

NO. 94999-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KAREEM HARRIS,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Kareem Harris has filed a petition for review of the Court of Appeals' opinion affirming his conviction for murder in the first degree with a firearm enhancement, State v. Harris, 199 Wn. App. 137, 398 P.3d 1229 (2017) (motion to reconsider denied August 15, 2017).¹ Harris seeks review of the Court of Appeals' holding that the evidence was sufficient to establish that Harris's act of shooting the victim five times caused the victim's death approximately 14 months later.

Washington recognizes two elements of causation: cause in fact and legal cause. Harris's appeal conflated these two elements, purporting to challenge only legal causation but conducting a factual causation analysis. The Court of Appeals' opinion held that the evidence was sufficient to establish factual causation and that legal causation was present as a matter of law given the jury's factual findings.

Harris's petition for review continues to conflate legal and factual causation, but he appears to primarily challenge the sufficiency of the evidence as to factual causation. The State requests that this Court deny the petition because it does not meet

¹ A copy of the Court of Appeals' opinion is attached to the Petition for Review.

the criteria for acceptance of review. The Court of Appeals properly applied longstanding principles and correctly concluded that the evidence—which included, *inter alia*, expert testimony that “the cause of death was pneumonia due to multiple remote gunshot wounds”—was sufficient to support the jury’s finding that the shooting caused Gant’s death.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE²

On the morning of October 28, 2009, Wilbur Lee Gant was getting into his car to go to work when the defendant, Kareem

² This Answer does not attempt to include all of the evidence relevant to causation that was presented at trial, but merely the most significant portions. A more complete summary of the evidence is contained in the Brief of Respondent at 2-14.

Harris, shot him five times. 11RP³ 70-72; 13RP 26, 35; 19RP 116. After multiple neighbors called 911, medics intubated Gant to keep him breathing and transported him to Harborview Medical Center, where he underwent emergency surgery to control bleeding that otherwise would have quickly killed him. 11RP 26, 44, 71; 18RP 71-73, 80.

Doctors discovered that bullets had struck, among other things, Gant's liver, gallbladder, colon, and pylorus, which is the valve connecting the stomach to the small intestine. 18RP 76. The injury to Gant's liver caused bleeding so extensive that doctors found one third of Gant's total blood supply pooled in his abdominal cavity. 18RP 75-76. In addition to stemming the bleeding from Gant's liver, doctors had to remove the pylorus, disconnecting the stomach from the small intestine, and had to remove Gant's gallbladder and a portion of the colon containing the valve between the small and large intestine. 18RP 79-81; 22RP 149.

³ This Answer will refer to the 29 volumes of the verbatim report of proceedings as they were referred to in the Brief of Respondent: 1RP (11/5/13), 2RP (11/6/13), 3RP (8/6/14), 4RP (8/12/14), 5RP (8/14/14), 6RP (8/21/14), 7RP (7/2/14, 7/3/14, & 11/21/14), 8RP (9/4/14), 9RP (9/8/14), 10RP (9/9/14), 11RP (9/10/14), 12RP (9/11/14), 13RP (9/16/14), 14RP (9/17/16), 15RP (9/18/14), 16RP (9/22/14), 17RP (9/23/14), 18RP (9/24/14), 19RP (9/25/14), 20RP (9/29/14), 21RP (9/30/14), 22RP (10/2/14), 23RP (10/6/14), 24RP (10/7/14), 25RP (10/9/14), 26RP (10/13/14), 27RP (10/14/14), 28RP (10/15/14), and 29RP (10/16/14).

The next day, Gant, who was still unconscious and on a ventilator, underwent two more surgeries: one to repair his elbow and remove bullet fragments from it, and another to reconnect the now-disconnected portions of his gastrointestinal tract and to close up his abdominal cavity. 18RP 84-85, 91-93. Because it was not possible to recreate the pylorus, doctors had to connect Gant's small intestine directly to what remained of his stomach. 18RP 88, 91-92. The loss of the valves between the stomach and the small intestine and between the small and large intestines affects the orderly movement of food through the gastrointestinal system, and makes it easier for material to move from the intestines back into the stomach, which normally should not happen. 22RP 151.

Gant remained hospitalized for 16 days following the shooting. 18RP 108. During that time, he endured complications such as an infection in his colon, collapsed lungs, and fluid collecting in his liver. 18RP 96, 101-03; 19RP 108. As a result of his injuries, Gant was in considerable pain, was unable to walk unassisted, and had general weakness throughout his body, limiting his ability to get in and out of bed or do household activities. 18RP 110; 19RP 55.

As Gant recovered at home under the care of his wife over the ensuing months, his physical state appeared to slowly improve for a time. 19RP 55. His pain decreased and he was able to walk more easily, though he would use a cane for the rest of his life. 19RP 55, 69. Over the next year, Gant continued to take medication and see doctors regularly for issues related to the shooting, including, among other things, multiple instances of bronchitis, severe post-traumatic stress disorder, and removal of some of the bullet fragments left in his body. 19RP 75, 91, 105, 107, 125; 21RP 86. Bronchitis is a viral respiratory illness that usually does not require antibiotics. 19RP 108. However, the damage to Gant's lungs caused by being intubated, put on a ventilator, and suffering collapsed lungs following the shooting put Gant at greater risk that bronchitis would develop into pneumonia, so doctors felt it necessary to treat the bronchitis conservatively with antibiotics. 19RP 108-10, 125-26.

One evening in early January 2011, approximately 14 months after the shooting, Gant's wife called an ambulance after Gant became short of breath and began coughing up blood. 19RP 76; 22RP 65. Blood tests and a CT scan at St. Francis hospital revealed that Gant's kidneys were not functioning properly, and that

he had pneumonia, a bacterial infection, in both lungs. 22RP 67-68. Doctors determined that the bacteria infecting Gant's lungs were E. coli, and that he was suffering from severe sepsis, a frequently lethal condition wherein a severe localized infection quickly disseminates throughout the entire body, overwhelming the kidneys, lungs, heart, and brain. 22RP 73-75.

Gant was intubated and given fluids and multiple antibiotics, but remained unstable and unconscious in the intensive care unit throughout the night. 22RP 75. He died at 1:46 p.m. the next day, less than 24 hours after arriving at the hospital. 22RP 90, 97.

Medical examiner Dr. Timothy Williams performed an autopsy, and identified the cause of death as bilateral bronchopneumonia resulting from remote gunshot wounds. 22RP 123, 168. E. coli is not a common bacteria found in cases of pneumonia; it occurs naturally only in the colon. 22RP 73; 27RP 27. Williams testified that the damage to Gant's colon from the shooting "facilitated or caused those [E. coli] organisms to get into the lungs, which caused the pneumonia." 22RP 169.

Williams described two possible ways in which that may have happened. 22RP 169-70. The first was that the loss of the valves in Gant's gastrointestinal tract may have allowed E. coli to

move from the colon into the stomach, and from there be regurgitated into the throat and breathed into the lungs, a process known as aspiration. 22RP 169-70. The second was that the scar tissue and permanent staples resulting from the bowel injuries may have resulted in chronic inflammation, which would allow E. coli to move from the colon directly into the bloodstream, which would then carry the bacteria into the lungs, causing pneumonia. 22RP 170. Williams explained that, as is often the case with pneumonia, it was not medically possible to definitively determine which particular path the E. coli took to get into Gant's lungs. 22RP 173.

The autopsy also revealed that the shooting and ensuing surgeries had resulted in extensive scar tissue, turning Gant's abdomen into "basically just one matted mass of organs embedded in scar tissue." 22RP 134. The immobility of Gant's abdominal organs meant that his ability to cough, and thus clear debris out of his airway, was impaired. 22RP 134-35. This put him at higher risk of pneumonia, and decreased his ability to detect the early onset of pneumonia. 22RP 171. The lack of organ mobility also would have impaired the downward movement of food through the gastrointestinal system. 22RP 150.

The autopsy also revealed that Gant was in the early stages of both emphysema and cirrhosis of the liver when he died. 22RP 141-42, 145. However, medical examiners determined that neither condition played a significant role in Gant's death—the cirrhosis had not progressed to the point of affecting liver function, and the emphysema would have been detectable while the patient was alive, which it was not in Gant's case, if it were severe enough to contribute to death. 22RP 163; 27RP 32.

Chief medical examiner Dr. Richard Harruff testified that he agreed with Williams' conclusion that Gant's death was caused by pneumonia due to multiple remote gunshot wounds. 27RP 22. He explained that Williams' inclusion of emphysema and cirrhosis of the liver as "pathological diagnoses" in the autopsy report merely signified that they had been detected during the autopsy, and did not necessarily mean that they contributed to Gant's death. 27RP 16-17. Harruff testified that the gunshot wounds were "a very important contributing factor[,] and quite likely the most important contributing factor" in Gant's death. 27RP 23. While acknowledging the possibility that more than one factor contributed to Gant's death, Harruff testified that he was "100 percent" certain

that “the gunshot wound injuries were a major contributing factor to Mr. Gant’s death.” 27RP 37.

Harris’s theory of the case was that he was not the shooter, and that the shooting did not cause Gant’s death. 28RP 40-68.

Harris testified on his own behalf that he was not the person who shot Gant. 26RP 6. The sole other defense witness was Dr. Carl Wigren, a forensic pathologist. 24RP 19-20.

Wigren testified that he had reviewed Gant’s medical records, and opined that the gunshot wounds were “in no way related” to the pneumonia that killed Gant. 24RP 31, 65, 83. However, cross-examination revealed numerous flaws in Wigren’s understanding of Gant’s condition following the shooting, such as erroneously believing Gant had returned to work four months after the shooting,⁴ erroneously believing that only one of the valves in Gant’s gastrointestinal tract had been removed, and not knowing how much of Gant’s stomach had been removed. 24RP 85-89, 96-97, 109.

Wigren’s analysis focused on what he perceived to be inconsistencies in Gant’s reporting of his alcohol use both before and after the shooting, and he concluded that Gant was

⁴ Gant’s post-traumatic stress disorder was so debilitating that he was never able to return to work. 19RP 79, 114-15; 21RP 20.

underreporting his alcohol use in a way that was “consistent with” ongoing chronic alcohol abuse. 24RP 37-38. Based on the fact that Gant had a low blood-alcohol level when he arrived at the hospital the evening before he died, Wigren speculated that Gant “could have been” extremely drunk earlier in the day and could have passed out and aspirated vomit into his lungs, causing pneumonia. 24RP 62.

However, other evidence affirmatively indicated that although Gant had been a heavy drinker earlier in life, he was not a chronic heavy alcohol user at or after the time of the shooting and had not been drunk in the days leading up to his death. 19RP 72-73, 77, 80, 129, 140; 20RP 7, 10; 21RP 14, 19, 129-30; 22RP 172-73. Additionally, although medical records from Gant’s final hospitalization indicated that doctors had found food particles in his esophagus, the autopsy found no evidence of any food particles in Gant’s lungs. 22RP 97; 24RP 145.

After deliberating for only one day, the jury found Harris guilty of murder in the first degree as charged. 29RP 10; CP 63. Harris appealed, challenging the sufficiency of the evidence to prove legal causation, the jury instruction defining causation, and his trial counsel’s effectiveness in agreeing to the standard

causation instruction. On the first issue, Harris's Brief of Appellant purported to challenge only whether the shooting was the legal cause of Gant's death. However, his arguments relied on principles of factual causation. The State's response addressed both legal and factual causation in an abundance of caution, and Harris's reply focused entirely on factual causation. The Court of Appeals affirmed in a published decision, holding that the causation instruction was proper, the evidence was sufficient to support the jury's finding on factual causation, and that legal causation was satisfied as a matter of law. State v. Harris, 199 Wn. App. 137, 398 P.3d 1229 (2017). Harris moved for reconsideration, and after requesting and receiving a response from the State the Court of Appeals denied the motion without explanation.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

Harris is incorrect when he claims that the Court of Appeals opinion in this case contradicts unspecified opinions of this Court and creates an issue of substantial public interest by "vastly expand[ing] the notion of causation." Pet. for Review at 16. The Court of Appeals did not hold, as Harris suggests, that "[a]ny act, no matter how remote in time or how minimal its contribution, which

increases the changes of a person [sic] death at some later point can establish the crime of murder.” Pet. for Review at 16. The Court of Appeals’ holding was merely that the evidence in this case, which included expert testimony that “the cause of death was pneumonia due to multiple remote gunshot wounds,” was sufficient for a reasonable jury to find beyond a reasonable doubt that Harris’s shooting of Wilbur Lee Gant caused Gant’s death. This holding was not an expansion or contradiction of existing law, as Harris asserts; it was merely a straightforward application of longstanding principles to the facts of this case.

1. HARRIS MISINTERPRETS BAUER AND INAPPROPRIATELY CONFLATES LEGAL AND FACTUAL CAUSATION.

Washington recognizes two elements of causation, both of which must be present before criminal liability can be imposed: cause in fact (sometimes called “but for” cause) and legal cause (sometimes called “proximate” cause). State v. Bauer, 180 Wn.2d 929, 935-36, 329 P.3d 67 (2014). Although many jurisdictions use “proximate cause” to refer solely to legal cause, Washington courts have traditionally used the term “proximate cause” to encompass

both elements of causation.⁵ Id. at 936 n.5. Factual causation refers to the “but for” consequences of the defendant’s act—the physical causal connection between an act and an injury. Id. at 936. In contrast, legal causation looks at the relationship between the result “intended or hazarded” by the defendant and the result that actually occurred, and asks “whether liability *should* attach as a matter of law given the existence of cause in fact.” Id. at 936-37, 940 (emphasis in original). As a question of law, the determination of legal causation is an issue for the court rather than the jury, and turns on “mixed considerations of logic, common sense, justice, policy, and precedent.” Id. at 936; Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 51, 176 P.3d 497 (2008).

The standard for establishing cause in fact is identical in civil and criminal cases. Bauer, 180 Wn.2d at 936. However, this Court announced in Bauer that legal causation is narrower in criminal cases than in civil cases, requiring “a closer relationship between the result achieved and [the result] intended or hazarded” by the defendant. Id. at 936-37, 940. In civil cases, legal causation may

⁵ The Petition for Review initially defines “proximate cause” as synonymous with “legal cause,” but goes on to use “proximate cause” to encompass cause in fact. Pet. for Review at 7, 9-10. In light of the contradictory uses of “proximate cause” in the caselaw, this brief will use the terms “legal cause” and “cause in fact” instead, and will avoid the term “proximate cause” when possible.

be present even though the defendant's non-criminal negligent act was not capable of directly causing injury, such as where a defendant who leaves a tractor operational and unguarded is held liable for damages caused by children who stole the tractor. Id. at 938. This Court held that while legal causation exists in a criminal case where the defendant commits an intentional criminal act capable of causing harm in and of itself, it does not exist where the defendant's act is not criminal and is incapable of causing harm in and of itself. Id. at 939-40.

Here, the existence of legal causation is abundantly clear, as the jury determined that the harm that ultimately resulted—Gant's death—was specifically intended by Harris. CP 33, 63. Thus, criminal liability was proper once a jury found Harris's actions to be the cause in fact of Gant's death and found the other elements proved.

Harris's argument that proof of causation is lacking in this case turns on his unsupported contention that Bauer stands for the proposition that, in every fact pattern, a finding of legal causation—which Harris labels "proximate cause"—in a criminal case "requires proof of a more direct connection between the act and injury" than would be required in a civil case addressing the same fact pattern.

Pet. for Review at 9. He then looks at cases addressing what is required to establish cause in fact—which Harris confusingly labels “proximate cause”—in civil cases, and contends that a more direct factual causal relationship between the act and the result is required in order to establish “proximate cause” in criminal cases.⁶ Pet. for Review at 9-10. This both misinterprets Bauer and conflates factual and legal causation.

2. THE COURT OF APPEALS APPLIED LONGSTANDING PRINCIPLES TO PROPERLY CONCLUDE THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY’S FINDING THAT THE SHOOTING WAS THE CAUSE IN FACT OF GANT’S DEATH.

Harris’s challenge to the sufficiency of the evidence requires this Court to view the evidence in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

⁶ Because Harris uses the term “proximate cause” indiscriminately to refer at various times to both legal cause and cause in fact, it is unclear whether he challenges the presence of legal causation or factual causation.

Harris's jury was instructed that he could not be guilty of murder unless his criminal conduct was a "proximate cause" of the victim's death, with "proximate cause" defined as "a cause which, in a direct sequence, unbroken by any new independent cause, produce[d] the death, and without which the death would not have happened." CP 45. The instruction also stated, "There may be more than one proximate cause of a death." CP 45. As Harris conceded in the Court of Appeals, this instruction accurately stated the standard for determining whether the shooting was a cause in fact of Gant's death. Brief of Appellant at 18; see also State v. Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990) (WPIC 25.02 properly states the law); State v. Dennison, 115 Wn.2d 609, 624, 801 P.2d 193 (1990) (WPIC 25.02 pertains to cause in fact).

In this case, the medical examiner who conducted Gant's autopsy testified explicitly that the immediate cause of Gant's death was pneumonia (specifically, an E. coli bacterial infection in Gant's lungs), and that the underlying cause of the pneumonia was the gunshot wounds. 22RP 168-69. The chief medical examiner testified that he agreed "that the cause of death was pneumonia due to multiple remote gunshot wounds." 27RP 22. Both explained that E. coli is not a common bacteria found in cases of pneumonia;

it occurs naturally only in the colon. 22RP 73; 27RP 27. The medical examiner testified that the gunshot wounds allowed E. coli to travel from Gant's colon into his lungs through one of two possible mechanisms: (1) by E. coli moving upwards from the colon into the stomach, due to the absence of the valves between the colon and the small intestine and between the small intestine and the stomach, and then being regurgitated and aspirated into the lungs, or (2) by chronic inflammation at the site of the bullet wounds in the colon, which would allow the bacteria to move directly into Gant's bloodstream, and from there into the lungs. 22RP 169-70. The jury was free to reject these conclusions if it found them not persuasive, but this testimony alone constitutes sufficient evidence to support the jury's finding that Harris caused Gant's death.

Harris's Petition for Review repeats, almost verbatim, arguments he made in the Brief of Appellant and again in his motion for reconsideration regarding why Harris believes the evidence was insufficient to prove that he caused Gant's death. These arguments rely on cherry-picking of the testimony and mischaracterization of the law, and were properly rejected each time by the Court of Appeals. They are addressed in more detail in

the State's Answer to Motion for Reconsider (attached as Appendix).

The Court of Appeals correctly recognized that Bauer has no relevance to the factual causation analysis. It properly applied longstanding principles and correctly concluded both that the evidence in this case was sufficient to support the jury's finding of factual causation and that legal causation was satisfied as a matter of law. The Court of Appeals' opinion not in conflict with opinions of this Court or the Court of Appeals, and Harris's petition for review does not involve an issue of substantial public interest. The criteria for acceptance of review are therefore not met.

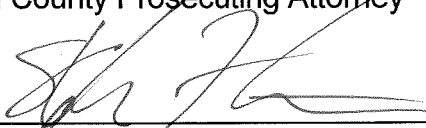
E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 16th day of October, 2017.

Respectfully submitted,

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Appendix

State's Answer to Motion to Reconsider

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 73064-9-1
)	
vs.)	STATE'S ANSWER TO
)	MOTION TO RECONSIDER
KAREEM HARRIS,)	
)	
Appellant.)	
)	
)	

This Court has requested that the State respond to the defendant's Motion to Reconsider. Harris asks this Court to hold that the State presented insufficient evidence to allow a reasonable jury to conclude beyond a reasonable doubt that Harris's shooting of Wilbur Gant was a cause in fact of Gant's death. The State asks this Court to deny the motion.

Harris is incorrect when he claims that this Court's opinion in this case "broadly expands the notion of causation in homicide cases" and "holds that any act which contributes in any degree to another person's death at any time after the act occurs 'caused' the death." Mot. to Recons. at 1. This Court held only that the evidence in this case—which included, *inter alia*, expert testimony

that "the cause of death was pneumonia due to multiple remote gunshot wounds"—was sufficient for a reasonable jury to find beyond a reasonable doubt that Harris's shooting of Wilbur Lee Gant was a cause in fact of Gant's death.¹ This holding was not an expansion or contradiction of existing law, as Harris asserts; it was merely a straightforward application of longstanding principles to the record in this case.

RAP 12.4(c) requires that a motion for reconsideration "state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended." However, Harris's motion for reconsideration identifies neither points of law nor facts in the record that he believes this Court overlooked. Instead, he merely repeats (often verbatim) arguments that were made in the Brief of Appellant and responded to in the Brief of Respondent, apparently in the hope that this Court will re-examine

¹ The jury was instructed that it must find that the criminal conduct of the defendant was "a proximate cause" of the death, and that "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened. There may be more than one proximate cause of a death." CP 45. Because varying and contradictory meanings are ascribed to the term "proximate cause" in caselaw, pattern jury instructions, and the briefing in this case, the State encourages this Court to use the terms "cause in fact" and "legal cause" instead of "proximate cause" except when quoting the jury instructions. See Br. of Respondent at 15-16.

the same evidence and arguments and reach a different conclusion.

Harris's challenge to the sufficiency of the evidence requires this Court to view the evidence in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In this case, the medical examiner who conducted Gant's autopsy testified explicitly that the immediate cause of Gant's death was pneumonia (specifically, an E. coli bacterial infection in Gant's lungs), and that the underlying cause of the pneumonia was the gunshot wounds. 22RP 168-69. The chief medical examiner testified that he agreed "that the cause of death was pneumonia due to multiple remote gunshot wounds." 27RP 22. They explained that E. coli is not a common bacteria found in cases of pneumonia; it occurs naturally only in the colon. 22RP 73; 27RP

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27. The medical examiner testified that the gunshot wounds allowed E. coli to travel from Gant's colon into his lungs through one of two possible mechanisms: (1) by E. coli moving upwards from the colon into the stomach, due to the absence of the valves between the colon and the small intestine and between the small intestine and the stomach, and then being regurgitated and aspirated into the lungs, or (2) by chronic inflammation at the site of the bullet wounds in the colon, which would allow the bacteria to move directly into Gant's bloodstream, and from there into the lungs. 22RP 169-70. The jury was free to reject these conclusions if it found them not persuasive, but this testimony alone constitutes sufficient evidence to support the jury's finding that Harris caused Gant's death.

Moreover, the medical examiner's testimony that the gunshot wounds were what allowed the E. coli to get into Gant's lungs was not the only evidence that the shooting was a cause in fact of Gant's death. 22RP 169. Expert testimony also established that the shooting rendered Gant much more likely to contract pneumonia and, if he contracted it, to die from it.

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TO RECONSIDER

Multiple experts testified that the immobility of Gant's organs due to scar tissue from the shooting and the resulting collapse of Gant's lungs made him less able to prevent pneumonia through effective coughing, and less able to detect the early onset of pneumonia once it occurred. 19RP 108-10; 22RP 134-35, 171; 27RP 25. Testimony also established that patients who contract pneumonia normally notice a rapid decline and seek medical treatment "quite early." 19RP 111. If detected and treated early, pneumonia is easily combated with antibiotics; however, pneumonia progresses quickly, and a patient's prognosis is directly related to how soon the first dose of antibiotics is received. 19RP 110-11. In Gant's case, he was critically ill when he arrived at the hospital. 22RP 65. This evidence provided a basis for a reasonable juror to conclude that—regardless of whether the E. coli came from Gant's colon as the State's experts explained, or from something Gant ate as Harris postulated—the shooting was the reason Gant died of pneumonia rather than avoiding infection or seeking treatment early enough to survive it.²

² This Answer does not attempt to include all of the evidence relevant to causation that was presented at trial. A more complete summary is contained in

Taken all together, the evidence presented to the jury was more than sufficient for a reasonable juror to find beyond a reasonable doubt that the shooting was a cause in fact of Gant's death.

Harris's argument in his motion for reconsideration, as in his Brief of Appellant, relies on several mischaracterizations of the evidence and the law. For example, his motion points again to testimony about how medical examiners determine the manner of death (in which "homicide" is chosen from the limited list of options if the death is at all attributable to the actions of another person), and uses that testimony to try to argue that the medical examiners' expert opinions were limited to determining merely whether the gunshot injuries contributed in some unquantifiable way to Gant's death. Mot. to Recons. at 2-3; 27RP 15; Br. of Appellant at 14-15. Harris ignores the fact that the State's witnesses explained the difference between the *manner* of the death and *cause* of death, and clearly testified that in their opinion the gunshot wounds were the underlying *cause* of Gant's death. 22RP 168; 27RP 15, 22.

the Brief of Respondent at 2-14.

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Harris also once again contends that because the experts were unable to definitively say that E. coli got into Gant's lungs through aspiration specifically, the evidence was insufficient to support the jury's finding that the shooting was a cause in fact of Gant's death. Mot. to Recons. at 2-4; Br. of Appellant at 15-16. This argument fails to recognize that the testimony described above clearly established the medical examiner's opinion that, regardless of which of two possible routes the E. coli took from Gant's colon to his lungs (aspiration or inflammation), it was the gunshot wounds that allowed it to get there. 22RP 169.

Harris also complains that the State's experts did not testify that the shooting was "more likely than not" the cause of death. Mot. to Recons. at 2. However, such testimony was unnecessary given the medical examiner's much stronger testimony that in his opinion the shooting was the underlying cause of death. 22RP 168.

Harris's motion also goes astray when he attempts, as he did in the Brief of Appellant, to draw an analogy to the level of causation required to establish *corpus delicti* for the crime of

murder. State v. Aten³ does not stand, as Harris contends, for the proposition that the State's evidence must "rule out" an innocent cause of death in order to establish the *corpus delicti* of murder. Mot. to Recons. at 2; Br. of Appellant at 12. Instead, Aten holds that "evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either," and concluded that there must be *some* evidence that is inconsistent with a hypothesis of innocence in order to establish the causal element of *corpus delicti* of murder.⁴ State v. Aten, 130 Wn.2d 640, 659, 661, 927 P.2d 210 (1996). Nothing in Aten supports the contention that all causes of death other than the shooting must be ruled out in order to prove that the shooting was a cause in fact of the death. Indeed, that contention is directly contradicted by the well-settled principle that there can be more than one cause in fact of an injury. CP 45; Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 611, 257 P.3d 532 (2011).

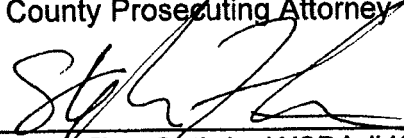
³ State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

⁴ In Aten, the defendant was tried for murder of an infant in her care, but aside from the defendant's statements, the evidence was equally consistent with murder and natural death.

This Court was correct when it held that the evidence in this case was sufficient to support the jury's finding that Harris's shooting of Gant was a cause in fact of Gant's death. Harris's motion for reconsideration should therefore be denied.

Submitted this 26th day of July, 2017.

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ANSWER TO MOTION
TO RECONSIDER

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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