SUPREME COURT NO. 95915-3

NO. 75903-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN BRAA,

Petitioner.

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

The Honorable Ellen J. Fair, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Kevin Braa requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Braa, 2 Wn. App. 2d 510, 410 P.3d 1176 (No. 75903-5-I, filed February 12, 2018). Braa's motion for reconsideration was denied on April 27, 2018. Copies of the opinion and order denying motion for reconsideration are attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Appellant was beaten badly in the parking lot of a bar. He testified he shot his assailant in self-defense. DNA testing of a blood drop in the parking lot could show the assailant was still close, thereby corroborating appellant's self-defense claim. Under RCW 10.73.170, did the trial court err in denying appellant's motion for post-conviction DNA testing?

C. STATEMENT OF THE CASE

Appellant Kevin Braa was convicted of manslaughter after a fight in a bar turned ugly. Simeon Whitney followed Braa out of the bar after Braa said some fairly provocative things and referred to non-white persons as "subhuman." RP 55, 166, 725-26, 738. In the fistfight that followed, Whitney consistently had the upper hand. RP 144.

Braa testified he was hit in the head just as he opened the door to leave the bar. RP 726. The fight apparently began in the walkway outside the

bar's back door and continued in the first row of cars parked in the adjacent lot. RP 108, 142, 153; Ex. 19. For what seemed like 5 to 10 minutes, Braa was in the parking lot being beaten and fearing for his life. RP 727-28. Whitney was five feet nine inches tall and weighed 195 pounds, three inches taller and roughly 50 pounds heavier than Braa. RP 599, 714-15. At one point, Braa's shirt was pulled up over his head. RP 111-12. One witness testified Braa was unable to throw even one punch; he was just trying unsuccessfully to get away. RP 159. One witness saw Whitney shove Braa up against a parked car. RP 167. Witnesses largely agreed Braa was losing the fight.[1] RP 111-12, 144, 167.

Braa testified he was lying slumped on the ground between two cars with Whitney standing over him when he managed to get his hand on his gun and began firing immediately. RP 731-32. He kept firing as he got to his feet. RP 733-34. Witnesses heard a total of five or six shots. RP 144-45, 177, 317-18, 334-36, 459-60. When he stopped firing, he saw no one nearby. RP 733-34.

Edwina Williams and her husband Morey heard shots, looked towards the source, and saw Braa standing alone in the parking lot firing towards the back door of the bar. RP 146, 283-85, 461-67, 556-57. Edwina testified he was in between two cars in the first row parked behind the bar.

[1] One witness described the man in the blue shirt (Whitney) as losing, but she appears to have been mistaken about who was who. RP 111-12.

RP 473, 482. Morey described him as at the driver's side of a truck with a door open. RP 556-57. Morey Williams subsequently claimed he saw Braa reach inside the truck to grab the gun. RP 562-63. (In an earlier statement, Morey said Braa must have had the gun on his person. RP 569.).

The Williams estimated Braa was 20 or 30 feet from the door of the bar. RP 463-65, 559-60. At a distance of 21 feet, police consider a person on foot to be an immediate threat because an adult can cover that distance before an officer can draw his or her gun. RP 417.

Forensic testimony showed two bullets entered Simeon Whitney's buttocks traveling from back to front and angled slightly upwards. RP 601-08. Another shot went through his left arm and another (possibly the same bullet) grazed his lower left abdomen. RP 613-19. The only other wounds on Whitney's body were a couple of minor abrasions to his face and knee and some bruises. RP 619, 632, 635.

Whitney entered the back door of the bar and collapsed in the hallway. RP 58. When police arrived, they found Whitney alive just inside the threshold at the back door of the bar. RP 320. The wounds would not have immobilized Whitney immediately and were potentially survivable with medical care. RP 630, 646. However, he later died from shock and blood loss. RP 627-29.

After the shooting, Braa checked himself for injuries, got in his car, and drove home. RP 735-36. Upon arrival, he told his roommate Lenny Graff he had shot or killed a "subhuman." RP 206-07, 738. Braa told Graff he was jumped leaving the bar by someone who tried to steal his wallet. RP 207. Graff also claimed Braa told him to keep this to himself, to lie, and to say that both of them were home watching television. RP 208-09. Graff later found Braa's 9-millimeter handgun under their deck. RP 219-20.

Forensic testimony showed Braa's handgun fired the bullets and casings found at the scene. RP 301-04, 374, 511-12. Braa testified he was convinced that if the fight had continued, he would have been killed or in a coma. RP 764. He did not intend to kill Whitney and only fired in self-defense. RP 755, 764.

In the parking lot, police also found a drop of blood. RP 301-04. Exhibits showed it was found approximately two thirds of the way across the walkway between the door of the bar and the first row of parked cars. Ex. 50. It also appears off to the side, closer to the two cars Braa was seen standing between while shooting. Ex. 50. The officer who found it pointed to a spot in one of the parking spaces, rather than in the walkway in between, but he was not entirely certain. RP 375.

Police did not have the blood tested because they believed they did not need to know who was bleeding where. RP 419-20. In closing argument,

however, defense counsel pointed out that the blood drop is "right in front of space 2, diagonally from space 3." RP 812. She queried whose blood it was, pointing out that, if it were Whitney's, "you know he's really close" and "not at the door" to the bar. RP 812.

The State argued that, because no witness saw anyone else in the parking lot during the shooting, the fight must have been entirely over so that Whitney was on his way inside and "quite a ways" from Braa. RP 783-84. The State argued Whitney must have been at or near the door when shot because he could not have made it from the area where Braa said he was to the area inside the bar where he was found. RP 794. It was crucial to the State's argument that, "when [Whitney] was shot, he was at the door." RP 794.

In 2008, Braa was found guilty and sentenced to 250 months. CP 103, 108. In 2016, Braa requested post-conviction DNA testing under RCW 10.73.170. CP 44-48. He sought DNA testing of blood samples from the parking lot on the grounds that the testing would provide new information about where Whitney was when he was shot. CP 44.

The Snohomish County Superior Court denied Braa's motion. CP 73. The court concluded Braa "failed to comply with the procedural requirements in RCW 10.73.170(2) because the identity of the shooter (the defendant) is undisputed." CP 73. The court also concluded Braa failed to

meet the substantive burden because favorable DNA evidence would not demonstrate his innocence on a more probable than not basis. CP 73. Braa appealed.

The Court of Appeals held DNA testing may be warranted if it would show a person acted in self-defense, but held that, under the circumstances, Braa did not make that showing. Braa, 2 Wn. App. 2d at 512. Braa now asks this Court to grant review, reverse the Court of Appeals decision and grant his request for post-conviction DNA testing.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

A FAVORABLE DNA RESULT WOULD MAKE IT MORE PROBABLE THAN NOT THAT BRAA'S ASSAILANT WAS IN THE PARKING LOT POSING AN IMMINENT THREAT WHEN BRAA BEGAN FIRING.

Braa testified he fired his gun during a mere pause in an ongoing assault. RP 731. The State claimed his assailant had left to go back into the bar. RP 783-84, 794. The assailant's location when shot was crucial to the question of whether Braa reasonably feared imminent serious harm. Was his assailant standing near Braa? Or was he walking through the doorway of the bar? If the blood in the parking lot near where Braa fired his gun belongs to Whitney, that fact would show Whitney was still close by when he was shot. Whitney's proximity would show that Braa reasonably feared the assault would continue.

Braa's case meets the statutory requirements for post-conviction DNA testing. The first requirement is that the person be convicted of a felony in Washington and currently serving a term of imprisonment. RCW 10.73.170(1). Braa was convicted of manslaughter, in 2008 and is currently serving his 250-month sentence. CP 103, 108. The procedural burden under the statute is met when DNA testing would yield significant new information about the identity of the perpetrator. RCW 10.73.170(2); State v. Thompson, 173 Wn.2d 865, 875-76, 271 P.3d 204 (2012). The substantive burden is met when there exists a "likelihood that the DNA would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). The dispute in this appeal pertains to the substantive burden.

In assessing a request for DNA testing, the court must assume the result would be favorable to the convicted person. State v. Crumpton, 181 Wn.2d 252, 255, 332 P.3d 448 (2014). The court must also assess the impact of the DNA evidence in light of the other evidence at trial but should not focus on the weight of the other evidence, since any trial leading to a guilty verdict will likely have strong evidence of guilt. Id. at 262. In this light, the court must allow the testing when a favorable DNA test would "raise a reasonable probability the petitioner was not the perpetrator." State v. Riofta, 166 Wn.2d 358, 367-68, 209 P.3d 467 (2009).

A trial court's decision on a motion for postconviction DNA testing is reviewed under the abuse of discretion standard. State v. Gray, 151 Wn. App. 762, 769, 215 P.3d 961 (2009) (citing Riofta, 166 Wn.2d at 370). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). A court also abuses its discretion when it applies an incorrect legal standard. Crumpton, 182 Wn.2d at 257.

Braa asks this Court to grant review and reverse for two main reasons. First, a favorable DNA test could provide a strong inference that Braa acted in self-defense, thereby showing a probability of innocence. Second, the Court of Appeals rejection of this argument is in conflict with precedent regarding the substantive burden by requiring Braa to exclude every possibility but innocence.

a. If the blood in the parking lot belongs to Whitney, it is more probable than not that Braa acted in response to an imminent threat.

DNA testing would show Braa is not guilty of manslaughter because he reasonably believed he was in imminent danger. The jury was instructed that a person acts self-defense when the person "reasonably believed that the person slain intended to inflict death or great personal injury" and the person "reasonably believed there was imminent danger of such harm being accomplished." CP 154.

That Braa was, at some point, in danger from Whitney was not substantially in dispute. Everyone who witnessed the fight explained that one of the two men was clearly losing. RP 111-12, 144, 166-69, 181. Seconds before the shooting, witnesses saw Braa on the ground. RP 158-60, 180, 183.

Then there is a gap in the eyewitness testimony. Several people saw parts of the fight, and several others saw parts of the shooting. But no one saw the transition from one to the other. Three witnesses saw Braa standing apparently alone in the parking lot still firing his gun towards the back door of the bar. RP 283, 285, 463-67, 556-57. Initially, all three said their attention was drawn by the sound of the gunshots, and they subsequently looked to see Braa. RP 280-81, 459-60, 555-56. However, after further contemplation, only one witness claimed to have seen Braa reach into a truck, get a gun, and begin firing. RP 562-63.

Braa described being slammed into a car, slumping down between two cars, and finally having the chance to pull out the firearm that he always carried. RP 730-32. He testified he aimed upwards and fired in the general direction of the person standing over him. RP 733.

Braa was at most 30 feet from the back door of the bar. RP 294-96, 463-65, 559-60. After the shooting, Whitney's body was just inside the back door of the bar. RP 58, 245-47, 289, 320. The distance was short enough that Whitney could have covered it quite rapidly after the gunshots began - an

adult can cover 21 feet before an officer can draw his or her gun. RP 417. Whitney's wounds would not have prevented movement. RP 646.

Even if Braa was alone in the parking lot for the last few shots, this told the jury nothing about whether Whitney was still standing over Braa, presenting an imminent threat when Braa first drew his gun and began firing. The only evidence on that question was Morey Williams' reconsidered claim to have seen Braa before he started firing and Braa's testimony that Whitney was still standing over him. RP 562-63, 733. DNA testing of the blood drop in the parking lot could break that tie in Braa's favor.

For purposes of post-conviction DNA testing, courts must assume the DNA test is favorable to the accused. Crumpton, 181 Wn.2d at 255. A favorable result in this case would be a test result showing the blood is Whitney's. Given the one-sided nature of the fight, Whitney is extremely unlikely to have bled until after he was shot. His only recent wounds, aside from the gunshots, were minor abrasions and bruises. RP 619, 632, 635.

If the blood in the parking lot is Whitney's, it shows he was in the parking lot (not the doorway to the bar) when he was first shot. The exhibits show the drop of blood was approximately two thirds of the way across the walkway between the door of the bar and the first row of parked cars. Ex. 50. It also appears off to the side, closer to the two cars Braa was seen standing between while shooting. Ex. 50.

The blood drop DNA would provide independent evidence that Braa's assailant was still close by posing an imminent threat. It also corroborates Braa's testimony to that effect. If his assailant was still nearby posing an imminent threat when he began firing, then Braa is not the perpetrator of a crime. He is a person who acted in justifiable self-defense. By showing Whitney's location at the moment he was shot, a favorable DNA test would give rise to a reasonable probability that Braa acted in self-defense and is, therefore, innocent of any criminal homicide offense, as required by the substantive prong of the statute, RCW 10.73.170(3); Riofta, 166 Wn.2d at 367-68.

b. Review should be granted because the Court of Appeals decision is in conflict with established law.

The Court of Appeals reasoned that Braa did not meet his substantive burden because innocence is "not the only possible conclusion available." Braa, 2 Wn. App. 2d at 522. This reasoning misconstrues the substantive burden on a petitioner for post-conviction DNA testing. Braa does not need to show DNA testing would make innocence the only possible conclusion. While the statutory burden is onerous, it is not that onerous. Riofta, 181 Wn.2d at 262. The standard is onerous but also "reasonable enough to let legitimate claims survive." Id. Testing is warranted whenever the evidence would show that innocence is "more

probable than not." RCW 10.73.170. This is the familiar standard from civil cases of a preponderance of the evidence. State v. Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017).

By contrast, a showing that a given conclusion is, "the only possible conclusion available" paraphrases (and even exceeds) the state's burden in a criminal trial of proof beyond a reasonable doubt. See, e.g., State v. Bennett, 161 Wn.2d 303, 311, 165 P.3d 1241 (2007) (discussing Victor v. Nebraska, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Even the burden of proof beyond a reasonable doubt does not require exclusion of every possible doubt. Id. The burden on a petitioner for post-conviction DNA testing cannot be to exclude every theoretical possibility inconsistent with his innocence. First, that is not the standard under the statute and second, if that were the burden, no one would ever obtain DNA testing.

Braa asks this Court to grant review because the Court of Appeals decision is in conflict with prior case law interpreting RCW 10.73.170, such as Riofta, 181 Wn.2d at 262. RAP 13.4(b)(1). Additionally, the Court of Appeals' holding requiring a petitioner to show that DNA testing would exclude every possibility other than innocence sets the bar far too high. Review should also be granted under RAP 13.4(b)(4), because it is a matter of substantial public interest that those with reasonable claims

should have access to post-conviction DNA testing when that testing would show innocence on a more probable than not basis, not the beyond a reasonable doubt basis imposed by the Court of Appeals opinion in this case.

Braa does not have to exclude every possible, or even every reasonable, conclusion other than his innocence. He does have to show that innocence is "more probable than not," assuming a favorable DNA result. RCW 10.73.170. This, he has done.

The Court of Appeals reasoned Braa was not "entitled to a favorable inference as to how Whitney's drop of blood came to be located in the parking lot." Braa, 2 Wn. App. 2d at 521. The Court then posited three possible ways for the blood to be found there, only one of which would be indicate Braa's innocence. Id. at 522.

While Braa is not entitled to a presumption regarding how the blood drop came to be in the parking lot, he is entitled to have the Court consider all the evidence and the relative probabilities. Courts look at the DNA in the context of all the evidence presented at trial. Crumpton, 181 Wn.2d at 262. The court should look at these three theoretical possibilities and weigh their likelihood in light of all the evidence. If a favorable conclusion is "more probable" than the others, Braa has met his burden. RCW 10.73.170. Based on the evidence at trial, the gunshot wound is the

only reasonable explanation for how Whitney's blood came to be in the parking lot. Although there are other theoretical possibilities, only one – that Whitney bled from a gunshot wound while in the parking lot – is supported by the evidence.

First, the opinion suggests Whitney could have dropped the blood in the parking lot during the fistfight. Braa, 2 Wn. App. 2d at 522. But there is no evidence to support that hypothetical possibility. On the contrary, the evidence shows Whitney did not bleed significantly during the fistfight.

Aside from his gunshot wounds, he had only minor abrasions and bruising. RP 619, 621, 632, 635. The medical examiner described the abrasion to his face as one that "would could have been caused by rubbing up against the carpet." RP 632. The abrasion on his leg was also described as one that could be caused by contact with a rough surface. RP 635. Even assuming the abrasion broke the skin sufficiently to draw a small amount of blood, it is difficult to imagine how that blood could drop to the ground without being absorbed by his pants or shoes. The evidence shows no wound, aside from the gunshots, that would have led to Whitney's leaving behind a drop of blood in the parking lot.

The Court's other alternative explanation is that the blood drop was tracked there by someone else. First, the blood was described by

police as a "spot." RP 396. It was not, for example, described as a "smear." RP 401. It would be highly unlikely that another person would have on their clothing or person so great a quantity of Whitney's blood that it would fall in droplet form in the parking lot. It is far more likely, and far more probable, that Whitney himself bled in the parking lot.

The opinion also reasons the blood drop would not show innocence because the evidence showed Whitney was shot in the back at least three times. Braa, 2 Wn. App. 2d at 522. But that fact does not refute Braa's self-defense claim. Medical evidence established that the force of a gunshot can rotate a person's body. RP 652. No one could say in what order the gunshot wounds occurred. RP 646. Thus, the fact that some of the bullets struck Whitney in the back is not inconsistent with him standing over Braa posing an imminent threat when he began shooting, whereupon Whitney turned or was spun around and was struck in the back as Braa fired in quick succession.

The trajectory analysis of one bullet, indicating it was fired from a standing position, is also consistent with Braa's self-defense claim. Braa explained he began firing on the ground and continued firing as he got to his feet. RP 731-33. Moreover, two of the three bullets that struck Whitney followed an upwards trajectory consistent with a shooter who was on the ground or in the process of getting up. RP 603, 608, 637.

A blood drop showing Whitney was still in the parking lot near Braa when the shooting began would indicate Braa continued to have a reasonable fear of Whitney and thus acted in self-defense. This amounts to a reasonable probability of innocence, as required by the substantive prong of the statute, RCW 10.73.170(3); Riofta, 166 Wn.2d at 367-68. Braa asks this Court to grant review, reverse, and hold that he is entitled to post-conviction DNA testing.

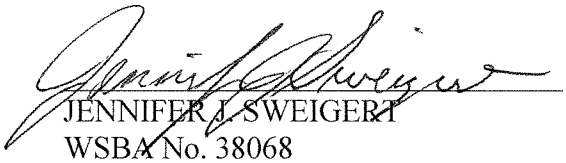
E. CONCLUSION

Because the Court of Appeals decision in this case is inconsistent with prior case law and impacts an issue of substantial public interest, Courtney requests this Court grant review under RAP 13.4 (b)(1) and (4).

DATED this 25th day of May, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN JORY BRAA, Appellant.	DIVISION ONE No. 75903-5-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Kevin Braa, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Dwyer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN JORY BRAA, Appellant.	DIVISION ONE No. 75903-5-I PUBLISHED OPINION FILED: February 12, 2018

DWYER, J. — Kevin Braa appeals from the superior court's order denying his postconviction motion to conduct a DNA (deoxyribonucleic acid) test of evidence in his case. Braa contends that the superior court erred by reasoning that such testing is not available in self-defense cases because a favorable test result would not identify a different person as the perpetrator of the crime. Braa also contends that the superior court erred by denying his motion on the ground that he did not show that a favorable DNA test result would, on a more probable than not basis, establish his innocence.

We conclude that the superior court erred by ruling that, in effect, postconviction DNA testing is not available in self-defense cases. However, we also conclude that the superior court did not err by ruling that a favorable DNA test result would not, on a more probable than not basis, establish Braa's innocence.

Accordingly, we affirm the superior court's decision to deny the requested testing.

I

The circumstances of Braa's crime of conviction are set forth in an unpublished opinion, State v. Braa, noted at 150 Wn. App. 1035, 2009 WL 1591369, as follows:

> On the evening of November 11, 2006, Kevin Braa was sitting at the bar reading a book in Kuhnle's Tavern in Marysville. Simeon Whitney was there playing pool with his brother, Roger Enick, and a friend, Kenny Celestine. Whitney, Enick, and Celestine are Native American and went to Kuhnle's Tavern because it is a hangout for Native Americans.
>
> Enick and another bar patron argued over a game of pool, and the other patron used racial slurs about Native Americans. At some point, Braa went over to the pool table and made offensive comments toward Enick. Whitney pushed Braa out of the way and told him, "Leave my homeboy alone." Braa told Whitney, "Go back to Mexico where you belong. You're a sub-human." When the bartender heard this, she told Braa that he would be asked to leave if he continued to talk that way. Braa did not comply, so she escorted him to the back door. A minute or two later, Whitney went out through the same door.
>
> A fight ensued between Whitney and Braa outside behind Kuhnle's Tavern. Witnesses saw Whitney repeatedly punch Braa and pull Braa's shirt up over his head. After the fight, Whitney started toward the back door of Kuhnle's, and Braa went over to his truck. Braa fired four to six shots at or toward the back door. Some witnesses saw Braa standing by his truck with the door open and his arm extended as he fired. Whitney staggered through the back door and collapsed by the bathrooms. When the bartender heard the gunshots and saw Whitney on the floor, she ducked down and called 911. Two witnesses saw Braa drive away in a white Chevy S-10 pickup.
>
> A police officer who happened to be a few blocks away heard the gunshots and responded to the scene. Whitney had a pulse but was bleeding from the abdominal area and was nonresponsive. He was airlifted to Harborview and died en route. Later, an autopsy determined Whitney had suffered four gunshot wounds. The wounds showed that the bullets traveled from back to front through Whitney's body. One bullet and fragments from another were recovered from his abdomen. Another bullet exited

through the front of his abdomen. The cause of Whitney's death was shock, trauma, and loss of blood due to the gunshot wounds.

Officers found bullet jacket fragments near where Whitney had lain. There were shell casings in the parking lot, as well as the book the defendant had been reading at the bar. Detectives recovered three bullets and bullet shrapnel from the back door area and the carpet just inside the back door. There were two indentations in the metal of the back door, which were consistent with bullet strikes. Detectives also located a bullet hole in an interior wall just inside the back door. Forensic analysis later confirmed that the bullet taken from Whitney's abdominal wall and the bullet found by the back door were fired from the same gun. The four shell casings found in the parking lot were compared and it was forensically determined that all had been fired from one gun.

Braa lived in a two-bedroom trailer that he shared with a roommate, Lenny Graff. Braa returned home around 10:30 on the night of the crime and asked Graff to get some beer, which Graff did. Graff recalled that Braa looked like he had been in a fight, with black eyes and a bloody nose. When Graff returned with the beer, Braa had changed his clothes and no longer looked dirty or bloody. Graff asked what had happened, and Braa told him that he had "killed a subhuman." When Graff asked what a subhuman was, Braa responded, "It means if you're not white, you're not right." He told Graff he had been jumped by some Mexicans who wanted to steal his wallet. He refused to discuss further the topic of killing someone and asked Graff to lie and say he had been home all night.

That night, Braa parked his car several feet further from the roadway than he usually did, and he did not move it for the next three days. On November 14, 2006, officers arrived at Braa's trailer to execute a search warrant and arrest him. They could see Braa inside, through the kitchen window. They announced their presence over the patrol car PA systems. They also used a "hailer," a box equipped with a loudspeaker, a handle for throwing, and hundreds of feet of cable, to communicate with Braa. Several times, an officer announced, "Kevin Braa, this is the Sheriff's Office. We have a warrant for your arrest. Identify yourself and surrender," but Braa did not come out. Officers shone lights into the home, and a helicopter was also used to illuminate the area. After Braa failed to respond to repeated voice commands, officers deployed two pepper spray projectile canisters through a window of the trailer. Braa came outside a few seconds later, complied with officers' verbal instructions, and was taken into custody.

Four and a half months later, while doing yard work, Graff discovered a plastic garbage bag under the deck of the trailer. Inside, he discovered Braa's 9mm semiautomatic Ruger handgun.

> He called 911, and police picked up the gun. Forensic analysis confirmed that the bullet extracted from Whitney's abdominal wall had been fired from that weapon and that one of the four spent shell casings found in the parking lot had also been fired from that weapon. The other bullets and casings were not analyzed because it had already been determined that they had been fired from the same weapon as the tested bullet and casing. An expert in trajectory analysis testified that at least one bullet had been shot from a height of about four and a half feet, within 10 feet of where bullet fragments were imbedded in the wall inside the tavern. The evidence was consistent with the trajectory from a gun held by a person of average height while standing up.
>
> At trial, Braa conceded that he shot the gun and argued that it had been in self-defense. He testified that he had a verbal exchange with some guys he thought were Mexican and that he had called them "Mexicans" and "sub-humans" and "invited them to go back to their own country." He recalled that the bartender had asked him to be quiet and go sit down, and he testified that he did so. Shortly afterward, he left the bar through the back door and as he was leaving was hit over the head and lost consciousness. When he came to, he was being beaten by an unknown assailant. He did not fight back but tried to protect himself by curling up. He tried to get away but was beaten more and shoved to the ground. He thought he was going to be beaten until he was killed. After being slammed into a vehicle, he got his gun out and fired immediately. He testified that he was slumped, lying on the ground when he fired.
>
> Braa was charged with second degree murder and, in the alternative, first degree manslaughter. The jury found Braa guilty of the alternate charge of first degree manslaughter.

Braa, 2009 WL 1591369, at *1-3.

Nine years after his conviction, Braa filed a motion in the superior court seeking DNA testing of a drop of blood taken from the parking lot of the tavern on the night that Whitney was shot. Braa argued that the DNA test would reveal new information suggesting that Whitney had bled in the parking lot, thereby supporting Braa's trial defense that he had shot Whitney in self-defense while Whitney was standing in close proximity over him.

The superior court denied the motion on two separate grounds. The superior court first concluded that Braa failed to satisfy the DNA testing statute's requirement that the petitioner show that DNA testing is material to the identity of the perpetrator of the crime. This was so, the superior court concluded, because "the identity of the shooter (the defendant) is undisputed." The superior court also concluded that Braa's motion failed to establish that "favorable DNA evidence, when considered along with all of the other evidence, would not demonstrate his innocence on a more probable than not basis."

II

Braa contends that the superior court erred by denying his postconviction motion to conduct a DNA test of the blood drop.

We review the superior court's decision on such a motion for abuse of discretion. State v. Crumpton, 181 Wn.2d 252, 257, 332 P.3d 448 (2014) (citing State v. Riofta, 166 Wn.2d 358, 370, 209 P.3d 467 (2009)). The superior court "abuses its discretion if the decision rests on facts unsupported in the record or was reached by applying the wrong legal standard." Crumpton, 181 Wn.2d at 257 (citing State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)).

"RCW 10.73.170 provides a mechanism under Washington law for individuals to seek DNA testing in order to establish their innocence." Crumpton, 181 Wn.2d at 258. The statute provides:

> **DNA testing requests.** (1) A person convicted of a felony in a Washington state court who currently is serving a term of imprisonment may submit to the court that entered the judgment of conviction a verified written motion requesting DNA testing, with a copy of the motion provided to the state office of public defense.
>
> (2) The motion shall:

> (a) State that:
> (i) The court ruled that DNA testing did not meet acceptable scientific standards; or
> (ii) DNA testing technology was not sufficiently developed to test the DNA evidence in the case; or
> (iii) The DNA testing now requested would be significantly more accurate than prior DNA testing or would provide significant new information;
> (b) Explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement; and
> (c) Comply with all other procedural requirements established by court rule.
> (3) The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

RCW 10.73.170.

On appeal, Braa challenges the superior court's determinations that his motion did not satisfy subsections (2)(b) and (3) of RCW 10.73.170. We discuss each ruling in turn.

A

Braa first contends that the superior court erred by denying his postconviction motion on the basis that his request did not demonstrate that the evidence he sought to test was material to the identity of the perpetrator of the crime. If the test result supports his defense of self-defense, Braa argues, then he can show that he acted lawfully—and was not the perpetrator of any crime. His contention has merit.

The procedural requirements set forth in RCW 10.73.170(2) are "lenient." Riofta, 166 Wn.2d at 367. As indicated, subsection (2)(b) requires that a motion

to conduct a DNA test of evidence "[e]xplain why DNA evidence is material to the identity of the perpetrator of . . . the crime." RCW 10.73.170(2)(b).

No prior appellate decision has discussed whether RCW 10.73.170(2)(b) is satisfied by a motion setting forth that DNA evidence supporting a claim of self-defense is material to the identity of the perpetrator of a crime. Thus, our inquiry begins with an examination of the statute itself. This requires that we apply familiar and recognized principles of statutory construction.

> The meaning of a statute is a question of law reviewed de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The fundamental objective of the court is to carry out the legislature's intent and give effect to the statute's plain meaning. Id. "'[T]he plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute [as well as] background facts of which judicial notice can be taken.'" Id. at 11 (quoting 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 48A:16, at 809-10 (6th ed. 2000)).

Riofta, 166 Wn.2d at 365.

"Perpetrator" is not defined in chapter 10.73 RCW. When the legislature has not defined a term, we look to dictionary definitions to determine the term's plain meaning. Buchheit v. Geiger, 192 Wn. App. 691, 696, 368 P.3d 509 (2016). A well-recognized dictionary defines "perpetrator" as "one that perpetrates esp. an offense or crime." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1684 (2002). Further, "perpetrate" is defined as "to be guilty of (as a crime, an offense)." WEBSTER'S, supra, at 1684. Hence, a person who commits a crime is a perpetrator. Logically, a person who does not commit a crime is not a perpetrator. This understanding aligns with the goal of the DNA testing statute—to make DNA testing available "as a way to ensure an innocent person is not in jail." Crumpton, 181 Wn.2d at 258.

Braa's trial defense was not that someone else committed the crime at issue. Instead, his defense was that *no* crime was committed because he acted in lawful self-defense. In this way, he attempted to show that he was not a perpetrator.

A person who kills in lawful self-defense is not a perpetrator because justifiable homicide is not a crime. RCW 9A.16.050.[1] Therefore, if a person convicted of manslaughter was actually engaging in lawful self-defense while causing the death, that person was misidentified as the perpetrator of the manslaughter crime. Indeed, a valid self-defense claim establishes that there was no perpetrator.

Accordingly, when DNA evidence supports the assertion that the jury's verdict wrongfully identified the petitioner as the perpetrator of a crime even though the petitioner had, in actuality, acted in lawful self-defense, such evidence is material to the "identity of the perpetrator" within the meaning of RCW 10.73.170(2)(b).

The State nevertheless contends that the superior court did not err in denying Braa's motion for failing to satisfy subsection (2)(b). This is so, the State

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[1] RCW 9A.16.050 reads:
Homicide—By other person—When justifiable. Homicide is also justifiable when committed either:
(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

asserts, because Braa's identity as the shooter was undisputed at trial and, therefore, the evidence sought to be tested cannot be material to the identity of the perpetrator in Braa's case.

The State's argument misreads subsection (2)(b) by confusing "shooter" with "perpetrator." Subsection (2)(b) does not require a showing that the evidence is material to the identity of the *shooter* but, rather, it requires materiality to the "identity of the *perpetrator*." RCW 10.73.170(2)(b) (emphasis added). "Shooter" and "perpetrator" are not synonymous.

The State's argument suffers from yet another failing. The State argues that postconviction DNA testing is not available in self-defense claims, even if the test result might establish the innocence of the petitioner. But the State cannot explain why the legislature would have enacted a statute designed to free some—but not all—innocent persons. We see no suggestion in RCW 10.73.170 of such a perverse legislative intent.

The superior court erred by denying Braa's motion on the ground that it did not satisfy RCW 10.73.170(2)(b).

B

Braa next contends that the superior court erred by denying his motion to conduct a DNA test of the blood spot on the basis that he did not demonstrate that a favorable DNA test result would establish his innocence on a more probable than not basis. We disagree.

The substantive requirement of RCW 10.73.170(3) is "'onerous.'" Crumpton, 181 Wn.2d at 261 (quoting Riofta, 166 Wn.2d at 367).

> The court shall grant a motion requesting DNA testing under this section if such motion is in the form required by subsection (2) of this section, and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.

RCW 10.73.170(3).

In determining whether a petitioner has satisfied this requirement, our Supreme Court has instructed that the petitioner is entitled to the "favorable presumption" of an "exculpatory DNA test result." Crumpton, 181 Wn.2d at 260. But in considering the petitioner's motion pursuant to subsection (3), the superior court

> should not ignore the evidence from trial. It must look at DNA evidence in the context of all the evidence against the individual when deciding the motion. Riofta, 166 Wn.2d at 368. It is only within the context of the other evidence that the court can determine whether DNA evidence might demonstrate innocence.

Crumpton, 181 Wn.2d at 262 (footnote omitted).

Accordingly, we "look to whether, considering all the evidence from trial and assuming an exculpatory DNA test result, it is likely the individual is innocent on a more probable than not basis." Crumpton, 181 Wn.2d at 260.

Assuming a favorable DNA test result and considering all of the evidence presented at trial, the record supports the superior court's conclusion that Braa did not establish his innocence on a more probable than not basis.

A DNA test of the drop of blood found in the parking lot of the tavern would determine that the blood came from one of three potential sources: Braa,

Whitney, or a third party. A favorable DNA test result would be that the DNA was Whitney's.[2]

Braa contends that, in addition to a favorable inference as to the DNA test result, he is further entitled to a favorable inference as to how Whitney's drop of blood came to be located in the parking lot.

However, Braa establishes no basis for such an inference. The statutory scheme places the burden of demonstrating the entitlement to a DNA test on the petitioner. RCW 10.73.170(2), (3). As an initial matter, Braa presents no argument or authority in support of his interpretation of RCW 10.73.170. Furthermore, neither our Supreme Court nor this court has held that a petitioner is entitled to additional inferences in his favor beyond the assumption of a favorable DNA test result. See, e.g., State v. Thompson, 173 Wn.2d 865, 875, 271 P.3d 204 (2012) (discussing whether DNA test results would exclude petitioner's DNA); Riofta, 166 Wn.2d at 370 (discussing that DNA test of white hat could result in two favorable test results for petitioner); State v. Gray, 151 Wn. App. 762, 774, 215 P.3d 961 (2009) (discussing possible favorable DNA test results). Nothing in the statutory scheme authorizes an inference in Braa's favor to be drawn from the inference of a favorable test result.

Braa wants it to be that the existence of a drop of Whitney's blood in the parking lot necessarily means that he suffered a gunshot at that spot. However, even if the drop of blood was Whitney's, this does not necessarily follow. That a

[2] If the DNA belonged to Braa, it would not be favorable to him because it would prove nothing about Whitney's location when he was shot. Similarly, if the DNA belonged to a third party, it would not support Braa's self-defense claim. If the DNA belonged to Whitney, however, it could support Braa's self-defense theory by placing Whitney's blood in the parking lot.

drop of Whitney's blood came from a gunshot wound he incurred while standing near Braa is not the only possible conclusion available. Indeed, there are three possibilities as to how a drop of Whitney's blood might have been deposited in the parking lot: from the fistfight between Whitney and Braa, from Whitney's gunshot wound, or from a third party unintentionally tracking Whitney's blood from one location—e.g., near the rear door of the tavern—into the parking lot.

At trial, Braa testified that, after he had been "lifted up and slammed" into a vehicle and was lying on the ground in fear for his life, he drew his gun, aimed upwards, and fired in the direction of the person standing in close proximity over him. This person was Whitney.

But even assuming that the drop of blood found in the parking lot was Whitney's, the evidence introduced at trial strongly contradicts Braa's self-defense theory. The evidence established that Whitney had been shot in the back at least three times. It further established that the bartender heard a burst of gunshots contemporaneously with Whitney crashing through the rear door of the tavern, 30 feet away from where Braa was seen to have fired the gunshots. In addition, the evidence established that there was a great deal of blood in the area of the rear door of the tavern.

Moreover, three witnesses testified that they saw Braa firing a burst of gunshots in the direction of the rear door of the tavern while he was alone in the parking lot. One of the three eyewitnesses also testified that he saw Braa alone in the parking lot both *before* and *after* the shots were fired. Two of the

eyewitnesses also testified that they saw Braa fire his gun while standing up, rather than while lying on the ground.

Bullet trajectory analysis testified to at trial further supported that the gunshots were fired from a standing position. Additional analysis of the indentations in the walls of the tavern and bullet fragments found in and near the rear door of the tavern established that multiple gunshots had been fired in that direction.

In addition, other testimony showed that Braa hid the gun in question under his porch. This supported the State's theory that Braa had a guilty conscience arising from his slaying of Whitney. Such a guilty conscience is incompatible with Braa believing that he had acted in lawful self-defense by shooting Whitney. Braa also admitted that, before he went to the tavern's parking lot, he had been angry because a "subhuman" had pushed him and wounded his pride.

On a more probable than not basis, a favorable DNA test result (that a drop of Whitney's blood was located in the parking lot) when considered alongside the evidence adduced at trial would not demonstrate that Braa is likely innocent. Accordingly, the superior court did not abuse its discretion by denying his request for DNA testing.[3]

[3] Braa filed a pro se statement of additional grounds for review. It raises no issue meriting analysis.

Affirmed.

We concur:

NIELSEN, BROMAN & KOCH P.L.L.C.

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