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NO. 52824-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KIM MASON,

Appellant.

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

The Honorable Michael J. Fox

APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The court violated Mr. Mason's right to confront witnesses against him as protected by the Washington Constitution, Article 1, § 22.

B. ARGUMENT.

1. THE VIOLATION OF THE RIGHT TO CONFRONTATION REQUIRES REVERSAL

a. The prosecution wholly misunderstands and misinterprets the United States Supreme Court decision in *Crawford*. The prosecution asserts that in *Crawford v. Washington*, U.S. ___, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court both limited the right of confrontation to formal, judicial-style statements and automatically exempted excited utterances from the definition of what qualifies as a "testimonial" statement for which confrontation is constitutionally required.

i. Excited utterances are not exempt from confrontation clause protections. *Crawford* itself strongly implies that excited utterances statements are not excluded from the requirements of the confrontation clause. 124 S.Ct. at 1368 n.8

(citing Thompson v. Trevanian, 90 Eng. Rep. 179 (K.B. 1694), as example of law at time Constitution drafted).

At common law in colonial times, hearsay was not subject to the demands of confrontation when it was a “spontaneous declaration.” Id. But such a “spontaneous declaration” was a far narrower occurrence than a modern day excited utterance. A spontaneous declaration required that the statement “be made immediately upon the hurt received.” Id.

This exception greatly differs from the excited utterance law in Washington. There is no requirement in Washington that the utterance be made immediately upon the hurt received. Instead, an excited utterance must be a statement relating to a startling event and made under stress resulting from a startling event, without requiring actual immediacy. ER 803(a)(2); State v. Chapin, 118 Wn.2d 681, 687, 826 P.2d 194 (1992) (favorably citing United States v. Napier, 518 F.2d 316 (9th Cir.), cert. denied, 423 U.S. 895 (1975), where statement made eight weeks after incident qualified as excited utterance); State v. Woodward, 32 Wn.App. 204, 207, 646 P.2d 135 (1982) (statement made 20 hours after incident is excited utterance).

Based on the language in footnote eight, as well as the broad pronouncements in Crawford that any statement requires confrontation when it describes a past crime and is made under circumstances that a reasonable person would understand may be used against the accused to investigate and prosecute the crime, excited utterances are in no way necessarily exempt from the confrontation clause. 124 S.Ct. at 1364-65, 1368 n.8; United States v. Cromer, __ F.3d __, 2004 WL 2711130, * 11 (6th Cir. Nov. 30, 2004).

The State points to State v. Orndorff, 122 Wn.App. 781, 95 P.3d 406 (2004) as authority for the proposition that excited utterances fall outside the confrontation clause as defined by Crawford. Resp. Brf. at 22. But Orndorff says no such thing. The hearsay statements introduced in Orndorff were made by one complainant to another complainant at the time of the incident or immediately thereafter. 122 Wn.App. at 785. They were casual remarks to an acquaintance, without any governmental role whatsoever and absent any understanding that the statements would ever even be heard by another person much less available for use at a trial. Crawford, 124 S.Ct. at 1364 (casual remark to acquaintance not "testimonial"); see also State v. Rivera, 844 A.2d

191 (Conn. 2004) (statement to acquaintance not “testimonial”).

Unlike Orndorff, the hearsay declarations at issue in the case at bar are those made to police officers and police employees in the course of their official duties, and therefore require an entirely different analysis.

ii. The prosecution artificially limits the holding and reasoning of *Crawford*. Contrary to the prosecution’s incredibly narrow view of what kind of statements must be tested by the crucible of cross-examination, Crawford explicitly refused to define the confrontation clause’s parameters in any limited way.

Crawford held there are “various formulations” of a “core class” of testimonial statements and declined to state any preference or to disavow any of those definitions. 124 S.Ct. at 1368. Instead of adopting a certain formulation, the Court merely gave some examples of statements that fell within the paradigmatic understanding of a witness bearing testimony, such as testimony before a grand jury or “a statement resulting from police interrogation.” Id. at 1374. Again, these were merely examples of

statements that would be “testimonial” and not a definition of the scope of the confrontation clause.¹

The crux of the distinction employed in Crawford as to what out-of-court statements are “testimonial” is whether the statement describes a past criminal act, and is made under circumstances that a reasonable person would understand the statement would be available for use in an investigation and prosecution. Crawford, 124 S.Ct. at 1364-65; Cromer, 2004 WL 2711130, *9; State v. Powers, __ Wn.App. __, 99 P.3d 1262 (2004).

In Cromer, the Sixth Circuit adopted as persuasive authority a source “relied” on by Crawford in defining the Confrontation Clause. 2004 WL 2711130, *9, citing Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L.Rev. 1171, 1240-41 (2002).² Professor Friedman offered as a “rule of thumb,”

A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial.

¹ The Supreme Court has consistently refused invitations to limit the confrontation clause to formal statements such as *ex parte* affidavits, as the prosecution seems to urge. See White v. Illinois, 502 U.S. 346, 352, 353 n.5, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992); Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 27L.Ed.2d 213 (1970).

² In Cromer, the Sixth Circuit adopted Professor Friedman’s definition of testimonial, finding it “both well-reasoned and wholly consistent” with Crawford. 2004 WL 2711130, * 10. Powers likewise relied upon, quoted at length from, and adopted the reasoning in Professor Friedman’s analysis. 99 P.3d at 1264-65.

2004 WL 2711130, *9, citing Richard Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1042-43 (1998).

Crawford did not precisely define “police interrogation” but again explicitly refused to define the term narrowly. 124 S.Ct. at 1365 n.4. It must be viewed in its “colloquial” sense, rather than a “technical legal” way. Id. “Colloquial” means an informal and familiar meaning of a word. Lee v. State, 143 S.W.3d 565, 570 (Tex. App. 2004) (statement to police at scene of incident meets definition of interrogation under Crawford). Additionally, investigative interrogation is defined as “[r]outine, nonaccusatory questioning by police of a person who is not in custody.” Black’s Law Dictionary 825 (7th ed. 1999). Again defining by example, Crawford noted that a statement “unwittingly” made to a governmental agent, such as a confidential informant, would not be considered the product of police interrogation. Crawford, 124 S.Ct. at 1368.

Thus, Crawford holds that police interrogation is not limited to formal police interviews made in the course of an on-going prosecution, as the prosecution asserts. 124 S.Ct. at 1371 (characterizing statement in State v. Bintz, 650 N.W.2d 913 (Wis.

App. 2002) as testimonial even though statement was given during a noncustodial interview at a police station); see e.g., Lopez v. State, ___ S.E.3d. ___, 2004 WL 2600408, *6 (Fla. App. Nov. 17, 2004) (even excited or distressed person understands that on-scene statement to police is form of accusation to be used against defendant); Lee, 143 S.W.2d at 570 (statement to police in patrol car at scene of incident testimonial); State v. Bell, 603 S.E.2d 93, 116 (N.C. 2004) (statement to investigating officer is testimonial because "it was made to further Officer Conerly's investigation of the crime"); Moody v. State, 594 S.E.2d 350, 354 n.6 (Ga. 2004) ("police interrogation" under Crawford encompasses field investigation of witnesses).

Moreover, "testimonial" is not limited to what the declarant subjectively believed the purpose of the statement to be. First, it is impossible to discern the declarant's understanding since the declarant is unavailable for cross-examination. Second, the definition of "testimonial" is also shaped by the intent to guard against prosecutorial abuse, such as statements generated by the government knowing they will be available for use at trial even if the declarant does not know of this possibility. Crawford, 124 S.Ct. at 1367 n.7.

The prosecution cites two cases from other jurisdictions adopting the very narrow view of Crawford it puts forward in its response brief. Response Brief, at 21-22, citing Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004), and State v. Barnes, 854 A.2d 208 (Me. 2004). However, this Court has rejected such a view, as have a number of other courts. Powers, 2004 WL 2590633; see United States v. Nielsen, 371 F.3d 574 (9th Cir. 2004) (statement to officer during execution of warrant testimonial); Lopez, 2004 WL 2600408, *6 (statement by distressed victim to officer at scene testimonial); Moody, 594 S.E.2d at 354 (statement to officer at scene “shortly after” incident testimonial); Bell, 603 S.E.2d at 116 (statement taken by officer asking victim for details of recent crime is testimonial, as they were made to further the officer’s investigation); Lee, 143 S.W.2d at 570 (statement to police at scene testimonial).

In Powers, the court analyzed whether a complainant’s statements to a 911 operator and to the responding police officers were testimonial under Crawford. After examining cases from other jurisdictions and a seminal law review article cited favorably in Crawford, the Powers Court concluded that when a person contacts the police through a 911 operator or speaks to police

responding to a request to report a crime, one of the most critical questions is whether the call is made to report a past crime. 99 P.3d at 1265-66.³ If the declarant contacts the authorities for the purpose of reporting a crime that has already occurred, that statement is “testimonial.” It is made for the purpose of seeking an official response such as a criminal investigation or prosecution.

The reasoning in Barnes, heavily relied on by the prosecution, is entirely suspect. 854 A.2d at 210. Barnes essentially advocates a reliability approach: the statement is reliable because the declarant came to the police station to report a crime and the police asked her questions only to see what was wrong. Id. at 210. Crawford holds that amorphous notions of reliability are inherently arbitrary and contrary to the principles protected by the confrontation clause. 124 S.Ct. at 1370. Not only is a reliability-centered approach unevenly applied, it has a “demonstrated ability to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.” 124 S.Ct. at 1371.

³ Powers cited at length Friedman, 150 U. Pa. L.Rev. at 1240-43; People v. Cortes, 781 N.Y.S.2d 401 (N.Y. S.Ct. 2004); and People v. Moscat, 777 N.Y.S.2d 875 (Bx. Co. Crim. Ct. 2004). 99 P.3d at 1264-66.

Barnes pays no heed to the important factor that the complainant went to the police station for the purpose of reporting a crime. See Powers, 2004 WL 2590633 (plain intent to report crime to authorities renders statement testimonial). Her statements to the police were made for the purpose of advising the law enforcement authorities of a crime, with the hope and expectation that they would investigate the crime and take action. Likewise, Mr. Santoso's statements to the police, recorded by the police in written and taped statements taken in his presence, fall within the scope of testimonial statements as described in Crawford.

iii. Since the crime was long over in the case at bar, Mr. Santoso's contact with the police was "testimonial." Mr. Santoso went to the police station to report a crime almost 24 hours after the incident. 4/8/03RP 118. He spoke to a number of police officers in the days that followed. The prosecution introduced many of these statements at trial, the earlier ones as excited utterances, and the later ones as "state of mind" exceptions to the hearsay rule. As discussed above and in the Opening Brief, statements made to government officers to report a past crime are testimonial. Crawford, 124 S.Ct. at 1365.

iv. Statements to Linda Webb were

"testimonial." First, the prosecution ignores a substantial part of Ms. Webb's job duties as a victim advocate employed by the prosecution and police, claiming she was merely an independent party trying to help Mr. Santoso make safety plans. 4/15/03 8-10; Resp. Brf. at 30-31.

The King County Prosecuting Attorney's web site describes the "victim advocate" as a person who works with prosecutors "as a team."⁴ Furthermore, "[t]he mission of the team is to ensure offender accountability . . ." Id. Among the responsibilities of the advocate is to "coordinate with all members of the domestic violence team (law enforcement, prosecutors, treatment agencies, etc.)." Id. The web sites reassures people seeking protection order assistance that any victim advocate, even if not employed by the King County office, "work[s] closely with the county's prosecutors on their assigned cases." Id.

⁴ King County Prosecuting Attorney, Protection Advocacy Program, Advocacy Services, <http://www.metrokc.gov/proatty/POP/services.htm> (describing advocacy in felony cases) (hereinafter "King County web site").

⁴ See In re Personal Restraint of Orange,

In order to help a person obtain a protection order, as Ms. Webb does, she must elicit a detailed description of the most recent incident or threat of domestic violence as well as the history of the relationship. 4/15/03RP 10; see King County web site (describing information required to obtain protection order).

A person does not receive a protection order without explaining in an application, and to a court, that he or she has been or reasonably fears he or she will be threatened with bodily injury, stalking, physical harm, or sexual assault. Id. Such allegations describe criminal activity. Ms. Webb wrote Mr. Santoso's application after learning from him the details of his criminal allegations and the basis of his fears. 4/15/03RP 25-26.

As a police employee charged with helping people tell a court about past incidents and fears of future violence, Ms. Webb is a conduit and critical team member coordinating services between the police, prosecution and any other agency.⁵ A person who speaks with Ms. Webb after reporting a crime to the police would surely see Ms. Webb as an extension of the government's efforts

to investigate and prosecute the criminal case. She helps the purported victim prepare paperwork that will be reviewed by a judge and escorts the person to court, where he or she can expect to be questioned about the criminal behavior alleged. She maintains contact with the victim throughout the pendency of the case.

The prosecution quotes Ms. Webb as saying she did not perceive her job as investigative, and she is not required by statute to report criminal actions to the police. Resp. Brf. at 31. But by the same token, Ms. Webb is a "member of the team" working with the police and prosecution. King County web site. Her goal is to "ensure offender accountability." Id. She has no confidentiality obligation or privileged relationship with the people she assists. She maintains records and those are available to the prosecution and police.

At the time of trial, Crawford had not been decided and the scope of Ms. Webb's role, as a government official employed by the police, both real and as perceived, was not critical to Mr. Mason's confrontation rights. Therefore, the defense had no

⁵ See Friedman, 86 Geo. L.J.L.J." 1041 (privately employed counselor who obtains statement from alleged victim that may be used by legal system "is essentially acting as conduit, an agent for the declarant" serving as "intermediary" with the authorities, so statements she obtains "should clearly be deemed

motive to explore that role and the record should not be seen as complete in this regard.⁶

Moreover, Ms. Webb was an employee of the Redmond police department at the time she spoke with Mr. Santoso. 4/15/03RP at 415 (reporting crime to civilian police employee is testimonial). Detective Beberich “requested” she speak with Mr. Santoso immediately after he had completed a lengthy interview with Mr. Santoso about his criminal accusations. 4/15/03RP 17.

As Professor Friedman explains, when a person is reporting details of a past crime to government authorities, or to even to non-governmental personnel, with the understanding that the statement will be recorded by officialdom in the context of a criminal matter, that statement is testimonial. Cromer, 2004 WL 2711130, *9; Friedman, 86 Geo. L.J. 1042-43. A reasonable person would see Ms. Webb as a police employee, who acts as a liaison to aid the victim’s access to the police, prosecution, and courts, and thus would expect that statements made to her will be recorded and available for use in a later investigation.

testimonial.”).

⁶ See In re Personal Restraint of Orange, __Wn.2d __, 100 P.3d 291, 295 (2004) (Supreme Court ordered reference hearing after oral argument to determine factual issues not sufficiently explored at trial).

v. Statements were erroneously and prejudicially labeled nonhearsay when they in fact amounted to and were used as substantive testimony. Questions of whether statements fit into an evidentiary rule exception are entirely irrelevant under Crawford. 124 S.Ct. at 1364 (“we once again reject” view that Confrontation Clause depends on “the law of Evidence for the time being.” quoting 3 J. Wigmore, Evidence § 1397, at 101 (2d. ed. 1923). The only question is whether the statements made by the nontestifying witnesses are essentially statements made by a “witness,” i.e., a person bearing testimony, who is not subject to cross-examination. Cromer, 2004 WL 2711130, * 12.

Crawford notes that statements not used for the truth of the matters asserted may not be testimonial. Crawford, 124 S.Ct. at 1369 n.9. This principle has no bearing on the issue in the case at bar, since the purported “nonhearsay” purpose of the statements was a ruse to introduce the detailed substance of Mr. Santoso’s allegations against Mr. Mason relating to the earlier, uncharged assault and kidnapping allegations.

Labeling testimony exempt from hearsay or confrontation rules as it is merely showing the witness's "state of mind" or explaining why the police acted as they did in no way circumvents the confrontation clause. Instead, the court must inquire into the actual purpose and likely use of that testimony. Cromer, 2004 WL 2711130, *12, see United States v. Fountain, 2 F.3d 656, 669 (6th Cir. 1993)¹ (where purported "scene setting" evidence irrelevant since motives of police of no material consequence, evidence must have been intended to establish truth of matter asserted and not purported non-hearsay reason); Stewart v. Cowan, 528 F.2d 79, 86 n.4 (6th Cir. 1976) (declarant's statements implicating appellant go to heart of prosecution's case and therefore may not be admitted under the exception for explaining why police took certain actions).

Under the guise of the state of mind exception, the prosecution elicited, in painstakingly detailed fashion, evidence repeating Mr. Santoso's allegations against Mr. Mason. In the prosecutor's summation, he argued that the corroborating details supplied by these statements admitted as "state of mind" or "background" information proved Mr. Santoso's allegations were

⁷ In relevant part, Article 1, § 22 states, "

true and Mr. Mason was the perpetrator of the murder and the assault. By using some of the hearsay evidence as proof of Mr. Mason's guilt, its erroneous admission may not be considered harmless. United States v. Silva, 380 F.3d 1018, 1020-21 (7th Cir. 2004) (by explicitly using evidence as proof of guilt when admitted as "not for the truth," error is not harmless).

The prosecution contends Mr. Mason conceded the jury was adequately instructed as to the limited purpose of the evidence when he declined the court's offer of further instructions. In Silva, the trial court issued a similar instruction to the jury. 380 F.3d at 1020. The Seventh Circuit found the instruction laughable, since the statements directly implicated the defendant and could not have served any material purpose other than showing his guilt. Id.

Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule. . . . Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers. See Crawford [citation omitted].

Id.

In the instant case, counsel's desire to not request further instructions as to the police officers' testimony likely resulted from both the hope not to draw further attention to the matter as well as the sense that an additional instruction would be pointless. Counsel had already objected to the admission of these statements and been denied any relief. The damage, once done, could not be undone. Stewart, 528 F.2d at 86 n.4 ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .'Bruton v. United States, 391 U.S. 123, 129, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)").

Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962) (internal quotations omitted); see also State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139, 147 (1977).

b. The forfeiture by wrongdoing doctrine may not be used in this case to avoid confrontation. Although never explored in any detail or accepted as a rule of evidence in Washington, the State urges this Court to broadly accept, adopt, and apply the

doctrine of forfeiture by wrongdoing. Under this doctrine, a person whose wrongdoing is responsible for keeping a witness from testifying at trial, and who acted for the purpose of keeping that witness from testifying at the trial, may not benefit from such wrongful acts by excluding otherwise admissible statements made by the missing witness. Fed. R. Evid. 804(b)(6). While this doctrine may indeed apply in certain cases, the case at bar is not one of them.

The constitutional right to confront witnesses is an “essential and fundamental requirement” for a fair trial that may not be deemed waived absent a clear showing of purposeful wrongful behavior. State v. Crawford, 147 Wn.2d 424, 431, 54 P.3d 656 (2002), overruled by Crawford, *passim*. While the Washington Supreme Court decision in Crawford was overruled based on its misapplication of reliability analysis, the court’s discussion of forfeiture may set some ground rules for the doctrine’s application in Washington. As the Washington court explained, the doctrine “at the least” requires the trial judge to find defendant is the cause of the declarant’s unavailability for the purpose of keeping him from testifying by a certain standard of proof and after a hearing outside the presence of the jury. Id. at 431 n.2.

Since the Washington Constitution, Article 1, § 22⁷ contains a more stringent confrontation requirement than the Sixth Amendment, it is reasonable to conclude that whatever the doctrine in Washington, it will be a stricter requirement than one adopted by federal evidentiary rules. State v. Smith, 148 Wn.2d 122, 131, 59 P.2d 74 (2003),¹ citing State v. Foster, 135 Wn.2d 441, 473-74, 957 P.2d 712 (1998) (Alexander, C.J., concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting).⁸

The prosecution takes the unprecedented position of encouraging this Court to reverse the trial court's pretrial

⁷ In relevant part, Article 1, § 22 states, "[I]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face."

⁸ The Smith Court did not explore the protections provided by the state constitution, as the petitioner did not adequately brief the issue and the case was decided favorably in Sixth Amendment grounds. Smith, 148 Wn.2d at 131, 139-40.

⁹ In Foster, five justices agreed that the state confrontation clause is more protective than the federal confrontation clause: the one-justice concurrence/dissent and the four-justice dissent. The concurrence/dissent created a plurality that the conviction should be affirmed. The concurrence/dissent created a plurality that the conviction should be affirmed.

Because the Washington Supreme Court has already recognized the confrontation right guaranteed by the state constitution is broader than that guaranteed by the federal constitution, a full analysis as set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) is not required. See State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).

evidentiary decision after the trial has been concluded, not based upon the trial court's abuse of discretion, but instead based upon all the evidence presented at trial, which it argues shows the trial court could have ruled another way. This *post hoc* approach to evidentiary rulings is inappropriate and underscores the weakness of the State's argument.¹

Before trial, the prosecution asked the trial court to admit Mr. Santoso's statements to the police into evidence under the forfeiture by misconduct doctrine. 4/3/03RP 57. The State claimed it bore the burden of showing, by at least a preponderance of the evidence if not beyond a reasonable doubt, Mr. Mason was responsible for Mr. Santoso's absence from trial and therefore his hearsay statements should be admissible despite the lack of confrontation.

The trial court decided the prosecution had not met its burden of proof. 4/3/03RP 57-58. It did not have enough information before it to conclude Mr. Mason was responsible for Mr.

¹⁰ None of the cases cited by the prosecution involve the situation in the case at bar, where the trial court rejected the prosecution's efforts to admit evidence under the forfeiture by wrongdoing theory, having found insufficient proof of purposeful wrongdoing by the accused, and the appellate court reversed that decision. Resp. Brf. at 35-39.

Santoso's absence and that he acted for the purpose of preventing him from testifying at trial. Id. at 58. The prosecution never renewed its motion to admit Mr. Santoso's statements under this doctrine, as it said it might do. Id. at 60.

The court's evidentiary decision was correct. It did not have sufficient evidence before it to conclude Mr. Mason was responsible for Mr. Santoso's death. The State did not ask the court to preliminarily admit all of his statements and then strike them if it did not meet its burden of proof, instead the prosecutor said he might renew his motion later but he did not. 4/3/03RP 60.

The State now claims that the court should have admitted Mr. Santoso's statements, and then stricken them had the State not proven Mr. Mason was responsible. The prosecution does not deign to address the real possibility that substantial prejudice would attach to such a maneuver. The likely prejudice would be so overwhelming that no curative instruction could even pretend to remedy the tainted evidence heard by the jurors.

Indeed, there is a significant likelihood the court would not have found the prosecution met its burden of proof. The jurors did

¹¹ To the extent the prosecution now claims t

not believe Mr. Mason killed Mr. Santoso for the purpose of keeping him from testifying. Indeed, whatever his motives could have been, the prosecution's evidence at best indicated Mr. Mason was troubled, in debt, and somewhat out of control financially, sexually, and behaviorally. These problems predated the January assault and continued regardless of that case. Thus, even if the court felt the prosecution had adequately proven Mr. Mason's culpability, his purpose was never clear and it is not for this Court, sitting without the witnesses before it, to make independent determinations. In re Personal Restraint of Gentry, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999) (trial court evaluates demeanor and weighs evidence). The jurors rejected the notion that Mr. Mason acted for the purpose of keeping Mr. Santoso from testifying and the trial court would likely have reached the same decision. In any event, since the prosecution never asked the court to revisit its decision, it cannot complain of the court's failure to do so on appeal.¹²

¹² To the extent the prosecution now claims the trial deputy had no incentive to renew his application since the evidence was admitted on other grounds, this argument only underscores the evidence was in fact admitted and freely used for the truth of the matters asserted. Resp. Brf. At 41.

c. The prosecution's harmless error analysis is fundamentally flawed. The prosecution presents five factors discussed in State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995), as a definitive test of whether the error was harmless beyond a reasonable doubt. Resp. Brf. at 42. Yet, Powell said these factors are nonexclusive examples of issues to consider. Powell, 126 Wn.2d at 267 ("we consider factors such as . . ."). Lost in the State's argument is the essential ingredient that reversal is required unless the prosecution proves and "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (Emphasis added.) State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), citing Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The reason the prosecution spent weeks of trial devoted to various police officers and police employees recounting Mr. Santoso's statements was they substantially and fundamentally bolstered its case. Dean Anderson was no pillar of credibility; he

was an admitted daily abuser of hard drugs at the time of the incident who himself manipulated Mr. Santoso, never paid rent, and was at one point considered a prime suspect for the offense charged. 4/10/03RP 125-26, 145. Mr. Santoso's sister recounted information that would never have been admitted, at least in the detail that it was, had the numerous police officers not testified about what Mr. Santoso told them, as by the time she testified, the only strategy the defense could employ was to try to draw contradictions in Mr. Santoso's uncross-examined statements. Likewise, Dr. Gross's statements, repeating Mr. Santoso's allegations in broad terms without great detail, would have had little impact if they were not so strongly corroborative of the statements the police had already recounted in such detail. Moreover, much of Dr. Gross's testimony was not directly related to medical diagnosis and would have been objected to by any reasonable attorney if the door had not been already so widely open that cross-examination through inconsistency was not the only available defense tactic. State v. Redmond, 150 Wn.2d 489, 497, 78 P.3d 1001 (2003) (statements identifying assailant and not directly related to cause of actual injury not admissible under medical hearsay exception).

Mr. Mason was wholly unable to challenge the credibility of most of the evidence against him, as it was recounted by hearsay witnesses. In a case predicated on circumstantial evidence, many of those circumstances came from declarants never tested by the crucible of confrontation as the constitution requires. Given the magnitude and volume of statements improperly admitted, the error most certainly contributed to the verdict obtained and therefore is not harmless beyond a reasonable doubt.

2. BY PROHIBITING THE DEFENSE EXPERT FROM TESTIFYING ABOUT A CRITICAL THEORY OF DEFENSE THAT IS WELL-SUPPORTED BY SCIENTIFIC EVIDENCE, THE COURT DENIED MR. MASON HIS RIGHT TO PRESENT A DEFENSE.

As explained in Mr. Mason's Opening Brief, 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).

The prosecution utterly misrepresents the importance of Dr. Libby's excluded testimony. The court barred Dr. Libby from testifying about his opinion that the likelihood of Mr. Mason's DNA in the mixed blood samples was substantially different from the

odds given by the State's expert. 6/4/03RP 84. The court acknowledged Dr. Libby's testimony involved a "central issue" and Dr. Blake's testimony about the mixed DNA in Mr. Santoso's car was the "most damaging forensic evidence" against Mr. Mason. 6/4/03RP 105.

Dr. Libby concluded that the mixed samples, since they contained masked alleles, could broadly apply to many people. 6/4/03RP 75. When an allele is masked, meaning one of the four alleles that should be present in a two person sample is not clearly shown, the appropriate calculation of the likelihood the genotype matches an individual's genotype is based on the unknowability of that allele. 6/4/03RP 84.

During the Frye hearing, Dr. Libby offered a mathematical equation that explains how the frequency calculation is established. 6/4/04RP 78. His opinion was based on a "standard formula" of statistical analysis used in computing the frequency of the unknown allele. Id. at 77-78. At the hearing, he offered as support a text that generally relied upon in the field as supporting the approach he favored. 6/4/03RP 74, People v. Pizarro, 3 Cal. Rptr.3d 21, 46, rev. denied, 2003 Cal. Lexis 77186 (2003). Additionally, in his motion to reconsider he offered articles that support the "probability

of exclusion" approach he used, as opposed to the deductive approach used by the prosecution's expert. His theory rested on the sound and well-accepted theory that if even a single allele differs from a person's DNA, that person may not be the source of the DNA. Gore, 143 Wn.2d at 302.

The prosecution asserts the court barred only a portion of Dr. Libby's testimony so the doctor could have testified about other aspects of the DNA evidence. However, Mr. Mason primarily wanted Dr. Libby to rebuke the prosecution's claim that the mixed blood sampled definitively, as a matter of incredible odds, established Mr. Mason's presence in Mr. Santoso's car. This testimony was the only real subject of dispute, as the single source DNA was not contested. Thus, the mere fact that Dr. Libby could have testified about different topics is entirely beside the point.

Additionally, the prosecution misstates Dr. Libby's proffered testimony and then attacks this misstated explanation. Although it was referred in shorthand by the court and prosecution that Dr. Libby's believed 30-80 percent of the relevant population field could not be excluded from the mixed samples, Dr. Libby explained his position in far greater detail and far more coherently, both during the hearing and in his motion for reconsideration. 6/4/03RP 75-78,

84-85; CP 466-99. Ultimately, he believed that if you accounted for the masked allele, and the frequency of that allele in the male population, the probability that Mr. Mason could have been a source for the DNA in the mixed samples was one in 830,000, as opposed to one in 100 million as Dr. Blake claimed. 6/4/03RP 84.

Moreover, the prosecution seems to assert that since Dr. Libby did not exclude Mr. Mason as a possible donor to the mixed blood samples, his testimony would not have been helpful to the jurors. In fact, Dr. Libby said that Mr. Mason could be a donor, as could many others, and Dr. Blake was wrong in concluding that Mr. Mason was the likely donor to an overwhelming degree. Dr. Libby's interpretation of the data as showing the odds were not nearly as high that Mr. Mason's blood was contained in the mixture would have been incredibly helpful for the jury in evaluating the "damaging" forensic evidence presented by the prosecution, and therefore was of critical importance to the defense. 6/4/03RP 105. The trial court never believed the information would not be helpful to the jurors; it concluded the opinion offered did not meet the Frye standard.

Finally, the prosecution gratuitously attacks Dr. Libby's credibility, implying it would have eviscerated him at trial and thus

the jury would not have believed him. Of course, the Frye determination is a legal and scientific test, without a credibility evaluation conducted by an appellate court on a limited record.

The prosecution's expert was not beyond reproach. The deductive approach he used is widely disregarded as proper when evaluating mixed samples with a masked allele. Dr. Libby would have warned against such an approach as highly dangerous, since if that allele is incorrectly presumed, the entire DNA match would be invalid.

The court erroneously denied Dr. Libby's testimony about the propriety of using a different means for assessing the likelihood Mr. Mason's DNA was contained in the mixed blood samples, based on a misunderstanding of the scientific concept underlying Dr. Libby's testimony. The court correctly acknowledged the importance of the testimony at issue, and by improperly refusing to allow the jury to hear Dr. Libby's testimony, it denied Mr. Mason his right to present a critical aspect of his defense.

3. THE OPINION TESTIMONY WAS IMPROPERLY ADMITTED AND, EVEN THOUGH PARTIALLY STRICKEN, IT WAS SO PREJUDICIAL THAT IT, ALONG WITH OTHER ERRORS, DENIED MR. MASON A FAIR TRIAL.

a. The medical examiner's opinion of death was wholly invalid and markedly prejudicial. Contrary to the prosecution's claim, it was not Dr. Haruff's job to issue a death certificate for Mr. Santoso. The law bars Dr. Haruff from issuing a death certificate when no dead body has been discovered unless the death was the result of an accident or natural disaster. RCW 70.58.390. Dr. Haruff exceeded his authority when he issued the death certificate in the case at bar.

The court's belated decision to strike Dr. Haruff's opinion that Mr. Santoso had died on the day following the doctor's testimony was insufficient to cure the prejudice resulting from the improperly admitted testimony. Dr. Haruff relied on the same information as was presented to the jurors and gave an opinion on an ultimate issue before the jury. He was not relying upon his medical expertise, as there was no medical evidence to assess, instead, he used circumstantial evidence to conclude that Mr. Santoso had suffered injuries involving the loss of a lot of blood and since he has not appeared in public since, he must have died.

5/28/03RP 40-44, 61-62.

Regardless of the court's instruction to disregard Dr. Haruff's issuance of the death certificate, without otherwise striking his

testimony, that instruction could not reasonably erase the harm flowing from the court's error. 5/29/03RP 7-8, 12. Having heard that a respected member of the medical establishment reviewed the same evidence as they did, jurors would surely feel encouraged and even pressured to reach the same conclusion as the medical examiner.

In determining prejudice, this Court does not merely rely upon the trial court's determination that the error did not require a mistrial. Resp. Brf. at 62. Instead, this Court reviews the error as it is raised on appeal, and as one of many trial errors that even if by itself does not require a new trial, combined with other errors renders the likelihood of a tainted verdict too strong to be harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Especially when the improper opinion testimony comes from a government official, its prejudice is likely to be significant. State v. Dolan, 118 Wn.App. 323, 331, 73 P.2d 1011 (2003).

b. The other opinion testimony was erroneously admitted. Before trial, the court granted the prosecution's motion to exclude any witness from saying a murder occurred. CP 342 (Prosecution's Supplemental Memorandum); 4/2/03RP 177. As argued in Appellant's Opening Brief, the other witnesses who told

the jury in no uncertain terms they believed Mr. Mason was guilty similarly offered inadmissible opinion testimony. State v. Barr, Wn.App. __, 98 P.3d 518, 522 (2004). Whether these witnesses believed Mr. Mason was guilty was irrelevant and extremely prejudicial. Id. at 522-23 (finding opinion testimony manifest error affecting constitutional right requiring reversal).¹⁴ Even when the court gave a limiting instruction or told the jury to disregard a few of those statements, it is a legal fiction to believe the information placed before the jury could be erased from consideration. Silva, 380 F.3d at 1020; Dolan, 118 Wn.App. at 331.

4. THE UNCHARGED WRONGFUL ACTS WERE IMPROPERLY ADMITTED.

The two knives and one firearm admitted into evidence and discussed in great detail at trial were far from relevant in the case at bar. The prosecution claims the gun corroborated the complainant's allegations, but essentially they merely corroborate the inadmissible hearsay offered by the police who seized evidence based on what Mr. Santoso "told them." Furthermore, corroborating Mr. Santoso's claims about a less than central issue

¹⁴ Similarly, as argued in section 1(v), the witnesses' "state of mind" were irrelevant and far too prejudicial to constitute grounds for admission of opinion as to Mr. Mason's guilt.

may make the weapon marginally relevant, but most certainly does not override the enormous prejudice attached.

The prosecution claims the folding knife, remarkably similar in appearance to the alleged murder weapon, was relevant since it increased the likelihood Mr. Mason was the murderer. This argument demonstrates the fundamental flaw in the prosecution's analysis, as it is relevant for the wholly improper purpose of concluding that because he had a knife on one occasion, he must have had one at the time of the incident, and indeed that he is regularly prepared for violent behavior.¹⁶

Furthermore, contrary to the prosecution's claims, the defense objected to drawing attention to certain pages of the book, the Ancient Art of Strangulation, as they would be taken out of context. 5/14/03RP 8-9. This objection preserves its claim that the prosecution, by highlighting the "vulgar" sexual details in the book, tried to use it to paint Mr. Mason as a dangerous sexually deviant person.

¹⁵ See State v. Freeburg, 105 Wn.App. 492, 501, 20 P.3d 989 (2001) (citing authorities holding that admission of uncharged weapon possession carries grave danger of improperly viewing accused as violent by nature)

The fact that Mr. Mason was charged with the January 23rd incident itself would be admissible at trial, since the prosecution was alleging the killing occurred for the purpose to preventing him from testifying. CP 11. Yet the prosecution engaged in such a full-scale recreation of the prior incident that its probative value was far diminished by its undue prejudicial effect. See State v. Oster, 147 Wn.2d 141, 148, 52 P.3d 26 (2002) (evidence of prior crimes “very” and “inherently” prejudicial). The court erred by not recognizing and ameliorating the extreme prejudice attached to the repetition of details and deep exploration of the earlier assault.

The prosecution’s remaining reasons for admitting undue prejudicial evidence of misconduct or socially reprehensible behavior are flimsy and only illustrate the evidence’s irrelevance to issues other than as an attack on Mr. Mason’s general character. Resp. Brf. at 75-85; Appellant’s Opening Brief at 49-56.

5. THE AGGRAVATING ELEMENT SUBSTANTIALLY INCREASING MR. MASON’S SENTENCE WAS PLAINLY AN ELEMENT OF AN AGGRAVATED CRIME.

In Washington, all elements of a charged crime must be contained in the “to-convict” instruction. Oster, 147 Wn.2d 141, 148, 52 P.3d 26 (2002). THE COU P.2d 917 (1997). The prosecution incorrectly asserts that this

Court must turn a blind eye to the inadequate “to convict” instruction since State v. Kincaid, 103 Wn.2d 304, 311-13, 692 P.2d 823 (1985), which stated that aggravating factors are not elements, has not been formally overruled.

Despite the prosecution’s inability to concede a change in the law has occurred, the foundation of Kincaid has crumbled in light of decisions in State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004); Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 738 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and Blakely v. Washington, __ U.S. __, 124 S.Ct. 2531, 2537, 159 L.Ed.2d (2004).

In Thomas, citing Apprendi and Ring, the Washington Supreme Court acknowledged that a factual determination increasing punishment, while not labeled an “element,” increases the penalty beyond that allowed for first degree murder. Thomas, 150 Wn.2d at 848-49. Apprendi, Ring, and Blakely undeniably hold that the Sixth and Fourteenth Amendments consider any factor increasing the penalty beyond the maximum set forth by a statutory sentencing range to be an “element” of an offense no matter what other word is used as its label, be it “sentencing factor[], or Mary Jane.” Ring, 122 S.Ct. at 2444 (Scalia, J., concurring); see

Apprendi, 530 U.S. at 477; Blakely, 124 S.Ct. at 2536. Since an element includes a factor that aggravates a sentence beyond the presumptive statutory range, as is true with the aggravating factors in the case at bar, those elements must be included in the “to convict” instruction. Oster, 147 Wn.2d at 147 (only exception to rule mandating complete “to convict” instruction for all elements of offense applies when prior convictions are elements).

The prosecution also incorrectly claims Mr. Mason may not raise this issue for the first time on appeal both because it is not a manifest issue affecting a constitutional right and because Mr. Mason proposed the same instruction as the prosecution used on appeal.

Mr. Mason did not propose an incorrect instruction and thereby waive his right to make the instant challenge on appeal. Resp. Brf. at 88. He proposed a few instructions, one of which contained the “to convict” instruction for murder in the first degree. CP 687-700. He did not offer any instructions on the offense of aggravated first degree murder, and proposed no instructions addressing the aggravated elements in any way. Id. His instruction was merely an instruction for the offense of first degree murder, akin to the second degree murder and first degree

assault instructions he also proposed. CP 693, 694, 697.

Therefore, he did not invite the error complained of on appeal.

See City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (by proposing exact instruction complained of on appeal, defense invited error).

The reviewability of this issue even absent an objection below is well-settled and supported by "extensive authority." State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 713 (2002) (defendant may challenge aggravating factor instruction for first time on appeal as it raises manifest error affecting constitutional right). Mr. Mason may raise this issue for the first time on appeal.

6. THE BURGLARY EVIDENCE WAS INSUFFICIENT.

The prosecution incredibly basis its claim of proof for unlawful entry on the fact a brick was through threw a window, even though its witnesses and its brief agree that no one entered through the broken window. 4/23/03RP 116, 134-35. Additionally, it speculates that Mr. Santoso would not have let Mr. Mason enter his apartment. But Mr. Santoso is the person who called Mr. Mason hours after he allegedly almost strangled him to death because he was concerned that Mr. Mason was upset. 4/10/04 112.

The State is not permitted to base a verdict on speculation and conjecture. State v. Todd, 101 Wn.2d 945, 950, 6 P.3d 86 (2000). Absent evidence Mr. Mason lacked permission to enter or remain, committing a crime therein does not establish a burglary. State v. Miller, 90 Wn.App. 720, 725, 954 P.2d 925 (1998).

C. CONCLUSION.

Mr. Mason respectfully requests this Court reverse his conviction and sentence, and remand his case for a new trial.

DATED this 9th day of December 2004.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 52824-6-1
)	
KIM MASON,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 9TH DAY OF DECEMBER, 2004, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENTS OF ERROR** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE DIVISION
KING COUNTY COURTHOUSE, W-554
516 THIRD AVENUE
SEATTLE, WA 98104

- [X] KIM MASON
DOC# 860319
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF DECEMBER, 2004.

x 

2004 DEC -9 PM 4:53

COA NO. 52824-6-1

