

NO. 38096-0-II

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

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MAPLES,

Appellant.

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

The Honorable Thomas P. Larkin, Judge

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

FILED
COURT OF APPEALS
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to hold a Frye¹ hearing on admissibility of expert testimony that hairs appeared stretched or forcibly removed.
2. The court erred in failing to give appellant's requested jury instructions on lesser-included offenses of first- and second-degree manslaughter.
3. The court erred in including appellant's 1977 conviction for robbery in the offender score calculation.

Issues Pertaining to Assignments of Error

1. Did the court err in admitting testimony that hairs appeared stretched or forcibly removed without a Frye hearing when the evidence showed hair analysis is "scientifically tenuous" and the Washington State Crime Lab no longer conducts hair analysis?
2. Did the court err in failing to give appellant's proposed jury instructions on the lesser-included offenses of first- and second-degree manslaughter when appellant was charged with second-degree intentional murder and the only evidence of appellant's mental state arguably showed a struggle and attempts to conceal what happened?

¹ Frye v. United States, 293 F. 1013, 54 App. D.C. 46 (D.C. Cir. 1923).

3. Did the court err in classifying appellant's pre-criminal code robbery conviction as a class A felony and including it in the offender score?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged Daniel Maples with one count of second-degree murder. CP 214. The jury convicted Maples of second-degree intentional murder. RP 2686, 4931; CP 326.

2. Substantive Facts

In 1988, Maples worked nights at the AK-WA shipyards on the Tacoma tide flats with Christine Blais. Around four a.m. on October 8, 1988, the pair left work, Blais having agreed to give Maples a ride home. RP 2826.

The next day, Blais' brother reported her missing. RP 2815. About three weeks later, Blais' car was found in a Tacoma motel parking lot. RP 3004-05. Her purse and money were still in the car. RP 3728-29. Dogs tracked a scent from the driver's seat of the car to a nearby dumpster. RP 4348-52. Police continued to investigate the case as a missing persons case. RP 3793.

On January 7, 1989, about three months after Blais disappeared, a skull was found in a wooded area across the street from a house Maples and

his former wife Linda had previously rented in northeast Tacoma. RP 2983. Dental records showed the skull was Christine Blais'. RP 3598. Various hairs, fibers, and approximately 30 other partial bones were collected from the area, but no clothing was found. RP 3229, 3257, 3550.

Medical examiner John Howard observed nothing from the remains that would show a cause of death. RP 3240. However, he opined death was due to "homicidal violence of undetermined ideology" [sic]. RP 3199. He based this conclusion not on his autopsy, but on the circumstances of Blais' death and disappearance. RP 3199-3200. He concluded her death was a homicide, rather than a suicide or death from accident or natural causes because her remains were found away from home and without clothes. RP 3199-3200. Additionally, she was healthy, had a child, and did not seem at risk for suicide. Id.

A watch with a torn leather band and several clumps of hair were found near the skeletal remains. Some of the hairs were entangled in the watch. DNA linked the hair to Blais, and two forensic scientists testified the hair appeared stretched or forcibly removed. RP 3668, 4046, 4439-40.

Maples' former wife Linda said he usually wore a watch similar to that found at the scene, and that after Blais disappeared, she never saw the watch again. RP 3867-68. She also observed Maples came home much

later than usual on October 8, 1988, with scraped knuckles, bloody jeans, and a bruise on his neck. RP 3865, 3870.

On January 13, 1989, police arrested Maples in connection with Blais' death. Officer Patrick O'Malley remembered Maples saying something like, "I'll tell you exactly what happened if you don't arrest me." RP 4175. The officer declined the offer. RP 4175.

During other interviews with police, Maples said Blais offered to give him a ride home after he helped her load things into her car. RP 4153. He also said Blais offered him one of the beers in her car, which he drank, and then left on a pillar when they drove away. RP 4153-54. Because he felt uncomfortable taking her out of her way, Maples asked to be let out of the car at the intersection of Portland and Puyallup and walked the remaining four miles home. RP 4154-57. Maples variously told other witnesses he was let out at the freeway exit at the Puyallup River or at the LaQuinta Inn on Portland Avenue. RP 2827, 3062, 3762. These locations are within a few blocks of each other. RP 3763. He then worked on his motorcycles in the garage before going to bed. RP 4157. He attributed the bruise on his neck to running into a beam at work. RP 4157. Sometime after his arrest, Maples was released. Nearly 16 years later, in April, 2005, Maples was charged with Blais' murder. CP 1.

Kristian Wales also worked at AK-WA and finished work about the same time as Maples and Blais on October 8, 1988. RP 3318. Wales was still in the parking lot when Maples and Blais left in her car. RP 3323. After Wales got home, sometime after 4 a.m., Maples called him from a phone booth near the shipyards, asking for a ride home. RP 3327. Maples told him Blais had car trouble. RP 3327. When Wales arrived to pick up Maples, Maples told him Blais had already been picked up. RP 3330.

At Maples' direction, Wales drove up to a wooded spot on McMurray Road and parked near Blais' car. RP 3336. Wales took Blais' keys and immediately started her car. RP 3337. He noticed the radio was on very loud. RP 3336. Maples suggested Wales drive Blais' car, since he was good at fixing cars if anything happened. RP 3338. Together, the pair proceeded to Maples' home, with Maples driving Wales's car. RP 3338-41. Once there, Maples put Blais' car in his garage to work on it. RP 3341.

No physical evidence linked Maples to Blais' death. At trial, the State argued the jury could find intent because 1) the lack of clothing indicated either sexual assault or an attempt to cover up what had happened; 2) Maples' injuries and the stretched hairs and torn watch band indicated a struggle; and 3) Maples' inconsistent statements showed consciousness of guilt. Maples' attorney pointed out the absence of physical evidence, the

gaps in the investigation, including inadequate investigation of Kristian Wales,² and the lack of evidence of intent.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING EXPERT TESTIMONY THAT HAIRS HAD BEEN STRETCHED OR FORCIBLY REMOVED WITHOUT HOLDING A FRYE HEARING.

In deciding whether to admit scientific evidence, a trial court must determine whether the underlying theory is generally accepted in the relevant scientific community. State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). Such an inquiry prevents “pseudoscience” from entering the courtroom. State v. Copeland, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996). The trial court in this case permitted expert testimony that hairs from the scene of the remains appeared “stretched” and “forcibly removed. Admission of this testimony was reversible error because the court did not first determine whether the theory underpinning this conclusion was generally accepted.

Washington courts apply the Frye test for determining the admissibility of new scientific evidence. State v. Gregory, 158 Wn.2d 759,

² Wales admitted he was “angered” because at work Blais would not go in the hold of the ships with him. RP 3445. He said she seemed “uppity” and had a “womens’ liberation type complex.” RP 3456. In January, 1989, Wales left work at AK-WA and moved to Montana. RP 3444. Although police interviewed him three times, he did not tell police about moving Blais’ car until 2007. RP 3460-61.

820, 147 P. 3d 1201 (2006). The goal of the test is to determine whether scientific evidence is based on established scientific methodology. State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). There must be general acceptance in the relevant scientific community of both the theory and the technique used to implement the theory. Id.; State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997). If there is a significant dispute among qualified scientists in the relevant scientific community, the evidence may not be admitted. State v. Gentry, 125 Wn.2d 570, 585-86, 888 P.2d 1105 (1995). If the Frye test is satisfied, the trial court must then determine admissibility under ER 702. Copeland, 130 Wn.2d at 256.

a. The Court's Failure to Hold a Frye Hearing Is Reversible Error.

Defense counsel objected to the admission of hair analysis by crime lab forensic scientists Charles Vaughan and George Johnston on the basis of Frye and ER 702. RP 3968-71. Counsel specifically objected to testimony regarding stretched hair in connection with previous rape cases, noting the Washington State Patrol Crime Lab has stopped performing hair analysis in general. RP 3970. The court excluded any conclusions of identity based on hair analysis and any mention of unrelated rape cases, but permitted the experts to describe their observations and make comparisons. RP 3970-71.

The experts then testified the hairs' microscopic characteristics were consistent with and could have been from Christine Blais, and that some of them appeared "stretched" and "forcibly removed." RP 4046, 4440. The State relied on this testimony in closing argument to support an inference of intent to kill. RP 4780, 4815-16, 4871.

Both experts testified the lab has stopped performing hair analysis because it is "scientifically tenuous." RP 4054-55, 4441. Moreover, the Washington case discussing hair analysis testimony relates only to the ability to state similarities between known and unknown hair samples and to exclude certain individuals. State v. Lord, 117 Wn.2d 829, 853-55, 822 P.2d 177 (1991). No Washington case appears to address the scientific theory or practice underpinning testimony that a hair appears to have been stretched or forcibly removed.

Absent evidence of generally accepted theory and practice undergirding the conclusion that hair has been stretched or forcibly removed, the court erred in admitting the evidence without first holding a Frye hearing. See State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999) ("When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing held under ER 104(a).") Failure to do so constitutes error. Cauthron, 120 Wn.2d at 888 n.3.

The trial court's gatekeeper role under Frye requires "careful assessment of the general acceptance of the theory and methodology of novel science. Copeland, 130 Wn.2d at 259. Although the court heard argument on the Frye issue, see RP 3968-71, it failed to inquire whether the principles and the techniques regarding the conclusion that hair was stretched or forcibly removed are generally accepted in the scientific community. This Court should therefore reverse and remand for a Frye hearing.

b. Evidence that Hairs Appear Stretched or Forcibly Removed Is Not Generally Accepted in the Scientific Community.

Appellate review of a Frye ruling after a hearing is de novo, and the court may consider evidence not in the record, including scientific and law review articles. State v. Leuluaialii, 118 Wn. App. 780, 789, 77 P.3d 1192 (2003). Since there was not a full Frye hearing in this case, it would be appropriate simply to remand for a hearing. But if this Court should engage in a Frye analysis on appeal, Maples presents the following brief discussion of legal and scientific literature on the Frye analysis of forensic hair analysis.

As a preliminary matter, practitioner-only acceptance is not enough. See Frye, 293 F. at 1014 (rejecting systolic blood pressure test despite its acceptance by its founder and his disciples because it was not accepted in the wider "physiological and psychological authorities"). The relevant scientific

community is the wider scientific community, rather than simply others in the same field who have a commercial incentive to maintain their status as paid expert witnesses. See, e.g., United States v. Downing, 753 F.2d 1224, 1236 (3d Cir. 1985); United States v. Alexander, 526 F.2d 161, 164 n.6 (8th Cir. 1975); Contreras v. State, 718 P.2d 129, 135 (Alaska 1986); People v. Kelly, 17 Cal.3d 24, 37-38, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976); State v. Thompkins, 891 So.2d 1151, 1152 (Fla. App. 2005). The strength of the Frye analysis is its reliance on “the collective wisdom of an institution that commands great epistemic prestige in contemporary society: . . . the ‘scientific community.’” Simon A. Cole, Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions, 9 Minn. J.L. Sci. & Tech. 453, 456 (2008).

In general, comparison of microscopic hair characteristics may be able to exclude certain individuals, but cannot uniquely identify individuals. Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward 114 (2009) (hereinafter Strengthening Forensic Science). No reliable statistics exist showing the frequency of specific hair characteristics in the general population. Id. at 117.

Very little scholarly or legal discussion appears to exist relating to expert conclusions that hairs have been stretched or forcibly removed. The one case discussing such a conclusion found at least some dispute among scientists as to the validity of this conclusion. Fensterer v. State, 493 A.2d 954, 962-64 (Del. 1985) vacated on other grounds sub nom Delaware v. Fensterer, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). In Fensterer, the State relied on testimony by an agent of the Federal Bureau of Investigations (FBI) that the victim's hairs had been forcibly removed. Id. at 962-63. The defense presented expert testimony that the presence of a follicle did not necessarily indicate forcible removal. Id. at 964. Absent any evidence that conclusions regarding hair stretching or forcible removal of hair are based on generally accepted scientific theory and practice, this evidence should have been excluded, or at a minimum, a Frye hearing should have occurred.

- c. This Error Was Prejudicial Because the State Relied Heavily on Evidence of Hair Stretching to Prove the Element of Intent.

The erroneous admission of expert testimony is reversible error when the expert testimony was critical and the other evidence was not overwhelming. State v. Huynh, 49 Wn. App. 192, 198, 742 P.2d 160 (1987). In Huynh, an arson case, a so-called expert testified that the gas recovered from the fire "matched" gas found in the defendant's car. 49 Wn. App. at

193-94. On appeal, the court held the testimony was not admissible under Frye because the scientific community was divided on the effectiveness of gas chromatography when the sample gas has been burned. Id. at 196-98. The only other evidence linking Huynh to the fire was that the victim was his recently estranged girlfriend, the victim accused him of starting the fire and of threatening and beating her on other occasions, and a car Huynh sold to the victim was vandalized the same morning. Id. at 193. The court reversed Huynh's conviction because the remaining evidence was circumstantial, and the expert's testimony probably affected the outcome of the trial. Id.

Vaughan and Johnston testified hair that could have belonged to Blais appeared to have been stretched or forcibly removed. RP 4046, 4440. The State referred to this testimony three times during closing argument. RP 4780, 4815-16, 4871. Other evidence of intent consisted solely of injuries to Maples, the lack of clothes found with the remains, and Maples' inconsistent statements to police and other witnesses. As in Huynh, admission of Vaughan and Johnston's testimony was prejudicial because the other evidence of intent was circumstantial and not overwhelming. Had the court properly excluded this testimony, the jury would have been far less likely to find intent to kill.

"The expert who assumes the aura of science while really basing her testimony on unsystematic inductions creates the worst of both

worlds.” Roger C. Park, SYMPOSIUM: Signature Identification in the Light of Science and Experience, 59 Hastings L.J. 1101, 1104 (2008). This hair stretching testimony should have been excluded. Maples requests this Court reverse his conviction because it is reasonably likely it affected the outcome of the trial.

2. WHEN THE STATE’S CIRCUMSTANTIAL EVIDENCE OF INTENT TO KILL COULD ALSO SUPPORT AN INFERENCE OF RECKLESSNESS OR NEGLIGENCE, THE JURY SHOULD BE INSTRUCTED ON MANSLAUGHTER.

When an element of the offense remains in doubt, but the defendant appears guilty of some wrongdoing, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); see also Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. Puget Sound L. Rev. 185, 193 (1992) (“When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.”).

This distortion of the fact-finding process is part of the rationale behind the common law rule, codified in every state and under the Federal Rules of Criminal Procedure, that defendants are entitled to have the jury instructed on lesser-included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Providing the jury with

a third option of convicting on a lesser-included offense “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Id. at 634.

The rule permitting instruction on lesser-included offenses has been part of Washington law since 1854. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). Defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser-included offenses. RCW 10.61.006. A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence supports an inference that the defendant committed the lesser offense (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

As a matter of law, first- and second-degree manslaughter are lesser-included offenses of second-degree intentional murder because the states of mind of recklessness and criminal negligence are necessary elements of the greater crime. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). Thus, the so-called legal prong of the Workman test is satisfied.

The factual component of the Workman analysis is satisfied when the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. Berlin, 133 Wn.2d at 551.

In other words, instructions should be given when evidence raises an inference that the lesser-included offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In making this determination, the court must consider all evidence presented at trial by either party. Fernandez-Medina, 141 Wn.2d at 455-56. On appellate review, the court views the supporting evidence in the light most favorable to the party seeking the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

a. Evidence of Struggle and Consciousness of Guilt Supports an Inference of Manslaughter.

The evidence at trial raised an inference of recklessness or criminal negligence instead of intent. A person is guilty of second-degree intentional murder when, “[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person.” RCW 9A.32.050(1)(a).³ A person is guilty of first-degree manslaughter when she “recklessly causes the death of another person.” RCW 9A.32.060(1)(a).⁴ A person is guilty of second-degree manslaughter

³ The crime with which Maples is charged occurred in 1988. However, citation is made to the current statutes because the relevant definitions of second-degree intentional murder and first- and second-degree manslaughter have not changed.

⁴ For purposes of first-degree manslaughter, a person acts recklessly when she “knows of and disregards a substantial risk that a wrongful act may occur and the disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c).

when, “with criminal negligence,” she “causes the death of another person.” RCW 9A.32.070(1).⁵

Evidence that Maples gave inconsistent accounts of events or otherwise attempted to hide his involvement in Blais’ death suggests he was guilty of manslaughter because this would also be criminal conduct that a person would be motivated to hide from police. First-degree manslaughter is still a class A felony, while second-degree manslaughter is a class B felony. RCW 9A.32.060, .070. Attempts to deceive may create an inference of reckless or criminally negligent killing. See, e.g., State v. Williams, 190 N.J. 114, 129-30, 919 A.2d 90 (2007) (consciousness of guilt evidence such as trying to make victim’s death look like a suicide could lead rational juror to find conscious disregard of risk necessary for recklessness); Panther v. Hames, 991 F.2d 576, 581 (9th Cir. 1993) (jury could infer grossly negligent conduct from fact that defendant lied about circumstances of accident).

Evidence that death resulted from a struggle while intoxicated also merits instruction on manslaughter as a lesser-included offense. Berlin, 133 Wn.2d 541, 552, 947 P.2d 700 (1997). In Berlin, two men had been

⁵ For purposes of second-degree manslaughter, a person acts with criminal negligence if she “fails to be aware of a substantial risk that a wrongful act may occur and the lack of awareness is a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d).

drinking heavily and heatedly argued. Id. at 549. Berlin testified the gun went off after the victim tried to pull it away from him, and that he did not intend to shoot him. Id. at 552. Instructions on manslaughter as lesser offenses of second-degree intentional murder were appropriate because Berlin drank to the point of potentially impairing his ability to form the requisite intent to kill and the killing occurred in the course of a struggle for the weapon. Berlin, 133 Wn.2d at 552.

The evidence of a struggle in Maples' case also suggests an inference of reckless or criminally negligent conduct and warrants an instruction on manslaughter. The torn watch band, the stretched and pulled-out hairs entangled in the watch, Maples' scraped knuckles, and the blood on Maples' pants suggests a struggle that could have inadvertently resulted in Blais' death. See RP 3869-70, 4046, 4059, 4440.

Reckless or negligent conduct is also suggested by evidence that Maples may have been intoxicated that night. He told police he had a beer before leaving AK-WA with Blais. RP 4153. His wife testified she and Maples used marijuana on a regular basis. RP 3861. AK-WA employees testified some employees gathered in the parking lot on breaks to consume drugs. RP 3291. As in Berlin, a jury could have rationally concluded Maples was intoxicated, which led him to engage in reckless or negligent behavior that inadvertently caused Blais' death. The jury should,

therefore, have been instructed on manslaughter as a “third option” in addition to second-degree murder or outright acquittal. Berlin, 133 Wn.2d at 551-52.

The medical examiner opined Blais’ death resulted from “homicidal violence.” The State argued this opinion proved intent. RP 4810. But this is a distortion of the testimony; one need not disbelieve Dr. Howard to find manslaughter. Howard did not express an opinion on the slayer’s state of mind.⁶ He testified his classification of homicide is based largely on the absence of another cause of death such as suicide, accident, or natural causes. RP 3187, 3240. His medical and anatomical observations were equally consistent with death from hypothermia, heart attack, or drug overdose. RP 3242. His opinion of homicidal violence could also suggest a reckless or criminally negligent killing in the course of a dispute or a struggle. Thus, Maples relies not on the mere possibility the jury would disbelieve the State’s evidence, but instead on a different inference that can be drawn from the State’s own evidence.

⁶ Nor would he likely have been permitted to do so. See State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (holding opinion on defendant’s intent amounted to an impermissible opinion on guilt); State v. Farr-Lenzini, 93 Wn. App. 453, 463, 970 P.2d 313 (1999) (improper for officer to express opinion on driver’s intent to elude police).

b. Evidence the Defendant May Not Have Formed the Requisite Intent Is Sufficient to Warrant an Instruction on Manslaughter.

The trial court in Maples' case refused to give manslaughter instructions, reasoning that (1) recklessness involves the disregard of substantial risk, and (2) Maples could not identify a disregarded specific risk. RP 2489, 2502, 4731. The trial court erred for two reasons.

First, the failure to identify a specific risk is not a barrier to a first-degree manslaughter instruction. Instead, evidence the defendant may not have formed the requisite intent also supports the lesser instruction. State v. Warden, 133 Wn.2d 559, 947 P.2d 708 (1997).

Warden is instructive. There, despite the absence of identification of a disregarded specific risk, the court held a manslaughter instruction was required because evidence of post-traumatic stress disorder potentially negated Warden's intent. Id. Based solely on evidence of this diminished capacity, the court concluded the jury could reasonably have found Warden acted recklessly or negligently. Warden, 133 Wn.2d at 564. Maples' case is analogous. The jury could have concluded from the evidence that Maples lacked intent to kill, but instead acted recklessly or negligently.

Second, by requiring Maples to identify evidence of a substantial risk that was disregarded, the trial court virtually penalized him for

exercising his right to silence. Maples should not be required to incriminate himself in order to have the jury instructed on a lesser-included crime that is entirely consistent with the evidence presented at trial.

The presumption of innocence means it is the defendant, not the State, who should have the benefit a doubt based on a lack of evidence. Cf. State v. Warren, 165 Wn.2d 17, 25, 28, 195 P.3d 940 (2008) (approving of curative instruction stating, “if you still have a doubt after having heard all of the evidence and lack of evidence . . . then the benefit of that doubt goes to the defendant”). Without an instruction on the lesser-included offenses of first- and second-degree manslaughter, the jury was faced with a choice between intentional second-degree murder and no criminal liability whatsoever. That Hobson’s choice gives the State the benefit of the lack of evidence of intent.

This is not a case in which the defense needs to rebut a legal presumption of intent. A trier of fact may presume an actor intends the natural and foreseeable consequences of his conduct. State v. Perez-Cervantes, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000). Thus, in cases in which the evidence shows the defendant committed some act raising an inference of intent to kill, courts have required the defense to present some

additional evidence rebutting that presumption to justify an instruction on manslaughter.

For example, in Warden, this presumption arose because the defendant hit the victim on the head with a mason jar and then stabbed her repeatedly in the chest with a kitchen knife. 133 Wn.2d at 561. Expert testimony she suffered from post-traumatic stress disorder warranted instructions on manslaughter. Id. at 564. Here, however, the State cannot point to any act raising such a presumption. Absent that presumption, the defendant has nothing to rebut, and the jury should decide whether the circumstantial evidence of Maples' mental state best fits a finding of intent or recklessness or criminal negligence.

c. Maples Was Entitled to Manslaughter Instructions Even If Such a Finding Would Be Inconsistent with his Statements to Police.

The State may also argue that instructing the jury on manslaughter is inappropriate because it would be inconsistent with Maples' version of events as recorded in his statements to police. But the court rejected this argument in Fernandez-Medina. 141 Wn.2d 448. In that case, the defendant, charged with first-degree assault, presented an alibi defense. Id. at 456. The victim testified Fernandez-Medina pointed a gun at her head and she heard a clicking sound consistent with a failed attempt to fire. Id. at 451. An expert witness demonstrated the gun could click

without the trigger being pulled. Id. at 451-52. The State argued against a jury instruction on the lesser-included offense of second-degree assault because it was inconsistent with the alibi defense. Id. at 453.

The court explained that it must look at all the evidence, not just the defendant's testimony, in considering a lesser-included instruction. Id. at 456. The forensic evidence was consistent with a theory that Fernandez-Medina was there, but did not attempt to fire the gun at the victim, and thus a jury could rationally have found him guilty only of second-degree assault. Fernandez-Medina, at 456-57. Noting that defendants are entitled to present inconsistent defenses, the court reversed the Court of Appeals and held Fernandez-Medina was entitled to a jury instruction on the lesser-included offense. Id. at 459, 462. Even if this court concludes manslaughter is inconsistent with Maples' statements to police, he is entitled to instructions on manslaughter because they are supported by other evidence.

d. When There Is Only Meager Evidence of a Required Mental State, Instruction Is Required on Lesser-Included Offenses That Do Not Require Proof of That Mental State.

In State v. Pittman, 134 Wn. App. 376, 379-80, 166 P.3d 720 (2006), the defendant was charged with attempted residential burglary after being caught lurking on the victim's patio and apparently kicking at

his front door trying to get in. A pipe wrench, screwdriver, and a pry tool were found in his backpack. Id. at 380. Pittman testified he had used methamphetamine, thought he was at his mother's house, and only tried to get in to apologize after realizing his mistake. Id. at 380. The court found the evidence of intent to commit a crime inside the home "so meager" a jury could reasonably have found he intended only to trespass. Id. at 386. Thus, the court concluded counsel's "all or nothing" strategy constituted ineffective assistance because evidence of intent to commit a crime inside the residence was weak, but evidence of some sort of wrongdoing was strong. Id. at 387-88 (citing Keeble, 412 U.S. at 250). This strategy unreasonably exposed Pittman to the risk the jury would convict him of attempted residential burglary because it was the only available option. Id. at 390.

Like Pittman, Maples was forced into an all or nothing strategy. The jury could rationally have found Maples merely acted recklessly or negligently in causing Blais' death. But given the strong evidence connecting Maples to the scene of her death, the jury may have been reluctant to acquit entirely. Thus the danger the court identified in Pittman and Keeble that the jury would convict in order to avoid letting the defendant go entirely unpunished was likely at play, distorting the fact-finding process. Pittman, 134 Wn. App. at 388; Keeble, 512 U.S. at 250.

The reliability of the verdict depended on the jury being given a third option other than second-degree murder and acquittal. Without manslaughter instructions, the jury may have voted for guilt only to avoid outright acquittal. We should not rely on the slight possibility that juries will understand they may provoke a mistrial by refusing to return a verdict if they agree the defendant is guilty of something but not necessarily intentional murder. See Beck, 447 U.S. at 644-45 (court “not persuaded by the State’s argument that the mistrial ‘option’ is an adequate substitute for proper instructions on lesser included offenses”). The court erred in denying Maples’ request for jury instructions on the lesser-included offenses of first- and second-degree manslaughter. Therefore, this Court should reverse Maples’ conviction and remand for a new trial.

3. MAPLES’ 1977 CONVICTION SHOULD NOT HAVE BEEN INCLUDED IN HIS OFFENDER SCORE BECAUSE IT IS COMPARABLE TO A CLASS B FELONY WHICH “WASHED OUT” AFTER TEN YEARS.

Maples was convicted in 1977 of a robbery committed in February, 1976 under former RCW 9.75.010 (1974). At sentencing, Maples contested the inclusion of this conviction in his offender score. CP 331-33; RP 4946. Under the law in effect in 1988, when the offense at issue occurred, prior unclassified felonies should be classified by comparing their elements to current classified felonies. State v. Johnson, 51 Wn. App. 836, 840, 759

P.2d 459 (1988). Maples' 1977 conviction for a pre-criminal code robbery should, therefore, be considered a class B felony and not included in his offender score. Former RCW 9.94A.360 (1988).

a. Maples' 1977 Felony Conviction Should Be Classified By Comparing Its Elements to Current Felonies.

Before the effective date of the criminal code in July, 1976, robbery was not divided into degrees, nor was it classified as a Class A, B or C felony.⁷ Washington courts have ruled that the elements of the pre-classification offense will be compared to elements of current classified offenses, rather than determining classification by the maximum punishment available under older laws. State v. Wiley, 124 Wn.2d 679, 681, 880 P.2d 983 (1994); Johnson, 51 Wn. App. at 840. Maples should be sentenced under the Johnson rule, in effect at the time of his offense in 1988. State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

RCW 9.94A.035, directing courts to look to the maximum punishment, rather than the elements of the offense, when determining classification of crimes not included in Title 9A RCW, does not govern Maples' criminal history because it was not enacted until 1996. Varga, 151 Wn.2d at 191. Moreover, RCW 9.94A.035 is ambiguous as to its

⁷ The minimum penalty was five years; as no maximum penalty was included in the robbery statute, former RCW 9.95.010 imposed a maximum of 20 years to life. Former RCW 9.75.010 (1974); former RCW 9.95.010 (1974).

application to unclassified pre-criminal code offenses, and thus the rule of lenity bars classification of pre-code felonies based on the maximum penalty under this statute. State v. Failey, 165 Wn.2d 673, 677, 201 P.3d 328 (2009)

Second, RCW 9A.20.40,⁸ which was in effect in 1988, provides that when “the grade or degree of a crime” is determined with reference to prior felonies, prior unclassified felonies should be classified based on the maximum penalty “for purposes of this title.” RCW 9A.20.040. By its own terms, this statute does not apply to sentencing under the Sentencing Reform Act of 1981.

b. Maples’ 1977 Robbery Conviction Is Comparable to Current Second-Degree Robbery, a Class B Felony.

⁸ RCW 9A.20.040 provides in full:

In any prosecution under this title where the grade or degree of a crime is determined by reference to the degree of a felony for which the defendant or another previously had been sought, arrested, charged, convicted, or sentenced, if such felony is defined by a statute of this state which is not in Title 9A RCW, unless otherwise provided:

(1) If the maximum sentence of imprisonment authorized by law upon conviction of such felony is twenty years or more, such felony shall be treated as a class A felony for purposes of this title;

(2) If the maximum sentence of imprisonment authorized by law upon conviction of such felony is eight years or more, but less than twenty years, such felony shall be treated as a class B felony for purposes of this title;

(3) If the maximum sentence of imprisonment authorized by law upon conviction of such felony is less than eight years, such felony shall be treated as a class C felony for purposes of this title.

A pre-criminal code robbery conviction is considered a class B felony under a comparability analysis. Failey, 165 Wn.2d at 678. In Failey, the court considered whether a 1974 robbery conviction should be a “strike” offense under the Persistent Offender Accountability Act. Id. at 674. Because RCW 9.94A.030(32)(u) defines a most serious offense as any felony comparable to a current most serious offense, the court held comparability of elements, rather than maximum punishment, determined inclusion in the criminal history. Id. at 677. The court found the 1974 robbery comparable to current second-degree robbery, a class B felony. Id. at 678. Thus, the conviction washed out after ten years. Id.

As in Failey, the elements of Maples’ 1977 robbery conviction are most similar to a current conviction for second-degree robbery, a class B felony. Former RCW 9.75.010 (1974) defined robbery as:

the unlawful taking of personal property of another, or in his presence, or against his will, by means of force or violence or fear of injury, immediate or in the future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery.

Former RCW 9.75.010 (1974). Since codification of the criminal code, a person commits robbery if he or she, “unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.” RCW 9A.56.190.

First-degree robbery requires proof that the offender was armed with a deadly weapon, displayed what appeared to be a deadly weapon, or inflicted bodily injury.⁹ RCW 9A.56.200. First-degree robbery is a class A felony. All other robberies are second-degree robbery, a class B felony. RCW 9A.56.210. Because the pre-criminal code version of the robbery statute did not require proof that the offender was armed with or displayed a deadly weapon or inflicted bodily injury, it is comparable to the current second-degree robbery statute.¹⁰

Maples' 1977 robbery conviction should thus be treated as a class B felony and not included in the offender score after ten years in the community without another felony conviction. Maples had no felony convictions during a 14-year period from 1980 to 1994.¹¹ Thus, his robbery conviction should not be included in his offender score.

⁹ A subsequent amendment in 2002 added a provision that robbery of a financial institution is also first-degree robbery. Laws of 2002 ch. 85, § 1.

¹⁰ Washington Practice also notes the statutory definition of robbery prior to the criminal code was "largely identical to the present definition of second-degree robbery." Seth A. Fine & Douglas J. Ende, 13B Washington Practice: Criminal Law with Sentencing Forms §2303 (2008-09).

¹¹ The current offense does not interrupt this period because although the offense occurred in 1988, no conviction occurred until 2008. Former RCW 9.94A.360 provides:

Class B prior felony convictions shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without being convicted of any felonies.

In 1988, the standard range for second-degree murder with an offender score of 6 was 195-260 months. Former RCW 9.94A.310 (1988). Maples' 342-month sentence should be vacated and this case remanded for resentencing based on his correct offender score. State v. Cruz, 139 Wn.2d 186, 193, 985 P.2d 384 (1999) (error requires remand for resentencing without resource to washed out convictions).

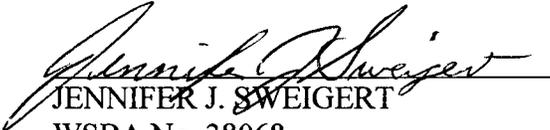
D. CONCLUSION

For the foregoing reasons, Maples' conviction should be reversed and this case remanded for a Frye hearing and a new trial with proper instruction the lesser included offenses of first- and second-degree manslaughter. Alternatively, the case should be remanded for resentencing under the proper offender score determined without reference to Maples' 1977 robbery conviction.

DATED this 29th day of May, 2009.

Respectfully submitted,

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

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STATE OF WASHINGTON)
)
 Respondent,)
)
 vs.) COA NO. 38096-0-II
)
 DANIEL MAPLES,)
)
 Appellant.)

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MAY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
BY Patrick Mayovsky
DEPUTY
COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MAY 2009.

x Patrick Mayovsky