IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29513-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MERLE WILLIAM HARVEY,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows convictions for first degree murder, second degree murder, and two counts of unlawful possession of a firearm. The appellant assigns error to police witnesses' use of the word "victim" to refer to the two men the appellant shot and killed. We conclude that this was not a comment on the appellant's guilt or his defense—self-defense. The appellant also assigns error to the court's decision to admit evidence of his flight, and the theft of cars to further that flight. We conclude that the evidence was appropriately admitted. We therefore affirm the convictions.

FACTS

Merle Harvey shot and killed Jack Lamere and Jacob Potter. The State charged

Mr. Harvey with two counts of first degree murder and two counts of unlawful possession of a firearm. Mr. Harvey admitted that he shot the men, but claimed he did so in self-defense. Witnesses for the State and for the defense offered different versions of the shooting.

Diana Richardson drove Mr. Harvey away from the scene of the shooting. Mr. Harvey abandoned the getaway truck in Spokane. Mr. Harvey and Ms. Richardson traveled to Idaho in one stolen car and then traveled to the Tri-Cities in another stolen car. They were on their way to Oregon when they caught the attention of the Kennewick police. Ms. Richardson drove so as to elude the Kennewick police; Mr. Harvey was in the passenger seat. Police tracked the couple down and arrested Mr. Harvey two weeks after the shooting.

At trial, the State introduced evidence of Mr. Harvey's flight. A jury found Mr. Harvey guilty of first degree murder for Mr. Lamere's death and second degree murder for Mr. Potter's death, as well as two counts of unlawful possession of a firearm.

DISCUSSION

Mr. Harvey appeals and argues that the evidence of his flight was not sufficiently probative to outweigh the potential prejudice. Mr. Harvey also argues that use of the term "victim(s)" by some of the State's witnesses amounted to improper opinion

testimony on Mr. Harvey's guilt.

Word "Victim" not a Comment on Guilt

Mr. Harvey contends that police witnesses' reference to the people he shot and killed as "victims" amounted to a comment on the evidence particularly since his defense was self-defense. We review the court's decisions to admit or exclude evidence for abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). We ultimately conclude that referring to the two men who died from gunshot wounds as victims did not amount to an opinion of guilt for a few reasons.

First, the use of *victim* here was not framed as opinion testimony. Opinion testimony is "'[t]estimony based on one's belief or idea rather than on direct knowledge of facts at issue.'" *Id.* at 760 (quoting Black's Law Dictionary 1486 (7th ed. 1999). The questions that prompted the use of *victim* were:

- "[A]fter you arrived on scene, what was the next step you took, sir?" Report of Proceedings (RP) at 322.
- "[W]hat are the standard procedures you follow when you're one of the first to arrive on a crime scene, Corporal?" RP at 323.
- "[W]hat information did you receive when you were called at home?" RP at 732.
- "When you arrived at the scene at 1310 West Boone at you said 2230 hours, could you tell us what you saw?" RP at 733.
- "Who all did you talk to? Do you remember the officers and/or

detectives?" RP at 831.

These questions do not ask the witness to give an opinion on guilt or anything else. Witnesses referred to Mr. Lamere, Mr. Potter, and those who saw the shooting as "victims," while explaining the actions of police when the investigation began.

Second, *victim* does not necessarily refer to the victim of a crime. One of the definitions of *victim* is "someone put to death, tortured, or mulcted by another." Webster's Third New International Dictionary 2550 (1993). Other definitions include: "anyone who suffers either as a result of ruthless design or incidentally or accidentally"; "someone who suffers death, loss, or injury in an undertaking of his own"; "someone tricked, duped, or subjected to hardship"; and "a living being sacrificed to some deity or in the performance of a religious rite." *Id.* The Delaware Supreme Court has concluded that the term *victim* "is a term of art synonymous with 'complaining witness'" for law enforcement. *Jackson v. State*, 600 A.2d 21, 24-25 (Del. 1991). And that appears to us to be the way the term was used here. The decedents were also referred to variously by name and as "subjects." RP at 528.

Moreover, common use of "victim" suggests that anybody with a gunshot wound is a victim. Here, Mr. Lamere and Mr. Potter were certainly victims of gunshot wounds, whether it was Mr. Harvey's or their own fault that they received the wounds. We

conclude then that referring to the men who died from gunshot wounds as victims does not amount to opinion testimony.

Further the testimony "must relate to the defendant" to be an opinion on a defendant's guilt. *State v. Wilber*, 55 Wn. App. 294, 298, 777 P.2d 36 (1989). For example, a police officer talking about how a police dog tracked a defendant's "guilt scent" was inadmissible opinion testimony. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985). And we have also held that an ambulance driver's testimony that a defendant was "calm and cool" when hearing about his wife's death was inadmissible opinion testimony on guilt. *State v. Haga*, 8 Wn. App. 481, 490, 507 P.2d 159 (1973). And in *State v. Black*, for example, a rape counselor's testimony that the alleged victim suffered from "'rape trauma syndrome,'" was held inadmissible, not only because the evidence did not pass the *Frye*[1] test, but also because such testimony would "'invade the jury's province of fact-finding and add confusion rather than clarity.'" 109 Wn.2d 336, 350, 745 P.2d 12 (1987) (quoting *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982)). The testimony at issue here did not relate to the defendant.

Ultimately, we do not know and cannot know what effect, if any, the reference by police or first responders to the deceased as "victims" had. We are asked to conclude that use of the term victim expressed an opinion of guilt. But it may also simply be, as the

[1] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (1923).

State suggests, a shorthand reference to the recipient of a bullet. Again, the officers also referred to the decedents as subjects or used their proper names. We cannot conclude that the jury would infer the officers' opinion of guilt from the use of that term and therefore that the defendant was prejudiced by the use of that term. It is more accurately described as a term of art. *Jackson*, 600 A.2d at 24-25. The jury must be given credit for following the instructions here on the presumption of innocence, self-defense, and the absence of a first aggressor instruction. We will not conclude that the use of the term "victim" was calculated to express an opinion of Mr. Harvey's guilt.

Evidence of Flight

Mr. Harvey contends that the court abused its discretion by refusing to suppress evidence of his flight. He argues that the court failed to consider the relevance and whether the probative value substantially outweighed the prejudice.

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (citing *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence." ER 401. Evidence that Mr. Harvey left the scene as Ms. Richardson's passenger, was involved in eluding the police, and stole two cars makes his unlawful killing of Mr. Lamere and Mr. Potter more probable than it would be without the evidence. *See* ER 401; *State v. Price*, 126 Wn. App. 617, 645, 109 P.3d 27 (2005) (concluding that evidence defendant traveled out of state and shaved off his hair relevant to his consciousness of guilt over murder).

Evidence of "other crimes, wrongs, or acts" is admissible so long as they are not admitted to show that a defendant's actions conformed with his character. ER 404(b). Evidence of a defendant's flight after the commission of a crime is admissible to show "a consciousness of guilt or . . . a deliberate effort to evade arrest and prosecution." *Price*, 126 Wn. App. at 645. Of course, this evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. To be more probative than prejudicial, the inference between flight and consciousness of guilt or deliberate effort to evade arrest and prosecution must be "'substantial and real' not 'speculative, conjectural, or fanciful.' *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and

prosecution." *Price*, 126 Wn. App. at 645. The inference that the flight here was a deliberate effort to evade arrest and prosecution is substantial and real.

Mr. Harvey posits a different and more nuanced analytical approach to evaluate the probative value of the evidence here. He wants us to ask whether the inference between flight and deliberate effort to evade arrest and prosecution is substantial and real, but by looking at "'the degree of confidence with which four inferences can be drawn.'" *See State v. McDaniel*, 155 Wn. App. 829, 854, 230 P.3d 245 (quoting *State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984 (2001)), *review denied*, 169 Wn.2d 1027 (2010). Those four inferences are: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Freeburg*, 105 Wn. App. at 498 (citing *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)). But deliberate efforts to evade arrest are also probative of guilt. *See Bruton*, 66 Wn.2d at 112-13.

Mr. Harvey complains that the probative value of flight from the scene of this shooting was not enough to balance its prejudice since someone other than him drove the getaway car. Br. of Appellant at 10-11. Evidence of a person other than the defendant driving a getaway car may not be probative of the defendant's guilt. *McDaniel*, 155 Wn.

App. at 855. But here the flight began, not while the girl friend was already driving, but while Mr. Harvey was still outside the truck. Ms. Richardson was sitting in the passenger seat when Mr. Harvey shot Mr. Lamere and Mr. Potter. Mr. Lamere was standing outside the truck as he fired. The truck then took off quickly. Here, there is a substantial and real inference that Mr. Harvey deliberately evaded arrest by jumping into a truck driven by his girl friend and then leaving the scene, minutes if not seconds, after he shot two people. *See Price*, 126 Wn. App. at 645. The court did not abuse its discretion in admitting this evidence.

Stealing two cars and using them to go to a different state and a different city is similarly admissible. Evidence that a murder suspect traveled out of state and changed his appearance has been held admissible because the evidence supports a reasonable inference that the defendant was deliberating avoiding prosecution. *Id.* at 642. The evidence here also creates a reasonable and substantial inference that Mr. Harvey deliberately evaded arrest and prosecution. Mr. Harvey changed cars and traveled out of state in the days and weeks following the shooting. This is probative of guilt. *See id.* at 645. Mr. Harvey testified that he was just scared. RP at 1081. And that may be. But what inferences should be drawn from his leaving the scene and evading police were for the jury not us. *See State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The

trial court did not abuse its discretion when it admitted evidence that Mr. Harvey traveled out of state in two stolen cars.

Statement of Additional Grounds (SAG)

SAG 1. Mr. Harvey argues that the trial court failed to instruct the jury that the State must prove an absence of self-defense beyond a reasonable doubt. He is mistaken. The court did instruct the jury that the State must prove "absence of [self-]defense beyond a reasonable doubt." CP at 293.

SAG 2. Mr. Harvey argues that the trial court incorrectly instructed the jury that it must unanimously answer "no" to find that Mr. Harvey was not armed with a firearm when killing Mr. Lamere and Mr. Potter. The court instructed the jury: "If you unanimously agree that the answer to the question is "no" *or if after full and fair consideration of the evidence you are not in agreement as to the answer*, you must fill in the blank with the answer "no." This instruction clearly tells the jury that it must answer "no" if it cannot come to a unanimous decision.

SAG 3. Mr. Harvey argues that the trial court failed to dismiss one of two unlawful possession of firearm charges in violation of double jeopardy principles. RCW 9.41.040(7) provides that "[e]ach firearm unlawfully possessed under this section shall be a separate offense." The evidence at trial showed that Mr. Harvey possessed a .22 caliber

firearm and a .30-06 caliber firearm. There is no double jeopardy here because each unlawful possession of a firearm charge corresponded to possession of a different firearm.

SAG 4. Mr. Harvey argues that CrR 6.15, his right to be present at trial, and his right to a public trial were violated when the trial court answered two inquiries from the jury outside the presence of counsel and Mr. Harvey, and presumably in chambers. One inquiry asked, "According to the testimonies of L. Averill and M. Harvey did Jack Lemere have his gun on his person when Merle Harvey put together the .22?" CP at 252. The other inquiry asked, "More detailed definition between premeditation and intent?" CP at 253. The trial court answered, "Please reread your instructions and continue to deliberate" to both. RP at 252-53.

The trial court did violate CrR 6.15 by failing to notify the parties of the questions. However, any error was harmless because the court's instruction "was neutral, simply referring the jury back to the previous instructions." *State v. Langdon*, 42 Wn. App. 715, 717-18, 713 P.2d 120 (1986).

Mr. Harvey had a right to be present at all "critical stages" of trial. A critical stage is one where the defendant's presence has a reasonably substantial relationship to fulfilling his opportunity to defend himself. *In re Pers. Restraint of Benn*, 134 Wn.2d

868, 920, 952 P.2d 116 (1998). Hearings involving purely legal issues are not critical stages of trial, so Mr. Harvey was not entitled to be present when the court answered the jury's first question. *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994). The trial court would have invaded the jury's province as fact finder by telling it whether Mr. Lamere was armed when Mr. Harvey assembled the .22 caliber weapon. The trial court had no choice but to answer the second question as it did. Mr. Harvey's presence did not have a reasonably substantial relationship to his defense of the charges. His right to be present at trial was not violated.

The right to a public trial applies to adversary proceedings including the disposition of evidentiary issues. However, the right does not apply to the resolution of "'purely ministerial or legal issues that do not require the resolution of disputed facts.'" *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (quoting *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)), *review granted*, 170 Wn.2d 1016 (2010). Again, one jury question was purely legal in nature. And, by referring the jury to its own instructions when the court was presented with a factual question it could not answer, the trial court resolved a ministerial issue. Mr. Harvey's right to a public trial was not violated.

SAG 5 and 13. Mr. Harvey contends that he was not present for hearings on May 10, 2010 and September 10, 2010 and that this violated his right to be present at trial. However, a transcript from the May 10 hearing and any order signed that day is not in the record. Also, the record is unclear as to whether Mr. Harvey was present at the September 10 hearing. Mr. Harvey suggests that he was not present at the pretrial hearing because the court told defense counsel that court could be recessed so that defense counsel could speak with him regarding a stipulation. While that could indicate Mr. Harvey was not present, it could also indicate that the court merely wanted to accommodate Mr. Harvey so that his counsel could advise him in private, rather than in an open courtroom. The record is insufficient to support Mr. Harvey's arguments.

SAG 6 and 8. Mr. Harvey argues that the amended information did not provide him with sufficient notice because it did not inform him that he could be convicted of second degree murder with a firearm enhancement as an alternative to first degree murder with a firearm enhancement. RCW 10.61.003 provides that a person may be convicted of offenses of a lesser degree of the crime charged in the information. This statute provided Mr. Harvey with sufficient notice. *State v. Garcia*, 146 Wn. App. 821, 829-30, 193 P.3d 181 (2008).

SAG 7. Mr. Harvey argues that the trial court's ruling that spectators had to leave

the courtroom to accommodate a large jury pool violated his right to a public trial. An order that spectators may not view voir dire due to a courtroom's space and the size of the jury pool can be reversible error. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *State v. Njonge*, 161 Wn. App. 568, 578-79, 255 P.3d 753 (2011). But there is no such ruling in this record.

SAG 9. Mr. Harvey argues that charging two counts of murder with firearm enhancements and two counts of unlawful possession of a firearm placed him in jeopardy twice for the same conduct. It did not. These charges seek to punish different conduct. The murder charges punished killing another using a firearm. The unlawful possession of a firearm charges punished unlawful possession of a firearm. A person who murders with a firearm did not necessarily possess that firearm unlawfully. Charging Mr. Harvey with both crimes did not violate double jeopardy.

SAG 10 and 11. Mr. Harvey claims that his trial counsel was ineffective. He claims that defense counsel failed to investigate whether Mr. Harvey knowingly gave up his right to possess a firearm in a prior case and that counsel failed to timely give the State its expert witness list. To successfully claim ineffective assistance of counsel, Mr. Harvey must show that "(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the

circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The record does not show whether counsel actually did fail to investigate anything. And a claim of ineffective assistance of counsel that relies on facts outside the record must be raised in a personal restraint petition, not in a direct appeal. *Id.* at 335. Moreover, the stipulation here avoided the need to disclose to the jury that Mr. Harvey had been convicted of first degree assault with a firearm. So using the stipulation was reasonable regardless of any failure to investigate.

Failing to provide the State with a witness list is no doubt not good practice but here there is no showing of how Mr. Harvey was prejudiced. That is, there is no showing of how his trial could or would have been resolved differently had counsel provided the list promptly.

SAG 12. Mr. Harvey argues that continuing his trial date from June 7 to September 9, 2010, violated his right to a speedy trial. Mr. Harvey asserted his speedy trial right on April 16, 2010 and objected to any continuance beyond June 9, 2010. On May 7, 2010, the State moved for a continuance because its lead detective, forensic

witness, and the prosecutor had prescheduled vacations in June. The prosecutor also had an out-of-county training scheduled. CP at 5-6. The court's order on this motion is not in the record. However, the unavailability of counsel and witnesses is generally good cause for a continuance and and such continuances do not violate speedy trial rights. *See State v. Brown*, 40 Wn. App. 91, 94-95, 697 P.2d 583 (1985); *State v. Day*, 51 Wn. App. 544, 548-50, 754 P.2d 1021 (1988).

SAG 14. Finally, Mr. Harvey argues that his right to procedural due process was violated and his appellate counsel was ineffective because counsel failed to provide him with certain court records. He presumes that this violates his right to receive trial records to prepare a statement of additional grounds. As an indigent person, Mr. Harvey is entitled to (1) a "record of sufficient completeness" for effective appellate review of his claims and (2) "'as adequate and effective an appellate review as that given appellants with funds.'" *State v. Thomas*, 70 Wn. App. 296, 298-99, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962); *Draper v. Washington*, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)). A record of sufficient completeness does not necessarily mean the entire trial record. *See Mayer v. City of Chicago*, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971). Here, Mr. Harvey received trial records through his counsel and was allowed to file a

statement of additional grounds. His procedural due process right was not then violated.

Regarding ineffective assistance of counsel, appellate counsel is not required to order a transcript of voir dire. RAP 9.2(b). But again the conduct complained of is outside the record.

We affirm the convictions.

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

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Sweeney, J.

WE CONCUR:

_____ _____
Kulik, C.J. Korsmo, J.