

63032-8

63032-8

NO. 63032-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

AREEWA SARAY,

Appellant.

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BRIEF OF RESPONDENT

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JANICE E. ELLIS  
Prosecuting Attorney

MATTHEW R. PITTMAN  
Deputy Prosecuting Attorney  
Attorney for Respondent

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Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

1. Did the trial court abuse its discretion in admitting evidence of defendant's behavior during a police interview wherein defendant agreed to speak to the officers, had waived his right to silence, and where his behavior was relevant because it was contrary to that of an individual conscious of his own innocence and provided relevant context in evaluating defendant's contemporaneous factual claims?

2. Even if the trial court erred in admitting evidence of defendant's behavior, is retrial required where, given the totality of the remaining evidence, there is no reasonable probability that the verdict would have been different had the contested behavior evidence not been admitted?

3. Should the matter be remanded for entry of written findings of fact and conclusions of law regarding the court's CrR 3.5 determination where written findings were subsequently entered consistent with its oral ruling?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY.**

Defendant was charged with two counts of Aggravated First Degree Murder with a Firearm and two counts of First Degree

Murder with a Firearm. As an aggravating factor, each count alleged that that it was committed while defendant was armed with a deadly weapon, a firearm. 1CP 62-63. The jury found the defendant guilty as charged. 1CP 18-27. At sentencing, on the recommendation of the State, the court dismissed the First Degree Murder with a Firearm charges on the basis of double jeopardy. 1CP 6; 2RP 5.<sup>1</sup>

#### **B. TRIAL.**

In July of 2007, Linda Nguyen and her fiancé, Kevin Meas, were living in a rented house on Dexter Avenue in Everett, Washington. Though Linda and Kevin lived there, they were not the actual renters. Ngoc Nguyen rented the house from its owner, Vo Van Tran. Linda and Kevin were living there as part of their employment arrangement with Ngoc, working for her by tending to marijuana she had growing in the basement. 1RP 440-53.

Ngoc had a separate marijuana grow operation set up in another Everett house on Beech Street. She had two people living and working there: Linda's brother, Hai Nguyen, and Hai's

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<sup>1</sup> The Verbatim Report of Proceedings for the December 19, 2008, 3.5 hearing and January 20-29, 2009, trial are referenced herein as 1RP. The Verbatim Report of Proceedings for the February 13, 2009, sentencing is referenced as 2RP.

girlfriend, Natalie Nguyen. 1RP 440-53. At some point, Hai's brother, Tam Nguyen, moved in with Linda and Kevin on Dexter Ave. as well. The Beech and Dexter houses are only a five minute drive apart and the respective occupants visited each other frequently. 1RP 440-53.

On July 2, 2007, around 6:00 or 7:00 pm, Hai drove to Linda and Kevin's house (Tam spent the day at the Beech St. house) where he borrowed some pots and pans and left. It was the last time he would see his sister conscious or Kevin alive. 1RP 454-57.

At approximately 8:45 pm, Vo Van Tran and his wife Thuy Pham arrived at the Dexter house. 1RP 397. The two hoped to confront Ngoc, thinking she actually resided there, and collect back rent that she owed. The pair was not involved in Ngoc's marijuana operation, and had not discovered what she was doing in the house until after they had begun renting her. 1RP 396.

As the pair arrived, they saw a light colored Honda Accord parked near the front of the house. 1RP 398-98. Walking up, they heard noises coming from inside. At the time, Tran thought it sounded like a nail gun firing. 1RP 400; 528. Standing at the door,

he noticed the body of woman, later identified as Linda, lying motionless on the floor inside. 1RP 401-03.

Two young Asian males brandishing handguns suddenly appeared inside the house and ran toward Tran. One stopped close, pointed his weapon at Tran's head, and commanded, "Go, go." 1RP 405-08. Thuy, standing behind her husband, saw the gun. She could not see face of the person holding the weapon. 1RP 531-34. The husband and wife retreated immediately and drove away.

After putting about a block's distance between themselves and the house, they saw what appeared to be the Accord speeding behind them. Worried he was being chased, Tran pulled into a random residential driveway. The Accord sped past, disappearing into the night. 1RP 413.

Soon after, Tran called Ngoc explaining something was wrong at the Dexter house. Ngoc, in turn called Hai, prompting him perform a cursory drive by. Hai did not observe anything unusual, though he did not actually stop. 1RP 456-58. Hai began to take the situation more seriously after a second call from Ngoc. This time, Hai and Tam returned to the Dexter house and stopped. The

door was ajar. Linda was on the floor, face down. She was bleeding and unconscious. 1RP 459-60; 482.

Hai had trouble describing the string of events that directly followed, explaining, "I was losing it." 1RP 460. Nonetheless, the group was able to load Linda into their car. Hai and Natalie set out in search of an emergency room. Eventually, with the aid of an off duty Edmonds police officer, an ambulance made contact with them on the side of the highway. Linda was taken to the Colby Hospital emergency room in North Everett. 1RP 175-84; 189; 461-64; 482-85.

Detective Phillip Erickson of the Everett Police Department made contact with Hai and Natalie at the hospital. Linda was dead. 1RP 189-90. Hai explained finding his sister in the Dexter Ave house. He also explained that Kevin may still be in the house and begged the officer to find him. 1RP 191-92.

Erickson proceeded to the house. Though stymied at first by a gas leak, officers were eventually able to make their way inside. 1RP 192-93. They discovered Kevin Meas lying at the bottom of the basement stairwell, dead. A search of the house also produced several bullets and bullet fragments, shell casings, and one unfired .9mm round. 1RP 329-31; 339-49; 375-77; 382-88.

Doctor Norman Thiersch, chief medical examiner for Snohomish County, autopsied Kevin and Linda's bodies. Linda had been shot in the head twice. 1RP 208-11. Kevin had been shot three times: once in the face; once in the back of the head; and once in the shoulder. 1RP 223-24. Bullets and bullet fragments were recovered from each of their bodies. 1RP 211-13; 225-26.

Det. Erickson spoke to Hai and Natalie gaining much of their information in the days following the murders. 1RP 483-94. An interview with Vo Van Tran was conducted on July 12. 1RP 497. Mr. Tran explained about the Honda at the crime scene and later following him. Det. Erickson had already begun working the case on the suspicion that a burnt Honda Accord found not far from the house may have been involved in the murders. 1RP 502.

At 9:57 pm on the day of the murders, in a then separate investigation, Everett Police had responded to an arson call in a small cul-de-sac approximately 1.6 miles from the Dexter house. 1RP 488. There they found a gold colored '91 Honda Accord had been completely burned and was still smoking. 1RP 252-54. A resident of that neighborhood testified that he had seen a dark colored compact or subcompact car speed away from the fire. 1RP 355-56. Records revealed that the burnt Accord had been sold

months before the murders to a Tacoma resident by the name of Phal Chum. 1RP 498-500.

At the July 12, 2007 interview, Det. Erickson showed Tran a photo montage which included a picture of Phal Chum. Tran did not recognize Chum or anyone in the montage as either of the Asian males from inside the Everett house. 1RP 503-04.

Det. Erickson further testified that in September, Tran was shown another photomontage again containing a photo of Phal Chum. Again, Tran confirmed that no one in the montage was one of the Asian males, though he did state the photo of Phal Chum “looked like” one of them. 1RP 560-61; 570.<sup>2</sup>

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<sup>2</sup> In his Statement of Facts, defendant notes that Tran testified that at the July 12, 2007, interview with Det. Erickson, Tran “picked” Chum’s photograph as looking like one of the men he saw at the Dexter house, seemingly equating this with his later identification of the defendant as one of the Asian males with the guns. Br. of Appellant, pp. 7, 8. This would appear to be derived from Tran’s testimony at 1RP 415-16.

While Tran did use the work “pick” in his testimony, any interpretation of such that Tran actually *identified* anyone in the Chum-included-montages as one of the Asian males is belied by Det. Erickson’s testimony. Erickson testified that Tran identified no one from the Chum-included-montage as one of the Asian males from the house at either Tran’s July interview or a September interview, though at the *latter*, Tran identified Chum’s photo as looking “like the person.” 1RP 503-05; 560-61; 570. Moreover, in court, defense counsel presented a single photo of Chum to Tran. Tran stated that while Chum had hair similar to the Asian male pointing the gun at him, Chum was not that person. 1RP 430; 670-71; 812.

Additionally, in identifying defendant at a later November interview, Tran did not note merely a similarity of facial characteristics or that defendant “looked like” the Asian male threatening him with the gun. Tran *actually* identified defendant as

At one of the interviews, Tran also informed the detective, that since the murders, he had seen an individual working at a Lowe's store that he felt may be one of the pair. Tran assigned an 80% likelihood that this was one of the individuals. Erickson investigated this lead, in addition to many others, and determined the Lowe's employee was not involved, however. 1RP 509-10. Tran also described the male who held the gun on him as having long hair, down to his shoulders. RP 410.

On November 7, 2007, Det. Erickson interviewed Phal Chum. Chum appeared at trial. He testified that he lives in Tacoma and is the cousin of an individual named Sareoun Phai, with whom he shared an apartment during the pertinent time period. He is also close friends with the defendant, having known him approximately 16 years. Defendant's nickname is "E." The defendant, Chum and Phai were friends as a group and socialized together. 1RP 642-46.

On or around June 30<sup>th</sup>, 2007, the three men went to the Tacoma waterfront to "hang out." While there, Phai and defendant

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the male who pointed the gun at him, signing his initials beneath defendant's photo. 1RP 503-05; 523; 560-61; 570.

separated and began to speak between themselves. Eventually, Phai called Chum over. Phai had a proposition. With defendant standing two or three feet away, Phai asked Chum if wanted to join the pair in committing a robbery. Phai explained that he and defendant planned to rob a house in Everett that contained money and marijuana. The intelligence on the house had come from defendant. The crime was to occur sometime before the fourth of July, so that their gunfire might be mistaken for fireworks. Chum agreed to join them. 1RP 647-54.

Later, Phai discussed the robbery in more detail with Chum, explaining the plan that he and defendant had devised together involved shooting the occupants. Defendant was not present at this time. Phai asked Chum to help him get a gun. 1RP 655-58.

Chum was able to obtain a .9mm handgun from relatives. Initially, the weapon did not work, however. Parts from another gun were obtained and it was reassembled. He gave the gun to Phai. 1RP 657-59.

On July 2, the day of the murders, Phai woke Chum, telling him it was time for the robbery. Chum refused to go, troubled with the notion of shooting the occupants. Phai left, taking Chum's '91

Honda Accord – the car that would be burned after the murders.  
1RP 661-65.

Chum saw defendant about two weeks later. His eyebrows had been shaved off and he had a haircut. Chum had never known defendant to shave his eyebrows before. 1RP 665-66. In describing defendant's appearance prior to his haircut, Chum stated that defendant had not worn his hair long in recent years. 1RP 670.

Chum admitted that he has been convicted of crimes of theft in the past and was in custody for possession of a stolen vehicle at the time of his testimony. 1RP 666-67. He also admitted that he was testifying against defendant, his friend, because he did not want to be convicted of a murder he did not commit – and that testifying truthfully was a condition of that. 1RP 667; 672. He maintained he was telling the truth, however. 1RP 667.

Subsequent to Chum's interview, Det. Erickson contacted Saroeun Phai. 1RP 55. Afterward, Phai was arrested. 1RP 536-45; 551.

Testimony was also presented from Sopheap Phal. Sopheap is the brother of Chann Phall and a cousin of Chum. He is also friends with Phai and the defendant, having known the latter

since the second grade. Defendant's nickname is "E." He confirmed that Phai and the defendant are friends as well. 1RP 606-11; 626; 640.

On July 2, the day of the murders, Sopheap was at his mother's residence in Federal Way. Phai and defendant drove up in a black Honda Civic sometime in the afternoon. Phai indicated they were later going to go up north and "do a lick" to obtain money and drugs. While Phai did the talking, defendant was present for these statements. 1RP 616-17.

Sometime after midnight, the pair reappeared at the Federal Way house. Phai told him something was wrong. Defendant and Phai appeared scared; they were shaking and shivering. Defendant's eyebrows and some of the hair on his head was burnt. Defendant told him that he had torched Chum's Accord. At defendant's request, Sopheap shaved defendant's eyebrows and his head. 1RP 618-23; 639. Sopheap described defendant's hair as "short" prior to shaving it. 1RP 623.

The pair discussed their alibis before Sopheap. Phai was to claim that he had been at a casino, defendant was at home. 1RP 624-26. Sometime during the evening/early morning, defendant

admitted to Sopheap that both he and Phai had shot someone. No further details were offered. 1RP 631.

Phai eventually left. At defendant's request, Sopheap drove defendant to a pier at the Federal Way waterfront. There, he saw defendant drop a handgun into the water. 1RP 627-30.

Sopheap admitted he knew testifying was, in some sense, to his benefit, though he was uncertain whether he could be charged with any crimes himself. 1RP 633-34.

A dive team comprised of officers from the Everett Police Department and the King County Sheriff's Office searched the Federal Way waters near the indicated pier. 1RP 676-80; 686-87. They retrieved, in part, a .38 caliber Rossi revolver, a .9 mm Glock semi-automatic, and a partially loaded Glock magazine. 1RP 709-12; 723-24.

The Washington State Patrol Crime Lab performed an analysis comparing the recovered weapons with the recovered bullets. 1RP 231; 735. The Rossi revolver had fired the .38 caliber bullets recovered from the victim's bodies. 1RP 754-56. In examining the Glock, while it was determined that the .9mm rounds had been fired from that brand of handgun, salt water corrosion precluded any conclusive *specific* handgun-to-bullet identification.

1RP 757. Analysis did reveal, however, that the recovered Glock had been partially reconstructed – parts from different Glocks assembled into one handgun. 1RP 760-61. In his 13 years experience, the crime lab scientist had never before seen a Glock constructed from different weapons, its parts bearing different serial numbers. 1RP 761.

On November 7, 2008, defendant was arrested and transported to the Tacoma police department. An interview was conducted after defendant waived his Miranda rights. 1RP 551-52. [The interview is detailed more extensively *infra*.] Defendant did not testify at trial.

Defendant and Phai's cell phone records were obtained. Despite defendant's interview claim that he did not know Phai, the records revealed extensive contact. The pair had called each other 20 times between June 27<sup>th</sup> and July 1<sup>st</sup>. On July 2<sup>nd</sup>, the day of the murders, contact increased. Defendant and Phai called each other 22 times that day alone. The first call was placed at 1:00 in the afternoon. 21 calls of varying duration followed over the next several hours. The last call between them was placed that day at 8:12 pm. 1RP 764-78.

On November 11, 2007, Erickson met with Tran again. 1RP 560. This time, Tran was shown a photo montage that included a picture of Saroeun Phai. Tran recognized no one in the montage. Finally, Tran was shown a montage with a picture of defendant. Tran looked over the montage for approximately five seconds then pointed to defendant. He was smiling and excited. 1RP 561-64. He identified defendant as the individual who had pointed the gun at him, signing his initials below defendant's photo. 1RP 522-23; 561-64.

### **C. INTERVIEW OF DEFENDANT.**

Prior to trial, a hearing was held pursuant to CrR 3.5. Det. Erickson noted that defendant was interviewed on November 7, 2007, at the Tacoma Police Department after being arrested outside his house, when he appeared during service of a search warrant. 1RP 6; 37. Present were Det. Erickson, Det. Zeka, and Det. Bair of the Tacoma Police department. 1RP 52.

At the outset, Det. Erickson advised defendant of his Miranda rights, reading them aloud from a written form, stopping after each to question whether defendant understood. Defendant indicated he understood each of his rights. Afterward, defendant read his rights from the form for himself. Thereafter, he advised the

detective he was willing to waive those rights, indicating such both verbally and by signing the waiver. 1RP 7-12; Ex. 1.

The detective began by asking him general orientation questions, including whether or not he had been drinking or using drugs. Defendant stated he had had "a couple of sips." 1RP 13-14.

Erickson next read the search warrant of defendant's house aloud. Defendant closed his eyes. He denied being tired, however, stating, "No, I'm listening to you." 1RP 12-15; 38. Defendant appeared alert and awake for the remainder of their interaction. 1RP 21; 27.

Erickson went on to broadly explain the general crimes he investigates given his position, and the methods of doing so. During this, defendant began to raise and drop his feet, exclaiming, "I'm cold, I'm cold." It was a warm room, however. 1RP 15.

Afterward, defendant began to burp and laugh. He passed gas as well. After the latter, he leaned back in his chair, blew air through his lips, and stated, "Ew, I stink." 1RP 15.

Despite defendant's antics, the detectives continued. They attempted to interview him regarding the specifics of their investigation. He was engaged with the questions, though

frequently not directly responsive. 1RP 27. Det. Zeka characterized defendant's nonresponsiveness and behavior, stating, "I don't know if it's so much uncooperative; possibly passive aggressive or just not – A lot of his answers just didn't track." 1RP 45.

At various points the defendant did offer specific answers, however. When asked if he knew Phal Chum, defendant denied knowing him. He was asked if he knew Sareoun Phai. Defendant denied knowing him as well. He further denied having any nickname. He also claimed he had not been to Everett since "a long time ago." 1RP 15-17; 54-55; 557.

At one point, Erickson told him that the matter was not just going to go away. Defendant responded, "It might as well." When the detectives told him they wanted to get his side of the story, he said, "I don't know why." Again, whether his responses were direct or not, his laughing and belching continued throughout the interview. 1RP 40; 53.

At one point, Det. Bair entered and attempted to speak to him. His attempts were met with largely the same behavioral response, though during Bair's questioning on whether defendant cared for his family he appeared to give genuinely honest answers.

1RP 19. Defendant claimed that Bair's questions were making his head spin. 1RP 21. He maintained his laughing, burping antics throughout, however.

At no point in his interaction did defendant express a desire to stop answering questions or have an attorney present. No promises or threats were made to get him to cooperate. 1RP 20-21; 41-42.

Officer Seth arrived to transport defendant to the Snohomish County Jail. He saw defendant emerge from the interview room smiling and laughing. 1RP 61-62. During transport, defendant asked the officer why he was being arrested. Seth explained it was for "murder one," and defendant replied, "Oh, that's right." Defendant nonetheless smiled and laughed throughout the drive to Snohomish County. 1RP 64-66.

At the conclusion of the hearing, the court ruled at length, finding the above facts were undisputed. It held that the statements were not taken in violation of defendant's constitutional rights. 1RP 72-73. The court has since entered a written order consistent with that oral ruling. 2CP 79-83.

Prior to trial, the State filed several motions in limine. Among them, it sought to admit defendant's verbal statements and

the behavior he exhibited while making those statements. 2CP 103-05; 1RP 138-39.

Defense argued against admission of defendant's demeanor or behavior, claiming unfair prejudice outweighed any relevance. Defense, in the trial court, did not characterize defendant's demeanor or behavior as "odd" or as evidencing any sort of mental disorder. Rather, it summarized defendant's behavior as "perhaps a little hostile." RP 139-41.

The court held that defendant's denial of knowing Phai or Chum was clearly relevant and admissible. It reserved ruling as to "defendant's behavior and attitude" however. RP 142.

Later, during trial, the court ruled that it would allow evidence of defendant's behavior. Such evidence was limited however. Testimony as to direct *observations* of defendant's behavior was admissible, but not any *opinion* testimony typifying that behavior or what it indicated:

I would find that any statements that the defendant made are relevant and are admissible. And with respect to the testimony regarding his behavior, I think descriptions of that behavior – And the State had also, I should indicate, cited to State v. Day at 51 Wn. App. 544 and State v. Craven at 69 Wn. App. 581.

And I think what is clear is that if ... the behaviors have any relevance, the observation of those behaviors are admissible. And I would be prepared to admit testimony regarding the detectives' observations. What I will not permit are any interpretations of what that behavior indicated or any opinions related to that behavior. But the observations themselves would be admissible.

1RP 514-15.

The defendant lodged a continuing objection prior to the relevant testimony. 1RP 552. At trial, the officers testified consistently with their CrR 3.5 testimony, taking care to detail only their direct observations of defendant's behavior, omitting any opinion as to what that behavior seemed to indicate. 1RP 552-59; 583-86; 591-98; 602-06.

### **III. ARGUMENT**

#### **A. THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING THE OFFICERS' DIRECT OBSERVATIONS OF DEFENDANT'S BEHAVIOR DURING HIS INTERVIEW.**

##### **1. The Trial Court Did Not Abuse Its Discretion In Admitting Behavior Evidence As Its Relevance Was Not Substantially Outweighed By Danger Of Unfair Prejudice.**

Under ER 401, evidence is relevant if it has

*any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.*

Emphasis added.

The evidence need only be minimally relevant, however. State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006) (“The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible.”)

Even relevant evidence may be excluded, however. ER 403 states, “Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice[.]” Emphasis added.

Appellate review has distinguished prejudice from *unfair prejudice*.

Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another. However, “unfair prejudice” is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors

State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

These trial court determinations are reviewed on an abuse of discretion basis.

We review a trial court’s evaluation of relevance under ER 401 and its balancing of probative evidence against its prejudicial effect or potential to mislead under ER 403 with a great deal of deference, using a ‘manifest abuse’ of discretion standard of review.

State v. Luvane, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995).

An abuse of discretion occurs “only when no reasonable person would take the view adopted by the trial court.” State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). The burden of proving an abuse of discretion falls on appellant. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982); Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994) (“[U]nder ER 403, the burden of showing prejudice is on the party seeking to exclude the evidence.”)

Thus, applying the standards above, to show the trial court abused its discretion in admitting the evidence, defendant must show that no reasonable person would have found the evidence was even minimally relevant. Alternatively, defendant must show that any reasonable person would have found that its relevance was substantially outweighed by the likelihood of an unthinking, emotional response against defendant. Defendant cannot carry his burden as to either.

Defendant’s behavior was relevant. A defendant’s non-verbal conduct in the course of a voluntary interview is relevant and admissible where such conduct is not likely that of one conscious of his own innocence.

Conduct on the part of an accused person... is a circumstance for the jury to consider as not being likely to be the conduct of one who was conscious of his innocence, or that his cause lacks truth and honesty, or as tending to show an indirect admission of guilt[.]

State v. McGhee, 57 Wn. App. 457, 461, 788 P.2d 603 (1990) quoting State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945).

It should be noted that neither case above advanced the “conduct-is-relevant-if-inconsistent-with-innocence” standard in the context of demeanor. Rather, each case examined the admissibility of a defendant’s separate and uncharged conduct in making threats against a witness in the charged matter. Kosanke, 23 Wn.2d at 215; McGhee, 57 Wn. App. at 461-62. Nonetheless, Washington courts have recognized the relevance and admissibility of a defendant’s *demeanor* in circumstances similar to the present.

In State v. Day, 51 Wn. App. 544, 744 P.2d 1021 (1988), the prosecution sought to admit not only the verbal statements of a defendant, but also evidence of his demeanor exhibited to police officers when defendant asked about his missing wife at a police station. The court ruled, “Testimony regarding defendant’s... demeanor is not opinion and is admissible if relevant.” Id. at 552.

The court went further, however, and allowed even *opinion* as to defendant's demeanor (as opposed to unadorned observation testimony) writing:

In this case, the officers' opinions that [defendant's] reaction was "inappropriate" were logically based on their factual observations that he had shown "very little emotion", that he had been "unemotional", and that he did not ask questions the officers expected. The officers' testimony was not improper.

Id. at 552.

Similar opinion testimony was admitted in State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993). There, an emergency room social worker spoke with defendant when she brought the victim into the hospital for the charged injuries. Defendant offered a verbal explanation for the injuries. Nonetheless, the social worker was allowed to testify as defendant's demeanor:

'She was having difficulty making eye contact. She wasn't looking at me. She was staring down at the floor a good deal of the time.' Defense counsel objected when the prosecutor then asked whether this behavior was something [the social worker] usually encountered. The court overruled the objections, and [she] responded that [defendant's] 'behavior was somewhat unusual from what I normally saw. She wasn't crying... She seemed sort of withdrawn to me.'

Id. at 586.

The court found this testimony entirely admissible, writing simply, “[The] testimony had an appropriate foundation and was not improper.” Id. at 586.

While in Craven and Day, the courts never explicitly stated what made defendant’s demeanor relevant, it is clear that it was because, like the conduct in Kosanke and McGhee, the behavior was contrary to that of one who was conscious of one’s own innocence, - i.e. an innocent man would not have reacted and behaved like defendant.

Here, defendant’s behavior was not that of one conscious of his own innocence. Defendant had just been arrested outside his house, been informed he was being charged with two murders, and transported to the Tacoma police station. He was informed of his Miranda rights and agreed to speak with the detectives, doing so voluntarily. In the immediately subsequent interview, his demeanor never remotely approached that of an individual conscious of his own innocence - one freshly informed that he was being mistakenly or falsely charged with a double homicide. To the complete contrary, defendant laughed and burped throughout, passing gas at least once, all the while exhibiting nothing but

amusement with the situation and his own antics, putting on a show and playing with the detectives.

Defendant attempts to typify such behavior on appeal as merely “strange” or “odd.” Br. of Appellant, p. 10. Even if this were a fair description, strangeness or oddness *is* relevant when it is a reaction that is “strange” or “odd” compared to that of an innocent person given the circumstances. It was just the “strangeness” and “oddness” of defendant’s behavior and demeanor in Craven and Day compared to what is normally expected in the circumstances that made both defendants’ demeanor/behavior admissible.

Moreover, testimony as to defendant’s demeanor was relevant to provide context for the verbal claims he made – that he did not know Phai or Chum, that he had not been to Everett in a long time and that he had no nickname. To admit those statements without evidence of the demeanor in which they were uttered denies the trier of fact the full truth about those claims that would have been illustrated in any videotape of the interview – that they were not full throated protests of innocence, but claims even defendant himself could not try to pass off with a straight face. Additionally, the testimony of his laughing, burping, etc... illustrates his very relaxed demeanor and further evidences to the jury that the

statements defendant did offer were entirely the product of his own free will, not the result of police coercion.

Defense now argues on appeal that unfair prejudice resulted because the evidence created “an impression that [defendant] suffers from some kind of mental disorder.” Br. of Appellant, p. 10. While certainly some of how defendant acted was not based on logic or reason, his behavior did not exhibit that defendant suffered any true mental disorder. Again, it evidenced defendant desired to play with the detectives, making light of a situation that one conscious of his innocence would have treated differently.

Moreover, any concern for *unfair* prejudice here was ameliorated by the trial court’s careful carving as to what could be admitted. The officer’s were precluded from offering any of their *opinions* as to what defendant’s behavior indicated. They could only offer direct testimony as to what defendant said and did.

Defendant’s behavior was relevant. It gave relevant context to his contemporaneous statements and illustrated he was conscious of his own guilt. It was not substantially outweighed by concerns of a prejudicial, visceral response. The court did not abuse its discretion.

**2. Even If The Trial Court Erred In Admitting Evidence Of Defendant's Behavior, The Error Was Harmless and Does Not Require Retrial.**

Even if the court abused its discretion in admitting evidence whose relevance was ultimately outweighed by a danger of unfair prejudice, such error does not necessarily mean that defendant suffered prejudice requiring retrial. Rather, the erroneously admitted evidence must be weighed against the evidence as a whole. Retrial is only warranted where it can be said that there is a *reasonably probability* that, absent the erroneously admitted evidence, defendant would have been found not guilty.

Where the error is from violation of an evidentiary rule rather than a constitutional mandate, we... apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.

State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

See also State v. Owens, 128 Wn.2d 908, 914, 913 P.2d 366 (1996) (“[Nonconstitutional]” error thus requires reversal only if there is a reasonable probability it affected the verdict.”)

Here, defendant was convicted, in part, on the testimony of Phal Chum, a close friend he had known for 16 years. Chum

described defendant's close involvement in the planning of the crime. Sopheap, another longtime friend, testified as to defendant's involvement, specifically defendant's shivering return on the night of the murders to his house, defendant's being burnt from the burning of the getaway car, his asking to be shaved i.e. change his physical appearance immediately after the murders, and, finally, defendant discussing his alibi and admitting to killing a person.

Portions of Sopheap's testimony were corroborated when he led lead police to the murder weapons, where defendant had tossed them off a pier. Portions of Chum's testimony were also corroborated by other evidence, specifically, the Glock he obtained was a murder weapon and that it was assembled from parts of other weapons. His further testimony that defendant shaved his eyebrows after the murders was corroborated by Sopheap.

Defense attempts to minimize the effect of their testimony, writing "Chum and [Sopheap] clearly had a motive to minimize their involvement and place the blame on [defendant.]" Br. of Appellant, p. 12. While the witnesses may have had some incentive to minimize their involvement, having acted to some degree as accessories before and after the fact, no evidence was produced to show either had any incentive to place the blame on their lifetime

friend, the defendant. Indeed, each would have been better off claiming he had no idea of defendant's involvement.

Sopheap's admissions to driving defendant to the pier and shaving his eyebrows and hair, his admissions to what defendant and his accomplice told him, only serve to incriminate him as an accomplice. Similarly Chum had no incentive to admit he produced the weapon for the murderers, knowing full well their intent. Each party would have been better off making no admissions. Their statements as to what they saw defendant do and what he said only served to incriminate themselves.

Vo Van Tran, not associated with Chum or Sopheap, was provided with several opportunities to identify other individuals, Chum included, as one of the Asian males he had seen inside the house. Vo Van Tran identified only the defendant from the montages, doing so with certainty. 1RP 503-05; 523; 560-61; 570.

Further, the case against defendant did not rely on witness testimony alone. Phone records revealed that Phai and defendant knew each other intimately, despite defendant's claims. They called each other repeatedly in the days prior to the murders, their contact reaching a crescendo the day of the crime.

The timing of their calls (and lack of calls) that day further reinforces defendant's guilt. The pair, having to take separate cars to transport the both Honda and the getaway car from the burnt Honda to Everett, would have been in constant contact, reassuring themselves and each other they could go forward with their plan beforehand. Those calls would have stopped when they were in Everett together, traveling to the Dexter house in the same vehicle, the Accord. Exactly that pattern was revealed by the phone records. Call after call until 8:15 pm, the time they would have been in Everett together, given Tran's interruption of their robbery at 8:45 pm.

Against this weight of evidence, defense lays the notion that the jury would not likely have returned the guilty verdict had it not been overcome by a visceral, emotional response to their belief defendant was mentally imbalanced.

As an initial matter, it is highly dubious the jury believed defendant was genuinely mentally deranged as a result of the interview as opposed to merely uncouth. Moreover, even if they believed he was mentally unbalanced, it is unlikely any reaction to this on the part of the jury made it more likely they would have found defendant guilty. The crimes here were obviously not crimes

of the mentally insane, but robberies involving forethought and cool deliberation – premeditated as was charged and as the jury found. Moreover, evidence showed cool deliberation continued by the perpetrators after the crime when they took to hide evidence including their getaway car and the murder weapons. Thus, even if the jury accepted defendant's appellate claim that the contested evidence colored him as mentally unbalanced, the jury would have been *less likely* to return verdicts of guilty for these planned, cold blooded crimes.

Ultimately, after full consideration of all the evidence as a whole, it cannot be said that there is a reasonable probability the jury would have returned a verdict of not guilty had the court not admitted the contested evidence.

**B. REMAND FOR ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW IS UNNECESSARY GIVEN THE TRIAL COURT HAS NOW ENTERED SUCH ORDERS AND THEY ARE CONSISTENT WITH ITS ORAL DECISION.**

A failure to enter written findings of fact and conclusions of law requires remand for the entry of proper findings where the appellant raises the issue. State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). This is to facilitate appellate review. Id. at 622-23. In such a situation, this will be the only remedy available.

Id. at 624. Obviously such findings must be based solely on evidence already taken. Id. at 625.

Appellant asks for remand for entry of findings, a remedy consistent with Head. Here, however, findings have now entered, albeit after appellant submitted his opening brief. The written findings are consistent with the court's oral ruling. Compare 2CP 79-83 with 1RP 72-73. The requested remedy is moot. Issues are moot when the court can no longer provide effective relief and only abstract questions remain. Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972); State v. Sansome, 127 Wn. App. 630, 636, 111 P.3d 1251 (2005).

#### IV. CONCLUSION

For the foregoing reasons, defendant's appeal should be denied.

Respectfully submitted on October 13, 2009.

JANICE E. ELLIS  
Snohomish County Prosecuting Attorney

By:   
MATTHEW R. PITTMAN, #35600  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

AREWA SARAY,

Appellant.

No. 63032-6-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 13<sup>th</sup> day of October, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

DAVID KOCH  
NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
SEATTLE, WA 98122

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STATE OF WASHINGTON  
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 13<sup>th</sup> day of October, 2009.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit