger girl. 7RP 25. Lisa also stated that when she returned to the car wash the following day, Beatie was there again and had noticeable scratches on his legs. 5RP 129, 131. Beatie claimed he fell down an embankment into blackberry bushes while looking for Berry's body. 5RP 129, 131; 7RP 18.

According to one police report, however, sergeant Aljets was the one who looked in the blackberry bushes, while Beatie looked in a grassy field north of the car. 7RP 18. Moreover, pictures showed there was no embankment or hill to fall down. 7RP 18, 25.

That day, Beatie also told Lisa that kids would find Berry's body in the woods, which is in fact what happened. 7RP 26.

[9] One of the cases being investigated occurred on July 15 and involved Beatie running the name of a Honey's bartender in his computer, getting her address and going to her trailer late at night, where he shined a flashlight in her window and tried to coax her to come out. 7RP 26.

Beatie was already involved in the investigation when Berry's car was discovered. CP 255. On August 1, 2015, Beatie went to Honey's to reportedly investigate Berry's disappearance. CP 255, 272-73; 7RP 25. As defense counsel argued was unusual, he made no attempt to secure Honey's surveillance tapes. CP 273-75; 7RP 25.

Beatie also responded when Berry's body was found at the Country Club Apartments; he claimed he was able to identify Berry from a small teddy bear tattoo on her inner thigh. CP 54-55. However, other officers said Berry's tattoo was not visible from the distance at which the site had been cordoned off. CP 55. Moreover, only detectives were allowed that close to the body. CP 55. Beatie never wrote a police report about his actions at the body site. CP 54-55.

In addition, on the day of Berry's funeral, Beatie called Berry's mother to offer condolences, saying he knew Berry and was like a "father figure" to all of the Honey's dancers. CP 389-91, 665; 7RP 25.

While Beatie was under investigation, Deputy Durand had a conversation with Beatie during which he appeared proud he was on administrative leave, suspected of Berry's murder. Supp. CP __ (sub. no. 73, Defense Witness List, 8/14/14). In that same vein, Sergeant Daniel Wikstrom also had a conversation with Beatie, during which – in response

to Wikstrom's inquiry as to whether Beatie killed Berry – Beatie merely hung his head and offered no denial. Id.; 7RP 28.

The defense also pointed out that in 2013, former sheriff Rick Bart disclosed to the prosecutor in this case that Beatie became a suspect because he had stalked dancers from Honey's, had sex with one of them, and was reportedly a "peeping Tom." CP 393; 7RP 27.

As a potential motive for Beatie to be involved in Berry's murder, the defense suggested Berry might have been blackmailing Beatie. 7RP 24. Fellow Honey's dancer Maria McCrae had gone with Berry to dance at an affiliated club in Texas shortly before Berry's murder. CP 354, 662-63. According to McCrae, Berry said she was afraid to come back to Washington, in part, because she was black mailing customers.[10] CP 368, 663; 7RP 23; RP 1981 Berry was in dire financial straits. 7RP 23. As the defense surmised, "Who would be a perfect person to blackmail than someone who is involved with all the Honey's dancers and taking part in activities with women that caused the Sheriff's office to consider him an other suspect?" 7RP 24.

Beatie initially would not agree to speak to Giles' defense attorneys unless he received immunity from the prosecution, which the prosecution declined to give. CP 395; 6RP 28-29. When he was

eventually deposed, Beatie asserted the Fifth Amendment privilege to numerous individual questions about his role in the investigation. CP 249-311.

Despite these facts, the court found an insufficient nexus to allow the defense to present evidence of Beatie as an "other suspect." 7RP 21, 38; see also 5RP 130. The court reasoned: (1) there was no concrete evidence Berry was blackmailing Beatie; and (2) there was no evidence "that showed Beatie had no obligation to search for the body." 7RP 38. At an earlier hearing, the court opined there would be a sufficient nexus if there was evidence Beatie "had no responsibility in his official job duties, for looking for the body." 5RP 130. Since then, the state found a report in which Beatie described getting scratches while looking for Berry's body after Berry's car was found. 7RP 18-19.

(ii) Frank Colacurcio, Jr.

The defense also sought to introduce evidence implicating Honey's owner Frank Colacurcio, Jr. CP 659-677; 5RP 109. He was identified as a suspect early after detective Padilla was told by Everett police detective Sniffen that he had an informant alleging that Berry said Colacurcio threatened to kill her. CP 664. Shortly thereafter, detective Ring of King

[10] According to McRae's statement Berry was already blackmailing clients; at trial, however, McRae said Berry was threatening to blackmail clients. RP 1981.

county intelligence similarly told Padilla a confidential informant told him that Colacurcio was behind Berry's murder. CP 664.

As indicated above, dancer Maria McCrae had gone with Berry to dance in Texas shortly before Berry's murder. CP 354, 662-63. McCrae reported Berry was afraid to return to Washington because she owed Colacurcio money for breast augmentation surgery and was blackmailing customers into paying her more money, including an associate of Colacurcio's.[11] CP 368, 663; 7RP 23, 119; Supp. CP __ (sub. no. 73, Defense Witness List, 8/14/14); see also Supp. CP __ (sub. no. 74, Motion to Prohibit Other Suspect Evidence, 8/15/14).

Honey's manager Sally Mulling did the books for Honey's and reported that at the time of her death, Berry owed thousands of dollars to Colacurcio's company, Talents West, not only for breast surgery but also back rent. 7RP 118-19; see also Supp. CP __ (sub. no. 73, Defense Witness List, 8/14/14). Dancers pay a "rental" fee to dance at any of Colacurcio's clubs. 7RP 118-19. Honey's was reportedly the least profitable of the clubs for dancers and considered a punishment to be sent there. 7RP 118-19. According to Berry's friend, Sarah Berry, Berry was angry when she "got kicked off the floor" at Rick's and "sent back up to Honey's." 7RP 119.

Berry's mother reported during a defense interview that shortly before her disappearance, Berry said she had punched Colacurcio. CP 664; 7RP 118, 124. Berry said something similar to MacRae. 7RP 118.

While in Texas, Berry befriended Roberto Marroquin, who accompanied her back to Washington just a few days before her disappearance. CP 664. Berry similarly told Marroquin she was afraid of returning to Washington and described Honey's owners as "mafia types." 7RP 120, 125-26. Marroquin accompanied Berry to Washington in part because of Berry's fear. CP 664.

In addition, surveillance tapes from Honey's the night of Berry's disappearance were not turned over in a timely fashion and erased. CP 665, 667; 7RP 118, 121, 124; 5RP 135.

Honey's manager Mulling also called detective Brad Pince telling him that one of the managers was demanding to know what Mulling told police. CP 665; see also RP 1889. Pince responded by saying to let him know if she was afraid of repercussions at work. 5RP 114.

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[11] It's not entirely clear whether Berry told MacRae she was blackmailing this associate or if she said she informed the associate's wife he was a client of hers. CP 354; 7RP 119.

Roy Nichols was at Honey's the night of Berry's disappearance and saw Berry depart that night. 7RP 120. He saw Colacurcio at Honey's that night as well, two hours before Berry's disappearance. 7RP 120, 122, 128. Nichols was familiar with Colacurcio's car – a black Corvette – and said he saw a black Corvette following Berry when she drove away from Honey's, north on Highway 99 and onto 128th Street, where her car was later found. CP 664; 5RP 112, 116, 118; 7RP 120.

Despite this evidence, the court found the defense had not alleged a sufficient nexus for the defense to present evidence of Colacurcio as an "other suspect." 5RP 117, 120-21, 143. In the court's opinion, Berry's financial debt to Colacurcio did not provide him with motive because "she owes him money, he's probably going to want his money back." 7RP 129. Moreover, while there was evidence Berry was blackmailing an associate of Colacurcio's, there was no evidence she was blackmailing Colacurcio. 7RP 129-30.

Previously, however, the court noted, "it's a close call" and that its decision would likely change if more information was presented about the car. 5RP 143. Yet when the defense subsequently presented evidence from Nichols that Colacurcio was at the club the night of Berry's disappearance, the court maintained its ruling. 7RP 122, 130.

(iii) James Leslie

James Leslie was Padilla's primary suspect. 5RP 134; 7RP 130. During a defense interview, Padilla said he thought he had enough to charge Leslie when he was on the case. CP 398-99. Berry danced for Leslie several times her last night at Honey's. CP 667; 5RP 134. Leslie provided several conflicting stories to Padilla and burned his diary instead of turning it over as he had promised. CP 667; 5RP 135. Leslie was identified by dancer Patricia Paulson as the person Berry spent a considerable amount of time with that evening. CP 667.

Berry appeared to be in a hurry to meet someone when she left Honey's the night of her disappearance, according to another Honey's employee. CP 355, 663; 7RP 24. Berry's friend Sarah Berry said it was not Berry's custom to leave work early unless she was going to meet a client for prostitution. CP 355, 370, 664; 7RP 24. Otherwise, Berry would stay and try and make as much money as possible. CP 664.

The court ruled there was an insufficient nexus to admit evidence of Leslie's possible involvement. 5RP 136, 143; 7RP 130.

C. ARGUMENT

1. THE STATE'S EXPERT'S VIOLATION OF THE COURT'S RULING CONSTITUTED AN IMPROPER OPINION ON GUILT AND VIOLATED GILES' RIGHT TO A JURY TRIAL.

Based solely on the DNA reports of the other expert witnesses, crime scene reconstructionist Kern testified it was "likely" Giles was in Berry's car and "likely" Giles touched Berry's belongings. Not only did Kern's opinion go further than the scientific evidence allowed, but it violated the court's ruling recognizing this limitation. His opinion was inadmissible. Whether Giles was in Berry's car or touched her belongings was a critical issue at trial – one that the state needed the jury to resolve in its favor in order to obtain a conviction. See e.g. RP 2051. As such, Kern's testimony also amounted to an improper opinion on Giles' guilt that violated his right to a jury trial.

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009). The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what

result to reach, rather than allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989). Consequently, no witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

As the Washington Supreme Court has held, it is clearly inappropriate for the State to offer opinion testimony in criminal trials that amounts to an expression of personal belief as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principals and the rules of evidence. Id. at 591, n. 5.

To determine whether a statement constitutes improper opinion testimony, courts consider the following five factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) and the other evidence before the trier of fact. State v. Quaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014); Montgomery, 163 Wn.2d at 591.

Kern's improper opinion testimony is akin to that at issue in State v. Quaale, 182 Wn.2d 191. In that case, trooper Chris Stone attempted to stop Quaale after seeing him speed by in a residential neighborhood.

When Stone attempted to pull Quaale over, Quaale turned off his headlights and accelerated. He reportedly continued for several blocks but eventually pulled over when Stone activated his siren. As standard procedure, Stone ordered Quaale to the ground and handcuffed him. Stone claimed that as he approached Quaale, he could smell a strong odor of intoxicants. Quaale, 182 Wn.2d at 193.

Stone then performed the horizontal gaze nystagmus (HGN) test on Quaale. The HGN is a routinely used field sobriety test in which the administrator tells the subject to follow a pen or fingertip with his or her eyes as the administrator moves the stimulus from side to side. After consuming alcohol, a person will have difficulty smoothly following the stimulus; the person's eyes will jerk or bounce as they move from side to side. Stone testified the HGN is an important tool in determining impairment because it measures an involuntary reflect. Stone did not perform any other sobriety tests on Quaale. Quaale, 182 Wn.2d at 194.

Quaale was tried twice. At the first trial, the jury convicted him of attempting to elude but could not agree on a verdict for the driving under the influence (DUI) charge. During a second trial on the DUI charge, the state ended its direct of Stone with the following questions:

> Q. In this case, based on the HGN test alone, did you form an opinion based on your training and experience

> as to whether or not Mr. Quaale's ability to operate a motor vehicle was impaired?
>
> [Defendant's objection that the question goes to the ultimate issue is overruled]
>
> Q. . . . Did you form an opinion?
>
> A. Absolutely. There was no doubt he was impaired.

Quaale, 182 Wn.2d at 195 (citation to record omitted).

On appeal, Quaale argued the trooper's testimony amounted to an improper opinion on guilt. Quaale, at 196. Applying a two-step analysis, the Supreme Court agreed. First, the court noted the trooper's opinion based solely on the HGN test was inadmissible under its decision in State v. Baity:[12]

> Although we held testimony on the HGN test admissible as evidence that a person was intoxicated on drugs, we placed limits on that testimony because the HGN test merely shows physical signs consistent with ingestion of intoxicants. Id. at 13-14, 17-18, 991 P.2d 1151. We said that an officer may not testify in a manner that casts an "aura of scientific certainty to the testimony." Id. at 17, 991 P.2d 1151. The officer also cannot predict the specific level of drugs present in a suspect. Id. We further instructed that a DRE officer, properly qualified, could express an opinion that a suspect's behavior and physical attributes are consistent or inconsistent with those behaviors and physical signs associated with certain categories of drugs. Id.

[12] State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000).

Quaale, 182 Wn.2d at 198. The Court held that under Baity, the trooper's testimony was inadmissible and the court should have excluded it. Id. at 199.

The second step of the court's analysis was to determine whether Stone's testimony constituted an opinion on guilt. Quaale, 182 Wn.2d at 199. The court concluded it did because the trooper's opinion went to the core issue and the only disputed element: whether Quaale drove while under the influence. Quaale, 182 Wn.2d at 200. The court held the opinion violated Quaale's right to have a critical fact to his guilt determined by the jury. Quaale, 182 Wn.2d 201-02.

The state could not prove the error was harmless because the trooper's assertion Quaale was impaired was based solely on the HGN and was "offered by an officer in a manner that 'cast an aura of scientific certainty,' significantly increasing the weight the jury likely attached to it." Quaale, at 202. The court therefore reversed the judgment and ordered a new trial. Id.

Application of the Quaale court's analysis confirms Kern's testimony amounted to an improper opinion on guilt. First, just as there was no foundation for trooper Stone's opinion there was "no doubt" Quaale was impaired based solely on the HGN test, there was no foundation for Kern's opinion Giles was likely in Berry's car and likely

touched her things based solely on the lab reports of the DNA experts. Expert opinions lacking an adequate foundation should be excluded. Walker v. State, 121 Wash.2d 214, 218, 848 P.2d 721 (1993); Katare v. Katare, 175 Wash. 2d 23, 39, 283 P.3d 546, 554 (2012).

Not one of the DNA experts who actually tested the evidence in this case reported to any degree of scientific certainty it was likely Giles was in the car or touched Berry's belongings. Rather, they reported that DNA obtained from certain pieces of evidence was consistent with Giles' profile. By opining it was "likely" Giles was in the car and "likely" Giles touched Berry's belongings, Kern's testimony provided "aura of scientific certainty" to the DNA evidence and improperly gave the appearance that the DNA testing produced scientifically certain results. Quaale, 198-99. The trial court recognized such testimony would be improper and attempted to limit Kern to opining the DNA evidence was "consistent with" Giles having been in the car. The prosecution and Kern did not abide by this limitation. Thus, Kern's opinion was not only inadmissible under the rules of evidence, it violated the court's ruling.

Second, just as Stone's opinion went to the core issue of whether Quaale**Error! Bookmark not defined.** was impaired, Kern's testimony went to the core issue of whether Giles was in Berry's car and whether he touched her belongings. As the state may point out, Giles in his interview

with Scharf suggested a circumstance under which he may have been in Berry's car, i.e. if he had sex with her. Cp 210-11; RP 1449-50. However, he also said he had no memory of being in Berry's car. CP 208; RP 1449-50; RP 2093. In closing, the defense argued "[s]cientific studies have shown that [DNA] could be there by third-party transfers." RP 2085. Moreover, Giles never said any circumstances under which he may have touched Berry's clothing. CP 212.

Whether Giles was in the car or touched Berry's belongings therefore was a hotly contested issue in the case. And significantly, the DNA experts who tested the pants and handbag specifically testified they could not make an individual identification, they could only include or exclude someone as a potential contributor. RP 782, 800, 803, 822. The DNA expert who tested the steering wheel similarly could not definitely say it was Giles' DNA. As an experienced crime scene reconstructionist, however, Kern's improper opinion testimony "cast an aura of scientific certainty to the DNA evidence, significantly increasing the weight the jury likely attached to it. Quaale, 182 Wn.2d at 202. As in Quaale, the state therefore cannot prove it was harmless.

In response, the state will likely argue there was no prejudice because the court gave a curative instruction. This argument should be rejected. Where misconduct strikes at the heart of the defense case, a

curative instruction is ineffective to "unring the bell." See, e.g., State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (reversing conviction and quoting State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)), rev. denied, 118 Wn.2d 1013 (1992). Considering the centrality of the DNA evidence in the case and Kern's credentials offered in support of his opinion Giles touched Berry's car and belongings, any curative instruction would have been ineffective to unring the bell. This Court should reverse his conviction.

2. THE TRIAL COURT VIOLATED GILE'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING OTHER SUSPECT EVIDENCE.

Giles proffered evidence that Beatie, Colacurcio and Leslie each had the motive, ability, and opportunity to commit the crime charged. Because the evidence pertaining to each, when taken together, amounted to a chain of circumstances that tended to create a reasonable doubt as to Giles' guilt, the court's exclusion of such evidence violated Giles' constitutional right to present a defense.

The Sixth[13] and Fourteenth[14] Amendments, as well as article 1, § 2[15] of the Washington Constitution, guarantee the right to trial by jury and

[13] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of

to defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor's case to the crucible of meaningful adversarial testing. Crane v. Kentucky, 476 U.S. 683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

In Washington, State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the scope of a criminal defendant's right to present evidence in his defense. A defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion.

> the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[14] The Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

No state interest is sufficiently compelling to preclude evidence of high probative value. Darden, 145 Wn. 2d at 621-22; Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 714- 15, 6 P.3d 43 (2000).

As the Ninth Circuit has recognized, there is a broad due process right to present all evidence tending to implicate another suspect:

> Even if the defense theory [were] purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: [I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

Thomas v. Hubbard, 273 F.3d 1164, 1177-78 (9th Cir. 2001) (quoting United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. ed. 1983)), overruled on other grounds, Payton v. Woodford, 299 F.3d 815, 829 n.11 (9th Cir. 2002).

The United States Supreme Court has held that a defendant is denied the right to present a defense if evidence is excluded under rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Specifically, the Holmes

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[15] Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

Court stated that when the defense proffers evidence that someone other than the defendant committed the offense, a trial court may only exclude that evidence if it is repetitive or poses an undue risk of prejudice or confusion. Holmes, 547 U.S. at 326-27 (citing Crane, 476 U.S. at 689-90.

The rule in Washington governing the admission of evidence that someone else committed the crime (other suspect evidence) was articulated more than 70 years ago. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). There, the court held that other suspect evidence is admissible only if the defendant can show "a train of facts or circumstances as tend clearly to point out some one besides the [accused] as the guilty party." Downs, 168 Wn.2d at 667. Thus, the court excluded evidence that "Madison Jimmy" – an infamous burglar – was in town at the time of the charged burglary, because there was no evidence actually connecting Madison Jimmy in any way to the particular burglary. Without the necessary "train of facts or circumstances" linking him to the crime, opportunity and character evidence alone were insufficient to infer third-party guilt. Franklin, 180 Wn.2d at 379.

The Supreme Court recently clarified the test for admission of other suspects evidence in State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2013). There, the trial court excluded Andre Franklin's proffered evidence that someone else committed the cyberstalking crimes with

which he was charged. Specifically, the court excluded evidence that Franklin's live-in girlfriend Rasheena Hibbler had sent threatening e-mails to his other girlfriend Nanette Fuerte despite the fact that Hibbler had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (of sending threatening e-mails to Fuerte regarding her relationship with Franklin) to support Franklin's theory of the case. Franklin, 180 Wn.2d at 372.

In excluding the evidence, the trial court reasoned, "The other suspects bar, quite frankly, is high" and that it required more than showing mere motive and opportunity – it required specific facts showing that someone else committed the crime. Franklin, 180 Wn.2d at 376-77. The Supreme Court held this was an incorrect interpretation of the law and that circumstantial evidence could support admission of other suspect evidence:

> We have never adopted a per se rule against admitting circumstantial evidence of another person's motive, ability or opportunity. Instead, our cases hold that if there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted.

Franklin, 180 Wn.2d at 373.

The court reiterated that although it relied on direct evidence to find other suspects evidence admissible in State v. Maupin, such was not required:

> In contrast, we held in State v. Maupin that eyewitness testimony that a kidnapping victim was seen after the kidnapping with a person other than the defendant was both relevant and sufficiently probative to pass the Downs test. 128 Wn.2d 918, 928, 913 P.2d 808 (1996). Such evidence links the other suspect to the specific crime charged, either as the true perpetrator or as an accomplice or associate of the defendant. Evidence of this sort differs from evidence of motive, ability, opportunity, or character in that the proffered evidence *alone* is sufficient under the circumstances to establish the necessary connection. However, neither Maupin nor the earlier cases stand for the proposition that motive, ability, opportunity, and/or character evidence together can never establish such a connection. The Downs test in essence has not changed: some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.

Franklin, 180 Wn.2d at 380-81.

The focus is on whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt. Franklin, at 381. Because evidence of Hibbler's motive, ability, opportunity and character to commit the crime created a chain of circumstances that tended to create a reasonable doubt as to Franklin's guilt, the court erred in excluding such evidence. Franklin, at 382.

The constitutional error was not harmless, even though some of the facts suggesting Hibbler's motive and opportunity were admitted:

> Here, Franklin offered evidence that Hibbler had the motive, ability, and opportunity to commit the charged crime, and that she had personally threatened Fuerte regarding her relationship with Franklin via text and e-mail

> in the past. Moreover, some of the circumstantial evidence against Franklin pointed equally to Hibbler. Though some of this evidence emerged at trial through other witnesses, some of it did not. And the trial court barred Franklin from arguing that the limited evidence on this point that was presented at trial implicated Hibbler. If the jury had been allowed to consider all of the other suspect evidence, it may have reached a different result.

Franklin, 180 Wn.2d at 383.

Like Franklin, Giles proffered evidence another individual had the motive, ability and opportunity to commit the offense for which he was charged. First, Beatie had a motive. The defense offered evidence he had an abnormal bent or lustful disposition towards Honey's dancers to the point he was being investigated for offenses involving them. Just before Berry's disappearance, Beatie had tracked down a different Honey's dancer and showed up at her house in the middle of the night. As the state acknowledged about Beatie, "He used his badge to have sex with dancers, as well as rape victims." 5RP 129. He had a common scheme or plan where Honey's dancers were concerned. Indeed, this is why the sheriff's office itself suspected him, aside from his strange behavior during the investigation.

Beatie also had the ability to commit the crime charged. His beat included Honey's, he lived in the area and he was off duty the night Berry disappeared. And he knew Berry. Beatie knew her well enough to know

she was too heavy to be in the trunk of her car and well enough to call Berry's mother the day of the funeral.

Beatie also had the opportunity. As indicated, he was using his badge to harass other dancers and rape victims. Again, he was off duty the night of Berry's disappearance, lived in the area, and intimately familiar with Honey's and its dancers.

Beatie also had a character consistent with committing the crime. The prosecutor argued there was a sexual component to Berry's death, as she was found unclothed from the waist down. RP 2057 ("some sexual component going on here"). The sheriff's office believed Beatie committed sexual crimes against other women.

There was other circumstantial evidence inculpating Beatie. He acted strangely during the investigation. Perhaps most striking was the fact he did not deny killing Berry when asked by a fellow officer, but merely hung his head. Taken together, the evidence amounts to a chain of circumstances that tends to create a reasonable doubt as to Giles' guilt. The court therefore erred in excluding it.

Giles also proffered evidence Colacurcio had motive, ability and opportunity to commit the offense. Berry owed Colacurcio thousands of dollars for breast augmentation surgery and back rent. Berry either had or was threatening to blackmail Honey's clients, including an associate of

Colacurcio's. Moreover, there was bad blood between Berry and Colacurcio. There was evidence Colacurcio may have threatened to kill Berry. There was evidence Berry was angry she had been relegated to Honey's and had slapped Colacurcio shortly before her disappearance. No wonder police suspected him.

Colacurcio had the ability to commit the crime. Roy Nichols saw him at Honey's the night of Berry's disappearance and saw a black Corvette – which Colacurcio was known to drive – driving behind Berry just before her disappearance. This evidence arguably links him to the specific crime charged as the true perpetrator. See Franklin, 180 Wn.2d at 380. Colacurcio's presence the night of Berry's disappearance also gives him the opportunity to commit the crime.

Like Beatie, Colacurcio also had a character consistent with committing the crime. Colacurcio had a reputation as being a "mafia type[.]" 7RP 120. And Berry was afraid of him. There was other circumstantial evidence inculpating Colacurcio. The surveillance tapes from Honey's that night were blank when finally handed over to police. There was evidence other Honey's managers wanted to know exactly what Mulling told police. Taken together, the evidence amounts to a chain of circumstances that tends to create a reasonable doubt as to Giles' guilt. The court therefore erred in excluding it.

Giles also proffered evidence Leslie had the ability and opportunity to commit the offense. There was evidence suggesting Leslie arranged to meet Berry outside the club later that night for an act of prostitution. He was present the night of Berry's disappearance. In fact, Leslie spent a significant period of time with Berry that night. Again, there was evidence Berry was open to meeting clients outside of the club. The fact she left early was indicative she made just such a plan the night of her disappearance. Berry was seen with Leslie just before leaving the club that night.

There was other circumstantial evidence inculpating Leslie. He gave multiple internally contradictory statements to Padilla. He promised to turn his diary over to police but burned it instead. All this shows consciousness of guilt. Taken together, the evidence amounts to a chain of circumstances that tends to create a reasonable doubt as to Giles' guilt. The court therefore erred in excluding it.

As in Franklin, the court's exclusion of the "other suspect" evidence cannot be considered harmless. Although some of the evidence emerged at trial – such as Beatie's weird statement about Berry not being in the trunk, the fact of a black Corvette behind Berry, and Padilla's interest in a Honey's customer who burned his diary – most of the evidence did not come in. Moreover, as in Franklin, Giles was precluded

from arguing that the limited evidence that was presented pointed to either one of these three individuals.

Under the circumstances, the state cannot show the jury would have reached the same result in the absence of the error. See Franklin, 180 Wn.2d at 382. Indeed, the record shows that even with the limited evidence presented, the jury was open to considering other suspects. They asked for the list of suspects Padilla said he still wanted to investigate at the time he was transferred off the case. CP 128. If the jury had been allowed to consider all the other suspect evidence, it may have reached a different verdict. This Court should therefore reverse.

D. CONCLUSION

The state's expert's improper opinion on guilt invaded the province of the jury and violated Giles' right to have the jury determine all critical facts in his case. The court's exclusion of Giles' "other suspects" evidence deprived him of his right to present a defense. For both these reasons, this Court should reverse his convictions.

Dated this 16th day of November, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH

DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 72726-5-I
DANNY GILES,	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 16TH DAY OF NOVEMBER, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANNY GILES
DOC NO. 923602
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF NOVEMBER, 2015.

x Patrick Mayovsky