

FILED
AUG 11 2005
APPELLATE DEPARTMENT
APL

77507-9

Supreme Court No. _____
(COA No. 52824-6-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIM HEICHEL MASON,

Appellant.

FILED
DEPT OF APPELLATE JUSTICE
2005 JUL 13 PM 4:40

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

The Honorable Michael J. Fox

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Kim Heichel Mason, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4 (b).

B. COURT OF APPEALS DECISION

Mr. Mason seeks review of the partially published decision by Court of Appeals affirming his conviction for aggravated first degree murder and his sentence of life without the possibility of parole, attached as Appendix A. The Court of Appeals denied Mr. Mason's motion to reconsider without comment on June 10, 2005, and granted a motion to publish an additional portion of the opinion on June 13, 2005, copies of which are attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Under Crawford v. Washington,¹ an out-of-court statement by an absent declarant describing a completed crime to police officers or police employee victim advocates requires confrontation to satisfy the Sixth Amendment. The Court of Appeals decision contravenes both Crawford and this Court's ruling

¹ Crawford v. Washington, 51 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

in Davis² in deciding that such statements are either non-testimonial or harmless when other evidence could have established guilt. Does the Court of Appeals decision incorrectly interpret Crawford, contravene Davis, and raise an issue of substantial public interest?

2. This Court ruled in Townsend³ trial judges must not alert jurors that the death penalty is not a possible penalty in a murder case, based on longstanding principles that the jury must decide the case without weighing possible punishment. The Court of Appeals decision affirmed the trial court's purposeful disregard of Townsend. Should this Court accept review where the published Court of Appeals decision directly conflicts with this Court's ruling in Townsend?

3. Frye⁴ hearings are required only when the admissibility of novel scientific practices are at issue. Here, the court held a Frye hearing for proffered statistical analysis and found the statistics employed by the defense expert did not meet the Frye test, thus barring the defense from introducing critical information questioning

² State v. Davis, ___ Wn.2d ___, 111 P.3d 844 (2005), petition for certiorari filed July 8, 2005.

³ State v. Townsend, 142 Wn.2d 838, 844-46, 15 P.3d 145 (2001).

⁴ Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923).

the likelihood Mr. Mason was the source of blood found in the decedent's car. Did the trial court err and deprive Mr. Mason of his right to present a defense by conducting a Frye hearing when no novel scientific technique was at issue?

4. Did the court improperly limit Mr. Mason's ability to defend himself when case law and scientific literature plainly demonstrate that the defense expert's approach to analyzing a mixed sample of DNA was generally accepted in the relevant scientific community?

5. Did the Court of Appeals violate Mr. Mason's constitutional right to a fair trial by jury when it upheld the admission of evidence from a medical examiner addressing the ultimate issue as to whether the alleged victim, missing but never found, was in fact dead?

6. The prosecution introduced a steady stream of evidence of marginal probative value that directly attacked Mr. Mason's character. Did the court violate Mr. Mason's right to due process of law by permitting the State to premise its case upon Mr. Mason's bad character?

7. Sufficient evidence of burglary requires evidence the accused lacked authority to enter or remain inside a building.

Where there was no evidence Mr. Mason lacked permission to enter or remain in the building, was there sufficient evidence to prove Mr. Mason committed a burglary?

8. The rights to due process of law and trial by jury require the court fully instruct the jury on every element of a charged offense in an unambiguous fashion. In the case at bar, whether the offense occurred in the course of certain aggravating factors was an essential element of the offense of conviction. Did the court's failure to include this element in the "to convict" instruction and the Court of Appeals' declaration that aggravating factors are not elements improperly deny Mr. Mason due process of law and the right to trial by jury?

D. STATEMENT OF THE CASE.

Herberto Santoso went to a neighborhood police station and reported to a police detective that the day before, he had been assaulted, threatened, and restrained against his will by Kim Mason. 4/30/03RP 119-27. Mr. Mason was arrested and charged with first degree kidnapping and attempted robbery in the first degree. Ex. 384; 5/29/03RP 4. Approximately one month later, Mr. Santoso disappeared. Police found his car at the SeaTac airport parking lot. 4/23/03RP 113, 117. Inside the car, blood matching

his DNA was found. Some blood inside the car came from more than one person. State's witness Dr. Edward Blake testified that the odds this mixed sample of blood was not from Mr. Mason, based on a deductive analysis, was one in 14 trillion. 6/9/03RP 113, 115, 140-42; 6/10/03RP 98, 99. The trial court barred defense expert Dr. Randall Libby from testifying that pursuant to a widely accepted probability of exclusion approach, 30 to 80 percent of the population could not be excluded from the mixed genes found in the DNA sample. CP 449 (Def. Offer Proof).

At trial, the court permitted a number of police officers to testify about statements Mr. Santoso made to them, even though Mr. Mason never had the opportunity to confront him or cross-examine his statements. Additionally, the court admitted evidence from the King County medical examiner that Mr. Santoso was legally presumed dead and that the evidence showed he was dead. Further evidence was admitted that Mr. Mason lied on employment applications and loan forms, asked a girlfriend to have group sex with him, read a book describing the sexual pleasure one may get from strangling someone, belittled his girlfriend by making her keep the door open while she went to the bathroom, and kept multiple knives and a gun in his home.

In a published opinion, the Court of Appeals rejected Mr. Mason's arguments and affirmed his conviction and sentence. The Court of Appeals decision is discussed in detail below. The facts are further set forth in the Court of Appeals opinion, pages 2-4, and Appellant's Opening Brief, pages 5-9. The facts as outlined in each of these pleadings is incorporated by reference herein.

E. ARGUMENT.

1. THE PUBLISHED DECISION IS CONTRARY TO THIS COURT'S RULING IN *DAVIS* AND RAISES AN IMPORTANT CONSTITUTIONAL ISSUE THAT HAS NOT YET BEEN DECIDED BY THIS COURT, THEREBY REQUIRING REVIEW AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

In a decision issued shortly before this Court decided Davis, the Court of Appeals set forth a multi-pronged test that must be applied when deciding whether statements to a police officer are "testimonial" and require in-court confrontation pursuant to the Sixth Amendment under Crawford. Applying this test, the court found admissible a number of statements reporting a past crime to police officers even though these statements were plainly given to the police in order to aid in an investigation and prosecution. The case at bar requires an analysis not directly presented in Davis but likely to commonly recur, addressing the question of when

statements given to a police officer reporting or investigating a crime are “testimonial.”

a. The issue of whether conversations with police officers reporting a crime are “testimonial” has not yet been decided by courts in Washington. In Crawford, the United States Supreme Court abandoned its prior framework for assessing Confrontation Clause claims and held that “testimonial” statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. The Court expressly declined to comprehensively define testimonial. Id. at 68.

In its first application of Crawford in a case involving statements to a 911 operator, this Court distinguished reporting a crime to a 911 dispatcher from reporting a crime to the police. Davis, 111 Wn.2d at 849. Because “a 911 operator is not a police officer” statements to the operator are less likely to be made with the understanding they will be used in a criminal prosecution. Id. Moreover, “[i]n most cases, one who calls 911 for emergency help is not ‘bearing witness,’ whereas calls made to the police simply to report a crime may conceivably be considered testimonial.” Id. at 850.

Courts from other jurisdictions have issued varying decisions as to whether and under what circumstances statements to police describing a completed crime are “testimonial” and require confrontation. Compare People v. West, 823 N.E.2d 82, 91-92 (Ill. App. 2005) (statements to police testimonial regardless whether labeled interrogations); Gay v. State, 611 S.E.2d 31, 33 (Ga. 2005) (witness’ statements to police at hospital shortly after event testimonial); United States v. Saner, 313 F. Supp. 2d 896 (S.D. Ind. 2004) (statements in response to prosecutor’s questions during interview testimonial) with Leavitt v. Arave, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (alleged victim statement to officer responding to 911 call not testimonial); Fowler v. State, 809 N.E.2d 960 (Ind. App. 2004) (statements to police informally investigating crime not testimonial), transfer granted (Ind. Dec. 9, 2004); State v. Maclin, 2005 WL 313977 (Tenn. App. Feb. 9, 2005) (same); Wilson v. State, 151 S.W.3d 694 (Tex. App. 2004) (statement to responding officer not testimonial where not answering tactically structured questions).

In the case at bar, the trial court admitted numerous uncross-examined statements made by an absent declarant, Mr.

Santoso, to police officers about an alleged crime. These statements were testimonial in nature: they were made at a police station, with the knowledge that the declarant was speaking to police employees, with the subjective purpose of reporting a crime that had been completed at least one day before, and with the objectively reasonable understanding that information received by the police would be used in the police investigation and prosecution. Moreover, the court labeled statements non testimonial when made to a police employee who served as a victim advocate, even though her role as a police employee and member of the prosecution team was clear. See King County Prosecuting Attorney, Protection Advocacy Program, Advocacy Services, <http://www.metrokc.gov/proatty/POP/services.htm> (describing victim advocates role as member prosecution team).⁵

The jury heard a lengthy statement Mr. Santoso made to a police officer at the police station describing an alleged crime on the grounds that it was excited utterance and thus *per se* exempt from the requirements of the confrontation clause. While the trial

⁵ See also State ex. Rel. Brandenburg v. Blackmer, 110 P.3d 66, 71 (N.M. 2005) (victim advocate reasonably expected to communicate with prosecution, is part of prosecution, and is protected by work product doctrine).

court's reasoning was obviously incorrect pursuant to Crawford, the Court of Appeals declined to rule upon the impropriety of admitting these statements. Instead, the Court of Appeals held its admission was harmless even though this error affected all others as it let the cat out of the bag of substantial uncontroverted testimony accusing Mr. Mason of a crime. By failing to consider the fact that these plainly inadmissible statements to Corporal Haslip preceded the numerous other out-of-court statements by Mr. Santoso and the defense was forced to focus on conflicts between the various statements as the only way to attack their credibility, the harmless error analysis is fundamentally flawed. Accordingly, not only did the Court of Appeals fail to define the testimonial nature of a statement given at a police station to report a crime, the court overlooked the obviously constitutional nature of the error in its published opinion.

b. The "state of mind" exception to the hearsay rule does not erase the testimonial nature of statements introduced in the case at bar. Questions of whether statements fit into an evidentiary rule exception are entirely irrelevant under Crawford. 541 U.S. at 51 ("we once again reject" view that Confrontation

Clause depends on ‘the law of Evidence for the time being.’”
quoting 3 Wigmore 1397, at 101). 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. United States v. Cromer,
389 F.3d 662, 673 (6^h Cir. 2004).

Here, 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 by claiming it merely shows 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, 389 F.3d at 674, see United States v.
Fountain, 2 F.3d 656, 669 (6th Cir. 1993)⁶ (where motives of police
not of 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)

⁶ cert. denied, 510 U.S. 1014 (1993) and overruled on other grounds,
Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999).

(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 proved Mr. Santoso's allegations were true and Mr. Mason was the perpetrator of the murder and the assault. By using this hearsay evidence as proof of Mr. Mason's guilt, these statements were plainly testimonial and their 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).

c. Substantial public importance requires review.

The case at bar raises issues regarding the application of the confrontation clause to interactions between witnesses and police that will undoubtedly routinely recur. The Court of Appeals neglected to issue a decision that clearly resolves these issues. This Court should accept review to settle the question of when

statements to the police describing a completed crime are testimonial and require confrontation.

2. THE PUBLISHED DECISION DIRECTLY CONFLICTS WITH, AND IMPLICITLY SEEKS TO OVERTURN, BINDING PRECEDENT ISSUED BY THIS COURT IN TOWNSEND.

This Court ruled it is improper to inform jurors that the death penalty will not be imposed upon a conviction in an aggravated first degree murder case. Townsend, 142 Wn.2d at 844-46. As the Townsend Court held, “[t]his strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations.” Id. at 846.

The rule on which Townsend is based stems from long-standing principals barring the court from commenting to the jury on sentencing issues. Id.; see Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994); State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960) (“The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases.”). These principals are based on the interests inherent in receiving a fair trial

by jury and due process of law. Shannon, 512 U.S. at 579-80; U.S. Const. amends. 6,⁷ 14,⁸ Wash. Const. art. I, sections 3,⁹ 21,¹⁰ 22.¹¹

As the United States Supreme Court said in Shannon,

Information regarding the consequences of a verdict is . . . irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

512 U.S. at 579. The Court in Townsend rendered its decision based upon a concern that jurors would be affected by receiving sentencing information. 142 Wn.2d at 846-47. This Court found there are unacceptable risks in discussing the penalty with jurors;

if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.

⁷ The Sixth Amendment provides in pertinent part, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury"

⁸ The Fourteenth Amendment provides in pertinent part, no "state [shall] deprive any person of life, liberty, or property, without due process of law"

⁹ Article I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

¹⁰ Article I, section 21 provides in pertinent part, "The right of trial by jury shall remain inviolate"

¹¹ Article I, section 22 provides in pertinent part, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury"

142 Wn.2d at 847. Therefore, voir dire should be used to find jurors who will not be swayed by issues of punishment when deliberating. Id.

In the case at bar, the trial judge informed the parties he believed Townsend was wrongly decided. 2/27/03RP 15-18; 4/1/03RP 6-8. Before trial, the judge stated he intended to disregard Townsend and instruct the jurors as a whole, if any individual juror asked, that Mr. Mason would not receive the death penalty upon a conviction. Id.

The Court of Appeals published decision affirmed the trial court's authority to purposely disregard binding precedent from this Court. The decision permits the trial court to decide what it believes jurors would benefit from hearing even when this Court has specifically admonished trial courts not to deliver that same information to jurors based on long-standing legal principles.

Accordingly, the Court of Appeals' decision disregards mandatory authority from this Court. Furthermore, the published decision potentially undermines this Court's authority generally, as it encourages lower courts to craft new rules contrary to the mandates of this Court based upon personal disagreements with

this Court's reasoning. Therefore, review is warranted under RAP 13.4(a) and (d).

3. THE COURT IMPROPERLY BARRED CRITICAL AND WIDELY ACCEPTED DEFENSE EVIDENCE AFTER A *FRYE* HEARING, THUS RAISING THE CONSTITUTIONAL ISSUE OF DENYING MR. MASON THE RIGHT TO PRESENT A DEFENSE.

- a. The right to present a defense includes the right to offer credible theories criticizing important aspects of the State's case. 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. 6¹² & 14; Wash. Const. art. I, section 22.¹³ 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).

¹² 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. . . ."

¹³ Article I, section 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"

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, 293 F. at 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). 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).

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).

b. The trial court held an unnecessary Frye hearing and erroneously barred the defense from introducing critical information. The principal concern of Frye is, “whether the evidence being offered is based on established scientific

methodology.” State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). 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, 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); 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.

Moreover, the trial court erred by finding Dr. Libby’s statistical approach was not generally accepted in the relevant scientific community, an issue that is reviewed *de novo* on appeal. The probability of exclusion approach favored by Dr. Libby involves the use of mathematics or statistics. CP 447 (Defense Offer of Proof). It looks at the genes displayed on each allele, adds those together, and then multiplies 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.

Because case law and scientific sources demonstrate the approach to mixed sample DNA used by Dr. Libby was widely accepted in the scientific community, the trial court erred by barring him from presenting this approach to the jury. People v. Pizarro, 3 Cal. Rptr.3d 21, 47, 51, rev. denied, 2003 Cal. Lexis 77186 (2003). This error deprived Mr. Mason of his right to present a critical part of his defense and raises an issue of substantial public importance. RAP 13.4(a), (c), (d).

4. THE TRIAL COURT’S EVIDENTIARY DECISIONS VIOLATED BASED PRINCIPLES ASSOCIATED WITH THE RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

a. The court admitted opinion testimony by a medical examiner on the ultimate issue before the 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 facts by the jury. U.S. Const. amend. 6; Wash. Const. art. I, section 21, 22; 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).

Despite repeated defense objections, the court permitted King County chief medical examiner Dr. Richard Harruff to testify he reviewed evidence in the case, concluded he believed Mr. Santoso was dead, and issued a presumptive death certificate. 4/3/01RP 105, 108-09; 5/28/01RP 12, 40-45; CP 397; CP 429-38. The court admitted this testimony even though Mr. Mason had explained that the medical examiner lacked authority to issue such a presumptive death certificate under the governing statute. 4/3/01RP 108-09; 5/28/01RP 5-6, 12.

The day after Dr. Harruff's testimony, the court realized it erred and told the jury to disregard the presumptive death certificate but did not strike Dr. Harruff's testimony. 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. 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).

b. The court admitted a plethora of information with only minor probative value that amounted to a wholesale attack on Mr. Mason's character and his propensity for acting in deviant, violent, or demeaning fashions. 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).

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 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.¹⁴ This evidence improperly admitted evidence, viewed in isolation and taken

¹⁴ The details of these evidentiary errors are set forth in Appellant's Opening Brief at 45-59.

together, served as evidence of Mr. Mason's propensity for having a bad character and deprived him of a fair trial.

5. THERE WAS INSUFFICIENT EVIDENCE MR. MASON COMMITTED A BURGLARY

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); 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. 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).

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).

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); “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.

In the case at bar, there was no credible evidence Mr. Mason lacked permission to enter or remain in Mr. Santoso’s apartment. The door was not broken. There was no testimony or physical evidence showing Mr. Mason was not willingly permitted to

enter the apartment. 4/23/03RP 49-50. While a rock had been thrown through a window, the police ruled out the possibility that someone had entered through that window. 4/22/03RP 116, 134-35. Absent evidence Mr. Mason was not granted permission to enter the apartment, the fact that he allegedly committed a crime therein does not establish a burglary. Id. The erroneous assumption by the Court of Appeals that Mr. Mason must not have been allowed to enter based on unfronted expressions of fear by Mr. Santoso should be reviewed by this Court.

6. THE COURT OF APPEALS INCORRECTLY RULED THAT AGGRAVATING FACTORS ARE NOT ELEMENTS OF THE CRIME.

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); U.S. Const. amend. 14; Wash. Const. art. I, sections 21, 22. 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. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). As this Court recently held in Mills, "an instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged." State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 415 (2005), citing Emmanuel, 42 Wn.2d at 819.

In Mills, the court ruled that elements that enhance a sentence need not be included in the "to convict" instruction as long as they are adequately addressed in a special verdict form. Mills reasoned that the penalty phase should be decided separately from the guilt phase. 154 Wn.2d at 9-10. However, this logic misapplies this Court's precedents as well as the United States Supreme

Court's unambiguous declaration that no matter what factual determinations are labeled, when they increase punishment for a crime they must be considered and treated as elements of the offense. 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).

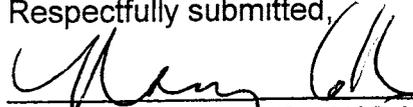
Mr. Mason was charged with aggravated first degree murder. RCW 9A.20.021(1); RCW 9A.32.030(2). Without the jury finding at least one of the aggravating factors, Mr. Mason's offense would have been punishable as first degree murder with a maximum term of life imprisonment *with* the possibility of parole, as opposed to the mandatory term of life without the possibility of parole RCW 10.95.030 (1), (2). The aggravating factors elevated the punishment and were functional equivalents of elements of aggravated first degree murder. Ring, 536 U.S. at 609. Accordingly, they should have been presented to the jury as elements of the offense with the same due process and jury trial rights attached. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); Emmanuel, 42 Wn.2d at 819. The rationale of Mills should be reconsidered.

F. CONCLUSION.

Based on the foregoing, Petitioner Kim Mason respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 13th day of July 2005.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Petitioner

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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



Name

JUL 13 2005

Date

Done in Seattle, Washington

FILED
COURT OF APPEALS DIV. #1
STATE OF WASH.
2005 JUL 13 PM 4:41

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 52824-6-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
KIM HEICHEL MASON,)	PUBLISHED IN PART
)	
Appellant.)	FILED: April 18, 2005
_____)	

AGID, J. -- Kim Mason was convicted of first degree aggravated murder after his friend, Hartanto Santoso, disappeared. Mason appeals, arguing the trial court violated his Confrontation Clause rights by permitting witnesses to testify about statements Santoso made before he disappeared. We hold that out-of-court statements made by unavailable witnesses while in peril, for the purpose of seeking protection, are not "testimonial" and do not fall within the Confrontation Clause's scope as defined by Crawford v. Washington. We affirm.

FACTS

Kim Mason met Hartanto Santoso while the two worked in the same retirement home. Mason was in his early twenties and was a kickboxing instructor and competitor. Santoso, in his early thirties, was an immigrant from Indonesia. The two were friends for approximately two years. Toward the end of 2000, Mason began running into

financial difficulties, and his friends suspected that he was addicted to drugs. At that time, Santoso gave money to Mason and helped him find additional jobs.

On the afternoon of January 23, 2001, Mason invited Santoso to his home. While Santoso's back was turned, Mason strangled him into unconsciousness then bound and gagged him with duct tape. When Santoso awoke, Mason threatened him with a loaded gun and forced him to write his roommate a letter saying that he was leaving town. Mason then forced Santoso to write him a check for the balance of his bank account. At that point, Mason attempted to fill a syringe with drain cleaner and threatened to inject Santoso. Santoso calmed him down and ultimately convinced Mason to release him. Santoso promised not to contact the police.

The next day, Santoso's friend talked Santoso into going to the police department to report the crime. Santoso first went to the Kirkland police, but later that day he spoke with the Redmond police because they had jurisdiction. Police searched Mason's home and found items that corroborated Santoso's description of the events. After he was arrested, Mason told the police that he strangled and bound Santoso and threatened him with a gun, but asserted he did so in self-defense because Santoso had attempted to grab Mason's genitals. Mason claimed the gun was unloaded and that he never displayed a syringe or demanded money from Santoso.

Mason was charged with first degree kidnapping and first degree attempted robbery, but on January 31, 2001, he was released pending trial. When Santoso learned that Mason had been released, he called his King County victim's advocate and expressed his profound fear that Mason would kill him. The victim's advocate helped Santoso obtain a no contact order.

At approximately 10:45 pm on February 19, 2001, Santoso's neighbors heard glass breaking and muffled noises coming from Santoso's apartment. They saw Santoso's car leave the parking lot about 10 minutes later. The next day, neighbors noticed that Santoso's front door was open and a trail of blood led from the door to the parking lot. Police found massive amounts of blood in Santoso's bedroom. The bedroom window was broken, and a cement cinder block was on the floor. On February 21, police found Santoso's car in the Sea-Tac airport parking lot. The parking stub found in the car indicated that it entered the lot on February 19 at 11:51 pm. There was a large quantity of blood inside the car, and some was on the car's exterior. The blood in the apartment, parking lot, and automobile all belonged to Santoso. His body was never found, but police presumed he was dead. Since February 19, 2001, Santoso has not collected any paychecks, established a public record of any kind, or contacted any friends or relatives.¹

When questioned, Mason told the police that he was at his girlfriend Marina Madrid's home on February 19, and Madrid corroborated that alibi. Police later learned that Mason had a significant cut on his upper right thigh that was likely inflicted on February 19 by a knife. In early April, police learned that Mason changed his name and put a false address on his driver's license. Also in April, Marina Madrid admitted to police that on the evening of February 19, Mason called her and asked her to pick him up at the airport and to bring a change of clothes. When Madrid arrived at the airport, Mason had blood on his hands and said, "Santoso won't be a problem anymore." Madrid noticed a cut on Mason's leg, and Mason explained that he had somehow gotten

¹ Mason's defense focused on the possibility that Santoso staged his own disappearance.

cut during the attack. Madrid helped Mason deposit his bloodied clothes in a dumpster and pick up his car, which was parked near Santoso's residence. Madrid also helped stitch and bandage Mason's cut. During the following weeks, Mason told Madrid that he broke Santoso's bedroom window, entered the apartment, and stabbed Santoso multiple times. He put the body in Santoso's car, concealed the body in an undisclosed location, and left the car at the airport.

Madrid later told the police that Mason had thrown a knife out of the car window while they drove along I-405. Police found the knife in bushes along the highway, and Santoso's blood was on the knife. Police also found Santoso's blood on the passenger side floorboard of Madrid's car, and they found Mason's blood on the passenger seat of Madrid's car. There was a mixed blood sample on the driver's seat of Santoso's car, near where the driver's right thigh would be.

Mason was charged with first degree aggravated murder. After a 10-week jury trial, Mason was convicted and sentenced to life imprisonment without possibility of parole.

DISCUSSION

I. Mason's Right to Confront Witnesses

A. The Sixth Amendment and *Crawford v. Washington*

Mason challenges the trial court's decision to allow police officers and a victim's advocate to testify about statements Santoso made to them. He argues that admitting the out-of-court statements violated his right to confront witnesses against him, as guaranteed by the sixth amendment of the United States Constitution and article I,

section 22 of Washington's Constitution. Mason relies on Crawford v. Washington,² a case recently decided by the United States Supreme Court.

Before Crawford, an out-of-court statement made by an unavailable witness was admissible if the statement had adequate indicia of reliability.³ A trial court could infer reliability if the statement fell within a firmly rooted hearsay exception.⁴ The excited utterance exception is a firmly rooted hearsay exception,⁵ and thus out-of-court statements made by unavailable witnesses were admissible if they qualified as excited utterances.

But in Crawford, the Supreme Court stated that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."⁶ Instead, a court may admit a witness's out-of-court testimonial statements only if the witness is unavailable and the *defendant had a prior opportunity to cross-examine* the witness.⁷ Non-testimonial statements may be admitted if they fall within a hearsay exception,⁸ and the Crawford rule applies only to those statements that are "testimonial."

² 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

³ State v. Thomas, 150 Wn.2d 821, 855-56, 83 P.3d 970 (2004) (citing State v. Strauss, 119 Wn.2d 401, 415, 832 P.2d 78 (1992)).

⁴ Id. at 856 (citing Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), abrogated by Crawford, 541 U.S. 36).

⁵ Id. at 853 (citing State v. Woods, 143 Wn.2d 561, 595, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001)).

⁶ 124 S. Ct. at 1371.

⁷ Id. at 1369.

⁸ Id. at 1374 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

In this case, the trial court admitted statements Santoso made to four police officers and a victim's advocate. These statements involved Santoso's description of the January 23rd incident, as well as his profound fear of Mason after the incident. Because Mason's trial was held before Crawford, the trial court admitted many of Santoso's statements as excited utterances. But under Crawford, if the statements were testimonial, they were inadmissible because Mason never had the opportunity to cross-examine Santoso. We must therefore examine Santoso's statements to determine whether they were testimonial.

The Supreme Court declined to provide a comprehensive definition of "testimonial,"⁹ but it did define "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."¹⁰ "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."¹¹ As examples of testimonial statements, the Court lists affidavits, custodial examinations, depositions, prior testimony,¹² confessions, or similar pretrial statements that the declarant would reasonably expect to be used in a prosecution.¹³ The Court also refers to "statements that were made under circumstances which would lead an objective witness reasonably

⁹ Id.

¹⁰ Id. at 1364 (alteration in original) (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

¹¹ Id.

¹² This includes prior testimony from a preliminary hearing, before a grand jury, or at a former trial. Id. at 1374.

¹³ Id.

to believe that the statement would be available for use at a later trial[.]”¹⁴ Statements taken by police officers during the course of interrogations are testimonial.¹⁵

Crawford addresses statements made to government officials during examinations or interrogations *initiated by those officials*.¹⁶ As soon as the focus moves to disputed out-of-court statements voluntarily made by the witness during *witness-initiated* contact, confusion arises. For example, since Crawford, several courts have considered whether statements made during 911 calls are testimonial for Sixth Amendment purposes.¹⁷ When determining whether statements voluntarily made to government officials during witness-initiated contact are testimonial, courts have looked to a variety of factors. These include the extent to which the interaction takes place in a formal setting such as structured questioning or recording,¹⁸ whether the statement was made as part of the incident or part of the prosecution,¹⁹ and whether the witness had time for contemplation before giving the statement.²⁰

¹⁴ Id. at 1364 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3).

¹⁵ Id.

¹⁶ See, e.g., id. at 1357-58 (the Crawford Court examined the admissibility of a tape-recorded statement made during a police interrogation); id. at 1359-63 (examining the historical background of the Confrontation Clause and discussing controversial examination practices); id. at 1363 (“the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”).

¹⁷ See, e.g., State v. Powers, 124 Wn. App. 92, 99 P.3d 1262 (2004) (citing People v. Moscat, 3 Misc.3d 739, 777 N.Y.S.2d 875 (2004); People v. Cortes, 4 Misc.3d 575, 781 N.Y.S.2d 401 (2004); Leavitt v. Arave, 371 F.3d 663, opinion amended and superseded, 383 F.3d 809 (9th Cir. 2004)); State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004), review granted Nov. 23, 2004.

¹⁸ See, e.g., State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22, 27, review on add'l issues denied, 607 S.E.2d 653 (2004); People v. Mackey, 5 Misc.3d 709, 785 N.Y.S.2d 870, 873-74 (2004) (citing People v. Newland, 6 A.D.3d 330, 775 N.Y.S.2d 308, leave to appeal denied, 3 N.Y.3d 679, 817 N.E.2d 835 (2004)).

¹⁹ See, e.g., Powers, 99 P.3d at 1266 (citing Moscat, 777 N.Y.S.2d at 880).

²⁰ See, e.g., Forrest, 596 S.E.2d at 27; Moscat, 777 N.Y.S.2d at 878.

But central to each of these factors, and most important in determining whether a statement is testimonial in this context, is the witness's *purpose* in initiating police contact and making the statement.²¹ The witness's purpose is essential because it goes to whether or not the declarant would reasonably expect his or her statement to be used at a later trial, a factor which is the centerpiece of the Supreme Court's definition of "testimonial."²² Courts must ask whether the declarant initiated the police contact to get help, or whether he or she did so to report a crime or provide information to assist police in investigating, apprehending, or convicting a suspect.²³

If a declarant makes a statement while seeking protection, it is unlikely that he or she intends to make a formal statement, is aware that he or she is bearing witness, or is aware that his or her utterances might ultimately be used in a prosecution. The witness's focus is on getting help, not establishing or proving a fact to further a prosecution. Therefore, statements seeking help made by someone in immediate peril are not testimonial. We hold that, in determining whether a statement is testimonial for Sixth Amendment purposes, courts must perform a fact-specific analysis to ascertain: (1) whether the declarant initiated the statement, (2) the formality of the setting, and (3) the declarant's purpose in making the statement. We further hold that statements made while in peril for the purpose of seeking protection, rather than for the purpose of bearing witness, are not testimonial and thus not subject to Crawford's cross-examination requirement.

²¹ See, e.g., Powers, 99 P.3d at 1266; Mackey, 785 N.Y.S.2d at 874; Moscat, 777 N.Y.S.2d at 879; Wright, 686 N.W.2d at 302.

²² Crawford, 124 S. Ct. at 1364.

²³ See, e.g., Powers, 99 P.3d at 1266; Mackey, 785 N.Y.S.2d at 874; Moscat, 777 N.Y.S.2d at 879; Wright, 686 N.W.2d at 302.

1. John Haslip's Testimony

First, Mason challenges the trial court's decision to admit certain aspects of John Haslip's testimony. Haslip, a corporal with the Kirkland police department, testified that on January 24, Santoso and a friend came to the police station and spoke with him. According to Haslip, Santoso's eyes were bloody, his face was swollen, and his neck was bruised. Santoso appeared to be extremely frightened. Haslip asked Santoso questions to figure out what had happened to him, and Santoso was reluctant to answer at first. Eventually, Santoso told Haslip about what happened at Mason's home the day before. After speaking with Santoso, Haslip realized that the incident took place in Redmond, so he referred Santoso to the Redmond police department.

The court admitted this testimony as an excited utterance under ER 803(a)(2). But, assuming this was error under Crawford, the error was harmless. A constitutional error is harmless if, beyond a reasonable doubt, a jury would have reached the same result without the error.²⁴ In this case, the jury would have reached the same result without Haslip's recitation of Santoso's out-of-court statements. First, forensic evidence and Marina Madrid's testimony alone could have been sufficient to convict Mason. And second, Santoso's roommate, employer, emergency room physician, and sister all testified about Santoso's description of the January 23rd incident. None of this testimony violated Crawford,²⁵ and Mason does not dispute it.

²⁴ State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); State v. Bergman, 44 Wn. App. 271, 275, 721 P.2d 522 (1986)).

²⁵ Crawford indicates that government officials must somehow be involved in the creation of a statement if the statement is to be deemed testimonial. In re T.T., 351 Ill. App. 3d 976, 988, 815 N.E.2d 789 (2004).

2. John Berberich's Testimony

Mason next disputes the admissibility of certain portions of John Berberich's testimony. Berberich is a detective with the Redmond police department who responded to Haslip's call and met with Santoso on January 24. He described Santoso's visible injuries and testified that while he spoke, Santoso periodically cried, and his tears were blood-red. Santoso told Berberich that he was afraid for his life.

While Mason does not challenge the admission of Santoso's statement about being afraid, he does challenge Berberich's frequent references to Santoso's out-of-court statements while testifying about items he found in Mason's home, as these items corroborated Santoso's description of the January 23rd incident. For example, Berberich testified that he seized a roll of duct tape from Mason's home because Santoso told him that he had been duct taped on his ankles, wrists, and face. And Berberich seized a loaded firearm found in Mason's home because Santoso had told him that Mason displayed a firearm during the incident. The court instructed the jury on several occasions that the testimony was being admitted only to explain why Berberich seized certain items from Mason's home and that it should not consider the testimony for the truth of the matter asserted within the statement.

The trial court did not err by permitting this testimony because the testimony was clearly not admitted for the truth of the matter asserted.²⁶ The trial court thoroughly instructed the jury that it could consider the statements only to explain why Berberich

²⁶ When out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no Confrontation Clause concerns arise. Crawford, 124 S. Ct. at 1369 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).

seized certain items.²⁷ The prosecuting attorney did occasionally argue as if the information were admitted for the truth of the matter asserted, but the defense did not object and Mason does not raise the issue on appeal. In this context, the statements were not admitted so that Santoso could bear witness against Mason, and thus they were not subject to Crawford's limitations.

3. Kristy Roze's Testimony

Mason also contests the admission of certain portions of Kristy Roze's testimony. Like Berberich, Roze is a detective with the Redmond police department. She testified that Santoso expressed fear about his safety, and the court admitted the statement to establish Santoso's state of mind at that time. Roze also testified that Santoso asked her if he could sleep at the police department under a desk or in a jail cell because he was afraid.

Roze's testimony does not implicate Crawford concerns. First, the court did not admit Santoso's statements to prove the truth of the matter asserted. Second, these statements do not implicate Mason, nor do they prove some fact helpful to the prosecution. Nor would Santoso have any reason to expect these statements to be used for prosecution purposes. Instead, Santoso was expressing his fear and asking for Roze's help to ensure his safety. The trial court did not err.

4. Anne Malins' Testimony

Detective Anne Malins, also with the Redmond police department, testified that she took Santoso's checkbook records into evidence. She explained that she did so

²⁷ Mason challenges the relevance of the non-hearsay purpose for which the court admitted these statements. But the evidence seized from Mason's home is relevant to show what took place on January 23. That incident is, in turn, relevant and admissible for reasons discussed below.

because Santoso stated that he had previously written one check to Mason and had begun to write a check during the January 23rd incident. The court admitted the statement only to establish why Malins took the checkbook records, and it instructed the jury about the limited reason for admitting the testimony. For the same reasons discussed in the context of Berberich's testimony, the trial court did not err here. The court clearly limited the admissibility of this testimony, and in this context, Santoso's statement was not introduced to implicate Mason. Crawford is inapplicable.

5. Linda Webb's Testimony

Finally, Mason challenges the admission of Linda Webb's testimony about certain statements Santoso made to her. Webb, a domestic violence victim's advocate, testified that she assisted Santoso with "safety planning" on January 29, six days after the assault. She testified that Santoso's eyes were bright red, he was visibly shaking, and he was crying. She also testified that he was reluctant to get a protective order because he was afraid. Webb testified that Santoso phoned her because Mason had recently been released from jail, and Santoso was hysterical and frightened. He told Webb that Mason was going to kill him; that he knew he was going to die. He begged Webb to put him in a jail cell or let him sleep in her office so he could be safe. Webb also testified that she and Santoso discussed the possibility of his relocating, but that he could not leave his job because he was sending money to his family in Indonesia. And Webb testified that Santoso expressed his fear that Mason's father, a retired police chief, would retaliate against Santoso as police often did in his native Indonesia.

Mason argues that a reasonable person in Santoso's position would expect these statements to be used to further the investigation and prosecution against Mason. We

disagree. Every statement Webb testified to involved Santoso's profound fear and his pleas for help. Santoso was seeking protection, not bearing witness to a crime. And because Webb was acting as a victim's advocate charged with helping Santoso find safety, Santoso had little reason to expect that his statements to her would ultimately be used to prosecute Mason. We conclude that these statements were not testimonial and that the trial court properly admitted them.

B. Washington's Confrontation Clause: Article One, Section 22

Mason also argues that the trial court's decision to admit the testimony discussed above violated his confrontation rights guaranteed by article I, section 22 of the Washington Constitution, because that clause is more protective of confrontation rights than is the Sixth Amendment. We reject Mason's argument.

In State v. Gunwall, the Washington Supreme Court held that a court must consider certain factors when determining whether Washington's constitution should be interpreted as extending broader rights than the federal constitution.²⁸ Parties asserting a violation of the state's constitution must brief and discuss these factors.²⁹ But a party need not provide a Gunwall analysis if the Washington Supreme Court has already analyzed the constitutional provision in the context at issue.³⁰ Instead, the court must analyze the party's claim according to "established principles of state constitutional jurisprudence."³¹ If the Supreme Court has not done the independent state

²⁸ 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986).

²⁹ Id. at 62 (citing In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

³⁰ State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80, 84 n.1 (2004) (citing State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)).

³¹ White, 135 Wn.2d at 769.

constitutional analysis in that context and the party does not perform a Gunwall analysis, the reviewing court must use the federal constitutional analysis.³²

In this case, Mason argues that he did not need to provide a Gunwall analysis because the Washington Supreme Court already recognized that the state constitution's confrontation right is broader than the federal constitution's. Mason cites State v. Foster³³ and State v. Smith³⁴ to support this proposition. In Foster, the Supreme Court analyzed whether a statute permitting child victims to testify using closed-circuit television violated the state or federal confrontation clauses. Although the lead opinion held that the state constitution's Confrontation Clause is identical to that of the federal constitution,³⁵ five concurring and dissenting justices concluded that Washington's Confrontation Clause provides *greater* protection.³⁶ But Foster did not establish a firmly-rooted principle of state constitutional jurisprudence, as it only discussed the constitutional provisions in a context entirely distinct from the one presented here.

In Smith, the court examined whether a trial court may consider the possibility of testimony using closed-circuit television when determining whether a witness is unavailable for Confrontation Clause purposes. The court recognized the majority opinion in Foster, but refused to analyze the defendant's state constitutional claim because the defendant had not briefed the Gunwall factors and the court had "not yet decided whether article I, section 22 provides greater protection than the federal

³² Reichenbach, 101 P.3d at 84 n.1 (citing State v. O'Neill, 148 Wn.2d 564, 582, 62 P.3d 489 (2003)).

³³ 135 Wn.2d 441, 957 P.2d 712 (1998).

³⁴ 148 Wn.2d 122, 59 P.3d 74 (2002).

³⁵ 135 Wn.2d at 466.

³⁶ Id. at 473-74, 481-94.

provision *in this situation*.³⁷ The Supreme Court has thus made it clear that a party asserting an independent state basis for its constitutional argument must provide a Gunwall analysis unless the court has already analyzed the argument *in that context*. The Supreme Court has never addressed the confrontation issue in the context currently before us. Therefore, in the absence of a Gunwall analysis, we reject Mason's state constitutional argument.

C. Forfeiture by Wrongdoing

The State also argues that Mason's confrontation claim fails on alternative grounds. According to the State, Mason forfeited his confrontation rights by causing the witness to be unavailable in the first place. The doctrine of forfeiture by wrongdoing³⁸ has not been expressly adopted by Washington courts, and the State urges the court to do so now. But because we conclude that there has been no harmful violation of Mason's confrontation rights, we need not reach this issue.

Mason also argues the court erred by (1) excluding an opinion of the defense's DNA (deoxyribonucleic acid) expert, (2) permitting certain witnesses to testify that Santoso was dead and Mason had murdered him, (3) admitting evidence of Mason's prior bad acts, (4) failing to include aggravating factors in the "to convict" jury instruction, (5) permitting the jury to convict of aggravated murder despite insufficient evidence of burglary as an aggravating factor, and (6) informing the jury that the State was not seeking the death penalty in this case. The remainder of this opinion has no precedential value. Therefore, it will not be published but has been filed for public record. See RCW 2.06.040; CAR 14.

³⁷ 148 Wn.2d at 131 (emphasis in original).

³⁸ The doctrine is also known as forfeiture by misconduct or waiver by misconduct.

II. Mason's DNA Expert Witness and the Frye Test

Police found a great deal of blood on the interior and exterior of Santoso's car. While all of the blood on the exterior and most of the blood on the interior matched Santoso's genetic profile, samples from the driver's seat contained a mixture of blood belonging to Santoso and another source.

During its case in chief, the State called Dr. Edward Blake, a forensic scientist specializing in DNA, to testify about his findings after analyzing the mixed DNA sample. Blake testified that the chances that Mason was *not* a source of the sample were one in 14 trillion. In response, defense counsel sought to introduce the testimony of neurogeneticist Dr. Randall Libby. The State interviewed Libby the night before he was to testify. During that interview, Libby disputed Blake's method of interpreting the sample, discussed the difficulties associated with interpreting mixed DNA samples and the inadequacies of Dr. Blake's method of interpretation, and stated that 30 percent to 80 percent of the population *cannot* be excluded from a mixed DNA sample. According to the State, Libby also stated that he was unable to provide names of scientists or published papers to support his view and that his opinion was based only on his 25 years of experience as a geneticist. Based on this interview and citing Frye v. United States,³⁹ the State moved in limine to exclude that portion of Libby's testimony that states that at least 30 percent of the population cannot be ruled out as possible sources of the DNA mixture. Under Frye, scientific evidence is admissible only if the theory

³⁹ 293 F. 1013 (D.C. Cir. 1923).

upon which it is based, and the technique used to implement that theory, is generally accepted in the relevant scientific community.⁴⁰

The trial court conducted a Frye hearing the next day. During that hearing, Libby provided a treatise to support his opinions and named several scientists who shared his interpretation. The court found that the defense presented no scientific authority supporting Libby's specific conclusion that 30 percent to 80 percent of the general population cannot be excluded when interpreting blood mixtures. The court noted that if Libby's statistic was true, there would be no use in interpreting mixed DNA samples at all, as such samples would be worthless. And if mixed DNA samples were worthless, there would be some authority saying so, but the court found none. Therefore, the court excluded Libby's testimony, but only that portion where he opined that at least 30 percent of the population cannot be excluded from mixed DNA samples.

After the Frye hearing, the State moved for access to Libby's time and billing records. The defense refused to provide them, and the court sanctioned the defense by excluding Libby's testimony altogether. When the defense still refused to provide Libby's records, the court reversed itself, allowing the testimony but permitting the State to raise the records issue during cross-examination. The court expressed its concern that not calling Libby would significantly compromise the defense, since the mixed DNA evidence was "certainly the most damaging forensic evidence to the defense in this case." But given the court's decision to exclude the "30% to 80%" portion of Libby's testimony, the defense decided to withdraw Libby as a witness altogether. After the defense rested, it filed an offer of proof to preserve the issue for appeal.

⁴⁰ State v. Gentry, 125 Wn.2d 570, 585-86, 888 P.2d 1105 (1995) (citing Frye, 293 F. at 1014; State v. Cauthron, 120 Wn.2d 879, 886-89, 846 P.2d 502 (1993)), cert. denied, 516 U.S. 843 (1995).

Mason now argues that the court erred by excluding the “30% to 80%” portion of Libby’s testimony. We question whether the defense preserved this error for appeal, as it voluntarily withdrew Libby as a witness. But even if the defense did preserve the issue, the court did not err. We review a trial court’s Frye ruling de novo, and our review involves a mixed question of law and fact.⁴¹

In his appellate brief, Mason argues

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. . . .

But the only portion of Libby’s testimony that the court excluded was his opinion that 30 percent to 80 percent of the population cannot be excluded from a mixed DNA sample. Clearly, Libby could have offered the testimony discussed in Mason’s brief. The court did not refuse to admit Libby’s opinion that mixed DNA samples are difficult to interpret, nor did it take issue with Libby’s preferred statistical calculation method.⁴² It simply wanted scientific confirmation of Libby’s “30% to 80%” statistic, and the defense

⁴¹ State v. Gore, 143 Wn.2d 288, 304, 21 P.3d 262 (2001) (citing State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996); State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

⁴² In his testimony, Libby planned to discuss four different methods of statistical calculations used when interpreting DNA mixtures: (1) no calculation-qualitative statement; (2) match probability estimation after deducing genotypes; (3) likelihood ratio calculation; and (4) exclusion probabilities. Dr. Blake apparently used the second method, while Libby would have recommended using the fourth method. In his offer of proof, Mason presents evidence that the fourth method is generally accepted by the scientific community. But the method of statistical calculation is not at issue on appeal.

presented none.⁴³ The trial court did not err by refusing to admit this small portion of Libby's testimony.

III. Improper Opinion Testimony

Mason next argues that the trial court improperly admitted opinion testimony about his guilt. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.⁴⁴ A trial court abuses its discretion only if no reasonable person would adopt its view.⁴⁵

Generally, no witness, lay or expert, may testify to his or her opinion about the defendant's guilt, whether directly or by inference.⁴⁶ To do so would unfairly prejudice the defendant, as it invades the exclusive province of the jury.⁴⁷ To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider "the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact."⁴⁸

A. Dr. Harruff's Testimony

First, Mason challenges Dr. Richard Harruff's testimony. Harruff, the chief medical examiner for the King County Medical Examiner's Office, issued a presumptive

⁴³ In fact, in his declaration attached to Mason's motion to reconsider the Frye ruling, Libby attempted to repudiate the 30 percent statistic, stating that the State's characterization of his testimony did not actually reflect his opinion.

⁴⁴ State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (citing State v. Rivers, 129 Wn.2d 697, 709-10, 921 P.2d 495 (1996)).

⁴⁵ Id. (citing State v. Sutherland, 3 Wn. App. 20, 21, 472 P.2d 584, review denied, 78 Wn.2d 996 (1970)).

⁴⁶ City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967)), review denied, 123 Wn.2d 1011 (1994).

⁴⁷ Demery, 144 Wn.2d at 759 (citing Heatley, 70 Wn. App. at 577).

⁴⁸ Heatley, 70 Wn. App. at 579 (citing State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992)).

death certificate after reviewing photographs of Santoso's apartment and car, as well as other evidence. Harruff opined that, based on the volume and distribution of the blood as indicated by the photographs, Santoso's injuries were life-threatening. Harruff emphasized that this was his opinion, and he made it clear that he had no actual knowledge of whether Santoso was in fact dead. Harruff never said that Mason killed Santoso.

At trial, Mason challenged this testimony on the basis that it improperly placed before the jury a government official's opinion on a central issue. The trial court later reversed its decision to admit the testimony and instructed the jury that it should disregard Harruff's opinion that Santoso was dead and the fact that Harruff issued a presumptive death certificate. Mason now argues that despite the court's attempt to remedy its perceived error, the damage was done and Mason was irreversibly prejudiced. But the trial court did not err by admitting the testimony in the first place.

It is true that courts must exercise care when government officials express their opinions, as those opinions may unduly influence the fact finder.⁴⁹ But opinion testimony is not improper if it is not a direct comment on the defendant's guilt, is helpful to the jury, and is based on inferences from the evidence.⁵⁰ Nor is opinion testimony improper merely because it encompasses an ultimate issue of fact reserved for the jury.⁵¹ And "[t]he fact that an opinion encompassing ultimate factual issues *supports* the

⁴⁹ State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985)).

⁵⁰ Heatley, 70 Wn. App. at 578.

⁵¹ Id. at 578-79. See also ER 704.

conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.”⁵²

In this case, Harruff made it very clear that he was only expressing his opinion about whether, given the evidence, Santoso’s injuries were life-threatening. Harruff clearly said nothing about Mason’s guilt. And while he did express an opinion about an issue that was ultimately for the jury to decide, this was not improper as it was helpful to the jury and based on his experience and his assessment of the evidence. Harruff never told the jury what conclusion to reach, and he emphasized that the death certificate issued was only presumptive. Finally, during Harruff’s testimony, the trial court reminded the jury that this was only Harruff’s opinion and it was only for the jury to decide whether Santoso was in fact dead. The trial court did not abuse its discretion when it initially admitted Harruff’s testimony.

B. Other Witnesses’ Testimony

Mason also challenges the court’s decision to admit certain opinion statements made by Marina Madrid, Kristine Riley, and Randy Rogers.

1. Marina Madrid’s Testimony

On five occasions during her three-day testimony, Marina Madrid inadvertently opined that Mason killed Santoso. First, when asked why she moved out of the state, Madrid stated, “Because I was traumatized that my boyfriend had committed a murder.” The court sustained defense counsel’s objection and instructed the jury to disregard the statement. The court also reminded the jury that it was for the jury to decide whether a murder was committed and, if so, who committed it, “based on the evidence that’s introduced in this case rather than anybody’s opinion.” Moments later, the State asked

⁵² Heatley, 70 Wn. App. at 579 (emphasis in original).

Madrid whether Mason killed Santoso and Madrid responded, "He did." The court sustained defense counsel's objection without comment, presumably relying on the limiting instruction it had given the jury seconds before.

Third, when asked why she initially lied about Mason's alibi, Madrid responded, "Because I loved him and I didn't want him to get in trouble, and I knew that he had killed him and I had to give an alibi." The court then instructed the jury that Madrid's statement was admitted only "to explain why the witness did what she did and not for the truth of any statements asserted within that answer." Fourth, when asked what she thought when Mason told her that Santoso would not be a problem anymore, Madrid answered, "[t]hat he had killed him." Defense counsel did not object and the court gave no limiting instruction. And finally, Madrid testified about the disbelief she felt when she was sewing Mason's leg wound. The State asked why she felt disbelief, and Madrid responded, "[e]verything about it; the fact that he had just killed him[.]" In response to defense counsel's objection, the trial court admitted the statement only to establish Madrid's mental state at the time that she was sewing Mason's wound.

Courts must consider the purpose for which evidence was offered,⁵³ and in this case, the court admitted certain statements for legitimate purposes other than to establish the truth of the matter asserted. The court gave adequate limiting instructions that either instructed the jury to disregard statements entirely, or to consider statements for limited purposes. Courts presume that jurors follow limiting instructions, including instructions to disregard improper evidence.⁵⁴ It is true that the court gave no limiting

⁵³ Demery, 144 Wn.2d at 761.

⁵⁴ State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994) (citing State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)), cert. denied, 514 U.S. 1129 (1995).

instruction in the fourth instance when Madrid testified that she thought Mason had killed Santoso. But defense counsel failed to object, and Madrid was clearly testifying about her mental impression at the time that Mason made a particular statement to her. The trial court did not abuse its discretion here.

2. Kristine Riley's Testimony

Kristine Riley, Mason's former girlfriend, testified that she was not candid with police when she was questioned in April 2001, but that she called the police one month later to report evidence implicating Mason. When the State asked her why she changed her mind about talking with the police, Riley answered, "I was a little more clear thinking, and I was no longer believing that [Mason] was innocent of the accusations." The trial court sustained defense counsel's objection and instructed the jury that the testimony was admitted only for the purpose of establishing Riley's reasons for calling the police. The judge also instructed, "[y]ou should not consider her belief or lack of belief in any particular proposition for any reason." The court admitted Riley's statement for a legitimate purpose and provided the jury with a proper limiting instruction. It did not abuse its discretion.

3. Randy Rogers' Testimony

Randy Rogers, the lead detective in this case, was describing an interview conducted during the course of his investigation when he referred to Mason as a suspect with a "powerful motive." The trial court overruled defense counsel's objections and admitted the testimony for the limited purpose of establishing Rogers' state of mind at that point in the investigation "to give the jury an understanding of what he did and why he did it during that particular interview, and for no other purpose." The court did

not err here as it correctly limited the purpose for which the jury could consider the testimony and provided a clear instruction to the jury.

Later, during cross-examination, Rogers referred to “the night that [Santoso] was murdered” and opined that Marina Madrid did not witness the “actual murder.” Defense counsel objected to both statements on the ground that they stated conclusions about an ultimate issue of fact, but the trial court overruled the objections without comment. As stated above, a witness may opine about issues of fact ultimately reserved for the jury as long as the testimony is helpful and based on inferences from the evidence. But unlike with Dr. Harruff’s testimony, the State never demonstrated on what evidence Rogers relied when forming his opinion that a murder had taken place, nor did Rogers testify that it was only his opinion, rather than a fact. And, unlike it did with Dr. Harruff’s testimony, the trial court never reminded the jury that Rogers’ reference to murder was only his opinion and that it was ultimately for the jury to decide whether Santoso was murdered.

But the court’s error in admitting Rogers’ statements is harmless if the remaining, untainted evidence is so overwhelming that it leads to a finding of guilt beyond a reasonable doubt.⁵⁵ Here, Rogers’ two questionable statements were insignificant in the context of a 10-week trial involving approximately 60 witnesses and over 300 exhibits. His two references to murder could not have been the defining evidence considered by the jury when it found Mason guilty, and a vast amount of untainted evidence supports its guilty verdict. The error was harmless.

⁵⁵ Improper opinion testimony must be harmless beyond a reasonable doubt. State v. Barr, 123 Wn. App. 373, 383-84, 98 P.3d 518 (2004) (citing Guloy, 104 Wn.2d at 426; Carlin, 40 Wn. App. at 703). See also Dolan, 118 Wn. App. at 330 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Guloy, 104 Wn.2d at 425).

IV. Prior Misconduct Evidence

Mason next argues that the trial court erred by admitting evidence of prior bad acts. We review rulings admitting evidence of prior misconduct for an abuse of discretion.⁵⁶ Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” But a trial court may admit this evidence for other purposes, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁵⁷ If a trial court does admit bad acts evidence, it must identify the purpose for which it is admitted and determine whether the evidence is relevant and necessary to prove an essential element of the charged crime.⁵⁸ Evidence is relevant and necessary if its purpose is of consequence to the action and makes an identified fact’s existence more probable.⁵⁹ The court must also balance on the record whether the evidence’s probative value outweighs its prejudicial effect.⁶⁰ It is a reviewing court’s role to determine whether the trial court had a proper basis on which to admit the prior bad acts evidence. “In so doing[,] we consider bases mentioned by the trial court as

⁵⁶ State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 286, 840 P.2d 860 (1992); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 91-92, 549 P.2d 483 (1976)).

⁵⁷ ER 404(b).

⁵⁸ Powell, 126 Wn.2d at 258-59 (citing Dennison, 115 Wn.2d at 628; State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981); State v. Dinges, 48 Wn.2d 152, 154, 292 P.2d 361 (1956); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), overruled on other grounds by 125 Wn.2d 847, 889 P.2d 487 (1995); Robert H. Aronson, *Evidence in Washington* 4014-10 (2d. ed. 1994)).

⁵⁹ Id. at 259 (citing Dennison, 115 Wn.2d at 628; Saltarelli, 98 Wn.2d at 362-63).

⁶⁰ ER 403.

well as other proper bases on which the trial court's admission of evidence may be sustained."⁶¹

A. Weapons Possession

Mason challenges evidence that he possessed a firearm and knives, arguing that these weapons were unrelated to the charged crime. Evidence of weapons possession is highly prejudicial, and courts should not admit evidence that the defendant possessed weapons if those weapons had nothing to do with the crime.⁶² "The question is whether the matter shown has such a connection with the crime for which the accused is being tried as to tend to show that the accused committed that crime."⁶³

Marina Madrid identified a knife during trial. She testified that it was found in her home and it belonged to Mason. She also testified that she had no reason to believe the knife was in any way involved in the events of February 19. Defense counsel objected to the photograph of the knife, arguing that it was irrelevant because it was not the murder weapon. But the trial court found it relevant in the context of Madrid's fear; that is, Madrid expressed her fear after February 19 when she saw the knife in her home.

Detective Gary Eggleston testified that he searched Madrid's apartment and found the knife. At trial, he identified a photograph of the knife, and defense counsel did not object. When Eggleston was asked to identify the actual knife, defense counsel

⁶¹ Powell, 126 Wn.2d at 259 (citing State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992); Pannell v. Thompson, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979)).

⁶² State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) (citing United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); United States v. Peltier, 585 F.2d 314, 327 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979); State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1005 (1980); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)).

⁶³ Oughton, 26 Wn. App. at 83-84 (quoting State v. Spadoni, 137 Wash. 684, 695, 243 P. 854 (1926)).

objected on the basis of relevance, but the court admitted it without comment. On cross-examination, Eggleston testified that the knife found in Madrid's apartment was similar to the discarded knife found on the highway, but it was not the same knife. And Detective Randy Rogers testified that after arresting Mason, he searched Mason's luggage and found another knife. Defense counsel did not object.

Detective Kristy Roze seized a loaded handgun from underneath Mason's bed which she identified in court. Defense counsel never objected, and Mason does not challenge this testimony. Detective John Berberich read aloud Mason's statement in which he admitted displaying an unloaded gun in self-defense during the January incident. Again, defense counsel did not object, and Mason does not raise this in his brief. Mason does raise the State's numerous references during closing argument to Mason's use of a gun during the January incident and the fact that the police found a loaded gun under Mason's bed. But defense counsel did not object to these references during closing argument.

Defense counsel objected only twice to the weapons evidence, and those objections were based on relevance.⁶⁴ The record indicates that defense counsel never raised the issue in the context of ER 404(b), and thus the trial court was never called upon to decide it. Relevance objections are insufficient to preserve appellate review

⁶⁴ In his brief, Mason argues that he objected to the knife evidence on ER 404(b) grounds, but the record does not support this.

based on ER 404(b).⁶⁵ And failure to object at trial waives the issue on appeal.⁶⁶ We thus decline to reach this issue.

B. Sexual Practices

Mason next disputes the admission of evidence about his sexual practices. Kristine Riley testified that during a party in March 2001 Mason expressed his interest in having a sexual encounter with her and two other women. Defense counsel objected on relevance grounds. The court overruled the objection, relying on the State's argument that the testimony pertained to bias and prejudice because it explained why Riley became upset with Mason later that night. Riley then testified that she was upset with Mason for paying attention to the other women, and she was upset the next morning because Mason did not want to have sex with her. The trial court did not err by admitting this testimony because it was offered for a purpose other than to prove action in conformity with Mason's character. And even if this were not the case, defense counsel objected to the testimony only based on relevance, which is insufficient to preserve an ER 404(b) issue for appellate review.⁶⁷

Riley also testified that Mason told her that he had previous sexual encounters with a man. The defense objected to this testimony, arguing that it was prejudicial. Overruling the objection, the court stated that Riley could testify about statements Mason made to her. The court also stated that the prejudice did not substantially

⁶⁵ State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079 (citing State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986); State v. Jordan, 39 Wn. App. 530, 539, 694 P.2d 47 (1985), review denied, 106 Wn.2d 1011 (1986), cert. denied, 479 U.S. 1039 (1987)), review denied, 108 Wn.2d 1024 (1987).

⁶⁶ Guloy, 104 Wn.2d at 421 (citing Bellevue Sch. Dist. No. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

⁶⁷ See Kendrick, 47 Wn. App. at 634 (citing Fredrick, 45 Wn. App. at 923; Jordan, 39 Wn. App. at 539).

outweigh the probative value because the evidence was probative of the nature of Mason and Santoso's relationship—a highly disputed issue. Again, defense counsel did not object on the basis of ER 404(b).

Curtis Schuster, a kickboxing instructor and friend of Mason's, testified that Mason used to talk about "potty training" some of his girlfriends where he would watch the women go to the bathroom so that "they would be comfortable with just about anything else." Defense counsel did not object,⁶⁸ and Mason has waived this issue on appeal.⁶⁹

C. "The Ancient Art of Strangulation" Book

Mason also challenges the admission of a book found among his possessions. The book was called "The Ancient Art of Strangulation," and Mason's fingerprints were found near several passages, including passages about the erotic nature of asphyxiation and death by strangulation. The State mentioned the book during closing argument, reminding the jury that the book discussed death by strangulation and by an "assassin's blade," and contained an appendix discussing body mutilation and disposal. Defense counsel did not object to admission of the book, but did object to the admission of the fingerprint evidence because the evidence indicated Mason had read specific pages. The court overruled the objection, ruling that defense counsel's concerns could be brought out on cross-examination. Mason never objected to the book or the fingerprints on the basis of ER 404(b), and thus he waived his right to do so now. But

⁶⁸ In his brief, Mason argues that his counsel objected to this testimony the next day. In fact, defense counsel objected to the admission of different information that Schuster privately told counsel the night before. Without discussing the nature of the testimony on the record, the court agreed that it was too prejudicial and excluded it. The parties never discussed the admissibility of the "potty training" testimony.

⁶⁹ Guloy, 104 Wn.2d at 421 (citing Bellevue Sch. Dist. No. 405, 70 Wn.2d at 950).

even if he had properly objected, the book would be admissible evidence of premeditation, preparation, and/or plan.

D. Misstatements on Financial and Employment Forms

During trial, the court admitted testimony about various misstatements Mason made on financial and employment forms, and Mason argues that the State improperly used this testimony to portray him as a liar during closing arguments. The human resources manager at Northwest Protective Services, Mason's former employer, testified that Mason listed "Santos Lunning" as a reference on his job application, but provided Hartanto Santoso's phone number. And the finance director for an automobile dealership testified that, in order to finance his new car, Mason listed two non-existent people as references and misstated his income. He also falsely indicated that his trade-in car was lien-free.⁷⁰ At the close of the finance director's testimony, the court instructed the jury not to consider the testimony for the purpose of assessing Mason's credibility, but rather to consider it as it relates to Mason's listing of references and his financial situation.

Several times during closing arguments, the State accused Mason of being a liar. At one point, the prosecuting attorney referred to the automobile financing documents to support these accusations. Although he did not object at the time, Mason now argues that this violated the court's prohibition against using the automobile dealership testimony to relate to Mason's credibility. But considering the argument in its context, there was no error. The contested portion of the State's argument revolved around

⁷⁰ Before trial, defense counsel objected to the admission of the employment and financing forms, arguing that they were improper character evidence. On appeal, Mason does not appear to contest the documents' admission, but rather objects to the State's use of those documents in closing argument.

December 28, 2000, the day that Mason misstated his income and references on the financing documents. That same day, Mason asked Santoso for a loan, and Santoso gave him \$400. Then, on January 23, 2001, Mason needed more money and confronted Santoso, presumably in the hopes of getting money. It is true that the State called Mason a liar in the context of the car financing documents, but that was a very small portion of the overall argument and, taken in context, the State was referring to the financing documents to demonstrate Mason's desperate financial situation.⁷¹

Mason's financial situation was relevant to demonstrate the nature of his relationship with Santoso, which in turn goes to Mason's motive. Evidence about motive is admissible.

E. Financial Mismanagement

Mason argues that evidence of his financial mismanagement was irrelevant to the charged crime and the court erred by admitting it. Specifically, Mason challenges evidence that he took out a loan and did not make car payments. He also challenges the admission of certain credit applications and payment accounts.

During trial, the manager of a consumer finance company testified that in November 2000, Mason took out a high interest loan for \$6,000 and made only one payment. Defense counsel objected based on relevance, and the trial court overruled the objection. The finance director of an automobile dealership testified that to her knowledge Mason never made any car payments. Defense counsel objected that the testimony was beyond the scope, and the court overruled the objection. Finally, the court admitted records from a consumer finance company that reflected Mason's

⁷¹ And while the State refers to Mason's lies at later times during closing arguments, it never again does so in the context of the employment or financing forms.

outstanding credit balances with two retailers. Again defense counsel objected that they were irrelevant, and again the court overruled the objection.

Before trial, defense counsel generally objected to evidence of Mason's financial situation, arguing that it was improper character evidence. But that objection challenged the admissibility of the employment and finance forms. We cannot find in the record defense counsel's objection to the evidence of Mason's financial problems based on ER 404(b). Thus the court was never called upon to evaluate it under that rule. Nevertheless, the evidence is admissible to show Mason's financial desperation during the period immediately before Santoso's assault and his later disappearance. And, as discussed above, Mason's financial situation was relevant to the nature of his relationship with Santoso and his attempts to get money from Santoso.

F. Convenience Store Interaction

Next, Mason argues that evidence of an interaction he had with Santoso at a convenience store was impermissible character evidence. Diana Jones, a former convenience store employee, testified that sometime in November or December 2000, Mason entered the store, got a beverage, then went to the glass door and motioned for Santoso to come inside. Santoso entered, and Mason stared at Santoso until Santoso paid for the drink. While Santoso completed the transaction, Mason glared at him and left the store. According to Jones, Santoso had tears in his eyes when he left the counter, and she commented that he needed different friends. Santoso asked Jones what he should do, and she told him to call the police. According to Jones, Santoso shrugged and left the store. Santoso came into the store again in January 2001, specifically to talk with Jones. He told Jones that his friendship with Mason was going

to end. Jones expressed her approval and support. Weeks later, when she saw photographs of Mason and Santoso in the newspaper, Jones contacted the prosecutor's office.

The court admitted Jones' testimony to show Mason's domineering and belittling behavior toward Santoso, as well as Santoso's reaction, as it related to the history and nature of their relationship. And during closing argument, the State referred to Jones' testimony when discussing how Mason exercised power and control over Santoso. The trial court did not abuse its discretion by admitting Jones' testimony. The testimony was one person's observation of an interaction between Mason and Santoso, and the nature of this relationship was relevant to establish motive.⁷²

G. January 23rd Incident

Finally, Mason argues that evidence about the January 23rd incident presented throughout the trial was entirely inadmissible character evidence. At the end of trial, citing ER 404(b), defense counsel proposed a limiting instruction that would allow the jury to consider evidence of the January 23rd incident only to explain the nature of Mason and Santoso's relationship. The court declined, ruling that the evidence was admissible for a variety of purposes, including motive, res gestae, and "readiness to employ violence against Mr. Santoso." The court noted that the January 23rd incident was a physical attack that occurred within 30 days of the charged crime, and it was the last time the two men were seen together.

⁷² See Powell, 126 Wn.2d at 259-61 (evidence of a hostile relationship is admissible to show motive).

The trial court did not err by admitting this evidence. Evidence of previous fights, threats, or hostile relationships is admissible to show motive⁷³ and intent.⁷⁴ And, under the res gestae exception, courts may admit evidence of other bad acts that happened near the same time and place as the crime in order to give the crime context and “complete the story of the crime.”⁷⁵ Evidence of the January 23rd incident clearly helps to explain Mason and Santoso’s relationship immediately before Santoso disappeared. It helps to explain Mason’s motive for killing Santoso, and his intent to do so. It also helps to provide a “complete picture” of the crime to the jury.⁷⁶ Without the evidence, the jury would have been hard pressed to understand the context of the crime they were to judge. The evidence is relevant and necessary to the action because it is of consequence to the action and makes an identified fact more probable.⁷⁷ And its highly probative value outweighs its prejudicial effect.⁷⁸

⁷³ Powell, 126 Wn.2d at 260 (citing State v. Hoyer, 105 Wash. 160, 163, 177 P. 683 (1919); State v. Gates, 28 Wash. 689, 697-98, 69 P. 385 (1902); State v. Americk, 42 Wn.2d 504, 256 P.2d 278 (1953); 1 Charles E. Torcia, *Wharton's Criminal Evidence* § 110, at 389-90 (14th ed. 1985)). See also State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545 (defendant’s previous theft from the murder victim was relevant to defendant’s motive), review denied, 106 Wn.2d 1017 (1986).

⁷⁴ Powell, 126 Wn.2d at 261 (citing State v. Parr, 93 Wn.2d 95, 102, 606 P.2d 263 (1980)).

⁷⁵ Id. at 263 (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981); State v. Thompson, 47 Wn. App. 1, 11-12, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987)).

⁷⁶ Id. (quoting Tharp, 96 Wn.2d at 594).

⁷⁷ Id. at 259 (citing Dennison, 115 Wn.2d at 628; Saltarelli, 98 Wn.2d at 362-63).

⁷⁸ The evidence of the January 23rd incident was admissible for another reason. One of the three aggravating factors the State charged was that Santoso was a potential witness in Mason’s kidnapping and robbery prosecution. The State is required to prove an aggravating factor beyond a reasonable doubt. State v. Kincaid, 103 Wn.2d 304, 311-13, 692 P.2d 823 (1985). In this case, the evidence of the January incident was relevant to prove this aggravating factor. Mason agrees that the fact that he was charged is in itself relevant to prove the aggravating factor, but he argues that the State’s “full-scale recreation” of the incident was too detailed and thus prejudicial. But the State was justified in its thorough presentation because it was permitted to prove the likelihood that Mason would be convicted of kidnapping/robbery, and his consequent desperation to exonerate himself.

It is true that the trial court should have told the jury the purposes for which it could consider the January 23rd evidence. But any error was harmless. Evidentiary errors under ER 404(b) are not of a constitutional dimension,⁷⁹ and thus the proper inquiry is whether, within reasonable probabilities, the trial's outcome would have been different if the error had not occurred.⁸⁰ In this case, we conclude that the outcome would not have been different if the court had specifically instructed the jury that the evidence could be considered only in the context of motive, intent, and res gestae. While the January 23rd incident is helpful in establishing Mason's connection to Santoso's disappearance, a great deal of other evidence sufficiently establishes Mason's guilt.

V. "To Convict" Jury Instructions and Aggravating Factors

Mason next challenges the "to convict" jury instruction. We review a challenged jury instruction de novo.⁸¹ It is well-established that the State must prove each essential element of a charged crime beyond a reasonable doubt,⁸² and the "to convict" jury instruction must contain all elements of the crime.⁸³ In this case, the trial court instructed the jury that to convict Mason, the jury must find that the State proved the various elements of first degree murder beyond a reasonable doubt. In a separate instruction, the court instructed the jury that if it found Mason guilty of first degree murder, it must further determine whether the State proved certain aggravating

⁷⁹ State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

⁸⁰ Id. (citing Robtoy, 98 Wn.2d 30).

⁸¹ State v. Deryke, 110 Wn. App. 815, 819, 41 P.3d 1225 (2002) (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003).

⁸² State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

⁸³ Id. at 143 (citing State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953)).

circumstances. Mason argues that aggravating factors are essential elements of the crime of aggravated first degree murder and should have been included in the “to convict” instruction. We disagree.

First, defense counsel proposed a “to convict” instruction that was almost identical to the one the trial court used. It did not mention the aggravating factors. This is invited error. Under the invited error doctrine, a defendant who proposed an erroneous instruction at trial “invited the error” and thus may not challenge the instruction on appeal.⁸⁴ This is so even when the “to convict” instruction allegedly omitted an essential element of the crime.⁸⁵

But even if the invited error doctrine did not preclude Mason’s challenge, Mason’s argument nevertheless fails because aggravating factors are not “elements” of the crime. Citing Apprendi v. New Jersey⁸⁶ and Ring v. Arizona,⁸⁷ Mason asserts that because aggravating factors increase punishment, they are elements of the crime. But Apprendi and Ring require that any fact which increases a defendant’s authorized punishment be found by a jury beyond a reasonable doubt.⁸⁸ They do not define essential elements of crimes, nor do they address jury instructions. And the Washington Supreme Court has clearly held that, for the purpose of jury instructions, aggravating factors for first degree murder are *not* elements of the crime but rather are

⁸⁴ City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (citing State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)).

⁸⁵ Id. at 720-21 (citing State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990); State v. Summers, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001), modified on recons., 43 P.3d 526 (2002)).

⁸⁶ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

⁸⁷ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

⁸⁸ Ring, 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83).

sentence enhancements.⁸⁹ Therefore, as long as the jury decides whether the State proved the aggravating factors, as they did in Mason's case, these factors are properly included in an instruction other than the "to convict" instruction.⁹⁰

VI. Sufficient Evidence of Burglary

Mason argues that the State presented insufficient evidence of burglary as an aggravating factor. Specifically, he asserts there was insufficient evidence to prove beyond a reasonable doubt that he unlawfully entered or remained in Santoso's home. In reviewing a sufficiency challenge, this court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.⁹¹ A reviewing court defers to the trier of fact on the persuasiveness of the evidence, witness credibility, and conflicting testimony.⁹² In this case, the evidence was sufficient to support the jury's burglary finding.

The evidence clearly indicates that someone threw a cinder block through Santoso's bedroom window. A police officer testified that there was a large hole in the bedroom window, broken glass along the windowsill, and a large concrete block on the floor. The block was in a puddle of blood. A forensic scientist described a large hole in

⁸⁹ State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004) (citing Kincaid, 103 Wn.2d at 312).

⁹⁰ Mason argues that State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002), and State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997), require a trial court to include aggravating factors in a "to convict" instruction. But in Oster, the Supreme Court held that it was not error to instruct a jury separately on the issue of prior criminal history. 147 Wn.2d at 143. And while Smith states that jurors should not be forced to refer to separate jury instructions to ascertain all of the elements of a crime, 131 Wn.2d at 262-63, it never says that aggravating factors are elements of a crime.

⁹¹ State v. Ainslie, 103 Wn. App. 1, 5-6, 11 P.3d 318 (2000) (citing State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999)).

⁹² Id. at 6 (citing State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992)).

the window and broken window blinds, and testified that the block was thrown through the window before the blood was deposited. And while the forensic scientist also said that no one entered through the broken window, Marina Madrid testified that Mason admitted to throwing a brick into Santoso's apartment and entering through the window. In fact, Mason told her that he might have cut his leg while entering the window.

One of Santoso's neighbors testified that at about 10:45 pm, she heard breaking glass and felt the building shake. She then heard moaning and "angry whispering." Another neighbor testified that he heard noises coming from Santoso's apartment: "[T]he front door had been opened really quickly, slamming into a wall right below kind of where we were sitting there. And then I heard some glass breaking and some muffled noises downstairs. It was pretty loud." He further described the muffled noises as "low-level thuds and bangs and crashes[.]" The forensic scientist testified that there was no indication that the front door was broken or that the locks were forcefully opened.

To be guilty of burglary, a defendant must have entered or remained in a building unlawfully.⁹³ "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain."⁹⁴ Unlawful entry and unlawful remaining may be construed as separate acts.⁹⁵ That is, in certain circumstances, a defendant could be guilty of burglary after *lawfully* entering but *unlawfully* remaining.⁹⁶ Unlawful entry "occurs when a person initially enters a building

⁹³ RCW 9A.52.020(1); .025(1); .030(1) (that the person entered or remained unlawfully in a building is an element of first degree, second degree, and residential burglary).

⁹⁴ RCW 9A.52.010(3).

⁹⁵ State v. Klimes, 117 Wn. App. 758, 765, 73 P.3d 416 (2003).

⁹⁶ Id. at 767 (citing State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988); State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993)).

without invitation, license or privilege, and with intent to commit a crime therein.”⁹⁷

Unlawful *remaining*, however, “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.”⁹⁸ A burglary conviction may also stand on unlawful remaining alone if the defendant lawfully enters but has previously been barred from returning to those premises.⁹⁹

The evidence in this case could be interpreted in several different ways. But viewing the evidence in the light most favorable to the State, and deferring to the trier of fact on the persuasiveness of the evidence, witness credibility, and conflicting testimony, a rational trier of fact could have found beyond a reasonable doubt that Mason unlawfully entered Santoso’s apartment through the broken window or through an unlocked front door. At the very least, a rational trier of fact could have found that even if Santoso permitted Mason to enter the apartment, Mason *remained* unlawfully because the no-contact order had previously barred him from entering those premises.¹⁰⁰

But even if insufficient evidence supports the burglary finding, it is ultimately of no consequence because another aggravating factor supports the aggravated murder conviction. The State charged Mason with violating RCW 9A.32.030(1)(a), which states that a person is guilty of first degree murder if, with a premeditated intent to cause

⁹⁷ Thomson, 71 Wn. App. at 640 (citing RCW 9A.52.030(1); .020(1); .010(3)).

⁹⁸ Id. at 640-41 (citing RCW 9A.52.030(1); .020(1); .010(3); Collins, 110 Wn.2d 253, 751 P.2d 837 (1988); State v. Rio, 38 Wn.2d 446, 230 P.2d 308, cert. denied, 342 U.S. 867 (1951)).

⁹⁹ Klimes, 117 Wn. App. at 767-68 (citing State v. Kutch, 90 Wn. App. 244, 951 P.2d 1139 (1998)).

¹⁰⁰ See id. (citing Kutch, 90 Wn. App. 244).

another's death, he or she causes that person's death. Mason was not charged with murdering another in the process of committing a burglary,¹⁰¹ and the burglary allegation is relevant only in the context of the aggravating factors. Mason was charged with three aggravating factors: (1) the victim was a potential witness in a proceeding against him;¹⁰² (2) the murder was committed in the course of a burglary;¹⁰³ and (3) at the time of the murder, a no-contact order existed prohibiting the defendant from contacting the victim.¹⁰⁴ Although three aggravating factors were charged, the jury needed to find only one in order for Mason to be convicted of aggravated first degree murder.¹⁰⁵ The jury found the State had proven two aggravating circumstances: Mason committed first degree murder in the course of a burglary and in violation of a no-contact order. Mason only challenges the burglary aggravating factor and does not dispute the no-contact order aggravating factor. Therefore, even if there were insufficient evidence to prove burglary, the other aggravating factor remains to support Mason's conviction. We reject Mason's challenge to the sufficiency of the evidence in the burglary charge.

VII. Informing the Jury About the Death Penalty

During voir dire, the judge instructed the jury venire members about their obligation to apply the law as directed by the court. The court then asked whether any of the jurors would be unable to enforce or apply the law as instructed. One particular

¹⁰¹ See RCW 9A.32.030(1)(c).

¹⁰² See RCW 10.95.020(8).

¹⁰³ See RCW 10.95.020(11)(c).

¹⁰⁴ See RCW 10.94.020(13).

¹⁰⁵ RCW 10.95.020 (a person is guilty of aggravated first degree murder if he or she commits first degree murder and *one or more* of the enumerated aggravating circumstances existed).

juror responded, "If it were the death penalty. I don't support the death penalty. I would have a hard time with that." The judge responded:

You should not concern yourselves with what penalty may 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 [the juror'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 which may be imposed, in the event that a jury reaches a verdict of guilty.

Aside from that consideration, would anybody find themselves in a position where they might not be able to apply the law as instructed, if you found yourself thinking that it might be changed somewhat?

[No response.] All right. Thank you. . . .

Mason now argues that the court committed reversible error by informing the jurors that the State was not seeking the death penalty, in violation of State v. Townsend.¹⁰⁶ In Townsend, the State mentioned the death penalty during voir dire, and the trial court responded by saying,

"Thank you . . . I had intended to let the jury know that I'd forgotten to indicate because when you do hear the term first degree murder, a lot of people think automatically about a death penalty. This is not a case in which the death penalty is involved and will not be a consideration for the jury."^[107]

In response to this statement, the Supreme Court held that "it is error to inform the jury during voir dire in a noncapital case that the case is not a death penalty case."¹⁰⁸ This rule ensures that juries remain impartial, and it prevents unfair influence on juries' deliberations.¹⁰⁹ Instead of informing jurors about possible sentences, "voir dire should be used to screen out jurors who would allow punishment to influence their

¹⁰⁶ 142 Wn.2d 838, 15 P.3d 145 (2001).

¹⁰⁷ Id. at 842.

¹⁰⁸ Id. at 840.

¹⁰⁹ Id. at 846.

determination of guilt or innocence and then, through instructions, jurors should be advised that they are to disregard punishment.”¹¹⁰

Despite its clear holding, the Townsend court found that the trial court’s error was harmless.¹¹¹ In other words, it is not *per se* reversible error to instruct a jury that the death penalty is not involved in a case. And Townsend is distinguishable from our case because that court *sua sponte* discussed the death penalty. In contrast, the trial judge in this case informed counsel ahead of time that he was concerned about a juror possibly inquiring about the death penalty during voir dire. The judge worried that a juror who opposed the death penalty might disqualify him or herself on those grounds, and that would disadvantage the defense. The judge acknowledged the Townsend ruling but nevertheless encouraged defense counsel to consider the issue because he thought “it could frankly have a significant effect on the composition of the jury. And I don’t think it’s an effect the defense would be enthusiastic about.”

After research and discussion, the judge composed the answer he would use if a juror were to ask about the death penalty. Defense counsel objected to the language. In response, the judge asked defense counsel how his proposed answer would prejudice the defense, saying: “Anything you can help me with, I would certainly appreciate it. I have been thinking about this a lot, as I’ve told you, over the months as we have been leading up to this moment.” Defense counsel responded that a jury may be more likely to convict a defendant if it knows that the defendant will not be put to death, but counsel admitted that he did not think that was a particularly compelling

¹¹⁰ Id. at 847.

¹¹¹ Id. at 840.

reason. The trial judge concluded that he would give his composed answer if asked by a juror, but he stated for the record that

this is not a seat-of-the-pants decision. We have had discussions about this issue going back four or five months.

It was my belief when we first started to have these discussions, and it's even more firmly my belief now, that to not inform the jury that this is not a death penalty case, in my view, would be prejudicial to the defense[.]

The judge opined that people who would opt off a jury panel because they oppose the death penalty would be naturally pro-defense. Therefore, he concluded that failing to inform the jury, if someone inquired, about the death penalty would prejudice Mason.

The trial court did not err by responding to the potential juror's statement as it did. This case is distinguishable from Townsend because the judge in this case had no intention of discussing the death penalty with the jury unless a juror made it clear he needed to do so. The court's discussion of the death penalty was short and succinct, and did not emphasize sentencing considerations. The court instructed the jury, both during voir dire and at the close of the case, that the jury was not to consider sentencing in making its decision. The judge was extraordinarily thoughtful about the issue and specifically consulted with defense counsel about it ahead of time. And finally, after he informed the jury that the death penalty was not involved, the judge again asked the jurors if they could apply the law as instructed. When he received no response, he proceeded with the voir dire. The trial court did not violate the Townsend rule, and even

if it did, the error was clearly harmless under these circumstances.

We affirm.

Ajda, J.

Kennedy, J.

Baker, J.

APPENDIX B

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 KIM HEICHEL MASON,)
)
 Appellant.)
 _____)

No. 52824-6-1

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant, Kim Mason, having filed a motion for reconsideration of the opinion filed April 18, 2005, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this ~~10th~~ day of June 2005.

FOR THE COURT:

Ajid, J.
Judge

2005 JUN 10 PM 3:55
FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

