

52824-6

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NO. 52824-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KIM MASON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1305 Fourth Avenue, Suite 802
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT.

Kim Mason was convicted of aggravated first degree murder. During his trial, the prosecution relied upon numerous statements by the alleged victim to the police in violation of the state and federal rights of confrontation. The court admitted opinion testimony by government witnesses and civilian witnesses that the alleged victim, whose body was never recovered, was killed by Mr. Mason. Additionally, the court barred Mr. Mason from introducing evidence challenging the method used by the State's DNA expert to calculate the extreme likelihood Mr. Mason's DNA was present in mixed-source DNA samples at the crime scene.

The court further admitted an array of "bad act" testimony of such a prejudicial and cumulative nature that it caused irreparable harm to Mr. Mason's ability to receive a fair trial. Contrary to a governing Supreme Court case, the trial court discussed the lack of death penalty with jurors during voir dire. Additionally, there was insufficient evidence to support the burglary charged as an aggravating factor. Finally, the cumulation of errors requires reversal.

B. ASSIGNMENTS OF ERROR.

1. The court violated Mr. Mason's Sixth Amendment right to present a defense and receive a fair trial by barring the testimony of a defense expert witness on DNA.

2. The court erred by finding a defense expert witness's proposed testimony was inadmissible under Frye.

3. The court allowed witnesses to invade the province of the jury by testifying as to their opinions regarding ultimate issues before the jury.

4. The court violated Mr. Mason's Sixth Amendment right to confront witnesses against him by admitting repeated hearsay statements of an unavailable declarant made to numerous government officials in the course of a prosecution.

5. The court erroneously admitted a wide array of "bad act" evidence that was far more prejudicial than probative.

6. The court erred by refusing to give a limiting instruction relating to uncharged misconduct.

7. The court improperly applied "state of mind" and background evidence exceptions to the hearsay rule to admit irrelevant and prejudicial information.

8. The court issued an incomplete "to convict" instruction that omitted essential elements of the charged crime in violation of Mr. Mason's rights to a fair trial by jury.

9. There was insufficient evidence to support Mr. Mason's conviction for having committed a burglary.

10. The court improperly discussed sentencing matters with the jurors in violation of governing law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to present a defense is fundamental to a fair trial. Here, the court refused to allow the defense to present testimony challenging the likelihood Mr. Mason was a contributor to a mixed sample of DNA, a critical part of the case against Mr. Mason. Did the court's ruling violate Mr. Mason's rights to present a defense and receive a fair trial?

2. Frye rulings are reviewed *de novo* on appeal. In the instant case, the court ruled that the proposed defense testimony regarding DNA mixture analysis was not generally accepted in the scientific community. Since numerous texts and experts demonstrate the proffered testimony was generally accepted, and the testimony related to critical forensic evidence, does the court's error require reversal?

3. When witnesses give their opinions on ultimate issues for the jury it invades the jury's fact finding function and deprives the accused of a fair trial by jury. In the instant case, a medical examiner testified about his opinion that Herberto Santoso was dead and other witnesses testified that Mr. Mason was guilty. Did testimony about ultimate issues to be decided by the jury invade the jury's province and deprive Mr. Mason of a fair trial?

4. The constitutional right of confrontation requires confrontation as a necessary predicate to the admissibility of an unavailable declarant's statements to government officers in the course of a criminal investigation. Here, the court admitted a wide range of testimony from police officials about uncross-examined statements the alleged crime victim made to them. Does the violation of Mr. Mason's confrontation rights require reversal?

5. Uncharged misconduct and out-of-court behavior are inadmissible when it is more prejudicial than probative and may cause the jury to believe the accused has a propensity for certain criminal acts. The trial court admitted a wide array of uncharged misconduct including weapons possession, deviant sexual acts, and lies on financial forms. Does the cumulation of this "bad act"

testimony that was far more prejudicial than probative require reversal?

6. A "to convict" instruction must include every element of a charged crime. Where the "to convict" instruction omits essential elements of the conviction, is reversal required?

7. A burglary requires proof the accused entered or remained in a building without permission to be there, and the lack of permission may not be inferred solely from the fact that the accused commits a crime inside. Here, there was no evidence Mr. Mason entered without permission. Was there sufficient evidence to support the aggravating factor and element of the crime relating to the commission of a burglary?

8. A court is forbidden from discussing sentencing issues with the jury by overwhelming authority. The trial court intentionally disregarded controlling caselaw and instead discussed with jurors the fact that the death penalty was not being sought in the case. Does the court's purposeful disregard of law barring it from discussing the lack of death penalty with jurors require reversal?

D. STATEMENT OF THE CASE.

Kim Mason and Herberto Santoso worked together at a nursing home and became friends. On February 20, 2001, Mr.

Santoso's neighbors found blood outside his apartment and the police found blood spattered throughout his bedroom. 4/17/03RP 113, 119;¹ 4/22/03RP 38, 43. The police located Mr. Santoso's car at the SeaTac Airport parking lot, with blood on the car's inside and outside. 4/23/03RP 113, 117. Mr. Santoso's body was never located nor his whereabouts discerned after February 19, 2001.

One month earlier, Mr. Santoso had reported that Mr. Mason had choked him, bound him with duct tape, pointed a gun at him, and tried to get a check for \$700 from him. 4/30/03RP 119-27. This January 23, 2001, incident ended when Mr. Mason turned the gun on himself and said he would kill himself if Mr. Santoso went to the police. Id. As a result of this incident, Mr. Mason was charged with first degree kidnapping and attempted robbery in the first degree. Ex. 384; 5/29/03RP 4.

Mr. Mason admitted his involvement in this January incident when interviewed by police, although disagreed with Mr. Santoso's description of events. 4/8/03RP 196-200. He said he choked Mr. Santoso in response to Mr. Santoso making a sexual advance at

¹ The verbatim reports of proceedings (RP) will be referred to by date of proceeding.

him, whereby he snapped because of sexual abuse he suffered as a child. 4/9/03RP 51.

Mr. Mason denied any involvement in Mr. Santoso's disappearance. 4/23/03RP 194-96. He was arrested in April 2001, and charged with aggravated first degree murder. 5/29/03RP 39; CP 11-12. The aggravating circumstances alleged were that the crime occurred with the intent to prevent Mr. Santoso from testifying in an on-going proceeding; that it occurred in the course of a burglary; and that it occurred when there was a court order barring Mr. Mason from contacting Mr. Santoso. CP 11-12.

At a jury trial before Judge Michael Fox, Mr. Mason's then-girlfriend Marina Madrid testified that she met Mr. Mason at the airport on the night of February 19, 2001. 4/29/03RP 98. She helped him dispose of his clothes, saw him toss a knife out the car window, stitched a wound on his thigh, and heard Mr. Mason say that Mr. Santoso would no longer be a problem. *Id.* at 99-102, 115. The police found a knife in the general area where Ms. Madrid said it was tossed and it contained a small amount of DNA from Mr. Santoso, a minor amount of DNA from an unidentified male, and no DNA from Mr. Mason. 5/5/03RP 88.

Thorough DNA testing of Mr. Santoso's home revealed only his DNA. Almost all blood in Mr. Santoso's car belonged solely to Mr. Santoso, other than three samples containing mixtures of DNA from two males. Applying a "deductive reasoning" approach, the prosecution's DNA expert testified the likelihood these mixtures contained DNA from someone other than Mr. Mason was one in 14 trillion. The court refused to allow a defense expert's testimony that the deductive approach was improper and another formula should have been applied, which would have significantly reduced the odds that Mr. Mason was the source of the DNA.

Other witnesses verified that Mr. Santoso was thinking of relocating, perhaps to Portland, and had pre-arranged a vacation from his job to begin shortly after February 19, 2001. 4/10/03RP 133, 173; 4/14/03RP 22; 4/21/03 133; 5/7/03RP 157, 166. Additionally, Mr. Santoso had been evicted from his apartment and was required to leave by the end of February, although no one was aware of any plans he had made to live elsewhere. One friend suggested he staged his disappearance. 4/10/03RP 120.

The jury convicted Mr. Mason of the charged offense, and found two aggravating factors: the killing in the course of a burglary and at a time when there was a no-contact order. CP 565-67. The

jury did not find the killing was accomplished for the purpose of keeping Mr. Santoso from testifying. CP 216. The court imposed a life sentence without the possibility of parole. CP 393-98. This appeal timely follows. CP 579.

Additional pertinent facts are addressed in the relevant argument sections below.

E. ARGUMENT.

1. THE COURT IMPROPERLY ADMITTED UNCROSS-EXAMINED, CUMULATIVE HEARSAY TESTIMONY OF AN UNCHARGED BRUTAL CRIME, IN VIOLATION OF MR. MASON'S RIGHTS TO CONFRONTATION AND TO A FAIR TRIAL.

The prosecution presented detailed testimony about statements Mr. Santoso made to numerous police witnesses regarding the January 23, 2001. Mr. Mason never had an opportunity to confront or cross-examine the testimonial evidence introduced against him. The overwhelming effect of this cumulative testimony was to indelibly paint Mr. Mason as a dangerous person who had a propensity toward violent actions, without the possibility of challenging these accusations.

a. Mr. Mason's constitutional right to confront his accusers prohibits the admission of statements made to government officials pertaining to a police investigation. In no

uncertain terms, an accused person's constitutional right to confront witnesses against him requires actual confrontation and cross-examination for the prosecution to introduce any out-of-court statements that are "testimonial" in nature. Crawford v. Washington, __ U.S. __, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). The Sixth Amendment grants a defendant the right, "to be confronted with witnesses against him." Likewise, the Washington constitution guarantees an accused the right "to meet the witnesses against him face to face." Wash. Const. art. 1, § 22.

The constitution's absolute prohibition of unconfroed out-of-court accusations at trial applies without question to statements made to a police officer in the course of an investigation. 124 S.Ct. at 1364. The statements need not be made as part of a formal interview or official interrogation. Id. at 1365 n.4. They are embraced by the confrontation clause when a reasonable person would think they might be used in a criminal investigation. Id. at 1364.

The absolute right of confrontation applies not only to formal statements to police officers, but also "pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. at 1364. Additionally within the "common nucleus" covered by the

Confrontation Clause are, “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Id.; see State v. Rivera, 844 A.2d 191, 202 (Conn. 2004) (interpreting Crawford as defining testimonial evidence to include statements made under circumstances where reasonable person would know they would be available for use by the police or prosecution).

The admissibility of an out-of-court statement to a government official no longer turns on the rules of evidence in anyway. Id. at 1374. No hearsay exception, even a “firmly rooted” exception, satisfies the constitutional demand of confrontation. Id.

In the case at bar, the trial court admitted numerous unsworn, uncross-examined statements Mr. Santoso made to the police. These statements were inadmissible and violated Mr. Mason’s fundamental right to confront his accusers.

i. Statements to Corporal Haslip. The court admitted Mr. Santoso’s entire statement to the police on January 24, 2001, as an “excited utterance” even though almost 24 hours had passed since in the incident. 4/8/03RP 116-19. Putting aside whether the court erroneously characterized the statement as an

excited utterance given the length of time that had elapsed and evidence Mr. Santoso had pondered his response in discussions with many people, his report of a crime to Corporal Haslip was a formal statement to the police plainly barred under Crawford without the opportunity for cross-examination.

Corporal Haslip repeated Mr. Santoso's allegations in great detail. 4/8/03RP 119-27. He related Mr. Santoso's descriptions of being choked, duct taped, rendered unconscious, confronted with a gun he believed to be loaded, threatened with a syringe of bleach, and accosted for money before Mr. Mason turned the gun on himself and apologized. Id. The corporal also repeated, over objection, Mr. Santoso's claim he afraid he was going to be killed and was extremely fearful of Mr. Mason. Id. at 122, 124-25.

ii. Statements to Detective Beberich. After Mr. Santoso spoke to the corporal, the case was transferred to the Redmond Police Department for jurisdictional reasons and Detective John Beberich interviewed Mr. Santoso for over three hours at the police station. 4/8/03RP 158, 163. Other than Mr. Santoso's statement he was afraid for his life, the court rejected the prosecution's efforts to introduce his statements to the detective as excited utterances. Id. at 172, 181.

However, Detective Beberich ultimately testified to what Mr. Santoso told him when explaining the search warrant he executed for Mr. Mason's apartment on January 25, 2001. For each piece of evidence he seized, he explained he took it because Mr. Santoso "told me" about it when explaining what happened. 4/8/03RP 211-12; 4/9/03amRP 52-65; 74-106; 4/9/03pmRP 5-20.

For example, he took a drawing of Mr. Mason from the wall because Mr. Santoso "told me he stood in front of the drawing when Mr. Mason approached him from behind and choked him." 4/8/03RP 211-12. He took the duct tape because Mr. Santoso "told me he was duct taped around the legs, wrist, and face during the incident on January 23rd." 4/9/03pmRP 20. He took an ice bucket with bullets and a magazine in it because Mr. Santoso "gave us information a firearm was displayed and pointed at him during the incident." 4/9/03RP 65. Mr. Santoso said the gun was loaded with 9 bullets and "told me" he saw Mr. Mason load the bullets. Id.; 4/9/03pmRP 39.

Detective Beberich repeated Mr. Santoso's allegations with each piece of evidence. When Mr. Mason objected to this back-handed way of presenting Mr. Santoso's statements that were previously found inadmissible, the State argued the jurors had a

right to know the detective's state of mind when he was taking this evidence. 4/9/03amRP 67-69. The court admitted Mr. Santoso's statements to the detective to establish why the detective took the items and said they were not to be considered for the truth of the matters asserted. 4/9/03amRP 71. Regardless of this limiting instruction, the prosecution elicited what Mr. Santoso told the detective in specific detail over the course of four days of trial. 4/8/03RP 211-12; 4/9/03amRP 52-65; 74-106; 4/9/03pmRP 5-20; 4/10/03RP 33, 39-42.

iii. Statements to other police officers.

Detective Kristi Roze testified that while assisting in the investigation, Mr. Santoso told her he was afraid for his safety and wanted to sleep in the police station. 4/14/03RP 126-27.

Detective Ann Malins was asked to explain why she took certain checks into evidence, and explained she did so because Mr. Santoso "said" he wrote Mr. Mason a check for \$400 and partially wrote a \$700 check at Mr. Mason's demand. 4/14/03RP 154-56.

iv. Statements to police employee Linda

Webb. The prosecution also introduced Mr. Santoso's statements to a domestic violence advocate who was employed by the King

County prosecutor's office at the time of trial and the Redmond Police Department when she spoke with Mr. Santoso. 4/15/03RP

9. Linda Webb spoke with Mr. Santoso at Detective Beberich's request after his initial interview at the police station, and later on the telephone. Id. at 17.

According to Ms. Webb, Mr. Santoso said he was afraid and reluctant to get a no-contact order because of his fear. Id. at 20, 25-26. Mr. Santoso told her, when he learned Mr. Mason was released from jail, that Mr. Mason was going to kill him, he knew he was going to die, and wanted to be put in jail or sleep in her office so he would be safe. Id. at 39.

Also, Mr. Santoso talked to her about leaving the area, expressed concern about finding a job elsewhere, and said it was important that he sent money to his family because they depended upon him. Id. at 40-41. She also explained his fear of retaliation based upon his belief that when a person accuses a relative of a police officer of a crime, that person may be killed, as could happen in his native Indonesia. Id. at 65. Since Mr. Mason's father was a police officer, he feared he would suffer this retaliation. Id.

Ms. Webb was a government employee, who spoke with Mr. Santoso in the course of a police investigation, as part of a police-

initiated program to assist people who accuse others of crimes. Mr. Santoso knew she was a police employee and spoke with her throughout the investigation with that understanding. A reasonable person in Mr. Santoso's shoes would have expected that his statements to Ms. Webb might be used by the State to further the investigation and on-going prosecution. Crawford, 124 S.Ct. at 1634. Therefore, under Crawford, his statements fall within the "core class" of testimonial statements for which confrontation is an essential predicate for their admissibility. Id.

b. The confrontation clause trumps the hearsay rules or exclusions asserted in the case at bar.

i. Forfeiture by misconduct does not apply and its foundation was not met. The prosecution argued below that Mr. Santoso's statements were admissible under the "forfeiture by misconduct" rationale applied by the federal courts and arguably available as a common law rule of evidence. 4/3/03RP 57; see Fed. R. Evid. 801(d)(6).² Washington's rules of evidence have not adopted this federal rule. But even if such a rule is available in

² Fed. R. Evid. 804(b)(6), enacted in 1997, provides a hearsay exception for, "A statement offered against a party that has engaged in or acquiesced in wrongdoing that was intended to and did procure the unavailability of the declarant as witness."

Washington, the trial court correctly concluded the prosecutor did not meet its burden of proof in the case at bar. 4/3/03RP 57-68.

This doctrine applies to a witness in the same case, not to a murder case in which the missing witness and declarant is the murder victim. United States v. Lentz, 282 F.Supp.2d 399, 426 (E.D. Va. 2002) (affirmed on appeal in unpublished decision); see United States v. Potamitis, 739 F.2d 784, 787 (2nd Cir. 1984) (defendant found responsible for grand jury witness's failure to testify at trial in same case). In order to admit evidence under this rule, the offering party must first prove that the defendant caused the victim/declarant's unavailability for the purpose of keeping him from testifying. In a murder case, this pre-trial proceeding would essentially place the court in the untenable position of finding the defendant guilty in advance of trial. Lentz, 282 F.Supp.2d at 426. Using this evidentiary exception in a murder case would undermine the presumption of innocence and extend the doctrine beyond its intended scope. Id.

Here, the trial court correctly ruled the prosecution did not meet its burden of proof. 4/3/03RP 57-58. A hearing is required for the prosecution to meet the evidentiary threshold and the prosecution asked for no such hearing here. Potamitis, 739 F.2d at

787. The trial court found it did not have the evidentiary foundation to conclude that Mr. Mason intentionally prevented Mr. Santoso from being present for the purpose of keeping him from testifying. 4/3/03RP 57-58.

Furthermore, it is unlikely the prosecution could have met its burden. In a special verdict, the jury found the prosecution did not prove Mr. Mason caused Mr. Santoso's death for the purpose of keeping him from testifying. CP 566 (Special Verdict Form). Thus, it is highly doubtful the prosecution could have met its burden of proof had it tried. In any event, without a proper pre-trial hearing establishing the evidentiary foundation, the court correctly ruled this potential common law evidentiary rule could not be used in the case at bar.

ii. The evidence violated Mr. Mason's confrontation rights even when the court cited a nominal non-hearsay purpose for its admissibility. If the jury is likely to consider a statement for its truth, and significant prejudice may result, it is insufficient to merely identify a relevant non-hearsay rule. United States v. Reyes, 18 F.3d 65, 70 (2nd Cir. 1994); see K. Tegland, Wash. Practice and Procedure, Evidence, section 803.16, 459 (4th ed. 1999).

When it is likely the jury will consider a statement for its truth, the offering party must also show the non-hearsay purpose for which it is offering the statement is relevant to any fact of consequence to the determination of the action. Reyes, 18 F.3d at 70. Additionally, the court must weigh the probative value of the non-hearsay purpose for which the evidence is offered against the danger of unfair prejudice by an impermissible use of the out-of-court statement. Id.

The trial court must not lose sight that the issue being tried in a criminal case is the offense charged, and not the story of the investigation. Without an opportunity to cross-examine the declarant, the accused has no opportunity to discredit the out-of-court statements. When evidence lacks other significant and proper purposes for its admission, and there is a high potential the evidence is used in an unfairly prejudicial fashion, it is unlikely a limiting instruction will prevent the jury from considering the evidence for its truth. Id. at 71.

Even though the court limited the purpose for admitting some of the statements by officials in which they repeated Mr. Santoso's allegations against Mr. Mason, these limiting instructions could not have been effective. The reasons the police seized

pictures, computer hardware, an ice bucket, syringes, drain cleaner, and numerous other items from Mr. Mason's apartment was not relevant other than that their existence corroborated Mr. Santoso's allegations of an uncharged crime. Detective Beberich testified that this corroboration made Mr. Santoso's claims more believable. 4/10/03RP 85. The prosecutor emphasized in his closing argument that the police corroborated all of Mr. Santoso's claims about the January 23rd incident.

Since the non-hearsay purpose which the court identified was not probative of any fact at issue, or relevant in any material way, and a great incentive existed to use the statements for the truth of the matters asserted therein, the few limiting instructions given are unlikely to have been successful. 6/9/03RP 125.

c. The admission of significant testimony in violation of the confrontation clause requires reversal. The prosecution spent several weeks introducing evidence pertaining to the January 23rd incident, much of it related to Mr. Santoso's statements during the course of the police investigation. The prosecution relied upon these statements in its closing argument, repeating what Mr. Santoso "told" the police and how the police verified his claims by seizing each piece of evidence as Mr. Santoso described.

According to the prosecution, the police's corroboration of Mr. Santoso's allegations showed that Mr. Mason was a liar and none of his statements to the police should be believed.

The prosecution's reliance upon Mr. Santoso's statements to the police to prove its case against Mr. Mason was not a minor part of the case against him. It formed the bulwark of the State's summation and was surely a critical part of the jury's deliberation. Since Mr. Mason never had the opportunity to cross-examine Mr. Santoso, and due to the State's reliance upon those statements in its case against Mr. Mason, the deprivation of his fundamental right of confrontation was not harmless.

2. BY REFUSING TO ALLOW A DEFENSE EXPERT WITNESS TO TESTIFY ABOUT CRITICAL DNA EVIDENCE, THE COURT DENIED MR. MASON HIS RIGHT TO PRESENT A DEFENSE AND DEPRIVED HIM OF A FAIR TRIAL.

a. The right to present a defense is a fundamental requirement of a fair trial. Essential to the guarantee of due process of law and the right to the compulsory attendance of witnesses is the "meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); State v. Maupin, 128 Wn.2d 918, 924, 913

P.2d 808 (1996); U.S. Const. amends. 6 & 14;³ Wash. Const. art. I, § 22.⁴ A criminal defendant is constitutionally assured a fair opportunity to defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

These protections include the right to offer the testimony of witnesses, to present one's own version of the facts, and to argue one's theory of the case. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The adversary process is trusted to sort the reliable from the unreliable. Barefoot v. Estelle, 463 U.S. 880, 898, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). Adversarial testing of evidence is the preferred means of presenting allegations to the trier of fact, so that the jury decides the credit and weight accorded to testimony. Rock v. Arkansas, 483 U.S. 44, 53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

³ The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . . ."

The Fourteenth Amendment includes the guarantee that no state shall "deprive any citizen of life, liberty, or property, without due process of law. . . ."

⁴ Article I, § 22 provides in pertinent part, "In all criminal prosecutions the accused shall have the right . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf"

The truth is more likely to follow if the jurors hear from all persons competent to testify. Id. The right to question the accuracy, reliability, or truthfulness of accusations is not limited to cross-examination. Maupin, 128 Wn.2d at 924.

Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

b. Scientific evidence of a novel theory must be sufficiently accepted by the scientific community. Evidence based on a scientific theory or principle must have "achieved general acceptance in the relevant scientific community" before it is admissible at trial. State v. Gentry, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995); see Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923). " '[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology.'" State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

The Frye test in Washington does not include whether a generally accepted technique was performed correctly on a given occasion. Gentry, 125 Wn.2d at 886. A challenge to the way an

accepted technique was applied goes to the evidence's weight, not its admissibility. Id. Additionally, Frye hearings are unnecessary when a scientific practice has been previously found to be generally accepted in the scientific community. State v. Russell, 125 Wn.2d 24, 69, 882 P.2d 747 (1994).

c. The defense expert witness offered relevant testimony based on accepted scientific techniques. Frye rulings are reviewed *de novo* on appeal. State v. Gore, 143 Wn.2d 288, 304, 21 P.3d 262 (2001). The appellate court makes a "searching review" that may include scientific literature and secondary sources beyond those presented to the trial court. Id.; quoting State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996).

In the case at bar, the trial court prohibited the defense from offering testimony by a DNA expert relating to the mixture of blood found in Mr. Santoso's car after a Frye hearing. 6/4/03RP 61, 106. Defense expert Dr. Randall Libby would have testified that the prosecution's expert miscalculated the statistical likelihood the mixed source DNA included Mr. Mason as a contributor by odds of 14 trillion to one. CP 472. The court ruled that Dr. Libby's testimony did not meet the requirements of Frye because his technique was not generally accepted in the scientific community.

A DNA sample containing a mixture of DNA from more than one person presents a complication in identifying what alleles belong to which person. See People v. Pizarro, 3 Cal. Rptr.3d 21, 64, rev. denied, 2003 Cal. Lexis 77186 (2003) (providing thorough explanation of DNA evidence in general and mixed DNA samples in particular). A single source of DNA never contains more the two alleles for a single locus, and those alleles together comprise the genetic profile discerned. Gore, 143 Wn.2d at 302. A mixture contains at least three alleles for at least one locus in the profile.

When comparing the DNA from a sample with the DNA of a known person, all alleles must match in their entirety for the person to be a possible source for the DNA sample.

If a defendant's DNA produces a different profile than the perpetrator's, even by only one allele, the defendant could not have been the source of the DNA, and he or she is absolutely exonerated.

Pizarro, 3 Cal. Rptr.3d at 51.

For a multiple source DNA sample, there are four "alternate methods for assessing" the evidence: 1) probability of exclusion; 2) likelihood ratio calculation; 3) deduction of genotypes by a match comparison; and 4) no calculation qualitative statement. CP 473 (Motion for Reconsideration with attached articles); Carl Ladd,

Henry Lee, Nicholas Yang, Frederick R. Bieber, Interpretation of Complex Forensic DNA Mixtures, *Croat.Med.J.*, 244-45 (2001); DNA Advisory Board, Federal Bureau of Investigation, Statistical and Population Genetics Issues Affecting the Evaluation of the Frequency of Occurrence of DNA Profiles Calculated From Pertinent Population Databases; *Forensic Science Communications*, 5 (2000).

The FBI's DNA Advisory Board, "strongly recommends" that either probability of exclusion or likelihood ratio be used for a mixture "whenever feasible." *Forensic Sci. Comm.* at 5; People v. Coy, 669 N.W.2d 831, 836 (Mich App. 2003) (relying on DNA Advisory Board's endorsement the probability of exclusion and likelihood ratio methods). According to one expert, 20 to 30 states have found the probability of exclusion calculation appropriate for calculating mixed DNA statistical likelihoods. Coy, 669 N.W.2d at 937-83.

Dr. Libby proffered that he would have used the probability of exclusion approach. CP 447 (Defense Offer of Proof). This approach is recognized by the FBI as a legitimate, and in fact preferred, method of assessing the probability of a match in a mixed sample. *Forensic Sci. Comm.* at 5. One of the most widely

respected and frequently cited treatises on DNA forensic science describes the probability of exclusion as the preferred method of assessing a mixture. National Research Council, The Evaluation of Forensic DNA Evidence II, 129 (1996) (commonly known as NRCII); see also Pizarro, 3 Cal. Rptr. 3d at 47 n.31 (relying on NRCII as authority for analysis of DNA frequency calculations)

This calculation involves looking at the possible variations that could belong to a person on each allele. CP 466-67. The DNA evaluator will examine the possible combinations that a person could have based on the nature of the genes displayed on each allele, add those together, and then multiply the result for each allele to determine the likelihood of that DNA being that of a certain genetic profile.

As explained in State v. Roman Nose, 667 N.W.2d 386, 396 n.5 (Minn. 2003).

The CPE [calculation of probability exclusion] method "provides an estimate of the portion of the population that has a genotype composed of at least one allele not observed in the mixed profile." DNA Advisory Board [citation omitted]. The advantages of the CPE method are: (1) it is a conservative estimate; (2) knowledge of the accused or the victim profiles is not used or needed in the calculation; and (3) no assumptions are required about the identity or number of contributors to the mixture. Id.

In the case at bar, Dr. Blake used the deductive approach. 5/19/03RP 122. He assumed that Mr. Santoso's DNA was included in the mixture and subtracted out his DNA. Id. He concluded the remaining DNA must be the genetic profile of the second person contributing to the mixture. Id.

Not only is Dr. Libby's approach generally accepted in the scientific community, it addresses an inherent problem in Dr. Blake's deductive approach. When fewer than four alleles are definitively present, other alleles may be masked, or hidden. CP 446; 6/4/03RP 82. While Dr. Blake assumed that the presence of fewer than four alleles means that some of the alleles are the same, or homogenous, this assumption is not always warranted as an allele could be masked. Id. When every allele is not accounted for in a genetic profile, the profile cannot be said to match a certain person, because the difference of a single allele would exclude a person as being a possible contributor. Pizarro, 3 Cal. Rptr. at 51.

In the case at bar, five of the eight loci in the sample showed less than four alleles. 5/19/03RP 120. If any one of these loci

contained a masked allele, Dr. Blake's deductive approach would have produced an incorrect result. Pizarro, 3 Cal. Rptr. at 65 (deductive approach adequate only where four alleles present at each locus). The probability of exclusion approach is generally accepted in the scientific community, appropriate to use in the case at bar, and admissible at trial.

d. The statistical approach proposed by the defense is not subject to Frye. Statistics are a necessary part of DNA testimony, in that they relate to the jury the relevance of the testimony to the case. Cauthron, 120 Wn.2d at 895. However, such mathematical equations are not novel scientific technique or theory subject to Frye. See In re Detention of Thorell, 149 Wn.2d 724, 754, 756, 72 P.3d 708 (2003) (statistical analysis not subject to Frye); Coy, 669 N.W.2d at 839; Wynn v. State, 791 So.2d 1258, 1259 (Fla. App. 2001) (rejecting defense claim that mixture analysis should have be subject to Frye). Accordingly, the court erred by finding Dr. Libby's testimony regarding the statistical analysis of the likelihood Mr. Mason could have been a contributor to the DNA in Mr. Santoso's car needed to meet, and failed to meet, the Frye standard.

e. Dr. Libby was a qualified witness. The prosecution moved for a Frye hearing regarding Dr. Libby's proposed testimony on the day he was scheduled to testify. 6/4/03RP 61. It claimed it had no notice Dr. Libby was going to testify until the week before, because his name was not on the witness list. While the prosecution's contention has little relevance to the issues raised on appeal, its claim of a lack of notice is meritless. Not only was Dr. Libby's name mentioned as a defense expert throughout the pendency of the case, as reflected by several motions to grant Dr. Libby access to evidence, Dr. Libby was listed as a witness in the very document the prosecution cited to claim it had no notice. 6/3/03RP 9; CP 277 (page 2 of Defense Trial Memorandum, filed 3/25/03). The defense trial memorandum lists Dr. Libby as its first witness under the heading "Witness List." CP 277. Although Dr. Libby's name and address were left off the page listing witness addresses, it is unreasonable for the State to claim it lacked knowledge of his proposed testimony.

f. The court's error requires reversal. The denial of the constitutional right to present a defense is an error of constitutional magnitude. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Maupin, 128 Wn.2d at 928-

29. It requires reversal unless the prosecution proves beyond a reasonable doubt it in no way affected the verdict, did not affect the substantial rights of the parties, and was trivial, formal, or merely academic. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

When excluding Dr. Libby's testimony regarding his analysis of the DNA mixtures, the court acknowledged the significant role this evidence played in the case against Mr. Mason. 6/4/03RP 115. The DNA mixture was the sole forensic evidence connecting Mr. Mason to Mr. Santoso's car. The court considered the DNA testimony as to Mr. Mason the "most damaging forensic evidence" in the case against him and a "central issue." 6/4/03RP 105.

Dr. Blake's conclusion that the DNA belonged to Mr. Mason by odds of 14 trillion to one formed a cornerstone of the prosecutor's closing argument. These incredible 14 trillion to one odds were repeated throughout, to show the extraordinary probability that Mr. Mason was responsible for Mr. Santoso's death. 6/9/03RP 113, 115, 140-42; 6/10/03RP 98, 99.

Yet Dr. Libby's calculation would have greatly reduced the odds against Mr. Mason. Had Dr. Libby been allowed to testify, he would have explained the flaws in Dr. Blake's overinflated claim

that Mr. Mason was the contributor to the DNA in the car to these extreme odds. Dr. Libby would have cautioned the jury against accepting this testimony, and explained how many scientists prefer to calculate the likelihood of DNA in a mixture belonging to a certain source. Instead of 14 trillion to one, Dr. Libby calculated the odds to be one in 121,951 for the black population and one in 833,333 for the caucasian population. CP 449 (Def. Offer Proof). His analysis would certainly have been helpful to the jury and his expert qualifications were not disputed by the court. 6/4/03RP 69; ER 702.⁵ Due to the critical nature of this evidence, the court's exclusion of Dr. Libby's testimony requires reversal.

3. THE COURT IMPROPERLY ADMITTED OPINION TESTIMONY REGARDING MR. MASON'S GUILT, THEREBY INVADING THE PROVINCE OF THE JURY AND VIOLATING THE RIGHT TO A FAIR TRIAL.

a. Personal opinions regarding the accused's guilt
violate the right to a trial by jury. The expression of an opinion as to a criminal defendant's guilt violates the accused's constitutional right to a jury trial including the independent determination of the

⁵ ER 702 provides:

facts by the jury. U.S. Const. amend. 6; Wash. Const. Art. I, §§ 21,⁶ 22⁷; Seattle v. Heatley, 70 Wn.App. 573, 577, 854 P.2d 658 (1993); State v. Carlin, 40 Wn.App. 698, 701, 700 P.2d 323 (1985); see Stepney v. Lopes, 592 F.Supp. 1538, 1547-49 (D.Conn.1984). "It is well-established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially." State v. Jones, 71 Wn.App. 798, 813, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Haga, 8 Wn.App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). Such evidence is unfairly prejudicial because it invades the province of the trier of fact. Heatley, 70 Wn.App. at 577.

It is prohibited for a witness to offer opinions regarding conclusions of law, what verdict the jury should reach, or knowledge beyond the witness's basis of expertise. 5B K.B. Tegland, Wash. Practice, Evidence § 704.5, at 237 (4th ed. 1999);

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

⁶ Article 1, § 21 of the Washington Constitution provides, "The right to trial by jury shall remain inviolate. . . ."

⁷ Article 1, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and the cause of the accusation against him, [and] . . . have a speedy public trial by an impartial jury."

Ball v. Smith, 87 Wn.2d 717, 722-23, 556 P.2d 936 (1976); Carlin, 40 Wn.App. at 701; ER 701.⁸ The trial court has broad discretion in determining the admissibility of evidence. Heatley, 70 Wn.App. at 579. However, since evidence that invades the province of the jury is an error of constitutional magnitude, the erroneous admission of such evidence requires reversal unless it is harmless beyond a reasonable doubt. State v. Farr-Lenzini, 93 Wn.App. 453, 465, 970 P.2d 313 (1999); see also State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2002) (in split opinion, majority finds improper opinion testimony where police say defendant lied during interview).

b. The medical examiner's opinion that the complainant was dead improperly placed before the jury a State official's opinion on a central issue. The defense repeatedly objected to testimony from King County chief medical examiner Dr. Richard Harruff about his decision to issue a presumptive death certificate based on his opinion that Mr. Santoso was dead. 4/3/01RP 105, 108-09; 5/28/01RP 12, 40; CP 397; CP 429-38. The defense explained that the governing statute does not

⁸ ER 701 provides,
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are

contemplate a death certificate's issuance in criminal cases and the Attorney General has delivered opinions stating the same.

4/3/01RP 108-09; 5/28/01RP 5-6, 12. Despite these objections, the trial court permitted Dr. Harruff to testify that he reviewed evidence in the case, concluded he believed Mr. Santoso was dead, and issued a presumptive death certificate. 5/28/01RP 40-45.

The day after his testimony, the court partially reversed itself, and directed the jury to disregard the presumptive death certificate without striking the remainder of Dr. Harruff's testimony. Yet removing the presumptive death certificate from evidence, which never should have been admitted in the first place, could not undo the prejudice caused by this witness's testimony. 5/29/03RP 7-8.

i. The court erred in admitting the presumptive death certificate and testimony about the basis for its issuance. A presumptive death certificate creates a rebuttal presumption that a person is dead. Nelson v. Schubert, 98 Wn.App. 754, 763, 994

(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

P.2d 225 (2000). It places the burden on the objecting party to establish that no death has occurred. Id.

In Washington, there is a legal presumption that if a person has disappeared for seven years, he or she is presumed dead. Id. at 759. During the first seven years, the law presumes a person is alive. Id.

In case of “accident or natural disaster,” RCW 70.58.390 permits the issuance of a certificate of presumed death without requiring a seven-year wait. RCW 70.58.390 allows a certificate of presumed death when the county coroner finds,

there is sufficient circumstantial evidence to indicate that a person has in fact died in the county or in waters contiguous to the county as a result of an accident or natural disaster, such as a drowning, flood, earthquake, volcanic eruption, or similar occurrence, and that it is unlikely that the body will be recovered.

(emphasis added). A presumed death certificate, “shall be the legally accepted fact of death.” Id. Additionally, “all persons and parties acting in good faith may rely thereon with acquittance.” Id.

In keeping with the plain words of the statute, the Attorney General has issued several opinions finding that the law authorizes a presumptive death certificate only when the death occurs as a result of accident or natural disaster. See Wash. Op. Atty. Gen.

1998, No.11, p. 2-3 (allowed in accident or natural disaster only); Wash. Op. Atty. Gen. 1992, No. 6 (not authorized where suicide); Wash. Op. Atty. Gen. 1980, No. 15 (not authorized when no body has been found after natural disaster, amended by later statute).

In the case at bar, Mr. Santoso was not alleged to have died as a result of an accident or natural disaster. Yet the court erroneously found the presumptive death certificate was validly issued and ruled it admissible. 5/28/04RP 12-13.

ii. The court improperly admitted a government official's opinion on a central factual issue. By allowing the medical examiner to testify as to his opinion that Mr. Santoso died, the basis for his opinion, and his issuance of a presumptive death certificate, the court improperly placed before the jury a State expert's opinion as to an ultimate factual issue and element of the offense. This testimony invaded the province of the jury. See State v. Dolan, 118 Wn.App. 323, 73 P.2d 1011 (2003); Farr-Lenzini, 93 Wn.App. at 459-60.

Additionally, it is likely the jury placed great weight in the opinion of a government official. Dolan, 118 Wn.App. at 331 (state case worker and police officer's opinions about defendant's guilt likely significant impact on jury); Farr-Lenzini, 93 Wn.App. at 459-

60 (police officer's testimony about defendant's intent improper and likely to influence jurors). "Particularly where such opinion [of guilt] is expressed by a government official . . . the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." Dolan, 118 Wn.App. at 331.

Here, the chief medical examiner testified he issued a presumptive death certificate. 5/28/03RP 40. He said a death certificate is only issued after he receives significant amounts of evidence supporting the death. Id. at 42. He reviewed photographs of Mr. Santoso's car and residence and other information supplied by the prosecutor. 5/28/03RP 43-44. Based upon the information he received, he concluded the injuries were life-threatening and, in the absence of evidence he received immediate medical attention, Mr. Santoso must have died from his wounds. 5/28/03RP 44-45, 69-70. The presumptive death certificate served as an official finding that Dr. Harruff believed all available evidence indicated Mr. Santoso was dead. 5/28/03RP 44-45, 61. He said it was his opinion and was a "reasonable" conclusion based on the evidence presented. 5/28/03RP 61-62.

On the day following Dr. Harruff's testimony, the court reversed its decision and ruled the presumptive death certificate

should not have been admitted into evidence. 5/29/03RP 7-8. The court instructed the jury that it must disregard the fact that the death certificate was issued. 5/29/03RP 12. The court had previously told the jurors Dr. Harruff's determination was one factor it may consider in deciding whether there was a death. 5/28/03RP 41.

The court did not strike Dr. Harruff's testimony, and told the jurors they could consider the rest of his testimony. 5/29/03RP 13. The court acknowledged the difficult position in which it put the jurors, as it is difficult to ignore information they had already learned. Id. Yet, having heard that a respected county official examined the evidence and concluded Mr. Santoso must have died from his wounds, it is plainly the type of evidence jurors would find difficult, if not impossible, to completely disregard.

c. Several witnesses testified as to their beliefs Mr. Mason was guilty. In addition to Dr. Harruff's opinion, the jurors heard several other witnesses express their beliefs Mr. Santoso was "murdered" and Mr. Mason was responsible. Whether Mr. Santoso was dead and how he died were the critical questions for the jury. No witness had first-hand knowledge as to either of these questions.

Before the trial, the court barred any testimony about the instant case involving a murder. 4/2/03RP 177. However, Marina Madrid repeated on several occasions that Mr. Mason killed or murdered Mr. Santoso. 4/29/03RP 15-16, 62, 99, 115. Although the court sustained Mr. Mason's objections to two consecutive claims by Ms. Madrid that Mr. Mason in fact "murdered" and "killed" Mr. Santoso, she was permitted to say she believed he killed him. 4/29/03RP 15-16. Additionally, the court overruled objections to Ms. Madrid's testimony, "I knew he killed him," although it told the jury this was admitted to explain why the witness did what she did and not for its truth. 4/29/03RP 62.

Ms. Madrid also said that based on what Mr. Mason did and said, "I thought he killed him." 4/29/03RP 62. Also, she thought to herself when helping Mr. Mason treat his leg wound, that Mr. Mason "had just killed him." 4/29/03RP 115. The court told the jury to consider this latter statement to establish her mental state at the time she was testifying about. Id. The court did not explain why her mental state at that time was relevant, more probative than prejudicial, or how her thought process was reflected in her opinion of Mr. Mason's guilt. State v. Powell, 126 Wn.2d 244, 266, 893 P.2d 615 (1995); ER 403. Moreover, her thoughts did not describe

her mental state but rather her opinion of Mr. Mason's actions, which was the issue for the jury to decide.

Kris Riley testified she, "no longer believed" Mr. Mason was innocent. 5/13/03RP 123. The court sustained the defense objection and told the jurors not to consider her belief. Id.

Lead detective Randy Rogers characterized Mr. Santoso as the victim of a "murder" and said Mr. Mason had "a powerful motive" for causing Mr. Santoso's disappearance. 5/29/03RP 16, 33; 6/2/03RP 39. Detective Roger's characterization of the incident as a "murder" directly violated a pre-trial motion in limine. 4/2/03RP 177.

The court overruled the objection to the "murder" comment without explanation, and admitted the detective's opinion as to motive to show the detective's state of mind when interviewing Mr. Mason one week after the incident. 5/29/03RP 33. Yet the detective's reason for interviewing Mr. Mason is not a description of the detective's mental state, the detective's mental state was irrelevant, and his belief as an experienced officer that Mr. Mason had a powerful motive was highly prejudicial.

d. The improper opinion testimony was significantly prejudicial and unlikely to be disregarded by the jurors. The jury

heard from several principal and respected witnesses, including the chief medical examiner and the lead detective, as well as two women who dated Mr. Mason, that they all thought he was guilty. It is impossible to believe the jurors wholly disregarded that testimony, given the prominence of the witnesses, the central importance of the issues on which they delivered opinions, and the cumulative nature of the opinion testimony. Plainly, people both close to Mr. Mason and with experience in evaluating criminal cases, believed Mr. Santoso was dead and Mr. Mason was responsible. The opinion testimony invaded the province of the jury on an ultimate issue and deprived Mr. Mason of a fair trial.

4. THE COURT ERRONEOUSLY ADMITTED AN EXTRAORDINARY ARRAY OF UNCHARGED BAD ACTS THAT WERE NOT RELEVANT TO ANY CENTRAL ISSUE AND WERE EXTREMELY PREJUDICIAL, REQUIRING REVERSAL.

a. Unduly prejudicial evidence is inadmissible

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. 14; Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. Jammal v. Van de

Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). But, compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. Id.; citing Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984). Due process is violated where the admission of evidence was arbitrary or so prejudicial that is rendered the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986).

In a criminal trial, evidence the accused committed uncharged crimes, wrongs, or acts is presumptively inadmissible. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002); Powell, 126 Wn.2d at 258; ER 404(b).⁹

Uncharged conduct may be admitted into evidence only when it is materially relevant to an essential ingredient of the charged crime and its probative value outweighs its prejudicial effect. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404(b). Doubtful cases should be resolved in favor of the

⁹ ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "Regardless of whether the evidence is relevant or probative, in no case may evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." State v. LeFever, 102 Wn.2d 777, 782, 690 P.2d 574 (1984); see Saltarelli, supra at 362; ER 404(b).

The evidentiary rules require that the trial judge carefully balance the evidence's probative value against its harmful effect. State v. Wade, 98 Wn.App. 328, 334, 989 P.2d 576 (1999); ER 403. A trial judge's decision to admit evidence of uncharged misconduct is reviewed for abuse of discretion. State v. Trickler, 106 Wn.App. 727, 732, 25 P.2d 445 (2001).

In the case at bar, the court admitted into evidence Mr. Mason's possession of weapons unrelated to the charged crime, testimony he lied on financial and employment forms, claims he liked to participate in deviant sexual acts, his failure to appreciate Mr. Santoso buying him a soda several months before the charged incident, his possession of a book about death as a sexual experience, and extraordinary details about the January 23rd incident, which was an uncharged crime. This evidence improperly

admitted evidence, viewed in isolation and taken together, deprived Mr. Mason of a fair trial.

b. Mr. Mason's lawful possession of uncharged knives and a firearm served no permissible purpose and created a strong impression Mr. Mason was a dangerous person. Evidence that the defendant possessed a weapon at the time of his arrest that is not connected to the charged crime should not be admitted. State v. Freeburg, 105 Wn.App. 492, 502, 20 P.3d 989 (2001); State v. Oughton, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980).

With respect to firearms, when the fact of gun ownership has no direct bearing on an issue in the case its admission into evidence causes unnecessary prejudice. State v. Rupe, 101 Wn.2d 664, 707-08, 683 P.2d 571 (1984). "Many view guns with great abhorrence and fear." Id. at 708. "[O]thers may consider certain weapons as acceptable but others as dangerous." Id. Furthermore, any or all people "might believe that [the] defendant is a dangerous individual . . . just because he owned guns." Id.

In Freeburg, this Court stressed the extremely "powerful" nature of firearm evidence. 105 Wn.App. at 502. The Freeburg Court ruled that even when marginally relevant, where a firearm is unnecessary to prove the case, it is error to admit the weapon into

evidence. Id. at 500. In Freeburg, the trial court admitted into evidence the loaded .45 caliber gun the defendant had when he was arrested. Id. at 496. It was not directly alleged that the weapon was used in the crime at issue. Id. at 500. The Court found not only did the gun have minimal probative value, the jury could readily use the weapon to conclude Freeburg was a bad person, generally carried weapons with him, or was more likely to have committed the charged crime because he had access to weapons. Id. Given the variety of purely speculative and improper ways the jury could have used the gun evidence, and since it was not necessary to the prosecution's case, the court ruled the improper admission of the firearm reversible error. Id. at 502.

In the instant case, the police seized a "fully loaded nine millimeter semi-automatic gun" from under Mr. Mason's bed after the January 23rd incident. 6/9/03RP 139 (prosecution's closing argument discussing gun "fully loaded with nine rounds."); 6/10/03RP 4 (prosecutor says Mr. Mason lied when did not admit he pointed "a loaded weapon, a loaded gun, a nine millimeter semi-automatic pistol at Mr. Santoso"). Although Mr. Mason was not accused of having used a firearm in the case at bar, the jurors learned the police recovered the loaded gun from Mr. Mason's

apartment, in addition to a magazine and two types of bullets. 4/9/03RP 65, 85. The gun and bullets were shown to the jurors and admitted into evidence. The prosecutor displayed the gun to the jury during his closing argument and repeatedly referred to its fully loaded nature when found in Mr. Mason's home. 6/9/03RP 120, 125, 19, 130, 132, 138-39.

Additionally, Mr. Mason possessed folding, locked blade knives unrelated to the February incident. The police found one knife in Ms. Madrid's apartment. 5/6/03RP 24-25. This knife was admitted into evidence and described as similar to the knife allegedly used in the crime. *Id.* at 11, 47. Ms. Madrid proclaimed her surprise at Mr. Mason having such a knife closely after he had allegedly stabbed Mr. Santoso with a knife. 4/29/03RP 181-82; 4/30/03RP 13-14. Ms. Madrid said she asked him why he had another knife, and claimed it made her fearful. 4/30/03RP 18.

Mr. Mason objected to the admission of the knife found in Ms. Mason's apartment under ER 404(b), as it was irrelevant and could be used to insinuate he must have had a knife at the incident because he had one later. 4/30/03RP 4; 5/6/03RP 24-25. The court ruled testimony about the knife was relevant because the witness said she was afraid of Mr. Mason after seeing the knife.

The prosecution immediately showed the knife to the jury.

5/6/03RP 25.

Detective Rogers further told the jurors he found a “folding single blade locked blade knife” in Mr. Mason’s suitcase when he was arrested at the airport. 5/29/03RP 47. The knife was brought into the courtroom and discussed at trial, but was ultimately removed from the exhibit before it was given to the jurors out of safety concerns, not because of its tendency to prejudice Mr. Mason.

When a weapon is not alleged to have been used during the incident it is of “highly questionable relevance” and tends “to impugn the defendant’s character or suggest a propensity” for using the weapon. Oughton, 26 Wn.App. at 84; see also McKinney v. Rees, 993 F.2d 1378, 1382 (9th Cir.1993) (only inference jury could have drawn from hearing defendant possessed knife months before incident was that he was type of person to have knife and thus is impermissible propensity evidence); Freeburg, 105 Wn.App. at 500 (error to admit weapon possessed at time of arrest when not part of crime charged).

These weapons served no legitimate purpose in proving a fact at issue. They had no connection to the homicide charged.

Mr. Mason possessed the knives after the incident, thus they had no legitimate bearing on whether he committed the offense. The gun was taken from his possession by police before the charged event, and had no pertinence to the offense itself.

Despite their lack of probative value, Mr. Mason's possession of several knives and a loaded semi-automatic gun demonstrated Mr. Mason was a person who regularly possessed knives and other dangerous weapons. It implied he was a person who would create potentially dangerous situations by carrying a locked blade knife on an airplane. It strongly implied his inherent readiness to resort to weapons by keeping them close at hand at all times.

c. Evidence of sexual practices was unnecessary and prejudicial. Unduly prejudicial "bad acts" is not limited to misconduct, but includes testimony that reflects on a person's character and which is likely to be used as evidence the accused tends to act in a certain way. Everybodytalksabout, 145 Wn.2d at 466.

The court admitted into evidence Kris Riley's claim that Mr. Mason several times expressed his interest in having her and two friends join him in group sex. 5/13/03RP 44-46, 208-11. The

defense objections to this irrelevant testimony were overruled, on the grounds that it demonstrated Ms. Riley's relationship with Mr. Mason. 5/13/03RP 44. Ms. Riley further testified that Mr. Mason told her once in 1999 and once more recently that he had engaged in oral sex with a male friend from high school. 5/13/03RP 87-88, 201-02. Defense objections to the relevancy and prejudicial nature of this testimony was overruled, as the court again found it showed the nature of Ms. Riley's relationship with Mr. Mason. 5/13/03RP 74-80.

Ms. Riley was not a first-hand witness to any events, rather she was called to testify primarily that she saw Mr. Mason cleaning his apartment after February 19, 2004, and her other observations of Mr. Mason's behavior close in time to the incident. Her discussion of being offered group sex was part of the prosecution's direct testimony, and not in response to a defense strategy of attacking her credibility or basis of knowledge.

Additionally, the prosecution introduced testimony that Mr. Mason told his former trainer Curtis Schuster that he found women were more permissive sexual partners after he watched them going to the bathroom. 5/14/03RP 154; 5/15/03RP 3-4, 9, 19-20. He said they would allow him to do more sexually after they had

exposed themselves so intimately to him as by going to the bathroom in his presence. 5/15/03RP 19-20, 55. The defense objections were overruled. 5/15/03RP 3-4, 9.

Furthermore, the prosecution introduced into evidence, read for the jury, and enlarged on a three foot tall poster board admitted into evidence, that Mr. Mason possessed a book which included passages such as, "death by strangulation" involves "innate intimacy" and some associate it "with the act of sex itself." Ex. 251; 6/9/03RP 72. The enlargement included the passage,

perhaps it is the fact that men hung or garroted to die with full seemingly death-defying erections that links death by strangulation with eternal vitality and that final ultimate and everlasting orgasm.

Ex. 251; 5/14/03RP 38-39 (Mr. Mason's fingerprint found near sexual passages); 6/9/03RP 72 (other portions of book read during closing argument). The prosecutor referred to this book in his summation as Mr. Mason's "vulgar little book." 6/9/03RP 72.

This evidence of Mr. Mason's apparent sexual interests tended to show Mr. Mason not only liked deviant sexual acts, but his affinity for seemingly perverted sexual practices made him the kind of person who would take extreme acts for sexual satisfaction. Since there was no claim here of deviant sexuality underlying the

charged offense, and the prosecution took pains to point out that sexual acts did not appear to be part of either the January or the February incidents, Mr. Mason's varied expressions of sexual interest were not probative of any material element but served to make him appear perverted and "vulgar." 6/9/03RP 72.

d. Mr. Mason's financial and employment forms improperly painted him as a liar on matters not probative of material issues. Numerous record keepers testified about lies Mr. Mason made on employment and financial forms. The prosecutor used this evidence to illustrate a central point of his closing argument, that Mr. Mason was a liar. 6/9/03RP 60, 129-30, 133; 6/10/03RP 98.

He was untruthful about the lien on a car he traded in, falsely stated his income on a car loan application, and gave fake names and titles for his references. 5/7/03RP 123, 125-26, 140-41. He did not make any payments on the car loan he entered in late 2000. 5/7/03RP 135. He used Mr. Santoso as a reference on an employment application but listed him under a false name. 5/6/03RP 72.

The prosecutor argued that the, "shall we say inaccuracies" in his financial reports show Mr. Mason, "lied. He misstated his

income. He misstated his references. He invented a sister and brother. All of it was a lie.” 6/9/03RP 60. The court had previously instructed the jury to use this evidence for certain limited purposes which did not include Mr. Mason’s credibility, but the prosecutor’s argument undercut the limiting instruction. 5/7/03RP 144.

e. Mr. Mason’s failure to act appreciative when Mr. Santoso bought him a soda was wholly irrelevant bad character testimony. Over objection, a cashier from the Brown Bear gas station testified that some time in late 2000, a person she later identified as Mr. Santoso bought a soda for Mr. Mason. 4/3/03RP 160-61; 4/14/03RP 218; 4/17/03RP 16-17. Although Diana Jones had never seen either person before, she concluded from his demeanor that Mr. Mason was unappreciative of the soda and acted “controlling” toward Mr. Santoso. 4/17/03RP 18-19. She said she saw Mr. Mason on another occasion, and he was not rude and demanding with other people. Id. at 23-24.

Ms. Jones further explained the conversation she had with Mr. Santoso, over defense objection. Id. at 20, 26-27. She claimed she told Mr. Santoso he should call the police and he did not need friends like that. Id. at 19-20. Her hearsay testimony was admitted over objection, without explanation. Id.

Neither ER 404(b) nor ER 403 permit the prosecution to use broad characterizations of a person's behavior as a grounds for admitting unpleasant behavior or actions on one occasion as a basis for arguing a propensity to act in the same way on other occasions. Everybodytalksabout, 145 Wn.2d at 466. Ms. Jones's testimony served no purpose other than to paint Mr. Mason as an unappreciative, domineering person and encouraged the jury to draw conclusions about his character based on his conduct at a certain time unrelated to an incident charged. The out-of-court statements were inadmissible under any exception.

f. Mr. Mason's financial mismanagement was not relevant to the charged crime. The prosecution introduced evidence that Mr. Mason took out a high interest loan in November, 2000, for \$5,000. 5/19/03RP 57. He made one payment on the loan, in January of 2001. Id. Additionally, Mr. Mason had not made his payments on a car he bought in December 2000. Mr. Mason's credit applications and payment accounts for Household Finance were admitted into evidence. 5/28/93RP 116-18; Exs. 376, 377. He had received credit from Good Guys and Levitz, and owed each company \$1,236.79 and \$3,728.71, respectively, as of

March 2001. Id. Mr. Masons' relevance objections were overruled. Id. at 118.

To the extent Mr. Mason may have had a financial motive underlying his actions, that motive applied strictly to the January 23rd incident. The prosecution never contended Mr. Mason committed the charged offense out of a desire for money. 6/9/03RP 116-17.

The killing itself had no apparent financial motive, and none of Mr. Santoso's belongings appeared disturbed, his wallet remained intact in his apartment after February 19th, and his bank account was untouched. 4/27/03RP 72-74. Despite the lack of financial motive for the charged crime, the prosecution introduced evidence of Mr. Mason's poor financial decisions and misstatements on financial forms to show his "desperate" need for money. 6/9/03RP 59.

The probative value of Mr. Mason's failure to promptly pay his car loan or his high interest loan pertained only to his reasons for committing a different crime. Its probativeness for the instant case rested on its tendency to show Mr. Mason as a person of unsavory, untrustworthy character. Although he promised to pay his loans promptly, he failed to do so. He owed money, so he must

be a desperate person. These financial problems amounted to reasons to conclude Mr. Mason was a person of bad character, and thus more likely to commit a crime, rather than probative of any material element of the offense charged.

g. The cumulative, repetitious focus on an uncharged incident overwhelmingly prejudiced Mr. Mason. The prosecution introduced substantial evidence regarding the January 23rd incident. Not only did it offer testimony from the several police officers to whom Mr. Santoso made his allegations, those who drove him to Mr. Mason's apartment to verify his address, those who took photographs of his injuries, and those who collected evidence from Mr. Masons' apartment, it also introduced each piece of evidence seized from the apartment, with the explanation of why it was seized and how its seizure corroborated Mr. Santoso's description of events. 6/9/03RP 125; *see infra*, section 3c.

Additionally, the January 23rd incident was described in detail by Mr. Santoso's employer, by the emergency room doctor who treated his injuries, and by Mr. Santoso's sister. 4/10/03RP 167; 4/14/03RP 73-74; 4/21/03 139, 169; Ex. 62. Mr. Santoso's demeanor and appearance after the incident were further

discussed by Mr. Santoso's friends Scott Briggs, Dean Anderson, and Henny Clemenson. 4/14/03RP 13-15; 4/20/03RP 98-99; 4/21/03 RP 31.

The evidence also included photographs of Mr. Santoso taken in the days after January 23rd. Exs. 9, 10, 11, 19, 20. These numerous photographs were a primary theme of the prosecutor's closing argument, as he described them as "the most haunting image" in the case. 6/9/03RP 53; 6/10/03RP 32.

While the fact Mr. Mason was being prosecuted for the January 23rd offense was plainly relevant to one of the charged aggravating factors, the prosecution's excessive introduction of testimony and physical evidence from the January 23, 2003 incident resulted in an overwhelming amount of bad act evidence relating to a collateral, uncharged crime. The jury could not help but use the fact that Mr. Mason was accused of having committed a brutal and ugly crime on another occasion as evidence he must have done so on the occasion charged.

In order to minimize the risk that the jurors misused the January 23, 2001 incident as propensity evidence, Mr. Mason proposed a limiting instruction. 6/9/03 43. Yet the court rejected that instruction, and rather than trying to craft one that it thought

would be appropriate as it did with other proposed instructions, the court refused to provide any limitations on the jury's use of the January 23rd incident. Id.; 6/5/03RP 36-44 (court offers to alter wording of proposed defense instruction to make it more accurate).

h. The lack of limiting instructions and sheer scale of prejudicial bad act evidence requires reversal. The court should give a limiting instruction when requested to obviate the harm caused by uncharged crime evidence. Saltarelli, 92 Wn.2d at 362; State v. Myers, 82 Wn.App. 435, 439, 918 P.2d 183 (1994). In the instruction the jury should be directed to use the bad act evidence only for the limited purpose for which it has been admitted. Id.

Mr. Mason proposed a limiting instruction relating to the January 23rd incident, warning the jury not to use that incident as propensity evidence relating to his likelihood to commit the charged crime. 6/9/03RP 43. The proposed instruction said the prior incident should be used for the limited purpose of establishing the nature of Mr. Mason's relationship with Mr. Santoso. Id. The court disagreed with the limitations in the instruction, and said the January 23rd incident could be used as *res gestae*, intent, motive and for a host of other reasons. Id. at 46-47. The court refused to give any instruction or to revise the proposed instruction as it had

with other instructions. Id. The jury was never instructed that the January 23, 2001, incident could not be used to infer Mr. Mason had a propensity for acting in a certain way.

The cumulative effect of the various “bad act” and bad character evidence deprived Mr. Mason of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The evidence, taken together, amounted to a devastating character attack on Mr. Mason as a liar, a deviant, and a dangerous person. Mr. Mason was entitled to a fair trial on the offense charged and was denied that right by the extensive introduction of uncharged and unprobative misconduct.

5. THE “TO CONVICT” INSTRUCTION OMITTED ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE, THUS DENYING MR. MASON HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW.

Mr. Mason was charged with aggravated first degree murder based upon three aggravating factors. CP 11-12. The trial court instructed the jury on the elements of the offense of first degree murder in Court’s Instruction 9, the “to-convict” instruction. CP 346 (A copy of the court’s instruction is attached as Appendix A). The jury was instructed on the aggravators in Instructions 20 through

25. CP 257-64. Court's Instruction 9 did not contain any reference to any of the aggravating factors.

a. The "to-convict" instruction must contain all of the essential elements of the offense. The State is required to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The court's instructions to the jury must clearly set forth the elements of the crime charged. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). In Washington, all of the elements of the crime must be contained in the "to-convict" instruction. State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The rationale behind the rule is that "[t]he jury has a right to regard the 'to-convict' instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction." Oster, 147 Wn.2d at 147. There is only one exception to this rule: where the element is prior criminal history. Id.

Aggravating factors which elevate the punishment for a crime are elements of the crime and must be proven beyond a reasonable doubt and found by a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 738 (2002), citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). As Justice Scalia so eloquently stated in his concurring opinion in Ring:

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or *Mary Jane* – must be found by the jury beyond a reasonable doubt.

Ring, 122 S.Ct. at 2444 (Scalia, J., concurring).

b. The aggravating factors in this case increased the level of punishment and were required to be in the “to-convict” instruction. Without the jury finding at least one of the aggravating factors, Mr. Mason’s offense would have been punishable as first degree murder with a maximum term of life imprisonment *with* the possibility of parole. RCW 9A.20.021(1); RCW 9A.32.030(2). However, with the jury finding at least one of the aggravating factors, the offense became aggravated first degree murder, which is punishable by life imprisonment *without* the possibility of parole

or death. RCW 10.95.030(1), (2). Thus, the aggravating factors acted to elevate the punishment and were functional equivalents of elements of aggravated first degree murder. Ring, 536 U.S. at 609; see State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004) (first degree murder with aggravating factor creates different offense than first degree murder due to enhanced maximum penalty).

In Ring the State argued aggravating factors, similar to the aggravating factors in RCW 10.95.030 which rendered the defendant eligible for the death penalty, were merely “sentencing factors” which the trial judge alone could find beyond a reasonable doubt after the jury had found the person guilty of the underlying substantive offense in the guilt phase. Ring, 536 U.S. at 609. The Supreme Court disagreed and found the aggravating factors operated as “the functional equivalent of an element of a greater offense,” which required them to be found by the jury not the judge. Id., quoting Apprendi, 530 U.S. at 494, n.19.

Thus, following the Washington Supreme Court’s ruling in Oster, the aggravating factors here were elements of the offense of aggravated first degree murder, the court was required to instruct the jury in the “to-convict” on the elements of aggravated first

degree murder which included the aggravating factors. Oster, 147 Wn.2d at 147; see Thomas, 150 Wn.2d at 848-49 (while not labeling aggravating factors as elements, court finds they increase the penalty beyond that allowed for first degree murder). The trial court erred in failing to so instruct the jury. Emmanuel, 42 Wn.2d at 821 (“We are compelled upon the authority of the cases cited herein to hold that the omission of this element from [instruction] No. 5 was prejudicial error.”).

c. The error in failing to include all of the elements of the offense in the “to-convict” instruction can never be harmless.

The Supreme Court in Oster ruled that elements of an offense may be relegated to a special verdict form and omitted from a “to convict” instruction only if the elements relate to the defendant’s prior criminal convictions. The Court took great pains to emphasize it was adhering to its earlier holdings in Smith and Emmanuel, that an error in omitting an element from the “to-convict” could not be harmless. Oster, 147 Wn.2d at 141. The Smith Court concluded,

We can only assume that the jury relied upon the “to-convict” instruction as a correct statement of the law. The jury was not required to search the other instructions to make sense of the erroneous “to-convict” instruction, and we cannot assume that the jury attempted to compensate for the court’s error by

doing so. We, therefore, cannot say that the error was harmless.

Smith, 131 Wn.2d at 265. Similarly the error in failing to include the aggravating factors in the “to-convict” instruction in this case can never be harmless. Oster, 147 Wn.2d at 147; Smith, 131 Wn.2d at 265.

d. The Washington Constitution protects an accused’s right to a “to convict” instruction that unambiguously sets forth all elements of a crime. Washington Constitution article 1, § 21 provides, “The right to trial by jury shall remain inviolate . . .” The right to a jury trial is interrelated to the due process rights set forth in Article 1, § 22, which provides in part, “In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him, [and] . . . have a speedy public trial by an impartial jury.” These constitutional procedural due process rights and “inviolable” jury trial rights are interrelated, such that the right to a jury trial has no meaning without the procedural protections guaranteed by the right to due process of law. State v. Strasburg, 60 Wash. 106, 116-24, 110 P.2d 1020 (1910).

Washington courts have long recognized and strongly protected an accused's right to a jury determination regarding every *element* of a charged offense based on the state constitution. Smith, 131 Wn.2d at 263.¹⁰ The Washington Constitution protects these rights as they existed at common law in the territory at the time the constitution was adopted. Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). A "to convict" instruction that does not "plainly, explicitly, and correctly" state all the elements required for a conviction is therefore, "constitutionally defective." Smith, 131 Wn.2d at 263; Strasburg, 60 Wash. at 116-17; McClaine v. Territory, 1 Wash. 345, 355, 25 P. 453 (1890).

The right to trial by jury, kept "inviolable" under the state constitution, is more extensive than that protected under the federal constitution when it was adopted in 1789. Mace, 98 Wn.2d at 96.

Because the Supreme Court has already determined that the right to a jury trial guaranteed by the Washington Constitution is

¹⁰ See also Mace, 98 Wn.2d at 96 (recognizing right to jury trial in misdemeanors and violations of local criminal ordinances); Strasburg, 60 Wash at 116-17 (finding right to jury trial allows person to mount insanity defense); Seattle v. Norby, 88 Wn.App. 545, 945 P.2d 269 (1997) (failure to give unanimity instruction violates right to unanimous verdict under Art. 1, § 22), overruled on other grounds, State v. Robbins, 138 Wn.2d 486, 497, 980 P.2d 725 (1999); State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983) (state constitutional right to be tried only for offense stated in information).

broader than that guaranteed by the federal constitution, the full analysis developed in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. See e.g., State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). Nonetheless, those factors provide a framework for discussing the scope of the state constitutional provisions in the case at bar.¹¹

i. The textual language and differences in the texts of parallel provisions of the federal and state constitutions.

The textual language of the state constitution is set forth *supra*. These provisions serve to ensure the right to a fair determination by a jury of the allegations against the accused. Smith, 131 Wn.2d at 263.

The Supreme Court recognized almost 100 years ago that unique language providing the “right to trial by jury shall remain inviolate” results in a broader guarantee than that in the federal constitution. Strasburg, 60 Wash. at 116-17. The federal right is embodied only in one statement, whereas the framers of the

¹¹The six factors are (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

Washington Constitution emphasized this right by mentioning it in two separate provisions. U.S. Const. art. 3, § 2 ("The trial of all crimes . . . shall be by jury.").

The differences in the texts of the state and federal constitutions are significant because the state constitution sought to preserve the right to jury trial as it had developed during the time between the adoption of the federal constitution in 1789 and the state constitution one hundred years later. Strasburg, 60 Wash. at 118; Mace, 98 Wn.2d at 99. Thus, significant textual differences exist and guide the scope of the state right.

ii. State constitutional, common law, and statutory history. Regarding the third and fourth Gunwall factors, Washington has a long history of requiring all essential elements of an offense to be clearly placed before the jury in a criminal trial in an accurate and complete fashion. McClaine, 1 Wash. at 353-55; Emmanuel, 42 Wn.2d. at 519. The common law due process concerns that a fair trial requires an accurate and complete jury instruction are consistent with the constitutional rights to a jury trial as it has developed in Washington. As discussed in Strasburg, the manner in which due process is grounded in the right to have all

questions of fact relating to guilt submitted to the jury is embodied in the constitution.

The due process of law provision of our constitution . . . probably does not, of itself, mean right of trial by jury; but it does mean, in connection with the provision "The right of trial by jury shall remain inviolate", that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our constitution.

Strasburg, 60 Wash. at 117.

Pre-existing state law requires the issues relating to the essential elements of a charged crime be presented to the jury in the single verdict form listing the elements. McClaine, 1 Wash. at 354-55. Thus, failing to present the essential elements is an incomplete statement of the factors necessary for a conviction and does not comport with the criminal process in 1890 or today. Id.; see also State v. Roberts, 142 Wn.2d 471, 510-12, 14 P.3d 713 (2000).

iii. Differences in structure between the federal and state constitutions. The structure of the state constitution limits the otherwise plenary power of the state to do anything not expressly forbidden. Gunwall, 106 Wn.2d at 66. Unlike the

federal constitution, the state constitution guarantees these fundamental rights rather than restricting them, thus pointing toward broader independent state constitutional protections. Id. at 62; Young, 123 Wn.2d at 180; Mace, 98 Wn.2d at 96.

iv. Matters of particular state interest or local concern. The conduct of criminal trials in state courts are matters of particularly state or local concern which do not warrant adherence to a national standard. Gunwall, 106 Wn.2d at 62; Young, 123 Wn.2d at 180; State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990). State courts have a duty to independently interpret and apply their state constitutions, stemming from the vast historical differences between the federal and state constitutions and courts, as well as the proper respect owed to a state's legal foundations and sovereign duties. Spitzer, H., Which Constitution? Eleven Years of Gunwall in Washington State, 12 Seattle U. L.R. 1187 (Spr. 1998).

The long and independent history of the state constitutional right to jury trial, and the explicit provisions of the due process guarantee, which are broader in scope and application than the federal provision, guarantee the right to a jury determination on every element. This guarantee is preserved by the rigid

requirements the Washington Courts have traditionally imposed where the instructions fail to ensure the jury renders a verdict encompassing every substantive fact going to the question of guilt or innocence. The integrity of the process and the reliability of the result are both cast into doubt when the jury is erroneously instructed in a way which does not make certain the constitutional burden has been properly applied and established. For that reason, the "to-convict" instruction was fatally flawed and requires reversal of Mr. Mason's conviction.

6. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MASON OF COMMITTING A BURGLARY.

a. Each element must be proven beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Winship, 397 U.S. at 364; State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); U.S. Const. amends. 5; 14; Wash. Const. art. 1, § 3. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v.

Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979);
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

Mr. Mason was charged with committing a murder in the course of, in furtherance of, or in the immediate flight from a burglary in the first degree, burglary in the second degree, or a residential burglary. CP 11-12. As discussed *infra*, the burglary was an element of the offense charged and must have been proven beyond a reasonable doubt.

b. There was insufficient evidence proving unlawful entry. Burglary requires proof, beyond a reasonable doubt, that the person unlawfully entered or remained in a building with the intent to commit a crime therein. RCW 9A.52.020(1).

A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so remain.

RCW 9A.52.010(3)

Permission to enter can be given either by express words or implied conduct. See e.g.; Winter v. Mackner, 68 Wn.2d 943, 945, 416 P.2d 453 (1966); State v. Woods, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991). The scope of permission to enter to or remain may be expressly or impliedly limited to certain areas or certain times. State v. Collins, 110 Wn.2d 253, 254, 751 P.2d 837 (1988)

(permission to enter home and use telephone exceeded by defendant entering another room against the plain wishes of the residents).

The fact that a person commits a crime inside a building does not establish an unlawful entry or unlawful remaining.

Unlawful remaining for purposes of the burglary statute occurs when:

(1) a person has lawfully entered a building pursuant to invitation, license or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the building.

State v. Thomson, 71 Wn.App. 634, 640-41, 861 P.2d 492 (1993);

Collins, 110 Wn.2d at 261; RCW 9A.52.030(1); RCW 9A.52.020(1);

RCW 9A.52.010(3). Permission to enter or remain in a building is not automatically revoked when a person commits a crime therein.

State v. Miller, 90 Wn.App. 720, 725, 954 P.2d 925 (1998);

Thomson, 71 Wn.App. at 640-41. "Washington courts have never held that violation of an implied limitation as to purpose is sufficient to establish unlawful entry or remaining." Miller, 90 Wn.App. at

725.

Circumstantial evidence alone may support a conviction. State v. Kroll, 87 Wn.2d 829, 842, 558 p.2d 173 (1976). However, “circumstantial evidence must be consistent with the hypothesis that the defendant is guilty and inconsistent with any hypothesis or theory tending to establish innocence.” State v. Todd, 101 Wn.App. 945, 950, 6 P.3d 86 (2000); State v. Sewell, 49 Wn.2d 244, 246, 299 P.2d 570 (1956). A conviction that relies upon circumstantial evidence may not be based upon inferences that involve “pure speculation.” State v. Bridge, 91 Wn.App. 98, 100, 955 P.2d 418 (1998).

In the case at bar, there was no evidence Mr. Mason lacked permission to enter Mr. Santoso’s apartment. No physical evidence indicated he forced his way into the apartment. 4/23/03RP 49-50. The door was not damaged and the lock was intact. Although a window in the rear of the apartment was broken, the police believed it would have been impossible for anyone to enter the window without leaving any trace forensic evidence. 4/22/03RP 116, 134-35.

Mr. Santoso may well have invited Mr. Mason into his home even though he had expressed fear of him on other occasions. Mr. Santoso called Mr. Mason after the January 23rd incident,

because he was worried about him. He may have asked him to come over, or allowed him in when he arrived, based upon a desire to discuss the issues between them.

Absent evidence of a lack of permission to enter or remain, the prosecution cannot establish a burglary occurred. The only basis of inferring a lack of permission is sheer speculation, assuming that Mr. Santoso never would have allowed Mr. Mason to enter his home. Yet such speculation is unreasonable here, given the nature of their relationship and Mr. Santoso's prior interest in Mr. Masons' well-being despite his fear of him.

Finally, although the prosecution did not argue this theory below, the State could argue on appeal that the unlawful entry is established by the existence of a no contact order. 6/10/03Rp 26-27; see State v. Stinton, __ Wn.App. __, __ P.2d __, 2004 WL 951487 (5/4/2004) (finding violation of no contact order offense defendant intended to commit inside house and evidence lack of permission where defense used force to remain inside, was expressly told to leave, and kicked his way inside, breaking the door). Not only would such a finding be duplicative of another aggravating factor, but it would swallow any separation between violating a no contact order and a burglary. While the existence of

the no contact order may be evidence of a lack of permission, it is not by itself enough to establish the lack of permission or invitation to enter. Where there is no evidence of a forced entry or a lack of permission, it is impossible to merely assume it occurred.

In light of the lack of evidence supporting the burglary, this aggravating factor must be dismissed.

7. THE COURT VIOLATED MR. MASON'S RIGHT TO AN IMPARTIAL JURY AND FAIR TRIAL BY DISCUSSING THE DEATH PENALTY WITH THE JURORS.

a. There is a strict prohibition against discussing any sentencing matters with the jury in a noncapital case. Long-standing principles bar a court from informing the jury about the possible penalty an accused person faces. Shannon v. United States, 512 U.S. 573, 579, 129 L.Ed.2d 459 (1994); State v. Townsend, 142 Wn.2d 838, 844-46, 15 P.3d 145 (2001). Providing the jury with any sentencing information creates the possibility of tainting the impartiality of the jurors, unfairly influencing deliberations, and invading the province of the juror as unbiased fact-finder. Shannon, 512 U.S. at 579; Townsend, 142 Wn.2d at 846. The protections of an impartial jury and fair trial proceedings

are enshrined in Sixth¹² and Fourteenth Amendments to the United States Constitution and Article 1; §§ 21¹³ and 22¹⁴ of the Washington Constitution.

In Townsend, the Supreme Court held in no uncertain terms that “overwhelming authority” demands “the jury in a non-capital case may not be informed about the penalty for the charged crime.” 142 Wn.2d at 844. This blanket prohibition makes it entirely improper for the court to tell prospective jurors that the death penalty is not involved in a murder prosecution. Id. A defense attorney’s failure to object to such a plain error falls below professional norms and amounts to a deficient performance under the law. Id. at 846.

In Townsend, the trial court told the jurors at the outset of *voir dire* that the aggravated murder case did not involve the death penalty. Id. at 842. The Supreme Court strongly objected to this comment, based on the long-standing principle that matters of punishment are irrelevant to the jury’s task. Id. at 844-46.

¹² “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury”

¹³ Article 1, § 21 of the Washington Constitution provides, “The right to trial by jury shall remain inviolate. . . .”

Sentencing considerations are “never a proper issue for the jury’s deliberation” even when the court is merely alerting the jury that the death penalty is not a possible punishment. Id. at 846.

b. The trial court purposefully disregarded Townsend and discussed sentencing matters with the jury. In the case at bar, before jury selection the trial court told the parties that it disagreed with Townsend and wanted to discuss the possibility of the death penalty with the jurors. 2/27/03RP 15-18; 4/1/03RP 6-8. The court stated that in its opinion, Townsend was wrongly decided and therefore, it intended to disregard it should a juror raise a question about the death penalty. The prosecutor agreed that “an honest answer” was required if a juror asked a question about the possibility of a death sentence. 4/1/03RP 9. The court told the defense such an instruction would aid them in getting more favorable jurors. 4/1/03RP 10. The court did not mention Townsend’s blanket finding that there was no legitimate trial strategy that could be the basis for failing to object to a court’s instruction to the jury that the death penalty is not involved in the

¹⁴ Article 1, § 22 provides, “In criminal prosecutions, the accused shall have the right to . . . demand the nature and the cause of the accusation against him, [and] . . . have a speedy public trial by an impartial jury.”

case. Despite the court's urgings, defense counsel objected to the court's intended remarks on the death penalty. 4/1/03RP 7.

During voir dire, a juror said he did not support the death penalty and would have a hard time enforcing the law if it was at issue. 4/1/03RP 32. The court instructed the jurors that "this is not a capital case" and "does not involve a request for the death penalty." Id.

The court's instructions included the following remarks:

Thank you. In response to that statement by the juror, which I think is basically a question of whether the death penalty is involved in this case, I will respond in the following way:

You should not concern yourselves with what punishment will be administered in the event the jury reaches a finding of guilty, except that the fact a penalty may follow conviction should make you careful.

In response to Juror No. 25's statement, I will respond by informing you that this is not a capital case. In other words, this case does not involve a request for the death penalty. The jury will not be involved in any way in determining any sentence imposed, in the event that a jury reaches a verdict of guilty.

4/1/03RP 31-32.

c. The court's flagrant violation of a Supreme Court decision requires reversal. The court's improper instruction to jurors that the death penalty is not involved in a murder case is an instructional error the requires reversal under the constitutional

harmless error test. Townsend, 142 Wn.2d at 846-47. Reversal is required unless the error is, “trivial, or formal, or merely academic, **and** was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” (Emphasis added.) Id.

Here, this error was one of many likely to have affected the verdict. The cumulative effect of the court’s errors are discussed below. With respect to the erroneous instruction on issues of sentencing, the court placed before the jury information that could alter the way that they considered the case. Surely the jurors had no idea that a mandatory life sentence attached to finding Mr. Mason’s guilty of the charged crime. Instead of taking seriously their role as fact-finder, they were told that “a penalty may follow” and implicitly encouraged to think that punishment was not necessarily severe or mandatory. Such comments encourage the jury to feel less responsible in its deliberations. See In re Jeffries, 110 Wn.2d 326, 342-43, 752 P.2d 1338 (1998) (reference to an appeal may reduce jury’s sense of responsibility).

This is one of those cases of misconduct in which “[t]he bell once rung cannot be unring.” State v. Powell, 62 Wn.App. 914, 919, 816 P.2d 86 (1991), quoting State v. Trickle, 16 Wn.App. 18,

30, 553 P.2d 139 (1976). The jury could not be expected to disregard the sentencing information given by the court, was not told to disregard this specific information, and the final generic jury instruction that punishment should not determine the verdict could not erase the taint of the court's delivery of improper sentencing information that tended to reduce the jurors' concerns about the nature of Mr. Mason's sentence.

F. CONCLUSION.

For the foregoing reasons, Mr. Mason respectfully requests this Court reverse his conviction and order a new trial.

DATED this 28th day of May 2004.

Respectfully submitted,



NANCY P. COLLINS (WSBA # 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

