

No. 41546-1-II  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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BY: *cm*

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STATE OF WASHINGTON,

Respondent,

vs.

ALONZO LAMAR BRADLEY, SR.,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 09-1-04682-6  
The Honorable James Orlando, Judge  
The Honorable Bryan Chushcoff, Judge

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REPLY BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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**I. ISSUES PERTAINING TO RESPONDENT'S ASSIGNMENT OF ERROR ON CROSS APPEAL**

1. Should this Court review the State's claimed error, where the issue is moot and cannot be repeated on remand, and where the issue is primarily factual and discretionary?
2. Did the trial court properly exercise its discretion when it excluded testimony that Officer Eugley learned through a computer record check that Bradley had been flagged as a "violent offender?"

**II. ARGUMENT & AUTHORITIES IN REPLY TO STATE'S BRIEF**

After the CrR 3.6 and CrR 3.5 hearings had been concluded, and in the middle of jury voir dire, the prosecutor asserted that Officer Robert Eugley ran a record check at the scene of the arrest and discovered that Bradley had been "flagged" as a "violent offender." (RP2 49-50, 51-52, 53-54) The prosecutor asked the court to allow Officer Eugley to testify that this information contributed to his concern that Bradley would act on his threats. (RP2 50-51)

The prosecutor did not know if Officer Eugley "was aware of specifically what prior convictions the defendant had, in fact, been convicted of." (RP2 50) The prosecutor also could not say what a "violent offender" designation actually means or what triggers an individual to be designated a "violent offender" in the records

database. (RP2 54)

Bradley objected, arguing that the late disclosure of this information prejudiced his ability to present his defense. (RP2 51-52) Bradley also argued that the testimony should be excluded because it was improper evidence of prior criminal behavior under ER 404(b), that it would violate the court's earlier motion in limine order excluding evidence of Bradley's criminal history, and because its prejudicial impact outweighed its minimal probative value. (RP2 53, 58-59)

The trial court excluded the testimony in part because it was not based on Officer Eugley's first hand knowledge or observation of Bradley's "words or conduct" but instead on nonspecific information from an electronic third party, and in part because it was more prejudicial than probative. (RP2 55, 59-61, 62) In its Brief of Respondent, the State asserts that this ruling was error, and that this Court should address the issue even though it is moot. (Respondent's Brief at 15-22)

An issue is moot if a court can no longer provide effective relief. State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (quoting State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)). This Court cannot provide relief to the State in this case.

On appeal, Bradley is challenging the sufficiency of the evidence to support his unlawful possession of a controlled substance and harassment convictions. (See Opening Brief of Appellant) This Court will either reject Bradley's arguments and affirm his convictions, or will agree with his arguments and reverse the convictions and dismiss the charges.<sup>1</sup> Either way, there will be no retrial and the trial court's error, if any, cannot be repeated on remand.

The State urges this Court to review this issue even though it is moot, asserting that the issue is of continuing and substantial public interest, and guidance would be helpful to public officers. (Respondent's Brief at 20) However, a moot issue is only "fit for judicial decision" under these circumstances if the issue raised is primarily legal, does not require further factual development, and the challenged action is final. See State v. Clark, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998) (citing First Covenant Church v. Seattle, 114 Wash.2d 392, 400, 787 P.2d 1352 (1990)).

The trial court's evidentiary ruling in this case is not fit for judicial decision because the issue is primarily factual, not legal. A

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<sup>1</sup> If the evidence is insufficient to support a jury verdict, the court must reverse and dismiss the conviction. State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

trial court's evidentiary rulings are discretionary. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). In this case, the trial court exercised its discretion and, based on the specific circumstances of this case, determined that the evidence should be excluded. The trial court's ruling in this case was based not just on its interpretation of the State's evidentiary burden under the statute, but also on the court's opinion that any probative value was outweighed by the high potential for prejudice. (RP2 59-61)

The cases cited by the State in support of its position that this issue is reviewable are also distinguishable. (Respondent's Brief at 20) State v. Hale and State v. Clark both involved review of a trial court's statutory authority to impose certain terms or conditions as part of a defendant's sentence. State v. Hale, 94 Wn. App. 46, 52, 971 P.2d 88 (1999) (court was asked to "clarify the sentencing court's authority" to order drug treatment); State v. Clark, 91 Wn. App. at 585 (court was asked to determine whether the sentencing court has authority to authorized a suspension of detention time at the probation officer's discretion). In State v. Harris, the court was "asked to determine what, as a matter of law, constitutes a certified Louisiana judgment and sentence." 148 Wn. App. 22, 28, 197 P.3d 1206 (2008). In all three of these cases, the

appellate courts were reviewing legal issues, not discretionary evidentiary rulings.

Moreover, there are numerous published cases, several of which are cited in the State's brief, that have allowed a harassment victim to testify about prior knowledge he or she had about the defendant's violent history, which contributed to the victim's concern for his or her safety. (Respondent's Brief at 16-19) Those cases provide adequate guidance to public officers on this issue, so there is no need for this Court to file what would be a purely advisory opinion on this matter.

Nevertheless, the trial court's ruling was correct. The trial court excluded the testimony because the harassment statute requires proof that the defendant's "words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). The trial court found that the information contained in the records database was not Bradley's "words or conduct" and therefore not necessary or relevant under the statute. (RP2 59-60, 62)

The State's reliance on State v. Ragin, State v. J.M., State v. Cross, and State v. Alvarez, to support its argument that the trial

court erred is misplaced.<sup>2</sup> (Respondent's Brief at 16-18) In those cases, the victims had personally observed, or been told about, specific instances of violent or unstable words or conduct. Here, the information came from a computer database and did not contain any information about what violent acts Bradley had committed or when. The trial court was correct that the database did not give Officer Eugley knowledge of Bradley's "words or conduct."

Furthermore, the reviewing court should defer to the assessment of the trial judge who is best suited to determine the prejudicial effect of a piece of evidence. State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). The trial court correctly assessed that the potential prejudice from this evidence would outweigh its probative value. (RP2 60-61) Telling the jury that Bradley is a "violent offender," without any additional context or information, creates a negative impression with the jury that cannot be overcome, and allows the jury to imagine the worst about Bradley's history.

The State has not established that this case is fit for review

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<sup>2</sup> State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999); State v. J.M., 101 Wn. App. 716, 6 P.3d 607 (2000); State v. Cross, 156 Wn. App. 568, 234 P.3d 288 (2010); State v. Alvarez, 74 Wn. App. 250, 872 P.2d 1123 (1994).

by this Court. The issue is moot and primarily factual, and the trial court properly exercised its discretion when it excluded the testimony. This Court should decline to address the State's claimed error.

**V. CONCLUSION**

For the reasons argued in Bradley's Opening Brief, his unlawful possession of a controlled substance and harassment convictions should be reversed and dismissed. For the reasons argued above, this Court should also decline to address the State's claimed error on cross appeal.

DATED: August 30, 2011

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM

WSBA #26436

Attorney for Alonzo Lamar Bradley, Sr.

**CERTIFICATE OF MAILING**

I certify that on 08/30/11, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Alonzo L Bradley Sr., DOC#718082, Monroe Correctional Complex – SOU, P.O. Box 514, Monroe, WA 98272-0777.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

