

63980-3

63980-3

NO. 63980-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT WHITE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

---

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. A standard range sentence is not reviewable absent procedural errors or categorical denial of an exceptional sentence downward without an exercise of discretion. Due process requires that the defendant be given the opportunity to review and rebut evidence presented. White proffered mitigating factors; the trial court reviewed the materials presented and concluded that there was no credible evidence to support the mitigating factors. Credibility decisions made by the trier of fact cannot be reviewed. Was the court's exercise of discretion consistent with the requirements of due process and properly within its discretion, and therefore, unreviewable?

2. The length of a term set within the standard range is not reviewable absent procedural errors. Due process requires that the defendant be given the opportunity to review and rebut evidence presented. Expert opinions presented are not binding on the trier of fact. The judge concluded that the brutality of this murder and the defendant's sinister cover-up afterward warranted a sentence at the high end of the sentencing range. Was the sentence imposed a proper exercise of discretion and unreviewable even if it is inconsistent with experts' opinions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Scott White, was charged by amended information with murder in the second degree, with a deadly weapon enhancement, for killing Mike Webb between April 13-15, 2007. CP 6-7. White entered a guilty plea. CP 8-28.

White originally had been charged with murder in the first degree. CP 1-5. The charge was reduced after psychologists retained by both parties evaluated White's mental state at the time of the crime and concluded that he probably did not have the capacity to premeditate the murder because of the combined effects of alcohol, drugs, and his mental illness. RP 4.<sup>1</sup>

The presumptive sentence for the crime was 147-244 months of confinement. CP 27, 36. White sought an exceptional sentence downward of 123 months. CP 29. The trial court rejected that request and imposed a sentence of 244 months. CP 35-42.

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<sup>1</sup> The Verbatim Report of Proceedings of the sentencing hearing of July 10, 2009, is referred to in this brief as RP.

## 2. SUBSTANTIVE FACTS

Scott White killed Mike Webb by attacking him with an axe, striking at least five blows to Webb's face as Webb lay in his own bed. CP 104, 214. The axe wounds were parallel, and Webb had no defensive wounds, which indicates that Webb was not moving when he was attacked. RP 19. White said that he hit Webb in the head as hard as he could. CP 104. After White killed Webb, he put a bag over Webb's head because of the huge amount of blood, and tied Webb's hands and feet so that he could drag Webb's body into the crawl space under Webb's house. CP 104, 214-15. He cleaned up the bedroom and got rid of the bloody sheets. CP 105, 214. The murder occurred in the early morning hours of April 14, 2007. CP 215.

White had been living with Webb for about five months and after he murdered Webb, White continued to live in the house. CP 213-15. White sent text messages to Webb's friends, posing as Webb, saying to one that Webb had to go to California because his sister's husband was critically injured, saying to another simply that he was going out of town. CP 213. White had guests to the house. CP 214. White pawned electronic equipment belonging to Webb, including his laptop computer. CP 214-15. White used Webb's

DSHS debit card. CP 214-15. White tried to use Webb's credit cards but was unsuccessful. CP 215.

On April 20<sup>th</sup>, Jane Bengston went to the house to try to find Webb and a panicked man ran out of the house, telling her that he was visiting White and that Webb was not home. CP 214.

Bengston could not see into the house. CP 214. She immediately received a text message from Webb's cell phone, chastising her for coming to Webb's home uninvited. CP 214.

White moved out of Webb's house about three weeks after the murder. CP 105, 215. White said that he moved out because he "didn't feel right being there," he was worried that Webb's friends would continue to come to check on Webb, and because he had used up the prescription drugs that were in the house. CP 105.

A missing person's report was filed on May 14, 2007, because no one had seen Webb in person or heard his voice since April 13<sup>th</sup>. CP 213-14. Webb's body was discovered in the crawl space below his house on June 28, 2007, with hands and feet still bound, and covered with a tarp. CP 214.

White had moved in with Webb in November of 2006. CP 213. The two met at an AA/NA organization. CP 100. White was

27 years old and had a long history of alcohol and drug abuse and a diagnosis of schizoaffective disorder. CP 87-99, 169-70, 213.

Webb was a gay man. CP 249. White told the defense psychologist that he is uncertain about his sexual orientation. CP 99. However, White socialized with gay men before he moved in with Webb, met Webb at a predominantly gay AA/NA organization, and admitted having sexual relations with other men both before and after he killed Webb. CP 46, 99, 105.

White has never held stable employment and as an adult, "has effectively been homeless, drifting from 'friend' to shelter to friend." CP 86 (Dr. Cunningham's words). White told a psychologist who evaluated him in connection with this case that he starting smoking crack cocaine at 22 years old and had been shooting heroin daily since he was 25. CP 98. He claimed several periods of sobriety between the ages of 25 and 27, including for two months before he met Webb. CP 99.

White had several sources of income in 2006 and 2007, although he did not have a regular job. CP 86-87. White collected a monthly disability check from the State of Washington. CP 105. Webb allowed White to live in Webb's home and provided free room and board, as well as an allowance of \$50 per week. CP 100.

White also claimed that he obtained prescription drugs from Webb. CP 100. White obtained money in exchange for sex with men; according to his statements this occurred multiple times after Webb's death. CP 105.

White was arrested on July 18, 2007. CP 215. He first told police that he had moved out of Webb's home after an incident in which he took Webb's car for several days without permission. CP 213, 215. He said that when he later returned, Webb was missing. CP 215. After confronted with some of the incriminating evidence, White explained that he had brought in the axe from outside and put it under the bed that he shared with Webb. CP 215. He told Webb he was going out for a cigarette, grabbed the axe and hit Webb multiple times with it. CP 215. He described concealing Webb's body, admitted posing as Webb in text messages to Webb's friends and family claiming that Webb was out of town, and admitted to pawning Webb's property and using Webb's debit card. CP 215.

C. ARGUMENT

THE STANDARD RANGE SENTENCE IMPOSED IS NOT REVIEWABLE.

White claims that he was deprived of due process because statements of the trial court at sentencing establish that its conclusions were based on material false information. He argues that the court violated due process by concluding that White is a master manipulator, which White claims is contradicted by experts' opinions that he did not plan the murder. These arguments are without merit. No false information was provided to the judge. The sentence imposed was a proper exercise of discretion based upon the court's evaluation of the materials presented.

White does not claim that the trial court incorrectly applied any legal standard or that he did not follow the sentencing procedures required by statute. The trial court considered the facts and found that they did not establish any mitigating factor justifying a sentence below the standard range. The trial court simply found insufficient evidence of the mitigating factors proffered by White. This was an exercise of discretion that is not reviewable. Constitutional due process does not require the court accept a defendant's version of events surrounding a crime.

1. None Of White's Claims Falls Within The Limited Grounds For Review Of A Standard Range Sentence.

A standard range sentence generally is appealable only if the sentencing court failed to follow a specific required procedure. RCW 9.94A.585(1); State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). If the trial court denies a request for an exceptional sentence below the standard range, review will be permitted of that decision, but only if the court refused to exercise its discretion at all or relied on an impermissible basis for its decision. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), rev. denied, 136 Wn.2d 1002 (1998). A court refuses to exercise its discretion if it categorically refuses to impose an exceptional sentence under any circumstances. Garcia-Martinez, 88 Wn. App. at 330. A court relies on an impermissible basis for denying an exceptional sentence if it relies on the defendant's race, religion, or sex, for example. Id. The defendant has the burden of establishing the existence of a mitigating factor by a preponderance of the evidence. RCW 9.94A.535(1). "A trial court that has considered the facts and has concluded that there is no basis for an

exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." Garcia-Martinez, 88 Wn. App. at 330.

White does not claim that required statutory procedures were not followed. White does not claim that his standard range sentence is appealable on either of the grounds recognized in Grayson and Garcia-Martinez.

White attempts to avoid the general bar to appeal of a standard range sentence by claiming the trial court violated due process because its decision was based on materially false information. The information identified as false is not any information submitted to the court, but the trial court's conclusions. The court's weighing of the evidence presented, however, is beyond the scope of a constitutional due process claim.

The legal foundation of White's argument is State v. Herzog, 112 Wn.2d 419, 771 P.2d 739 (1989), and its broad statement that "if a sentencing judge relies upon material facts of a constitutional magnitude that are not true, the defendant's sentence has been enhanced in violation of due process." Id. at 431. The Court in Herzog relied upon two United States Supreme Court cases involving defendants who were sentenced based upon inaccurate

information about prior convictions: Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); and United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). An examination of those cases demonstrates their limited application.

In the earlier case, Townsend v. Burke, Townsend was sentenced in 1945 on convictions of burglary and armed robbery. 334 U.S. at 737. Townsend claimed a violation of the Fourteenth Amendment due process clause because he was not represented by counsel at sentencing. U.S. Const. amend. XIV, § 1; Townsend, 334 U.S. at 738-39. At the time, counsel was not required at sentencing in a non-capital case, but absence of counsel could constitute deprivation of due process if the defendant was prejudiced. Townsend, 334 U.S. at 739. The comments of the sentencing judge were mocking and the judge treated three prior felony charges as convictions but those charges actually either had been dismissed or resulted in acquittals. Id. at 739-40.

The Supreme Court in Townsend concluded, "[I]t is the careless or designed pronouncement of sentence on a foundation so extensively or materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." Id. at 741.

The Court held that counsel could have taken steps to see that the sentence was not predicated on misinformation, "a requirement of fair play which absence of counsel withheld from this prisoner." Id.

In the second case, United States v. Tucker, Tucker was sentenced in 1953 on a conviction of armed robbery. 404 U.S. at 443-44. The trial judge specifically considered three prior felony convictions but after the sentencing on the robbery, two of the prior convictions were collaterally attacked and found to be unconstitutionally obtained because Tucker was not represented by counsel. Id. at 444-45. Tucker later challenged the robbery sentence pursuant to 28 U.S.C. § 2255. Id. at 445.

The Supreme Court opinion in Tucker did not mention due process, although the Court cited Townsend for the proposition that the sentence was reviewable because it was based upon "misinformation of constitutional magnitude," that is, "'assumptions concerning his criminal record which were materially untrue.' [Townsend, 334 U.S.] at 741, 68 S.Ct., at 1255." Tucker, 404 U.S. at 447. The Tucker Court reversed the sentence because the trial court considered convictions obtained in violation of the right to counsel. Tucker, 404 U.S. at 449.

The issue in Herzog itself was the proper consideration of a West German rape committed by Herzog; the trial court had concluded that the conviction for that rape did not satisfy the requirements of the United States Constitution. 112 Wn.2d at 420-22. The trial judge did not include the West German conviction in Herzog's offender score but did consider the facts of that rape in imposing its sentence. Id. at 422. The Washington Supreme Court affirmed the sentence, after broadly stating the rule of Townsend and Tucker, because it concluded that Herzog's right to due process was protected by the opportunity to object to facts considered by the judge and the judge was aware of the constitutional invalidity of the West German conviction. Id. at 431-32.

White is incorrect in his assertion that Herzog held broadly that there is "a due process right to be sentenced on accurate information." App. Br. at 34 (emphasis in Appellant's Brief). The Court noted that a sentencing court should be "almost completely unfettered in order that it may 'acquire a thorough acquaintance with the character and history of the man before it.'" Herzog, 112 Wn.2d at 424, quoting United States v. Doyle, 348 F.2d 715, 721 (2<sup>nd</sup> Cir.), cert. denied, 382 U.S. 843 (1965). The Court held that a

sentencing judge should consider matters that would not be admissible at trial. Herzog, 112 Wn.2d at 424-25 (citing cases illustrating broad range of evidence appropriately considered). The Court concluded that the trial court properly considered the prior rape incident, despite the "inherent unreliability of the underlying facts," because the court was informed as to the invalidity of the conviction. Id. at 429. The Court held:

Granted, as uncontroverted hearsay, the evidence is unreliable; but due process simply does not demand the same evidentiary presumptions nor reliability in a sentencing proceeding.

Id. at 431.

None of these cases suggests that the trial court's evaluation of the circumstances of the crime itself is subject to review for possible inaccuracy. Townsend made it clear that its holding was limited to deprivation of counsel when there had not been a diligent search for the truth, and that an error in resolving a question of fact would not necessarily be a deprivation of due process. 334 U.S. at 741. As one federal circuit court explains, the broad language in Townsend is often misunderstood, "Yet no one supposes that a defendant can litigate any issue of fact at any time he or she likes merely by invoking the due process clause and offering to show tat

a mistake was made." United States v. Dupont, 15 F.3d 5, 7 (1<sup>st</sup> Cir. 1994).

The trial court in the case at bar carefully considered the materials presented, as its comments at the sentencing hearing reflect. It was very familiar with the mitigation packet submitted by White, including the psychologists' reports. The court asked questions of counsel about the evidence in the case, to assist in its determination of the facts.

White does not cite any information presented to the court in this case as being false, so he has not shown that constitutionally material false information was provided to the court. White simply challenges the trial court's evaluation of the credibility and significance of the evidence presented by the defense. That evaluation of the evidence is the essence of a court's exercise of discretion and is not reviewable. The trial court's weighing of the information presented and its conclusion that White's version of events was not sufficiently credible to establish that the proffered mitigating circumstances were substantial and compelling reasons for an exceptional sentence was within its discretion.

2. The Trial Court Had Discretion To Disbelieve White's Self-serving Description Of His Relationship With Webb.

White claims that the trial court relied on constitutionally material false information because it reached the following three conclusions: that there was no credible evidence either that Webb was abusing nonprescription drugs, there was no credible evidence that Webb supplied White with drugs; and that evidence presented contradicted White's claim that he was ambivalent and anxious about his sexual orientation. These claims should be rejected. The three conclusions are not reviewable, as argued in the previous section of this brief. In any event, the court accurately cited evidence presented on which it relied to support its conclusions, so it did not rely on misinformation. Finally, the core of these claims was White's post-homicide description of his relationship with the dead victim -- the court obviously did not find White credible, a conclusion supported by White's admitted thefts and elaborate scheme of lies after the murder. White simply did not meet his burden of proving the existence of any mitigating factors.

White argues that there was ample evidence that Webb abused prescription drugs, citing the report of Webb's reputation by two of White's friends, a report of another acquaintance that Webb

was addicted to a prescription painkiller, and prescription medication found at White's home after his death. App. Br. at 35-36. The court noted that Webb may have been using prescribed drugs, but there was no credible evidence that he was abusing them.<sup>2</sup> RP 37.

As the trier of fact, it was the court's responsibility to evaluate the credibility of the evidence presented. Even on review of a finding of guilt, where the State has the burden of proof, the trier of fact is the sole arbiter of credibility determinations and those credibility decisions cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The trial judge may rely on all facts admitted, proved, or acknowledged to determine a sentence. RCW 9.94A.530(2); Grayson, 154 Wn.2d at 338-39. Acknowledged facts include all facts presented to or considered by the sentencing court that are not objected to by the parties. Grayson, 154 Wn.2d at 339.

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<sup>2</sup> Statements of friends, family, and colleagues of Webb were submitted to the trial court and the defense. CP 221-286; RP 13, 15, 21. They strongly disputed White's characterization of Webb as a predatory drug abuser. See e.g., CP 226-31, 235, 240, 249-50, 271-77, 278. Four of those individuals spoke at the sentencing hearing. RP 5-12.

The trial court was not misinformed as to material facts when it concluded that reports of some acquaintances relayed via third parties were not credible evidence of prescription drug abuse by Webb. White has cited no evidence that Webb used nonprescription drugs, beyond White's own claims after the homicide.

It is clear that the court concluded that White's statements were not credible. That conclusion is reflected in the court's finding that White is a manipulator, as illustrated by White's posing as Webb after the murder to delay discovery of Webb's death and allow White to live in Webb's home and steal Webb's money and property. RP 41-42. Those lies, which the court characterized as "sinister," clearly influenced the court's decision that White was not credible. RP 41.

The Washington Supreme Court has emphasized that the SRA does not require judges to leave their experience at the door. Grayson, 154 Wn.2d at 339-40. The Court noted that judges have personal experiences that provide a practical understanding of the world, and that judges are not required to leave their knowledge or their common sense behind when they impose a sentence. Id. at 339. The sources of information that the court may considered also

are not limited. State v. Handley, 115 Wn.2d 275, 282-83, 796 P.2d 1266 (1990). The limitation of due process is simply that the parties must have the opportunity to review, examine, and contradict the evidence considered. Grayson, 154 Wn.2d at 340.

The trial court spent some time at sentencing questioning both attorneys about whether there was any corroboration in the evidence of White's claims that Webb was using heroin or supplying drugs to White. RP 21-25, 28-29, 31-33. The prosecutor stated that there was no physical evidence or independent witness who would substantiate White's claim that he was taking drugs that Webb obtained. RP 22, 29. The prosecutor also confirmed that no evidence at Webb's autopsy suggested that Webb was using heroin. RP 24-25. The toxicology report showed prescription medication but no heroin in Webb's system at the time of his death. RP 23. There was no evidence of needle marks. RP 24. Defense counsel was invited to offer any additional information and did not dispute these facts, although she asserted that Webb's body was too decomposed to determine if there may have been needle marks, and that independent witnesses could not testify to matters that occurred in private. RP 23-24, 31-33. The court noted that the experts simply repeated the claims made by White. RP 29.

As to the second challenged conclusion, the trial court stated, "I certainly don't find any credible evidence that [Webb] was supplying drugs to the defendant." RP 37. White argues that the evidence "amply demonstrates" that proposition, yet cites only the alleged circumstances of the relationship and Webb's purported reputation as evidence. White relies on the premise that White had no income and argues that because White was using drugs, Webb must have been supplying them. However, White received a monthly disability check and paid no room or board to Webb; Webb paid White an allowance; and White admitted that he was willing to perform sex acts for money to use to buy drugs. CP 100, 105. White had been using illegal drugs, including heroin, for years before he met Webb. CP 98-99. Further, White specifically reported that he was the one who was using heroin before Webb did and that he did that outside the house. CP 100. He claimed that he used the \$50 weekly allowance that he got from Webb to buy the heroin. CP 100. The evidence supports the conclusion that White had the resources, financial and logistic, to obtain drugs without help from anyone.

As to the third challenged conclusion, the trial court did not simply reject White's claim that he was ambivalent and anxious

about his sexual orientation. White admitted having sexual relations with men both before and after he killed Webb. CP 99, 105. In rejecting White's claims that Webb provoked the incident and that Webb sexually abused White, the court cited White's sexual activity as inconsistent with the claim that Webb was conflicted about his sexuality but also repeated the telling observation that the claim of sexual abuse was based solely on White's own assertions after the murder. RP 37-39.

The court simply rejected the defendant's claim that he was sexually abused by the man he killed. The claim was uncorroborated, as defense counsel conceded. RP 31-33. The court had concluded that White was not credible. The court's rejection of that claim also was supported by Dr. Strachan's observation that White claims that he brought the axe into the bedroom that he shared with Webb so that Webb would take White seriously; that description of his state of mind is inconsistent with Webb being in fear of White. CP 171-72. White also specifically denied that Webb had ever threatened him. CP 172.

Moreover, the credibility of White's report of abuse by Webb is further drawn into question by White's reports of other delusions

relating to sexual activity. CP 96-97. White reported that while in jail he had heard the voice of the arresting detective trying to get him (White) to masturbate. CP 96. According to Dr. Cunningham, White suffers from "Delusional Disorder, Erotomanic Type," which involves fixating on others inappropriately. CP 88.

White makes the remarkable assertion that because Dr. Strachan concluded that White was vulnerable to making bad decisions because of his use of drugs and alcohol, that expert agreed that Webb was to a significant degree an initiator or aggressor to the incident. App. Br. at 38. Dr. Strachan was not asked to address that question and drew no such conclusion. CP 168-78.

With respect to each of these facts, even if the evidence would have supported the opposite conclusion, the court was not required to find the proffered evidence credible. The court's conclusion that the evidence was not credible is not constitutional error.

3. The Trial Court's Rejection Of A Failed Mental Defense Mitigating Factor Was Compelled Because White Acted Under The Influence Of Drugs And Alcohol.

White asserts that the trial court relied on misinformation in rejecting the mitigating factor commonly known as "failed mental defense," because the court misunderstood the report of Dr. Strachan and incorrectly concluded that White's actions were solely attributable to drugs and alcohol.<sup>3</sup> App. Br. at 41-44. That claim is without merit. The court properly concluded that the record was not adequate to justify reliance on this mitigating factor because White did not establish that there was an impairment of capacity that was unrelated to White's voluntary use of drugs and alcohol.

White requested an exceptional sentence below the standard range based on the impaired mental capacity statutory mitigating factor in RCW 9.94A.535. CP 32-33. The statute provides, in pertinent part:

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The

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<sup>3</sup> White also claims that the court rejected this proffered mitigating factor based on its rejection of White's claim of conflict about his sexual orientation, but the court did not mention that conclusion in its discussion of the failed mental defense factor. See RP 38-39.

following are illustrative ... reasons for exceptional sentences.

....

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1)(e).

The Supreme Court in State v. Allert defined this statutory mitigating factor as it applies to a person whose mental state was impaired by a combination of the use of drugs and other factors. 117 Wn.2d 156, 815 P.2d 752 (1991). The Court held that voluntary use of alcohol (or drugs) cannot be considered in relation to this mitigating factor.<sup>4</sup> Id. at 167. The mitigating factor has not been established unless the defendant has established that absent the substance abuse, he would have been significantly impaired in appreciating the wrongfulness of his conduct or conforming his conduct to the law. Id. at 166-67. Mental impairment cannot be considered in support of the impaired capacity mitigating factor unless that mental impairment is unrelated to the drugs or alcohol ingested. State v. Fowler, 145 Wn.2d 400, 410-11, 38 P.3d 335 (2002).

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<sup>4</sup> Drug use also may not be considered as a nonstatutory mitigating factor. State v. Gaines, 122 Wn.2d 502, 510, 859 P.2d 36 (1993).

White's claim that "both experts endorsed this mitigating factor" is totally unsupported by the experts' reports, which is the sole source of their opinions that is part of the record. While both experts concluded that White's schizoaffective disorder would have affected his mental state when he murdered Webb, neither opined that in the absence of White's substance abuse, his ability to appreciate the wrongfulness of his conduct would have been significantly impaired, which is the relevant legal standard.

Dr. Cunningham concluded that White's schizoaffective disorder, poly-substance abuse, anxiety about his sexual orientation (aggravated by his substance abuse, among other things), and "As described by [White]," the nature of relationship with Webb, "converged and synergistically interacted" and resulted in the fatal attack. CP 83, 101-05.

Dr. Cunningham concluded that White was almost certainly intoxicated with multiple substances at the time of the killing. CP 102. White told Dr. Cunningham that he was "high as a kite" when he killed Webb. CP 103-04. According to Dr. Cunningham:

Unfortunately, a co-morbid substance dependence/ abuse disorder is likely to further psychologically destabilize persons like Scott [sic] who suffer from a schizophrenia spectrum disorders [sic], aggravating their psychotic symptoms, increasing their interpersonal

misperceptions, potentiating their emotional volatility, and disinhibiting their aggression. This synergistic interaction between the various substances Scott [sic] was ingesting proximate to the offense, as well as between these substances and Scott's [sic] Schizoaffective disorder, played a major role in this tragic outcome.

CP 102.

Dr. Strachan concluded that the clinical evidence generally did not support the conclusion that White was unable to tell right from wrong. CP 172. He stated that if the mental defense was based on the theory that White misjudged the threat that Webb posed, voluntary intoxication was a necessary component of that theory. CP 172-73. Dr. Strachan observed that White's typical response to his psychotic symptoms was isolation rather than anger, and "there is no significant evidence" that symptoms of White's mental illness predisposed him to "violent misjudgment in response to imagined threats." CP 173. Therefore, Dr. Strachan concluded, either White simply wanted to kill Webb and knew it was wrong to do so, or the combination of an unpleasant living situation and the use of drugs and alcohol caused impaired judgment. CP 173.

Neither expert opined that absent the substance abuse, White would have been significantly impaired in appreciating the

wrongfulness of his conduct or conforming his conduct to the law.<sup>5</sup>

Therefore, the trial court correctly concluded that White did not establish this mitigating factor.

4. The Trial Court Had Discretion To Impose A High End Standard Range Sentence Based On The Brutality Of The Murder And White's Sinister Masquerade Afterward.

White argues that imposition of a sentence at the high end of the sentencing range was a violation of his right to due process of law because the trial court concluded that White is a master manipulator and, White asserts, the opinions of two psychologists were to the contrary because they opined that White did not plan the killing. This claim is without merit. The trial court explained that its decision was based on the brutality of the murder and the court's rejection of White's claims that he was a victim of circumstance. These findings do not conflict with the conclusion that White did not plan the killing. Even if the court's conclusion was inconsistent with the opinions of the two psychologists, White's claim that a court's reliance on its own conclusions violates due process is frivolous.

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<sup>5</sup> Dr. Cunningham's opinion that White was insane when he killed Webb did not address the role of intoxication in producing White's mental state. CP 107-08.

The trial court's colloquy on this subject follows:

The facts of this murder are undisputedly horrific and gruesome. The defendant himself recounts directing multiple axe blows to Mr. Webb's head as hard as he could. In 13 years as a superior court judge, I must say that this is one of the two most brutal murders that have been before me. The horror of it all is thankfully almost unimaginable to most people. But to the people affected, it's a waking nightmare whose images will not fade away.

As if that weren't enough, this Court is struck by the defendant's behavior following the murder: The secreting of Mr. Webb's body in the crawl space of his own home; the creation of a post-murder to-do list to cover his tracks; the pawning of Mr. Webb's property; the use of Mr. Webb's DSHS card and the attempted use of his credit cards; and lastly, and perhaps in my mind the most sinister of all, the defendant's masquerading as Mr. Webb for several weeks wherein he texts friends of Mr. Webb in an effort to convince them that Mr. Webb was just fine and that nothing was wrong.

This act of the defendant strikes me as especially cunning, callous, and calculated. By assuaging the concerns of Mr. Webb's friends, he turned them into unwitting pawns in his effort to avoid detection and justice. For the rest of their lives, these individuals will relive just how they were lulled into inaction by the very person who killed their friend.

One has to wonder: Was this what he meant by being nice to the people who survived? In my mind, Mr. White is not some poor, unfortunate victim of circumstances in this scenario. I think and I believe the evidence supports that he's a master manipulator who will do whatever it takes to attain his own ends.

And given the horrific nature of this crime and the reprehensible conduct of the defendant following its commission, I find that the top end of the standard range is amply justified....

RP 40-42.

The court's conclusion was based on the horrific nature of the murder and the defendant's behavior afterward, hiding the body and conducting a calculated and sinister masquerade to avoid detection. There is nothing in those conclusions inconsistent with the experts' findings that White did not plan the murder.

Even if the court had totally rejected the expert opinions submitted, that would not constitute constitutional error. A trier of fact is not required to accept expert opinions offered at trial.

"Expert opinions are not binding." State v. Toomey, 38 Wn. App. 831, 690 P.2d 1175 (1984), rev. denied, 103 Wn.2d 1012, cert. denied, 471 U.S. 1067 (1985). When expert witnesses offer opinions, the trier of fact "can then determine what weight, if any, it will give to their testimony." State v. Ellis, 136 Wn.2d 498, 522-23, 963 P.2d 843 (1998). A trier of fact may infer the defendant's mental state based on his actions and conclude that the experts were misled or simply wrong. State v. Pirtle, 127 Wn.2d 628, 646-47, 904 P.2d 245 (1995).

White does not dispute that he lived with Webb rent free, receiving an allowance from Webb; that he stole from Webb both before and after he killed Webb; that he covered up the homicide

and secreted Webb's body where it would not be discovered; that he remained in the house using Webb's prescribed drugs and his credit cards, pawning property of value; and that he posed as Webb to avoid discovery of Webb's death, sending text messages to family and friends for weeks after the murder while he stayed in Webb's home and enjoyed Webb's money and property. CP 100, 213-15. These undisputed facts provided ample evidence to support the judge's conclusion that the defendant was a master manipulator.

Neither expert addressed the question of whether White was a manipulator. White cites the experts' conclusions that he probably did not plan the murder, claiming that precludes the court's conclusion that he was a master manipulator. It is worth noting that Dr. Strachan twice pointed out that his analysis was of the mental defense, and he did not eliminate the possibility that White simply wanted to kill Webb and deliberately did so. CP 171, 173.

In any event, the court's comment about White's manipulative behavior was in the context of White posing as Webb after the murder, concealing Webb's death while White robbed Webb's estate. RP 40-42. The court remarked on that behavior

only after citing the brutality of the murder as a reason for the term imposed. RP 40-41.

The court did not rely on materially false information in violation of due process when it relied on its own evaluation of the evidence.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reject this appeal and affirm White's sentence.

DATED this 18<sup>th</sup> day of October, 2010.

Respectfully submitted,

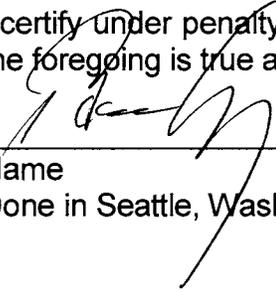
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to DANA LIND, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SCOTT WHITE, Cause No. 63980-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington

10-18-10  
Date

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