

NO. 63913-7-I

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

REC'D
SEP 28 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

OMAR NORMAN,

Appellant.

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CLERK OF COURT
REGINA S. CAHAN
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina S. Cahan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial by the introduction of “gang evidence.”

2. Appellant was denied his constitutional right to confrontation when the court permitted hearsay to bolster the testimony of the State’s DNA expert.

3. Appellant was denied his constitutional right to present a defense when his second statement to police was improperly redacted.

4. The trial court erred in denying the defense motion for mistrial when spectators in the courtroom applauded at the conclusion of the prosecutor’s rebuttal closing argument.

5. Cumulative error deprived Appellant of his constitutional right to a fair trial.

6. The trial court improperly granted restitution.

Issues Pertaining to Assignment of Error

Appellant was charged with first degree murder, first degree assault, and two corresponding firearms charges.

1. Did the trial court err in admitting extensive evidence of the gang affiliations of Appellant, witnesses, and the victims, when the State’s theory of the case was that the offenses were personal rather than gang

related, and there was no other valid basis to admit the gang evidence under ER 404(b)?

2. DNA test results were critical to the State prosecution of Appellant for murder. As such, was it prejudicial error to allow the State's DNA analyst to testify over a defense hearsay objection that his work was verified by two other non-testifying analysts?

3. Appellant was interrogated twice by police. In both statements, Appellant initially provided an innocent explanation for his contact with the murder victim. Under pressure by police during each interrogation, however, Appellant gave conflicting explanations for his activities on the night of the victim's death, which at trial he asserted were untrue and were the result of "trying to explain something he couldn't" under police pressure.

In redacting the second statement for admission at trial, the court cut many segments wherein police repeatedly warned Appellant he would spend 23 to 30+ years in jail if he did not tell them who committed the murder. Appellant argued these statements provided essential context by demonstrating the degree of police pressure to make some sort of statement, even an untrue one. The trial court, however, redacted them on the premise that the statements bore on punishment. Where Appellant's statements were crucial evidence against him, should Appellant have been

permitted to present the redacted comments to the jury under the Rule of Completeness?

4. At the end of the prosecutor's rebuttal closing argument, the courtroom audience burst into applause. The court told the audience, "Excuse me, excuse me, we cannot have that in a court of law," but took no other action to prevent prejudice. Did the trial court err in denying Appellant's subsequent motion for a mistrial based on the applause of the spectators?

5. The unnecessary use of gang evidence, use of inadmissible hearsay by the DNA technician, improper redaction of his statement to police, and the applause by courtroom spectators all impaired Appellant's constitutional right to a fair trial. Even if these do not individually require a new trial, do they together constitute prejudicial cumulative error?

6. Did the trial court err in awarding the Crime Victim's Compensation (CVC) fund approximately \$12,000 for funeral costs and death benefits it paid to the murder victim's family when RCW 7.68.070 forbids payments by CVC to a victim's family if the victim was killed while committing a felony, and the trial court conceded that the victim here was committing felony escape on the night of his death?

B. STATEMENT OF THE CASE

1. Facts Pertaining to the Death of Terrell Milam

On the night of October 16, 2005, Terrell Milam went out nightclubbing in Pioneer Square. A casual acquaintance, Alison Burk, drove down from her home in Shoreline to join him. 9RP 726-27, 761.¹

Burk met Milam in the parking lot of Pioneer Fellowship House (PFH), the federal halfway house where Milam was living, but after chatting with her in the car for a few minutes he asked her to drive to a location a few blocks away where he would come and meet her. 9RP 766-67; 10RP 842. She waited there and he soon arrived. 9RP 766-67.²

The couple first went to a club on Queen Anne and had four drinks, then went to Larry's Nightclub in Pioneer Square. 9RP 729-32, 769-71. After about 15 minutes at Larry's, Burk left to go to a different

¹ There are twenty-four volumes of the Verbatim Report of Proceedings, referenced as follows: 1RP - 10/31/07; 2RP - 8/22/08; 3RP - 12/1/08; 4RP - 5/14/09; 5RP - 5/18/09; 6RP - 5/19/09; 7RP - 5/20/09; 8RP - 5/21/09; 9RP - 5/26/09; 10RP - 5/27/09; 11RP - 5/28/09; 12RP - 6/1/09; 13RP - 6/2/09; 14RP - 6/3/09; 15RP - 6/4/09; 16RP - 6/8/09; 17RP - 6/9/09; 18RP - 6/10/09; 19RP - 6/11/09; 20RP - 6/15/09; 21RP - 6/16/09 and 7/24/09; 22RP - 12/10/09; 23RP - 1/6/10; and 24RP - 3/12/2010.

² Persons living at PFH are not permitted to leave the house except for certain activities, such as working. Milam had apparently been sneaking out of Pioneer Fellowship House on a regular basis. 14RP 1494; 17RP 1921; 18RP 1964. On the night of his death, he had left a "dummy" in his bed at the halfway house. 17RP 1921; 18RP 1959, 1964.

club. 9RP 732. After she left, Milam got into a fight with another patron, and the other man was seriously injured. 14RP 1485-86.³

Burk called Milam at about 1:30 a.m. to see if he needed a ride anywhere. 9RP 732-33, 771-72. She subsequently picked Milam up at a gas station on Cherry Street. 9RP 733-34, 772-73. When she did, Milam had blood on his shirt and was bleeding from his hand. 9RP 734, 773-75. Milam told Burk about the bar fight. 9RP 774.

Burk and Milam drove to Lake Washington and briefly strolled on the beach. 9RP 734-35, 776-77. Then around 3 a.m. (now on October 17), Milam asked Burk to drive him to a friend's house in the Central District. 9RP 734-36, 777-79. Milam did not mention his friend's name, but he called the house "the Spot." 9RP 734-36.⁴

The Spot was located by the intersection of South King Street and Martin Luther King, Jr., Way. 10RP 806; 11RP 1006-07. It was apparently rented to a man named Tyree Lee, although Tyree's friend, appellant Omar Ali Norman, had largely taken over making rental payments on the house and stayed there frequently. 18RP 2017-18.

³ The bar fight became news locally because the person Milam fought with was Seattle Seahawk Ken Hamlin, and Hamlin was severely injured in the fight. The fact that Hamlin was the injured party was excluded at trial, and Hamlin's identity did not appear to be an issue in the case.

⁴ The "Spot" was not capitalized as a proper noun in the transcripts, but is in this brief to avoid it being confused with a generic "spot."

At the Spot, Burk and Milam went into the house where there were five to seven other people inside, all black men. 9RP 737-38, 780, 811, 1007. These were later identified as including Norman, Lee, Charles Justice, David Melton, and later Cedric Jackson. 11RP 1006; 12RP 1115-20. There was no obvious tension among the men – in fact, either Melton or Justice gave Milam a shirt to change into because of the blood spatters on his shirt. 9RP 738, 780-82; 11RP 1005; 12RP 1129.

Milam told the men at the Spot about his bar fight. 9RP 782. All men in the house were drinking, and Burk thought they were already drunk. 9RP 812-13. As the only female there, Burk felt uncomfortable, and within a half-hour she told Milam it was time for her to go home. 9RP 739; 10RP 811, 848-49. 854-55. Milam walked Burk out to her car and tried to persuade her not to go. 9RP 739-41.

Burk made a comment about Milam's build. 9RP 739-40; 10RP 813. Milam responded by picking Burk up and setting her hard on the hood of her car. Burk described the interaction as "playful," even though Milam put her on the car hard enough to dent the hood in. 9RP 740; 10RP 814. Cedric Jackson, who was only at the Spot briefly and both arrived

and departed while Milam and Burk were outside,⁵ described the two as “bickering” or “fighting.” 12RP 1119, 1128-29.

Burk said two or three men came out of the Spot and said the Spot “was hot” so they were leaving. 9RP 741-42. Burk got into her car while Milam got into another the car with the men from the Spot. 9RP 742-43. Burk described that car as a black 4-door – maybe a Caprice – with tinted windows and big, shiny rims. 9RP 743; 10RP 809, 848. Both cars left the Spot in different directions. 9RP 743-44.

Burk was unfamiliar with Seattle and got lost looking for the freeway. 9RP 744. She thought she saw the same car Milam got into drive past her when she was stopped at a gas station on Rainier Avenue. 9RP 744-45, 757; 10RP 821. She drove after the car, hoping it would go to the freeway, but instead she ended up in a residential area. 9RP 745-46, 757-58; 10RP 824-25. She turned back and drove around until she found the freeway, and thereafter drove home. 9RP 746; 10RP 826-27.

An early-morning jogger found Milam’s body at about 5 a.m. on October 17, 2005, at South 57th Avenue and South Dawson in the Seward Park neighborhood of Seattle. 9RP 700-01; 10RP 861. The body had been left in a grassy planting strip between the sidewalk and the street.

⁵ Jackson was also living in PFH with Milam. He had to get back to the house by 4 a.m. to check in, and so he left only 10-12 minutes after arriving. 12RP 1119-21.

10RP 862; 14RP 1481. No one living in the area reported hearing gunshots. 9RP 706-07, 714-15.

Milam's body was on its back, arms overhead, and the back of Milam's shirt was hiked up. 13RP 1367. From this positioning, police guessed that Milam's body had been dragged out of a car by his ankles after his death. 10RP 942, 952-53; 14RP 1393, 1414-16.

Milam had been shot nine times. 12RP 1197. One plainly deadly wound was a gunshot to the head. 12RP 1200-02. Milam had two other potentially lethal wounds to the torso and many superficial wounds to his arms and hands. 12RP 1202-14. Several wounds were close-range, and a few appear to have been inflicted when Milam was leaning against something like a chair. 12RP 1203, 1208-12, 1214-15. The Medical Examiner could not identify the exact gunshot wound that killed Milam. 12RP 1227-29.

2. The Immediate Investigation

Milam was a high-ranking member of the Deuce 8's, a Central District gang. 14RP 1494.⁶ Much of the early police investigation focused on Milam's Deuce 8 connections and on the bar fight.

⁶ Deuce 8 refers to "28," as in the intersection at 28th and South Jackson Street in Seattle's Central District. 11RP 1038, 18RP 2023.

On the same day Milam's body was found, Burk heard Milam had been killed and she contacted police and gave a statement. 9RP 747-48. Two police officers drove Burk around central Seattle in an unsuccessful attempt to locate the Spot. 9RP 748; 14RP 1486-87, 1524-25.

Burk drove around by herself the next day, October 18, and found the Spot. 9RP 748; 14RP 1486-87, 1524-25. She called police and reported she could see the same car she had watched Milam get into parked in front. 16RP 1794, 1821. Police responded to the Spot within the hour. 16RP 1821-22.

Once there, the detectives saw a black 1995 Crown Victoria - license plate 343 56U - which matched Burk's description of the car she saw Milam get into prior to his death. 14RP 1525-27; 16RP 1784, 1786-87, 1822. Just after detectives arrived, three people came out of the Spot, got in the car, and left. 14RP 1525-26; 16RP 1787, 1822; 17RP 1925-27. Detectives tried to follow the car, but lost sight of it on Martin Luther King Drive South. 14RP 1526; 16RP 1822; 17RP 1927.

Later the same day, one detective returned to the Spot and saw a different black 1995 Crown Victoria with tinted windows and chrome rims parked close to the house. 14RP 1527-28; 16RP 1788-89. This car's license plate number was 631 SVL, and it was registered to Deborah Lee. 16RP 1789; 17RP 1930. The detective took pictures of the parked vehicle,

and, shortly after taking the pictures, saw three people exit the Spot and head toward the car. 16RP 1787-91. Because the detective was alone and not wearing a bullet-proof vest, he did not approach. 16RP 1791.⁷

Police obtained a search warrant for the Spot. When they served it, however, the house had been completely emptied, and nothing of note was found. 14RP 1490-91, 1511-14.

Cedric Jackson was both Norman's cousin and a friend of Milam. 11RP 1114, 1118, 1126. Jackson told police (and later testified) that he spoke with Norman shortly after Milam's death about what happened that night, and Norman told him he and Justice gave Milam a ride to an AM/PM at 12th and Jefferson - less than a block away from PFH - and dropped Milam off there. 12RP 1122-23.

Charles Justice spoke to police on October 24, 2005, and told them Milam showed up at the Spot and talked about the fight at Larry's. 14RP 1496-99; 16RP 1961. Justice told police – as he'd also told Tremaine Milam, the victim's brother – that he and Norman had driven Milam to

⁷ Sixteen months after Milam's death, this same vehicle was located in Puyallup after being sold to a taxi company. 16RP 1799-1801, 1806, 1823-24; 17RP 1929-30. It was searched, and nothing of evidentiary value was found inside, nor did anything inside the car show signs of having been replaced or re-covered. 16RP 1800-01, 1806-07, 1823-24; 17RP 1930.

12th and Jefferson and dropped him off there. 14RP 1498-99; 16RP 1961, 1970-71.⁸

A detective watched a videotape from the AM/PM at 12th and Jefferson. 17RP 1905-06, 1922-24; 18RP 1961. Cars traveling by on 12th were somewhat visible on the tape, but the detective did not see any vehicles that resembled the car Milam got into at the Spot. 17RP 1905-06, 1922-24; 18RP 1961. Police did not keep the videotape, and no copy of it existed at the time of trial. 17RP 1924-25.

Police had no further updates on Milam's homicide, and the case stalled until the tests results on a shell casing and a cigarette butt found near Milam's body seemed to detect a match to Norman's DNA. 17RP 1932-33.

3. Mark Anderson

State's witness Mark Anderson had known Norman since childhood and claimed he was "cool with" Norman's in 2005 and 2006. 12RP 1138-39, 1144-45, 1182-83. Anderson identified himself, Milam,

⁸ Charles Justice owned a black 1996 Crown Victoria, license plate number 844 RIB. 16RP 1798, 1824-25; 17RP 1930-32; 18RP 1974. Justice's Crown Victoria was searched pursuant to a warrant, but nothing of evidentiary value was discovered. 16RP 1799, 1804, 1824-25; 17RP 1932. Police noted that nothing in the car appeared to have been replaced or re-covered. 16RP 1805-06; 17RP 1932. A number of other cars, as many as six or seven total, were searched in this case, but nothing of evidentiary value was discovered therein. 12RP 1124-26; 16RP 1825.

and Justice as all members of Deuce 8, while he said Norman was a member of both Deuce 8 and “LP” – meaning Low Profile. 12RP 1138-39, 1142-43, 1186-87; 13RP 1271.

Anderson claimed that he and a mutual friend of his and Norman’s – Olijuan Crain⁹ – sat together in Norman’s car in the Central District on a day in late 2005 or very early 2006. 12RP 1146-48; 13RP 1273-74. Anderson said Norman’s car was a silver or gray Lexus, and he had seen Norman drive the Lexus many times before. 12RP 1148.

On this occasion, Norman, Anderson, and Crain were smoking pot and drinking Hennessey in the car; in addition, Anderson and Crain each took an “Ecstasy pill.” 12RP 1148-49, 1189-90; 13RP 1274-76, 1326. All three were listening to music on the car stereo. 12RP 1148.

According to Anderson, Crain began to talk about Milam’s death. 12RP 1149-50, 1190; 13RP 1277-78. Then Norman told them Milam was “in the car,” and “started talking shit.” 12RP 1150, 1277-79. Norman then said, “Niggas put him in a headlock...went over and topped him off.” 12RP 1150-51; 13RP 1279-81. In between the phrases “put him in a headlock,” and “went over and topped him off,” Norman supposedly gestured, as though holding someone with one hand with his fingers in a

⁹ Anderson identified Crain as a member of D Dub, yet another Central District gang. 12RP 1147; 13RP 1272.

gun shape with the other. 12RP 1150; 13RP 1279-81. Norman allegedly told Crain and Anderson to keep this information "on the low," meaning that they should not talk about it. 12RP 1154; 13RP 1333-34.

Anderson acknowledged that Norman never claimed he was the one who put Milam in a headlock and "topped him off." 12RP 1151; 13RP 1279-81. Norman said "niggas" did it. 12RP 1150-51; 13RP 1330-31. But Anderson believed Norman was claiming to have shot Milam. 12RP 1151-53; 13RP 1328.

Shortly after talking to Norman, Anderson told this story to Walter Hayden - a good friend of Milam's before Milam's death. 12RP 1154-55; 13RP 1334. Anderson said he did this because he thought that not telling people about Norman's statement would be "taking sides" with the people who killed Milam. 12RP 1155.

Some time later, while Anderson was walking one of his drug-selling routes, a person who knew Norman shouted to Anderson that he had Norman's phone number on his cell phone. 12RP 1156-58; 13RP 1287, 1289, 1335, 1337-38. Anderson shifted his route slightly to head towards his grandmother's house, where he kept his gun. 12RP 1157-58. It was about 8 p.m., and was just beginning to get dark. 12RP 1159

At 21st Avenue and Jefferson Street, Anderson noticed someone wearing gray camouflage partially hidden by a bush. 12RP 1158-60;

13RP 1290-91. Anderson claimed he recognized Norman as he stepped out, made an offensive statement, and pointed a shotgun at Anderson. 12RP 1160. As Anderson turned to flee, Norman allegedly fired the shotgun, striking Anderson with birdshot in the backs of his legs and hips. 12RP 1160-61; 13RP 1297-98.

Anderson claimed Norman followed him partway into the street, firing a total of two or three times with the shotgun. 12RP 1161. Anderson was able to maintain his feet and run behind a nearby house. 13RP 1261, 1295. Norman fled the scene, and when police arrived, they recovered two fired shotgun shell casings and one unfired cartridge from the street. 12RP 1161-62; 14RP 1428-29; 15RP 1550-51.

Anderson testified he did not tell police Norman was the shooter because he intended to “take care of it” himself by killing Norman. 12RP 1162-63, 1166; 13RP 1301, 1335. He told police the shooting was related to Milam’s shooting, but also told them he didn’t know the shooter. 12RP 1162; 15RP 1552, 1568.

In late May 2007, Anderson was arrested on an unrelated gun charge. 12RP 1166. He asked to be put in contact with the gang detectives and told Seattle police detectives that Norman shot both him and Milam. 12RP 1166-68; 13RP 1308-10; 17RP 1877-78. Anderson admitted he decided to contact police about Norman because he faced

serious charges and wanted to “get less time” for them. 12RP 1167-70, 1172; 13RP 1311-14, 1343-44; 15RP 1628; 17RP 1879, 1938.

At trial, Olijuwana Crane said he had been a close friend of Anderson’s, but knew Norman only because they had played football together some 10 years before. 18RP 1993-95, 1999-2001. Crane flatly denied ever being in a car with Norman and Anderson at the same time, and denied ever hearing Norman talk about the Milam death. 18RP 1996-97, 2002.

4. Items Found Near Milam’s Body and Laboratory Testing

A cigarette butt was found in the street near Milam’s body. 10RP 945-46, 949; 13RP 1364. The detective who found the cigarette butt stated that it looked very recent, with ash still on it. 13RP 1364; 14RP 1407-08.

An empty 9mm Ruger shell casing was also found in the street close to Milam’s body. 10RP 895, 927, 945-46, 949; 13RP 1364; 14RP 1481; 17RP 1916. A firearm and tool specialist from the Washington State Patrol Crime Lab (WSPCL) opined that the casing might have been fired by a semiautomatic. 10RP 898, 912-13, 917-18. He further testified a number of weapons could have fired the casing, among them a Ruger pistol or a P-89 Ruger. 10RP 898, 913-15, 928, 932.

Bullet fragments found in Milam's head appeared to come from either a .38 caliber or 9mm bullet. 10RP 900-01, 919-20, 927; 12RP 1200-01. The fragments could have come from the casing found near Milam's body, but that could not be confirmed. 10RP 931-32. Another bullet – a 45 caliber one, likely fired from a revolver – was recovered by the medical examiner, apparently from Milam's clothing. 10RP 902-06.

An analyst from the WSPCL found DNA that matched Norman's profile on: 1) the cigarette butt; and 2) the 9mm shell casing. 15RP 1674-75, 1678, 1688.¹⁰ The analyst calculated the likelihood of another person matching the DNA on the cigarette butt or the shell casing at 1 in 6.1 quadrillion Americans, or 1 in 940,000 Earths. 15RP 1688-89; 16RP 1764-66.¹¹

DNA testing of the shotgun shells recovered at the scene of Anderson's shooting produced only a partial and mixed profile,¹² but one

¹⁰ Many pieces of evidence were also tested for fingerprints, but nothing of evidentiary value was obtained. 14RP 1467; 15RP 1635-37.

¹¹ Tests of other items found at the scene with Milam did not elucidate the case further. Tests of ankle swabs from Milam's body, for example, showed a mixture of three persons' DNA on one of Milam's ankles, none of which matched Norman, Tyree Lee, or Charles Justice. 15RP 1669, 1684, 1691-92. Blood on Milam's shorts matched only Milam. 15RP 1690-91.

in part matched Norman's profile. 15RP 1695-98. Based on the results, the analyst estimated the likelihood of a match at 1 in 260,000. 15RP 1697-98.

The defense called its own DNA expert, Dr. Randall Libby, PhD. 19RP 2097-99. Dr. Libby stated the tests by the State's analyst were insufficiently rigorous; that the results were more ambiguous than the State represented; and that the statistical approach was overly exclusive. 19RP 2026-27, 2130-42, 2145-71, 2187-91, 2201, 2208-20, 2234-40, 2243, 2247-48. Dr. Libby estimated instead that the likelihood of a match to the DNA from the cigarette butt and/or the shell casing at roughly 1 in 46 million. 19RP 2222-25. As far as the assault was concerned, Dr. Libby said there was so little DNA in the shotgun shell sample that it could not be tested reliably. 19RP 2161-71, 2201, 2229-31, 2244-45.

5. Additional Witness Testimony

Two witnesses, David Melton and Eljae Givens, apparently gave statements to police in 2007 inculcating Norman. At trial, however, both claimed they did not remember talking to police and did not know anything about how Milam died. 11RP 993-1027 (Melton); 11RP 1030-66 (Givens).

¹² Because the analyst did not expect much DNA on the shells, all three shells were swabbed and the results were combined to get sufficient DNA for testing. 15RP 1695; 16RP 1768-69

Melton eventually acknowledged that Norman and Lee left the Spot on the night Milam died. 11RP 1019. He implied that they returned sometime later, but then immediately stated, "I don't know if they came back. I wasn't there. I left. This is garbage, man." 11RP 1019.

Eljae Givens also testified for the State. 11RP 1030. He said he had known Norman since childhood, and that he and Norman played music together. 11RP 1031-33. Givens testified that Low Profile (also called "LP") was not a gang, but just people who liked to play music together. 11RP 1032-34. Givens did acknowledge that he talked to the police after Milam's death, but said he didn't remember ever discussing Milam's death with Norman. 11RP 1040.

6. Norman's Statements to Police and Testimony

Police interrogated Norman twice in 2007, once in May and once in September. In each interview Norman first claimed he and Justice had dropped Milam off at 12th and Jefferson, but then changed his story later in the interrogation.

In January 2007, police received the report that the cigarette butt and the shell casing found at the scene contained DNA that matched Norman's. 16RP 1826; 17RP 1932-33. Police decided to interview Norman, who was then incarcerated on unrelated matters. 16RP 1826-27.

On May 16, 2007, the two detectives began their interview of Norman by discussing the then-recent shooting death of Tyree Lee, as they knew Norman and Lee had been close. 16RP 1827, 17RP 1934; 18RP 1972. The detectives then explained they also wanted to discuss Milam's death. 16RP 1828. After being read his rights, Norman told detectives the same thing Justice had told them months before – that Milam and a girl arrived at the Spot on the night Milam died, with Milam wearing bloody clothing from a bar fight. 17RP 186. Norman said he and Justice later gave Milam a ride to 12th and Jefferson, near PFH, where they dropped him off. 16RP 1828-29; 17RP 1863, 1866. Afterwards, Justice dropped Norman off at his own home. 16RP 1829.

The detectives then explained to Norman that DNA matching his had been found near Milam's body on a shell casing and a cigarette butt. 16RP 1829-30; 17RP 1862. Norman asked to use the restroom, and afterwards he told detectives a new version of events. 16RP 1830; 17RP 1863-64, 1936.¹³

In his new version, Norman claimed he and Milam had been picked up by a group of Crips and had eventually wound up in a shootout

¹³. Norman claimed that during the break, a detective came into the bathroom with him and told him he needed to “give him [the detective] something” or Norman and Justice would wind up with life in prison. The detective denied such an interaction occurred. 17RP 1863-65, 1900, 1935-36.

in Seward Park, during which Milam was killed. 16RP 1830-32; 17RP 1874-76.¹⁴ During this statement, Norman acknowledged carrying a P-89 Ruger the night Milam was shot, and also said Milam told him that night that he was involved in a shooting of someone named "Rollo." 16RP 1832-34; 17RP 1876. Charles Justice's older brother, Raphael Justice, goes by the street name, "Rollo." 12RP 1120. Norman's May statement was recorded and admitted at trial. 16RP 1827; 17RP 1843-44.

In September 2007, Norman – who had since been released - was arrested for Milam's murder. He was interrogated by police again and once again protested that he did not know what had happened to Milam because he and Justice had dropped Milam at 12th and Jefferson. See Ex. 254 (pp. 1-47). Eventually, however, he changed his story again and this time claimed Tyree Lee, now dead, had killed Milam. Ex. 254 (pp. 47-84).

Norman testified at trial and explained he began staying regularly at the Spot in 2005. 18RP 2016-17. His good friend, Tyree Lee, officially lived in the Spot, but when Lee moved to a new place Norman took over rental of the Spot and became an unofficial tenant, splitting nights between there and his mother's house at 12th and Judkins. 18RP 2017-19, 2073-74.

¹⁴ The details of this story are not discussed in great detail because Norman later recanted this story anyway.

Norman explained that he was good friends with Lee, Charles Justice, Eljae Givens, and Dave Melton. 18RP 2019-23, 2066-68. He knew Justice's brother, Raphael Justice ("Rollo"), but had never spent much time with him because Raphael was older. 18RP 2020-21, 2072. Norman explained that he knew who Milam was, but had never spent much time with him prior to the night Milam was killed. 18RP 2024-25. Norman had "rapped" one time for Milam when Milam wanted to hear Norman's music. 18RP 2072.

Norman explained that he and the Givens brothers, including Eljae, had formed Low Profile (LP) when they were around 13 or 14 years old to make music. 18RP 2023-24, 2062.¹⁵ Norman denied being a part of any actual gang, although he acknowledged that he had a Deuce 8 tattoo on one arm. 20RP 2259-60.

On the night Milam was killed, Norman and his friends had gone to a club close to the Seattle Center. 18RP 2025-26. Afterwards, they returned to the Spot to drink, relax, and play video games. 18RP 2026-27, 2029.

Milam came to the Spot late that night. 18RP 2026-27. He arrived with a woman no one had previously met – witness Alison Burk. 18RP

¹⁵ Police also acknowledged that Low Profile was a group of musicians living in the Central District who wanted to become professional rappers. 17RP 1868-69.

2026, 2080-81. Milam shook hands with everyone there, and when Norman squeezed Milam's hand, Milam winced because his hand was injured from a bar fight earlier that night. 18RP 2028-29, 2081-82. Milam told the people at the Spot about the fight, and Justice gave Milam a shirt to wear, since Milam's shirt had blood on it from the fight. 18RP 2028-29, 2081-82.

Milam and Tyree Lee spoke together for a while. 18RP 2027, 2030. At some point Cedric Jackson arrived and then left shortly afterwards so he would make his curfew at PFH. 18RP 2030-31, 2068-69. At about the same time, Milam went outside to talk to Burk. 18RP 2031.

Norman and Justice left the Spot then, too. 18RP 2031-32. Justice intended to drop Norman off at his mother's home on 12th Avenue, and then Justice would drive north to his own home. Id.¹⁶

Outside the Spot, Justice and Norman saw Milam and Burk. 18RP 2032. The couple was wrestling on the hood of Burk's car, and Norman said Milam "slammed" Burk down on the hood. 18RP 2032, 2083-84. Norman and Justice told Milam and Burk they were "hot" or making the area hot, meaning their conduct would cause someone to call the police. 18RP 2032-33. Burk got off the car and got into it, shouting "You

¹⁶ At trial, Justice claimed the protection of the Fifth Amendment and did not testify. 16RP 1710-17. His statements to police and other witnesses were, however, admitted as described in these facts.

[explicative] take him home[,]” and drove away leaving Milam laughing in the street. 18RP 2033-34.

Justice offered Milam a ride and he accepted. 18RP 2034. Justice drove his black Crown Victoria, Norman sat in the front passenger seat, and Milam in the rear. 18RP 2034-36, 2074. They drove to 12th and Jefferson, where they dropped Milam off across the street from the AM/PM. 18RP 2034, 2037, 2074; 20RP 2274, 2315. Norman did not recall the exact route, noting that both he and Milam were drunk. 18RP 2036, 2075. When Milam got out of Justice’s car, he had his phone out and appeared to be making a telephone call. 18RP 2037-38.

After dropping off Milam, Justice dropped Norman at 12th and Judkins and then went home. 18RP 2038-39. Norman said he learned of Milam’s death the next day from his uncle as he was heading back to the Spot. 18RP 2039-41.

Norman said he knew Anderson, but they were not close friends. 18RP 2043-44. He denied ever being in a car with Anderson and Crain, or confiding in Anderson about anything, including Milam’s death. 18RP 44-45. Norman denied having anything to do with the assault of Anderson. 18RP 2045.

Norman testified that his initial statement to police in May 2007 -- that they dropped Milam off at 12th and Jefferson -- was the truth.

Norman explained, however, that during the bathroom break one of the detectives badgered him, saying “You need to give me something,” or else Norman and Justice would do life in prison. 18RP 2051-54, 2086-87; 20RP 2264, 2272-73. Norman said that he told the lie about meeting with Crips and the shootout because he was “trying to explain something he couldn’t explain,” the fact that DNA matching his had been found near Milam’s body. 18RP 2054-55, 2088-89; 20RP 2262-63, 2272-73. He told police he was carrying a P-89 Ruger because they had told him about the 9mm casing found by Milam’s body. 18RP 2085-86.

In September, Norman was arrested for Milam’s death and interrogated again. 18RP 2056-57. For roughly half that interrogation, Norman once again insisted that he and Justice had dropped Milam off at 12th and Jefferson. See generally Ex. 254. Then, under pressure from police, he made up a third story, that Lee killed Milam. 18RP 2057-60.¹⁷

Norman insisted at trial that he was not present when Milam was killed and didn’t kill Milam. 18RP 2060-61. Norman also said he didn’t know Milam and had no reason to kill him. 18RP 2061.

¹⁷ Norman stated that he was somewhat intoxicated during the September interrogation. 20RP 2293-94.

Norman noted that Tyree Lee owned a number of cars, including three Crown Victorias and two Caprices, all of which had heavy tint on the windows. 18RP 2041-42.

By stipulation, the State admitted a certified copy of Norman's prior conviction for violation of the uniform controlled substances act (possession with intent to deliver). 18RP 1976.

7. Conviction and Restitution

Norman was charged with first degree murder for Milam's death and first degree assault on Anderson, and also charged with two corresponding firearms charges. CP 157-59. He was convicted of all charges and subsequently sentenced within the standard range. CP 206, 208, 210-11, 214, 216.

At his restitution hearing, Norman argued that under RCW 7.68.070, he should not have to pay restitution to the Crime Victim's Compensation (CVC) fund because Milam was clearly committing a felony at the time of his death, which should have excluded his family from receiving death benefits. CP 256-57, 269-72; 23RP 3-5

In ruling, the trial court acknowledged Milam was committing felony escape from his federal halfway house, but it nonetheless ordered restitution of \$12,202.36 to CVC for the funeral costs and death benefits

paid to Milam's family. CP 273; 24RP 4-6. Norman appeals both his conviction and the restitution order. CP 222, 274.

C. ARGUMENT

1. THE INTRODUCTION OF GANG EVIDENCE DEPRIVED NORMAN OF A FAIR TRIAL.

Evidence of prior bad acts and misconduct is not admissible to prove the defendant's character and to show his general propensity for misconduct. ER 404. Such evidence, however, "may...be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." ER 404(b). The trial court's admission of ER 404(b) is reviewed under an abuse of discretion standard. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Gang membership is protected by the First Amendment of the U.S. Constitution as part of a citizen's right to freedom of association. State v. Scott, 151 Wn. App. 520, 526, 213 P.2d 71 (2009), review denied, 168 Wn.2d 1004 (2010) (citing Dawson v. Delaware, 503 U.S. 159, 164-67, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)). Evidence of gang affiliation is therefore doubly inadmissible when it proves no more than a

defendant's abstract beliefs. Dawson, 503 U.S. at 167.

Evidence of gang affiliation falls within the scope of ER 404(b), and is generally characterized as prejudicial. Scott, 151 Wn. App. at 526; State v. Boot, 89 Wn. App. 780, 788-89, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998). Accordingly, before a court may admit such evidence, it must follow the requirements of ER 404(b), which include:

- 1) Find[ing] by a preponderance of the evidence that the misconduct occurred,
- 2) Identify[ing] the purpose for which the evidence is sought to be introduced,
- 3) Determin[ing] whether the evidence is relevant to prove an element of the crime charged, and
- 4) Weigh[ing] the probative value against the prejudicial effect.

State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009) (citing State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995)). Evidence of gang affiliation is admissible only upon a showing of "a nexus between the crime and gang membership." Scott, 151 Wn. App. at 526.

For example, evidence of gang involvement demonstrated motive and "extreme indifference," when the evidence showed two local groups of "Bloods" and "Crips" had many recent conflicts shortly before the defendant - a member of the local Crips - pulled a gun in a crowd outside a nightclub and fired into the crowd in an effort to shoot a rival Blood. State

v. Yarbrough, 151 Wn. App. 66, 74-76, 82-86, 210 P.3d 1029 (2009).

Somewhat similarly, in Boot, evidence of gang involvement was appropriate in part because it showed motive and that the defendant had premeditated the crime. 89 Wn. App. 789-90. In a previous assault, the defendant had pointed a gun at a woman's head, and onlookers had laughed at him and told him he was too much of a baby to shoot anyone. Id. at 790. Evidence also showed the defendant had been escalating in his use of guns in order to improve his status in his gang. Id. For these reasons, his prior use of a gun and his membership in the gang were admissible. Id.

Most cases wherein the use of gang evidence is affirmed involve use of gang membership to prove motive or mental state. See, i.e., Boot, Yarbrough, supra. See also State v. Campbell, 78 Wn. App. 813, 822-23, 901 P.2d 1050, review denied, 128 Wn.2d 1004 (1995). But Norman's membership in a gang did not show either of these, as even the State acknowledged in oral argument on this topic. 4RP 426. All the parties agreed Norman's alleged gang was allied with Milam's gang until this incident.

Here, the trial court listed a number of possibilities of how gang membership by the various participants could be relevant:

It seems under 404(b) analysis it does go to res gestae, opportunity, it goes to bias. So I don't see frankly, even if I had wanted to, how you could keep it out in general and still present this case with any kind of, you know, genuine truth of what is happening.

7RP 430.

It is unclear how the court might have seen "opportunity" as a 404(b) purpose here, as no resources of the gangs were apparently called upon. But the purposes of "res gestae" and "bias" are further reviewed below.

In Boot, as here, the trial court admitted the evidence, at least in part, under the res gestae exception to ER 404(b). 89 Wn. App. at 790. The trial court noted that the unrelated gang activities the defendant and his co-defendant had engaged in previous to the murder showed how the two worked together as a team and how their crimes were escalating in seriousness over a short period of time. Id. They were therefore relevant to show "a complete picture" of the instant crime. Id.

Here, however, there was no similar justification to show why the parties might have worked together: Norman was allegedly a member of LP. Justice was allegedly a member of Deuce 8's, and Milam was a high-ranking member of Justice's same gang. The State's theory – that Justice and Norman worked together to kill Milam – had no relation to their memberships in the gangs.

In the case of Anderson's shooting, the State's theorized that Norman shot Anderson because Anderson was telling people about Milam's murder – again, not an action premised on any sort of gang membership, and the gang membership of the parties had no apparent impact on the methods or events of the assault. The court's assertion that the gang evidence was justified to show res gestae in either the Milam or Anderson shootings is not supported by the record and therefore fails.

The State may assert that this evidence was relevant to witness credibility or bias, most particularly to Anderson, who refused to identify his attacker when he was shot. But Anderson very clearly indicated that he refused to identify Norman because he wanted to kill Norman himself. 12RP 1162-63,1166; 13RP 1301, 1335.

Upon prodding by the State, Anderson said of reporting Norman to the police "You can't tell. That's just in the streets, you can't do that, plus it would have messed up what I was trying to do [kill Norman himself]." 12RP 1163. The State prodded Anderson again, asking if his "status" would be affected by telling on Norman, and Anderson stated that his status would be affected, but he did not link that fact to gang status or membership. Id. Anderson self-boosted his testimony, noting repeatedly that he would be killed, possibly by members of his own gang, if he

returned to the Central District,¹⁸ but since Anderson never recanted anything, the gang evidence clearly cannot be said to have explained any inconsistent evidence from him.

In Scott, the Court noted that in cases where gang membership had been admitted to show motivation or how members of a gang had acted in concert, “there was a connection between the gang’s purposes or values and the offense committed.” 151 Wn. App. at 527. In contrast, where no connection was made between the gang affiliation and the charged offense, “admission of the gang evidence was found to be prejudicial error.” Id. (citing, Asaeli, supra; State v. Ra, 144 Wn. App. 688, 701-02, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008)).

As the defense argued, the only reason to raise the topic of gangs in Norman’s case was because the State wanted to. 7RP 428-29. According to the State’s theory, the Milam shooting was motivated purely by personal relationships – specifically, Justice’s relationship with his brother, and Norman’s personal friendship with Justice. This was a conflict between individuals, having nothing to do with gangs. The same must be said of the Anderson shooting. Moreover, the other 404(b) purposes identified by the trial court are unsupported by the record. For these reasons, this Court should reverse and remand for a new trial. See

¹⁸ See, i.e., 12RP 1140, 1172-73; 13RP 1325-26, 1342-43.

Scott, Asaeli, Ra, supra.

2. IMPROPER ADMISSION OF HEARSAY TESTIMONY
BOLSTERING THE TESTIMONY OF THE STATE'S
DNA EXPERT DENIED NORMAN HIS RIGHT TO DUE
PROCESS AND A FAIR TRIAL

Pre-trial, the State moved to allow DNA analyst Nathan Bruesehoff to testify that his conclusions were confirmed by two other analysts. 4RP 103-04. The State claimed this would show all proper procedures were followed by the lab. 4RP 103-04; 7RP 486-87. The defense simultaneously moved to exclude such testimony unless the additional analysts appeared and testified. 7RP 485, 487. The trial court ruled for the State, suggesting the State could elect to bring the witnesses in, but not requiring it. 7RP 488.

At trial, Bruesehoff testified over the defense's objection that his results were checked by two other non-testifying DNA analysts from his lab. 15RP 1655-56, 1667-68. These other analysts did not retest the DNA, but did review the data generated and approve Bruesehoff's conclusions. 15RP 1656-57. Moreover, the defense expert, Dr. Libby, was cross-examined on the fact that the State's expert's test results were reviewed by other people at the crime lab, while his own results were not similarly reviewed – "Who peer-reviewed your conclusions?" was a question by the prosecutor. 19RP 2234, 2245.

Hearsay such as this is plainly not admissible: “Generally, one expert may not relay the opinion of another non-testifying expert without running afoul of the hearsay rule.” State v. Brown, 145 Wn. App. 62, 184 P.3d 1284 (2008), review denied, 165 Wn.2d 1014 (2009) (citing State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002), review denied, 148 Wn.2d 1001 (2003) (supervisor in Crime Lab improperly testified to drug test results made by his subordinate, who was on vacation at the time of trial); and State v. Wicker, 66 Wn. App. 409, 411-12, 832 P.2d 127 (1992) (fingerprint ID tech improperly testified that his conclusions were checked by other technicians in his laboratory); See also Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (certificates of analysis by lab techs from state crime laboratory were not admissible evidence unless the prosecutor called the analysts as witnesses).

"A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Wicker, 66 Wn. App. at 414; Nation, 110 Wn. App. at 666. Because constitutional error is presumed prejudicial, the State bears the burden of proving harmlessness. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The violation of Norman's constitutional right to confront witnesses requires the application of the "overwhelming untainted evidence" rule. Under this test, an appellate court looks only to the untainted evidence to determine whether the untainted evidence is so overwhelming that it "necessarily leads to a finding of guilt." State v. Davis, 154 Wn.2d 291, 305, 111 P.3d 844 (2005), affirmed, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The detective in this case noted that the case was stalled until the return of DNA evidence from the WSPCL, because there was no strong evidence pointing towards any suspect. 17RP 1932-33. After DNA evidence was acquired, the State later obtained the testimony of Mark Anderson, but Anderson received significant benefits for his cooperation, so his testimony alone could not be said to be "overwhelming." The fact that Norman lied to police was used as evidence against him, but the statements also supported his own version of events, which was that he did not know how the DNA got to the scene of the crime, and he was intimidated into trying to explain the unexplainable.

In short, without the DNA evidence, all the evidence against Norman was either highly circumstantial or tainted by potentially improper motivations. The bolstering of the critical DNA evidence with the hearsay accounts of other, non-testifying analysts – not to mention the

impeachment of the defense expert by his lack of similar (inadmissible) hearsay – could not be not harmless beyond a reasonable doubt.

3. IT WAS ERROR NOT TO ALLOW NORMAN TO PRESENT TO THE JURY REDACTED SECTIONS OF HIS INTERROGATION BY POLICE ON SEPTEMBER 12, 2007.

The trial court excluded several portions of the recording of Norman's September interrogation during which the police made specific intimations that Norman would spend "23 years," "30 years," or even "his life" in prison. 17RP 1849-52. Norman's attorney objected and argued that these police statements put the overall statement in context and showed the stress Norman was under to make a statement – any statement, even an untrue one. 17RP 1849, 1851. The trial court disagreed and excluded the statements because it believed the jury would then improperly consider Norman's possible punishment. 17RP 1851-52.

- a. Police statements of this nature are generally admissible under the rule of completeness.

The "rule of completeness" generally requires that when part of a defendant's statement is introduced into evidence by the State, the defendant has a right to have the entire statement introduced. ER 106.¹⁹

¹⁹ "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

This rule applies even if some of the introduced parts are otherwise inadmissible. State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967).

The purpose of the rule is “to protect against the misleading impression which might otherwise result from hearing or reading matters out of context.” 5 Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE § 25, at 93 (3d ed., 1989). As a result, the proffered portions of a written or recorded statement must be used “to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved.” West, 70 Wn.2d at 754.

The evidence a defendant seeks to admit must be relevant to the issues in the case. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022 (2002). Once relevance is established, a trial court should ask whether the offered evidence (1) explains the admitted evidence, (2) places it in context, (3) avoids misleading the trier of fact, and (4) insures a fair and impartial understanding of the evidence. Id. (citing United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992)). Something that is “part and parcel” of a defendant’s admitted statement will generally be subject to the rule of completeness. Larry, 108 Wn. App. at 909 (citing U.S. v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993)).

Here, the police statements at issue were “part and parcel” of Norman’s statement, which was introduced by the State. The redacted police statements strongly supported Norman’s contention that he was intimidated by police and felt that he had to make some statement – even a false one – because of police pressure.

- b. The passages excised from Norman’s statement would have been extremely helpful to support his theory of the case, as they showed extreme police pressure.

A trial court’s ruling on a rule of completeness issue is an evidentiary question and is therefore reversible only for abuse of discretion. Larry, 108 Wn. App. at 910. Discretion is abused where it is exercised on untenable grounds or for untenable reasons. Carroll v. Junker, supra, 79 Wn.2d at 26. Here, the redactions removed many passages which support Norman’s assertion that police pressured him strongly to provide answers, true or not.

For example, in the following passages, the italicized portions were excluded:

COBANE: [Y]ou’re the one looking at murder in the first degree. You’re the one looking at the time. *The rest of your life, possibly, behind bars.* Okay, so this is the time.

Pretrial Ex. 16, at 29; Ex. 254 at 20; 17RP at 1848 (ruling).²⁰

²⁰ Unfortunately, the references by the trial court to what it is redacting do not match up perfectly to the page references on the unredacted Pretrial

COBANE: Omar, I walk out this room, it's over. It's done....You take your chances at court. Now you think about it. *It's your life. You want to do all this fucking time. Hey, be my guest. Step up and do it.*

Pretrial Ex. 16, at 47; Ex. 254 at 233; 17RP at 1850 (ruling).

COBANE: Omar, look at it this way. You sit in jail for a month or you sit in jail for thirty-five years. You do the math. Jury ain't buying it unless you, you bring the people in. It's the only way the jury is buying it.

TAKEMOTO: Omar, you've got to start thinking about your future. Okay. *You know thirty years, thirty plus years, okay.* You know that I'd be happy to talk to a prosecutor and tell them that you are willing to be cooperative with us.

Pretrial Ex. 16, at 61; Ex. 254 at 45-46; 17RP at 1850 (ruling).

Also excluded from Norman's statements were much larger passages such as the following, which the court redacted entirely:

TAKEMOTO: Omar, can you do thirty plus years?

NORMAN: Shit, no, I didn't do that, shit. I didn't...

TAKEMOTO: Omar, question, simple question. Can you do thirty years, thirty plus years?

NORMAN: No, I ain't going to do thirty years.

TAKEMOTO: Thirty years.

NORMAN: I ain't going to do it.

TAKEMOTO: You're going to do it if you don't get smart.

Pretrial Ex. 16 (unredacted statement), at 30; Ex. 254 (redacted statement), at 20.

Ex. 16, probably because some redactions were agreed upon. However, between the rulings of the trial court at 17RP 1849-52, and the comparison between the unredacted statement and the redacted one, it is clear which portions of the statement were removed by the court.

TAKEMOTO: Like I said, you know, I'd put a bullet in my head before I'd do thirty plus years.
NORMAN: No, you wouldn't.
TAKEMOTO: Yeah, I would.
NORMAN: Unintelligible – mumbling.
TAKEMOTO: Thirty plus years, Omar.
COBANE: And you know. But you know. You've had on your face.
NORMAN: Unintelligible – mumbling.
TAKEMOTO: Saving your life. Put you in jail for thirty plus years.
NORMAN: Huh?
TAKEMOTO: I'm going to save your life by putting your ass in jail for thirty plus years.
NORMAN: What do you mean save my life?
TAKEMOTO: Save your life.
NORMAN: How?
TAKEMOTO: You probably would have gotten shot tonight.
NORMAN: How?
COBANE: It's karma, man. The streets.
TAKEMOTO: You've got a lot of enemies, my man.
NORMAN: I've been out twenty three days.
....
TAKEMOTO: Well, maybe twenty three years if he's a good boy. Omar, can you do that? Can you do that?
NORMAN: What, twenty three years?
TAKEMOTO: Twenty three years if you're good.
....
TAKEMOTO: Keep your nose clean. Maybe, maybe twenty three, thirty years. Can you do that, Omar? Can you fight this (holding up DNA report)?

Pretrial ex. 16 at 35-36; Ex. 254 at 24 (skipping pp 34-36 from the pretrial exhibit entirely); 17RP at 1848 (ruling).

Not only do these passages demonstrate how the police were pressuring Norman about his potential sentence in this case, but there is

nearly an implied threat in the last passage that the police are the only ones who can help Norman survive. Norman's case required the jury to believe his testimony that he was pressured by police into making false statements. Under these circumstances, excision of the above sections of the interrogation is misleading and unfair and constitutes an abuse of discretion by the trial court. Reversal is therefore required. Larry, 108 Wn. App. at 910.

4. AFTER THE AUDIENCE APPLAUDED THE PROSECUTOR'S REBUTTAL CLOSING ARGUMENT, THE TRIAL COURT IMPROPERLY DENIED THE DEFENSE MOTION FOR MISTRIAL.

At the end of the State's rebuttal closing argument, the courtroom spectators applauded. 21RP 2459. The trial court responded: "Excuse me, excuse me, we cannot have that in a court of law." 21RP 2459. The court then excused the jury without any additional mention of the applause. 21RP 2459-61.

After the jury had departed, defense counsel immediately moved for a mistrial based on the applause and its potential to for its "undue effect on the jury." 21RP 2461-62. The trial court denied the motion, finding that the applause would not affect deliberations, and it cautioned audience members about further shows of support for one side or another. 21RP 2462.

Washington law provides that silent displays of affiliation by trial spectators, which do not explicitly advocate guilt or innocence, are permissible and do not require reversal. State v. Lord, 161 Wn.2d 276, 289, 165 P.3d 1251 (2007); State v. Woods, 154 Wn.2d 400, 416, 114 P.3d 607 (2005). Thus, in Lords and Woods, both murder trials, it was not error to permit spectators to wear buttons showing the image of the deceased victim, or black and orange ribbons in remembrance. Lord, 161 Wn.2d at 289-90; Woods, 154 Wn.2d at 416-18.

In reviewing whether a trial court erred in denying a motion for mistrial, the appellate court applies the abuse of discretion standard. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (internal citations omitted). “The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial.” Id. (quoting State v. Mak, 105 Wn.2d 692, 701, 719, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986)).

In determining the effect of an irregular occurrence during trial, a Court must examine: “(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” Hopson, 113 Wn.2d at 284 (internal citations omitted). Here, of course, the applause at the conclusion of the

prosecutor's closing argument was not cumulative to anything that happened during the trial, but was a wholly new event. Moreover, the trial court did not instruct the jury to disregard the applause

The event did, however, underscore the idea that feelings ran high in the case, and that many people in the audience fit into at least one "group," doubtless reminding the jurors of the gangs mentioned repeatedly throughout the trial. It bears noting that immediately prior to jury selection there was a scuffle outside the courtroom between gangs associated with the parties in this case. 7RP 538-40, 544. At least one member of the jury pool (who was not seated) was aware of the altercation and discussed it with other unidentified members of the pool. 7RP 538-40. Given the overall context and the subject matter of this case, the misconduct by the audience in demonstrating their affiliation and demand for a conviction could not be harmless and therefore the Norman's motion for a mistrial should have been granted.

5. CUMULATIVE ERROR DEPRIVED NORMAN OF A FAIR TRIAL.

All of the errors discussed above bear directly on Norman's right to due process and a fair trial, and many of them would naturally reinforce each other. For example, inappropriate gang evidence and the applause could easily combine to leave the jury especially intimidated by the

improper behavior of the audience. Similarly, the inappropriate bolstering of the State's DNA expert by hearsay and the inappropriate redaction of Norman's September statement to police combined to hamper Norman's ability to present his own theory of the case to the jury.

The "cumulative error doctrine" states that while some errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors may require a new trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1990).

Norman maintains that each of the errors discussed above, standing alone, warrant reversal of his conviction. But in addition, because all these errors affected his right to a fair trial, their cumulative impact provides yet another basis to reverse.

6. RESTITUTION WAS IMPROPERLY ORDERED, WHEN UNCONTESTED EVIDENCE PROVED MILAM WAS COMMITTING A FELONY WHEN HE WAS KILLED.

RCW 7.68 governs Crime Victims Compensation (CVC). RCW 7.68.070(3)(b) reads in relevant part:

[N]o person or spouse, child, or dependent of such person is entitled to benefits under this chapter when the injury for which benefits are sought, was

....

(b) Sustained while the crime victim was engaged in the attempt to commit, or the commission of, a felony....

The trial court conceded that on the night of his death, Milam was committing a felony: escape from his federal work release program. 24RP 4-5. The trial court, however, compared the case to one where a decedent has drug residue somewhere on his body, and therefore was committing a crime at the time of his death. 24RP 4-5. In such a case, the trial court said that it would order restitution, because it believed the person should be more active in the commission of a felony before death benefits should be denied by CVC. 24RP 5-6. It thereupon ordered full restitution to CVC for the death benefits and funeral expenses paid to Milam's family.

RCW 7.68.070, however, is unambiguous in limiting CVC benefits only to family members of victims who were not in the midst of committing a felony at the time they were injured. CVC had no statutory authority to award compensation to Milam's family, and the trial court was therefore without authority to award restitution to CVC. RCW 34.05.570;²¹ Manke Lumber Co., Inc. v. Diehl, 91 Wn. App. 793, 802,

²¹ If a party – such as Norman – requests relief from an agency order, a court “shall grant” such relief if it finds the following:

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; [or]

....

(d) The agency has erroneously interpreted or applied the law; [or]

807-08, 959 P.2d 1173 (1998), review denied, 137 Wn.2d 1018 (1999) (although reviewing court grants discretion to an agency, such court cannot support an agency decision plainly based on misinterpretation of the law).

The trial court should have denied compensation to CVC because payment by CVC clearly contravened RCW 7.68.070. This Court should therefore hold that restitution to CVC is in violation of Washington law and reverse.

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; [or]

....

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency....

RCW 34.05.570(3)(b), (d), (e), (h).

D. CONCLUSION

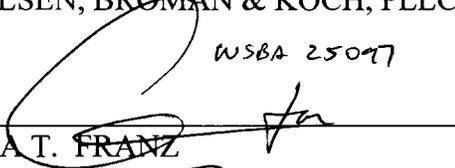
For the reasons above, this Court should reverse Norman's convictions and remand for a new trial. Because the issue may occur on retrial, this Court should also rule that restitution to CVC is inappropriate here, as Milam was committing a felony at the time of his death.

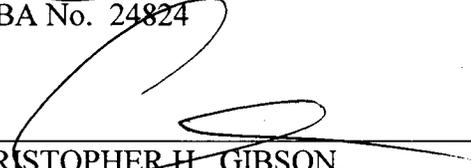
DATED this 28th day of September, 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63913-7-I
)	
OMAR NORMAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 28TH DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] OMAR NORMAN
DOC NO. 301004
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*