

NO. 47960-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEROME ALVERTO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable K.A. van Doorninck

No. 06-1-02214-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Should this Court affirm denial of defendant's successive motion for post-conviction DNA testing of a hair recovered from the neighbor's house where his shooting victim fled for help since identifying the hair's source cannot undermine defendant's well-proved identity as the victim's assailant?..... 1

2. Would it be proper to award appellate costs to the State as there is nothing unjust in a man convicted for attempting to murder of his ex-wife being required to reimburse the public for funding a successive request for DNA testing incapable of refuting his guilt? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts.....5

C. ARGUMENT.....8

1. THE DENIAL OF DEFENDANT'S MOTION FOR POST-CONVICTION DNA TESTING SHOULD BE AFFIRMED FOR IT SEEKS TO IDENTIFY THE SOURCE OF A HAIR THAT COULD NOT EXCULPATE HIM EVEN IF ONE ASSUMES DNA TESTING WOULD EXCLUDE HIM AND IDENTIFY ANOTHER AS THE SOURCE.8

2. THERE IS NOTHING UNJUST IN A MAN WHO BRUTALLY ATTEMPTED TO MURDER HIS EX-WIFE BEING ORDERED TO REIMBURSE THE PUBLIC FOR FUNDING A SUCCESSIVE ATTEMPT TO SECURE DNA TESTING THAT IS INCAPABLE OF EXONERATING HIM..... 16

D. CONCLUSION.18

Table of Authorities

State Cases

<i>State v. Barklind</i> , 87 Wn.2d 814, 820, 557 P.2d 314 (1976).....	16
<i>State v. Benn</i> , 120 Wn.2d 631, 641, 845 P.2d 289 (1993).....	13
<i>State v. Blazina</i> , 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015).....	16
<i>State v. Booth</i> , 36 Wn. App. 66, 70, 671 P.2d 1218 (1983).....	12
<i>State v. Brockob</i> , 159 Wn.2d 311, 336, 150 P.3d 59 (2006).....	12
<i>State v. Crumpton</i> , 181 Wn.2d 252, 257-58, 332 P.3d 448 (2014)	8, 9
<i>State v. Gentry</i> , 183 Wn.2d 749, 768, 356 P.3d 714 (2015)	15
<i>State v. Riofta</i> , 166 Wn.2d 358, 364, 209 P.3d 467 (2009)	8, 9, 11, 13
<i>State v. Sinclair</i> , 192 Wn. App. 380, 389, 367 P.3d 612 (2016).....	16
<i>State v. Thompson</i> , 173 Wn.2d 865, 875, 271 P.3d 204 (2012).....	14
<i>State v. Wicker</i> , 10 Wn. App. 905, 909, 520 P.2d 1404 (1974).....	14

Federal and Other Jurisdictions

<i>Herrera v. Collins</i> , 506 U.S. 390, 423, 113 S. Ct. 853 (1993).....	14
---	----

Statutes

RCW 10.73.160	16
RCW 10.73.160(1)	16
RCW 10.73.170	4, 8, 13
RCW 10.73.170(3)	9

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this Court affirm denial of defendant's successive motion for post-conviction DNA testing of a hair recovered from the neighbor's house where his shooting victim fled for help since identifying the hair's source cannot undermine defendant's well-proved identity as the victim's assailant?

2. Would it be proper to award appellate costs to the State as there is nothing unjust in a man convicted for attempting to murder of his ex-wife being required to reimburse the public for funding a successive request for DNA testing incapable of refuting his guilt?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was convicted of attempted first degree murder, first degree burglary, and first degree robbery for crimes he committed against his ex-wife Stephanie Wilson. CP 363, 366.¹ The trial court admitted a notebook containing a murder "to-do" list. CP 366-67. In this appeal, defendant claims an analysis of the notebook is new exculpatory evidence,

¹ CP above CP 361 reflect the State's estimate of how supplemental designations will be numbered. The Pierce County electronic file shows there may have been a designation error between defendant's two appeals No. 47000-4 and 47960-5. To the extent the State inadvertently designated Clerk's Papers already before the Court it was intended to ensure the record needed to decide this appeal is complete.

but at trial he perceived it to be damaging. CP 367; RP (8/5/08) 1-13. It was admitted over his objection and that ruling was affirmed by this Court in defendant's first appeal. CP 367-71. The notebook was found in his tan Mercedes—the car he was driving just after Wilson's attack when police found him wearing pants stained with her blood. 366, 370. At trial, Wilson testified the notebook's handwriting belonged to defendant, who she also identified as her attacker. CP 367, 371. This Court summarized the notebook's content:

The notebook contained what appeared to be a 'to-do list.' The following was written on the first page []: Remove cell (GPS); 5:30 to 6 am (5 am); has to look natural; cuts, ransack truck and purse On the second page, the following was written: (Tools), gun, taser, knife, handcuffs, tape, shoe covers, gloves, flashlight, scarf or face mask, use white face mask, trash bags (2 large, 4 small), **stranger hair**/condom. ... The third page states, (dress code, dark pants, dark shirt, glove, stocking cap and face mask, tape gloves to shirk [sic], tape eyebrows, tape pants to shoe cover, tape pockets. The fourth page reads, (execute); no communication; enter garage 5 am, wait til anyone enter; taser individual; handcuff right arm to left leg, handcuff left arm to right leg; tape arms and tape legs together (added restraint). The final page reads, (options), set her on fire, act out a carjacking gone bad, taser – stab her in her garage and smear blood in garage.

CP 366-67 (internal citations and modifications omitted)(emphasis added).

Its use over defendant's objection was found to be harmless if error since:

Wilson identified [defendant] as her attacker. When [a deputy] arrested [defendant,] [the deputy] noticed blood on [defendant's] pants. The blood stains ... matched Wilson's DNA. This evidence demonstrates that the notebook evidence had only minor significance in reference to the

overall, overwhelming evidence as a whole. Thus, any error would have been harmless.

CP 371. The convictions were affirmed. CP 362-63(No. 38323-3-II).²

A number of *pro se* pleadings followed. This Court dismissed his first personal restraint petition (No. 42739-7-II) on July 31, 2012. CP 377-82.³ There as here, defendant argued newly discovered evidence would prove his actual innocence. CP 377. This Court correctly noted the human hair, at issue in this appeal, had "little chance [of] exculpate[ing] him" "in light of all the other evidence implicating [him]." CP 380. The single hair was found on the glass door of a neighbor's house the morning defendant committed his crimes. CP 56. At trial, the victim testified defendant picked her up by her hair and shot her twice before she managed to find her way to the back door of the neighboring residence and bang on it for help. CP 57. He then shot her in the back of the neck, grabbed her by the hair again, and dragged her away from the house. CP 57. So, the hair could belong to the victim, defendant or anyone who either visited or resided at the neighbor's home. CP 57.

"Further, the plan in the notebook included bringing stray hairs to the crime scene." CP 380. Handwriting analysis of the notebook "found in his vehicle" was also deemed without any likelihood of changing the result of defendant's trial. CP 380. And the notebook was not newly discovered evidence since it had been discovered before trial. CP 377. The request for

² A certified copy of the decision is attached as Appendix A.

an evidentiary hearing was denied. CP 381. So was his RCW 10.73.170 request for DNA testing as it was improperly before the Court. CP 381.

The trial court denied his motion for post-conviction DNA testing as it failed to show the DNA evidence would demonstrate innocence by a preponderance of the evidence. CP 305. Defendant appealed the order, but, appellate counsel moved to withdraw, "having found no basis for a good faith argument on appeal." CP 383-84. This Court "considered [the] appeal on ... the merits" and found it to be "frivolous." CP 384 (No. **44098-9-II**).⁴ Handwriting analysis of the notebook was correctly deemed beyond the scope of relief available under RCW 10.73.170. CP 383, n.1.

Defendant filed another motion for post-conviction DNA testing. CP 386-440. Exhibit 1 of the motion purports to be an affidavit from one of his fellow DOC inmates, which claims that during a billiards game in Kent a man known as "E" confessed to committing defendant's crimes. CP 407. Exhibit 2 purports to be 2013 opinion from a Tennessee handwriting examiner who refers to himself as "TheHandwritingCop." According to "TheHandwritingCop," the notebook containing the murder "to-do" list, which was found in defendant's car when he was driving it near in time to the crimes with the victim's blood on his pants and which the victim recognized to be in defendant's handwriting, was not actually written by defendant; but rather her boyfriend, Eric Rogers. *Id.*

³ A certified copy of the decision is attached as Appendix B.

⁴ A certified copy of the decision is attached as Appendix C.

The trial court granted defendant's motion for DNA testing July 9, 2014, and denied his motion for a new trial. CP 1. A motion for reconsideration was filed by the State. CP 53. The motion explained why obtaining a profile for the hair recovered from the neighbor's door could not have any tendency to undermine the convictions. CP 57-58. A hearing was held on the State's untimely motion. The court rescinded its order granting post-conviction DNA testing since the order was entered based on a mistaken belief it authorized testing of fingernail "scrapings" taken from the victim. RP (7/30/15) 5-8, 11-12; CP 66. It was forgotten medical staff failed to collect scrapings in response to the detectives' request. *Id.*; CP 378. As for testing the hair recovered from the neighbor's residence, the court tried to explain to defendant why it could not have any impact on his case even if one presumed it excluded him given all the unrelated ways a third party's hair could be deposited at the house and the overwhelming evidence of his guilt. RP (7/30/15) 7-12. Defendant filed a motion for reconsideration. CP 67. That motion was denied without oral argument. CP 78. A timely notice of appeal followed. CP 90.

2. Facts

A detailed summary of the evidence of defendant's guilt appears in the decision affirming his convictions. CP 363-71. In sum, the victim received a call from her ex-husband (defendant) early in the morning of May 13, 2006. Defendant said "So, you got a concealed weapons permit,

huh?" CP 365. "He told her that she should not have married him and asked her if she was going to marry her boyfriend, Eric Rogers. [Defendant] told [her] she was going to be sorry. ...

[The victim] sent a text message to Rogers, who called her back. [She] set her house alarm and ... went into her bathroom, where she was hit on the head from behind with a wine bottle. [She] fell to the ground and was then hit repeatedly on the head with a gun. Her attacker told her, as he hit her, that she should not have married him. [She] recognized [defendant's] eyes, body, and voice, even though he wore black clothing, black gloves, and a bandana around his face." CP 365-64. Clothing consistent with the uniform described in the notebook subsequently recovered from the car he was driving; the victim later identified the handwriting used to draft the notebook's murder to-do list as belonging to defendant. CP 365-67.

After ambushing the victim in the bathroom, "[defendant] picked [her] up by her hair, brought her into her bedroom, put a gun to her head, and told her ... he was going to kill her and ... her kids were going to come home and find her. [She] asked [defendant] to take her elsewhere. ... [Defendant] told [her] to put some clothes on [He] picked up [her] safe, which contained her wedding ring..., taking his eyes off [her]. [She] ran out of her bedroom and down ... stairs[,] [where] [defendant] caught .. her[,] then ... hit her on the head repeatedly with the butt of his gun."

[Defendant] told [her] to turn off her house alarm.... [S]he was able to run out the front door ... to her neighbor's house; however, [defendant] chased ... her and shot her in the chest. [She] collapsed, and [he] shot her in the right hand. [She] played dead until she heard [him] run off ... so she went to a neighbor's house for help." CP 364. This is the place where the hair at issue in this appeal was recovered. CP 57-58. Defendant "then appeared again and shot her in the back of her neck. [She] collapsed, and [he] grabbed her by the hair and pulled her body down the stairs and onto the neighbor's lawn. He shot [her] twice in the head then ran off." CP 364.

The victim miraculously survived. She identified defendant as her attacker to the neighbor as well as police, then described the cars he drove, to include a champagne Mercedes. CP 365. As deputies drove toward his house around ten minutes after 911 was first called at 4:50 a.m., they observed him driving the Mercedes. CP 365. He was wearing a black shirt, blue pants (confirmed through DNA testing to be stained with the victim's blood) and black shoes. CP 365-66. Defendant said he was going "deer hunting;" however, it was not deer hunting season. CP 365. The notebook found on his front seat contained the murder "to-do" list described above. CP 366-67, 370.

A duffle bag was recovered about two miles away from the victim's home which contained: a backpack, leather jacket [and] bandana.

The jacket pockets held two pairs of handcuffs and the victim's cellular phone. The backpack held three white trash bags; two stocking caps, one with the eyes, nose, and mouth cut out; clothes, including a pair of jeans; the victim's garage door opener (there were no signs of forced entry at the victim's house), a photograph of the victim and Rogers, in addition to two bracelets, one of which defendant received from the victim when they were together. CP 365. The duffle bag also contained a blood spattered handgun. CP 365. A grocery list with defendant's name printed across the top was also found in the bag. CP 365, 370.

C. ARGUMENT.

1. THE DENIAL OF DEFENDANT'S MOTION FOR POST-CONVICTION DNA TESTING SHOULD BE AFFIRMED FOR IT SEEKS TO IDENTIFY THE SOURCE OF A HAIR THAT COULD NOT EXCULPATE HIM EVEN IF ONE ASSUMES DNA TESTING WOULD EXCLUDE HIM AND IDENTIFY ANOTHER AS THE SOURCE.

Although there is no constitutional right to DNA testing, RCW 10.73.170 provides a mechanism under Washington law for individuals to seek DNA testing to establish their innocence. *State v. Crumpton*, 181 Wn.2d 252, 257-58, 332 P.3d 448 (2014). A person requesting such a test must satisfy the statute's procedural and substantive requirements. *State v. Riofta*, 166 Wn.2d 358, 364, 209 P.3d 467 (2009). In this case, defendant's *pro se* briefing appears to satisfy the procedural requirement by alleging

the requested testing would provide significant new information. *E.g.*, CP 386-440. The Supreme Court held a defendant's failure to avail himself of available pre-trial DNA testing is not a procedural bar to post-conviction testing under the statute. *Riofta*, 166 Wn.2d at 366.

At issue is the statute's substantive component, which requires the convicted person to show requested DNA testing, in conjunction with other evidence, would demonstrate innocence on a more probable than not basis. *Crumpton*, 181 Wn.2d at 258, 263; RCW 10.73.170(3). To make that finding, the trial court is to presume the DNA results would be favorable to the defendant. *Id.* at 260-64. "At the same time, a trial court should not ignore the evidence from trial. It must look at DNA evidence in the context of all the evidence against the individual when deciding the motion." *Id.* at 262. This "substantive requirement ... is meant to be onerous." *Id.* at 261. "Testing should be limited to situations where there is a credible showing ... it could benefit a possible innocent individual ... not only because that is the goal of the statute but also to avoid overburdening labs or wasting state resources without good reason." *Id.* at 261. A trial court's denial of post-conviction DNA testing is reviewed for an abuse of discretion. *Crumpton*, 181 Wn.2d at 257-58; *Riofta*, 166 Wn.2d at 370. Discretion is only abused if the decision applied the wrong legal standard or rested on facts unsupported by the record. *Id.*

Defendant rightly does not challenge the legal standard correctly identified by the trial court. RP (7/30/15) 5-8, 11-12. So this Court is

called upon to decide whether the trial court was manifestly unreasonable in finding a favorable DNA result would not probably prove defendant's innocence given the overwhelming evidence of his guilt. The trial court correctly weighed the evidence. Defendant's theory of the DNA testing's value is it will establish who the real assailant is by excluding him and identifying the person who deposited the hair. What he again fails to grasp is the inferential link between the premise: *the hair belongs to X*, and the conclusion: *X is therefore the assailant*, is purely speculative, for there is no evidence supporting the implied middle term: *only the assailant could have left the hair*. In actuality, the hair could have been transferred to the exterior of the neighbor's glass door by any number of circumstances completely unrelated to the incident.

There are three probable outcomes of the requested testing:

[1] [I]f the DNA profile of that hair matches defendant, it is consistent with th[e] [victim's] testimony, and inculpates [him].

[2] If the DNA profile matches [the victim], it is consistent with [the victim's] testimony and inculpates defendant.

[3] Finally, if the DNA matches some third party it is consistent with [the victim's] testimony and inculpates defendant. **This is especially true given ... the notebook found in [his] vehicle minutes after the attack included a list of "tools" in defendant's handwriting, which included a "stranger hair."**

Even if the DNA profile matched [the victim's boyfriend] Rogers, it would not exculpate defendant.

Rogers was found at the scene and admitted to being at the scene looking for [the victim], who had contacted him earlier that morning. Rogers was familiar with the home and the area and it would not be surprising or, in anyway exculpatory, for his DNA to be there.

CP 57-58 (emphasis added). This Court also perceived the expressed plan to plant stranger hair at the crime scene diminished the probative value of any result obtained from the test requested. CP 380 (No. 42739-7-II, p. 380). Defendant certainly had the time to take a hair from the victim's house and deposit it on the neighbor's door during the attack, when he inexplicably broke off the attack, then returned and fired two more bullets at her head. One need not strain to imagine Rogers would have topped the list of men defendant would have liked to frame for the victim's murder.

Even if one accepted the ludicrous hypothesis Rogers authored the murder "to-do" list found on the front seat of the Mercedes defendant was driving when apprehended with the victim's blood on his pants, it does not make sense Rogers would have staged the scene with his own hair. If third party hair was staged, testing would identify the patsy, not the assailant. Placing defendant's hair at the neighbors would have a slight tendency to further incriminate him provided its presence could not be accounted for outside the incident. Defendant is consequently identically situated to the defendant in *Riofta*, where neither the absence of his DNA nor the presence of another's DNA would achieve a probability of innocence. *Riofta*, 166 Wn.2d at 363, 373.

At the same time, the evidence of defendant's guilt is impressive. The victim positively identified him as her assailant. CP 371, 378. She recognized his eyes, body and voice, which repeated the same remark he had made on the phone right before the attack: "[you] should not have married [me]." CP 364. This was not a fleeting encounter with a person the victim never met or hardly knew—she had been defendant's wife, and the attack involved a substantial interaction action in her house, making her identification very reliable. CP 364-65; *State v. Booth*, 36 Wn. App. 66, 70, 671 P.2d 1218 (1983). Based on her familiarity with defendant, she also recognized the murder "to-do" list to be drafted in his handwriting. CP 367. Defendant has consistently challenged the victim's identification, but as this Court stated: "[it] does not review credibility determinations made by the jury." CP 378 (citing *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006)).

The victim's identification of her ex-husband as the assailant was also powerfully corroborated. Defendant had her blood on his pants just after the attack when he was found driving his Mercedes with the "to-do" list in a notebook found within reach on his front passenger seat. CP 365-66. A duffle bag, fairly described as a murder kit consistent with the "to-do" list was found near the victim's home and contained a receipt bearing his name and a bracelet he received from her. Also within was her garage door opener, which explained his ability to sneak into her house without leaving evidence of forced entry. CP 365.

Defendant's other suspect of choice has always been Eric Rogers, the man whose company defendant's ex-wife apparently preferred. At best, identifying the hair as coming from Rogers would prove either Rogers or someone who came in contact with Rogers' hair (such as the victim) likely made contact with the neighbor's door sometime before the hair was collected by police. But neither scenario bears the promise of exculpating defendant. Rogers admitted to being at the scene looking for the victim in response to the communication she initiated with him after receiving the menacing call from defendant. The presence of Rogers' hair at that location could also be innocently explained by his pre-incident contact with the premises or the victim's contact with it due to her contact with Rogers. CP 57-58. Proof the hair came from Rogers cannot support a probability of defendant's innocence as RCW 10.73.170 requires.

In response to this adversarially tested evidence, defendant offers a dubious affidavit from a DOC prisoner. The prisoner attributes to a man matching Rogers' description a fortuitous confession to defendant's crimes. Defendant would not be the first to enlist a cohort to fabricate exculpatory evidence. *E.g.*, ***State v. Benn***, 120 Wn.2d 631, 641, 845 P.2d 289 (1993). "In evaluating probative force of newly presented evidence the court may consider how the timing and the likely credibility of the affiants bear on the probable reliability of the evidence." ***Riofta***, 166 Wn.2d at 372. "[P]osttrial affidavits casting blame on third parties are to be treated with a fair degree of skepticism." *Id.* (citing ***Herrera v. Collins***, 506 U.S. 390,

423, 113 S. Ct. 853 (1993)(O'Connor, J., concurring); *State v. Wicker*, 10 Wn. App. 905, 909, 520 P.2d 1404 (1974)(disregarded uncorroborated hearsay casting blame on third party)). The timing of defendant's new information is exceedingly suspicious, for it comes after prior litigation precisely informed him of legal and factual deficiencies that resulted in the denial of the requested relief. CP 377-81, 383-85.

Not only is any probative value adhering to the prisoner affidavit eclipsed by the victim's adversarially tested eyewitness identification and the verified presence of her blood on defendant's pants, it does nothing to make the hair anymore exculpatory for him since DNA would only place Rogers at a scene he admittedly contacted. Rogers' DNA at the residence would only be material if its presence could not be innocently explained, such as the case where a person's DNA is found in a rape victim who only had sexual contact with her attacker. *E.g.*, *State v. Thompson*, 173 Wn.2d 865, 875, 271 P.3d 204 (2012).

Defendant's other uncorroborated information was presented in the form of unsworn hearsay from an alleged handwriting analyst working under the confidence-inspiring title: "The Handwriting Cop." According to him, Rogers wrote the to-do list found in the notebook. Curiously, this "[h]andwriting cop" does not attempt to explain how Rogers could have planted the notebook on the front seat of defendant's Mercedes as defendant drove it just after the attack wearing dark clothing stained with the victim's blood. Not an easy thing to do. Some might call it impossible.

On appeal defendant combines "The Handwriting Cop[']s" finding with a vague reference to Rogers' presence at the scene to portray the finding as adding to suspicion surrounding Rogers. This rhetorical tactic, grounded in mentioning Rogers' presence without context, fails once one recalls the victim texted him right after she received the menacing pre-attack call from defendant. Defendant points to the call's absence from his phone records as proof he did not place it, but as this Court explained to him: "there are myriad ways he could have placed the call other than from that phone." CP 378.

Aside from the obvious reliability problems inherent in defendant's *contributions* to the record, his evidence, even if accepted, does not make it any more likely testing the hair at issue for DNA would probably prove his innocence given the reasons reiterated above. It is not probable the compelling evidence of his guilt would be overcome by proof a hair belonging to someone other than him found its way to the outside of a house the victim impulsively fled to for help. As in ***Gentry***, "[e]ven assuming further testing shows the hairs did not belong to [defendant], evidence at trial showed ... many sources could have deposited the hair." ***State v. Gentry***, 183 Wn.2d 749, 768, 356 P.3d 714 (2015)("[t]he presence of another person's hair on [the victim's] body does not mean ... Gentry is innocent."). In this case, it is at least as likely the hair was carried to the neighbor's exterior door by a resident, visitor, solicitor or the wind as any

person involved in the incident. Defendant's successive request for DNA testing was properly denied.

2. THERE IS NOTHING UNJUST IN A MAN WHO BRUTALLY ATTEMPTED TO MURDER HIS EX-WIFE BEING ORDERED TO REIMBURSE THE PUBLIC FOR FUNDING A SUCCESSIVE ATTEMPT TO SECURE DNA TESTING THAT IS INCAPABLE OF EXONERATING HIM.

RCW 10.73.160(1) empowers appellate courts to impose appellate costs on adult offenders. Imposition of legal financial obligations has been historically perceived to be an appropriate method of ensuring able bodied offenders "repay society for a part of what it lost as a result of [their] commission of a crime." *State v. Barklind*, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). More recently, this community-centric concept of restorative justice has been subordinated to offender-centric concerns focused on the difficulties attending repayment. *E.g. State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily an indispensable factor." *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016).

According to the record developed in this case, defendant drove two cars, one of which was the tan Mercedes where his murder "to-do" list was found. He was capable of purchasing materials to fill his murder kit. He had the capacity of mind to premeditate a violent attack on this ex-wife

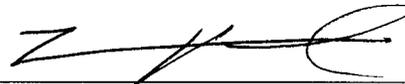
and the physical prowess to execute it with brutal intensity. No doubt the imprisonment attending his convictions has limited his prospects. But if he directed to payment of costs through prison or post-release labor some of the physical and mental energy he applied to attempting the murder of his ex-wife and drafting *pro se* pleadings to forestall accountability for that exceedingly well-proved crime, he might, perhaps, in small measure, reimburse the public for the substantial resources it has and continues to expend on his behalf. Prison-based indigency should not be a barrier to appellate costs.

D. CONCLUSION.

Denial of defendant's request for DNA testing of a hair deposited on the external door of a house his victim fled to for help was proper since there is no result capable of establishing his innocence. While it remains uncertain whether a cost bill will be submitted, costs should not be ruled out because defendant's well-proved crimes resulted in substantial imprisonment.

RESPECTFULLY SUBMITTED: JUNE 27, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{spite} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/2/11

Date

Signature

APPENDIX “A”

Mandate
Dated February 22, 2011

February 22 2011 2:44 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KEVIN STOCK
COUNTY CLERK
NO: 06-1-02214-1

STATE OF WASHINGTON,
Respondent,

v.

JEROME CEASAR ALVERTO ,
Appellant.

No. 38323-3-II

MANDATE

Pierce County Cause No.
06-1-02214-1

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on July 27, 2010 became the decision terminating review of this court of the above entitled case on February 1, 2011. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

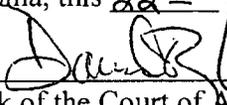
Judgment Creditor: State \$9.68

Judgment Creditor: AIDF \$8476.95

Judgment Debtor: Jerome Ceasar Alverto \$8486.63



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 22nd day of February, 2011.


Clerk of the Court of Appeals,
State of Washington, Div. II

Hon. Kitty-Ann Van Doorninck
Pierce County Superior Court
930 Tacoma Ave. S
Tacoma, WA 98402-2102

Melody M Crick
Pierce County Prosecuting Attorney
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2171

Rebecca Wold Bouchey
Attorney at Law
PO Box 1401
Mercer Island, WA 98040-1401

COURT OF APPEALS
DIVISION II

10 JUN 27 11:08:27
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 38323-3-II

Respondent,

v.

JEROME CEASAR ALVERTO,

UNPUBLISHED OPINION

Appellant.

Penoyar, J. — Jerome Ceasar Alverto appeals his convictions of attempted first degree murder, first degree burglary, and first degree robbery. He argues that the trial court abused its discretion by admitting a notebook found in his vehicle. He also raises numerous claims in his statement of additional grounds (SAG).¹ We affirm.

FACTS

I. BACKGROUND

In the early morning of May 13, 2006, Stephanie Wilson received a phone call from her ex-husband, Alverto. Alverto said to Wilson, “So you got a concealed weapons permit, huh?”⁶ Report of Proceedings (“RP”) at 267. He told her that she should not have married him and asked her if she was going to marry her boyfriend, Eric Rogers. Alverto told Wilson that she was going to be sorry. Wilson told Alverto she did not want to talk anymore and hung up her phone.

Wilson sent a text message to Rogers, who called her back. Wilson set her house alarm and then went into her bathroom, where she was hit on the head from behind with a wine bottle. Wilson fell to the ground and was then hit repeatedly on the head with a gun. Her attacker told

¹ RAP 10.10.

38323-3-II

her, as he hit her, that she should not have married him. Wilson recognized Alverto's eyes, body, and voice, even though he wore black clothing, black gloves, and a bandanna around his face.

Alverto then picked Wilson up by her hair, brought her into her bedroom, put a gun to her head, and told her that he was going to kill her and that her kids were going to come home and find her. Wilson asked Alverto to take her elsewhere. She picked up her cellular phone to call the police; however, she ultimately did not call, believing that the police would be unable to detect her location.²

Alverto had told Wilson to put some clothes on, so she went into her walk-in closet. Alverto picked up Wilson's safe, which contained her wedding ring, from inside her closet. He put the safe onto Wilson's bed, taking his eyes off of Wilson. Wilson then ran out of her bedroom and down the stairs. Alverto caught up to her and then proceeded to hit her on the head repeatedly with the butt of his gun.

Next, Alverto told Wilson to turn off her house alarm. As she went to turn off the alarm, Alverto kicked her. At one point, Alverto lost eye contact with Wilson, and she was able to run out the front door. Wilson ran to her neighbor's house; however, Alverto chased after her and shot her in the chest. Wilson collapsed, and Alverto then shot her in her right hand.

Wilson played dead until she heard Alverto run off. She looked up and could not see him, so she went to a neighbor's house for help. Alverto then appeared again and shot her in the back of her neck. Wilson collapsed, and Alverto grabbed her by the hair and pulled her body down the stairs and onto the neighbor's lawn. He shot Wilson twice in the head and then ran off.

² At trial, Wilson testified that she could not remember what happened to her phone.

38323-3-II

Wilson managed to reach a neighbor's house and knocked on the door. This neighbor had previously called 911, around 4:50 A.M., after hearing a series of booms and then seeing a man dragging a woman by her hair off the patio of a neighbor's home. Wilson told the neighbor the name of her attacker; the types of cars he drove, a green Volvo and a champagne Mercedes; and his address. When the police arrived, she gave them the same information that she had given the neighbor.

Pierce County Deputy Sheriffs Mark Fry and Bryan Cline were dispatched to Alverto's residence at around five in the morning. As they were driving, they observed a man in a tan Mercedes. Cline stopped the vehicle, which Alverto was driving. Alverto wore a black shirt, blue pants, and black shoes. Fry noticed blood on Alverto's pants. Alverto denied shooting anyone and told Fry that he was going deer hunting. It was not deer hunting season.

Later that morning, a framing contractor found a duffel bag at a construction site and called the police. The construction site was located approximately one to two miles from Wilson's home. The duffel bag contained a backpack, a leather jacket, light blue respirator-type masks, four gas masks with filters, and a blue bandanna. The jacket pockets held two pairs of silver handcuffs and Wilson's cellular phone. The backpack held three white trash bags; two stocking caps, one with the eyes, nose, and mouth cut out; clothes, including a pair of jeans; a garage door opener for Wilson's garage door; a photograph of Wilson and Rogers; two bracelets, one with an inscription that said "Songs of Solomon 8:6 . . . Love, Stephanie." 9 RP at 756. Wilson later identified the bracelet as one she had given Alverto when they were in a relationship. The duffel bag also contained a handgun; there was blood on the lower receiver, on the upper slide around the barrel, and on the pistol grip. Inside the pair of jeans, an investigator found a grocery list with Alverto's name printed across the top of it.

38323-3-II

Detectives found no indication of a forced entry into Wilson's home. Police found a steak knife in Wilson's master bedroom, hidden between her mattresses. DNA testing showed that the blood stains on Alverto's pants matched Wilson's DNA.

II. PROCEDURAL HISTORY

On May 16, the State charged Alverto with attempted first degree murder, first degree burglary, and first degree robbery.³ Before trial, Alverto moved to suppress "any/all items seized" during a warrantless police search of his house immediately after his arrest. Clerk's Papers (CP) at 8. The trial court found that there was not sufficient evidence for a warrantless search of Alverto's home under the community caretaking exception. The trial court ruled that it would not suppress evidence from Alverto's house that the police subsequently obtained under a valid search warrant.

At trial, the trial court admitted into evidence a notebook found in the front seat of Alverto's vehicle. The notebook contained what appeared to be a "to-do list." 10 RP at 785. The following was written on the first page of the notebook: "[R]emove cell (GPS); 5:30 [to] 6 am (5 am); has to look natural; cuts, ra[n]sack truck [and] purse." CP at 43 (semicolons added). There were also two phone numbers on the notebook's first page; neither was Wilson's. On the second page, the following was written: "(Tools), gun, taser, knife, handcuffs, tape, shoe covers, gloves, flashlight, scarf or face mask, [u]se white face mask, trash bags (2 large, 4 small), stranger hair/condom." CP at 44 (commas added). The third page states, "(dress code), dark pants, dark shirt, glove, stocking cap [and] face mask, tape gloves to shirk [sic], tape eyebrows, tape pants to shoe cover, tape pockets." CP at 45 (commas added). The fourth page reads,

³ The State filed an amended information, correcting the spelling of Wilson's name, on August 18, 2008.

38323-3-II

“(execute)[;] no communication[;] enter garage 5 am, wait til anyone enter; taser individual; handcuff right arm to [left] leg; handcuff [left] arm to right leg; tape arms [and] tape legs together (added restraint).” CP at 46. The final page reads, “(options), set her on fire, act out a carjacking gone bad, taser – stab her in her garage and smear blood in garage.” CP at 47 (commas added). At trial, Wilson identified the handwriting in the notebook as Alverto’s.

Previously, Alverto had moved in limine to exclude the notebook. The trial court stated:

The defense argument had been regarding *State v. Whalon*[, 1 Wn. App. 785, 464 P.2d 730 (1970)] And I read that very carefully, and I think it’s very distinguishable. That was a situation where there was a charge of [r]ape, and there was [sic] some writings by the defendant having to do with, it appeared to be, sort of planning out a rape.

But in that case, not the victim, but a different woman’s name was there, a different woman’s address was there, and other contact information. So there was nothing particularly about the victim in that alleged case related to the notebook. And the Court of Appeals then said that was too prejudicial.

This is a little bit different. Perhaps, vaguer, but I think that under 403, it is very prejudicial. It is also very probative. And it is my understanding from -- I guess what I’m saying is, even if it’s equal in terms of prejudice and probative, everything the State wants to admit is usually prejudicial to the defendant; that on balance that it would be admissible to -- in terms of being relevant to the issues in this case.

It’s not a 404(b) kind of prior bad act. It is in and of the same time frame, just that it was found in the defendant’s car at the time of his arrest, shortly after the alleged assault occurred, but again, on balance. I think that it’s probative, given the issues that have been raised by the defense, in terms of identification, and -- anyway, that’s my ruling.

7 RP at 429-30.

The jury found Alverto guilty on all charges. Alverto appeals.

38323-3-II

ANALYSIS

I. ADMISSION OF NOTEBOOK

Alverto asserts that the trial court erred by admitting into evidence the notebook from his vehicle. He argues that the trial court applied an incorrect legal standard to evaluate the admissibility of the notebook and that the “unfair prejudice of this evidence is not outweighed by the probative value and therefore the evidence should have been excluded under both ER 403 and ER 404(b).” Appellant’s Br. at 10. We disagree.

We review a trial court’s decision as to the admissibility of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence is admissible; however, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 402, 403. The trial court has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996). “[T]he record must in some way show that the court, after weighing the consequences of admission, made a ‘conscious determination’ to admit or exclude the evidence.” *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

Generally, we defer to the assessment of the trial judge, who is best suited to determine the prejudicial effect of evidence. *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Also, “[i]n almost any instance, a defendant can complain that the admission of potentially

38323-3-II

incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is charged.” *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). Thus, the focus must be on whether the admitted evidence was unfairly prejudicial. *Bernson*, 40 Wn. App. at 736. Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

First, Alverto argues that the trial court abused its discretion by applying an incorrect legal standard to evaluate the admissibility of the notebook. Specifically, he argues that “the trial court applied an incorrect standard when it held that when the probative value was equal to the prejudice, the evidence should be admitted.” Appellant’s Br. at 10. The State asserts that “[t]he balancing test is required but because the scales have to be tipped by substantial prejudice in order to exclude the challenged evidence, if the balance is even, the evidence should be admitted.” Resp’t’s Br. at 13.

Here, the court found that the evidence was relevant and balanced its probative value against its prejudicial effect. The trial court noted that the evidence was prejudicial in that “everything the State wants to admit is usually prejudicial to the defendant.” 7 RP at 429. Evidence that may contribute to proving beyond a reasonable doubt that Alverto committed the crime with which he was charged is not the type of unfairly prejudicial evidence that ER 403 seeks to exclude. We conclude that the trial court weighed the evidence’s probative value against its prejudicial effect and did not abuse its discretion in finding the notebook admissible.

Next, Alverto asserts that the notebook’s probative value did not outweigh the unfair prejudice, so the notebook should have been excluded under ER 403 and ER 404(b). We disagree.

38323-3-II

Alverto relies on *State v. Whalon*, 1 Wn. App. 785. In *Whalon*, we held that a defendant's nine-step list for committing rape in an automobile was more prejudicial than probative and should not have been admitted. 1 Wn. App. at 787, 794. In *Whalon*, the crime took place in the victim's bedroom, and the list was found on the defendant's person about two months after the crime. 1 Wn. App. at 786-87. We concluded that evidence showing lustful disposition should only be admitted in a sex offense case where it tends to show such lustful inclination toward the victim. 1 Wn. App. at 794. Our case is distinguishable from *Whalon*.

Here, the trial court allowed admission of the notebook for identification purposes.⁴ The notebook, found in Alverto's vehicle on the morning of Wilson's attack, contained entries and notes of "remove cell," "5:30 [to] 6 am (5 am)," "gun," "trash bags," "gloves," "handcuffs," "scarf or face mask," "(dress code) dark pants dark shirt," and "enter garage 5 am" CP at 43-46. Wilson's attacker wore a bandanna around his face, gloves, and dark clothing. The attack occurred just before 5 A.M. A garage door opener for Wilson's garage, a gun, trash bags, two pairs of handcuffs, masks, and Wilson's cellular phone were found in a duffel bag at a construction site on the morning of the crime. The duffel bag also contained a grocery list with Alverto's name on it and a bracelet that Wilson gave Alverto when they were in a relationship. Further, the notebook establishes that Alverto had a premeditated intent to cause Wilson's death. See RCW 9A.28.020(1); RCW 9A.32.030(1)(a). While not all of the entries in the notebook match what happened during the attack, the notebook's probative value outweighed its prejudicial value.

⁴ It is unclear from the record under what rule the trial court admitted the notebook. It appears, however, that the trial court did not admit the notebook under ER 404(b). The trial court stated, "I think that under 403, it is very prejudicial. It is also very probative It's not a 404(b) kind of prior bad act." 7 RP at 429.

38323-3-II

Moreover, any error in admitting such evidence would have been harmless. An error in admitting evidence that does not prejudice the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Such an error is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. *Bourgeois*, 133 Wn.2d at 403 (quoting *Tharp*, 96 Wn.2d at 599). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Bourgeois*, 133 Wn.2d at 403. Wilson identified Alverto as her attacker. When Fry arrested Alverto, he noticed blood on Alverto's pants. The blood stains on Alverto's pants matched Wilson's DNA. This evidence demonstrates that the notebook evidence had only minor significance in reference to the overall, overwhelming evidence as a whole. Thus, any error would have been harmless.

II. STATEMENT OF ADDITIONAL GROUNDS

A. SEARCH OF WILSON'S RESIDENCE

In his SAG, Alverto first appears to argue that the police conducted an unlawful warrantless search of Wilson's home. Alverto also challenges the validity of the search warrant police subsequently obtained to search Wilson's home. Fourth Amendment rights are personal rights that may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). A defendant who does not personally claim a legitimate expectation of privacy in the area searched or property seized generally has no standing to challenge the search or seizure. *State v. Gocken*, 71 Wn. App. 267, 279, 857 P.2d 1074 (1993) (quoting *State v. Foulkes*, 63 Wn. App. 643, 647, 821 P.2d 77 (1991)). Alverto had no legitimate expectation of privacy in Wilson's home and, therefore, he has no standing to challenge the search or the warrant to search Wilson's home.

38323-3-II

B. STATEMENT OF PROBABLE CAUSE

Alverto also argues that the officer who submitted the statement of probable cause for Alverto's arrest committed perjury in the statement. There is no evidence in the record to support these assertions and we do not consider matters outside the record in a direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

C. SEARCH OF ALVERTO'S VEHICLE AND RESIDENCE

Next, Alverto contends that Detective Warren Dogeagle made a false statement on his complaint for a search warrant of Alverto's residence. In *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the court held that:

where defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

A defendant bears the burden to make a substantial preliminary showing that an officer providing an affidavit for a search warrant made a false statement or omitted information knowingly and intentionally, or with reckless disregard for the truth. *See State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992). Further, the allegedly false statement or omission must be necessary to the finding of probable cause. *Garrison*, 118 Wn.2d at 874. Alverto asserts that Dogeagle intentionally lied when he wrote that he believed evidence was concealed in Alverto's house when the evidence "he just described as being found, and [was] found, in Mr. Alverto's 'car.'" SAG at 7 (emphasis omitted). Alverto fails to meet his burden of making a substantial preliminary showing that Dogeagle intentionally made a false statement; we hold that his argument is without merit.

38323-3-II

Further, Alverto appears to argue that the warrantless search of his car and home were unconstitutional. An officer may conduct a vehicle search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring in judgment)). Thus, the warrantless search of Alverto's car at the time of his arrest was permissible as a vehicle search incident to a lawful arrest, because officers reasonably believed evidence relevant to the attempted murder of Wilson might be found in the vehicle.

In regards to the warrantless search of Alverto's home, the trial court found before trial that there was not sufficient evidence for a warrantless search of Alverto's home under the community caretaking exception. The State asserted that nothing was seized during the warrantless sweep of Alverto's house and that when a search warrant was obtained for Alverto's home, the warrantless sweep was not mentioned. Eventually, the trial court ruled that it would not suppress evidence obtained under the valid search warrant that the police later obtained. The trial court already resolved this issue in Alverto's favor by ruling that there was insufficient evidence to justify the warrantless search of Alverto's home; thus, there was no trial court ruling adverse to Alverto on the warrantless search issue giving rise to an appealable action.

D. PERJURY AND USE OF PERJURED TESTIMONY

Alverto contends that Officer Robert Johanson's testimony was perjured. Credibility determinations are for the trier of fact and are not subject to our review. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008).

38323-3-II

Alverto also appears to argue that the State knowingly presented false testimony. We do not address this argument as it depends on facts not in the record. See *McFarland*, 127 Wn.2d at 335. There is nothing in the record to indicate that the prosecutor presented false testimony knowingly or otherwise.

E. VIOLATION OF THE CODE OF JUDICIAL CONDUCT

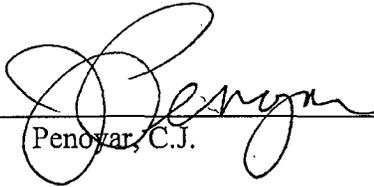
Alverto appears to argue that the trial court judge violated Alverto's right to a fair trial by exhibiting judicial bias and prejudice against Alverto. To support his claim, he argues that the trial court demonstrated bias when it did not allow the defense to impeach a witness and admitted evidence relating to the relationship between Alverto and Wilson. Evidentiary rulings, even if erroneous, do not constitute judicial misconduct. Further, even if the trial court erred, any error was harmless.

Furthermore, we presume that a trial court properly discharged its official duties without bias or prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). Thus, a defendant claiming a violation of the appearance of fairness doctrine must make a threshold showing of a trial court's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992). A defendant must provide specific facts supporting his allegation of bias. *Davis*, 152 Wn.2d at 692. Judicial rulings alone almost never constitute a valid showing of bias. *Davis*, 152 Wn.2d at 692. There is no evidence in the record that the trial judge was prejudiced against Alverto. We hold that this argument is without merit.

38323-3-II

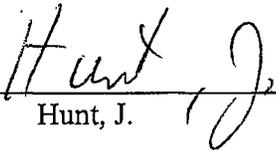
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

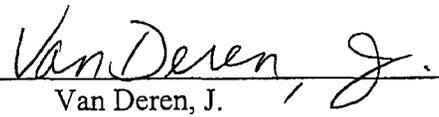


Penoyar, C.J.

We concur:



Hunt, J.



Van Deren, J.

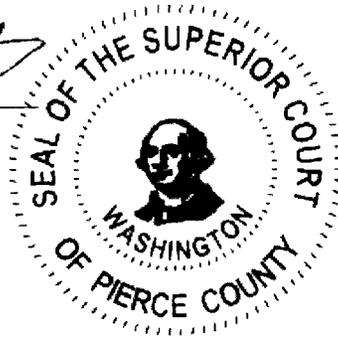
State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 21 day of June, 2016



Kevin Stock, Pierce County Clerk

By /S/Rebecca Ahquin, Deputy.

Dated: Jun 21, 2016 4:01 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter SerialID: 9CE3233E-DEA8-4E28-89F27F04F88698E5.

This document contains 14 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX “B”

*Order Dismissing Personal Restraint Petition
Dated July 31, 2012*

8/1/2012 10314 300104

Case Number: 06-1-02214-1 Date: June 21, 2016

Serial ID: 12875A0F-019A-44A1-8D112331FE403894

Filed By: Kevin Stock Pierce County Clerk, Washington



06-1-02214-1 38943211 CPPRP 07-31-12

FILED
COURT OF APPEALS
DIVISION II

2012 JUL 31 AM 9:28

STATE OF WASHINGTON
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of
JEROME CEASAR ALVERTO.
Petitioner

No. 42739-7-II

ORDER DISMISSING PETITION

06-1-02214-1

Jerome Alverto seeks relief from personal restraint imposed following his 2008 convictions for attempted first degree murder, first degree robbery and first degree burglary.¹ He raises numerous arguments

First, Alverto argues that he has new reliable evidence that will prove his actual innocence. *House v Bell*, 547 U.S. 518, 126 S. Ct. 2064, 2077, 165 L. Ed. 2d 1 (2006). He asserts is exculpated by (1) a human hair that was not tested for DNA, (2) a notebook detailing plans to kill his victim that was not tested for DNA or against his handwriting, and (3) records from his cell phone that do not show calls to the victim. But to constitute newly discovered evidence, the evidence must have been discovered since the trial and will probably change the result of the trial. *In re Personal Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001). The human hair and the notebook were discovered before trial and so cannot constitute newly discovered evidence. And the cell phone

¹ We issued the mandate of Alverto's direct appeal on February 22, 2011, making his October 13, 2011 petition timely filed. RCW 10.73.090(3)(b)

42739-7-II/2

records would not probably change the result of the trial. Although Alverto asserts that his cell phone was his only phone, there are myriad ways he could have placed the call other than from that phone. He does not meet the standard for showing actual innocence through newly discovered evidence

Second, Alverto argues that he was not at the scene of the crimes and so could not have committed them. But his victim identified him at trial as being there and committing the crimes. While he challenges that identification, we do not review credibility determinations made by the jury. *State v Brockob*, 159 Wn 2d 311, 336, 150 P.3d 59 (2006). He also argues that the State did not present evidence that he robbed the victim. But the police recovered a bag from a nearby construction site that contained the victim's cell phone, the victim's garage door opener, a bracelet that the victim had given Alverto when they were married, a handgun with blood on it and a grocery list with Alverto's name on the top. The State presented sufficient evidence of robbery.

Third, Alverto argues that the detectives deliberately destroyed scrapings from under the victim's fingernails that could have exculpated them. But he does not show deliberate destruction. The detectives asked the medical staff to take those scrapings, but that staff did not do so. At most, they failed to follow up on their request. In order to obtain dismissal of criminal charges based on the State's failure to preserve evidence, the evidence must have had an apparent exculpatory value, the State must have destroyed the evidence, and the destruction must have been done in bad faith. *State v Wittenberger*, 124 Wn.2d 467, 477, 880 P 2d 517 (1994). Alverto shows neither that the scrapings would have had an apparent exculpatory value, that the State destroyed them or that, to

42739-7-II/3

the extent that failing to have the medical staff obtain the scrapings constituted a "destruction," it did so in bad faith.

Fourth, Alverto argues that Deputy Cline (1) smeared the victim's blood on his pants, (2) planted a loaded magazine, holster and ammunition in his home, and (3) planted a handgun case, gloves and the notebook in his vehicle. But other than his self-serving affidavit, he presents no evidence to support those assertions.

Fifth, Alverto argues that he was denied due process because evidence that another person, specifically the victim's boyfriend, could have committed the crime. But he does not demonstrate that any such evidence was excluded. And the boyfriend testified and was cross-examined about his possible motives for committing the crimes. Alverto does not show a denial of due process.

Finally, Alverto argues that he received ineffective assistance of counsel in a number of regards. To establish ineffective assistance of counsel, he must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v McFarland*, 127 Wn 2d 322, 335-36, 899 P 2d 1251 (1995), *Strickland v Washington*, 466 U.S. 668, 687, 104 S. Ct 2052, 80 L. Ed 2d 674 (1984).

Alverto asserts that his trial counsel performed deficiently in the following regards: (1) failing to have the human hair tested for DNA, (2) failing to have the notebook's handwriting analyzed, (3) not objecting to the items found in the bag discovered at the construction site, (4) not arguing that no property had been stolen from the victim, (5) not obtaining his cell phone records, (6) not moving to admit a complete copy of the victim's medical records, (7) not objecting to the admission of an incomplete

42739-7-III/4

Case Number: 06-1-02214-1 Date: June 21, 2016
SerialID: 12875A0F-019A-44A1-8D112331FE403894
Certified By: Kevin Stock Pierce County Clerk, Washington

copy of the victim's medical records, (8) not moving to dismiss based on deliberate destruction of the fingernail scrapings, (9) not allowing him to testify in his own defense, (10) not obtaining a Safeway video recording placing him in the store at the time of the crime; (11) not interviewing the victim's boyfriend, (12) not confronting Deputy Cline about his crimes of dishonesty; and (13) not presenting evidence that his vehicle had clear windows, not the tinted windows described by witnesses.

As to claim (1), in light of all the other evidence implicating Alverto, there was little chance that a single human hair would exculpate him. Further, the plan in the notebook included bringing stray hairs to the crime scene. As to claim (2), Alverto does not show any competent evidence calling into question that the notebook was found in his vehicle. He does not show any likelihood that the handwriting analysis would have changed the result of the trial. As to claim (3), he does not show any grounds for objecting to the items found in the bag. The limited handling of the items by the construction workers would not be enough to render the items inadmissible. As to claim (4), the victim's cell phone and garage door opener were found in the bag along with items that could be identified with Alverto. As to claim (5), he does not show that obtaining his cell phone records probably would have changed the result of the trial, for the reason described above. As to claims (6) and (7), other than speculation that the victim might have been under the influence of a substance that would lead her to make a false identification of Alverto, he does not show any deficient performance regarding the victim's medical records. As to claim (8), there were no grounds to move to dismiss, for the reasons described above. As to claim (9), the transcript shows that Alverto was advised of his right to testify and that he declined to testify. As to claim (10), Alverto

42739-7-II/5

Case Number: 06-1-02214-1 Date: June 21, 2016
 SerialID: 12875A0F-019A-44A1-8D112331FE403894
 Certified By: Kevin Stock Pierce County Clerk, Washington

fails to show that any such video could have been obtained, such that failure to obtain it would be deficient performance. As to claim (11), Alverto fails to show that such an interview probably would have changed the result of his trial. As to claim (12), Alverto's counsel did confront Deputy Chne with his prior convictions, over the State's objection. And as to claim (13), the victim, who provided the police with the first identification of Alverto's vehicle, did not describe it as having tinted windows, so evidence of the clear windows would not probably have changed the result of the trial. Alverto fails to show ineffective assistance of counsel.

Alverto fails to demonstrate grounds for relief from restraint.

Finally, Alverto moves for appointment of counsel, for an evidentiary hearing and for post-conviction DNA testing. Because his petition fails to demonstrate grounds for relief from restraint, he is not entitled to appointment of counsel or to an evidentiary hearing. RAP 16.11(a). And his motion for post-conviction DNA testing is denied because such motions must be brought in the trial court in which he was convicted. RCW 10.73.170.

Accordingly, it is

ORDERED that Alverto's petition is dismissed as frivolous under RAP 16.11(b). His motions for appointment counsel, for an evidentiary hearing and for post-conviction DNA testing are denied.

DATED this 31st day of July, 2012.

Van Deren, A.C.J. pro tem
 Acting Chief Judge Pro Tempore

cc: Jerome C Alverto
 Brian Wasankari

Case Number: 06-1-02214-1 Date: June 21, 2016

SerialID: 12875A0F-019A-44A1-8D112331FE403894

Certified By: Kevin Stock Pierce County Clerk, Washington

42739-7-II/6

Pierce County Clerk
County Cause No. 06-1-02214-1

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 21 day of June, 2016



Kevin Stock, Pierce County Clerk

By /S/Rebecca Ahquin, Deputy.

Dated: Jun 21, 2016 4:01 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter SerialID: 12875A0F-019A-44A1-8D112331FE403894.

This document contains 6 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

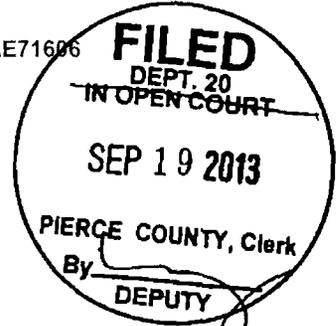
APPENDIX “C”

Ruling
Dated September 19, 2013



06-1-02214-1 41243203 CPRM 09-20-13

Case Number: 06-1-02214-1 Date: June 21, 2016
SerialID: 93BCC524-32A3-4C37-918A40E8DAE71606
Certified By: Kevin Stock Pierce County Clerk, Washington



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
 Respondent,
 v.
 JEROME CEASAR ALVERTO,
 Appellant.

No 44098-9-II
06-1-02214-1

RULING AFFIRMING ORDERS

FILED
 COURT OF APPEALS
 DIVISION II
 2013 SEP 18 AM 11:31
 STATE OF WASHINGTON
 BY DEPUTY

In 2008, Jerome Alverto was convicted of attempted first degree murder, first degree burglary and first degree robbery. This court affirmed his convictions. In 2012, Alverto filed a motion for post-conviction DNA testing, under RCW 10.73.170, of a human hair and scrapings from under the victim's fingernails.¹ On October 12, 2012, the trial court denied the motion, ruling that he had "failed to show the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." Clerk's Papers (CP) at 85. He filed a notice of appeal. His appellate counsel moves to withdraw, having found no basis for a good faith argument on appeal, and has filed a brief pursuant

¹ Alverto also asked for handwriting analysis of a notebook and for cellular telephone records. But those requests are outside the scope of RCW 10.73.170.

44098-9-II

to *Anders v. California*.² This court considered Alverto's appeal on a motion on the merits calendar under RAP 18 14(a). This court finds Alverto's appeal is frivolous, affirms the trial court's order and denies without prejudice the motion to withdraw.

Alverto's appointed counsel raises one possible issue for review: Did the trial court err in denying the motion for post-conviction DNA testing? In deciding a motion for post-conviction DNA testing under RCW 10 73.170, the trial court "must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis." *State v. Thompson*, 173 Wn.2d 865, 872-73, 271 P.3d 204 (2012) (quoting *State v. Riofta*, 166 Wn.2d 358, 367, 209 P.3d 467 (2009)) (emphasis omitted). This court reviews the trial court's decision on such a motion for an abuse of discretion. *Riofta*, 166 Wn.2d at 370. No abuse of discretion is apparent in the denial of Alverto's motion. The judge who denied it is the same judge who presided over his trial. The considerable evidence establishing Alverto as the perpetrator of the crimes is set forth in the opinion rejecting his direct appeal, No. 38323-3-II

Alverto filed a statement of additional grounds, arguing that his appeal has merit. He contends that some evidence should not have been admitted at trial, namely rifle evidence, hearsay testimony and fabricated evidence, and so that evidence should not be

² 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). See also *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970).

Case Number: 06-1-02214-1 Date: June 21, 2016
 SerialID: 93BCC524-32A3-4C37-918A40E8DAE71606
 Certified By: Kevin Stock Pierce County Clerk, Washington

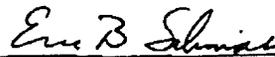
44098-9-II

considered in whether favorable DNA test results would raise the likelihood that he is innocent on a more probable than not basis. But he fails to demonstrate that the rifle evidence and hearsay testimony were improperly admitted. And he presents no evidence to support his claim that the blood evidence taken from his pants, the DNA of which matched the victim's DNA, was fabricated. The blood stains were noticed at the time of Alverto's arrest. Alverto's claim of an illegal search of his residence was rejected in the appeal of his convictions. Alverto does not demonstrate that this appeal has merit.

This court conducted an independent review of the record, as required by the *Anders* procedure, and found no non-frivolous issues. Accordingly, it is hereby

ORDERED that the trial court's order denying Alverto's motion for post-conviction DNA testing is affirmed. Alverto's counsel's motion to withdraw is denied without prejudice, pending compliance with RAP 18.3(a)(3) and (a)(4). *State v. Folden*, 53 Wn. App. 426, 429, 767 P.2d 589, review denied, 112 Wn.2d 1022 (1989). Alverto is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985)

DATED this 18th day of September, 2013



Eric B. Schmidt
 Court Commissioner

cc: Sheri Arnold
 Kimberley DeMarco
 Hon. Kitty-Ann Van Doorninck
 Jerome C. Alverto

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 21 day of June, 2016



Kevin Stock, Pierce County Clerk

By /S/Rebecca Ahquin, Deputy.

Dated: Jun 21, 2016 4:01 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter SerialID: 93BCC524-32A3-4C37-918A40E8DAE71606.

This document contains 3 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

PIERCE COUNTY PROSECUTOR

June 27, 2016 - 9:50 AM

Transmittal Letter

Document Uploaded: 1-479605-Respondent's Brief.pdf

Case Name: State v. Jerome Alverto

Court of Appeals Case Number: 47960-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com