72093-7

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Court of Appeals
Division I
State of Washington

NO. 72093-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LOVETT CHAMBERS,

Appellant.

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

The Honorable Theresa Doyle, Judge
The Honorable Michael Hayden, Judge
The Honorable Jim Rogers, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED WHEN IT INSTRUCTED JURORS ON MANSLAUGHTER WITHOUT A FACTUAL BASIS FOR THAT CHARGE.

Not a single witness offered testimony that Hood's death was anything other than intended. There were three witnesses at Vause's pickup in a position to witness everything that happened there: Vause, Hood, and Chambers. And the testimony of the two surviving participants is consistent in that it establishes an intentional killing.

Vause and Chambers agree that, with Chambers in close proximity, Hood removed the shovel from the bed of the truck. 27RP 102-107; 42RP 198-199. They agree that Hood held the shovel in a batter's stance, ready to strike, in close proximity to Chambers. 27RP 108; 42RP 199. Chambers testified he believed he was about to be killed, and Hood agreed that Chambers could reasonably have believed Hood was about to strike him with the shovel. 28RP 150-152; 42RP 200. From that point forward, Chambers did not recall what happened. 42RP 201. But Vause did, and he explained that – within the span of a single second following Hood's threat with the deadly shovel – Chambers jumped back as if he had stumbled upon a rattlesnake, pulled out his firearm, and fired his weapon. 27RP 110-112; 28RP 149-153. Thereafter, all witnesses agree that once

Hood fell into the pickup and dropped the shovel, Chambers stopped firing, put his pistol away, and calmly walked back to his car. 25RP 54; 27RP 113-114; 28RP 98, 104, 163-164. Chambers intended to kill Hood and did so.

The State assigns significant weight to the fact Chambers himself could not recall shooting Hood, arguing that in the absence of Chambers' own statement of intent, evidence of Chambers' mens rea was circumstantial and subject to interpretation. BOR, at 20. Of course, circumstantial evidence can be every bit as compelling as direct evidence. See CP 1782 ("The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts of this case."). And in Chambers' case, all of the evidence – direct or circumstantial, from participants or bystanders – indicates an intentional killing. The State's position that the only evidence capable of preventing a manslaughter instruction was an assertion from Chambers that he now recalled intending to kill Hood is not convincing.

Initially, so certain were prosecutors that Chambers intentionally killed Hood, they charged him with premeditated intentional murder. CP 1-7. Later, tacitly acknowledging the absence of premeditation (but still recognizing that Chambers intended to kill

Hood), prosecutors amended the charge to intentional murder. CP 2302-2303. This is hardly surprising, since both the prosecution and defense evidence revealed conduct intended to kill. The State's position that jurors could have concluded Chambers merely acted recklessly rather than intentionally when – within the span of a single second – he used deadly force to meet what everyone agrees was threatened deadly force is not plausible. The only proper issue for jurors was whether Chambers intentionally killed Hood in lawful self-defense.

The State nonetheless offers three theories in support of its position. None leads to the result it seeks.

The State's first theory is that Chambers' "reckless actions and decisions leading up to and including his shooting of Hood provided sufficient facts for the court to give the jury the lesser offense alternative." BOR, at 20. The State notes that, despite suffering from PTSD – which made Chambers hyper-vigilant to threats – Chambers did not take medication for his PTSD, carried a gun, and drank a considerable amount of alcohol the night of the shooting.[1] BOR, at

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[1] Concerning PTSD, and attempting to elevate its role, the State asserts in its brief, "Dr. Cunningham testified that the defendant's PTSD could have led the defendant to believe he was in imminent danger on the night of the shooting. 38RP 81." BOR, at 22. This is incorrect. Dr. Cunningham testified, "if it happened as [Chambers] described, then his [PTSD], and the actions of Mr.

21-22. And rather than stay in his car, call 911 from his phone, or seek help from those in a nearby bar, Chambers grabbed his gun and walked up the street. BOR, at 22-23. The State theorizes that Chambers created this situation, and Hood was "compelled to grab a shovel," which led to Chambers recklessly shooting him, even though it was never his intent to kill Hood. BOR, at 23-24.

The problem with this theory is that it largely ignores what happened at the critical time and place – when Chambers and Hood arrived at Vause's truck and immediately thereafter. Regardless of what preceded this, all of the evidence supports the conclusion that Hood then threatened to hit Chambers with a deadly weapon and Chambers ensured that did not happen by immediately, repeatedly, and intentionally shooting him dead. This is Murder in the Second Degree and only Murder in the Second Degree unless deemed justifiable. Whether Chambers might have avoided the situation with Hood had he made different or even better decisions prior to Hood's threat with a deadly weapon is not the relevant inquiry and not the inquiry jurors were required to make in deciding the case.[2]

Hood and Mr. Vause could have caused him to believe that he was in imminent danger of death or great personal injury when he shot Mr. Hood." 38RP 81. (emphasis added).

[2] Properly characterized, the State's first theory is more in the nature of an

The State's second theory is that Chambers' "extreme intoxication" lowered his mens rea from intentional to merely reckless. BOR, at 20. As an initial matter, Chambers' level of intoxication at the time of the shooting is unknown. Witnesses who interacted with him – and his own testimony – indicate he was acting normally, still had his wits about him, and was not yet feeling the full impact of his consumption. No one believed him to be significantly impaired. See 24RP 83, 104-105; 40RP 73, 83-84; 42RP 177-178; 43RP 156.

In any event, the State cites two cases in support of its position: State v. Jones, 95 Wn.2d 616, 628 P.2d 474 (1981), and State v. Collins, 30 Wn. App. 1, 632 P.2d 68, review denied, 96 Wn.2d 1020 (1981). BOR, at 24-26. Both are easily distinguished.

In Jones, the defendant was charged with Murder in the Second Degree and raised an intoxication defense premised on former RCW 9A.16.090. Jones, 95 Wn.2d at 617-619. That statute provided:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular kind or degree of crime, the fact

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argument that Chambers was the first aggressor than it is an argument showing he recklessly killed Hood. However, jurors were never instructed on the first aggressor doctrine. See CP 1797-1800 (instructions relevant to justifiable homicide).

> of intoxication may be taken into consideration in determining such mental state.[3]

Id. at 622 (citing former RCW 9A.16.090). On appeal, Jones argued that the trial court erred in refusing to instruct jurors on the lesser-included offense of Manslaughter in the First and Second degrees. Id. at 618-619. The Supreme Court agreed, holding that, because the intoxication instruction had been properly given, and that instruction permitted jurors to find that Jones lacked the intent to kill based on his intoxication, jurors should have been instructed on manslaughter, which required lesser intents for conviction and would have permitted Jones to present his theory that the killing was unintentional due to intoxication. Id. at 622-623.

In State v. Collins, the defendant was convicted of Murder in the Second Degree and, on appeal, argued jurors should have been instructed on Manslaughter in the Second Degree. Collins, 30 Wn. App. at 3. In Collins, as in Jones, the defense successfully argued for an intoxication instruction under former RCW 9A.16.090. Id. at 12-13. Noting that this instruction had become the law of the case, and following Jones, Division Three held that Collins had been entitled to an instruction on manslaughter. Id. at 12-15.

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[3] The current statute tinkers with this language, but retains its substance. See RCW 9A.16.090.

There is an obvious distinction between Jones and Collins on the one hand, and Chambers' case on the other. Chambers' jury was not instructed on voluntary intoxication. See CP 1776-1804. This is not surprising because – as already noted – those in direct and personal contact with Chambers immediately prior to the shooting confirmed that he was not yet significantly impaired by the alcohol. It would have been impossible to get such an instruction even if the defense had sought one. See State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002) (instruction not properly given without substantial evidence that drinking affected ability to acquire the required mental state at time of offense). And in the absence of this instruction, Jones and Collins do not control.

Finally, the State's third theory is the one that succeeded below. The State argues, consistent with State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998), jurors may have believed that Chambers acted reasonably in pulling out his gun, but acted recklessly when he immediately fired the gun three times. BOR, at 20-21, 26-27. Chambers distinguished Schaffer in his opening brief. As noted there, the distinguishing feature in Chambers' case is that Chambers, unlike Schaffer, faced a confirmed threat of deadly force when he pulled his gun and immediately fired. His actions show he

intended to kill Hood, and he did so. Schaffer reasonably pulled his gun based on a perceived possible threat, but then recklessly used lethal force without confirming the threat, which was not real. See Brief of Appellant, at 28-30.

The State does not mention Schaffer in its brief. Instead, it cites Jones again, which is cited in Schaffer. BOR, at 26; Schaffer, 135 Wn.2d at 358. Not only is Jones distinguishable based on its intoxication defense, it is distinguishable because, like Schaffer, it involved evidence from which jurors could conclude that the defendant initially acted in self-defense, but then recklessly used excessive force. Jones testified that the victim (Bates, a developmentally challenged individual born with Downs Syndrome) approached him in a menacing manner and armed with a knife. Bates dropped the knife, Jones picked it up, and Jones then stabbed Bates during a struggle. Jones, 95 Wn.2d at 618. Bates left the room, and Jones followed him – knife still in hand – to check on his welfare. Another struggle ensued and Jones stabbed Bates several more times. Id. Because Bates had been disarmed when stabbed, jurors could have found a reasonable need to act in self-defense, but a subsequent and reckless use of excessive force against the unarmed Bates. These facts do not resemble the imminent and

deadly threat Chambers faced or his unambiguous response while facing that threat.

Under State v. Fernandez-Medina, 141 Wn.2d 448, 455-456. 6 P.3d 1150 (2000), the State should not have been permitted to obtain instructions on manslaughter without substantial evidence in the record supporting a rational inference that only that crime had been committed. Where all of the evidence indicated an intentional killing, it is not enough that jurors may have disbelieved that evidence and settled on mere recklessness. A new trial should be ordered.

2. THE TRIAL COURT ERRED WHEN IT DENIED A MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO DETECTIVES WHERE DETECTIVES FAILED TO SCRUPULOUSLY HONOR APPELLANT'S INVOCATIONS OF HIS RIGHT TO REMAIN SILENT.

Under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), the circumstances under which detectives obtained Chambers' statements following his invocation of silence violated his Fifth Amendment rights.

As discussed in the opening brief, although Chambers immediately and repeatedly invoked his right to silence following arrest, homicide detectives had him brought to headquarters anyway for the express purpose of interrogation. BOA, at 37. Moreover, (1) Chambers' statements were obtained after an insignificant period of time had elapsed since Chambers' last invocation of silence, (2) the same detectives in whose presence Chambers had last invoked attempted to speak with him, (3) Chambers had invoked concerning the very crime about which detectives wished to question him, and (4) both the last invocation and subsequent attempt by detectives to speak with Chambers occurred on the same Harborview trip. See BOA, at 36-40. Based on all of these circumstances, Chambers'

invocation of silence was not "scrupulously honored." Mosley, 423 U.S. at 104.

The State disputes that little time elapsed between Chambers' invocation of silence and detectives' efforts to get him to talk. Specifically, the State argues that Chambers invoked his right to silence but once – at 10:51 p.m., immediately after his arrest and after Officer Anthony Belgarde advised him of his Miranda rights. BOR, at 35-36 at n.12. Thereafter, argues the State, Chambers enjoyed a five-hour period in which he could sober up, get some sleep, contemplate his situation, enjoy the fruits of his invocation, and then make a refreshed and rational decision about whether he still wished to remain silent in light of detectives' desire to speak with him. BOR, at 36.

Assuming without conceding that Chambers' did not invoke a second time while transported from his home to the Southwest Precinct by Officer Kyle Galbraith, there can be no doubt Chambers invoked an additional time in the presence of Detectives Steiger and Kasner on the way to Harborview. See BOA, at 32, 37. The State's argument to the contrary is found in a single paragraph in a single footnote:

> the defendant's statement to the detectives on the way to Harborview amounted to nothing more than a reminder that he did not wish to speak to the police. The detectives were not attempting to question the defendant nor attempting to determine if he had changed his mind about speaking to police. In short, the defendant invoked once, an invocation that continued until such time as he ultimately agreed to discuss the shooting with detectives.

BOR, at 36 n.12. The State cites no authority for its suggested distinction between the constitutional significance of an initial invocation and a subsequent "reminder" from the defendant that he still insists on exercising his constitutional right to say nothing. The argument can be rejected on this ground alone. See State v. Benn, 120 Wn.2d 631, 661, 845 P.2d 289 ("An appellate court need not decide a contention that is not supported by citation to authority."), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

Importantly and understandably, Judge Doyle did not see any such distinction. In her oral ruling, she found that "Mr. Chambers invoked his right to silence about 3:00 a.m. on the way from the homicide office to Harborview for a blood draw" and "[t]hat was the second time he invoked his right to . . . remain silent." 11RP 140. These findings, along with Judge Doyle's written findings and conclusions, are part of the court's decision. See CP 2281 ("In

addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.").

The State has not assigned error to these findings; therefore, they are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Moreover, any proper argument against such critical findings would not be found in a footnote. See State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993) (declining to address challenge in footnote to trial court's finding of fact); State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (discouraging use of footnotes for important arguments).

Finally, the State argues that, even if admission of Chambers' statements violated his constitutional rights, the violation was harmless beyond a reasonable doubt because (1) he never confessed during the interrogation and (2) jurors would have heard the statements anyway because the defense necessarily would have opened the door to their use as impeachment evidence following the testimony of Dr. Cunningham and/or Chambers himself. BOR, at 40.

That Chambers did not confess criminal liability during the interrogation does not render what he said harmless. The interview showed Chambers being deliberately obtuse with detectives and revealed detectives' opinions that Chambers was a liar. The

evidence portrayed Chambers as uncooperative and deceptive, and it required the defense to attempt to explain it away based on Chambers' criminal past.

The State cannot predict, with any degree of confidence, that had Chambers' statements to detectives been properly suppressed, the defense would have opened the door to their admission anyway. It defies common sense to think that, after working so hard for their exclusion, the defense would allow this to happen. And it cannot simply be presumed that Dr. Cunningham and Chambers would have testified in the same manner or testified at all with the evidence excluded. See State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (citing State v. Lewis, 130 Wn.2d 700, 706 n.2, 927 P.2d 235 (1996)) (admission of improper evidence may force witness to testify or explain evidence; improper to assume evidence necessarily could have been used for impeachment).

3. THE TRIAL COURT ERRED WHEN IT DENIED A MOTION TO SUPPRESS FRUITS OF THE WARRANTLESS SEARCH OF CHAMBERS' HOME.

Neither this Court nor the Supreme Court of Washington has ever indicated that the United States Supreme Court's decision in Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), should be extended to authorize protective sweeps inside a

home when a lone suspect is arrested without incident outside the home. Such an unwarranted expansion would conflict with "heightened constitutional protection" within the home. See State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). In Washington, "'the closer officers come to intrusion into a dwelling, the greater the constitutional protection'." Id. (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

Despite Washington's historical protection of the home against warrantless intrusions, and citing cases from foreign jurisdictions, the State seeks to save the warrantless search of Chambers' home by expanding Buie beyond its intended boundaries. See BOR, 48-49. The State accuses Chambers of arguing for a rigid, artificial barrier at a home's threshold that could risk officer safety. BOR, at 47. But this barrier is hardly artificial, consistent with the general prohibition on warrantless home searches, and consistent with Buie. Officers simply do not face the same safety risks outside the home as they do inside when arresting a lone suspect.

As discussed in the opening brief, the Sixth Circuit Court of Appeals joins many other jurisdictions in limiting the search of areas adjoining the place of arrest (the first Buie rationale) to arrests inside the home. In U.S. v. Archibald, 589 F.3d 289 (6th Cir. 2009), the

Court held that under Buie, an arrest made just outside the home, on the front porch, does not authorize a protective sweep of areas inside the home. Id. at 296-298. Even if it did, however, officers could only sweep the area immediately adjoining the front porch (such as a front living room) but could not sweep any additional areas (such as a kitchen immediately beyond that living room). Id. at 293, 298. The Archibald Court held that, for arrests just outside the home, Buie only authorizes a protective sweep inside the home where there is reasonable suspicion to believe the home harbors another dangerous person. Id. at 297-299.

Applying this interpretation of Buie to Chambers' case, because Chambers was arrested on his front porch, officers were not authorized to enter the home for a protective sweep. Only if officers had reasonable suspicion that another dangerous person was hiding inside Chambers' home were they authorized to do a sweep of the home (including the kitchen) to find that person. But there was no such evidence at Chambers' arrest.[4]

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[4] The State concedes, as it must, that police had no information suggesting an accomplice, much less an accomplice inside Chambers' home. See BOR, at 42 ("the police had no specific information that there were any other suspects involved in the shooting").

Even if – contrary to Archibald – this Court were to hold that Chambers' arrest on the front porch authorized a sweep of the area immediately adjoining the porch under the first Buie rationale, it did not authorize a sweep of the kitchen. The State argues otherwise:

> The defendant focuses solely on the locations of the living room and kitchen, while ignoring the fact that the rooms are attached, the only separation being an open entryway with no doors, and a ready place from which an attack could easily be launched.

BOR, at 50.

The State reads Buie to mean not only can officers search a room immediately adjoining the place of arrest, but once they have entered that adjoined room, they are then in danger of attack from the next immediately adjoining room and can also search that space. This would ultimately result, under the first Buie rationale, in the warrantless search of every room in the dwelling because entry into each new space would create potential peril from the next. But Buie expressly rejects this approach. See Buie, 494 U.S. at 335 (warning that the first rationale does not authorize a search of the entire premises). And such an interpretation would render the second Buie rationale unnecessary.

The State cites State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008), review denied, 176 Wn.2d 58, 299 P.3d 19 (2013), to support its expansion of Buie. BOR, at 50-51. In Sadler, two officers responded to information indicating that a 14-year-old runaway might be in Sadler's home and the victim of sadomasochistic sexual activity. Sadler, 147 Wn. App. at 119. Officers knocked on Sadler's front door, he answered, and officers asked if the girl was in the home. Sadler turned and headed up the stairs while calling the girl's name, and an officer followed him to a bedroom, where the girl was found restrained and sleeping or unconscious. Id. at 119-120. Division Two upheld the initial warrantless entry into the home under the emergency exception. Id. at 123-125. Relying on Buie, Division Two also upheld the use of evidence officers had seen inside the house when they looked in rooms immediately adjacent to the bedroom and evidence seen during a cursory search on the first floor, where officers had detained Sadler for a short period. Id. at 125-126.

Sadler involved lawful entry into a home during an emergency, the defendant's arrest well inside the home, and a cursory search of areas within the home immediately adjacent to where the defendant was detained or arrested. Sadler is unlike Chambers' case in almost every respect.

Finally, the State argues that officers had sufficient evidence to obtain a warrant without using what they saw inside Chambers' home and, even if they did not, any error in admitting the firearm Chambers' used was harmless beyond a reasonable doubt. BOR, at 52-56. Both arguments fail. This is not a situation, like State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987), where independent evidence established that the gun would be found where officers unlawfully viewed it. See BOA, at 52-55. Moreover, the gun was instrumental in detectives' successful efforts to obtain Chambers' statement, which prosecutors later used at trial to impeach his version of events and his credibility. This was damaging to the defense. Discovery and testing of the gun also confirmed beyond any doubt that Chambers had been the shooter.

Although not addressed in the State's brief, were this Court to find the warrantless search of Chambers' home unlawful, but also find the warrant affidavit sufficient without the offending information, the matter still should be remanded to determine whether the evidence unlawfully viewed in Chambers' kitchen prompted police to seek the subsequent warrant. See BOA, at 56 (citing Murray v. United States, 487 U.S. 533, 542-544, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)).

4. CHAMBERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL DURING THE PRESERVATION DEPOSITION OF PROSECUTION WITNESS BRIAN KNIGHT.

Everyone agreed that Brian Knight's video deposition would be admitted at trial as substantive evidence and a substitute for his presence and examination at trial. 16RP 5; CP 2369-2370. And this is exactly how it was used at trial. 24RP 130-131.

As discussed in Chambers' opening brief, videotaped witness testimony, admitted as evidence at a criminal trial, is the functional and constitutional equivalent of live testimony at trial. See AOB, at 66 (citing State v. Hobson, 61 Wn. App. 330, 333-334, 810 P.2d 70, review denied, 117 Wn.2d 1029, 820 P.2d 510 (1991)). Logically, then, article 1, section 22 – which guarantees the right to appear before a jury free from physical restraints – should also apply to witness depositions made for use at trial. And so should the cases setting forth the limited circumstances in which physical restraints can be used. See AOB, at 61-63.

The State argues that, Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 256 P.3d 1179 (2011), holds that a preservation deposition is not a "court proceeding" and therefore trial protections, including constitutional limitations on restraint, do not apply. BOR, at

64. A careful reading of Tacoma News, however, reveals that it supports Chambers.

The issue in Tacoma News was whether a preservation deposition in a criminal case qualified as a court proceeding for purposes of article 1, section 10 and the First Amendment, both of which require that such proceedings be open to the public and press. Tacoma News, 172 Wn.2d at 60-61, 65-66. The press was excluded from the videotaped deposition of a key prosecution witness, whom prosecutors feared would not show up for trial. Id. at 61-62. The witness did show up, however, and testified. Thus, the deposition was never used. Id. at 63. Under these circumstances, the Supreme Court held that the deposition was merely discovery, for which there was no constitutional right to access. Id. at 70, 74, 79-80. Notably, however, the Court reasoned that the videotaped deposition would have been treated like any other court proceeding, and subject to constitutional requirements, had it been used at trial as part of the decision making process. Id. at 70-72.

Because the video deposition of Brian Knight was always intended by the parties and court to be part of the decision making process, and was used at trial as a direct substitute for Knight's in-court testimony, Tacoma News suggests that Chambers enjoyed his

same rights at the deposition hearing as he would in the courtroom at trial, including the right to be free from prejudicial physical restraint. Whether testimony is taken live or recorded live, restraint measures potentially interfere with the constitutional right to appear and defend.

Ultimately, regardless whether article 1, section 22 guaranteed Chambers the right to be free from restraints at the video recording of Knight's testimony, the State concedes that Chambers certainly had a right to the assistance of counsel at the deposition and, assuming he can show the restraints interfered with that right, he can prevail. BOR, at 67-68. The difficulty for Chambers, according to the State, is that the record does not demonstrate an interference. BOR, at 68.

The State argues there is no evidence in the record that Chambers could not write or was otherwise diminished in his ability to communicate with his attorney. BOR, at 68-69. But there is no dispute that Chambers was restrained with chains at the waist, which were connected by short chains to wrist restraints. 16RP 48. Defense counsel, while looking directly at the restraints and with the express intent to describe them accurately for the record, indicated these chains were 4 or 5 inches long and did not permit Chambers to

"meaningfully write or review discovery."[5] Pretrial exhibit 57, at 6. Defense counsel also expressly told Judge Hayden that these restraints did not allow Chambers "to take notes in a meaningful way." Pretrial exhibit 58, at 10-11. Judge Rogers reviewed both the video deposition that included this description and a transcript of the hearing before Judge Hayden. 16RP 4, 8. And defense counsel confirmed for Judge Rogers that, as predicted at the beginning of the deposition, the restraints left Chambers unable to sit at the table and write and unable to flip through discovery materials. 16RP 23-24.

The prosecuting attorney present for the deposition could only say that she saw Chambers holding a tablet of paper while shackled. She was unable to articulate any memory of his abilities beyond that single recollection. 16RP 29-31. But she argued that, even if the chains were merely three or four inches long, Chambers could have scribbled a note to counsel after placing the paper on his lap, although she allowed that even this would have been difficult for him. 16RP 30-31.

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[5] The prosecution did not contest this real-time assessment. See Pretrial exhibit 57, at 6-7. But at the hearing before Judge Rogers, a month and a half later, a prosecutor estimated the length of the chains on these types of restraints as approximately eight inches. 16RP 29.

These were the facts and this was the evidence on which Judge Rogers relied when recognizing that defense counsel had a "real concern" that Chambers' movements would reveal the sound of the restraint chains and this was the evidence on which he relied when he assumed that Chambers could not write. See 16RP 48, 52-53. While it was not *physically impossible* for Chambers to scribble a note on a pad in his lap, defense counsel's statement that Chambers had not been able to meaningfully take notes or even scribble a note to counsel because of the legitimate concern about noise from his chains was never seriously disputed. Therefore, it was appropriate for Judge Rogers to assume that Chambers could not write. See 16RP 52-53.

Although the record supports a finding that Chambers could not meaningfully take notes or write a note to counsel without revealing his restraints, if this Court desires additional evidence and argument on this point, it can simply remand for an evidentiary hearing to assess the impact of the restraints, just as it has done in other restraint cases. See State v. Finch, 137 Wn.2d 792, 855, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); In re Davis, 152 Wn.2d 647, 677-678, 101 P.3d 1 (2004).

The State argues that defense counsel should have done more to protect Chamber's rights and that his failure to do so makes any error invited or waived. See BOR, at 70. The State argues, as it did below, that counsel could have simply asked to stop the deposition every time he and Chambers needed to confer. BOR, at 71. Judge Rogers rejected this argument, recognizing there was no indication Chambers had even been alerted to such an option prior to the deposition. See 16RP 54. The State also argues the microphone on the defense table could have been moved or turned off. BOR, at 71. But the videographer required a microphone on the defense table. 16RP 12. And, as argued in the opening brief, Chambers' movement risked detection of the chains by any of the microphones in the room, a problem that would persist so long as Chambers remained restrained during the deposition. AOB, at 68-69.

5. PROSECUTORIAL MISCONDUCT DENIED CHAMBERS A FAIR TRIAL.

During closing argument, prosecutors accused the defense of raising issues of race merely "to pander to your prejudices," to "make you not use your rational thought processes," and "so that your prejudice against racism clouds your judgment." 46RP 168-169. Prosecutors also accused the defense of attempting to fool jurors with

an equity defense, where jurors would weigh the value of Chambers' life against Hood's. 46RP 184-185.

On appeal, the State says this was proper argument, that no serious misconduct occurred and, if it did, the defense cannot show prejudice. While the State's brief makes considerable effort to explain *why* prosecutors decided to attack the defense in this manner (purportedly attempting to focus jurors on the law and evidence), the State's brief utterly fails to establish that these were fair, proper, or permissible arguments to make in front of jurors. See BOR, at 72-80.

If prosecutors wanted to keep jurors focused on the evidence, rather than emotions evoked by issues of racism or sympathy for Chambers' past struggles, they simply had to focus on the evidence and jury instructions addressing these concerns. There can be no justification for, instead, choosing to personally attack the integrity of defense counsel and accusing them of intentionally attempting to fool jurors, pandering to their prejudices, clouding their judgments, and causing them to abandon rational thought. All of this was highly inappropriate under established precedent. See AOB, at 69-73.

In arguing harmlessness, the State notes that closing arguments followed a very lengthy trial. BOR, at 80. The State, however, does not cite to anything justifying serious prosecutorial

misconduct so long as the trial was a long one. The State also notes that jurors were instructed not to let emotion overcome their thought processes and to decide the case based on the facts and law. BOR, at 80 (citing CP 1779). Juror always receive this instruction, yet convictions are still overturned based on prosecutorial misconduct. And whatever this instruction otherwise meant to Chambers' jurors, they would not have interpreted it to prevent their consideration of the serious allegations prosecutors hurled at defense counsel in light of the trial court's decision to overrule every defense objection to these very arguments.

As discussed in the opening brief, prosecutorial misconduct improperly neutralized key aspects of the defense case while simultaneously making it seem as though defense attorneys were the ones breaking the rules. In an otherwise close case, arguments of this type can make the difference between conviction and acquittal. There is a substantial likelihood they did here.

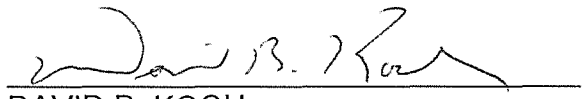
B. CONCLUSION

Chambers respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 3rd day of May, 2016.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72093-7-I
	)	
LOVETT CHAMBERS,	)	
	)	
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 3RD DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LOVETT CHAMBERS
DOC NO. 375239
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF MAY 2016.

X Patrick Mayovsky