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NO. 52824-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KIM MASON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Crawford v. Washington provides that “testimonial” out-of-court statements may not be admitted at trial without an opportunity for cross-examination. A “testimonial” statement is a formal statement made in preparation for trial as the result of police interrogation. In this case, the deceased victim’s out-of-court statements were admitted at trial. None of these statements were “testimonial,” and they were admissible under the evidence rules. The statements were also admissible under the doctrine of “forfeiture by wrongdoing,” which provides that a defendant who kills a witness has forfeited his right to confront that witness. Should the defendant’s Crawford claims be rejected?

2. Under Frye v. United States, scientific evidence is not admissible unless it has achieved general acceptance in the relevant scientific community. Under ER 702, expert testimony is not admissible if it lacks foundation and is not helpful to the jury. In this case, the defendant’s DNA expert rendered an opinion that was not supported by other experts or by any relevant literature. The expert’s opinion also lacked foundation and was not helpful to the jury. Did the trial court properly exclude the expert’s testimony?

3. A trial court’s denial of a motion for mistrial is reviewed for

abuse of discretion. A jury is presumed to follow the trial court's instructions to disregard evidence that is stricken from the record. In this case, the trial court initially allowed the medical examiner to testify that he had issued a death certificate though the victim's body was never found. The trial court later reversed this ruling, and instructed the jurors to disregard this testimony. Overwhelming evidence proved that the victim was dead, including the fact that the victim's apartment and car were covered with pools of his blood, and the defendant's own admissions that the victim was dead. Did the trial court properly deny the defendant's motion for mistrial based on the medical examiner's testimony?

4. Evidence is admissible under ER 404(b) in the trial court's discretion if the evidence is probative of motive or premeditation, or if the evidence tends to rebut material assertions made by the defense. In this case, the trial court allowed the State to present evidence under ER 404(b) for the purposes of proving motive and premeditation, to prove an aggravating factor, and to rebut the defendant's statements to the police. Did the trial court exercise sound discretion in admitting this evidence?

5. Controlling precedent holds that aggravating factors may be submitted to the jury in a special verdict form rather than in the

“to convict” instruction for first-degree murder. Under RAP 2.5, even an alleged error of constitutional magnitude may not be raised for the first time on appeal if the error is not “manifest.” In this case, the aggravating factors were contained in a special verdict form by agreement of the parties. This procedure had no conceivable impact on the proceedings; thus, even if this procedure were error, it is not “manifest.” Should this court reject the defendant’s claim that the jury instructions were erroneous?

6. Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational jury could find the elements proved beyond a reasonable doubt. A person commits burglary by unlawfully entering or remaining in a building with intent to commit a crime. In this case, the evidence proved that the defendant threw a large cinder block through the victim’s bedroom window, entered the victim’s apartment, and stabbed him to death. Is the evidence sufficient to support the jury’s verdict on the aggravating circumstance of burglary?

7. Washington case law holds it is error for a trial court to instruct prospective jurors *sua sponte* that the State is not seeking the death penalty. But no case law controls how a trial court should respond when prospective jurors ask about the death penalty and

indicate that they could not follow the law in a death penalty case. In this case, the trial court concluded that if prospective jurors asked about the death penalty during voir dire, the court would honestly inform them that the death penalty was not being sought. At the beginning of voir dire, a prospective juror indicated she could not be fair if this were a death penalty case. The trial court then informed the venire that the death penalty was not being sought. Should the trial court's decision to answer the jury's questions honestly result in a new trial for the defendant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Kim Heichel Mason, was charged with Murder in the First Degree with aggravating circumstances for the February 19, 2001 killing of Hartanto Santoso. CP 11-12, 13-21. The aggravating circumstances were: 1) that the victim was a witness in a pending trial; 2) that the murder was committed in the course of a burglary; and 3) that a court order prohibited the defendant from contacting the victim when the murder was committed. CP 11.

Mason was tried to a jury from April 8, 2003 through June 10, 2003 before the Honorable Michael J. Fox. 4/8/03 RP –

6/10/03 RP. The jury found Mason guilty of first-degree murder as charged. CP 565; 6/11/03 RP 3. The jury was unanimous that two of the aggravating circumstances had been proved beyond a reasonable doubt: 1) that the murder was committed in the course of a burglary, and 2) that an order prohibiting contact was in place when the murder was committed. CP 566-67; 6/11/03 RP 3-4.

The trial court imposed the mandatory penalty of life in prison without the possibility of parole. CP 572-78; 7/25/03 RP 3. Mason timely appeals. CP 579-86.

2. SUBSTANTIVE FACTS

Hartanto Santoso was a young man from Indonesia who came to the United States in 1997. 4/21/03 RP 135. He worked two jobs as a nursing assistant so that he could send money home to his family. 4/10/03 RP 151-53; 4/21/03 RP 137. Santoso and his roommate, Dean Anderson, lived in an apartment in Kirkland. 4/10/03 RP 88-90. Santoso met Kim Mason when they were both working at Lake-Vue Gardens, a retirement home. 4/8/03 RP 195.

Mason was a professional kickboxer who fought under the name Kim "The Sensation" Mason. 4/15/03 RP 156. He was a very talented athlete with disciplined training habits and a high pain threshold. 4/15/03 RP 93-98; 4/22/03 RP 159-60. Mason was also

an instructor at the AMC Kickboxing gym in Kirkland. 4/22/03 RP 158-59. Mason met Marina Madrid, a medical researcher, at AMC in late 1999, and they began dating. 4/29/03 RP 16-18.

Mason's life started falling apart in late 2000 and early 2001. His behavior became erratic, and his friends suspected he was abusing drugs. 4/15/03 RP 102-07. He broke up with Madrid, and rekindled a sexual relationship with Kristine Riley, a drug addict and alcoholic. 4/29/03 RP 48; 5/13/03 RP 10-13, 96-99. Mason lost his job as a kickboxing instructor in December 2000. 4/22/03 RP 165-66/ 4/29/03 RP 40-41. His finances were in shambles: in November 2000 he took a high-interest loan and in December 2000 he bought a sports car on credit, but he could not pay the bills. 5/7/03 RP 120-35; 5/19/03 RP 56-58. He also owed nearly \$7000 on his credit cards. 5/28/03 RP 188-19.

During this period in his life, Mason considered Santoso his "only true friend[.]" 4/15/03 RP 207. Mason also knew that Santoso was sexually attracted to him. 4/29/03 RP 44-45. In late December, Mason asked Santoso for money, and Santoso gave him \$400. 4/8/03 RP 195. Santoso introduced Mason to his supervisor to help him get a job with a nursing referral service. 4/10/03 RP 156-60. On January 19, 2001, Mason used Santoso as

a reference on a job application with a security service under a false name. 5/6/03 RP 71-74. Mason even used Santoso's urine in order to pass a drug test in early January 2001. 4/29/03 RP 75-76.

On January 23, 2001, Mason lured Santoso to his Redmond condominium by offering to drive him to a doctor's appointment. 4/8/03 RP 119. As Santoso was admiring a drawing of Kim "The Sensation" Mason that was hanging on the wall, Mason came up behind him, wrapped his arm around his neck, and strangled him into unconsciousness. 4/8/03 RP 119; 4/14/03 RP 73-74. Santoso woke up on the floor in Mason's bathroom; his mouth, arms and legs were bound with duct tape. 4/8/03 RP 119. Mason brandished a gun and threatened to kill him. 4/14/03 RP 73. Mason demanded the balance of Santoso's bank account, so Santoso started writing a check for \$700. 4/8/03 RP 121-22; 4/10/03 RP 167. Displaying a typed document as the text, Mason forced Santoso to write a letter in his own hand to his roommate that he was moving to Portland. 4/8/03 RP 121; 4/16/03 RP 58-69. Mason poked a syringe into a jug of drain cleaner and threatened to inject it into Santoso. 4/8/03 RP 123; 4/9/03 RP 70.

Eventually, Mason lost his nerve and Santoso talked him into letting him go. Mason threatened to commit suicide. 4/8/03 RP

123. Mason also threatened to kill Santoso if he went to the police.
4/10/03 RP 168.

Santoso suffered severe injuries as a result of the attack, including a swollen face, bruises on his wrists, and bruises on his neck so pronounced that they left an imprint in the shape of the necklace he was wearing. 4/8/03 RP 110; 4/14/03 RP 64-65. He had so much blood in his eyes from petechial hemorrhaging that he literally cried blood. 4/9/03 RP 78. The doctor who treated Santoso had never seen strangulation injuries so severe. 4/14/03 RP 66.

Santoso wanted to flee, but his friend Steven Briggs talked him into going to the police. 4/14/03 RP 16. Briggs drove Santoso to the Kirkland Police Department, and Santoso told Corporal Haslip what had happened. 4/8/03 RP 113-124. When the Kirkland police determined that the crime had occurred in Redmond, Redmond Detective Berberich took over the case. 4/8/03 RP 158-60. Berberich arrested Mason on January 24, 2001. 4/8/03 RP 185-87.

After his arrest, Mason admitted he had strangled Santoso, bound him with duct tape, and displayed a gun; however, he claimed he had done so because Santoso had tried to grab his

penis and kiss him. 4/8/03 RP 196, 198. Mason denied that he had forced Santoso to write a check or threatened him with a syringe of drain cleaner. He said there were no syringes in his condominium. He also said the gun was not loaded. 4/8/03 RP 197. Berberich booked Mason into jail. 4/8/03 RP 205.

Berberich obtained a warrant and searched Mason's condominium. 4/9/03(a.m.) RP 51. He found syringes, a sharps container, a loaded gun, ammunition, duct tape, and a jug of drain cleaner with needle holes in the seal. 4/9/03(a.m.) RP 63, 65, 77-78, 83, 85. Mason's computer hard drive still contained part of the prepared text that Mason had used to force Santoso to write the letter of disappearance. 4/15/03 RP 202. Santoso's checkbook contained a partially completed check for \$700 and Mason's fingerprints. 4/16/03 RP 105, 117-18, 122.

Mason was charged with first-degree kidnapping and attempted first-degree robbery as the result of his attack on Santoso. 5/29/03 RP 14. Nonetheless, he was released from jail on January 31 pending trial. 4/9/03 RP 89. When Santoso found out that Mason had been released, he was petrified. He called Linda Webb, his victim advocate, and begged her to let him sleep in her office or in a jail cell. 4/15/03 RP 36-37, 39. Santoso "knew he

was going to die." 4/15/03 RP 39. In addition to the no-contact order that was issued at Mason's arraignment, Webb helped Santoso obtain a civil protective order against Mason, which became final on February 12, 2001. 4/15/03 RP 30.

After Mason was released from jail, he reconciled with Marina Madrid. 4/29/03 RP 52. Mason was furious with Santoso. He was angry about being arrested and having to pay for a lawyer. 4/9/03(a.m.) RP 91-92. He told Madrid that Santoso "couldn't testify" and "was making his life a living hell," and he decided to do something about it. 4/29/03 RP 91, 96-97.

At 10:30 p.m. on February 19, 2001, Mason called Madrid. He told her to meet him at the airport, and to bring a change of clothes. 4/29/03 RP 92. As Madrid was gathering the clothes, Mason stopped by her apartment and reiterated his request in person. 4/29/03 RP 95-96.

At 10:45 p.m., Santoso's neighbors heard a window breaking and a crash so loud that it shook the building. 4/17/03 RP 97, 99. They heard Santoso's front door slamming open, muffled bangs and thumps, angry voices, and moaning. 4/17/03 RP 102, 111, 168-75. About ten minutes later, they saw Santoso's car leaving the parking lot. 4/17/03 RP 108, 182-87.

Madrid did as she was told and drove to the baggage claim area at Sea-Tac Airport. 4/29/03 RP 96. As Mason got in the car, Madrid saw that his hands were covered with blood. She asked him what happened, and he said, "Let's just say that Santoso won't be a problem anymore." 4/29/03 RP 98.

As they drove away from the airport, Mason told Madrid he had cut himself on the right thigh during the attack. He asked her if she would sew it for him, and she agreed. 4/29/03 RP 99-100. They stopped in a dark parking lot, and Mason changed his clothes. 4/29/03 RP 101. As they were driving north on I-405, Mason pulled out a knife and told Madrid to slow down; she complied, and he threw the knife out the window. 4/29/03 RP 101-02. They stopped at Factoria Mall and threw away a plastic bag containing Mason's bloody pants, shirt, shoes, and gloves. 4/29/03 RP 101, 105. Then they drove to Kirkland, near Santoso's apartment, and stopped in the QFC parking lot; Mason told Madrid to go get his car and gave her directions. She had to walk some distance in order to find it, and she was afraid it would be parked at Santoso's apartment. She eventually found it some blocks away. Mason drove Madrid's car to her apartment. 4/29/03 RP 105-09.

On her way home, Madrid bought supplies to sew Mason's

leg wound. When she got home, Mason was already there in obvious pain. 4/29/03 RP 114. Madrid sewed the wound.¹ 4/29/03 RP 114, 117. She then went to Home Depot and bought rubber cement to seal the wound at Mason's request. 4/29/03 RP 121-22. Mason told Madrid to provide him an alibi and to tell the police that he had been at her apartment for the entire evening, and she agreed. 4/29/03 RP 123, 127. Mason also told Madrid about what he had done to Hartanto Santoso.

Mason told her he had thrown a brick through Santoso's window, went into his apartment, and stabbed him to death. 4/29/03 RP 129. He said that Santoso was moving around and making noises, so he "had to keep stabbing him many times." 4/29/03 RP 130. Mason said he had put the body in Santoso's car and drove it away; he said he hid the body, but he did not say where. 4/29/03 RP 131.

The next day, Santoso's neighbors noticed that Santoso's front door was open, and that a trail of blood led from the door to the walkway and into the parking lot. They called the police.

¹ Mason had a medical appointment the next day, but he did not show up. 4/24/03 RP 116. He did keep an appointment on February 22, but he did not say anything about the wound on his leg. 4/24/03 RP 116-17.

4/17/03 RP 65-69. The responding officers went inside, and saw more blood leading from the front door to the back bedroom.

4/21/03 RP 88-89. The bedroom was a "catastrophe." 5/29/03 RP 25. The window was broken, and a large cinder block had crashed to the floor. There were no sheets on the bed, and nearly everything in the room was covered with blood. 5/29/03 RP 25-27; Ex. 14, 15, 99, 100. There was so much blood on the floor that it was still wet two days later. 4/22/03 RP 47.

Santoso's car was discovered in the parking lot at Sea-Tac Airport on February 21. 4/23/03 RP 109, 113. It contained a parking stub indicating that it had entered the lot at 11:51 p.m. on February 19, and a lot of blood. 4/23/03 RP 4-24; Ex. 16, 113, 114.

Kirkland Police detectives questioned Mason about Santoso's disappearance. He told them he had been at Madrid's apartment that night. 4/23/03 RP 195-96. While he admitted that he had known Santoso for two years, he claimed that their friendship had been "cooling off" in recent months because Santoso had tried to kiss him. 4/24/03 RP 162-64. Mason claimed that he had never been to Santoso's apartment, and that he had never driven Santoso's car. 4/24/03 RP 174.

Mason spent nearly the entire day on February 20, 2001 with

a friend, Kyle Wilkins. 5/6/03 RP 94-108. Wilkins noticed that Mason was limping, and Mason said he had hurt himself while sparring. 5/6/03 RP 96. Mason showed Wilkins the bandage on his thigh and said he'd sutured the wound himself. Mason asked Wilkins if he could get some penicillin. 5/6/03 RP 105-08. Mason then dropped by unexpectedly the next day, and told Wilkins to tell the police "exactly what we did" on February 20. 5/6/03 RP 111. Mason also told Wilkins to forget about the penicillin, and said it was a "joke." 5/6/03 RP 112.

Mason's neighbor, Frank Clapsaddle, saw Mason washing his car, inside and out, at 2:00 a.m. on February 21. 5/5/03 RP 184-88. Kristine Riley went to Mason's condominium later in the day on February 21; Mason was cleaning, and was using so much carpet freshener that the smell was overwhelming. 5/13/03 RP 60-61. Riley saw that Mason had scratches on his hands. When she asked him about it, he said he had fought in a tournament in Eastern Washington the prior weekend. 5/13/03 RP 58, 69.

Mason moved in with Marina Madrid at the end of February, but he moved almost none of his possessions except for a black gym bag. 4/29/03 RP 135-35; 5/13/03 RP 59. Madrid found a book entitled "The Ancient Art of Strangulation" in Mason's bag; the book

included advice about killing, dismembering and concealing bodies. 4/29/03 RP 184-85; 6/9/03 RP 73. Mason also kept a knife at Madrid's apartment, which frightened her. 4/29/03 RP 180-82. Mason later told Madrid that he had gone back to Santoso's body and decapitated it so that it could not be identified with dental records. 4/29/03 RP 132-33. He also told her that he had gone to Santoso's apartment with the intention of killing him, and that he had purposely worn dark clothing and gloves. 4/29/03 RP 144.

On March 3, 2001, Mason went to a kickboxing match with his trainer, Curtis Schuster. 5/15/03 RP 21-23. Schuster asked about Santoso; Mason said, "I hope that motherfucker is dead, but I didn't do it." 5/15/03 RP 28. Schuster also asked Mason about the bandage on his leg, and Mason said he had injured himself while training for the match. 5/15/03 RP 31-32. But later that same day, Mason told Schuster that Santoso had been killed by the Russian Mafia, and that the Mafia had stabbed him in the leg to keep him quiet. 5/15/03 RP 40-43.

Mason was arrested April 9, 2001 at Sea-Tac Airport when he returned from a kickboxing match in Japan. 5/29/03 RP 39. By this time, Mason had changed his name to "Hihiro Takashi Riser." 4/29/03 RP 42; 5/1/03 RP 49-50; 5/29/03 RP 46-47.

Marina Madrid initially lied to the police, and provided the alibi that she and Mason had agreed upon. 4/29/03 RP 55-62. But when the police served a search warrant at her apartment on April 9, 2001, she realized she had made a mistake. 4/29/03 RP 77, 84. She met with the prosecutor two days later, negotiated an immunity agreement, and agreed to tell the truth. 4/29/03 RP 88-90. As the result of Madrid's cooperation, the police were able to locate the murder weapon in the bushes near I-405. 5/1/03 RP 192; 5/5/03 RP 57-58.

Dr. Edward Blake of Forensic Science Associates (FSA), a noted expert in forensic DNA, tested the evidence in this case using the "short tandem repeats" (STR) method. 5/19/03 RP 13-14, 44-45. All of the blood samples from inside and outside Santoso's apartment matched Santoso's genetic profile. 5/19/03 RP 76-77, 88, 90-103, 138, 151-56. The blood on the exterior of Santoso's car and most of the blood inside the car also belonged to Santoso. 5/19/03 RP 104-105, 126. Samples from the driver's seat of Santoso's car contained a mixture of blood belonging to Santoso and Mason. Mason's blood was located on the seat directly below where the driver's right thigh would be, corresponding to Mason's wound. 5/19/03 RP 119-25; 5/20/03 RP 43-44. Santoso's blood

was found on the murder weapon. 5/19/03 RP 160-61; 5/20/03 RP 23-24. Santoso's blood was also present on the floorboard of Marina Madrid's car, and Mason's blood was found on the passenger seat. 5/20/03 RP 32-33.

Hartanto Santoso was never heard from again after February 19, 2001. 4/10/03 RP 109; 4/21/03 RP 34, 145; 5/27/03 RP 147, 157, 159-61. His body has never been found. 5/1/03 RP 184-89.

C. **ARGUMENT**

1. **THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING THE VICTIM'S STATEMENTS REGARDING THE ATTACK ON JANUARY 23, 2001.**

Mason claims that his confrontation rights were violated when the trial court admitted Hartanto Santoso's statements regarding the attack on January 23, 2001. Appellant's Opening Brief, at 9-21. This claim should be rejected for three reasons. First, Santoso's statements to Corporal Haslip, Detective Berberich, and Linda Webb are not "testimonial" under Crawford v. Washington, and are admissible under applicable hearsay exceptions. Second, Santoso's statements are admissible under the doctrine of "forfeiture by wrongdoing," and the trial court may be affirmed on this basis as well. Finally, even if any statements were

admitted in error, Mason's conviction should still be affirmed. The challenged statements are cumulative of other statements not challenged on appeal, and the evidence of Mason's guilt is overwhelming; thus, any alleged error is harmless.

- a. CRAWFORD V. WASHINGTON DOES NOT BAR THE ADMISSION OF ALL OUT-OF-COURT STATEMENTS TO GOVERNMENT EMPLOYEES AS MASON IMPLIES.

As a preliminary matter, Mason misstates the law in arguing that Santoso's statements were admitted in error. Specifically, Mason argues that Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), bars the admission of virtually any statement made to a governmental employee, regardless of the declarant's purpose in making the statement, the conduct of the government employee while hearing the statement, or the reason the statement is offered at trial. Appellant's Opening Brief, at 11. Mason overstates the scope of Crawford.

The Crawford majority concluded from the text of the Sixth Amendment that the confrontation clause applies to "witnesses" who "bear testimony." Crawford, 124 S. Ct. at 1364. "Testimony" in this context means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. (citation

omitted). Thus, the confrontation clause applies to “testimonial” out-of-court statements; accordingly, such statements are not admissible unless they have been subjected to cross-examination, either at trial or at some other time. Id. at 1370.

Although the Court did not provide a precise definition of “testimonial,” the historical and modern examples the Court provides are telling. First, after conducting an extensive historical analysis of English and colonial law, the Court concluded that “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.” Crawford, 124 S. Ct. at 1363. As a paradigmatic example of such abuses, the Court cited the infamous treason trial of Sir Walter Raleigh in 1603. The statements at issue in Raleigh’s trial were made by an alleged accomplice, Lord Cobham, who implicated Raleigh in *ex parte* testimony before the Privy Council and in a letter. The Court cited Cobham’s statements as classic “testimonial” evidence, made for the purpose of proving Raleigh’s guilt in a trial with no opportunity for cross-examination. Id. at 1360.

Given this historical backdrop, it is not surprising that the Court’s modern examples of “testimonial” statements closely

resemble the formality of Cobham's ex parte statements to the Privy Council. For instance, the Court held that affidavits, depositions, ex parte pretrial testimony, or other formal statements "that declarants would reasonably expect to be used prosecutorially" are "testimonial." Id. at 1364. Further, the Court held that "[s]tatements taken by police officers *in the course of interrogations* are also testimonial[.]" Id. (emphasis supplied). This is because "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England." Id. Thus, "testimonial" statements, by their very nature, have some degree of formality and are created with an eye toward later use at trial.

The Court did not hold that any and all statements made to a government employee are testimonial. To the contrary, the Court was concerned with "*structured* police questioning,"² and the "involvement of government officers in the *production of testimony with an eye toward trial* [that] presents unique potential for prosecutorial abuse[.]" Crawford, at 1367 n.7 (emphasis supplied).

Crawford is concerned with evidentiary statements that the government produces by contacting witnesses and creating

² Crawford, at 1365 n.4 (emphasis supplied).

“testimony” or its functional equivalent through the use of “interrogation” or “structured” questioning. This type of tactically structured interrogation alerts a witness to the fact that his statements are being gathered in anticipation of trial, thus rendering them “testimonial.”

On the other hand, “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law[.]” Crawford, 124 S. Ct. at 1374. In other words, when a statement is not “testimonial,” the rules of evidence govern its admissibility. Santoso’s statements to Corporal Haslip, Detective Berberich, and Linda Webb were not “testimonial” under Crawford, and were properly admitted under the evidence rules.

b. SANTOSO’S STATEMENTS REGARDING THE JANUARY INCIDENT WERE PROPERLY ADMITTED AT TRIAL.

(1) The statements to Corporal Haslip were non-testimonial excited utterances.

An excited utterance is a statement made while the declarant is under the influence of stress from a traumatic event such that the statement is not the product of reflection or deliberation. ER 803(a)(2); State v. Woods, 143 Wn.2d 561, 600, 23 P.3d 1046 (2001). As such, an excited utterance is not

“testimonial” under Crawford because it is not made with the purpose of creating evidence for trial, and it is not made as the product of police “interrogation.”

Division Two of this court recently considered this question in State v. Orndorff, ___ Wn. App. ___, 95 P.3d 406 (2004). In Orndorff, the declarant, Coble, made statements shortly after an armed, home-invasion-style assault. The witness who related Coble’s statements at trial described her as “panic-stricken” when she made the statements. Orndorff, 95 P.3d at 407-08. After discussing the historical underpinnings of the term “testimonial” as described in Crawford, the Orndorff court held that excited utterances do not fall into this category:

[Coble’s excited utterance] was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony or a statement given in response to police questioning; and Coble had no reason to expect that her statement would be used prosecutorially. Rather, Coble’s statement was a spontaneous declaration made in response to the stressful incident she was experiencing. We hold that Coble’s excited utterance was not testimonial, and, therefore, not precluded by Crawford’s Confrontation Clause analysis.

Orndorff, 95 P.3d at 408.

Other courts have also held that excited utterances are not “testimonial.” For instance, the Indiana Court of Appeals recently

held that the excited utterances of a domestic violence victim to an officer at the scene were not “testimonial,” even though these statements were made in response to questioning. Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004). The court observed that the victim’s statement was not given in a formal setting like the Privy Council, was not given “during any type of pre-trial hearing or deposition,” and “was not contained within a ‘formalized’ document of any kind.” Hammon, 809 N.E.2d at 952. Moreover, the court distinguished the informal questioning by the police officer from the formal “interrogation” conducted by the detectives in Crawford:

Admittedly, A.H. gave her statement in direct response to questioning by Officer Mooney. However, we observe that the Supreme Court chose not to say that any police *questioning* of a witness would make any statement given in response thereto “testimonial”; rather, it expressly limited its holding to police “interrogation.” We conclude this choice of words clearly indicates that police “interrogation” is not the same as, and is much narrower than, police “questioning.” . . . “Interrogation” is defined in one common English dictionary as “To examine by questioning formally or officially.” This is consistent with our prior observation that the common characteristic of all “testimonial” statements is the formality by which they are produced. We also believe that “interrogation” carries with it a connotation of an at least slightly adversarial setting.

Hammon, 809 N.E.2d at 952 (citations omitted) (emphasis in original). Therefore, because the victim’s excited utterances were

not formal statements produced during police interrogation, they did not qualify as “testimonial,” and were admissible under Indiana’s evidence rules. Id. at 953.

The Supreme Court of Maine also recently held that excited utterances were not “testimonial,” even though the declarant drove to a police station in order to make her statement. State v. Barnes, 854 A.2d 208 (Me. 2004). In Barnes, the defendant was charged with his mother’s murder. At trial, a police officer testified to a prior incident where the mother drove to the police station to report that the defendant had assaulted and threatened her. Id. at 209. In deciding that this statement was not “testimonial,” the court highlighted several significant factors that distinguished it from statements made during formal police interrogations:

First, the police did not seek her out. She went to the police station on her own, not at the demand or request of the police. Second, her statements to them were made when she was still under the stress of the alleged assault. Any questions posed to her by the police were presented in the context of determining why she was distressed. Third, she was not responding to tactically structured police questioning as in Crawford, but was instead seeking safety and aid. The police were not questioning her regarding known criminal activity and did not have reason, until her own statements were made, to believe that a person or persons had been involved in any specific wrongdoing. Considering all of these facts in their context, we conclude that interaction

between Barnes's mother and the officer was not structured police interrogation triggering the cross-examination requirement of the Confrontation Clause as interpreted by the Court in Crawford. Nor did the victim's words in any other way constitute a "testimonial" statement.

Barnes, 854 A.2d at 211.

A similar case presents itself here. After attacking Santoso on January 23, Mason threatened to kill him if he went to the police. Santoso took these threats very seriously. 4/10/03 RP 168; 4/14/03 RP 74-75, 79. Santoso was also distrustful of government based on his experience in Indonesia. Nonetheless, Steven Briggs persuaded him to go to the police, and drove him to the Kirkland Police Department. 4/14/03 RP 17-18.

When Corporal Haslip met Santoso in the lobby, he noticed that his eyes were blood red, his face was swollen and puffy, and his neck was obviously bruised. 4/8/03 RP 110-12. Haslip had never seen someone with so much blood in his eyes. 4/8/03 RP 135. Santoso also had marks on his wrists consistent with binding. 4/8/03 RP 129. He was "extremely frightened," his voice was hoarse, and his hands were shaking. 4/8/03 RP 113. He maintained this demeanor throughout his contact with Haslip. 4/8/03 RP 115-16.

Although Haslip asked Santoso questions, he did so solely “to determine what had happened to him.” 4/8/03 RP 114. Moreover, Haslip did not take any type of formal statement from Santoso. 4/8/03 RP 127. Rather, once Haslip determined that the attack had occurred in Redmond rather than Kirkland, Haslip contacted the Redmond authorities so that a formal investigation could commence. 4/8/03 RP 130.

As in Barnes, the police did not seek out Santoso for the purpose of taking his statement; rather, Santoso came to the police for help. Also as in Barnes, Haslip asked questions to find out why Santoso was distressed, but did not engage in “tactically structured police questioning[.]” Barnes, 854 A.2d at 211. Haslip was not investigating “known criminal activity and did not have reason, until [Santoso’s] own statements were made, to believe that a person or persons had been involved in any specific wrongdoing.” Id. Also, as in Hammon, Haslip did not take any kind of formal statement from Santoso. For all of these reasons, this court should find that Haslip did not conduct an “interrogation,” and that Santoso’s statements to Haslip are not “testimonial.”

Finally, though Mason questions Judge Fox’s evidentiary ruling in passing, he offers no argument or citations to authority that

Judge Fox erred in admitting this statement as an excited utterance. Rather, his sole argument is that this statement “was a formal statement to the police plainly barred under Crawford[.]” Appellant’s Opening Brief, at 12. As discussed above, this is not the case. When a statement is not “testimonial,” it is admissible subject to the rules of evidence under state law. Crawford, 124 S. Ct. at 1374. Judge Fox properly exercised his discretion in ruling as he did on the unique fact of this case. See State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992) (holding that passage of time is not dispositive in determining whether statements are excited utterances, citing numerous cases). This court should reject Mason’s claim, and affirm.

(2) The statements to Detective Berberich were admitted for non-hearsay purposes.

As discussed above, the lynchpin of Crawford is the question of whether a statement is “testimonial.” “Testimony” means “a solemn declaration or affirmation made *for the purpose of establishing or proving some fact.*” Crawford, 124 S. Ct. at 1364 (citation omitted) (emphasis supplied). Thus, the Crawford decision omits from the scope of its holding any statements that are offered for a legitimate non-hearsay purpose. In other words, if statements

are not hearsay – i.e., not offered to prove the truth of the matter asserted – they do not meet the Crawford Court’s definition of “testimony,” and do not run afoul of the confrontation clause. Crawford, 124 S. Ct. at 1369 n.9 (confrontation clause does not bar the use of statements “for purposes other than establishing the truth of the matter asserted,” even if they are testimonial); see also People v. Reynoso, 2 N.Y.3d 820, ___ N.E.2d ___ (2004) (statement offered to show detective’s state of mind, not for truth of matter asserted, did not violate Crawford). Such is the case with Santoso’s statements that Detective Berberich described at trial.

Detective Berberich met with Santoso on January 24 after Corporal Haslip had referred Santoso to the Redmond Police. 4/8/03 RP 157. The trial court correctly ruled that Santoso’s statements to Berberich were not excited utterances. 4/8/03 RP 166-68, 181. The trial court allowed limited testimony from Berberich regarding Santoso’s statements, but only to explain why he collected particular items of evidence at Mason’s apartment. Accordingly, the trial court gave limiting instructions to the jury during these portions of Berberich’s testimony. 4/9/03(a.m.) RP 71-72, 78. The court instructed the jury that this testimony could be considered only for the express purpose of explaining why the

police seized certain items of evidence, and “may not be considered by you for the truth of the matters asserted[.]”

4/9/03(a.m.) RP 71.

The trial court’s instruction clearly informed the jury that these statements were not to be considered for “testimonial” purposes. In fact, after the court had given this instruction twice, the following exchange occurred between the court and Mason’s counsel:

THE COURT: Okay. Mr. Phillips, if the defense would like me to I would repeat the curative – the limiting instruction with regard to statements by [Santoso] in the presence of Detective Berberich, if you would like.

MR. PHILLIPS: Your Honor, I think that would not be necessary. I think the Court has made it abundantly clear.

THE COURT: I will make it clear to the jury, the earlier instruction I gave you applies to all statements by Mr. Santoso in the presence of Detective Berberich.

4/9/03(p.m.) RP 15-16.

Thus, as defense counsel conceded, the trial court made it “abundantly clear” to the jury that any statements that Santoso made to Berberich could not be considered for the truth of the matters asserted. Such statements are by definition not

“testimonial” under Crawford, and Mason’s claims under the confrontation clause should be rejected.³

- (3) The statements to Linda Webb were admissible to show Santoso’s state of mind, and as excited utterances.

A “testimonial” statement under Crawford is a statement made for the purpose of creating evidence for trial under circumstances where the declarant “would reasonably expect [the statement] to be used prosecutorially.” Crawford, 124 S. Ct. at 1364. But a statement describing then-existing mental condition under ER 803(a)(3) is not “testimonial” if the declarant made the statement for reasons that had no evidentiary purpose at the time. Such is the case with Santoso’s statements to Linda Webb.⁴

As a preliminary matter, this court should reject Mason’s claim that Ms. Webb’s status as government employee *ipso facto* renders Santoso’s statements “testimonial.” Ms. Webb is a victim

³ Detective Malins’s testimony regarding Santoso’s checkbook is subject to the same analysis; the testimony was limited, was admitted for non-hearsay purposes, and the trial court gave a limiting instruction. 4/14/03 RP 155-56. Mason’s arguments regarding this testimony should be rejected as well. Appellant’s Opening Brief, at 14.

⁴ Santoso’s remarks to Detective Roze fall within this hearsay exception as well. 4/14/03 RP 126-27. Mason’s arguments regarding these remarks should be rejected for the same reasons. Appellant’s Opening Brief, at 14.

advocate, not a police officer. As such, her job is to help people obtain protection orders and make safety plans. 4/15/03 RP 7-12. Her job does *not* include conducting “structured questioning” or “interrogations” for the purpose of creating evidence for trial.

Crawford, 124 S. Ct. at 1364-65. Ms. Webb made this clear during her testimony:

[MR. O'TOOLE]: Now, do you have any investigative role? For example, someone comes to you and tells you they need a protective order.

Do you go out and investigate whatever it is they are telling you or do you accept what they say on face value or something else?

[MS. WEBB]: My role is very different from an investigative role. My role is to support the victim coming in. *In fact my role is not one that I would be required to report anything to the police or write it down into a statement as part of the investigation.*

My only mandatory reporting would be to CPS if there is child abuse or to APS, or Adult Protective Services, but I don't have any other mandatory reporting.

So quite often I would receive calls from a victim of domestic violence asking about protective orders. And in many cases a victim does not report a crime to the police, and so I would assist a victim with the protective order even if it's not – you know, *if they didn't want to report the crime, I would still assist them with the protection order.*

4/15/03 RP 12-13 (emphasis supplied).

Ms. Webb is not a detective, a magistrate, a member of the Privy Council, or anything resembling a government agent whose

duty is to take “testimonial” statements. Rather, Ms. Webb’s job is to help people who are in danger. Furthermore, no credible claim could be made that Ms. Webb “interrogated” Santoso. Thus, Santoso’s statements to Ms. Webb are not “testimonial.”

Moreover, Santoso’s purpose for making statements to Ms. Webb also belie Mason’s claim that Crawford applies. Santoso did not make statements to Ms. Webb in order to “bear testimony” with an eye toward prosecution. Crawford, at 1364. Rather, he told Ms. Webb he was afraid, discussed his trepidation regarding his future, and asked for her help in obtaining a protection order⁵ and making a safety plan. 4/15/03 RP 22-28, 30-36. When Santoso discovered that Mason had just been released from jail, he called Ms. Webb and was “close to hysteria.” 4/15/03 RP 37. He urgently sought her help:

He told me that Mr. Mason was going to kill him; that he knew he was going to die. He told me he wanted – begged me to put him in jail. He said the only safe place was to be in jail. He begged to be

⁵ It should be noted that some courts have found that affidavits and written declarations in support of protective orders are “testimonial” under Crawford. See People v. Thompson, 812 N.E.2d 516 (Ill. App. Ct. 2004); People v. Pantoja, ___ Cal. Rptr. 3d ___, 2004 WL 1982332 (Cal. Ct. App. 2004). But that issue is not presented here, as Judge Fox did not admit Santoso’s affidavit in support of his petition for a protective order.

someplace that he would be safe.

I remember telling him that we couldn't do that;
that it was something that – we couldn't put him in jail.

And then he said, "Well, let me sleep in your
office. Just let me come to your office and sleep. I
just want to be someplace safe."

4/15/03 RP 39.

These are not statements that a declarant "would reasonably expect to be used prosecutorially[.]" Crawford, at 1364. Rather, these statements were a fearful cry for help. Thus, they were properly admitted under ER 803(a)(3). Moreover, Santoso's telephone call to Ms. Webb upon learning of Mason's release from jail squarely falls within the definition of an excited utterance under ER 803(a)(2). As discussed at length above, such statements are not "testimonial." See Hammon, 809 N.E.2d at 953 ("the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial'").

"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[.]" Crawford, 124 S. Ct. at 1374. Santoso's statements to Ms. Webb are nontestimonial, and fall within established hearsay exceptions under the evidence rules. The trial court exercised sound discretion in its evidentiary rulings,

and Mason's claims to the contrary should be rejected.

c. ALL OF SANTOSO'S STATEMENTS ARE
ADMISSIBLE UNDER THE DOCTRINE OF
"FORFEITURE BY WRONGDOING."

Mason argues that the doctrine of "forfeiture by wrongdoing" does not apply in this case. To the contrary, this doctrine provides an alternative basis to admit all of Santoso's statements regarding the January 23 incident. A trial court may be affirmed on any basis that is supported by the record and the law. State v. Kelly, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992). This court should hold that forfeiture by wrongdoing applies, and affirm.

Forfeiture by wrongdoing⁶ is an historical common-law exception to the requirement of confrontation that was recognized in American case law over 100 years ago. Reynolds v. United States, 98 U.S. 145, 158, 25 L. Ed. 2d 244 (1878). The Crawford Court specifically recognized the continuing vitality of the doctrine, noting that "the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds[.]" Crawford, 124 S. Ct. at 1370 (emphasis supplied). The

⁶ The doctrine is also known as "waiver by misconduct," "forfeiture by misconduct," and other terms. For purposes of this brief, except in citations to source materials using different terms, the doctrine will be referred to as "forfeiture by wrongdoing" throughout.

doctrine dictates that a defendant cannot use his confrontation rights as both a shield and a sword:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158. Therefore, if the defendant wrongfully causes a witness's unavailability, he forfeits both the right of confrontation and any objections under the hearsay rule. United States v. Houlihan, 92 F.3d 1271, 1282 (1st Cir. 1996); United States v. Mastrangelo, 693 F.2d 269, 271-72 (2nd Cir. 1982).

The policy of this doctrine is simple: a defendant should not be rewarded for subverting the justice system by depriving the prosecution of evidence through bribery, intimidation, or murder. In other words,

The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such a subversion of a

criminal prosecution “would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause.”

United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982) (quoting United States v. Carlson, 547 F.2d 1346, 1359 (1976)), *superceded by rule on other grounds as stated in United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001). This principle is extremely compelling. As one commentator has noted, “the alternative to the rule – allowing a defendant to murder or intimidate a witness and then smugly object that the use of the missing witness’s statements violates the Constitution – is ethically unacceptable.” John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. Rev. 835, 869 (1996).

While forfeiture by wrongdoing has been well established in the common law for over a century, it was not codified in the federal evidence rules until 1997. The evidence rule reflects the common law principle, and provides that out-of-court statements are admissible if “offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Fed. R. Evid. 804(b)(6). The rule has three components: 1) the defendant caused the witness’s unavailability 2) by a wrongful act 3) that was

intended, at least in part, to cause the witness's unavailability. Houlihan, 92 F.3d at 1280; United States v. Dhinsa, 243 F.3d 635, 654 (2nd Cir. 2001). Many states have followed the federal courts in adopting the doctrine. Several states have codified the doctrine in their evidence rules.⁷ More still have adopted it through their decisional law.⁸

Because of the compelling public policy at the heart of this doctrine, forfeiture by wrongdoing is not limited in its application to a trial for the underlying crimes about which the absent witness originally would have testified. To the contrary, a murdered witness's statements are admissible in the murder trial itself. United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999) (public policy would be thwarted if statements of the murdered witness were not admitted in the murder trial); *accord*, Dhinsa, 243 F.3d at

⁷ See Del. R. Evid. 804(b)(6); Haw. R. Evid. 804(b)(7); Mich. R. Evid. 804(b)(6); Ohio R. Evid. 804(b)(6); Pa. R. Evid. 804(b)(6); Tenn. R. Evid. 804(b)(6).

⁸ See State v. Valencia, 186 Ariz. 493, 498, 924 P.2d 497, 502 (Ariz. Ct. App. 1996); State v. Henry, 76 Conn. App. 515, 530-33, 820 A.2d 1085-87 (2003); State v. Hallum, 606 N.W.2d 351, 355-56 (Iowa 2000); State v. Gettings, 244 Kan. 236, 239-40, 769 P.2d 25, 28-29 (1989); State v. Magourik, 561 So.2d 801, 806 (La. 1990); State v. Byers, 570 N.W.2d 487, 494-95 (Minn. 1997); State v. Sheppard, 197 N.J. Super. 411, 436-37, 484 A.2d 1330, 1345-46 (1984); People v. Geraci, 85 N.Y.2d 359, 365-67, 625 N.Y.S.2d 469, 649 N.E.2d 817 (1995); State v. Frambs, 157 Wis.2d 700, 706-07, 460 N.W.2d 811, 814 (1990).

652-53 (and cases cited therein).⁹

While a pretrial hearing is the preferred method for establishing the factual basis for forfeiture by wrongdoing, this procedure is not always necessary. Rather, the failure to hold an evidentiary hearing is not error when the prosecution has produced sufficient evidence during trial to establish the necessary facts. United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000); Houlihan, 92 F.3d at 1281 n.5. Trial courts may also admit evidence subject to later proof on conditional relevance grounds. ER 104(b). Furthermore, it is not a legitimate objection in murder cases that the doctrine should not apply because it “requires the trial judge to find that defendant killed” the witness. Valencia, 186 Ariz. at 500. Rather, the evidence rules fully contemplate that trial courts will make such findings outside the presence of the jury, thus preserving the jury’s role in finding the ultimate facts. Id.; see also

⁹ Mason cites only one case – United States v. Lentz, 282 F. Supp. 2d 399 (E.D. Va. 2002) – for the proposition that the absent witness’s statements are not admissible in the defendant’s trial for the witness’s murder. Appellant’s Opening Brief, at 17. Although Lentz does seem to hold this way, it cites cases for this proposition – Dhinsa and Emery – that hold precisely the opposite. Lentz is also a trial court opinion. For these reasons, and given the weight of authority to the contrary, Lentz is of dubious precedential value and should be rejected.

ER 104. Most jurisdictions require the factual basis for forfeiture by wrongdoing to be established by a preponderance of the evidence. See, e.g., Houlihan, 92 F.3d at 1280 (and cases cited therein); Hallum, 606 N.W.2d at 356; Gettings, 244 Kan. at 241.

Forfeiture by wrongdoing has not yet been specifically adopted in Washington. However, this court cited the general principle with approval over 25 years ago. See State v. LaBelle, 18 Wn. App. 380, 398, 568 P.2d 808 (1977) (“One cannot indiscriminately obstruct the course of justice and then rely on constitutional safeguards to shield him from the legitimate consequences of his own wrongful act”) (citing cases including Reynolds, 98 U.S. at 158). Moreover, the Washington Supreme Court recognized the existence of the doctrine in Crawford, although the court ultimately found that the defendant had not acted wrongfully by invoking a “recognized statutory privilege” to prevent his wife from testifying. State v. Crawford, 147 Wn.2d 424, 431-32, 54 P.3d 656 (2002), *overruled on other grounds*, Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

This case presents the opportunity to adopt forfeiture by wrongdoing in Washington. Indeed, a more paradigmatic case is

difficult to imagine. Based on the record in this case, this court may conclude by a preponderance of the evidence – or even by clear and convincing proof – that Mason 1) caused Santoso’s absence 2) by the wrongful act of murder 3) to prevent him from testifying about the January 23 attack.

Mason specifically told Marina Madrid that Santoso was “making his life a living hell,” and “that Santoso couldn’t testify.” 4/29/03 RP 91. When Mason called Madrid immediately prior to the murder and told her to meet him at the airport with a change of clothes, she was extremely anxious due to Mason’s prior statements that Santoso “was causing [Mason] such grief and that he couldn’t testify.” 4/29/03 RP 97. When Madrid picked Mason up at the airport and she noticed that his hands were covered in blood, he said, “Let’s just say that Santoso won’t be a problem anymore.” He smirked and appeared relieved. 4/29/03 RP 98.

Based on this evidence, this court should find that Mason forfeited his right to confrontation and any hearsay objections to Santoso’s statements. Although Judge Fox declined to admit these statements on grounds of forfeiture by wrongdoing, he did so because he had not yet heard the evidence establishing the necessary facts. 4/3/03 RP 57-60. Although the issue was not

raised later in the trial because Santoso's statements were admitted on different grounds, this court has an ample record before it to decide that the doctrine applies. Moreover, the fact that the jury did not find the prospective-witness aggravating factor beyond a reasonable doubt should not be dispositive. A lower quantum of proof is required for the application of forfeiture by wrongdoing, and the evidence is more than sufficient in this regard.

Washington should follow the federal courts and the growing number of states that have adopted forfeiture by wrongdoing. This court should find that Mason forfeited his right of confrontation by killing Hartanto Santoso, and affirm.

d. ANY ERROR IN ADMITTING SANTOSO'S STATEMENTS IS HARMLESS.

Finally, even if this court finds that all of Judge Fox's rulings were erroneous and rejects forfeiture by wrongdoing, the court should still affirm Mason's conviction.

Improper hearsay evidence is harmless beyond a reasonable doubt if there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). In deciding whether the admission of hearsay is harmless,

a reviewing court considers five factors:

[T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)); see also United States v. Nielsen, 371 F.2d 574 (9th Cir. 2004) (applying harmless error analysis to a Crawford violation).

First, although Santoso's statements were important to the State's case because they established Mason's motive, forensic evidence, Mason's statements to Marina Madrid, and evidence regarding Mason's activities after the murder were more significant. Moreover, the jury did not ultimately find beyond a reasonable doubt that Mason committed this murder to prevent Santoso from testifying about the January incident. CP 566. Thus, the first factor does not mandate reversal.

Second, the testimony of Haslip, Berberich and Webb is cumulative of a wealth of other evidence to which Mason assigns no error on hearsay grounds. For instance, Santoso's roommate, Dean Anderson, testified that he talked to Santoso on the

telephone shortly after the January 23, 2001 attack. Santoso told Anderson that "he had just been choked, tied up, gagged, choked, threatened with a gun and a syringe" by Mason. 4/10/03 RP 98. When Anderson saw Santoso at their apartment a few minutes later, Santoso had "bleeding eyes" and duct tape residue on his face, and he "was standing there looking like a zombie . . . saying he was lucky to be alive." 4/10/03 RP 99. Santoso told Anderson that Mason choked him from behind without provocation. 4/10/03 RP 128. Anderson also explained that both he and Santoso were afraid of Mason. 4/10/03 RP 143.

Santoso's supervisor, Lisa Schulke, also testified that Santoso called her on January 23, 2001. Santoso was "[h]ysterical" and "panicked" when he called her as he was leaving Mason's apartment. 4/10/03 RP 164-65. Santoso told Schulke that he had "just been beaten up, choked to the point of passing out, he had been duct taped, threatened with a gun, threatened with a syringe full of drain cleaner." 4/10/03 RP 167. Santoso said Mason had held him hostage and forced him to write a check for \$700. 4/10/03 RP 167. Schulke encouraged Santoso to go to the police, but Santoso said Mason would kill him if he did. 4/10/03 RP 168.

Dr. Gregory Gross treated Santoso for his injuries on

January 24, 2001. 4/14/03 RP 61. Dr. Gross had never seen strangulation injuries as severe as Santoso's. 4/14/03 RP 61, 66. Santoso told Dr. Gross that he had loaned money to his attacker in the past, and that the person wanted more money and threatened to kill him. Santoso said he had been bound with duct tape and strangled from behind to the point of unconsciousness. 4/14/03 RP 73-74. Santoso also said he had been threatened with a gun and a syringe of bleach. 4/14/03 RP 74. Dr. Gross told Santoso to report the attack to the police, but Santoso was afraid he would be killed if he did. 4/14/03 RP 74-75, 79.

Santoso's sister, Nina Kandiani, also testified that she spoke to Santoso on the telephone on January 24, 2001, and that he told her "he was beaten up and almost dies by his best friend." 4/21/03 RP 171. He told her that he had been rendered unconscious, that he woke up lying in the bathroom with his hands and legs bound, and that his friend threatened him with a syringe and a gun in order to extort money from him. 4/21/03 RP 171-72. Santoso explained that he had begged for his life, and his friend began crying and gave him the gun. The friend told Santoso not to go to the police. 4/21/03 RP 172.

Given the testimony of Anderson, Schulke, Dr. Gross, and

Ms. Kandiani, the testimony of Haslip, Berberich and Webb is superfluous and there is no reasonable possibility that the verdict would have been different if it had been excluded. This factor weighs heavily in favor of affirming Mason's conviction.

Third, the presence of evidence corroborating Santoso's statements also weighs in favor of affirming Mason's conviction. Detective Berberich found a sharps container and syringes, drain cleaner, a gun, ammunition, and duct tape in Mason's condominium. 4/9/03(a.m.) RP 63, 65, 77. Santoso's pants and socks still had duct tape on them from the attack. 4/9/03(a.m.) RP 98; 4/9/03(p.m.) RP 12. Santoso's checkbook contained a partially completed check for \$700 and Mason's fingerprints. 4/9/03(a.m.) RP 109; 4/16/03 RP 117-18. Santoso's injuries also corroborated his statements: he had blood-red eyes from petechial hemorrhages, a swollen, puffy face, abrasions on his neck, and tape marks on his arms and neck. 4/9/03(p.m.) RP 46-48.

Fourth, the extent of cross-examination also weighs in favor of affirming Mason's conviction. Haslip, Berberich and Webb – and indeed, every witness at trial – were extensively cross-examined by the defense. In fact, while cross-examining Detective Berberich, the defense elicited Santoso's statements in much greater detail

than the State had on direct, and did not request limiting instructions while doing so. 4/9/03(p.m.) RP 70-73, 80; 4/10/03 RP 7, 11, 15-18.

Finally, the strength of the State's case weighs in favor of affirming Mason's conviction. Mason's guilt was established by a juggernaut of evidence, including his own statements and activities following the murder, and the presence of his and the victim's blood in the victim's car and in Madrid's car. Moreover, ample evidence proved premeditation: Mason told Marina Madrid prior to the murder that Santoso was making his life miserable, he later told her that he went to Santoso's apartment to kill him, and he had been reading about murder and body disposal before putting this knowledge into action. Mason wore dark clothing and gloves, went to the apartment armed with a knife, parked his car several blocks away, and disposed of the body before leaving Santoso's car at the airport.

None of these five factors weighs in favor of granting a new trial, and there is no reasonable possibility that that the trial's outcome would have been different without Santoso's statements to Haslip, Berberich and Webb. Mason's conviction should be affirmed.

2. **THE TRIAL COURT PROPERLY EXCLUDED A NARROW PORTION OF DR. LIBBY'S PROPOSED TESTIMONY BECAUSE IT DID NOT MEET THE FRYE STANDARD, AND BECAUSE IT WOULD NOT HAVE BEEN HELPFUL TO THE JURY.**

Mason next argues that the trial court erred by excluding testimony from Dr. Randell Libby, the defense's DNA expert. Specifically, he argues that Dr. Libby's statistical methods meet the Frye¹⁰ standard, and that the trial court should not have excluded his opinions regarding mixed DNA samples on this basis. Appellant's Opening Brief, at 21-32. This argument should be rejected.

First, Mason mischaracterizes the trial court's ruling. The court did not exclude Libby's entire proposed testimony regarding DNA mixtures, as Mason suggests. Rather, the State's motion to suppress was focused solely on Libby's opinion that "30 to 80 percent" of the general population could not be excluded from a mixed DNA sample. 6/4/03 RP 68-69. Thus, only this opinion was at issue at the Frye hearing, and only this opinion was suppressed. 6/4/03 RP 68-69, 83; CP 701-03. The trial court properly concluded that this opinion does not meet the Frye standard because it has no

¹⁰ See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

scientific basis. Furthermore, because Dr. Libby's opinion lacked foundation and had little relevance to this case, it was also properly excluded under ER 702. The trial court should be affirmed on this basis as well.¹¹

A criminal defendant has the right to present evidence in his defense; however, this right extends only to evidence that is relevant and admissible. See State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). In other words, a defendant has no constitutional right to present inadmissible, irrelevant evidence. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Under Frye, novel scientific evidence is admissible if it "has achieved general acceptance in the relevant scientific community." State v. Jones, 130 Wn.2d 302, 306, 922 P.2d 806 (1996) (quoting State v. Cauthron, 120 Wn.2d 879, 886, 846 P.2d 502 (1993)). Conversely, if "there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be

¹¹ Mason also notes that there was a dispute at trial as to whether the defense had violated CrR 4.7 by failing to endorse Dr. Libby as a witness in a timely manner. 6/3/03 RP 6-9. While a last-minute decision by the defense might explain why Libby seemed so unprepared to testify at trial, the trial court's ruling was correct whether the defense complied with the discovery rules or not; therefore, this issue will not be addressed further.

admitted.” Cauthron, 120 Wn.2d at 887. Thus, the trial court must determine “whether the evidence in question has a valid, scientific basis.” Jones, 130 Wn.2d at 306-07. A trial court’s ruling based on Frye is reviewed *de novo*. Id. at 307. In this case, the trial court correctly concluded that there was no scientific basis for Dr. Libby’s opinion that 30 to 80 percent of the population could not be excluded from a mixed DNA sample.

When Libby expressed the opinion on the eve of his testimony that 30 to 80 percent of the population could not be excluded, he conceded that he did not know of any experts in the field or any scientific literature that would support this view. 6/4/03 RP 73; CP 510, 533-34. Indeed, he cited his own experience as the sole support for his opinion. CP 503, 510, 533. Further, although he attempted to back-fill during his testimony by naming some experts¹² who would allegedly agree with him, no

¹² One of the experts Libby named is Dr. Lawrence Mueller. 6/4/03 RP 73. The Washington Supreme Court has previously found that Dr. Mueller is a dubious witness based on his financial interests and limited qualifications. State v. Gore, 143 Wn.2d 288, 308-09 n.9, 21 P.3d 262 (2001), *overruled on other grounds*, Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Gore court also discusses Dr. Libby. While the court stopped short of expressly discrediting Libby, it did cite with approval the trial court’s finding that Libby has a “considerable personal financial interest” in perpetuating controversy about DNA evidence. Id. In this case, the extent of Libby’s “considerable personal financial interest” could not be determined because Libby and Mason’s trial counsel refused to provide Libby’s billing records in contravention of the trial court’s order to provide this information. 6/4/03 RP 5-8, 65, 107-08, 110-15.

documentation supports these claims. 4/6/03 RP 73, 89-90. He also brought the NRC-II¹³ to court in support of his conclusion. But as the trial court observed, this publication did not support his opinion that 30 to 80 percent of the population cannot be excluded; in fact, the NRC-II provides support for Dr. Blake's method of analysis, even though the cited page does not specifically address STR testing.¹⁴ 4/6/03 RP 74-75, 78-80, 96; CP 527-28.

At the conclusion of Dr. Libby's testimony, defense counsel confirmed that he would testify that 30 to 80 percent of the population cannot be excluded from mixed DNA samples. 6/4/03 RP 96. As the trial court observed, mixed DNA samples would be "worthless" if Libby were correct;¹⁵ thus, given the prevalence of

¹³ National Research Council, The Evaluation of Forensic DNA Evidence, National Academy Press, Washington D.C. (1996).

¹⁴ Dr. Blake testified that there is no debate in the scientific community as to the ability to identify individual genotypes within mixed DNA samples using the STR testing method. 5/19/03 RP 46-47. He also explained that it was easy to identify the contributors to the mixed samples in this case because the "major" and "minor" contributors were obvious. 5/19/03 RP 123-25. Dr. Blake is widely recognized as an expert in the field of forensic DNA. See State v. Gentry, 125 Wn.2d 570, 588, 888 P.2d 1105 (1995).

¹⁵ As Judge Fox observed, if Dr. Libby's opinion were correct, a minimum of more than half a million people in King County alone could not be excluded from a mixed DNA sample. 6/4/03 RP 97.

forensic DNA, the trial court astutely observed that something would be published to this effect if Libby's opinion were generally accepted. 6/4/03 RP 97. The court correctly concluded that nothing supported Libby's opinion in this regard. 6/4/03 RP 106-07.

In an offer of proof filed several days after Dr. Libby testified and the trial court had excluded his opinion, Dr. Libby attempted to provide further experts and materials that he claimed would support him. CP 439-65, 482-99. But nowhere in these materials is there any support for Libby's conjecture that 30 to 80 percent of the general population cannot be excluded from mixed DNA samples. Rather, all that can be deduced from these materials is that scientists should use caution when evaluating mixtures, that there are different methods for doing so in different circumstances, and that some laboratories are better at evaluating mixtures than others.¹⁶ CP 455-65, 486. Finally, Dr. Libby outlined a host of other general topics he would have covered had he testified. CP 446-50. But the trial court did not exclude Libby's testimony about any of these topics; rather, Judge Fox excluded only Libby's

¹⁶ In fact, the article by Ladd, Lee, et al. that Libby provided seems mainly concerned with problems in interpreting DNA mixtures when the samples are small and/or degraded. CP 455-56. Nonetheless, the article acknowledges that Dr. Blake's method is valid. CP 456.

opinion that 30 to 80 percent of the general population could not be excluded from mixed DNA samples.¹⁷ CP 701-03.

In this case, Dr. Libby's opinion was based on nothing but Dr. Libby's opinion. Libby's claim that 30 to 80 percent of the population could not be excluded from a mixed DNA sample has no foundation in any of the materials provided to the trial court or to this court on appeal. Indeed, Libby himself attempted to repudiate this opinion in an affidavit submitted several days after he testified. CP 474-75. In light of this record, Judge Fox properly concluded that this portion of Libby's proposed testimony had no scientific basis, and thus that it did not meet the Frye standard.

Nonetheless, Mason argues that Dr. Libby's testimony was improperly excluded under Frye because Libby's testimony was based on a variation of the product rule. As Mason correctly notes, the product rule is generally accepted in the scientific community. State v. Copeland, 130 Wn.2d 244, 266-70, 922 P.2d 1304 (1996);

¹⁷ Dr. Libby belatedly contested the trial court's characterization of his opinion in an affidavit appended to Mason's motion for reconsideration. CP 474-75. Libby contended that the "30 to 80 percent" comment was a misunderstanding borne of "confusion" and "argumentative questioning[.]" CP 475. But Libby made no such claims during his testimony before the trial court; in fact, he admitted that his opinion as expressed during the prosecutor's interview (that 30 to 80 percent of the population could not be excluded) differed from his opinion as expressed in his testimony (that the chances of a random match were approximately 1 in 830,000). 6/4/03 RP 86. The trial court did not exclude the latter version of Libby's opinion; the defense still chose not to call him as a witness. CP 701-03.

Gore, 143 Wn.2d at 308-11.¹⁸ However, the trial court did not exclude Libby's testimony regarding application of the product rule. Rather, the trial court suppressed only Libby's short-lived opinion that 30 to 80 percent of the population cannot be excluded from a mixed DNA sample. CP 701-03. This ruling was proper, and this court should affirm.

But even if this court disagrees with Judge Fox's conclusion that Dr. Libby's opinion should be excluded under Frye, this court should still affirm. Based on the record, Judge Fox's ruling is also proper under ER 702. See Kelly, 64 Wn. App. at 764 (the trial court may be affirmed on any basis supported by the record and the law).

Expert testimony is admissible under ER 702 if the testimony will help the jury understand the evidence or determine a material fact at issue. Three requirements must be met for admissibility

¹⁸ Ironically, Dr. Libby testified for the defense in Gore to support the position that the product rule is not valid as applied to PCR-based DNA testing. Gore, 143 Wn.2d at 309. In fact, Dr. Libby has testified repeatedly and consistently against the admissibility and/or reliability of DNA; however, his opinions have been repeatedly and consistently rejected. Cauthron, 120 Wn.2d at 899 (criticism of RFLP testing); State v. Kalakosky, 121 Wn.2d 525, 542, 852 P.2d 1064 (1993) (criticism of test based on human error); Jones, 130 Wn.2d at 306 (criticism of statistical methods); Gore, 143 Wn.2d at 306 n.8 (criticism of polymarker and D1S80 tests); State v. Buckner, 74 Wn. App. 889, 893, 876 P.2d 910 (1994), *aff'd*, 133 Wn.2d 63, 941 P.2d 667 (1997) (criticism of laboratory protocols).

under ER 702: 1) the witness must qualify as an expert; 2) the opinion is must be based on a theory generally accepted in the scientific community; and 3) the testimony must be helpful to the jury. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). A trial court's decision to exclude expert testimony under ER 702 is reviewed for abuse of discretion. Id. Accordingly, a ruling will be reversed "only when no reasonable person would take the view adopted by the trial court." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Under ER 702, conclusory or speculative opinions should not be admitted. Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1992). Furthermore, under ER 703, an expert's opinion must be based on sufficient foundational facts. State v. Pittman, 88 Wn. App. 188, 198, 943 P.2d 713 (1997). Accordingly, an expert's opinion may be excluded when it is not supported by studies or other relevant scientific evidence. Id. Moreover, an expert's practical experience "does not obviate the need for a scientific basis for his opinion." Id. Courts should also be mindful that a jury may be overly impressed with a witness who possesses the aura of an expert. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986). Therefore, it is an

abuse of discretion to admit expert testimony that lacks an adequate foundation. Weyerhauser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683-84, 15 P.3d 115 (2000).

In this case, Dr. Libby's opinion that 30 to 80 percent of the general population could not be excluded from mixed DNA samples is completely lacking in foundation. Dr. Libby did not write a report, and he either could not or would not explain what work he had done or what research he had performed in reaching this conclusion.¹⁹ CP 508, 532. He admitted during an interview that he did not know of any recognized experts or publications that supported this conclusion. 6/4/03 RP 73; CP 503-04, 510, 533-34. As discussed above, none of the materials submitted during or after Libby's testimony support this opinion. Moreover, during his testimony, Libby conceded that he did not disagree with Dr. Blake's analysis, and that the problems he identified in analyzing complex mixtures were not necessarily present in this case. 6/4/03 RP 87-88. Therefore, Libby's statement that 30 to 80 percent of the population cannot be excluded from mixed DNA samples has no foundation,

¹⁹ Dr. Libby's billing records could have shed some light on this, but Libby refused to provide them. 6/4/03 RP 5-8, 65, 107-08, 110-15.

either in the scientific community or in the facts of this case. As such, this opinion is speculative and conclusory, and the trial court properly excluded it under ER 702.

Furthermore, expert testimony is not admissible under ER 702 unless it is relevant. Accordingly, the Washington Supreme Court recently held that an expert's testimony was properly excluded where the expert would have offered only general testimony rather than an opinion relevant to the case. State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004). In Willis, the issue was whether the trial court had properly excluded the testimony of an expert in child interview techniques. In concluding that the trial court had exercised its discretion appropriately, the court observed that while the expert offered very general observations about interviewing children, the expert admitted that nothing about the interview in this case had led the child to falsely accuse the defendant. Willis, 151 Wn.2d at 263. The court ultimately concluded that the expert's testimony "did nothing to help the trier of fact evaluate" the material issues in the case. Id. at 264. A similar circumstance presents itself here.

Dr. Libby was prepared to testify to a number of general topics without reference to the facts of this case. CP 446. He also

indicated that his opinions regarding mixed samples were general, and that his opinions were particularly applicable to “complex mixtures of varying peak height intensities, which could be indicative of other issues relative to the PCR reaction.” 6/4/03 RP 79. Dr. Libby stated that his opinion was merely that allele peak height cannot “always” be ascribed weight, “*without going into any of the specifics of this particular case.*” 6/4/03 RP 88 (emphasis supplied). He further remarked that he was not “speaking with regard to a particular genetic profile or particular locus *in this matter.*” 6/4/03 RP 88 (emphasis supplied). In fact, Dr. Libby conceded that he did not disagree with Dr. Blake’s genotype “calls” based on the test results. 6/4/03 RP 87. He also agreed that there was no evidence of allele peak “stuttering,” contamination, or laboratory error in this case. CP 502.

Like the expert in Willis, Dr. Libby was not offering an opinion that was relevant to a material issue in this case. Rather, he was offering generalized criticism of DNA identification using “complex” mixed samples.²⁰ He conceded that his concerns did not

²⁰ In fact, Dr. Libby indicated that his statistical methods would apply when “one is dealing with a mixture that has *more than two individuals . . .*” 6/4/03 RP 72. If this is the case, then Libby’s testimony is irrelevant for this reason as well.

concern “the specifics of this particular case.” 6/4/03 RP 88. Under ER 702, the trial court exercised proper discretion in excluding Libby’s unsupported opinion, and, as in Willis, Libby’s general testimony would not have assisted the jury in deciding any material issue at trial. Mason’s conviction should be affirmed.

3. THIS COURT SHOULD REJECT THE DEFENDANT’S CLAIM THAT IMPROPER OPINION TESTIMONY DEPRIVED HIM OF A FAIR TRIAL.

Mason claims that the trial court admitted improper opinion testimony regarding his guilt. He claims the court erred when 1) the medical examiner testified that he issued a presumptive death certificate; and 2) when other witnesses expressed their opinions that Mason was guilty. Appellant’s Opening Brief, at 32-42. These claims should be rejected.

First, this court should reject Mason’s claim that Dr. Harruff rendered an opinion on guilt. Dr. Harruff did not opine that Mason was guilty; rather, he testified that he issued a death certificate based on his assessment of the evidence. Second, the trial court later reversed its initial ruling, and gave the jury a detailed instruction to disregard this portion of the doctor’s testimony. Thus, the only issue this court must resolve is whether the trial court properly denied Mason’s motion for a mistrial on this basis. The

trial court exercised sound discretion in this regard. Finally, Mason's arguments regarding other witnesses should be rejected as well. All of the testimony in question was stricken, subject to limiting instructions, or harmless. Mason's conviction should be affirmed.

a. THE TRIAL COURT PROPERLY DENIED
THE MOTION FOR MISTRIAL BASED ON
THE MEDICAL EXAMINER'S TESTIMONY.

A witness may not render an opinion regarding the defendant's guilt because such testimony invades the province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). "Improper opinions on guilt usually involve an assertion pertaining directly to the defendant." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994). For example, witnesses may not testify that a defendant is guilty,²¹ or that a victim is telling the truth about what the defendant has done.²²

²¹ See State v. Carlin, 40 Wn. App. 698, 700, 700 P.2d 323 (1985) (police officer gave improper opinion by testifying that his tracking dog followed defendant's "fresh guilt scent").

²² See State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (expert opined that defendant was guilty by testifying that child was not lying about sexual abuse).

But opinion testimony is proper and admissible when it is not a direct comment on the defendant's guilt or veracity, it is helpful to the jury, and is based on inferences from the evidence. Heatley, 70 Wn. App. at 578. Furthermore, an expert's testimony that is "based solely upon inferences from the physical evidence and the expert's experience, and not based upon the defendant's credibility, may properly be admitted." State v. Baird, 83 Wn. App. 477, 485, 922 P.2d 215 (1996), review denied, 131 Wn.2d 1012 (1997). Such testimony is proper "even if it addresses an ultimate issue to be decided by the trier of fact." Id.

For example, in Baird, two doctors testified to their medical opinion that the victim's injuries had been deliberately inflicted. Baird, 83 Wn. App. at 480-81. This testimony was proper, even though the defendant's intent was the key issue at trial because he had raised a voluntary intoxication defense. Id. at 485-86. An even less troublesome case presents itself here.

In this case, Dr. Harruff testified that one of his duties as a medical examiner is to issue a presumptive death certificate in cases where no body has been recovered, but where there is evidence to show that the person is dead. 5/28/03 RP 41. He explained that he issued a death certificate in this case after

examining evidence including the photographs of Santoso's apartment and car, and concluding that the volume and distribution of blood indicated life-threatening injuries. 5/28/03 RP 43-45. Dr. Harruff freely admitted that he had no personal knowledge that Santoso was dead; nonetheless, he issued a death certificate because in his opinion, there was sufficient evidence to conclude that he was dead. 5/28/03 RP 47, 61. The trial court instructed the jury that the death certificate did not "dispose of the issue of whether or not Mr. Santoso is deceased," but that the doctor's testimony was "one factor that you may consider in ultimately making that decision as to whether or not there has been a death." 5/28/03 RP 41.

Dr. Harruff did not render an opinion that Mason was guilty or comment on Mason's credibility. He did not tell the jurors how to determine guilt or innocence or what verdict they should render. Rather, as in Baird, he rendered a medical opinion based on his training, his experience, and his assessment of the physical evidence. Moreover, unlike Baird, Judge Fox took the further step of giving a limiting instruction to ensure that the jury did not presume death based solely on Dr. Harruff's testimony. Mason's argument that Dr. Harruff rendered an opinion of guilt misses the

mark. Accordingly, this court need only decide whether Mason's motion for mistrial was properly denied.

A motion for mistrial should not be granted unless the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be tried fairly. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). In deciding whether a mistrial should be granted, courts consider 1) the seriousness of the alleged irregularity, 2) whether the challenged evidence is cumulative of other evidence, and 3) whether an instruction could cure the alleged error. State v. Bourgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Appellate courts recognize that the trial court is in the best position to gauge whether prejudice has occurred; therefore, the trial court's judgment is given deference on appeal. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Accordingly, a trial court's ruling on a motion for mistrial is reviewed for abuse of discretion, and will not be overturned unless it is manifestly unreasonable. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Judge Fox's ruling was reasonable, and this court should affirm.

First, the alleged irregularity here is not serious; indeed, it is

far from clear that Judge Fox's initial ruling was error at all. Opinion evidence is admissible in the sound discretion of the trial court. See Baird, 83 Wn. App. at 486; Heatley, 70 Wn. App. at 579. As discussed above, Dr. Harruff's testimony that he issued a presumptive death certificate was based on his training, experience, and personal assessment of the physical evidence. Thus, this factor weighs against granting a mistrial.

Second, Dr. Harruff's testimony that Santoso was dead is cumulative of other evidence that Santoso was dead. Several witnesses testified that Santoso's apartment and car were covered with large amounts of his blood. 4/21/03 RP 94-95; 4/22/03 RP 43, 47, 102; 4/23/03 RP 4-21; 5/29/03 RP 25-26. Detective Rogers aptly described Santoso's bedroom as a "catastrophe." 5/29/03 RP 25. The jurors could see this for themselves in the photographs of the scene. Ex. 14, 15, 16, 93. Furthermore, Santoso's passport, visa, driver's license, credit cards, and other important personal effects were found in his blood-soaked bedroom. 4/24/03 RP 61-75. Santoso never picked up his last paychecks from work. 5/7/03 RP 157-58. Since February 19, 2001, none of Santoso's family or friends has heard from him, and there has been no activity by him in any state, in Indonesia, or in Canada. 4/10/03 RP 109; 4/21/03

RP 34, 145; 5/27/03 RP 147, 157, 159-61. Mason admitted to Marina Madrid that he had killed Santoso, and he told Curtis Schuster that Santoso had been killed by the Russian Mafia. 4/29/03 RP 16; 5/15/03 RP 40-41. As the trial court correctly observed, the evidence that Santoso was dead was so overwhelming as to render Dr. Harruff's testimony "inconsequential." 6/5/03 RP 15. This factor also weighs against granting a mistrial.

Third, the trial court gave a detailed curative instruction regarding Dr. Harruff's testimony. Judge Fox instructed the jurors that he had reversed his prior ruling; he told them to disregard Dr. Harruff's opinion that Santoso was dead, and he told them that it was their sole responsibility to determine whether he was dead. CP 426-28; 5/29/03 RP 12-13. Also, at the conclusion of the evidence, the trial court further instructed the jury that they were to disregard any evidence that was stricken by the court. CP 536. When the trial court gives curative instructions, the reviewing court presumes that the jury follows them. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). This factor weighs against granting a mistrial as well.

Based on this record, Mason cannot show that the trial court

was manifestly unreasonable in denying his motion for a mistrial.

Mason's conviction should be affirmed.

- b. MASON IS NOT ENTITLED TO A NEW TRIAL
BASED ON REMARKS BY OTHER
WITNESSES.

Mason also claims that error occurred during the testimony of Marina Madrid, Kristine Riley, and Detective Rogers. He claims that these witnesses also expressed opinions of guilt, and that he was thus deprived of a fair trial. These claims should also be rejected, as these remarks were either stricken by the court or admitted for a proper purpose, and in any event were harmless.

As to Ms. Madrid, Mason first notes that she said, "my boyfriend committed a murder." 4/29/03 RP 15. But the trial court immediately gave the jury a strongly-worded curative instruction to disregard this remark, stating that it was "the jury's decision here about whether a murder was committed at all[.]" 4/29/03 RP 15. The trial court also sustained an objection when Madrid stated that Mason killed Santoso.²³ 4/29/03 RP 16. Jurors are presumed to follow the court's instructions. Copeland, 130 Wn.2d at 284. There

²³ Immediately after this remark, Ms. Madrid explained that Mason had told her that he killed Santoso, and that he had told her about the killing "many times" with "many details." 4/29/03 RP 16. This testimony is clearly admissible.

is no reason to believe they did not do so here.

Mason also claims error occurred when Madrid explained that she initially lied to the police because she loved Mason, and because she “knew that he had killed [Santoso] and [she] had to give an alibi.” 4/29/03 RP 62. In response to defense counsel’s objection, the court gave a detailed limiting instruction that the jury should consider this testimony only “to explain why the witness did what she did and not for the truth of any statements asserted[.]” 4/29/03 RP 62. And again, when Madrid testified that she was thinking about “the fact that he had just killed him” when she was sewing Mason’s leg wound, the court instructed the jury to consider this testimony only for Madrid’s “mental state at the time[.]” 4/29/03 RP 115. Considering that Madrid’s credibility was a hotly contested issue, it was proper for the court to instruct the jury in this manner. See Bourgeois, 133 Wn.2d at 402-03 (evidence of a witness’s state of mind admissible when credibility is seriously challenged).

Mason also claims that one remark from Kristine Riley deprived him of a fair trial. Riley stated that she called the police after initially avoiding them because she “was no longer believing that [Mason] was innocent[.]” 5/13/03 RP 123. But, as Mason correctly notes, Judge Fox immediately instructed the jury that this

testimony was to be considered only "for the purpose of establishing why she called the police." 5/13/03 RP 123. Kristine Riley, like Marina Madrid, was a witness whose credibility was seriously challenged; thus, the court's instruction was proper. See Bourgeois, 133 Wn.2d at 402-03.

Finally, Mason claims that two remarks by Detective Rogers warrant a new trial. Detective Rogers testified that he considered Mason a suspect because the January 23, 2001 incident "poses a powerful motive" for Santoso's disappearance. 5/29/03 RP 33. But as was made clear to the jury by the prosecutor and the court's limiting instructions, this testimony was offered solely to explain Detective Rogers's state of mind and motivations during his interview with Mason on February 28, 2001. 5/29/03 RP 32-33. Finally, Detective Rogers remarked during one of several redirect examinations that Ms. Madrid was not "an eyewitness to the actual murder[.]" 6/2/03 RP 39. Although the trial court overruled defense counsel's objection, Mason fails to demonstrate how a passing reference to the word "murder" caused irreparable prejudice in the context of the entire trial.

Indeed, even taking the challenged remarks by Madrid, Riley and Rogers together, Mason fails to demonstrate prejudice. This

was a lengthy trial with numerous witnesses, hundreds of exhibits, and overwhelming evidence; indeed, Ms. Madrid's testimony alone took the better part of three days. 4/29/03 RP 13 – 5/1/03 RP 110. Evidentiary error is harmless "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403. Such is the case here, and Mason's conviction should be affirmed.

4. THE TRIAL COURT EXERCISED SOUND DISCRETION IN MAKING ITS EVIDENTIARY RULINGS UNDER ER 404(B).

Mason claims that several of the trial court's evidentiary rulings were erroneous under ER 404(b). He claims that the trial court erred in admitting evidence regarding 1) his possession of a gun and a knife, 2) his possession of a book on strangulation, 3) his sexual practices, 4) his finances, 5) his relationship with Santoso, and 6) the January 23 attack. Appellant's Opening Brief, at 42-59. Each of these claims is without merit. This evidence was relevant to prove material facts, and to rebut material assertions made by the defense. Mason's conviction should be affirmed.

Evidence of other crimes, wrongs, or acts is inadmissible to prove that a defendant has a propensity for criminal behavior. ER 404(b). But such evidence is admissible for other purposes

including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Id. Such evidence is also admissible to rebut material assertions made by the defendant. State v. Hernandez, 99 Wn. App. 312, 321, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000). Evidence should be admitted under ER 404(b) if it “is relevant and necessary to prove an essential ingredient of the crime charged.” State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). “Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.” Id. at 259.

When admitting evidence under ER 404(b), the trial court should identify the reason why the evidence is admissible, determine its relevance to the crime, and weigh its probative value against the danger of unfair prejudice. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court’s rulings under ER 404(b) will not be disturbed absent manifest abuse of discretion. Powell, 126 Wn.2d at 258. A trial court has not abused its discretion unless no reasonable judge would have ruled as the trial court did. Thang, 145 Wn.2d at 642.

In this case, the trial court exercised sound discretion in

admitting relevant evidence that was necessary to prove material facts. Each ruling Mason challenges will be discussed in turn.

a. POSSESSION OF WEAPONS

Mason alleges that the trial court erred in admitting evidence that he possessed a gun and a knife. These claims should be rejected. In this case, evidence that Mason possessed a gun and a knife was directly relevant to proving that he attacked and later killed Santoso. The trial court should be affirmed.

Mason first argues that the trial court erred in admitting the 9-mm pistol and ammunition that was seized from his condominium on January 25, 2001. But this evidence was directly relevant to Mason's motive for killing Santoso on February 19, 2001.

Santoso reported that Mason threatened him with a loaded gun during the January 23 incident. 4/9/03(a.m.) RP 65-66. On the other hand, Mason claimed the gun was not loaded. 4/8/03 RP 198. The fact that Mason's gun was loaded when it was seized makes Santoso's version of events more likely to be true, and rebuts Mason's version. 4/14/03 RP 100-01. As will be discussed further below, Mason's pending trial regarding the January 23 incident was his motive for killing Santoso three weeks later; indeed, it was a charged aggravating factor. CP 11. Thus,

evidence corroborating Santoso's report is "of consequence to the action and makes the existence of the identified fact more probable." Powell, 126 Wn.2d at 259. Furthermore, the gun was admitted at trial without objection. 4/14/03 RP 105. A defendant who fails to object to an alleged evidentiary error at trial has not preserved the issue for appellate review. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Mason's claim fails.

Nonetheless, Mason relies primarily on State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001), and argues that a gun should not be admitted where it "has no direct bearing on an issue in the case[.]" Appellant's Opening Brief, at 45. Mason's reliance on Freeburg is misplaced. In Freeburg, the defendant killed his victim, and then evaded arrest for over two years. Freeburg, 105 Wn. App. at 495-96. He possessed a gun when he was arrested, and the gun was admitted at trial as evidence of flight. Id. at 497. After noting that evidence of flight "tends to be only marginally probative as to the ultimate issue of guilt or innocence," this court found that possession of a firearm two years later was so attenuated as to be more prejudicial than probative. Id. at 498-501.

In this case, Mason's gun was not admitted as evidence of flight. Rather, Mason's gun was admitted as evidence that he

kidnapped and attempted to rob Hartanto Santoso in the manner Santoso had described. Mason's claim is without merit.

Mason's claim regarding the knife seized from Marina Madrid's apartment also fails. Evidence that a defendant possessed a knife should certainly not be admitted when it is not relevant. But in this case, the evidence was relevant for two reasons. First, evidence that Mason possessed a knife while staying at Madrid's apartment was admissible to explain why Madrid was afraid of Mason. 4/30/03 RP 4-5, 18. Moreover, Detective Eggleston noted at trial that the knife found in the dresser drawer in Madrid's bedroom was similar to the murder weapon. 5/6/03 RP 47. While the possession of a dissimilar knife would be less probative, Mason's possession of a second knife similar to the murder weapon makes it much more likely that the murder weapon belonged to Mason. The trial court's ruling may be also affirmed on this basis, and Mason's claims should be rejected.

Finally, Mason claims that the trial court erred in admitting brief testimony that he had a knife in his luggage when he returned from Japan. But Mason did not object to this testimony. 5/29/03 RP 47. Thus, he has not preserved this claim for appeal. Guloy, 104 Wn.2d at 421. Mason's conviction should be affirmed.

b. POSSESSION OF A BOOK ABOUT MURDER

Mason claims that his possession of a book entitled "The Ancient Art of Strangulation" was admitted for the improper purpose of proving that he had deviant sexual interests. But this book was admitted as proof that Mason killed Santoso, and that he did so with premeditated intent. Mason's claim should be rejected.

Premeditated intent is an essential element of first-degree murder. RCW 9A.32.030(1)(a). Premeditation is "the deliberate formation of and reflection upon the intent to take a human life[.]" State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982). In this case, not only did the State have to prove premeditation beyond a reasonable doubt; the State also had to prove beyond a reasonable doubt that a murder had taken place.

The book was seized from Mason's gym bag, which was in the closet in Marina Madrid's bedroom. 5/6/03 RP 12. Thus, this book was important enough – or incriminating enough – to Mason that it was one of very few possessions that he brought with him when he moved from his condominium to Madrid's apartment after Santoso's disappearance. Mason's fingerprints were found throughout the book, near sections on the erotic nature of asphyxiation (5/14/03 RP 38-39), on killing for spiritual gain

(5/14/03 RP 40), on being a "Thug" (5/14/03 RP 41-42), on using a knife (5/14/03 RP 42-43), and on breaking a victim's neck (5/14/03 RP 43). Moreover, as the prosecutor noted during closing argument, the book contained the following passage:

Death from an accomplished assassin's blade is swift and efficient. A stab up into the heart or a slice through the arteries on the side of the neck with practiced finality.

6/9/03 RP 72. The book also contained detailed information on disposal of a body, including the fact that a murder is harder to solve if the body is moved from the scene, and that a decapitated corpse cannot be identified with dental records. 6/9/03 RP 73.

The probative value of this book is obvious. Hartanto Santoso was strangled into unconsciousness, died three weeks later by an "assassin's blade," and his body was removed from the scene never to be found. Mason's possession of a book on these very topics is extremely damaging proof that he premeditated not only the killing itself, but also its grisly aftermath.

The book also was admissible to corroborate Marina Madrid's testimony. Mason told Madrid he went to Santoso's apartment wearing dark clothing and gloves with the intention of killing him. 4/29/03 RP 144. Mason also told her that he took

Santoso's body away from the crime scene in his car and hid it "where the rats would get it[.]" 4/29/03 RP 131, 143. Mason explained that he went back to Santoso's body and decapitated it to prevent later identification. 4/29/03 132-33. These actions are consistent with instructions from "The Ancient Art of Strangulation." The book is highly probative for this reason as well.

Nonetheless, Mason claims that he was prejudiced because the book contained graphic descriptions of the erotic nature of asphyxiation. But this evidence was admitted without objection during the testimony of the latent print examiner. 5/14/03 RP 38-39. Therefore, Mason has waived appellate review. Guloy, 104 Wn.2d at 421. Moreover, the book was admitted for proper purposes under ER 404(b). Mason's claims are without merit, and should be rejected.

c. SEXUAL EVIDENCE

Mason also claims the trial court erred in admitting limited testimony regarding some of Mason's sexual behavior. Given the context of this case, the trial court's rulings were not erroneous.

Mason objects to Curtis Schuster's testimony that Mason bragged about his control over Marina Madrid. Mason told Schuster that he would watch Madrid when she used the bathroom.

Mason called this “potty training,” and remarked that a woman who was willing to let him watch her in the bathroom would do almost anything for him. 5/15/03 RP 19-20. As the prosecutor explained, this evidence was proof of Mason’s control over Madrid, which was relevant to explain her initial willingness to provide him with an alibi. It was also admissible to rebut the defense’s oft-repeated position that Madrid was more sophisticated than Mason – by virtue of age, education and experience – and not subject to Mason’s control. 5/15/03 RP 6-9. While this testimony would perhaps not be admissible in a different case, it was relevant to material issues in this one, and was necessary to rebut material assertions by the defense. See Hernandez, 99 Wn. App. at 321.

Mason also objects to two brief portions of Kristine Riley’s testimony. Riley had an ongoing sexual relationship with Mason. 5/13/03 RP 7, 13. She testified that in early March 2001, she was drinking and smoking marijuana with Mason and two other women at Mason’s condominium. 5/13/03 RP 43. Mason suggested to her that he was interested in having sex with the three of them; Riley was not pleased by this suggestion. 5/13/03 RP 45-47. Riley also testified that Mason told her in January or February 2001 that he had had oral sex with a male acquaintance. 5/13/03 RP 87-88.

Again, while such testimony would perhaps be inadmissible in a different case, it was not error here. Riley was one of the most problematic witnesses at trial. She admitted to severe alcohol and drug abuse. 5/13/03 RP 33-35. She attempted suicide multiple times in April 2001, and was involuntarily committed to a psychiatric hospital. 5/13/03 RP 91-99. She admitted that she lied to the police. 5/13/03 RP 103. She testified, without objection, that she told the police that Mason "bashed gays" because she knew Santoso was gay, and she thought that it would help Mason if the police thought he hated gay men. 5/13/03 RP 105, 147, 200.

Mason's comment about his interest in three women was relevant to Riley's relationship with Mason, and Mason's remarks about a same-sex relationship was relevant to Mason's relationship with Santoso. 5/13/03 RP 45, 78-81. Moreover, Mason claimed that he strangled Santoso on January 23 because Santoso made a pass at him. 4/8/03 RP 198. Mason's remarks about his same-sex relationship make this explanation less likely to be true. In the context of this trial, the court did not abuse its discretion, and Mason's conviction should be affirmed.

d. FINANCES AND EMPLOYMENT

Mason claims that the trial court erred in admitting evidence

regarding the state of his finances at the time of the murder. This claim should be rejected. A defendant's financial circumstances and quarrels with the victim over money may be admitted under ER 404(b) as proof of the defendant's motive for murder. Powell, 126 Wn.2d at 216. A defendant's prior thefts from the victim are also probative of the defendant's motive for murder. State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545, review denied, 106 Wn.2d 1017 (1986). Mason's financial desperation was his reason for borrowing \$400 from Santoso on December 29, his motive for attacking Santoso on January 23, and a major factor in his decision to murder Santoso on February 19.

Mason's finances were severely overextended in the months leading up to his attacks on Santoso. In November 2000, Mason took out a high-interest loan for more than \$6,000. He made only one payment in January 2001. 5/19/03 RP 56-58. On December 19, 2000, Mason bought an expensive sports car and failed to make any payments. 4/15/03 RP 207; 5/7/03 RP 120-35. On December 28, he refinanced the car and borrowed \$400 from Santoso. 4/8/03 RP 195; 4/14/03 RP 207. Mason owed nearly \$7,000 on his credit accounts. 5/28/03 RP 118-19. Mason also lost income when he stopped teaching kickboxing at AMC gym in

December 2000. 4/22/03 RP 165-67. As a direct result of these increasing financial pressures, Mason kidnapped Santoso on January 23, 2001 and attempted to rob him. 4/8/03 RP 119-22.

But Mason's financial problems were not only relevant as proof of his motive for the January 23 attack. As the prosecutor explained in closing argument, Santoso made a "fatal mistake" on January 23 by resisting Mason's demands for money, and by reporting the incident to the police. 5/9/03 RP 61-62. As a result, Mason became fixated on Santoso as the person who was "making his life a living hell." 4/29/03 RP 91. As the prosecutor argued at trial, Mason felt increasing desperation for losing his control over Santoso, and for losing control over most aspects of his life. 6/9/03 RP 63. Thus, proof of Mason's financial problems were necessary to the State's theory of the case. The trial court exercised sound discretion in admitting this evidence, and no error occurred.

Finally, Mason argues that evidence proving that he gave false information on financial and employment documents was used for improper purposes at trial. But in making this argument, Mason takes the prosecutor's closing remarks out of context. Mason listed Santoso as a reference under a false name on one of these documents, which was relevant to show that their relationship

was close despite Mason's claims to the contrary. 5/6/03 RP 72-74. Furthermore, this evidence was not used to show that Mason was a liar, and therefore of bad character. Rather, this evidence was part of the overall picture of Mason's life in collapse, which culminated in Hartanto Santoso's murder.²⁴ 6/9/03 RP 60. Mason's conviction should be affirmed.

e. CONVENIENCE STORE INCIDENT

Mason also objects to the testimony of Diana Jones, who witnessed an incident between Mason and Santoso at the convenience store where she worked. Contrary to Mason's claims, this evidence was relevant and admissible to show the nature of the relationship between Mason and Santoso, and to rebut Mason's efforts to minimize that relationship. It was evidence of Mason's control over Santoso, and of Santoso's fear of Mason. Therefore, it was probative of motive.

"Evidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases,

²⁴ Mason also cites to portions of the prosecutor's closing where he argued that Mason's statements to the police were not credible, and that the forensic evidence proved that Mason lied when he said he had never driven Santoso's car. 6/9/03 RP 129-30, 133; 6/10/98. These arguments are entirely proper, and have nothing to do with Mason's finances.

particularly where malice or premeditation is at issue.” Powell, 126 Wn.2d at 261. Moreover, evidence of a prior disagreement is admissible to prove motive, as proof of motive “is often necessary when only circumstantial proof of guilt exists[.]” Id. at 260. Such evidence bears directly on the defendant’s state of mind. State v. Stenson, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997).

In Stenson, the defendant was charged with killing his wife. At trial, a bank employee testified that she overheard the victim and the defendant having a conversation a few days before the victim was murdered. The victim asked the defendant if she could use his truck. The defendant told her she would be “in a lot of trouble” if anything happened to the truck. Stenson, 132 Wn.2d at 700. The trial court had properly admitted this evidence because the nature of the defendant’s relationship with the victim was relevant. Id. at 701-02. This evidence showed that the defendant was very controlling of the victim, which was probative of motive and premeditation. Id. at 702. This case is very similar.

Diana Jones testified that about two or three months before Hartanto Santoso disappeared, she saw Santoso and Mason in the convenience store where she worked. 4/17/03 RP 11-13. Mason initially came into the store alone, selected a soda from the cooler,

and walked to the window and motioned for someone to come inside. 4/17/03 RP 14. From Mason's behavior, Jones thought he was motioning to a child or perhaps a girlfriend. Santoso then came into the store and Mason stared him down without saying a word. 4/17/03 RP 16. Mason continued to stare at him until he finally went to the counter and paid for Mason's soda. 4/17/03 RP 16-17. Mason left the store, and Jones noticed that Santoso was crying. 4/17/03 RP 17-18. Jones described this incident as "a very controlling situation" between Mason and Santoso. 4/17/03 RP 32.

In this case, as in Stenson, the trial court admitted Jones' testimony because it was probative of the nature of Mason's relationship with Santoso. 4/3/03 RP 149. The centerpiece of the State's theory of the case was that Mason exercised "absolute power over Hartanto Santoso." 6/9/03 RP 55. As the prosecutor noted in closing, this incident was proof of Mason's control. 6/10/03 RP 14-15. As was the case in Stenson, the trial court exercised sound discretion in admitting this evidence, and Mason's claims to the contrary are without merit.

f. JANUARY 23, 2001 ATTACK

Finally, Mason claims that the trial court erred in admitting evidence regarding the January 23 incident. While Mason

concedes that this evidence “was plainly relevant to one of the charged aggravating factors,” he argues that the amount and strength of this evidence was excessive and prejudicial.

Appellant’s Opening Brief, at 57. This claim should be rejected.

Washington courts have admitted evidence of a defendant’s prior violent behavior under ER 404(b) in a variety of circumstances. See, e.g., Powell, 126 Wn.2d at 260 (prior assaults admissible to prove motive for murder); State v. Ragin, 94 Wn. App. 407, 410-12, 972 P.2d 519 (1999) (prior violence toward third parties admissible to prove victim’s fear); State v. Boot, 89 Wn. App. 780, 789-90, 950 P.2d 964 (1998) (prior assault with a firearm and gang affiliation relevant to motive and res gestae). In this case, evidence of the January incident was certainly relevant to prove motive, premeditation, and res gestae. But even more compelling is the fact that the prior incident was proof of an aggravating factor.

As will be discussed further below, an aggravating factor is not an element of the crime; however, like an element of the crime, the State must prove an aggravating factor beyond a reasonable doubt. State v. Kincaid, 103 Wn.2d 304, 311-13, 692 P.2d 823 (1985). No case stands for the proposition that a trial court should exclude relevant, probative evidence that is necessary to prove an

element of the crime or an aggravating factor because the State has too much evidence. Rather, so long as the evidence is relevant, probative, and admitted for a proper purpose, the State should be entitled to present all of the evidence at its disposal in order to carry its burden of proof beyond a reasonable doubt.

Mason's pending trial on serious criminal charges stemming from the January 23 attack was Mason's motive for killing Santoso on February 19 and a charged aggravating factor. CP 11. Thus, the State assumed the burden of proving, beyond a reasonable doubt, that Mason killed Santoso to prevent him from testifying about what happened on January 23. Moreover, the strength of this evidence made it very likely that Mason was going to be convicted at his pending trial, thus strengthening Mason's motive to kill the State's only witness to the attack. This evidence was necessary to the State's case, and this court should affirm.

Nonetheless, Mason argues that he was prejudiced by the trial court's refusal to give a limiting instruction he proposed regarding the January 23 incident. This claim is without merit.

A trial court's rejection of a proposed jury instruction is reviewed for abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998). A trial

court exercises sound discretion in refusing to give an instruction that is inaccurate or misleading. Rehak, 67 Wn. App. at 165. In this case, Mason's proposed instruction stating that the jury could consider the January incident only "for the limited purpose of explaining the nature of any relationship between Mr. Mason and Mr. Santoso." 6/9/03 RP 43. This instruction was inaccurate and misleading, as the evidence was not admissible for only this purpose. The trial court properly rejected it, and no error occurred.

g. HARMLESS ERROR

Finally, even if this court were to conclude that any of the evidence admitted under ER 404(b) was admitted in error, any such error was harmless. The admission of evidence under ER 404(b) is not an issue of constitutional magnitude; therefore, when such evidence is admitted in error, reversal is required only if a reasonable probability exists that the outcome of the trial was materially affected. Stenson, 132 Wn.2d at 709. No such reasonable probability exists in this case. The evidence against Mason was extremely strong. Moreover, the jury did not return a verdict on the prospective-witness aggravating factor. CP 566. Mason has failed to demonstrate material prejudice, and this court should affirm.

5. THE “TO CONVICT” INSTRUCTION AND SPECIAL VERDICT FORM COMPORT WITH CONTROLLING PRECEDENT, AND THE DEFENDANT FAILS TO SHOW MANIFEST CONSTITUTIONAL ERROR.

Mason also claims that it was error to give separate instructions and a special verdict form for the aggravating factors. He claims that the federal and state constitutions require the aggravating factors to be in the “to convict” instruction for first-degree murder. Appellant’s Opening Brief, at 59-70. This claim is without merit. Controlling precedent from the Washington Supreme Court approves the instructions given in this case, and Mason’s claim fails on the merits. Moreover, Mason’s trial attorneys agreed to the instructions as given, and Mason cannot show manifest constitutional error under RAP 2.5. Mason’s claim fails procedurally as well.

A person commits first-degree murder when he kills the victim with premeditated intent to cause death. RCW 9A.32.030(1)(a). A person who commits this crime is subject to enhanced penalties – life without parole or death – when one or more aggravating circumstances are present. RCW 10.95.020; RCW 10.95.030. The aggravating factors need not be in the “to-convict” instruction because these factors are sentencing

enhancements, not elements of the crime of first-degree murder. State v. Kincaid, 103 Wn.2d 304, 307, 692 P.2d 823 (1985); see also State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004). Thus, it is proper to include the aggravating factors in a separate instruction, and to submit a special verdict form to the jury. Kincaid, 103 Wn.2d at 311-12.

As the Kincaid court explained, aggravating factors are analogous to deadly weapon enhancements in this regard:

A statutory aggravating circumstance relates to the crime of premeditated murder in the first degree as a defendant being armed with a deadly weapon relates to the commission of certain felonies while so armed. In the statutory framework in which the statutory aggravating factors now exist, they are not elements of a crime, but are 'aggravation of penalty' provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense.

Kincaid, 103 Wn.2d at 312. Therefore, so long as the jury is correctly instructed that it must find the aggravating factors beyond a reasonable doubt, it is entirely proper to submit them to the jury separately. Id. at 311-13.

In this case, the "to convict" instruction correctly set forth the elements of first-degree murder. CP 546. The jurors were given a separate instruction to consider the aggravating factors only if they

found Mason guilty of first-degree murder. CP 557. The jurors were further instructed that they had to be unanimous that a factor had been proved beyond a reasonable doubt in order to answer “yes” on the special verdict form. CP 557-58. This procedure comports with Kincaid, and this court must follow Kincaid. See State v. Ben, 114 Wn. App. 148, 55 P.3d 1169 (2002) (an intermediate appellate court will not overrule Washington Supreme Court precedent).

Furthermore, an appellate court will not consider a claim raised for the first time on appeal unless the claim concerns a “manifest error affecting a constitutional right.” RAP 2.5(a). The defendant bears the burden of showing that such an error has occurred. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). To meet this burden, the defendant must “show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of *actual prejudice* that makes the error ‘manifest,’ allowing appellate review.” Id. (emphasis in original) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). In this context, “manifest” means “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn. App. 339, 345, 835

P.2d 251 (1992). “A purely formalistic error is insufficient.” Id.
Mason’s claim fails to meet these standards.

In this case, Mason’s trial attorneys agreed to the court’s first-degree murder instruction,²⁵ and also agreed to the separate instructions and special verdict form regarding the aggravating circumstances. 6/5/03 RP 3-5, 8, 13; 6/10/03 RP 25-27. These instructions properly informed the jury of the State’s burden of proof, and correctly required jury unanimity. CP 557-58. And, while Mason has provided this court with a detailed discussion of Apprendi²⁶ and its progeny and a Gunwall²⁷ analysis of state constitutional law, nowhere does Mason identify any prejudice that could have resulted from the instructions in this case. See Appellant’s Opening Brief, at 59-70. While Mason’s brief correctly points out that aggravating factors must be found by a jury – a requirement that is clearly met here – Mason does not explain how his rights could have been materially affected by the instructions in

²⁵ In fact, Mason’s attorneys proposed a “to convict” instruction for first-degree murder virtually identical to the one that the trial court gave. CP 693; CP 546.

²⁶ See Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

²⁷ See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

this case.

Mason identifies no prejudice because there is none.

Mason's claim is "purely formalistic," not manifest constitutional error. See Lynn, 67 Wn. App. at 345. His claim is barred under RAP 2.5, and his conviction should be affirmed.

6. AMPLE EVIDENCE SUPPORTS THE JURY'S CONCLUSION THAT MASON COMMITTED THIS MURDER IN THE COURSE OF COMMITTING A BURGLARY.

Mason next argues that insufficient evidence supports the jury's special verdict that he murdered Hartanto Santoso in the course of committing a burglary. Specifically, he claims that the evidence fails to show that he unlawfully entered or remained in Santoso's apartment. Appellant's Opening Brief, at 71-75. This claim is frivolous.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, the evidence could persuade a rational jury that the elements have been proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant claiming evidentiary insufficiency admits the truth of the State's evidence, and the reviewing court draws all reasonable inferences from the evidence in the State's

favor. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded the same weight as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 619 P.2d 99 (1980).

A person commits burglary when he enters or remains unlawfully in a building or dwelling with intent to commit a crime. See RCW 9A.52.020(1) (first-degree burglary); RCW 9A.52.025(1) (residential burglary); RCW 9A.52.030(1) (second-degree burglary). A person enters or remains unlawfully "when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3). In this case, ample evidence supports the jury's conclusion that Mason entered and remained unlawfully in Santoso's apartment.

The evidence proved that Mason threw a large cinder block through Santoso's bedroom window. 4/21/03 RP 95-97; 4/29/03 RP 129; Ex 14. The block was thrown with such force that the building shook when it crashed through the glass and onto the floor. 4/17/03 RP 99. Although the evidence showed that Mason probably did not enter the apartment through the broken window,²⁸

²⁸ 4/22/03 RP 134-35.

Santoso's neighbors heard the front door slamming open, muffled bangs and thumps, angry voices, and moaning. 4/17/03 RP 102, 168, 170-71, 175. The blood pattern evidence showed that Mason stabbed Santoso at least five times. 4/22/03 RP 91. There was so much blood in the bedroom that it was still wet two days after the murder. 4/22/03 RP 43, 47. Based on this evidence, the jury's special verdict should be affirmed.

Nonetheless, Mason argues that "there was no evidence Mr. Mason lacked permission to enter Mr. Santoso's apartment," and that "Mr. Santoso may well have invited Mr. Mason into his home even though he had expressed fear of him on other occasions." Appellant's Opening Brief, at 73. While it is perhaps theoretically possible that a homeowner could invite someone into his home after that person has hurled a cinder block through the window, it is not a rational inference to be drawn from the evidence in this case. Moreover, Santoso was so afraid of Mason that he obtained a protective order and asked the police to let him sleep in a jail cell. Mason's contention that Santoso gave him permission to enter his apartment and kill him is ludicrous.

Interpreting the evidence with common sense, and drawing all reasonable inferences in favor of the State, the jury reached a

rational conclusion that Mason committed burglary when he killed Hartanto Santoso. This verdict should be affirmed.

7. THE TRIAL COURT PROPERLY DECIDED TO ANSWER HONESTLY PROSPECTIVE JURORS' QUESTIONS REGARDING THE DEATH PENALTY.

Finally, Mason argues that Judge Fox violated the dictates of State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), when he decided he would answer honestly if any prospective jurors asked about the death penalty during voir dire. This claim should be rejected. While Townsend generally prohibits a trial court from informing prospective jurors *sua sponte* that the death penalty is not being sought, Townsend gives no guidance as to what a trial court should do when jurors ask about the death penalty.

In this case, Judge Fox made it clear that he would follow Townsend and would not mention the death penalty so long as no questions were asked. But after careful consideration, Judge Fox properly concluded that he would answer honestly if the jurors inquired about the death penalty during voir dire. Judge Fox's decision was sound, and Mason's claim should be rejected.

Generally, a trial court should not instruct jurors about the sentencing consequences of a non-capital case. Townsend, 142 Wn.2d at 846; see also State v. Murphy, 86 Wn. App. 667, 670-71,

937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998). Specifically, these cases hold that a trial court should not inform potential jurors *sua sponte* that the death penalty is not being sought. Townsend, 142 Wn.2d at 842 (trial court informed jurors “at the outset of voir dire” that State was not seeking death penalty); Murphy, 86 Wn. App. at 669 (trial court gave an “introductory instruction” informing jurors that case did not involve death penalty). The rationale is that jurors have no sentencing function in non-capital cases, and a prohibition against telling them about sentencing consequences ensures their impartiality. Townsend, 142 Wn.2d at 846.

Judge Fox agreed prior to voir dire that he would follow Townsend, and would not inform the jurors about the death penalty if the jurors did not raise the issue. 3/31/03 RP 104-06. But Townsend does not govern what a court should do if jurors ask about the death penalty. As Judge Fox correctly observed, jurors strongly opposed to the death penalty would likely disqualify themselves from service if they suspected that the death penalty were being sought because they would not agree to follow the law. 2/27/03 RP 15. Therefore, after several discussions and careful consideration, Judge Fox decided that he would inform the jurors

honestly if they asked. 4/1/03 RP 6-7, 10-12.

Far from denying Mason an impartial jury, Judge Fox's decision was made to *ensure* an impartial jury. In making this ruling, Judge Fox ensured that potential jurors strongly opposed to the death penalty – jurors who would be more attractive to the defense – did not opt out of service in this case. 4/1/03 RP 10-11. This judgment is sound, and it should be affirmed.

Moreover, Mason's trial counsel implicitly agreed with the court's judgment. While objecting to the court's decision "for the record," Mason's counsel also "defer[red] to the court on this matter." 4/1/03 RP 7. Further, when Judge Fox asked Mason's attorneys if they could articulate any prejudice that would result from his decision, the following exchange ensued:

THE COURT: Let me ask you this, Mr. Womack, can you think of any way in which responding to this question would prejudice the defense in terms of jury selection or in the trial itself? I have been trying to think of that as I've struggled with this question.

MR. WOMACK: I mean, I could come up with a reason, Your Honor, but I don't know if it is a particularly compelling one.

THE COURT: 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 months as we have been leading up to this moment.

MR. WOMACK: Correct. The alternative to the rationale that if a jury knows that it's a death penalty case, they will off themselves from the jury; and the converse of that is if they know it's not a death penalty case, there is a possibility, like I said, I don't know if this is very compelling, there is a possibility that they could be more prone to convict, realizing that the end result won't result in death.

That's a reason. I don't know, again, in my mind, it's not a particularly compelling reason. I have read Townsend, and I tend to agree with the State that some of the rationale there is somewhat less than persuasive.

4/1/03 RP 7-8. Thus, while formally objecting to preserve this issue for appellate review, Mason's experienced trial counsel obviously agreed with Judge Fox's assessment of the issue.

Judge Fox's concerns soon came to fruition. Very early in voir dire, shortly after reading the information, Judge Fox asked if any potential jurors felt that they could not follow the law:

Now, one of your obligations here as jurors would be to follow the instructions of the Court as to the law you are to apply. That would be your obligation, even if you found yourself thinking, well, perhaps that law should be changed or repealed or modified in some way. If you found yourself thinking that perhaps the law should be changed or modified in some way, is there anybody here who would be unable to enforce the law or apply the law as you are instructed?

Juror No. 25?

JUROR NO. 25: If it were the death penalty. I don't support the death penalty. I would have a hard

time with that.

4/1/03 RP 31. Thus, as Judge Fox had predicted, Juror No. 25 stated that she probably would not follow the law if the death penalty were at issue. In response, Judge Fox gave the following instruction:

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

4/1/03 RP 32.

In this case, unlike Townsend and Murphy, the issue of the death penalty was raised by the veneer, not by the trial court. Judge Fox's response was succinct and accurate, and did not place undue emphasis on sentencing considerations. Moreover, there is no evidence that the jury's impartiality or careful attention to this case were affected by Judge Fox's instruction. To the contrary, the record demonstrates that the jury took its obligations very

seriously.²⁹ Judge Fox's decision did not deprive Mason of an impartial jury. Mason's arguments to the contrary should be rejected.

But even if this court were to conclude that Judge Fox erred in honestly answering a question about the death penalty, Mason still should not receive a new trial. Instructional error of this type is harmless if it did not affect the trial's outcome, and if the evidence of guilt is overwhelming. Townsend, 142 Wn.2d at 848-49. Such is the case here.

Mason's guilt was overwhelmingly established by his strong motive to kill Santoso, his statements and activities following the murder, and the forensic evidence. Moreover, the evidence of premeditation was staggering: Mason told Ms. Madrid that Santoso was making his life miserable and that he went to Santoso's

²⁹ For example, Juror No. 20 also voiced concern about serving on a death penalty jury, and expressed relief that that was not the case. 4/1/03 RP 84. Juror No. 48 noted that after he heard the charge, "I thought I better darn well pay attention." 4/1/03 RP 83. Juror No. 59 acknowledged that the charge was very serious. 4/1/03 RP 84. Juror No. 41 recognized that the jury would not determine the penalty, but would only concern itself with "guilt or innocence." 4/1/03 RP 97. Juror No. 52 described the gravity of serving on a previous jury in a murder case, and noted how the jurors "concentrated so hard on trying to do a job as best as they possibly could[.]" 4/1/03 RP 17-18. And, after the jury had been selected and sworn, one of the jurors asked whether they should stay away from work on non-trial days, "[g]iven the importance of this case." 4/1/03 RP 163. These examples from voir dire are by no means exhaustive, as the seriousness with which this jury approached its service is evident throughout the record.

apartment to kill him, and Mason had been reading about murder and body disposal before putting this knowledge into action. Mason wore dark clothing and gloves, went to the apartment armed with a knife, and parked his car several blocks away.³⁰

This was a lengthy trial with numerous witnesses and hundreds of exhibits. At the trial's conclusion, the jurors were again instructed that they had "nothing whatever to do with any punishment that may be imposed," and that the possibility of punishment should not be considered except to make them careful in their deliberations. CP 538. In light of the entire record, Judge Fox's instruction during voir dire had no conceivable impact on the outcome of the trial. Mason's conviction should be affirmed.

³⁰ Indeed, although lesser-included instructions were given, Mason's attorneys did not argue that Mason committed a lesser offense; rather, they argued that the State had not proved that Mason was the perpetrator of *any* offense. 6/10/03 RP 45-49, 51-53, 60-62, 76-77, 90-94. As counsel stated in closing argument, "the defense theory in this case has been clear. It has been cogent. It has been convincing. It has, in fact, been unchanging. And that is: Put Mr. Mason in [Santoso's bedroom], and you can establish the case. Don't put him in the room, and you can't." 6/10/03 RP 61-62.

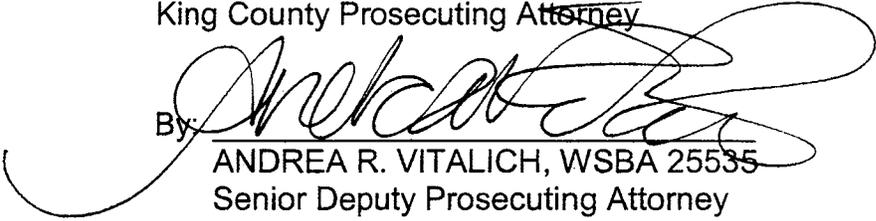
D. CONCLUSION

For the foregoing reasons, Mason's conviction for Murder in the First Degree with aggravating circumstances, and his sentence of life without parole, should be affirmed.

DATED this 4th day of October, 2004.

RESPECTFULLY submitted,

NORM MALENG
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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KIM MASON, Cause No. 52824-6-1, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

10/4/04
Date

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