

63032-6

63032-6

NO. 63032-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

AREEWA SARAY,

Appellant.

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

The Honorable Larry McKeeman, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting irrelevant and unfairly prejudicial evidence describing appellant's behavior and demeanor during a police interrogation.

2. The trial court failed to comply with CrR 3.5(c) when it failed to enter written findings of fact and conclusions of law after a hearing on the admissibility of appellant's statements to police.

Issues Pertaining to Assignments of Error

1. Police were allowed to testify that during their interrogation of appellant he stomped his feet, laughed, burped, farted and said they were making his head spin. Where the sole issue at trial was identity and the evidence that appellant was involved in the crimes lacked credibility, was the police witness testimony about appellant's odd and strange behavior during the interrogation irrelevant and unfairly prejudicial?

2. Under CrR 3.5, whenever a statement of the accused is offered as evidence, the trial court is required to hold a hearing to determine whether the statement is admissible. After the hearing, the trial court is required to set forth in writing the undisputed facts, the disputed facts, conclusions as to the disputed facts, and a conclusion as to whether the statement is admissible and the reasons therefore. Although the trial

court held a CrR 3.5 hearing, it failed to enter the required findings and conclusions. Should this court remand for entry of written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural History

Areewa Saray was charged by amended information filed in the Snohomish County Superior Court with two counts of aggravated first degree murder and two counts of first degree murder. CP 62-63. One count of aggravated murder and first degree murder were related to the murder of Linda Nguyen (Counts 1 and II); the other counts of aggravated murder and first degree murder were related to the murder of Kevin Meas (Counts II and IV). Id. It was alleged in all four counts that Saray was armed with a firearm. Id.

A jury found Saray guilty as charged. CP 18-27. Saray was sentenced to life plus 60 months on the two aggravated murder charges. CP 3-15. The first degree murder charges were dismissed. Id.

2. Substantive Facts

Linda Nguyen and her boyfriend, Kevin Meas, were living in a house on Dexter Avenue in Everett, Washington. RP 450. The house was

owned by Vo Van Tran and rented to Ngoc Nguyen.<sup>1</sup> RP 391. It was one of two houses in Everett Ngoc rented; the other was on Beech Street, few blocks away. RP 450. In both, Ngoc conducted a marijuana growing operation. RP 442-450.

Linda and Meas worked for Ngoc growing marijuana in the Dexter house. RP 450. Linda's brother, Hai Nguyen, along with his girlfriend Nhung Nguyen (Natalie) and brother Tam Nguyen, lived in the Beech house and also grew marijuana for Ngoc. RP 445, 448. Ngoc recruited Hai to grow marijuana for her and Hai in turn recruited Linda. RP 443, 446-447.

On the evening of July 2, 2007, Tran, accompanied by his wife and young son, went to the Dexter house to try and collect the rent Ngoc owed him. RP 396-397. Tran knew Ngoc was growing marijuana in the house. RP 396.

When Tran arrived he noticed a coffee colored Honda Accord parked outside the house. RP 398. As he and his wife approached the front door they heard sounds that Tran described as the sound made by a nail gun. RP 400, 528. The front door of the house was open and when Tran looked inside he saw a woman, who as later identified as Linda, laying on the floor by the door. RP 402. Almost immediately two Asian

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<sup>1</sup> A number of the people involved share the name Nguyen, whether related or not. They will be referred to by their first names to avoid confusion.

men came to the door from inside the house and one pointed a gun at Tran and told him to “go, go.” RP 405-408. Tran said both men had long hair and one had hair down to his shoulders and was wearing a baseball cap. RP 410-411.

Tran and his wife and son got back into their car and left. RP 412. Tran had only driven about a block when he saw the Honda that was parked outside the house coming up behind him. He thought he was being chased so he pulled into a driveway. The Honda drove on. RP 413-414. Tran then called Ngoc and told her what happened. RP 414.

Earlier that day Linda was at the Beech house helping Hai, Tam and John, who was an associate of Ngoc, harvest the marijuana crop Hai had grown. RP 454, 477. Linda left about 4:00 p.m. to go back to the Dexter house but she planned to return later. RP 455-456. At about 9:00 p.m., John called Hai and told him to go to the Dexter house because Linda was in trouble. RP 455. Hai thought the request was a ruse to get him and Tam out of the house so Ngoc could come and take the marijuana they just harvested. RP 458. So, Hai and Tam drove by the Dexter house and when they did not notice anything unusual they quickly returned. RP 456. Hai did not go inside the Dexter house but he told John he spoke to Linda and Meas and that everything was fine. RP 457.

Ngoc called Hai about 20 minutes later and told him Tran saw Linda laying on the floor. RP 458. Hai, Tam and John went back to the Dexter house and found Linda on the floor unconscious and bleeding. RP 459, 482. Hai put Linda in his car and called Natalie, who was still at the Beech house, and told her about Linda and asked her to find directions to a hospital. RP 482.

Hai and the others drove back to the Beech house with Linda. RP 456. Tam and John got out of the car and Natalie and Hai left to take Linda to the hospital. RP 461, 483. They could not find a hospital so they eventually stopped at the side of the road and called 911. RP 461. An off-duty police officer and an off-duty EMT saw Hai and Natalie yelling for help so each stopped and administered CPR to Linda until an ambulance arrived and took her to a hospital. RP 174-177, 181, 461-462, 484.

Later, inside the Dexter house, police found Meas dead at the bottom of a stairwell and the marijuana growing operation. RP 195, 249-250, 265-266. Both Meas and Linda died of multiple gunshot wounds to the head. RP 218, 229.

That same evening at about 10:00 p.m., before police went to the Dexter house, they were called to investigate a car fire in a cul-de-sac near the Dexter house. RP 251-252. The car was a gold colored Honda

Accord. RP 253-254. Two people who saw the fire testified a small car sped away from the burning Accord. RP 355-356, 358.

The Accord belonged to Phal Chum who had bought it a few weeks earlier. RP 499-500, 663-665. Chum has been Saray's friend for years and said Saray's nickname is "E" for "Easy." RP 645.

Chum testified that on June 30, 2007, his cousin Saroeun Phai asked Chum if he wanted to help rob a house in Everett where there was money and marijuana. RP 647-650, 652. Phai said the plan was to commit the robbery before July 4<sup>th</sup> because fireworks would mask any gunshots. RP 653. Chum agreed to help as the driver. Id. According to Chum, Saray was a few feet away when Phai talked to Chum about the robbery but Saray did not say anything. RP 651. Later, when Phai and Chum were alone, Phai dismissed Chum's plan to tie up the people in the house they were going to rob. Instead Phai told Chum if anyone in the house had a gun he would shoot. RP 656-657. Phai also asked Chum to get him a gun. Chum got a 9mm from Chann Phal and gave it to Phai. RP 657.

Sopheap Phal, who is also Chum's cousin and Chann Phal's brother, testified that sometime in the afternoon on July 2<sup>nd</sup> Phai and Saray came to his house in Federal Way in Phai's black Honda Civic. RP 613-614, 640. When Phal asked what they were doing, Phai told Phal they

were going up north and commit a robbery to get some money and drugs. RP 616-618. Saray did not say anything during the conversation between Phai and Phal. RP 618.

Later that night Phai and Saray returned and appeared scared. RP 619-620. When Phal asked what was going on, Saray said they had done something wrong. RP 621. Saray's eyebrows were burnt and he told Phal he burned Chum's Accord. RP 622-623. Although Saray's hair was already short, he asked Phal to shave his head, which Phal did. RP 623. Before Phai left, Phai asked Phal to throw away a bag of clothes Phai had with him. He also heard Phai and Saray say that if anyone asked Phai was at the Casino that night and Saray was at home. RP 626. After Phai left, Phal took Saray to the waterfront and Saray dropped a gun into the water. RP 627-628. Phal claimed that later that night Saray told him and he and Phai shot a person. RP 631.

Phal showed police where he saw Saray drop the gun in the water. RP 632. Police divers recovered a revolver and a 9 mm Glock. RP 710-712, 733-734. Ballistic tests showed that bullet and bullet fragments found at the Dexter house and recovered from the bodies of Linda and Meas were fired from the recovered revolver. RP 736-756.

On July 12<sup>th</sup>, ten days after the murder, police showed Tran a photo montage that included Chum's photograph. RP 415-417, 503, 560.

Tran said he picked Chum's photograph as looking like one of the men he saw at the Dexter house. RP 416. Tran was shown the same montage in September but he did not recognize anyone. RP 561. In November, Tran was shown two montages, one that included a photograph of Phai and one that included a photograph of Saray. RP 561. He said the photograph of Saray looked like one of the men he saw in the Dexter house. RP 563, 572. Tran was not asked to identify Saray at trial.

In early November, police arrested Saray. Police also procured a search warrant to search Saray's home. Police interrogated Saray after he was arrested. Everett Police Department Detective Phillip Erickson testified that when he initially read the search warrant to Saray, Saray pretended to be asleep. RP 555. Erickson and other officers who attended or observed the interrogation were allowed to testify that during the interrogation Saray kept saying he was cold and he would loudly stomp his foot on the floor. RP 555. They said Saray also laughed, burped and farted during the interrogation. RP 555, 583, 591-592, 603. Saray told police he did not know Chum or Phai and denied his nickname was "E." RP 556-557. At some point during the interrogation, Saray told police they were making his head spin. RP 596.

C. ARGUMENTS

1. POLICE TESTIMONY DESCRIBING SARAY'S ODD BEHAVIOR DURING HIS INTERROGATION WAS IRRELEVANT, UNFAIRLY PREJUDICIAL AND DENIED SARAY HIS RIGHT TO A FAIR TRIAL.

The State moved in limine to admit Saray's statements as well as the behavior he exhibited during the police interrogation. RP 137-138. Saray argued both were irrelevant and unfairly prejudicial and should be excluded. RP 139-141. The court ruled the Saray's statements were relevant and admissible but reserved ruling on the admissibility of the officer's observations of his demeanor and behavior. RP 142. Later, the court found Saray's demeanor and behavior relevant and admissible. RP 514-515. Saray requested a continuing objection to the testimony. RP 552.

Testimony of a defendant's demeanor is not an opinion and is therefore admissible if relevant. State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." RP 401. Evidence is only relevant if it logically tends to prove a material fact in issue. State v. Lee, 87 Wn.2d 932, 939, 558 P.2d 236 (1976).

But even relevant evidence is inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403. The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Police testimony that during the interrogation Saray stomped his feet, laughed, burped, farted and said they were making his head spin was irrelevant. The sole issue was whether Saray participated in the murder. His odd behavior during the interrogation does not logically support the inference that he was at the Dexter house and committed the murders. Thus, testimony describing Saray's behavior was irrelevant to prove any issue at trial.

The testimony was not only irrelevant it was unfairly prejudicial. Because his behavior was so strange and inappropriate, the testimony created an impression that Saray suffers from some kind of mental disorder. It is likely that if a juror had a reasonable doubt Saray participated in the murder, the juror could overcome that doubt based on a visceral response to Saray's odd behavior.

The improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Here

admission of the testimony describing Saray's behavior at the interrogation was not harmless.

The witnesses that implicated Saray in the crimes were Phal, Chum and Tran. Phal testified Saray made statements about killing a person and that he saw Saray throw the murder weapon in the water. Phal's involvement in helping to get rid of the clothes and murder weapon rendered him an accomplice. Chum also got the gun he gave to Phai from Phal's brother, Chann Phal. And, Phal candidly admitted that he was told he would benefit if he testified at the trial. RP 633-634.

Chum, who procured one of the weapons and initially agreed to participate in the robbery, was also an accomplice. In addition he had been convicted of several crimes of theft. RP 666. He was promised he would not be charged with an offense related to the murder if he testified at the trial. RP 672.

Tran, who picked Saray's photograph from a montage, described the men he saw at the Dexter house as having long hair. There was undisputed testimony that Saray never wore his hair long and that his hair was short on the day of the murders. RP 636-637, 670. Moreover, Tran at one point told police he was 80% sure a man he saw working at a Lowes hardware store was one of the men he saw inside the Dexter house with a gun. RP 428. Police determined the man had nothing to do with

the case. RP 509. Tran too was told if he testified at the trial it would help him with regard to his involvement with the marijuana grow operation. RP 424.

Chum and Phal clearly had a motive to minimize their involvement by place the blame on Saray. In addition, Chum has been convicted of several crimes of dishonesty. Their credibility was suspect.

Tran likewise had a motive to testify he saw Saray to curry favor with the prosecution based on the promise his testimony would help him with his own criminal liability. And, his identification of Saray from the montage was impeached by his descriptions of the men he saw and his false identification of the Lowes employee.

Under these facts, a reasonable jury could have had doubts Saray was involved in the murders. The admission of the irrelevant and prejudicial testimony concerning Saray's behavior at the interrogation was not insignificant because it likely caused the jurors to render a decision on their emotional response to that behavior despite their doubts. Thus, the admission of the testimony was not harmless and denied Saray his right to a fair trial. His convictions should be reversed.

2. REMAND IS REQUIRED BECAUSE THE STATE FAILED TO PROPOSE, AND THE COURT FAILED TO ENTER, WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.5(c).

There was a pretrial on hearing on the admissibility of Saray's statements to police. RP 2-68. The court ruled Saray was properly advised of his constitutional rights, understood and waived those rights, and voluntarily spoke with police. RP 72.

Criminal Rule 3.5 (c) provides that, "[a]fter the hearing the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefore."

A trial court's oral statements are merely a verbal expression of its informal opinion at the time, necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. State v. Dailey, 93 Wn.2d 454, 458, 610 P.2d 357 (1980); State v. Smith, 68 Wn. App. 201, 206, 842 P.2d 492 (1992). A trial court is always entitled to change views expressed in an oral opinion upon presentation of the findings of fact. Smith, 68 Wn. App. at 206. Unchallenged formal written findings, however, are treated as verities on appeal. Id. at 206- 7; Metropolitan Park District v. Griffith, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986).

In all cases where an accused's statements are admitted under CrR 3.5, courts require a clear and comprehensive oral opinion so that the appellate court is left with no doubt as to the court's findings. Smith, 68 Wn. App at 206; see also State v. Cruz, 88 Wn. App. 905, 908-09, 946 P.2d 1229 (1997) (trial court's failure to enter findings of fact and conclusions of law may not be excused in the absence of a clear and comprehensive oral opinion that would permit a reviewing court to determine how or whether the dispositive factual issues were decided by the trial court). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205. Where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 ( 1998).

Following the CrR 3.5 hearing, the court ruled Saray's statements to police admissible. 4RP 43-51. The court, however, failed to enter written findings or conclusions. Accordingly, remand for entry of the findings and conclusions is an appropriate remedy. Id.

D. CONCLUSION

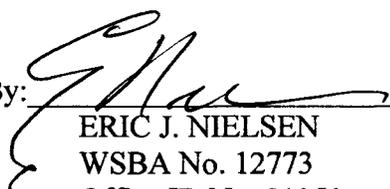
For the above reasons, this Court should reverse Saray's convictions and remand for a new trial. In the alternative, because the trial

court failed to comply with CrR 3.5 (c) this Court should remand for entry of written findings of fact and conclusions of law.

DATED this 21 day of July, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON	)	
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Respondent,	)	
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v.	)	COA NO. 63032-6-I
	)	
AREEWA SARAY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF JULY 2009.

x *Patrick Mayovsky*

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