74859-9

FILED
October 25, 2016
Court of Appeals
Division I
State of Washington

74859-9

No. 74859-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERRY ALLEN FLUKER

Appellant.

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR AND ISSUES 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 8

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Fluker rendered criminal assistance when he simply drove his brother home. 8

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt. 8

b. The State presented insufficient evidence to prove that Mr. Fluker provided a means of avoiding discovery or apprehension, as required to support a conviction for rendering criminal assistance. 9

c. The remedy is reversal of the conviction and remand for dismissal of the charge with prejudice. 15

2. The trial court erred in sustaining the State's objection to Mr. Fluker's discussion of relative burdens of proof in closing argument. 15

a. Mr. Fluker attempted to present a standard closing argument emphasizing the relative burdens of proof, but the trial court sustained a State's objection. 15

b. The trial court erred and violated Mr. Fluker's Sixth and Fourteenth Amendment rights by limiting his closing argument. 17

c. A new trial is required because the State cannot prove the error was harmless beyond a reasonable doubt..... 19

3. If the State prevails, this Court should decline to order costs. 20

D. CONCLUSION 21

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989)..... 9

State v. Blazina, 182 Wn. 2d 827, 344 P.3d 680 (2015)..... 21

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015) 12

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009)..... 9

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 15

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000) 20

State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000) 17

State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011) 17

State v. Vasquez, 178 Wn. 2d 1, 309 P.3d 318 (2013)..... 9

Washington Court of Appeals Decisions

State v. Hummel, ___ Wn. App. ___, ___ P.3d ___ (No. 72068-6-I, filed 10/17/16)..... 8

State v. Nelson, 190 Wn. App. 261, ___ P.3d ___ (2016)..... 12, 13

State v. Osman, 192 Wn. App. 355, 366 P.3d 956 (2016)..... 17, 19

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016)..... 20

United States Supreme Court Decisions

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 19

Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) 17

In re Winship, 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 8

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970) .. 8

Decisions of Other Jurisdictions

United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978) 14

Constitutional Provisions

Const. art. I, § 3 9

U.S. Const. amend. VI 17

U.S. Const. amend. XIV 9, 17

Statutes

RCW 9A.76.050 ..... 10, 12, 13

Rules

RAP 14.2 20

RAP 15.2 20

Other Authorities

www.courts.wa.gov 18

A. ASSIGNMENTS OF ERROR AND ISSUES

1. In violation of the Fourteenth Amendment and article I, section 3, the State presented insufficient evidence to convict Mr. Fluker of rendering criminal assistance where Mr. Fluker simply drove his brother home after the incident.

2. During closing argument, the trial court erred and violated Mr. Fluker's Sixth and Fourteenth Amendment rights when it prohibited counsel from explaining that "beyond a reasonable doubt" is a higher standard of proof than the standards applied in other circumstances.

B. STATEMENT OF THE CASE

Wednesday, August 12, 2015 began the way most weekdays did for Jerry Fluker. Because he was a manager at a bakery, he woke up early to go to work. RP (2/2/16) 1121. After work, he went back to his parents' home, where he lived with his mother, father, and younger brother Marque. RP (2/1/16) 995-97; RP (2/2/16) 1120, 1122. Jerry Fluker was in the process of moving from his parents' apartment to his girlfriend's home, because his girlfriend was pregnant with their first child. RP (2/1/16) 1023; RP (2/2/16) 1120. That Wednesday, Mr. Fluker and his girlfriend planned to go shopping for a baby shower after work. RP (2/2/16) 1123.

When Mr. Fluker got home that day, he was exhausted. RP (2/2/16) 1123. But instead of resting while waiting for his girlfriend to finish work, he helped his brother run errands. Marque was having car problems, so Jerry and Marque took Jerry's car to buy new tires for Marque's car. RP (2/1/16) 978; RP (2/2/16) 1123. Their nephew Jayvon Grayson went with them. RP (2/1/16) 978; RP (2/2/16) 1120, 1124.

After buying tires they went to the location where Marque had parked his car, but they were unable to put the tires on properly. RP (2/1/16) 979; RP (2/2/16) 1123. They were on their way back home when Marque said he wanted to stop at a marijuana dispensary. RP (2/1/16) 979-80; RP (2/2/16) 1124. They stopped at a strip mall and Marque went to the dispensary. RP (2/1/16) 981. Jerry Fluker did not buy any marijuana, but he was hungry so he went to get some chicken at Ezell's next door. RP (1/27/16) 688; RP (2/2/16) 1125. After he paid for his order and got his ticket, he went back outside to wait. RP (2/2/16) 1125; Ex. 21 at ~ 4:25.[1]

When he went outside, he saw his brother and nephew chatting with three young men in the parking lot. RP (2/2/16) 1125. At least two of the three young men, LeMaun Lancaster and Jalen Coleman, were friends and former classmates of Marque Fluker. RP (1/27/16) 579; RP (2/1/16)

---

[1] In exhibit 21, choose the folder "Upright GHL Medical Surveillance Video," then run the video LHV1008_ch3_main_20150812223000_20150812224826.avi.

981; RP (2/2/16) 1125. Jalen Coleman was also friends with the Flukers' nephew Jayvon Grayson, because Coleman had dated Grayson's sister. RP (1/27/16) 581.

Like Marque Fluker, LeMaun Lancaster had bought marijuana at the dispensary. RP (1/21/16) 340. In the parking lot, Mr. Lancaster was distributing flyers for a rap group, but Jayvon Grayson did not want to take the flyers and said he did not like the group. RP (1/27/16) 589, 606-08.

Mr. Lancaster and Mr. Grayson started "trash-talking" in a joking manner, but eventually the argument grew serious. RP (1/27/16) 589, 608. Mr. Lancaster initiated a physical fight, punching Mr. Grayson. RP (1/27/16) 590; ex. 21 at ~7:50. Mr. Coleman encouraged Mr. Grayson to fight back "like a man," and Mr. Lancaster and Mr. Grayson fought for a while. RP (1/27/16) 590. Eventually, others stopped the fight. Mr. Coleman grabbed Mr. Grayson, while Marque Fluker grabbed Mr. Lancaster. RP (1/27/16) 591.

During the interaction, Jerry Fluker had gone back inside to pick up his chicken, and then "was just kind of standing off to the side." RP (1/27/16) 591; RP (2/2/16) 1127. He eventually put his chicken in the car and joined the group. RP (2/2/16) 1129; Ex. 21 at ~ 9:30; ex. 21 at ~ 10:25.

Mr. Lancaster and Mr. Grayson started hitting each other again. They eventually stopped, but all of the young men continued arguing and posturing. RP (2/2/16) 1131; Ex. 21 at ~ 10:30-11:15. Mr. Lancaster and Mr. Grayson again exchanged heated words, and the Fluker brothers separated them. Ex. 21 at ~ 11:15-11:30.

Mr. Lancaster spun his arms in circles and again tried to approach Mr. Grayson, but Jerry Fluker and Mr. Coleman stepped between them. Ex. 21 at ~ 11:30-11:45. Mr. Coleman escorted Mr. Grayson away from the group and back to Mr. Fluker's car. RP (1/27/16) 591-92, 620; *see* ex. 21 at ~11:40-46. Jerry Fluker briefly held onto Mr. Lancaster's shirt, but then let go. Ex. 21 at ~ 11:45. Mr. Lancaster then pushed Jerry and punched him in the face. Ex. 21 at ~ 11:50; RP (2/2/16) 1134.

According to the Fluker brothers and Bruce Johnson, who owned a car wash on the lot, Mr. Lancaster then told his friend "Tank" to get his gun. RP (2/1/16) 987; RP (2/2/16) 1086, 1134. Others at the strip mall did not hear this statement. RP (1/21/16) 294, 335-37; RP (1/25/16) 404; RP (1/27/16) 592, 622. However, most of them could not hear what was said at all; they could only hear general yelling. RP (1/21/16) 346-47; RP (1/25/16) 404. After Mr. Lancaster punched Jerry Fluker, Marque Fluker pulled out a gun and shot Mr. Lancaster multiple times. Ex. 21 at ~ 11:50-55; RP (2/1/16) 987-88.

Jerry Fluker got back into his car, where Jalen Coleman had already ushered Jayvon Grayson into the backseat. Ex. 21 at ~12:00-12:15. Mr. Coleman then went to aid Mr. Lancaster. Marque Fluker, who had gotten into the passenger seat of Jerry's car, briefly got out of the car, but Mr. Coleman told him to get back in the car and leave with his brother. RP (1/27/16) 623-25; Ex. 21 at ~ 12:20-12:40.

As they drove away, Marque Fluker called 911 and told the operator he had shot someone. RP (1/25/16) 447-50; RP (2/1/16) 990, 1036-38. He said he would be at a Safeway, but after spending about a minute at the grocery store, the young men went home. RP (1/25/16) 447-49; RP (2/1/16) 990. Jerry Fluker dropped his brother and nephew off at home, then parked his car. RP (2/2/16) 1139. He called his girlfriend, who picked him up and took him to their home. RP (2/2/16) 1140. Jerry Fluker did not have any contact with Marque Fluker after dropping him off at home. RP (2/1/16) 1035-36; RP (2/2/16) 1142.

Although Jerry Fluker had dropped Marque Fluker at home, Marque was not there when police arrived the next day. RP (1/25/16) 532-34. Mr. Lancaster had died of his wounds, and the police were investigating a homicide. But sometime after Jerry dropped Marque off at home, a friend of Marque's had driven him back to his car. RP (2/1/16)

990-91. Marque then went to stay with his friend in North Seattle. RP (2/1/16) 998, 1035.

In the meantime, the Flukers' parents had contacted an attorney, but the attorney said he would not be available until Monday and that the brothers should wait until then to do anything. RP (2/2/16) 1141-43, 1157.

On Monday, August 17, both Marque Fluker and Jerry Fluker reported to the police station. RP (1/25/16) 535-36, 544-45. Jerry Fluker believed the police would want to speak with him because he was both a victim of Mr. Lancaster's assault and a witness to his brother's shooting. RP (2/2/16) 1156. But the police arrested him and charged him with first-degree rendering criminal assistance. Supp. CP ___ (Sub no. ___) (First Amended Information).

Jerry Fluker was tried jointly with his brother, who was charged with second-degree murder. *Id*. Jerry Fluker testified that he was scared after the shooting because he thought that someone else had a gun and he feared for his own safety and that of his brother and nephew. RP (2/2/16) 1135-37, 1143. Other witnesses similarly testified that they were afraid and wanted to leave the area for their own safety. RP (1/21/16) 347; RP (1/27/16) 613, 623; RP (1/28/16) 717. Consistent with all of the other evidence presented, Jerry Fluker also testified that he simply dropped his

brother off at home, where the police first looked for him. RP (1/25/16) 532-34; RP (2/1/16) 908-15; RP (2/2/16) 1139-40.

When presenting closing arguments, Jerry Fluker's attorney tried to explain the different standards of proof to the jury, but the prosecutor objected and the court sustained the objection. RP (2/3/16) 43-44, 51. During deliberations, the jury sent a question to the court regarding the mental state required for rendering criminal assistance, and the court referred the jury to the instructions. CP 65-66. The jury ultimately convicted Marque Fluker of the lesser offense of first-degree manslaughter, and convicted Jerry Fluker of first-degree rendering criminal assistance. CP 67; RP (2/4/16) 8-9. But the jury wrote another note to the judge expressing its hope for a lenient sentence for Jerry Fluker. CP 63; RP (2/19/16) 26.

Jerry Fluker had an offender score of zero and was sentenced to nine months in jail (time served). CP 69-71. He lost his job while he was in jail, and he now has a felony on his record. CP 68. His baby was born while he was in jail awaiting trial. RP (2/1/16) 1023.

C. ARGUMENT

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Fluker rendered criminal assistance when he simply drove his brother home.

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

> [A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

State v. Hummel, ___ Wn. App. ___, ___ P.3d ___ (No. 72068-6-I, filed 10/17/16) (quoting *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970)).

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The beyond a reasonable doubt standard is designed to impress "upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson*, 443 U.S. at 315. It "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Id.*

A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. U.S. Const. amend.

XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318; *State v. Vasquez*, 178 Wn. 2d 1, 6, 309 P.3d 318 (2013). Where a determination of sufficiency of the evidence requires statutory construction, review is de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

b. <u>The State presented insufficient evidence to prove that Mr. Fluker provided a means of avoiding discovery or apprehension, as required to support a conviction for rendering criminal assistance</u>.

The State charged Mr. Fluker with rendering criminal assistance in the first degree, alleging:

> That the defendant JERRY ALLEN FLUKER in King County, Washington, on or about August 12, 2015, with intent to prevent, hinder or delay the apprehension or prosecution of Marque Deandre Fluker, did render criminal assistance to Marque Deandre Fluker, a person who he knew committed Murder in the Second Degree, a Class A felony, or Assault in the First Degree, a Class A felony, by providing such person with transportation, disguise, or other means of avoiding discovery or apprehension;
>
> Contrary to RCW 9A.76.070(1), (2)(a) and 9A.76.050, and against the peace and dignity of the State of Washington.

Supp. CP ___ (Sub no. ___) (First Amended Information).

Consistent with the First Amended Information, the statute provides, in relevant part:

> [A] person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime …, he or she:
>
> …
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension.

RCW 9A.76.050.

The State presented insufficient evidence to prove the above crime. The evidence viewed in the light most favorable to the State showed that Jerry Fluker simply drove Marque Fluker home. RP (2/2/16) 1139. While in the car, Marque Fluker called 911 and admitted to the shooting. RP (1/25/16) 447-50; RP (2/1/16) 990, 1036-38. Marque Fluker apparently told the operator that he would be at a Safeway, but instead he went home. RP (1/25/16) 447-49; RP (2/1/16) 990. Jerry Fluker dropped Marque off at his apartment, and that is the last contact he had with his brother before he was arrested. RP (2/1/16) 1035-36; RP (2/2/16) 1142.

After dropping Marque off at home, Jerry Fluker parked his car, then called his girlfriend to pick him up. RP (2/2/16) 1140. Although Marque apparently ended up going to a friend's house and staying there, no evidence was presented that Jerry knew this occurred, let alone that he

had anything to do with it. RP (2/1/16) 990-91, 998, 1035-36; RP (2/2/16) 1142.

The evidence further showed that the Flukers' parents contacted an attorney either the next day or the day after. The attorney told them he was not available until Monday and that the brothers should wait until he was available to contact the police. RP (2/2/16) 1141-43, 1157.

On Monday, the brothers contacted the police as directed by their lawyer. RP (1/25/16) 535-36, 544-45. At this point, Jerry Fluker believed he was wanted only as a witness. RP (2/2/16) 1156. He had been the victim of LeMaun Lancaster's assault and a witness to his brother's shooting of Mr. Lancaster.

Jerry Fluker explained to the jury that after he was punched and his assailant was shot, he was scared at the prospect of additional violence, and wanted to leave. However, he could not leave without his brother and nephew, both of whom he had driven to the strip mall and whose safety he felt responsible for. RP (2/2/16) 1135-37, 1143.

To be sure, after struggling with the question of whether the State proved the requisite intent, the jury ultimately entered a finding of guilty. CP 65-67. However, even if the thin evidence of intent is deemed sufficient, the State did not present sufficient evidence that Mr. Fluker

provided a "means of avoiding discovery or apprehension," as required to support the conviction.

The word "transportation" in the statute must be construed in light of the surrounding words and phrases. *See State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (statutory construction requires consideration of "the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole."). Proof of providing transportation is not enough; the transportation must be used as a "means of avoiding discovery or apprehension." RCW 9A.76.050(3).

This Court's opinion in *State v. Nelson* is instructive. *See State v. Nelson*, 190 Wn. App. 261, ___ P.3d ___ (2016). There, this Court interpreted the statute prohibiting theft of access devices. *Id.* at ¶ 1. The relevant portion of the statute defined "access device" as "any card, plate, code, account number, or other means of account access …." *Id.* at ¶ 10 (quoting RCW 9A.56.010(1)). The State argued that the word "card" was not limited by the phrase "means of account access," but this Court disagreed. *Id.*

> The plain meaning of the statute requires all access devices to be means of account access. The word "other" does not modify only the phrase "account number." The comma before the qualifying phrase "or other means of account access" is evidence that this phrase modifies each item in

> the list "card, plate, code, account number." *See State v. Bunker*, 169 Wash.2d 571, 578, 238 P.3d 487 (2010). The phrase "other means of account access" clearly modifies "card, plate, code, [and] account number," such that each of these devices must be a means of account access to fall under the statute.

Id. at ¶ 11. Accordingly, it was not enough for the State to prove the defendant used a "card;" rather, the card had to be used as a "means of account access." *See id.*

Similarly here, the plain meaning of the statute requires more than proof that the person provided transportation. The transportation must be used as a "means of avoiding discovery or apprehension." RCW 9A.76.050(3); *see Nelson* at ¶¶ 10-11. The State failed to prove that Jerry Fluker provided a means of avoiding discovery or apprehension, because it was undisputed that Mr. Fluker simply drove his brother home, which is where the police went to look for him. RP (1/25/16) 532-34; RP (2/1/16) 908-15. The fact that Marque Fluker went to a different location after his brother dropped him at home has nothing to do with Jerry Fluker. The State could have charged whoever took Marque Fluker into hiding with rendering criminal assistance, but it did not do so. *See* RCW 9A.76.050(1). There was no evidence that Jerry Fluker was involved. RP (2/1/16) 990-91, 998, 1035-36; RP (2/2/16) 1142.

Furthermore, the conviction may not be affirmed by relying in any part on Mr. Fluker's exercise of his constitutional right to counsel. The State implied that the delay between the shooting Wednesday and the reporting to station on Monday could somehow be considered with respect to rendering criminal assistance.[2] But the evidence showed that an attorney was consulted as early as Thursday and at the latest on Friday, and that counsel advised the Flukers not to contact the police until Monday. RP (2/2/16) 1141-43, 1157. The delay attributable to the exercise of the right to counsel may not be used to support a conviction for rendering. *Cf. United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (reversing conviction for federal equivalent to rendering criminal assistance, because conviction was improperly based in part on the exercise of constitutional right to refuse warrantless entry into home).

---

[2] The prosecutor employed the classic rhetorical device of paralipsis by mentioning the delay in reporting while simultaneously acknowledging that it is "fine" to wait for counsel to be available:

> [PROSECUTOR]: He knew by the next day that the police had impounded his car and that the police were there and looking for them and he didn't turn himself in then. Now, he says, you know, I waited to turn myself in because I wanted my attorney to be available and that's fine. But don't say it is because you are scared.

RP (2/3/16) 22.

In sum, the conviction for rendering criminal assistance is not supported by sufficient evidence and violates Mr. Fluker's constitutional right to due process of law. This Court should reverse.

c. The remedy is reversal of the conviction and remand for dismissal of the charge with prejudice.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Mr. Fluker accordingly asks this Court to reverse his conviction and remand for dismissal of the charge with prejudice. This Court need not reach the alternative argument below.

2. The trial court erred in sustaining the State's objection to Mr. Fluker's discussion of relative burdens of proof in closing argument.

a. Mr. Fluker attempted to present a standard closing argument emphasizing the relative burdens of proof, but the trial court sustained a State's objection.

During closing argument, Mr. Fluker's attorney emphasized to the jury that the State bore the burden of proving the elements of the crime beyond a reasonable doubt. Defense counsel explained that the beyond a reasonable doubt standard is "a very high standard, a standard that is the highest of all the standards we use in the legal system." RP (2/3/16) 43. She went on:

> If you think about standards of proof, kind of starting at the lowest level possible, you would have reasonable suspicion, and that's something an officer would use to look at a scenario to decide whether or not they have a basis to stop, to talk, to investigate a case, whether they have something to submit to the prosecutor for charges. Higher than that, you have probable cause. Probable cause is where a judge would find that there are sufficient allegations to let a case - -

RP (2/3/16) 43-44.

At this point, the prosecutor inexplicably objected and the trial court sustained the objection:

> [PROSECUTOR]: I'm going to object at this point, it is sounding an awful lot like telling the jury –
>
> THE COURT: Sustained. The jury has the law, you should focus on the Court's instructions.
>
> [DEFENSE COUNSEL]: Well, your Honor, I believe that –
>
> THE COURT: Objection sustained.

RP (2/3/16) 44.

After the parties completed closing arguments, Mr. Fluker's attorney explained that her argument had been improperly limited:

> [DEFENSE COUNSEL]: I wanted to make sure I made a record, since I wasn't allowed to -- when the jury was present, that I felt it was appropriate argument for the defense to be able to put the burden of proof levels in context, and I have done this routinely throughout my career and never been told I couldn't. So I was a little bit shocked, but I do think it was appropriate argument. I wanted to make sure that that is in the record if there happens to be an appeal.

RP (2/3/16) 51. The court responded that defense counsel is permitted to compare the beyond a reasonable doubt standard to the preponderance standard only and may not compare it to other standards. RP (2/3/16) 51.

b. The trial court erred and violated Mr. Fluker's Sixth and Fourteenth Amendment rights by limiting his closing argument.

The trial court erred in sustaining the prosecutor's objection to Mr. Fluker's proper closing argument. Improper limitation of closing argument implicates both the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law. *State v. Osman*, 192 Wn. App. 355, 368-69, 366 P.3d 956 (2016); U.S. Const. amends. VI, XIV.

Closing argument is the "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Thus, defense counsel must be afforded "the utmost freedom in the argument of the case." *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). Certainly, she must be permitted to make accurate statements of law. *Cf. State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43 (2011) (holding prosecutor's closing argument discussing burden of proof was proper, "particularly given the latitude that a prosecutor has in arguing from the evidence during closing argument."); *see Osman*, 192

Wn. App. at 358 (holding that trial court improperly limited defendant's closing argument by sustaining prosecutor's objection to defendant's accurate description of the beyond-a-reasonable-doubt standard).

Mr. Fluker's attorney was simply making accurate statements about the law when she explained the relative burdens of proof to the jury. The court itself tells jurors about the different standards of proof applicable to the justice system. The front page of courts.wa.gov includes a link to information for jurors:

> Juror Website
> Summoned for jury duty? Click above to learn more on jury service, what to expect, and how courts in Washington State operate. . .

www.courts.wa.gov. Clicking the Juror Website link leads to a page with links to several resources, including a "Glossary of Terms." The Glossary of Terms includes definitions for "probable cause," "preponderance of evidence," and "reasonable doubt."[3] Thus, our justice system obviously believes it is appropriate for jurors to be aware of the various standards and burdens of proof.

In sum, Mr. Fluker's attorney was simply attempting to convey legally correct information to the jury in closing argument. She was doing so in an effort to explain the gravity of the standard of proof applicable to

[3] http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.termguide&altMenu=Term.

criminal cases. The trial court erred and violated Mr. Fluker's constitutional rights to counsel and to due process when it sustained the State's objection to this proper argument. *See Osman*, 192 Wn. App. at 377 ("We hold the defense argument is not an improper characterization of the reasonable doubt standard. The court erred in sustaining the objection as inaccurate and limited the scope of defense closing argument.").

c. A new trial is required because the State cannot prove the error was harmless beyond a reasonable doubt.

Because the improper limitation of closing argument violates a defendant's constitutional rights, a new trial is required unless the State proves beyond a reasonable doubt that the verdict would have been the same absent the error. *Osman*, 192 Wn. App. at 377-78; *see Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this heavy burden here. As explained in section (1) above, the evidence against Mr. Fluker was weak. The jury struggled with the question of his guilt, and sent out questions attempting to clarify the mens rea. CP 65. The jury also apparently advocated for a light sentence because of Jerry Fluker's limited culpability. CP 63; RP (2/19/16) 26. If Mr. Fluker's attorney had not been improperly chastised during closing argument, the jury may well have found him not guilty. *Cf. State v. Allen*,

182 Wn.2d 364, 378, 341 P.3d 268 (2015) (finding prejudice where trial court overruled defense objections in the jury's presence, potentially leading the jury to believe that the prosecutor's statements were a proper interpretation of the law). The State cannot show beyond a reasonable doubt that the error was harmless. Accordingly, a new trial should be granted.

3. If the State prevails, this Court should decline to order costs.

If Mr. Fluker does not substantially prevail on appeal and the State requests appellate costs, any such motion should be denied. This Court has discretion under RAP 14.2 to decline an award of costs. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means "making an individualized inquiry." *Sinclair*, 192 Wn. App. at 391. A person's ability to pay is an important factor. *Id.* at 389.

Mr. Fluker was found to be indigent. Supp. CP ___ (sub no. 49). This creates a presumption of indigence that continues on appeal. RAP 15.2(f); *Sinclair*, 192 Wn. App. at 393. The trial court further recognized this indigence by waiving discretionary legal financial obligations. CP 70.

Furthermore, Mr. Fluker lost his job as a result of this case and having a felony on his record will make it much more difficult to regain

employment. *See State v. Blazina*, 182 Wn. 2d 827, 837, 344 P.3d 680 (2015) (recognizing that a criminal record has "serious negative consequences on employment"). To the extent he can find a job, his earnings must go toward supporting his first child, who was born during trial. *See* RP (2/1/16) 1023; RP (2/19/16) 17. Accordingly, the Court should exercise its discretion and reject any requests for costs in the event the State prevails.

D. CONCLUSION

Jerry Fluker asks this Court to reverse and remand for dismissal of the conviction. In the alternative, a new trial should be granted.

Respectfully submitted this 25th day of October, 2016.

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74859-9-I
v.	)	
	)	
JERRY FLUKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] JERRY FLUKER 17303 120TH LN SE APT L-203 RENTON, WA 98058	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF OCTOBER, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710