

NO. 63913-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

OMAR NORMAN,

Appellant.

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King County Prosecutor  
Appellate Unit

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

The Honorable Regina S. Cahan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. GANG EVIDENCE DEPRIVED NORMAN OF A FAIR TRIAL.

Evidence of prior bad acts and misconduct is not admissible to prove the defendant's character or to show his general propensity for misconduct. ER 404(b). The State argues admission of gang evidence here was proper by referring to evidence not presented to the jury. It next argues that the evidence explains the actions of Mark Anderson, but this assertion is contravened by Anderson's own testimony. Finally, it claims ER 404(b) does not even apply. These assertions are incorrect.

First, the State improperly bootstraps its argument with the testimony of David Melton and Eljae Givens. The State initially describes the pretrial statements of Melton and Givens, which is appropriate as these materials were before the trial court before its ruling on the gang evidence. Brief of Respondent (BOR) at 13 n.6. The State then argues, however, that Melton and Givens' gang membership or affiliation was relevant to show why they were reluctant to speak to the jury and would not discuss their prior statements to police. BOR at 14-15, 18. But because Melton and Givens would not cooperate with the State's questioning, the jury never learned the content of their pretrial statements. See generally 11RP 993-1027 (Melton); 11RP 1030-66 (Givens). Their gang membership and

thus their alleged bias or motivation not to cooperate never became appropriate evidence – because there was little or no substantive evidence for the State to explain or rebut with their alleged bias.

Also interestingly, Melton was never identified as an LP gang member; if anything, he appeared to belong to Deuce 8, Norman's alleged ex-gang and then Milam's gang. 5RP 160; 11RP 1022; 12RP 1138-39; 18 RP 2067. And Givens, for his part, identified with LP, but denied it was a gang and rather described it as a group of people involved with music. 11RP 1032-33. The State's "bias" evidence therefore lacks even a reasonable factual foundation. As was noted in the Brief of Appellant (BOA), Melton and Givens' reluctance to testify appeared to be due to personal motivations, not their ill-supported "gang" membership.

The State next argues the gang evidence was properly used to explain why Anderson did not report Norman to police before Norman attacked him. BOR at 19-20. In support, the State repeats a passage of Anderson's testimony cited in Norman's opening brief: Anderson said of reporting Norman to the police "You can't tell. That's just in the streets, you can't do that, plus it would have messed up what I was trying to do [(kill Norman)]." 12RP 1163. The State prodded Anderson again, asking if his "status" would be affected by telling on Norman, and Anderson replied it would, but never mentioned gangs at any point close to or

connected with this interaction, nor did the prosecutor. See, e.g., 12RP 1159-65. Anderson instead talked about the attacks on himself, wanting to kill Norman, and selling and using drugs. Id. When Anderson does talk about gangs close in time to this testimony, it is only to talk about his own interaction with the gang detectives, his knowledge of who they were, and his decision to talk to them in an attempt to reduce his legal jeopardy. 12RP 1166-71. Anderson, of course, had no problem describing his and Norman's gang affiliations, as well as the affiliations of many other witnesses in the case. 12RP 1138-39, 1142-43, 1186-87; 13RP 1271.

Despite the State's determined efforts, Anderson never said gangs motivated his cooperation or silence on this case. In fact, he talks about being motivated by: 1) wanting to kill Norman, 12RP 1162-63, 1166; 13RP 1301, 1335; 2) wanting to get charging and sentencing advantage, 12RP 1167-70, 1172; 13RP 1311-14, 1343-44; 15RP 1628; 17RP 1879, 1938; and, 3) upon prodding by the prosecutor, wanting to protect his "status," but with no mention of gangs with regard to that status. 12RP 1163. These do not bear directly on Anderson's or Norman's gang memberships.

The State next argues ER 404(b) simply does not apply to gang evidence where it is introduced as evidence of witness bias. BOR at 20-21, 29 (citing U.S. v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); and State v. Craven, 67 Wn. App. 921, 927-928, 841 P.2d 774

(1992)). In Abel, the State gave notice that it intended to impeach a defense witness with information he belonged to the Aryan Brotherhood, a group who the government's witness would explain required its members to commit perjury to protect its membership. 469 U.S. at 47. Abel is thus significantly different from this case – first, ER 404(b) was never specifically raised as an issue, as it was here. Second and more importantly, the evidence was used in rebuttal, rather than being a primary leitmotif throughout the State's case-in-chief. Id. at 47, 52. Third, the gang had a specific rule that was relevant to motivation – that members were required to lie for each other, including committing perjury. Id. at 47. In contrast, here the State's witnesses could only say gang members generally did not cooperate with police, a more vague and objectionable assertion if it fails other evidentiary underpinnings.

State v. Craven similarly fails to talk about ER 404(b) in its discussion of gangs, and so does not prove the point that ER 404(b) does not apply to gang membership. 67 Wn. App. at 927-928. The State also references U.S. v. Beck, 625 F.3d 410 (7<sup>th</sup> Cir. 2010). Beck does indicate that questioning a witness about his gang membership does not necessarily implicate ER 404(b). Id. at 419. But Beck lay in a significantly different posture -- the defendant wished to use gang evidence to cross-examine a State witness, an alleged accomplice who Beck argued would be

motivated to lie on the stand to protect other members of his gang who might be accused or convicted of the crime; thus, Beck's constitutional rights to cross-examine the witnesses against him and to present a defense were implicated. Id. at 415, 418-19. And even assuming one could cut the ER 404(b) question loose from its factual moorings in Beck, this 7<sup>th</sup> Circuit case must carry less weight than the many Washington cases cited by Norman.<sup>1</sup> Moreover, the trial court below treated the gang evidence as subject to ER 404(b) and not simply as bias evidence, a fact completely ignored by the state in its Response. 7RP 430.

As the defense argued previously, the only reason to raise the topic of gangs in Norman's case was because the State wanted to. 7RP 428-29. According to the State's theory, the shooting was motivated purely by personal relationships – specifically, Justice's relationship with his brother, and Norman's personal friendship with Justice. This was a conflict between individuals, having nothing to do with their gang membership. Moreover, the 404(b) purposes identified by the trial court are not sustained by the record, and the State has not bothered to address

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<sup>1</sup> The many cases cited by Norman and ignored by the State – cases all more recent than Abel and Craven – assume or outright state that ER 404(b) applies to evidence of gang membership. See, i.e., State v. Scott, 151 Wn. App. 520, 526, 213 P.2d 71 (2009), review denied, 168 Wn.2d 1004 (2010); State v. Yarbrough, 151 Wn. App. 66, 74-76, 82-86, 210 P.3d 1029 (2009); State v. Boot, 89 Wn. App. 780, 788-89, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998); State v. Campbell, 78 Wn. App. 813, 822-23, 901 P.2d 1050, review denied, 128 Wn.2d 1004 (1995).

such purposes in its brief. Gang evidence is generally presumed to be prejudicial, doubtless because of the obvious stigma towards gangs in our society. Scott, 151 Wn. App. at 526. For these reasons, this Court should reverse and remand for a new trial. See Scott, supra.

2. WHERE THERE WERE NO WITNESSES TO THE CRIME, IMPROPER ADMISSION OF HEARSAY TESTIMONY BOLSTERING THE CRITICAL DNA EVIDENCE WAS PLAINLY PREJUDICIAL.

a. Bruesehoff's testimony about other analysts checking his work constitutes hearsay.

Over a hearsay objection, the State's DNA expert Nathan Bruesehoff testified his work was reviewed by another analyst<sup>2</sup> to "see if [he/she] would come to the same conclusion." 15RP 1655-56. See also 4RP 103-04; 7RP 485-88; 15RP1667-68 (objections and rulings). The State claims "Bruesehoff never testified about the specific peer review conducted in this case, and, therefore, his testimony was not hearsay and did not run afoul of the Confrontation Clause." BOR at 23. This is absurd – Bruesehoff bolstered his testimony with the peer review in exactly the same manner analogous testimony was bolstered in State v. Wicker.<sup>3</sup>

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<sup>2</sup> Norman's opening brief states Bruesehoff testified his work was checked by two analysts. BOA at 32. In fact, Bruesehoff only testified at trial that a single analyst checked his analysis. 15RP 1655-56. The fact that two analysts actually reviewed Bruesehoff's report was only noted during hearings prior to Bruesehoff's testimony. 7RP 486-88.

<sup>3</sup> 66 Wn. App. 409, 832 P.2d 127 (1992).

The State quotes Bruesehoff's testimony on the subject, including this segment among others:

When I'm done with my analysis, written everything up, done – basically completed what I needed to, my work is given to another analyst, who will go through, examine my data, and see if they would come to the same conclusion. It's called a peer review, that another trained analyst will look at the same data, see if they reach the same conclusion as I do, and that's done for every report before it goes out the door.

15RP 1656; BOR at 24.

Bruesehoff clearly stated his work had been peer-reviewed, which meant it was checked by another analyst to “see if they would come to the same conclusion....[to] see if they reach the same conclusion as [he does]” before the report is released. This meant another analyst had, in fact, come up with the same conclusion – any other interpretation twists the testimony beyond all recognition.

As though to eliminate all doubt, the State emphasized this purpose of the testimony while cross-examining the defense expert:

Q: And, Doctor, you do understand that...[w]hen these conclusions are made by the State Patrol Crime Lab, just like any other forensic lab, they're peer-reviewed first, correct?

A: I think that's the general idea, yes.

Q: Well, that's what happened here, correct?

A: I think that's the case, yes.

Q: And who peer-reviewed your conclusions for this case?

A: Well, unfortunately I can't send them out. I think that would be a good idea if I were authorized, but when I

take a case on, I take it on with some understanding of confidentiality and I can't just submit the data anywhere I want. I think that would probably be a good thing.

Q: So nobody peer reviewed your work.

19 RP 2245-46. The State's claim that this evidence was only to show correct procedures were followed – and not an attempt to bolster Bruesehoff's conclusions – is thus made manifestly absurd by the overall context of how the peer review testimony was used.

The State discounts State v Wicker, implying the case anticipates “explicit testimony about the work and conclusions of a non-testifying analyst.” BOR at 26. But Wicker contains no such requirement, and the Wicker testimony was very similar to the testimony produced here.

In Wicker, State fingerprint expert Phil Anderson testified it was standard procedure for his work to be “verified” by another technician, and that it was verified if the other technician agreed with the expert's conclusions. 66 Wn. App. at 411. Anderson testified he knew his conclusions were checked by Karen Tando, because the initials “K.T.” were written on the fingerprint card. Id. Although the out-of-court statement only amounted to the initials “K.T.,” the Wicker Court correctly held that in context, this was an assertion by Anderson that Tando agreed with his conclusions. 66 Wn. App. at 411.

The State did not, as it implies, need to give the names of the analysts or discuss their techniques to run afoul of Wicker. Here, Bruesehoff's testimony that he gave his results to an analyst for retesting to "see if [he/she] would come to the same conclusion" before the report went "out the door" was very nearly identical to Wicker except for lacking the name of the analyst(s). 15RP 1655-56. This is fully within the hearsay contemplated by Wicker: "classic hearsay, an out-of-court statement offered for the truth of what it asserts." 66 Wn. App. at 412.

b. The error was not harmless under the constitutional standard.

The State concedes that if hearsay was admitted, it was in derogation of Norman's confrontation rights and so the constitutional error standard applies. BOR at 28.<sup>4</sup> It nonetheless contends any error was harmless. BOR at 28-29. This is incorrect.

There was an accumulation of circumstantial evidence against Norman, such as his presence in Justice's car with Milam on the night Milam was killed and his dishonest statements to police. There was also Anderson's testimony, but Anderson was a felon with a lengthy record who admitted he gave a statement in order to get preferential treatment by the State, and moreover, his testimony was directly rebutted by the one

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<sup>4</sup> Of course, the State is correct to concede this. See Wicker, 66 Wn. App. at 414; State v. Nation, 110 Wn. App. 651, 666, 41 P.3d 1204 (2002)

other person who Anderson claimed was present during Norman's admission about the crime – Olijuwana Crain. See 12RP 1168-70, 1172; 13RP 1311-14, 1343-44; 15RP 1628; 17RP 1879, 1938 (Anderson and police testify about Anderson's motivations); 18RP 1995-97, 2002 (Crain's contradictory testimony).

The State's firmest evidence tying Norman to the crime was the DNA evidence put forward by Bruesehoff. Even police witnesses testified the Milam murder investigation was "stalled" until DNA evidence placed Norman at the scene. 17RP 1932-33.

The bolstering of this crucial evidence by asserting it had been checked by another analyst was tantamount to admitting the direct testimony of such a witness for the State and then not allowing Norman to cross-examine him or her. The credibility of Bruesehoff's conclusions was a foundation of the State's case. Like the fingerprint testimony in Wicker, such bolstering of central evidence could not be harmless beyond a reasonable doubt. 66 Wn. App. at 114.

3. NORMAN'S STATEMENT TO POLICE ON SEPTEMBER 12, 2007, WAS IMPROPERLY REDACTED.

Over objections, the trial court excluded several portions of the recording of Norman's September interrogation during which the police made specific intimations that Norman would spend "23 years," "30

years,” or even “his life” in prison, and that he might be in danger without the protection of the detectives. 17RP 1849-52. The State claims the Rule of Completeness does not apply, arguing Norman “introduced” his own statement, but this is simply incorrect. BOR at 29, 33. Moreover, the State misapprehends the scope and purpose of the Rule.

First, the State claims the Rule of Completeness does not apply because Norman “introduced” his own statement. BOR at 29, 33. This assertion is at best disingenuous.

The State introduced Norman’s May 2007 interrogation in its case-in-chief, but not the September 2007 interrogation (hereinafter the “September statement”). 17RP 1843-44. Prior to his own case-in-chief, Norman sought permission to introduce the September statement during his direct testimony, in large part to limit the damage if the State were to introduce it in cross-examination or rebuttal. 18RP 1943-46, 1950-51, 1953, 1955. This request was denied by the trial court, and the court only permitted Norman to testify briefly that he gave the September statement, that it was false, and why the statement was false. 18RP 2007, 2009, 2013. Norman followed these instructions, only mentioning the statement’s content in the broadest terms. 18RP 2056-61.

The State then – as Norman had anticipated and tried to mitigate by his motion – used the September statement extensively during cross-

examination, at times reading aloud large swaths from the statement transcript. 20RP 2274-81, 2291-2317, 2319-20. Finally, after cross-examination had concluded, Norman was permitted to admit the “whole” statement, but this was still the version that had been heavily redacted by the Court over Norman’s objections. 17RP 1849-57; 20RP 2321, 2324, 2328-29; Ex. 254 (transcript of redacted statement played to jury).

The State’s argument that the Rule of Completeness does not apply because Norman was admitting his own statement ignores the depth of Norman’s cross-examination by the State and the significant information about the statement brought before the jury by the State’s actions. The State is, perhaps, confused.

“Introduced into evidence” – the requirement under ER 106 – does not equate to admission as an exhibit before the jury. If something is introduced into evidence, it is: “admitted into the trial record, allowing it to be considered by the jury or the court in reaching a decision.” Black’s Law Dictionary 828 (7<sup>th</sup> ed. 1999). Admission of an “exhibit” has a stricter meaning: “A document, record, or other tangible object formally introduced as evidence in court.” Black’s Law Dictionary 595 (7<sup>th</sup> ed. 1999).

The fact that Norman introduced the somewhat more full version of the statement – after being extensively cross-examined regarding its

contents – does not waive his right to raise the Rule of Completeness when he argues the statement was improperly redacted. If it did, an absurd result follows: suppose the State could use 10% of a statement to impeach a defendant when the other 90% of the statement favored the defense. Suppose then the Court redacted most of that 90%, but the defense did introduce as an exhibit what little was left. Is the defense precluded from arguing the statement was improperly redacted? Of course not, and notably, the State produces no caselaw or other legal authority indicating that is a proper result.

The purpose of the Rule of Completeness is “to protect against the misleading impression which might otherwise result from hearing or reading matters out of context.” 5 Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE § 25, at 93 (3d ed., 1989). As a result, the proffered portions of a written or recorded statement must be used “to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved.” State v. West, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967).

The reasoning behind the Rule of Completeness was exactly why Norman was permitted to introduce the redacted statement after having been liberally cross-examined upon it. But in a proper application of the Rule of Completeness, the statement would have still included those items

wrongly redacted by the trial court.

Next, the State asserts the Rule of Completeness would not permit inclusion of the redacted material because “The Washington Supreme Court has recognized a ‘strict prohibition’ against informing the jury of the sentencing consequences of the charged crime.” BOR at 30, 33-35. The State relies on two cases, State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), and State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), but these cases are inapposite for three separate and independent reasons.

First, in both Townsend and Magers, a specific, binary question of punishment was at issue: whether the death penalty applied (or not) and whether it was a third strike case (or not), respectively. 142 Wn.2d at 842-43; 164 Wn.2d at 189. The question of whether a defendant will be put to death; or whether a defendant will be in prison for the rest of his life; is an inherently more dramatic and consequential issue than the difference between whether a defendant gets 23, 27, or 30 years on a given charge.

But second and more importantly, in Townsend and Magers, one party or the other sought to inform the jury that the case actually involved a particular type of punishment or not. In Norman’s case, by contrast, whether Norman faced 10 years, or 20, or 50 was not especially relevant. What was relevant was what the police had threatened him with. Whether the police in the interrogation room were correct about his potential legal

jeopardy was irrelevant. What was relevant was that the fact of the threats and Norman response to them. This alone distinguishes Norman's case from Townsend or Magers.

Third and finally, Townsend and Magers did not involve application of the Rule of Completeness, which in some sense exists only to overrule other rules of evidence. After all, there would be no need for a "Rule of Completeness" if the challenged portions of a given statement were admissible anyway. The Rule of Completeness overrides other rules of evidence to acknowledge that some items can and should come before the jury to explain a statement, even if they would ordinarily be excluded by other rules of evidence. West, 70 Wn.2d at 754-55. Specifically, if the excluded portions: (1) explain the admitted evidence; (2) place it in context; (3) avoid misleading the trier of fact; and (4) insure a fair and impartial understanding of the evidence, then they are subject to the Rule. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001), review denied, 146 Wn.2d 1022 (2002). Here, the excluded police statements strongly supported Norman's contention that he was intimidated and therefore lied in the statement. They should have been admitted under the Rule.

Finally, the State argues that redaction of the passages Norman complains of were ultimately harmless. BOR at 36-37. The State's factual argument on this point is vague and brief, only a paragraph in

length. BOR at 37. The only specific assertion by the State is that the excluded evidence would have only shown that Norman had motivation to lie a second time in his second statement to police. Id.

Norman asserted, however, that he lied to police in both his May and September interrogations because of the extreme pressure he was under, illustrated in part by the excluded parts of the statements. As the State knows, Norman claims he was pressured in his May interrogation, including during a bathroom break, which went unrecorded. Moreover, parts of what Norman said during the May statement were unintelligible; Ex. 239 at 7, 10-11, 15, 18-19, 22-25, 27, 29, 31, 36-37, 40, 42, 44-46, 50, 52, 56-61; as were statements by both Norman and the detectives during the September statement. Ex. 254 at 1, 3-13, 15-32, 34-47, 49, 51-53, 55-65, 67-76, 78-82, 84. The redacted portions of the statement would have helped illustrate the degree to which the police were willing to pressure Norman for a statement, and such a degree of pressure would have made his allegations about the pressure at the May statement more credible.

Based on the excluded portions of the statement, the pressure was demonstrably intense. Consider the following statement where the italicized portion was excluded:

COBANE: [Y]ou're the one looking at murder in the first degree. You're the one looking at the time. *The rest of your life, possibly, behind bars.* Okay, so this is the time.

Pretrial Ex. 16, at 29; Ex. 254 at 20. Add to this the many times Norman was threatened with 23 or 30 years behind bars, or violent retribution on the streets, and you have a statement that is much more questionable than one without such police tactics. See BOR at 37-39 (additional examples of the types of excluded items).

These passages showed how the police were willing to threaten Norman to get this statement. Norman did not seek to get his actual future sentencing before a jury – the accuracy of such statements by the police was irrelevant. He was attempting to get their threats before a jury. It was error, under the Rule of Completeness, to exclude them.

4. THE APPLAUDING SPECTATORS WARRANTED A MISTRIAL.

At the end of the State's rebuttal argument, the courtroom spectators applauded. 21RP 2459. The trial court responded: "Excuse me, excuse me, we cannot have that in a court of law," and then excused the jury without any other mention of the applause. 21RP 2459-61. The defense motion for mistrial was denied. 21RP 2461-62.

The State claims the mistrial was correctly denied because "the trial judge had instructed the jury to disregard extraneous matters." BOR at 41. Given that the only such instruction was the standard WPIC read at the very beginning of the lengthy jury instructions given, CP 165, and not

any specific instruction either related to the applause or even occurring after it, the State's claim should be rejected.

The State relies on State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). BOR at 38-39. In Johnson, an unidentified woman interrupted the prosecutor during closing argument to angrily shout that the State's witnesses were "gang bangers" and "Cripps," and to say of the defendant "My son ain't no gang banger, honey...." 124 Wn.2d at 61-62, 76. The defendant, for his part, called the woman "mom" several times. Id. The woman was removed from the courtroom, and the trial court afterwards denied a defense motion for a mistrial. Id. at 62, 76.

Two factors easily distinguish Johnson from Norman's case. First, as both reviewing courts noted, while the outburst was "likely startling," the statement by a woman that the State's witnesses were gang members and that "her son" was not a gang member was not "inherently prejudicial" to the defendant, her apparent son. 124 Wn.2d at 76-77. Second, the trial court explained to the jury in no uncertain terms they were not to consider the outburst, ordering the jury:

"not to consider anything that was stated by the person who was sitting in the bench in the rear of the courtroom, as it has absolutely nothing to do with the charges made against the defendant here or of any verdict you may arrive at."

124 Wn.2d at 62 (internal quotations the Court's).

Here, neither consideration applies. To the contrary, applause in response to the State's close of rebuttal argument is "inherently prejudicial." It commends the prosecutor for his role in - hopefully - convicting the defendant, and is thus quite unlike a woman's arguably helpful and well-meaning assertion that her son is not involved in gangs. Here too, the court made no effort to instruct the jury, and thus the State is left to rely only upon the single sentence in the first page of the lengthy instructions to the effect that the jury will consider "only the evidence" in their deliberations. See CP 165; 21RP 2382; 2459-61. This does not compare to the action taken in Johnson.

The State also relies on , State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), which is also distinguishable. In Bourgeois, one juror saw a spectator make a gesture at a witness as though miming holding a gun, and the same juror and one other juror felt that courtroom spectators were staring at some witnesses in an intimidating manner.<sup>5</sup> 133 Wn.2d at 397-98, 406-07.

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<sup>5</sup> The State description of the Bourgeois case appears slightly misleading. The State claims "jurors noticed several spectators glaring at a State's witness and one spectator making a gesture with his fingers as if to form a gun." BOR at 39 (emphasis added). In fact, only one juror saw the gun gesture and the same juror believed he had seen two spectator "glare" at the same witness. 133 Wn.2d at 398. One other juror agreed that he had seen persons glaring at a witness or witnesses, but he did not see the gun gesture. Id. The parties stipulated that no other jurors remembered any unusual or inappropriate spectator behavior. Id. at 398-99.

The Supreme Court found the two jurors' observation of spectators "glaring" at witnesses was subjective and had to have been minimal, as neither the trial court nor the other ten jurors had noticed it. 133 Wn.2d at 408. The gun gesture was more serious, but the Court wrote:

The trial court did not learn of it until after the trial and, consequently, was unable to instruct the jury to disregard it.

133 Wn.2d at 409.

Here, of course, the applause was not subjective in nature, like the glaring or staring in Bourgeois, but was obvious and dramatic. Moreover, the misconduct happened in full sight and hearing of the judge, who nonetheless failed to instruct the jury to disregard it.

Washington law indicates that silent displays of affiliation by trial spectators, which do not explicitly advocate guilt or innocence, are permissible and do not require reversal. State v. Lord, 161 Wn.2d 276, 289, 165 P.3d 1251 (2007); State v. Woods, 154 Wn.2d 400, 416, 114 P.3d 607 (2005). But this was no silent, nonpartisan display.

In determining the effect of an irregularity at trial, a Court must examine "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." State v. Hopson, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989) (internal citations omitted). As the opening brief notes, the applause would have

re-emphasized the highly partisan nature of the case – the jury would have suddenly been reminded that there was a group of persons in the room – perhaps members of the gangs they had heard so much about - excited enough about a conviction that they were willing to cheer aloud for it. Moreover, the applause of the spectators was not cumulative to anything that happened during the trial, but was a wholly new event. Finally, although the applause was unhidden and dramatic, the trial court did not feel it was necessary to instruct the jury to disregard the misbehavior, as the Court did in Johnson.

Given the context and subject matter of Norman's case, the spectator misconduct was not harmless. This Court should reverse based on this irregularity, or in the alternative, consider the irregularity as it bears on the issue of cumulative error. See BOA at 42-43.

5. RESTITUTION TO MILAM'S FAMILY WAS IMPROPER BECAUSE MILAM WAS COMMITTING A FELONY WHEN KILLED.

The State appears to concede Milam was committing a felony escape at the time of his death. BOR at 42-45. Certainly, the State never argues against the trial court's finding that Milam's actions constituted felony escape when he left his federal halfway house without permission. BOR at 42-45, 14RP 1494; 17RP 1921; 18RP 1959, 1964.

The State nonetheless asserts the felony should not preclude the payment of benefits under RCW 7.68.070 because it did not directly contribute to Milam's death. BOR at 45. This improperly reads ambiguity into a statute where none exists. RCW 7.68.070(3)(b) provides:

[N]o person or spouse, child, or dependent of such person is entitled to benefits...when the injury...was....[s]ustained while the crime victim was engaged in the attempt to commit, or the commission of, a felony....<sup>6</sup>

Repeating the argument of the trial court, the State compares this case to one where a decedent has drug residue somewhere on his body, and therefore was committing a crime at the time of his death. 24RP 4-5; BOR at 45. The State calls this result "absurd," BOR at 45, forgetting perhaps that many drug residues – marijuana, prescription drugs, steroids, ephedrine, or nor epinephrine – would not result in this outcome, because

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<sup>6</sup> The State notes Norman argued an additional subsection of the same statute below, BOR at 43 n.9, which reads in relevant part:

[N]o person or spouse, child, or dependent of such person is entitled to benefits under this chapter when the injury for which benefits are sought, was...(c) Sustained while the victim was confined in any county or city jail, federal jail or prison or in any other federal institution, or any state correctional institution maintained and operated by the department of social and health services or the department of corrections, prior to release from lawful custody; or confined or living in any other institution maintained and operated by the department of social and health services or the department of corrections.

RCW 7.68.070(3)(c) (emphasis added).

Because Milam was in a federal work release facility, not a state facility, he could only be denied benefits if he was "confined" in the facility at the time of his death, but not if he was "living there," which clause applied only to institutions operated by our state DSHS or DOC. And of course, Norman could not assert that Milam was "confined in" his work release facility at the precise time of his death, because Milam had decided to leave a dummy in his bed and gone out for the night. Indeed, this subsection was not raised on appeal because Milam had, in fact, escaped.

possession of such substances is a misdemeanor or gross misdemeanor. RCW 69.41.030 (legend drugs); 69.41.350 (steroids); 69.43.120 (ephedrine and nor epinephrine); 69.50.4014 (marijuana). It is not “absurd” for the legislature to decide to deny certain benefits to persons who happen to be committing felonies at the time they are injured, as opposed to misdemeanors or no crimes at all. It is the legislature’s right to make such distinctions when deciding to whom such benefits should go.

Our Supreme Court has written:

When the plain language [of a statute] is unambiguous - that is, when the statutory language admits of only one meaning-the legislative intent is apparent, and we will not construe the statute otherwise.

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); see also State v. Marohl, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010 WL 5394775, December 30, 2010) (“Where statutory language is unambiguous, we accept the legislature means exactly what it says”). This is true even in restitution case.

In J.P., the Supreme Court noted that amendments to the juvenile restitution statutes both explicitly allowed restitution for counseling costs “reasonably related to the offense” and in another place allowed counseling costs “if the offense is a sex offense.” 149 Wn.2d at 452-53. The Court found these statutes were, on their face, unambiguous and not

open to statutory construction. Id. at 455. Their only reasonable interpretations, however, conflicted with each other. Id. The Court reluctantly decided that the more specific provision must therefore rule, and it denied restitution for counseling costs for non-sex offenses. Id. at 457. See also State v. Mollichi, 132 Wn.2d 80, 86-87, 936 P.2d 408 (1997) (although the overarching purpose of restitution statute is to make victims whole, time requirement for hearing was unambiguous and thus restitution imposed afterward was void; “We have no license to rewrite explicit and unequivocal statutes”).

The trial court should have denied compensation to CVC because the CVC payment plainly contravened RCW 7.68.070. This Court should therefore hold that restitution to CVC is in violation of Washington law.

D. CONCLUSION

For the reasons above and in the opening brief, this Court should reverse Norman's convictions and remand for a new trial. Because the issue may arise again, this Court should also rule that imposing restitution to CVC is improper.

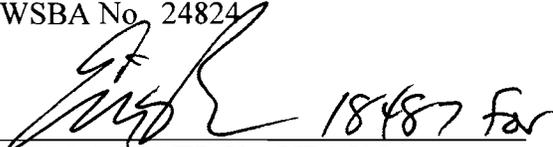
DATED this 11<sup>th</sup> day of February, 2011.

Respectfully Submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63913-7-1
	)	
OMAR NORMAN,	)	
	)	
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 11<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] OMAR NORMAN  
DOC NO. 301004  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2011 FEB 11 PM 4:12

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2011.

x Patrick Mayovsky