

NO. 63913-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

OMAR NORMAN,

Appellant.

2010 DEC 21 PM 1:27

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly admitted evidence relating to the gang affiliation of various witnesses, the victims and defendant Omar Norman.

2. Whether the trial court properly allowed testimony about the Washington State Patrol Crime Laboratory's peer review procedures.

3. Whether the trial court acted within its discretion in redacting portions of Norman's taped interview where detectives referred to the length of the sentence that Norman faced if convicted of murdering Milam.

4. Whether Norman has failed to show that a mistrial was warranted because some spectators applauded after the prosecutor's rebuttal argument.

5. Whether Norman has failed to show that cumulative error justifies reversal of his convictions.

6. Whether the trial court properly ordered restitution.

B. STATEMENT OF THE CASE

In October of 2005, Terrell Milam was murdered, shot nine times, once at close range to the head. He was last known to have

been in a car with defendant Omar Norman and another man. Approximately a month after the murder, Norman admitted to Mark Anderson that he had “topped off” Milam. After Anderson shared this disclosure with Milam's friend, Norman ambushed Anderson on the street, shooting him in the leg.

More than a year after the murder, a forensic scientist reported that (1) DNA on a shell casing and cigarette butt, both found near Milam's body, matched the DNA profile of Norman, and (2) DNA on shell casings from Anderson's shooting was consistent with Norman's DNA profile. In June of 2009, a jury convicted Norman of first-degree murder, first-degree assault, and two counts of unlawful possession of a firearm.

1. THE MURDER OF TERRELL MILAM

Terrell Milam was a long-time resident of the Central District neighborhood of Seattle and a high-ranking member of the Deuce 8 gang. 14RP 1494.¹ In October of 2005, Milam was living in the Pioneer Fellowship House, a federal halfway house. 12RP 1115, 1126; 14RP 1484, 1492. On the night of October 16, 2005, Alison

¹ The State adopts the abbreviations for the report of proceedings used by Norman.

Burk picked Milam up and drove him to several bars in downtown Seattle. 9RP 730-33. At one point, Burk left Milam to visit a different bar. 9RP 732-33. Later that night, Milam called Burk and asked her to pick him up at a gas station near Harborview Medical Center. 9RP 732-34. When Burk picked him up, she saw that he had blood on his clothes. 9RP 734. Milam explained that he had been in a fight. Id.

Milam asked Burk to drive him to a friend's house, referred to as "The Spot." 9RP 735-36. The house was located in Seattle at the intersection of South King Street and Martin Luther King Jr. Way. 9RP 755-56. There were between four to six men inside the house, but Burk did not recognize any of them.² 9RP 738.

After fifteen minutes at "The Spot," at approximately 3:30 a.m., Burk decided to go home. 9RP 739. Outside the house, Burk and Milam talked and playfully wrestled. 9RP 740-41; 12RP 1118-19. At one point, Milam threw Burk on her car, causing a dent to her hood. 9RP 740. As she was leaving, several men came out of the house, and one announced that "The Spot" was hot and that they needed to go. 9RP 741-42. Burk saw Milam and three other men get into a black Caprice-type car with distinctive rims. 9RP 742-43.

² Testimony at trial established that Norman, Cedric Jackson, Tyree Lee, Charles Justice, and David Melton were inside "The Spot" that night. 11RP 1006; 12RP 1117-20.

As she drove home, Burk became lost and stopped at a gas station. 9RP 744. While at the gas station, Burk saw the same black car that Milam had entered. 9RP 745. She decided to follow the car, assuming that they were headed to the freeway. 9RP 745. However, as they drove through a residential area, Burk turned around and found her own way home. 9RP 746.

Less than two hours later, at approximately 5:00 a.m. on October 17, 2005, a man jogging in the Seward Park neighborhood noticed Milam's body lying in the grassy median between the sidewalk and the street. 9RP 700-02; 10RP 861-62. Milam had been shot nine times. 12RP 1197. He was shot once, at close range, in the head and several times in the chest. 10RP 932-33; 12RP 1199-1214; 13RP 1376-77. Based upon the position of the body, it appeared that Milam's body had been dumped there after he had been killed. 14RP 1393-94.

The police found one 9mm shell casing and a cigarette butt near Milam's body. 10RP 945-46; 13RP 1364. The 9mm shell casing and bullet could have been fired by a Ruger P-89. 10RP 894-901. The medical examiner subsequently recovered bullet fragments from Milam's head and a .45 caliber bullet in his shirt.

10RP 902; 12RP 1200-18. The bullet fragments were consistent with 9mm ammunition. 10RP 899-901.

Alison Burk heard about Milam's murder, contacted the police and helped them locate "The Spot." 14RP 1486-90,1511. However, when the police arrived to execute a search warrant, they discovered that the house was abandoned and vacant. 14RP 1513-14.

The police located several witnesses who identified Norman and Charles Justice as the last people to have contact with Milam. On October 21, 2005, Detective Paul Takemoto spoke with Cedric Jackson. 14RP 1491-92. Like Milam, Jackson resided at the Pioneer Fellowship House. 12RP 1115; 14RP 1492. Jackson had briefly been at "The Spot" on the night of the murder and saw Milam with Burk. 12RP 1118-19. According to Jackson, he spoke with Norman a few days after the murder. 12RP 1122; 14RP 1493-94. Norman told Jackson that on the night of the murder, he and Charles Justice had given Milam a ride, dropping him off at 12th Avenue and Jefferson Street, close to the Pioneer Fellowship House. 12RP 1122-23; 14RP 1493-94.

A few days later, Detective Takemoto talked to Charles Justice. 14RP 1496-97. Justice stated that he was at "The Spot" on

the night of the murder and that he and Norman had dropped Milam off at 12th and Jefferson. 14RP 1498-99.

The homicide investigation then stalled while various items of evidence were submitted to be examined for fingerprints and DNA. 14RP 1500-02.

2. THE ASSAULT ON MARK ANDERSON

Sometime after Thanksgiving of 2005, more than a month after the murder, Norman, Mark Anderson, and Olijuan Crain were in a car, drinking and getting high. 12RP 1148; 13RP 1272-73. Anderson was a longtime friend of Norman. 12RP 1138. The conversation in the car turned to Milam's death, and Norman explained that he and Milam had been in a car together, that Milam began "talking shit," and that "niggas put him in a deadlock." 12RP 1150; 13RP 1280. While making a gesture indicating the firing of a gun, Norman said, "man, went over topped him off." 12RP 1150-53; 13RP 1280-81. Anderson understood that Norman was acknowledging that he shot Milam in the head. 12RP 1151-52. Norman told Anderson and Crain not to tell anyone. 12RP 1154.

However, Anderson told Walter Hayden, aka Walt or Walnut, Milam's best friend, about Norman's admission to shooting Milam.

12RP 1154-55; 13RP 1285. Anderson then learned that Norman was looking for him and wanted to kill him. 13RP 1286. Norman later acknowledged to the police that he was aware that "Walt" was telling others that Norman had shot Milam in the head. Ex. 239 at 60.

On March 26, 2006, Anderson was walking on the street in Seattle when Norman, wearing camouflage clothing and carrying a shotgun, emerged from a bush and approached Anderson. 12RP 1156-60; 13RP 1286. Norman called Anderson a "son of a bitch ass nigger," and shot him twice in the legs with buck shot. 12RP 1160-61. Anderson hid behind a house, and Norman ran away. 12RP 1161.

The police responded and recovered two fired shotgun shell casings and one unfired cartridge in the street. 14RP 1428-39; 15RP 1550-51. When the police contacted Anderson, he was uncooperative. He claimed that he did not know who shot him, though he admitted that he was shot because of his friendship with Milam. 14RP 1430-31; 15RP 1551-83. Anderson later explained that he did not cooperate because he did not want to be a snitch and that he had his own plans to kill Norman in retaliation. 12RP 1162-63; 13RP 1302.

3. THE DNA EVIDENCE AND NORMAN'S STATEMENTS

In January of 2007, the Washington State Patrol Crime Laboratory reported that DNA on the shell casing and cigarette butt, both found near Milam's body, matched the DNA profile of Norman. 15RP 1668-69, 1685-88. The estimated probability of this profile is 1 in 6.1 quadrillion. 15RP 1689.

On May 16, 2007, Detective Takemoto and Detective Shandy Cobane contacted Norman, who was already in custody. 16RP 1825-26; 18RP 2047. After being advised of his rights, Norman agreed to speak with police. 16RP 1827-28; Ex. 239 at 1. Norman admitted that on the night of the murder he saw Milam at "The Spot" and noticed that his hand was injured. Ex. 239 at 1-5. He described seeing Milam with Alison Burk outside of the house and was aware that Milam caused damage to Burk's car. Id. at 3. He claimed that he and Charles Justice drove Milam in Justice's black Crown Victoria and dropped him off at 12th and Jefferson. Id. at 3-6; 16RP 1828-29. Norman admitted that he was carrying a gun that night, but denied that he killed Milam. Ex. 239 at 9.

After hearing this story, the detectives informed Norman that his DNA had been found on a shell casing and a cigarette butt near

Milam's body. Ex. 239 at 13-19; 16RP 1829. Norman then changed his story and claimed that on that night he and Milam had met up with some Crips.³ Ex. 239 at 22-23; 16RP 1830-31. According to Norman, the Crips drove them to Seward Park, and they got into an argument. Ex. 239 at 24-32; 16RP 1831. Norman claimed that the Crips shot Milam five or six times, and that Norman fired his own gun, a 9-millimeter Ruger, six or seven times, in self-defense. Ex. 239 at 33-36; 16RP 1831-33.⁴

Because Norman was in custody, the detectives decided not to arrest him for Milam's murder until he was released in August of 2007. 18RP 1969. However, Norman was released earlier than expected. 18RP 1969-70.

On September 12, 2007, the police located and arrested Norman for Milam's murder. 18RP 1969. Detectives Takemoto and Cobane interviewed Norman again. Ex. 254. The detectives informed Norman that neighbors had not heard gunshots in the area where Milam's body was found. Ex. 254 at 11. The detectives

³ Norman told detectives that one of these Crips, known as "Bone," had previously shot Charles Justice's older brother "Rollo," and that Milam had helped "Bone" get away after the shooting. Ex. 239 at 27-28; 16RP 1833-35; 17RP 1876.

⁴ On the night of Milam's murder, there were no reports of gunshots in the Seward Park neighborhood where his body was found. 9RP 714; 10RP 876.

reminded Norman that his DNA was found on a 9mm shell casing at the scene and told him that a 9mm round was found in Milam's head. Id. at 19. A detective asked whether Norman had given his gun to someone else, and Norman stated that he had given it to Tyree Lee, and that Lee had admitted to shooting Milam over a dispute about money. Id. at 49-77. At the time of this interview, Norman was aware that Lee was dead. Id. at 60.

4. THE CHARGES, FURTHER DNA DEVELOPMENTS AND THE TRIAL

On September 17, 2007, the State charged Norman with second-degree murder. CP 1. In May of 2008, Anderson was arrested on a gun charge and asked to speak with a detective, indicating that he had information about Milam's murder. 12RP 1166; 13RP 1340-42; 15RP 1615-16; 17RP 1877-79. Anderson ultimately entered an agreement with the prosecutor's office where he agreed to testify in Norman's trial, and the charges against him were reduced. 12RP 1168-70.

In July of 2008, a forensic scientist examined shotgun shell casings recovered at the scene where Anderson had been shot. 15RP 1669-70, 1694-95. He developed a partial DNA profile of

mixed origin that included Norman as a possible contributor. 15RP 1695-97. Based on the U.S. population, one in 260,000 individuals is a potential contributor to the mixed profile. 15RP 1697.

The State subsequently amended the charges to first-degree murder, first-degree assault, and two counts of first-degree unlawful possession of a firearm.⁵ CP 79-81, 157-59. The State further alleged firearm enhancements on the murder and assault charges. CP 79-80.

Trial began in May of 2009. Norman testified and denied that he killed Milam or shot Anderson. 18RP 2045, 2061. He claimed that he last saw Milam when he and Charles Justice dropped him off at 12th and Jefferson. 18RP 2026-38. Norman admitted that he was carrying a gun on the night that Milam was killed. 18RP 2064.

A jury found Norman guilty as charged. CP 206, 208, 210-12. The court imposed standard range sentences on all counts. CP 213-16. Additional relevant facts are set forth below.

⁵ It was illegal for Norman to possess a firearm due to his prior conviction for possession with intent to deliver cocaine. 18RP 1976.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE ABOUT GANG AFFILIATIONS

Norman claims that the trial court erred in admitting evidence of the gang affiliations of Milam, Anderson, Norman, and several civilian witnesses. This evidence was properly admitted because it was relevant to the credibility of witnesses at trial. Several witnesses, who had provided information implicating Norman in Milam's murder, recanted their statements at trial. The fact that they and Norman were in the same gang was relevant to show their bias. In addition, the fact that Anderson would be ostracized by his gang for cooperating with the police was relevant to explain why he did not report that Norman had admitted to committing the murder, and why he did not cooperate with the police after Norman shot him. The testimony about Norman's gang, Low Profile, was not unduly prejudicial; it was repeatedly described as a group created due to a mutual interest in music. The trial court acted within its discretion in allowing this evidence.

a. Relevant Facts

Prior to trial, the prosecutor informed the court that the State anticipated testimony about gang affiliation in its case-in-chief.

7RP 422; Supp. CP ____ (Sub No. 74 at 16-17). The prosecutor acknowledged that gang affiliation was not a motive for the murder. 7RP 422. Instead, he argued that gang affiliation was relevant to the bias of certain witnesses. Supp. CP ____ (Sub No. 74 at 16-17). The prosecutor explained that he intended to call two witnesses, David Melton and Eljae Givens, who had provided information inculcating Norman in Milam's murder.⁶ Id. More recently, Givens and Melton had attempted to recant their statements, and the prosecutor argued that the fact that they and Norman belonged to the same gang, Low Profile ("LP"), was relevant to their bias. Supp. CP ____ (Sub No. 74 at 16-17); 7RP 425-28.

The prosecutor observed that virtually every civilian witness was in a gang and that it would be impossible to explain their various relationships without getting into the subject. 7RP 422-27. He further noted that Norman had given a statement in which he

⁶ Givens told the police that Norman had described in detail how he and Charles Justice had killed Milam. Supp. CP ____ (Sub No. 74 at 6); Ex. 100. According to Givens, Justice was upset with Milam for being involved in a shooting of Justice's brother. Supp. CP ____ (Sub No. 74 at 6). Norman told Givens that Justice first shot Milam and that Norman then shot Milam in the head. Id.

Melton told the police that he was at "The Spot" on the night of the murder, that Norman had left and then returned acting nervous. Norman then asked for a change of clothes and discussed the need to dispose of clothing. Supp. CP ____ (Sub No. 74 at 8); pretrial ex. 16.

claimed that members of the Crips gang killed Milam. CP ____
(Sub No. 74 at 17).

In response, defense counsel did not dispute the common gang affiliations. See, e.g., Ex. 100 at 7-8 (defense interview of Givens where he acknowledges that he and Melton were affiliated with LP). Instead, counsel briefly argued that because gang affiliation was not a motive for the murder, evidence of any gang association should be inadmissible. 7RP 428-29.

The court allowed the evidence, explaining:

I don't know how you could present this case and shield the jury from the fact it involves gangs. It seems that that is just too much of a fiction and would be – it would be too difficult. I will – I find that it would not be unduly prejudicial since... this is involvement of folks with gangs on every side. Most of the... civilian witnesses for the State and the witnesses for the defense. So I – I just don't know how you could not present it. It seems under 404(b) analysis it goes to res gestae, opportunity, it goes to bias. So I don't see frankly, even if I wanted to, how you could keep it out in general and still present the case with any kind of, you know, genuine truth of what is happening.

...[T]here clearly cannot be an inference that one is involved in a gang, therefore, one is guilty of this event....

7RP 430-31.

As the prosecutor anticipated, Givens and Melton both recanted their earlier statements to the police. Givens denied that

he had talked to Norman about Milam's death. 11RP 1039-40.

When confronted with a statement that he gave the police, Givens claimed that he never gave the statement. 11RP 1038-42. Givens acknowledged that he and Norman were members of Low Profile, though he objected to the characterization that it was a "street gang" and described the group as involved in music. 11RP 1032-33.

At trial, David Melton refused to acknowledge his name, repeatedly stated that he would not answer any questions, and at one point claimed that he had amnesia. 11RP 994-1013. After the court directed him to answer the prosecutor's questions, Melton responded, "I'm directing myself not to say anything" and invited the judge to find him in contempt. 11RP 1010, 1020. Melton admitted that he wrote a note to Norman stating, "I threw my loyalty and my heart away and almost made a deal with the devil... I haven't signed shit. I'm withdrawing anything to do with that shit." 11RP 1020-25. He signed it under the inscription, "death before dishonor." 11RP 1021. He denied that he was in that Low Profile but acknowledged that Norman was his friend. 11RP 1022.

The trial testimony established that Norman was a member of the Low Profile gang. 17RP 1867-68, 1873. With respect to Low

Profile, a detective explained that "[i]t started as a clique actually, a group of guys who had dreams of becoming rappers, stars...."
17RP 1868-69.

Mark Anderson testified that he was a member of Deuce 8 and that Norman had previously been a member of Deuce 8 and then joined Low Profile. 12RP 1138-39. Anderson further testified that at the time of Milam's death, there were no problems between the Low Profile and Deuce 8. 12RP 1141. He explained it was not uncommon for members of different gangs to get along. 12RP 1141. A detective confirmed this testimony. 17RP 1873.

Anderson explained that due to his testimony, he would be considered a snitch and would no longer be accepted in his gang. 12RP 1139-40; 13RP 1325-36. Several police officers confirmed that it was common for gang members not to cooperate with the police because they did not want to be perceived as snitching. 14RP 1432; 15RP 1553-54, 1575.

The State introduced evidence that Milam was a high ranking member of the Deuce 8 gang. 14RP 1494; 17RP 1867.

b. Gang Affiliation Evidence Was Relevant To Bias And To Explain The Refusal To Cooperate With The Police

The trial court has wide discretion to determine the admissibility of evidence, and the court's decision to admit evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion. State v. Rivers, 129 Wn.2d 697, 709-10, 921 P.2d 495 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court did not abuse its discretion in admitting gang evidence in this case.

A witness's and a party's common membership in a gang is probative of bias and may be elicited at trial. United States v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984); United States v. Takahashi, 205 F.3d 1161, 1164 (9th Cir. 2000); State v. Craven, 67 Wn. App. 921, 927, 841 P.2d 774 (1992). In Abel, a cooperating witness, Ehle, testified that he and Abel had robbed a bank. Defense witness Mills then testified that Ehle had admitted that his trial testimony was false. In rebuttal, Ehle testified that he, Abel and Mills were all members of a prison gang that required its members to deny its existence and to commit perjury. Id. at 47.

The United States Supreme Court held that the gang membership evidence was properly admitted to show Mills' bias. "Ehle's testimony about the prison gang certainly made the existence of Mills' bias towards respondent more probable. Thus it was relevant to support that inference. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." 469 U.S. at 52.

Gang affiliation was admissible to establish the biases of the various witnesses in this case. As the prosecutor anticipated, several witnesses, who had originally given statements inculcating Norman, were uncooperative and recanted their statements at trial. Evidence of Givens, Melton and Norman's common gang membership was relevant to these witnesses' bias. On appeal, Norman does not even address this ground for admitting the evidence, though it was presented to the trial court.

The gang affiliation evidence was also relevant to explain why Mark Anderson did not cooperate with the police. Though Anderson heard Norman admit to shooting Milam in the head, he did not report this information to the police. Even after Norman

shot Anderson, Anderson did not tell the police about Norman's involvement in Milam's death and would not even identify Norman as the person who shot him. At trial, Anderson explained that in his gang it was unacceptable to cooperate with the police, and that, due to his trial testimony, he would no longer be welcome in the gang. This testimony was relevant and admissible to explain Anderson's failure to report what he knew to the police. See People v. Martinez, 113 Cal.App.4th 400, 413-14, 7 Cal.Rptr.3d 49 (2004) (holding gang evidence relevant to explain gang member's reluctance to cooperate and discrepancy between statements to the police and testimony at trial); People v. James, 117 P.3d 91, 94 (Colo. Ct. App. 2004) (evidence of gang culture relevant to explain uncooperative attitudes, "losses" of memory, reluctance to testify, and changed statements of witnesses).

Anticipating this argument, Norman claims that the trial testimony did not establish a link between Anderson's reluctance to cooperate and his gang membership; he insists that Anderson's sole reason for not cooperating with the police was because he wanted to kill Norman. Brief of Appellant at 30. This argument overlooks the fact that, even prior to Norman shooting him, Anderson did not report to the police that he was aware of who had

killed Milam. In addition, Anderson explained that cooperating with the police "would have affected my status... You can't tell. That just in the streets, you can't do that...." 12RP 1163. He further testified that due to his trial testimony, he was no longer associated with Deuce 8, explaining, "You can't do what I'm doing right now and be in Deuce 8...." 12RP 1139-40. Consistent with Anderson's testimony, several police officers confirmed that gang members do not cooperate with the police for fear of being labeled as a snitch. 14RP 1432; 15RP 1553-54, 1575. The State was entitled to offer evidence about Anderson's gang affiliation to explain his behavior.

At trial, Norman argued gang evidence was admissible only if it established a motive for the crime, and on appeal he suggests that evidence of gang affiliation is admissible exclusively under ER 404(b). The relevant caselaw does not support this proposition. As noted above, courts have held gang affiliation admissible as evidence of bias without requiring the trial court to make findings for admission under ER 404(b). Abel, 469 U.S. at 52; Craven, 67 Wn. App. at 927; see also United States v. Beck, ___ F.3d ___, 2010 WL 4366132, at *7 (7th Cir. 2010) (because cross-examination questions about gang membership sought to show witness's bias and not his bad character, they did not implicate Rule 404(b)).

"Evidence of a witness's bias or prejudice may be brought out under Rule 607 without regard to the restrictions on character evidence." 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 404.7, at 495 (5th ed. 2007).

In the cases cited by Norman, the appellate court addressed ER 404(b) because the gang evidence was offered under that rule as evidence of motive. See State v. Scott, 151 Wn. App. 520, 527, 213 P.3d 71 (2009) (gang evidence offered to show motive for crime); State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964 (1998) (same). Here, the evidence was offered and relevant in order to assess various witnesses' credibility.

c. Any Error Was Harmless

Even if the trial court erred in admitting evidence of gang affiliation, the error was harmless. Evidentiary errors under ER 404(b) are nonconstitutional in nature. State v. Alams, 93 Wn. App. 754, 759, 970 P.2d 367 (1999). An error is reversible, therefore, only if the defendant shows within reasonable probabilities that, had the error not occurred, the outcome of the trial would have been materially affected. Id.

Norman does not explain how he suffered prejudice from evidence that the *victims* in the case were gang members. Assuming such evidence is bad character evidence, it would be a novel proposition that a defendant suffers prejudice due to bad character evidence relating to the victims.

With respect to evidence of Norman's gang affiliation, the evidence about Low Profile was not unduly prejudicial. There was no evidence offered as to any criminal behavior that Low Profile was associated with. Instead, Low Profile was described, even by a detective's testimony, as a group formed to make music. The prosecutor never argued or suggested that Norman's gang affiliation was a motive for the crime. In fact, he elicited testimony that Norman's and Milam's gangs were on friendly terms. Norman has not shown a reasonable probability that, had the gang evidence not been admitted, the outcome of the trial would have been materially affected.

2. THE COURT PROPERLY ALLOWED THE PEER REVIEW TESTIMONY

Norman claims the trial court admitted inadmissible hearsay and violated his right to confrontation by permitting forensic

scientist Nathan Bruesehoff to testify that one of his standard procedures is to have another scientist review his work. This claim should be rejected; 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.

a. Relevant Facts

Pretrial, Norman moved to exclude as hearsay any testimony by a Washington State Patrol forensic scientist that his lab reports were subject to peer review. 4RP 103-04; CP 114-15. Norman subsequently provided the court with one case, State v. Wicker, 66 Wn. App. 409, 411, 832 P.2d 127 (1992). 7RP 484-85. After reviewing Wicker, the trial judge stated that she would allow "testimony in a very general way." 7RP 488.

At trial, forensic scientist Nathan Bruesehoff testified about the general procedures that the lab followed when conducting an analysis of evidence. 15RP 1655-59. He testified about the control samples, peer review, proficiency testing and lab accreditation. 15RP 1655-59. His testimony about peer review was as follows:

Q.: What's done in your lab to insure the accuracy of your results?

A: 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.

Q. And is it that they review your work or do they do the testing all over again to see if they get the same results?

A. They review the data that I generated. They don't test it themselves.

Q: So they're just looking at the results you came up with, not retesting the same item, is that fair to say?

A. That's correct.

15RP 1656. Bruesehoff did not testify about the specifics of the peer review done in this case.

The defense called Dr. Randall Libby to testify about this review of the DNA work performed by Bruesehoff. 19RP 2096. Libby testified that he was familiar with the procedures and protocols of the Washington State Patrol Crime Laboratory and that he was capable of determining whether Bruesehoff's work was consistent with the lab's protocols. 19RP 2109-10. During his testimony, he suggested that Bruesehoff's work was not consistent with some of the lab's protocols. 19RP 2122-23, 2157-58. During

cross-examination, the prosecutor asked, without objection, whether it was significant to him that Bruesehoff's work had been peer reviewed. 19RP 2234. Libby was dismissive, stating, "It would be akin to you [the prosecutor] writing a motion and giving it to your officemate and have them review it for accuracy, whatever." 19RP 2234.

b. Bruesehoff's Testimony About The Peer Review Procedure Was Not Hearsay Or Testimonial

Norman's argument on appeal is premised on his claim that Bruesehoff testified that "his results were checked by two other non-testifying DNA analysts from his lab." Brief of Appellant at 32. This assertion is factually incorrect. In fact, as reflected in the testimony quoted above, Bruesehoff briefly testified about the peer review procedure used in all cases; he did not testify as to the actual peer review conducted in this case. Accordingly, the factual basis of Norman's claim is not supported by the record.

This testimony cannot be characterized as hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801. "Statement" is defined

as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” ER 801(a). Here, Bruesehoff did not offer testimony as to any out-of-court statements or nonverbal conduct. His testimony was about general procedures; he did not discuss the peer review of his work in this case.

Similarly, Bruesehoff's testimony about peer review did not run afoul of the Confrontation Clause. A defendant's right to confront witnesses is violated only by the admission of a testimonial statement. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Supreme Court has described a testimonial statement as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Id. at 51. Norman does not explain how Bruesehoff's testimony about the peer review process falls under this definition.

In contrast, in the case cited by Norman, State v. Wicker, 66 Wn. App. 409, 411, 832 P.2d 127 (1992), there was explicit testimony about the work and conclusions of a non-testifying analyst. In Wicker, an identification technician testified that he had concluded that certain latent fingerprints matched Wicker's fingerprints. Id. at 411. He further explained that it was standard

procedure to have his comparison “verified” by another senior technician. Id. He then testified that another senior technician had verified his identification in Wicker’s case and he identified the senior technician by her initials on a fingerprint card. Id. On appeal, this Court held that the initials on the fingerprint card together with the technician’s testimony constituted an assertion by the non-testifying senior technician that the two sets of prints matched. Id. The Court held that the evidence was classic hearsay, and its admission violated Wicker’s right of confrontation. Id. at 412-13.

Wicker is distinguishable. Bruesehoff did not testify as to the actual peer review done in this case. The State offered no evidence relating to any scientist who performed the peer review.

Though he suggests that the prosecutor’s cross-examination of Libby about peer review was somehow improper, Norman does not provide any specific argument explaining why. There was no objection to the prosecutor’s questions at trial, and, even had there been one, it is well-settled that the trial court has broad discretion in determining the scope of cross-examination, particularly with respect to the examination of experts. In re Detention of Griffith, 136 Wn. App. 480, 485, 150 P.3d 577 (2006). Libby testified that

he had reviewed Bruesehoff's work in this case in order to determine whether it was contrary to the crime laboratory's procedures and protocols. Given this testimony, the prosecutor could question Libby about whether the peer review procedure was significant to him. The trial court did not err in allowing the testimony about peer review.

c. Any Error Was Harmless

Even if the court erred in admitting the testimony about peer review procedures and such testimony violated Norman's right to confrontation, any error was harmless. In the context of a Confrontation Clause violation, "If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009).

Norman's harmless-error argument presumes that none of the DNA evidence should have been admitted. Brief of Appellant at 34. In fact, the only "tainted" evidence is Bruesehoff's very brief testimony about peer review procedures, testimony that was not even mentioned by either party during closing argument. The

remainder of Bruesehoff's testimony is unchallenged and can be considered in determining whether the error was harmless.

The evidence of Norman's guilt on the murder charge was overwhelming: Milam was seen getting into a car with Norman less than two hours before the murder, Norman's DNA was found on a 9mm shell casing and a cigarette butt found near Milam's body, bullet fragments consistent with 9mm ammunition were recovered from Milam's head, Norman admitted to Anderson that he had "topped off" Milam, and Norman, after first claiming to know nothing about the murder and then being confronted with the DNA evidence, told an implausible story about a gang shoot-out in the Seward Park neighborhood. This Court should hold that any error was harmless.

3. THE TRIAL COURT PROPERLY REDACTED NORMAN'S TAPED INTERVIEW

Citing the rule of completeness, Norman claims that the trial court erred by redacting portions of his September 2007 interview where detectives referred to the time of confinement that Norman might face for killing Milam. Norman argues that these references

were relevant in explaining why he lied to the police in that statement.

Norman's reliance on the rule of completeness is misplaced. That rule applies when one party has introduced part of a statement, and the adverse party seeks to introduce any other part of the statement. Here, Norman, not the State, introduced his September 2007 interview into evidence, and the rule of completeness does not entitle him to supplement that statement.

Moreover, the trial court properly redacted Norman's September 2007 interview to remove the specific references to the time of confinement that Norman faced. The Washington Supreme Court has recognized a "strict prohibition" against informing the jury of the sentencing consequences for the charged crime. The references to Norman's possible sentence were not necessary to establish that the detectives applied pressure to him to explain why his DNA was found on the evidence. The redacted statement is replete with examples of the detectives aggressively and skeptically questioning Norman. The trial court acted well within its discretion in redacting the statement.

a. Relevant Facts

As noted above, the police taped two interviews with Norman. The first interview occurred on May 16, 2007. Ex. 239. The second interview occurred on September 12, 2007. Ex. 254.⁷

Prior to trial, Norman requested numerous redactions to both taped interviews, claiming that there were numerous comments that were unduly prejudicial. 7RP 459-60. The prosecutor agreed to go through the interviews and work with defense counsel in making redactions. 7RP 460-61; 11RP 990-92. After the parties were unable to agree on all the redactions, the court examined the various suggestions and ruled on the proposed redactions to both statements. 11RP 990-92; 13RP 1351-54; 17RP 1845-51.

With respect to the September 2007 interview, defense counsel asked the court to include all reference by the detectives about the time of imprisonment that Norman was facing; he argued that they were relevant "to show what pressure was being applied in terms of those statements." 17RP 1849. The court excluded these references, noting that "I don't think it's appropriate for the jury to have inferences of sentencing." 17RP 1849.

⁷ The unredacted September 2007 interview is pretrial exhibit 6; Norman's opening brief incorrectly refers to it as pretrial exhibit 16.

As the trial progressed, the prosecutor indicated that he did not intend to offer the September 2007 interview unless Norman testified. 16RP 1809-10. The State then rested without offering it into evidence. 18RP 1943-44, 1977. During Norman's direct examination, defense counsel elicited testimony about the September 2007 interview,⁸ and Norman acknowledged that he had told the detectives another version of Milam's death that was untrue. 18RP 2057-58. During cross-examination, the prosecutor questioned Norman about the September 2007 interview, but did not offer the taped interview into evidence. 20RP 2319-20. In re-direct, Norman offered the redacted interview into evidence and played it for the jury. 20RP 2324.

b. The Rule Of Completeness Does Not Apply

Norman claims that the State offered his September 2007 interview into evidence and that under the rule of completeness he should have been allowed to supplement the interview with certain redacted portions. However, the rule of completeness does not

⁸ Defense counsel wanted to offer the redacted September 2007 interview during his direct examination of Norman. 18RP 1943-44. After hearing argument, the trial court ruled that Norman could testify about the statement but could not introduce it. 18RP 1943-55, 2007-13.

apply. Under that rule, when one party has introduced part of a statement, *the adverse party* is entitled to introduce any other part that ought in fairness to be considered contemporaneously with it. ER 106; State v. Perez, 139 Wn. App. 522, 531, 161 P.3d 461 (2007). Here, Norman, not the State, offered his own redacted second interview. 20RP 2324. The rule of completeness does not allow him to supplement a statement that he offered and introduced into evidence.

c. The Trial Court Did Not Abuse Its Discretion In Redacting References To The Length Of Norman's Possible Sentence

Norman insists that the detectives' references to the length of his possible sentence were relevant to show the pressures he faced. However, the Washington Supreme Court has held that the specific punishment that a defendant faces is not relevant evidence for a jury's consideration. Moreover, even if the redacted sections had some relevance, under ER 403, the trial court could exclude such evidence if its probative value was outweighed by the dangers of confusion of the issues or misleading the jury. The trial court's ruling on such issues is afforded great deference. State v. French, 157 Wn.2d 593, 605, 141 P.3d 54 (2006).

Here, the length of the sentence that Norman faced is precisely the type of information that the Washington Supreme Court has repeatedly held should not go before the jury. State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145, 149 (2001). The court has recognized that such information can have an undue and improper influence on the jury's deliberations. "This strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations." Id.

For example, in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), Magers was charged with assaulting his girlfriend. By the time of trial, she had recanted and Magers sought to elicit testimony that she knew that he was facing a third strike and a sentence of life imprisonment without the possibility of parole. Id. at 189. Magers argued that the testimony would show that she had no reason to be fearful of him. Id. Though the trial court permitted testimony that she was aware that he faced a lengthy sentence, on appeal, Magers claimed that he should have been allowed to elicit testimony about the specific sentence he faced. Id. Citing Townsend, the Washington Supreme Court rejected this argument, and concluded that the trial court did not abuse its discretion when

it limited testimony regarding Magers's possible sentence. Id. at 189-90.

Here, consistent with Magers, the trial court excluded references in the second interview to *specific periods* of time that Norman might be facing if convicted. Despite the redactions, the court left in numerous comments by the detectives that Norman was facing significant punishment for Milam's murder. The court left in a statement where a detective told Norman that he was "looking at first-degree murder. You're the one looking at the time." Ex. 254 at 20. The jury heard a detective tell Norman that he would "spend the rest of [his] days behind bars." Id. The court left in references that Norman would "go to prison," that "we're talking about your life," and that he could save "a whole lot of fucking time" if he cooperated. Id. at 9, 28, 32. The jury heard detectives tell Norman that if he cooperated he could "minimize the impact of this whole thing that's going to be on you." Id. at 31.

Moreover, in addition to the references about the punishment, the redacted September 2007 interview contains numerous instances where the detectives pressured Norman to tell the truth about what happened. They repeatedly confronted him about the fact that his DNA was on the 9mm shell casing and that a

9mm slug was found in Milam's head. Id. at 12, 18-26. They repeatedly told him that his story about a shoot-out with Crips in the Seward Park neighborhood was implausible. Id. at 12, 19, 23. They told him that they knew he was the shooter - "that's not even up for debate." Id. at 30. They warned him that Deuce 8 ran the prison system and that Milam was the "god" of Deuce 8. Id. at 32-33.

Any fair reading of the redacted September 2007 interview belies the notion that the jury had to hear the detectives' specific references to periods of incarceration in order to appreciate that the detectives were pressuring Norman to provide more information. The trial court did not abuse its discretion when it redacted specific references to the length of Norman's possible sentence in the September 2007 interview.

d. Any Error Was Harmless

Even if the court erred in redacting the interview, the error was harmless. An erroneous ruling excluding evidence requires reversal only if there is a reasonable possibility that the evidence would have changed the outcome of trial. State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

The excluded evidence consists of a few statements by detectives during the September 2007 interview. The State did not offer this statement as part of its case-in-chief, and Norman simply claims that the redacted statements were relevant to show why he lied *a second time* to the police. Given the marginal relevance of the excluded statements and the overwhelming evidence of Norman's guilt, there is not a reasonable possibility that the jury's verdict would have been different if they heard that the detectives discussed the period of time that Norman was facing for murdering Milam.

**4. THE TRIAL COURT PROPERLY DENIED
NORMAN'S MOTION FOR A MISTRIAL**

Norman claims that the trial court erred by denying his motion for mistrial, made after some spectators applauded at the conclusion of the prosecutor's rebuttal argument. The trial court acted well within its discretion in denying the motion. In the presence of the jurors, the judge scolded the spectators who had applauded, and the judge was in the best position to ascertain the effect of the applause on the jury. The trial judge had instructed the

jury to disregard extraneous matters, and there is no reason to believe that the jury did not follow the court's instructions.

At the end of the prosecutor's rebuttal argument, some spectators applauded. 21RP 2459. The judge immediately responded by stating, "Excuse me, excuse me, we cannot have that in a court of law." Id. The court then released the jurors for the day, and Norman moved for a mistrial based on the applause. 21RP 2461. His attorney acknowledged that he did not "know what effect that [the applause] has," but expressed concern of "an undue effect on the jury." 21RP 2461-62. The court denied the motion. 21RP 2462.

In determining whether a trial court abused its discretion in denying a motion for mistrial, this Court will find abuse only if no reasonable judge would have reached the same conclusion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Id. In determining the effect of an irregular occurrence during trial, the court examines "(1) its seriousness; (2) whether it involved cumulative evidence; and

(3) whether the trial court properly instructed the jury to disregard it.” Id.

The appellate courts appropriately defer to the trial judge in determining the seriousness of the irregularity when spectators act improperly. In Johnson, during the prosecutor's closing argument, a spectator had an outburst; she referred to the defendant as her son and insulted the State's witnesses. 124 Wn.2d at 76. The Washington Supreme Court held that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial. Id. The court noted that the trial court had instructed the jury to disregard the outburst and that there was no basis to conclude that the jury was more likely to convict the defendant of the crime due to the outburst. Id.

In State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), the court concluded that spectator misconduct did not require that the trial court declare a mistrial. 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. The trial judge learned of this behavior after the verdict and advised counsel of the gun gesture at sentencing. Id. at 398. Bourgeois moved for a new trial,

claiming that the gun gesture and the court's lack of response was prejudicial and reversible error. Id.

The Washington Supreme Court rejected Bourgeois's argument. The court noted that the irregularity was "fairly serious," and that the "gesture here could be viewed as a threat directed at [the witness], which was intended to deter her from testifying against Bourgeois." Id. at 409. However, the court concluded that a mistrial was not warranted. "We cannot say, however, that the misconduct was so significant that the defendant will have been treated unfairly unless granted a new trial." Id. The court observed that the trial judge had instructed the jury to consider only the testimony of the witnesses and the exhibits admitted into evidence, and concluded that "[w]e assume that the jury followed this instruction and therefore disregarded extraneous matters." Id.

In this case, Norman has not shown that he was so prejudiced that nothing short of a new trial could ensure that he would receive a fair trial. The court clearly indicated to the jurors that the applause was inappropriate and should not be considered during deliberations. Immediately after the applause and in front of the jury, the trial court scolded the spectators who had applauded, telling them that, "we cannot have that in a court of law."

21RP 2459. The court had already instructed the jury to consider only the evidence admitted at trial when deliberating. 21RP 2382; CP 165. The court further told the jury that they must not let "emotions overcome your rational thought process," and that they should not base their decision "on sympathy, prejudice, or personal preference." CP 168.

This Court presumes that the jurors follow the court's instruction to disregard inadmissible material. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). In fact, when moving for a mistrial, Norman's trial attorney candidly acknowledged that he was not sure of the impact of the applause on the jury. The trial court acted within its discretion in denying Norman's motion for a mistrial.

5. CUMULATIVE ERROR DOES NOT WARRANT A NEW TRIAL

Norman argues that his convictions should be reversed based on cumulative error. That doctrine applies only if there were several trial errors, none of which standing alone is sufficient to warrant reversal, that when combined may have denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d

390 (2000). Because Norman has not shown that there were several trial errors, reversal based on cumulative error is not warranted.

6. THE TRIAL COURT PROPERLY ORDERED RESTITUTION

Norman claims that the trial court erred by ordering him to pay restitution to the Crime Victims Compensation program ("CVC") for amounts it paid as benefits to Milam's family. He argues that CVC should never have paid those benefits because Milam was committing the crime of escape when he was killed. Norman's interpretation of the relevant restitution statutes is the type of "overly technical construction" that the Washington Supreme Court has cautioned against. The court properly ordered the restitution because Milam's alleged crime had no connection with his murder.

The State sought restitution for amounts paid by CVC to Milam's family for funeral costs and survivor benefits. CP 256. Norman objected and, citing RCW 9.94A.753(7), argued that Milam's family was not entitled to the CVC payments because Milam was engaged in a felony, the crime of escape, at the time of

his death.⁹ CP 255-57, 269-70. Sherri Dowd, a CVC supervisor, subsequently reported that CVC had paid Milam's family after contacting the Department of Corrections and the Seattle Police Department and concluding that Milam was not engaged in the commission of a felony at the time of his death. Supp. CP ____ (Sub No. 150); CP 271-72. When arguing the issue, the prosecutor did not dispute that Milam had "escaped" from the halfway house, but argued that the statute cited by defense was not meant to apply to Milam's situation. 23RP 6-7.

The trial judge concluded that the statute was meant to apply when the victim was actively involved in criminal activity. 24RP 5. She noted that under Norman's interpretation, the family of a murder victim who happened to possess drug residue would not receive restitution. 24RP 4-5. The trial court entered an order setting restitution in the amount of approximately \$12,200. CP 273.

The trial court's authority to order restitution is derived entirely from statute. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The legislature intended "to grant broad powers of restitution" to the trial court. State v. Davison, 116 Wn.2d 917, 920,

⁹ Norman also argued that Milam's family was not entitled to the CVC payments because Milam was in custody at the time of his death. CP 256-57. He has abandoned that argument on appeal. Brief of Appellant at 43-45.

809 P.2d 1374 (1991). Recognizing that the restitution statutes were intended to require the defendant to face the consequences of his criminal conduct, the Washington Supreme Court has held that "[w]e do not engage in overly technical construction that would permit the defendant to escape from just punishment." Tobin, 161 Wn.2d at 524. A trial court's order of restitution will not be disturbed on appeal absent an abuse of discretion. Id. at 523

RCW 9.94A.753 authorizes restitution whenever the offender is convicted of an offense that caused injury to any person. Under RCW 9.94A.753(7), "the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW."

Norman argues that the trial court should not have ordered him to reimburse CVC for payments made to Milam's family because Milam was committing the crime of escape at the time that he was murdered. Norman cites RCW 7.68.070(3)(b) as support for his position. That statute provides: "no 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... (ii) Sustained while the crime victim was engaged in the attempt to commit, or the commission of, a felony." RCW 7.68.070(3)(b).

The trial court properly recognized that Norman's interpretation of this provision, which required no connection between the injury at issue and the victim's criminal behavior, would lead to absurd results and would be inconsistent with the purposes of the restitution statutes. The obvious purpose of RCW 7.68.070(3)(b) is to prevent payments when the victim's injury or death is connected to his own criminal behavior. Under Norman's interpretation, there would be no payments by CVC if a murder victim happened to have cocaine residue on his or her person and was therefore committing a felony crime of possession of cocaine.

The court should interpret the law to avoid absurd results when it can do so without doing violence to the words of the statute.

State v. Hall, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010).

Interpreting the statute to require some connection between the victim's criminal behavior and the victim's injury is consistent with the purposes of the restitution statutes and does no violence to the language of the statute. The trial court acted within its discretion in ordering restitution.

D. CONCLUSION

For the reasons cited above, this Court should affirm Norman's convictions and sentence.

DATED this 21st day of December, 2010.

Respectfully submitted,

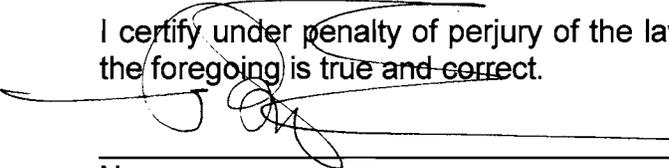
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kira Franz and Chris Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. OMAR NORMAN, Cause No. 63913-7-1, 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.



Name
Done in Seattle, Washington



Date