

NO. 66507-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MERLIN BELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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**A. ISSUE**

1. A trial court's decision to limit the scope of cross-examination of a witness for impeachment purposes is reviewed for an abuse of discretion. The trial court here allowed Bell to broadly impeach Johnathan Stanley as to bias and credibility, precluding Bell only from asking Stanley about a single ambiguous statement to police that was arguably inconsistent with Stanley's trial testimony, and that likely would have required Stanley to talk about an incident that the court had excluded. Did the trial court properly exercise its discretion in limiting the scope of cross-examination?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

Defendant Merlin Bell was charged by information and amended information with premeditated first-degree murder (Count I), second-degree murder (felony murder based on assault and intentional murder) (Count II), and second-degree unlawful possession of a firearm (Count III). Counts I and II included a firearm allegation. The State alleged that, on September 17, 2009, Bell shot and killed 19-year-old De'Von Winston-Parks at the Federal Way Transit Center. CP 1-9, 68-69.

Bell opted for a bench trial on Count III, unlawful possession of a firearm, and the trial court found him guilty on that count. 19RP<sup>1</sup> 6-23; CP 75-79. A jury was unable to agree on Count I, first-degree murder, and found Bell guilty of the lesser-included crime of first-degree manslaughter. 25RP 48; CP 262-64, 270. The jury found Bell guilty of second-degree murder as charged in Count II. 25RP 48; CP 269. The jury also found that Bell was armed with a firearm during the commission of the crimes in Counts I and II. 25RP 49; CP 265, 268.

At sentencing, the trial court vacated Count I, first-degree manslaughter. 2RP 615; CP 305. As to the remaining counts, the State recommended the high end of the standard range, 304 months. 2RP 589-90. Bell asked for a mitigated exceptional sentence. 2RP 608. Finding that Bell had acted out of revenge, not in self-defense, in killing Winston-Parks, and that Winston-Parks did not initiate the incident that took his life, the court declined to impose a mitigated exceptional sentence. 2RP 616-17. Noting Bell's lack of remorse, and the danger that Bell's actions

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<sup>1</sup> In referring to the verbatim report of proceedings, the State adopts the numbering system set out in the Brief of Appellant at page 1, footnote 1.

posed to the many people at the transit center on a busy afternoon, the court imposed 304 months of confinement. 2RP 618-20; CP 283-91.

## **2. SUBSTANTIVE FACTS.**

### **a. The Robbery Of Merlin Bell.**

On a September day in 2009, De'Von Winston-Parks decided to set up a robbery with his friend Johnathan Stanley; this decision would set Winston-Parks on a path that ended in his murder only days later. 5RP 95; 6RP 18; 7RP 68; 17RP 22-24. The target of the robbery was Merlin Bell, also known as "Liquid." 5RP 92, 95; 6RP 18; 7RP 64-65; 17RP 22, 24. Winston-Parks, using Demaris Jones's cell phone, called Bell, ostensibly to set up a purchase of marijuana. 5RP 98-99; 6RP 16-17; 7RP 70-72. The agreed-upon place for the transaction was across the street from a movie theatre located a few blocks from the Federal Way Transit Center. 5RP 100; 6RP 17-18; 7RP 72-73; 17RP 24.

On the afternoon of the robbery,<sup>2</sup> Demaris Jones, Gabriel Stockstill, Anthony Leonard, Johnathon Stanley and De'Von

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<sup>2</sup> No one was certain of the date of this robbery. The consensus was that Stanley and Winston-Parks robbed Bell three or four days before Winston-Parks was murdered. 5RP 95; 6RP 13; 7RP 68; 17RP 23.

Winston-Parks left the transit center and headed toward the movie theatre. 5RP 100; 6RP 18; 7RP 75-76; 17RP 25-26. When Jones and Leonard saw Bell approaching, they went the other way. 5RP 100-01; 6RP 18-19; 7RP 76-77. Stanley approached Bell, and pulled a gun out of his waistband. 17RP 26-27. Stockstill and Winston-Parks were behind Stanley as he approached Bell, but they left when Stanley pulled out his gun. 5RP 100; 17RP 26-27.

Stanley told Bell to empty his pockets and hand over the "weed" (marijuana), and Bell complied. 17RP 27-28. Stanley got about an ounce of marijuana from Bell, individually packaged in about 32 "dime bags." 17RP 28-29. Stanley also told Bell to remove the chain from around his neck and throw it on the ground. 17RP 28-29. Stanley did not ask Bell for money, nor did he take any. 17RP 29-30.

After the robbery, Stanley met up with Winston-Parks at some nearby apartments. 17RP 30-31. They divided the marijuana between them. 17RP 31. Stanley then left the area, catching a bus from the Federal Way Transit Center. 17RP 31-32.

Within a day or two of the robbery, Bell left a number of voicemails on Demaris Jones's cell phone. 5RP 107-08, 111; 6RP 27, 29; 7RP 85-86. The tone of the messages was serious, angry

and threatening. 6RP 31; 7RP 88; 8RP 28-29, 68, 73. Bell said things like: "This is your last song," "I hope you have fun with that bud," "If I see you guys at the transit center, you guys are done," "I'm going to pop you," ""On my life, you guys are dead," "You guys robbed the wrong person," and "I'm your worst nightmare." 5RP 111, 113-14, 115; 6RP 30; 7RP 88; 8RP 68. Stockstill and Leonard heard these messages. 5RP 107-17; 6RP 27-33. Jones played the messages for Winston-Parks before deleting them, and Leonard repeated the messages to Winston-Parks. 6RP 34; 7RP 92-93.

b. The Murder Of De'Von Winston-Parks.

Anthony Leonard, Demaris Jones and Tyler Irwin were all at the Federal Way Transit Center on the afternoon of September 17, 2009, the day Winston-Parks was shot and killed. 6RP 34-36, 40-41; 7RP 102; 8RP 75. All agreed that Winston-Parks had a backpack with him that day. 6RP 39; 7RP 117; 8RP 78.

Shortly after Leonard and Winston-Parks arrived at the transit center, Leonard saw Bell get off a bus; Leonard immediately notified Winston-Parks of Bell's arrival. 6RP 41-42. Winston-Parks responded by removing something wrapped in a bandanna from a

compartment of his backpack, and placing it in a mesh pocket on the side of the pack; Leonard believed that the wrapped object was a gun. 6RP 46-49. Winston-Parks then put his backpack back on. 6RP 49-50.

Bell was alone when he got off the bus. 6RP 42. When Bell saw Winston-Parks, Bell walked the other way, but soon returned accompanied by a second man. 6RP 44, 50. Bell walked quickly toward Winston-Parks, flashing a gun in his waistband and demanding to know where his chain was. 6RP 55-57. At this point, as Leonard recalled, Winston-Parks's backpack was on a nearby bench.<sup>3</sup> 6RP 62, 147-48.

A neutral eyewitness, Flora Black, heard Winston-Parks say to Bell, "I hear you want to see me, nigger." 10RP 21. Bell responded, "See you? See you?" Then Bell fired his gun at Winston-Parks, saying, "That's seeing you, nigger." 10RP 21. A

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<sup>3</sup> There was some disagreement about the location of Winston-Parks's backpack at the time of the confrontation with Bell. Like Leonard, Demaris Jones and Tyler Irwin believed that the backpack was on a bench at that point. 7RP 117-18; 8RP 88. Bell said in his statement to police that Winston-Parks "came towards me unzipping his bag." Ex. 229 at 50. A neutral eyewitness, Ferdaws Abbasi, said that the boy who got shot had a backpack on his back, but never took it off his back or attempted to reach into it during the confrontation. 9RP 154. Another neutral eyewitness, Flora Black, thought that the backpack was "over on the side" during the confrontation; she never saw the boy who got shot reach into the backpack. 10RP 25. The transit center video apparently shows Winston-Parks holding his backpack at the time of the confrontation with Bell. 23RP 34; Ex. 37.

second neutral eyewitness, Ferdaws Abbasi, heard a loud exchange, saw the two engaged in a fistfight, then saw Bell pull a gun from his waistband and shoot Winston-Parks. 9RP 146-50.

Others saw Bell hit Winston-Parks on the head with the gun before shooting him. 6RP 63-65; 7RP 119-20; 8RP 94. Bell himself confirmed this in his statement to police: ""I went towards him and pistol whipped and then I popped him." Ex. 229 at 51. An autopsy revealed that Winston-Parks had a blunt-force injury to the top of his head. 14RP 78-81.

Winston-Parks died from a single gunshot wound to the neck. 14RP 58, 67, 71-76, 90. None of the witnesses ever saw a gun in Winston-Parks's hands during the altercation. 6RP 71; 7RP 123; 8RP 93; 10RP 25; 19RP 144-45.

After Winston-Parks was shot, he looked at Tyler Irwin and said, "backpack." 8RP 102. Irwin grabbed the backpack and "took off." 8RP 109. When he later looked in the backpack, Irwin found a gun; it was not wrapped in a bandanna in the mesh pocket, but was inside a holster in one of the two front zippered compartments. 8RP 111-12, 117-18. There were two bullets in the gun. 8RP 120.

Gabriel Stockstill, who had not been at the transit center at the time of the shooting, agreed to dispose of the gun. 5RP 123-24. He took the gun home and put it in a shoebox. 5RP 126. About a week later, the police came to Stockstill's house asking about the gun, and Stockstill turned it over to them. 5RP 127-29; 15RP 17-18.

Immediately after the shooting, Bell ran from the scene.<sup>4</sup> 6RP 74; 7RP 122; 8RP 103; 9RP 152; 10RP 24. A K-9 unit tracked Bell to a brushy area nearby, where police apprehended him. 10RP 94-102; 13RP 116-30. The dog also located a gun along the track. 13RP 131-33.

Kenneth Martin testified in the defense case. Martin had know Bell for six or seven years and considered him "street family." 19RP 101-02. At Bell's request, Martin accompanied Bell as Bell approached Winston-Parks at the transit center. 19RP 143-44. Martin claimed to have heard Winston-Parks threaten to "smoke" Bell. 19RP 107. Martin never saw Winston-Parks with a gun. 19RP 108, 144-45.

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<sup>4</sup> Bell confirmed this in his statement to police: "I got him before he got me and then got up out of there." Ex. 229 at 49.

Bell did not testify at his trial. However, he gave a lengthy statement to police on the night of the shooting, a redacted version of which was admitted at trial.<sup>5</sup> 4RP 90-107; Ex. 229. Bell repeatedly denied being at the Federal Way Transit Center on September 17<sup>th</sup>. Ex. 229 at 20, 22, 23, 24, 28, 32-33, 35, 36. He denied firing a gun on that day. Ex. 229 at 40. After detectives suggested that maybe the other guy started the fight (Ex. 229 at 35, 39, 40, 41), Bell finally changed tack and asked, "How much time does self defense carry?" Ex. 229 at 44.

Bell then proceeded to tell a tale of self-defense. He said that Winston-Parks came at him, screaming "I'll pop you right now." Ex. 229 at 48. Bell said that Winston-Parks "came towards me unzipping his bag, so I came from my waist." Ex. 229 at 50. "I got him before he got me and then got up out of there." Ex. 229 at 49. "I felt that he was, he was going in his backpack to get a gun to shoot at me." Ex. 229 at 57. Bell admitted that Winston-Parks had "nothing in his hands," but said, "I'm hearing the threats so at that point I'm feeling like my life is in danger." Ex. 229 at 59. Bell

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<sup>5</sup> The jury viewed a redacted videotape of Bell's statement to police. 18RP 41; Ex. 227.

denied any intent to kill Winston-Parks: "I wasn't, I wasn't really trying to, trying to kill him, I was just trying to back him up off me because he threatened that he was going to kill me so I knew there were people watching, I just shot it once and ran." Ex. 229 at 62.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING THE SCOPE OF CROSS-EXAMINATION.**

Bell contends that, by limiting the scope of his cross-examination of Johnathan Stanley, the trial court violated his constitutional right to present a defense. Bell misconstrues the trial court's action. The court allowed Bell extensive cross-examination of Stanley as to bias and credibility, but precluded him from confronting Stanley with a single arguably inconsistent statement to police about *when* Stanley and Winston-Parks had robbed Bell. Given the ambiguous nature of Stanley's statements to police about the timing of the robbery, and the otherwise extensive impeachment of Stanley, the court did not abuse its discretion in limiting the scope of cross-examination as it did. For the same reasons, any error was harmless.

a. The Impeachment Of Johnathan Stanley.

Johnathan Stanley, who claimed to have wielded the gun in the robbery of Merlin Bell a few days before Winston-Parks was killed, gave a statement to police almost a year after the murder. Ex. 220. In that statement, Stanley told police that he and Winston-Parks had carried out another robbery earlier on the day that Winston-Parks was killed. Ex. 220 at 25-32. Stanley confirmed that Winston-Parks had a gun with him that day, a .38 revolver ("just some old cowboy gun"), in a holster. Ex. 220 at 29-30.

About two weeks after his statement to police, Stanley participated in a defense interview. Ex. 223. Again, Stanley said that he and Winston-Parks had carried out a robbery together on the day that Winston-Parks was killed. Ex. 223 at 27.

The defense moved for admission of Stanley and Winston-Parks's robbery of Bell a few days before the shooting; the defense believed that the robbery was relevant to Bell's self-defense claim, in that it showed the reasonableness of Bell's belief that Winston-Parks had a gun and was prepared to use it. 2RP 287-89. The State agreed that the robbery of Bell was admissible on that basis. 2RP 293.

The defense also wished to present evidence of other robberies that Winston-Parks and Stanley had engaged in as part of the *res gestae*, and to show Winston-Parks's "violent disposition and aggressive nature." CP 63-64. Specifically, the defense asked the court to admit evidence that Stanley and Winston-Parks had robbed and shot someone named Andre Green only hours before Winston-Parks was killed. 2RP 280-84.

The State objected to evidence of this incident because Green had failed to pick either Winston-Parks's or Stanley's picture out of a photo montage. 2RP 295-96. Moreover, there was no evidence that Bell had any knowledge of this incident; thus, it could not have affected his state of mind in any way relevant to his self-defense claim. 2RP 296.

The trial court found no nexus between Winston-Parks and the Green robbery. 2RP 342. Thus, the court found, the Green incident was not relevant to the shooting at the transit center later that day. 2RP 343. The court accordingly denied the defense motion to admit evidence of the Green robbery. 2RP 343.

Just prior to Stanley's testimony at trial, the parties addressed the scope of his testimony. 16RP 142. The defense wished to cross-examine Stanley about his close relationship with

Winston-Parks, to establish Stanley's bias and his interest in the outcome of Bell's trial. 16RP 143. The defense also wished to cross-examine Stanley as to a series of armed robberies allegedly carried out by Stanley and Winston-Parks, including a robbery earlier on the same day on which Winston-Parks was shot and killed. 16RP 143-44.

The court adhered to its earlier ruling that evidence of robberies other than the robbery of Bell days before the murder would not be allowed. 16RP 161-62. The court agreed to allow impeachment of Stanley with three prior juvenile convictions, in addition to his adult convictions, under ER 609.<sup>6</sup> 16RP 163-67.

Stanley testified that he was Winston-Parks's best friend. 17RP 20-21. He acknowledged that he was angry at Bell because Bell had killed his best friend. 17RP 38. Stanley confirmed that he was acquainted with Bell before the shooting, and that he had

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<sup>6</sup> Under ER 609, evidence of juvenile convictions is "generally not admissible." ER 609(d). The court has discretion, however, to admit juvenile convictions of a witness other than the accused "if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." Id.

disliked Bell from the outset. 17RP 41-45. After Stanley learned of the shooting, he went looking for Bell, fully intending to kill him.

17RP 74.

Stanley also acknowledged the robbery that he and Winston-Parks carried out against Bell in the days before the shooting at the transit center. 17RP 22-23. While Winston-Parks set the robbery up and accompanied Stanley to the agreed-upon meeting place with Bell, it was Stanley who actually wielded a loaded gun to convince Bell to hand over his marijuana. 17RP 23-30.

Stanley acknowledged that he was serving a 75-month sentence for first-degree robbery and first-degree burglary. 17RP 32, 76. He acknowledged a prior adult conviction for first-degree theft, and prior juvenile convictions for taking a motor vehicle, residential burglary, and first-degree theft. 17RP 33. He acknowledged that he was currently under investigation for attempted murder and first-degree assault. 17RP 76.

Defense counsel further impeached Stanley with several inconsistent statements. At trial, Stanley denied demanding or obtaining any money from Bell during the robbery. 17RP 29-30, 70. Yet in his statement to police, Stanley had said that he got about

\$80 from Bell. 17RP 70-71; Ex. 220 at 19, 21, 24. Stanley said at trial that Winston-Parks was not armed during the robbery of Bell, but acknowledged that he had earlier indicated that Winston-Parks *always* had a gun. 17RP 71-72; Ex. 223 at 28-29. At trial, Stanley denied threatening to kill Bell when they were in custody together, but agreed that he had earlier said, "If I don't get you, them guys gonna get you." 17RP 75-76; Ex. 223 at 35.

The defense nevertheless wished to impeach Stanley with an additional allegedly inconsistent statement. Stanley testified at trial that the robbery of Bell took place about four days before Winston-Parks was shot. 17RP 22-23. Defense counsel believed that Stanley had earlier said that the robbery of Bell had occurred on the morning of the day Winston-Parks was shot. 17RP 58. Counsel relied on the following exchange in Stanley's statement to police:

**Stanley:** [T]he last time I actually spoke to [Bell] is when Devon called me. That morning when he got killed, he called me that morning and he was like yeah man I got a lick and I know what he was talking about so I was like yeah sure. You know I said I don't care man, he said I ain't got no money, I'm down, and my uncle's tripping, he gonna try to kick me out, I got nowhere to go. I was like maybe you can come to my baby's mom house and live with me if you want to.

He was like man no, I ain't gonna do that. I'm not gonna cause you no trouble man, I just need some money, I said yeah, come on. He met me in Federal Way at the transit center, then he explained to me everything.

**Det. Kim:** Okay

**Stanley:** from there

**Kim:** you're talking about the day of the incident?

**Stanley:** Yes

**Kim:** Okay and what time did he call you that day?

**Stanley:** Probably about ten o'clock in the morning, probably nine actually, probably about nine

**Kim:** Okay, so you met him at the transit center?

**Stanley:** Yeah, I met him at the transit center, my home girl Yana, she drove me over there.

**Kim:** Okay and when you got there, what did you guys do and where was he?

**Stanley:** He happened to call me.

**Kim:** Okay

**Stanley:** Devon was at the transit, he happened to call me and he was talking and everything, don't you know I have my gun, cause that's what I do and he his, but he didn't use his gun. He didn't even participate in the robbery, I did.

**Kim:** Okay and so when you say "the robbery" of that day, what are you talking about?

**Stanley:** About Liquid, we robbed him

**Kim:** Okay, when did you rob him? Was it that morning?

**Stanley:** That morning

**Kim:** Okay and was it several days prior

**Stanley:** It was prior to that, it was prior to that.

Ex. 220 at 8-9.

Subsequent to this somewhat ambiguous account, Stanley clarified that the robbery of Bell took place *before* the day on which Winston-Parks was shot and killed. Later in the same interview, after Stanley had described the robbery of Bell in some detail, Detective Kim asked Stanley when he next spoke with Winston-Parks. Ex. 220 at 25. Stanley responded, "Not till later when he called me another morning, *the same morning when he got killed*, he called me and had *another* lick." Id. (emphasis added).

The State argued that the record showed "some confusion about which incident and which day they were talking about"; to clear up the confusion, Stanley would be forced to talk about the robbery on the day of Winston-Parks's death, evidence of which had been excluded. 17RP 59-61. The trial court agreed that

Stanley seemed to be confusing the two robberies. 17RP 61. The court did not agree with the defense contention that Stanley's answers constituted an inconsistent statement. 17RP 68. Finding that Stanley could not respond to the proposed line of questioning without talking about the excluded robbery, the court declined to allow impeachment along these lines. 17RP 68-69.

b. Cross-Examination Was Properly Limited.

Determinations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of that discretion. State v. Dixon, 159 Wn.2d 65, 75, 147 P.3d 991 (2006). An appellate court will review a trial court's decision to limit cross-examination for impeachment purposes for an abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010). A reviewing court will find an abuse of discretion where the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. Dixon, 159 Wn.2d at 75-76.

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice

or confusion of the issues. State v. Darden, 145 Wn.2d 612, 625, 41 P.3d 1189 (2002); ER 403. A defendant's right to put on relevant evidence may be outweighed by the State's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the trial. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

The trial court properly exercised its discretion in this instance. The court allowed the defense to impeach Johnathan Stanley as to bias by bringing out the fact that Stanley considered De'Von Winston-Parks to be his best friend, and the fact that Stanley disliked Merlin Bell and even intended to kill him after Bell shot Winston-Parks. The court also allowed the defense to impeach Stanley's credibility with his prior convictions, including presumptively inadmissible juvenile convictions, as well as with several statements that Stanley had made to police that were inconsistent with his testimony at trial.

Moreover, the trial court properly recognized that allowing the defense to impeach Stanley with statements about the timing of the Bell robbery would require Stanley to talk about a previously-excluded robbery that took place on the day of the shooting, an

incident that the court had correctly found was not relevant. Because there was no evidence that Bell knew of that robbery, or that Winston-Parks wielded a gun during that robbery, evidence of that robbery could not support Bell's claim of self-defense based on his alleged fear that Winston-Parks had (and might be willing to use) a gun at the transit station. Evidence of that robbery would thus serve only to confuse the issues or mislead the jury, leading to unfair prejudice to the State. See ER 403; Darden, 145 Wn.2d at 625 (even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury). The additional impeachment was properly excluded.

While Bell characterizes the issue as the constitutional right of a criminal defendant to present a defense, citing the Sixth and Fourteenth Amendments and Article I, § 22 of the Washington Constitution, the cases on which he relies do not support this claim.

For example, in State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), the trial court precluded Jones, who was charged with rape, from testifying that, on the night of the alleged rape, the alleged victim used alcohol and cocaine, and engaged in

consensual sex with Jones and two other men. The appellate court found a Sixth Amendment violation, characterizing the excluded evidence as "Jones's entire defense." Jones, 168 Wn.2d at 721. See also Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed.2d 636 (1986) (defendant was precluded from putting on evidence about the circumstances under which his confession to murder was obtained); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973) (defendant was precluded from introducing evidence that another person had admitted to the murder with which defendant was charged); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed.2d 1019 (1967) (defendant was precluded from introducing the testimony of an accomplice, who would have testified that the defendant ran away before the accomplice fired the fatal shot).

Here, by contrast, Bell was not prevented from impeaching Stanley. To the contrary, the trial court allowed broad impeachment of Stanley, limiting the impeachment as to a single statement only. Bell's constitutional right to present his defense was not infringed under these circumstances.

c. Any Error Was Harmless.

An erroneous ruling with respect to the admissibility of evidence requires reversal only if there is a reasonable probability that the testimony would have changed the outcome of the trial. Aguirre, 168 Wn.2d at 361.<sup>7</sup> The defense was allowed to impeach Johnathan Stanley as to bias and credibility on a number of bases. The sole basis on which Bell rests his claim of error, Stanley's apparent momentary confusion about the times of the two robberies under discussion in his police interview, would have added little, if anything, to the weight of the impeachment. Under these circumstances, there is no reasonable probability that the exclusion of this evidence, even if error, affected the outcome of Bell's trial. Any error was harmless.

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<sup>7</sup> The Aguirre opinion uses the word "possibility" in place of "probability." Aguirre, 168 Wn.2d at 361. Aguirre cites State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006), for this standard. Aguirre, at 361. Fankhouser, in turn, cites State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Fankhouser, at 695. Bourgeois, however, recites the correct standard: nonconstitutional error is not grounds for reversal "unless, within reasonable *probabilities*, the outcome of the trial would have been materially affected had the error not occurred." Bourgeois, at 403 (emphasis added).

**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Bell's conviction for Murder in the Second Degree.

DATED this 26<sup>th</sup> day of March, 2012.

Respectfully submitted,

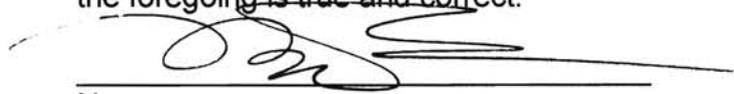
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Christopher H. Gibson**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. MERLIN BELL**, Cause No. **66507-3-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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