IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NOS. 63913-7-I
	)	65211-7-I
Respondent,	)	(Consolidated Cases)
	)	
v.	)	DIVISION ONE
	)	
OMAR ALI NORMAN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 11, 2011

Lau, J. — In this consolidated appeal, Omar Norman challenges his jury trial convictions for first degree murder while armed with a firearm, first degree assault while armed with a firearm, and two counts of first degree unlawful possession of a firearm. He argues that the trial court improperly admitted gang affiliation evidence, violated his confrontation rights by admitting DNA (deoxyribonucleic acid) peer review testimony, violated ER 106's completeness rule by redacting portions of his police interview, and improperly denied his mistrial motion after audience applause. Because (1) the gang affiliation evidence established witness bias, (2) any confrontation clause violation was harmless, (3) the court properly redacted confinement time, and

(4) audience applause warranted no mistrial, we affirm Norman's convictions.[1] Norman

[1] And Norman's supplemental assignments of error are without merit.

also challenges his restitution order, arguing the murder victim's commission of felony escape when he was killed bars restitution. But because the court properly ordered restitution, we affirm the restitution order.

FACTS

The trial evidence shows Terrell Milam was a longtime resident of Seattle's Central District neighborhood and a high-ranking Deuce 8 gang member. In October 2005, Milam lived in the Pioneer Fellowship House, a federal halfway house. On the night of October 16, 2005, Alison Burk picked Milam up and drove him to several bars in downtown Seattle. At one point, Burk left Milam to visit a different bar. Later that night, Milam called Burk and asked her to pick him up at a gas station near Harborview Medical Center. When Burk picked him up, she saw blood on his clothes. Milam explained that he had been in a fight. Milam asked Burk to drive him to "the spot," a reference to his friend's house located at the intersection of South King Street and Martin Luther King Jr. Way in Seattle. Between four to seven men were inside the house, including Norman, Cedric Jackson, Tyree Lee, Charles Justice, and David Melton.

At approximately 3:30 a.m., Burk and Milam talked and "playfully" wrestled outside "the spot." At one point, Milam threw Burk on her car, causing a dent to her hood. After about 15 minutes at "the spot," Burk decided to go home. As she was leaving, several men walked out of the house and one announced that "the spot" was "hot" and they needed to go. Burk then saw Milam and three other men get into a black Caprice-type car with distinctive rims.[2]

On the way home, Burk got lost and stopped at a gas station. While there, she saw the same black car that Milam had gotten into at "the spot." She followed the car, assuming that it was headed to the freeway. But as the black car drove through a residential area, Burk turned around and found her own way home.

Less than two hours later, at approximately 5 a.m. on October 17, a jogger running by noticed Milam's body lying in the grassy median between the sidewalk and the street in the Seward Park neighborhood. Milam had been shot nine times, once in the head at close range, and several times in the chest. Based on the body's position, detectives concluded Milam's body had been dumped there.

Police also recovered one 9mm shell casing and a cigarette butt near Milam's body. They later determined the 9mm shell casing and bullet could have been fired by a Ruger P89. The medical examiner subsequently recovered bullet fragments from Milam's head and a .45 caliber bullet in his shirt. The bullet fragments were consistent with 9mm ammunition.

Alison Burk heard about Milam's murder, contacted the police, and helped them locate "the spot." However, when the police arrived to execute a search warrant, the house was abandoned and vacant.

The police located several witnesses who identified Norman and Justice as the last people to have contact with Milam. On October 21, Detective Paul Takemoto spoke with Jackson. Like Milam, Jackson lived at the Pioneer Fellowship House. Jackson was at "the spot" on the night of the murder and saw Milam with Burk.

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[2] Various witnesses described the car as a "Caprice-type" or "Crown Victoria." This fact is immaterial to the issues on appeal.

According to Jackson, he spoke with Norman a few days after the murder. Norman told Jackson that on the night of the murder, he and Justice gave Milam a ride, dropping him off at 12th Avenue and Jefferson Street, near the Pioneer Fellowship House.

A few days later, Detective Takemoto spoke to Justice. 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. The homicide investigation then stalled while various items of evidence were submitted for fingerprints and DNA examination.

Sometime after Thanksgiving in 2005, Norman, Mark Anderson, and Olijuwan Crain were in a car, drinking and getting high. Anderson was a longtime friend of Norman's. The conversation in the car turned to Milam's death. Norman explained that he and Milam had been in a car together, that Milam began "talking shit," and that "niggas put him in a headlock." 12 Verbatim Report of Proceedings (VRP) (June 1, 2009) at 1150; 13 VRP (June 2, 2009) at 1280. While making a gesture indicating the firing of a gun, Norman said, "Man, went over and topped him off." 13 VRP (June 2, 2009) at 1280-81. Anderson understood Norman meant that he shot Milam in the head. Norman told Anderson and Crain not to tell anyone. However, Anderson told Milam's best friend, Walter Hayden, that Norman admitted to shooting Milam. Anderson then learned that Norman was looking for him and wanted to kill him.

While Anderson was walking in Seattle on March 26, 2006, Norman, wearing camouflage clothing and carrying a shotgun, emerged from a bush and approached him. He called Anderson a "son of a bitch ass nigger," and shot him twice in the legs with buck shot. 12 VRP (June 1, 2009) at 1160. Anderson hid behind a house, and

Norman ran away.

Police responded and recovered two fired shotgun shell casings in the street. Anderson was uncooperative when police contacted him. He denied knowing who shot him but said he was shot because of his friendship with Milam. Anderson later explained he refused to cooperate because he wanted to avoid being a "snitch" and planned to retaliate by killing Norman.

In January 2007, the Washington State Patrol Crime Laboratory concluded that DNA on the shell casing and cigarette butt recovered near Milam's body matched Norman's DNA profile. DNA expert Nathan Bruesehoff calculated the likelihood of another person matching this DNA profile as 1 in 6.1 quadrillion.

In May 2007, Detectives Paul Takemoto and Shandy Cobane contacted Norman, who was already in custody. After being advised of his Miranda rights, Norman spoke with the detectives. He claimed that he and Justice drove Milam in Justice's black Crown Victoria to 12th and Jefferson, where they dropped him off. The detectives told Norman his DNA was found on a shell casing and a cigarette butt near Milam's body. Norman then claimed that on that night, he and Milam met up with some "Crips"[3] who drove them to Seward Park where they got into an argument. According to Norman, the Crips shot Milam five or six times, Norman fired his 9mm Ruger six or seven times in self-defense.[4]

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[3] Norman told detectives that one of these Crips, known as "Bone," had previously shot Justice's older brother "Rollo" and that Milam had helped Bone get away after the shooting.

[4] On the night of Milam's murder, police investigation showed no gunshots reported in the Seward Park neighborhood where his body was found.

On September 12, 2007, the police arrested Norman for Milam's murder. Detectives Takemoto and Cobane interviewed Norman again. The detectives informed Norman that no one reported hearing gunshots in the area where Milam's body was found. The detectives also reminded Norman that his DNA was found on a 9mm shell casing at the scene and told him that a 9mm round was removed from Milam's head. Asked whether he had given his gun to someone else, Norman said he had given it to Tyree Lee, who admitted shooting Milam over a dispute about money. At the time of this second interview, Norman knew Lee was dead.

Five days later, the State charged Norman with second degree murder. In May 2008, Anderson was arrested on a gun charge and he asked to speak with a detective about Milam's murder. Anderson later agreed to testify at trial against Norman in exchange for the State's promise to reduce his gun charge.

In July 2008, a forensic scientist examined shotgun shell casings recovered at the scene where Anderson was shot. He developed a partial DNA profile of mixed origin that included Norman as a possible contributor. He concluded one in 260,000 individuals is a potential contributor to the mixed profile based on the United States population.

The State subsequently amended the information to allege first degree murder while armed with a firearm, one count of first degree assault while armed with a firearm, and two counts of first degree unlawful possession of a firearm.

Jury trial began in May 2009. Norman testified[5] and denied that he killed Milam

[5] The State presented the following witnesses at trial: Jordan Rosenfeld

or shot Anderson. He claimed that he last saw Milam when he and Justice dropped him off at 12th and Jefferson. Norman also admitted he had a gun on the night that Milam was killed.

A jury convicted Norman as charged. The court imposed standard range sentences on all counts.

ANALYSIS

Gang Evidence

Norman argues the trial court's admission of gang affiliation evidence deprived him of a fair trial and its ER 404(b)[6] ruling is unsupported by the record. The State responds that the court properly admitted gang affiliation evidence to show witness bias and ER 404(b) does not apply.

Before trial, the State informed the court that it anticipated gang affiliation testimony in its case in chief. The State acknowledged gang affiliation was not a

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(accountant who discovered the body while jogging), Thomas O'Connor (owner of house next to location where body discovered), Sally Martin (Milam's former girl friend), Allison Burk, Officer Gary Davenport, firearms expert Rick Wyant, Detective Lisa Haakenstad, David Melton, Eljae Givens, Cedric Jackson, pathologist Brian Mazrim, Sprint custodian of records Jennifer Schied, Mark Anderson, Detective Kevin O'Keefe, Officer Michael Sloan, fingerprint examiner David Lizote, Detective Paul Takemoto, Detective Nathan Janes, Officer Julie Wight, Detective Thomas Mooney, fingerprint examiner Connie Toda, DNA expert Nathan Bruesehoff, and Detective Shandy Cobane.

The following defense witnesses testified: Olijuwon Crane, Omar Norman, and DNA expert Randall Libby.

[6] ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

motive for the murder but argued the evidence was relevant to show witness bias. For example, the State explained that witnesses David Melton and Eljae Givens, members of the same "Low Profile" gang as Norman, had provided statements[7] implicating Norman but they later recanted the statements. The State also explained that nearly every civilian witness, including State witnesses, were gang members and to explain their relationships without discussing gangs proved impossible. The State further noted Norman's own explanation to police that Crips gang members killed Milam. Defense counsel argued against admission of gang affiliation evidence based on unfair prejudice and no relevance to motive for the murder. But he did not dispute the common gang affiliations.

The court admitted the gang affiliation evidence, reasoning:

> 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 this case with any kind of, you know, genuine truth of what is happening.
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> . . . .
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> . . . . [T]here clearly cannot be an inference that one is involved in a gang, therefore, one is guilty of this event . . . .

[7] Givens told the police that Norman had described in detail how he and Justice had killed Milam. According to Givens, Justice was upset with Milam for being involved in a shooting of Justice's brother. Norman told Givens that Justice first shot Milam and that Norman then shot Milam in the head.

Melton told the police that he was at "the spot" on the night of the murder, and 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.

7 VRP (May 20, 2009) at 430-31.[8]

At trial, Givens and Melton recanted their prior statements to police. When confronted with his prior statement to police, Givens denied making the statement. Although Givens acknowledged that he and Norman were Low Profile members, he claimed it was a musical group and not a street gang.

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. After the court directed him to answer the State's questions, Melton responded, "I'm directing myself not to say nothing" and invited the judge to find him in contempt. 11 VRP (May 28, 2009) at 1010, 1020. Melton admitted that he wrote a note to Norman—"I threw my loyalty and my heart away and almost made a deal with the devil" and "I haven't signed shit. I'm withdrawing anything to do with that shit." 11 VRP (May 28, 2009) at 1020-25. He signed it under the inscription, "death before dishonor." 11 VRP (May 28, 2009) at 1021. He denied he was a Low Profile member but acknowledged that Norman was his friend.

The trial testimony established that Norman was a member of the Low Profile gang. A detective explained, "[Low Profile] started as a clique actually, a group of guys who had dreams of becoming rappers, stars . . . ." 17 VRP (June 9, 2009) at 1868-69.

Mark Anderson testified about his membership in Deuce 8. He described

[8] The court gave the following limiting instruction relating to gang affiliation evidence: "Evidence has been introduced in this case to the effect that the defendant was affiliated with a gang or associated with gang members. You must not consider evidence that the defendant was affiliated with a gang or associated with gang members as proof that he committed the charged crimes."

Norman as a former Deuce 8 member who then joined Low Profile. Anderson further testified that at the time of Milam's death, no problems existed between the Low Profile and Deuce 8 gangs. He also explained it was not uncommon for members of different gangs to get along. A detective confirmed this testimony while explaining gang culture. Anderson explained that due to his testimony, he would be considered a snitch and no longer accepted in his gang. Several police officers testified that gang members frequently refuse to cooperate with the police to avoid being viewed as a snitch. The State also elicited evidence that Milam was a high ranking Deuce 8 gang member.

"The decision to admit evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. A trial court abuses its discretion when it exercises its discretion on untenable grounds or for untenable reasons, or where its discretionary act was manifestly unreasonable." State v. Veliz, 160 Wn. App. 396, 247 P.3d 833, 841 (2011) (citations omitted).

"Evidence of gang affiliation is admissible when it is relevant to a material issue in the case." United States v. Takahashi, 205 F.3d 1161, 1164 (9th Cir. 2000). A witness's gang affiliation may be probative of bias and, if so, a party may elicit evidence regarding such an affiliation at trial. State v. Craven, 67 Wn. App. 921, 927, 841 P.2d 774 (1992); United States v. Abel, 469 U.S. 45, 49, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). In a case involving disputed gang affiliation evidence, the United States Supreme Court reasoned:

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness'

> self-interest. 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.

Abel, 469 U.S. at 52.

Norman correctly asserts that Washington courts are reluctant to allow the State to introduce gang affiliation alone to suggest a defendant's "guilt by association" in violation of ER 404(b)'s bar against propensity evidence. See, e.g., State v. Scott, 151 Wn. App. 520, 213 P.3d 71 (2009) (reversing trial court's admission of gang-related activities in assault and burglary prosecution because State never connected defendant's gang activities to a motive for the crimes charged and the motive appeared to be simply to collect money owed to defendant). While we have held the admission of such evidence proper to establish motive for committing the crime, Norman fails to establish that the court abused its discretion by admitting gang affiliation evidence for nonpropensity purposes—to show witness bias.[9]

Here, gang affiliation evidence was highly relevant to establish witness bias under ER 607.[10] Givens and Melton, who implicated Norman in the murder before trial, were uncooperative and recanted their statements at trial, refusing to implicate Norman

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[9] See, e.g., Craven, 67 Wn. App. at 927 (trial court properly allowed prosecutor to question defense witnesses about whether they were in the same gang as defendant to show bias); State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) (in addition to motive, gang evidence showed defendant's mental state); State v. Boot, 89 Wn. App. 780, 789-90, 950 P.2d 946 (1998) (in addition to motive, gang evidence relevant to show "the context in which the murder was committed," premeditation, and under the res gestae exception "'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place'") (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)).

[10] ER 607 provides, "The credibility of a witness may be attacked by any party, including the party calling the witness."

in open court. Evidence of Givens, Melton, and Norman's common membership in the Low Profile gang was relevant to establish their bias and, in particular, why their pretrial statements differed from their trial testimony.

Similarly, Mark Anderson's affiliation with the Deuce 8 gang was relevant to explain why his trial testimony differed from his initial statement to police and why he refused to cooperate with police. Although Anderson heard Norman admit he shot Milam in the head, he failed to report this to police. And even after Norman shot Anderson, Anderson declined to identify Norman as the shooter or reveal Norman's role in Milam's death. But at trial, Anderson testified that Norman shot him and admitted to killing Milam. He explained that Deuce 8 gang members do not accept a member who testifies at trial. And based on his testimony, he was no longer welcome in the gang or safe in Seattle. This evidence was relevant to explain why Anderson failed to disclose to police what he knew. See People v. Martinez, 113 Cal. App. 4th 400, 413-14, 7 Cal. Rptr. 3d 49 (2003) (gang evidence relevant to explain gang member's reluctance to cooperate and discrepancy between statements to police and testimony at trial).

Norman also argues that the only reason Anderson failed to report Norman to police was Anderson's desire to kill Norman himself. Norman correctly cites Anderson's testimony that he made no initial identification so he could kill Norman himself. But Anderson also testified, "[T]here's many reasons of why I didn't tell [police] that day, many reasons. Not just because I wanted to kill him, not just because I was afraid of my safety, because I didn't want to be known as a snitch." 13 VRP (June 2,

2009) at 1302. Anderson had earlier explained that cooperating with police "would have affected my status. . . . You can't tell. That's just in the streets, you can't do that." 12 VRP (June 1, 2009) at 1163. Police officers also testified at trial that gang members frequently refuse to cooperate with police to avoid the "snitch" label.

We turn next to Norman's contention that gang affiliation evidence is governed exclusively by ER 404(b). The State responds that ER 404(b) does not apply to bias evidence. We agree that bias evidence is governed by ER 607, not ER 404(b).

As discussed above, a witness's or 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, 52, 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 United States v. Beck, 625 F.3d 410 (7th Cir. 2010), the court addressed this precise issue under the federal counterpart to ER 404(b). It held that because cross-examination questions about gang membership sought to show witness bias and not bad character, they did not implicate FR 404(b). And "[e]vidence 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 & Practice § 404.7, at 495 (5th ed. 2007). Under the circumstances here, we conclude that evidence admitted to show bias under ER 607 does not implicate ER 404(b).[11] The court properly admitted relevant gang affiliation evidence to show witnesses' bias and

[11] Given our resolution of this issue, we do not address the court's reliance on the res gestae exception to ER 404(b).

to explain their changed testimony and lack of cooperation.[12]

[12] The State also correctly asserts that the danger of unfair prejudice arising from the gang affiliation evidence here is minimal because (1) virtually every State and defense witness, including the victims, belonged to a gang, (2) the State presented no evidence of any criminal behavior by Norman's Low Profile gang, (3) Norman told detectives about a Crips gang shoot-out in the Seward park neighborhood and (4) the State never suggested or argued that gang affiliation was a motive for the crime.

Confrontation Clause

Norman next argues the trial court violated his constitutional right to confrontation when it admitted hearsay testimony and allowed DNA expert Nathan Bruesehoff to testify that his analysis was reviewed by another scientist according to standard procedures.[13] The State responds that because Bruesehoff never testified about the specific peer review conducted in this case, the testimony constitutes admissible nonhearsay evidence. The State also argues the statements were not "testimonial" under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We review confrontation clause challenges de novo. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

The Sixth Amendment confrontation clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The confrontation clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The confrontation clause is not implicated where testimonial statements are offered for some purpose other than establishing the truth of the matter asserted. Crawford, 541 U.S. at 59 n.9.

Over defense objection, Bruesehoff testified,

> 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

[13] We note that at oral argument before this court, Norman argued for the first time that this evidence constitutes "testimonial" evidence under Crawford. But his appellant brief makes no argument on this point.

> 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.
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> 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?
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> A: They review the data that I generated. They don't test it themselves.
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> Q: So they're just looking at the results you came up with, not retesting the same item, is that fair to say?
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> A: That's correct.

15 VRP (June 4, 2009) at 1656.

While we are not persuaded a violation of Crawford occurred here,[14] "[i]t is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Even assuming a confrontation clause violation, we conclude any error was harmless.

"'A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.'" Guloy, 104 Wn.2d at 425. Constitutional error is presumed to be prejudicial, and the State bears the burden of providing that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980); Guloy, 104 Wn.2d at 425. An appellate court uses the "overwhelming untainted evidence" test in its harmless error analysis under the confrontation clause. Guloy, 104 Wn.2d at 426. Under that test, the court views only the untainted evidence to determine whether the

[14] Norman relies primarily on State v. Wicker, 66 Wn. App. 409, 832 P.2d 127 (1992), which held that the trial court's admission of the nontestifying fingerprint technician's opinion violated defendant's confrontation right. But Wicker was decided before the United States Supreme Court decided Crawford.

untainted evidence is so overwhelming that it "necessarily leads to a finding of guilt." Guloy, 104 Wn.2d at 426 (citing Parker v. Randolph, 442 U.S. 62, 70-71, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979)).

Here, the only arguable "tainted" evidence is Bruesehoff's brief testimony, quoted above, about peer review procedures. Norman does not challenge Bruesehoff's remaining testimony and opinions.

Our review of the record establishes overwhelming evidence of Norman's guilt. Milam was seen getting into a car with Norman less than two hours before the murder. Norman testified he carried a gun the night of Milam's 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, and Anderson testified that Norman told him he had "topped off" Milam. Norman also told the detectives differing accounts about what happened. He first claimed to know nothing about Milam's murder and after confronted with the DNA evidence, told them about a gang shoot-out in the Seward Park neighborhood. He later on told detectives that Tyree Lee committed the murder. The untainted evidence overwhelmingly establishes guilt. We conclude therefore that any error here in admitting the peer review evidence constitutes harmless error.

Redaction of Norman's September 2007 Statement to Police

Norman relies on ER 106's rule of completeness[15] to argue the court erred by

[15] ER 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

redacting portions of his September 2007 interview where detectives referred to the confinement time Norman faced in prison on the murder charge. Norman cites to statements by detectives such as, "sit in jail for thirty-five years," and "Can you do thirty years, thirty plus years?" Pretrial Ex. 6 at 30, 60. He argues these and similar redactions prevented him from explaining why he lied to the police and the pressure applied to obtain the statements. The State counters that the rule of completeness does not apply because Norman, rather than the State, sought to admit the evidence and evidence of sentencing consequences for the charged crime constitute inadmissible evidence as a matter of law. "'This Court will not disturb a [trial] court's decision regarding a rule of completeness issue absent an abuse of discretion.'" State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001) (quoting United States v. Haddad, 10 F.3d 1252, 1259 (7th Cir. 1993)).

We agree the rule of completeness does not apply. The rule provides that when a party (Norman) seeks to introduce a statement, the adverse party (the State) may offer any other part that in fairness ought to be considered with it. State v. Perez, 139 Wn. App. 522, 531, 161 P.3d 461 (2007). Because under the rule, Norman may not supplement a statement he offered and introduced into evidence, the rule does not apply.

Our Supreme Court has repeatedly held that the length of a sentence faced by a defendant should not be considered by the jury because a "strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents

unfair influence on a jury's deliberations." State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001); see also, e.g., State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (trial court properly allowed testimony that a defendant faced a lengthy sentence but precluded evidence about the specific sentence he faced).

Our review of the record shows the court excluded reference to specific time that Norman might face if convicted, while including numerous statements by detectives that Norman faced significant punishment for Milam's murder. For example, the jury heard the recording of detectives tell Norman that he was "looking at murder in the first-degree. You're the one looking at the time" and he would "spend the rest of [his] days behind bars," "go to prison," and "we're talking about your life." Ex. 254 at 20, 9, 32.

The jury also heard other evidence where detectives pressured Norman to tell the truth. They repeatedly confronted him with the DNA evidence linking him to Milam's murder. And detectives told Norman that Duece 8 members owned the prison system. The record demonstrates that Norman's redacted September 2007 statement presented a fair view of Norman's interview with detectives and their efforts to pressure him to provide information on Milam's murder. Exclusion of the detectives' reference to specific incarceration time would have added little to the already ample evidence on the pressure used by detectives.[16]

We conclude the court acted well within its discretion in redacting portions of Norman's statement that referred to specific confinement time. In addition, any error

[16] The court admitted 84 out of the 100-page interview.

here was harmless.[17] As discussed above, overwhelming evidence supports Norman's guilt.

Mistrial Motion

Norman next argues that the audience applause following the prosecutor's rebuttal in closing argument warranted a mistrial. The State counters that Norman shows no abuse of discretion by the court in denying the motion for mistrial made after some spectators applauded following the State's rebuttal argument.

We review the denial of a mistrial motion for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In determining whether a trial court abused its discretion in denying a motion for mistrial, we 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 ensure that the defendant will be tried fairly. Johnson, 124 Wn.2d at 76. In determining the effect of an irregular occurrence during trial, the court examines "'(1) its seriousness; (2) whether it involved cumulative evidence;[18] and (3) whether the trial court properly instructed the jury to disregard it.'" Johnson, 124 Wn.2d at 76 (quoting Hopson, 113 Wn.2d at 284).

At the end of the State's rebuttal argument, some spectators applauded. The

[17] State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010) (an erroneous ruling excluding evidence requires reversal only if there is a reasonable probability that the evidence would have changed the outcome of the trial).

[18] The record shows spectator applause occurred only once.

record shows the trial court immediately responded by chastising the spectators in the jury's presence, "Excuse me, excuse me, we cannot have that in a court of law." 21 VRP (June 16, 2009) at 2459. The court then excused the jurors for the day. Norman's counsel moved for a mistrial based on the applause but acknowledged he did not "know what effect that [the applause] has" and expressed concern over "an undue effect on the jury." 21 VRP (June 16, 2009) at 2461-62.

Our Supreme Court has repeatedly deferred to trial court determinations on the prejudice to a defendant from a courtroom irregularity.[19] And other state courts have rejected such arguments under circumstances similar to the spectator applause here.[20] The trial court was in the best position to evaluate the applause's impact on the jury. The court stated, "I assume the jury is going to figure out that any of the applause likely were on behalf of the victim in this case, and so that's not something that would be surprising for them to hear." 21 VRP (June 16, 2009) at 2462. The court scolded the audience in the jury's presence, clearly indicating the impropriety of the applause. The court also commented it had "absolutely no doubt that [the jury will follow the court's instructions] and [the outburst] will not affect their deliberations."[21] 21 RP 2463. And

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[19] Johnson, 124 Wn.2d 57 (audience outburst calling State's witnesses gang members did not require a mistrial); State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) (spectators' attempts to intimidate witnesses, seen by some jurors, did not require a mistrial).

[20] See, e.g., Hafer v. People, 177 Colo. 52, 492 P.2d 847 (1972) (no abuse of discretion in failing to grant mistrial because of audience applause); Bandana Trading Co. v. Quality Infusion Care, Inc., 164 Cal. App. 4th 1440, 1446, 80 Cal. Rptr. 3d 495, 499 (2008) (applause by juror during reading of jury instructions did not deny defendant a fair trial).

[21] Before closing remarks, the court instructed the jury to consider only the

Norman's counsel candidly acknowledged uncertainty over any impact the applause had on the jury. The record fails to establish Norman was so prejudiced that nothing short of a new trial could ensure him a fair trial. Accordingly, we conclude the trial court acted well within its discretion in denying the mistrial motion after consideration of the Johnson factors.[22]

Restitution Order

Norman argues that because Milam was killed while committing the crime of felony escape, the court improperly ordered him to pay restitution to the crime victims compensation (CVC) program for the amounts it paid to Milam's family. The State contends the court properly ordered restitution because Norman shows no nexus between Milam's alleged crime and his murder.

The authority to order restitution is purely statutory. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). The CVC act assures a base level of compensation for victims of crime. Haddenham v. State, 87 Wn.2d 145, 148, 550 P.2d 9 (1976). The statute is remedial in nature, and any doubt should be viewed in favor of the victim of the crime. Sebastian v. Dep't of Labor & Indus., 95 Wn. App. 121, 974 P.2d 374 (1999). In a criminal case, the sentencing court has the authority to order restitution when a victim is entitled to benefits under the CVC act. RCW 9.94A.753(7).

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evidence admitted at trial during their deliberations and not allow emotions to overcome their rational thought process. The court also instructed the jury not to base their decision on sympathy, prejudice, or personal preference. We presume the jury follows the court's instructions. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

[22] Because no error occurred as discussed above, Norman demonstrates no cumulative error.

Determining the amount of restitution lies within the sound discretion of the trial court. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Thus, a trial court's decision to award restitution will only be overturned upon a clear showing of abuse of discretion, that is, discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The subsection relied on by Norman provides in part[23]

> [N]o person or spouse, child, or dependent of such person is entitled to benefits under this chapter when the injury for which benefits are sought, was
>
> . . . .
>
> (b) Sustained while the crime victim was engaged in the attempt to commit, or the commission of, a felony . . . .

RCW 7.68.070(3)(b).

According to Norman, subsection (3)(b) bars restitution paid to Milam's family because Milam was committing felony escape from a federal halfway house when he was killed. Although Norman argues the State, defense counsel, and the trial court agreed that "Milam was committing a felony: escape from a federal work release program," we are not bound by an erroneous concession. Appellant's Br. at 44. State

[23] Norman also relied on former RCW 7.68.070(3)(c) (2008) below but abandoned subsection c on appeal. That subsection provides in part: "[N]o person or spouse, child, or dependent of such person is entitled to benefits under this chapter when the injury for which benefits are sought, was [s]ustained while the victim was confined in any county or city jail, federal jail or prison or in any other federal institution, or any state correctional institution maintained and operated by the department of social and health services or the department of corrections, prior to release from lawful custody; or confined or living in any other institution maintained and operated by the department of social and health services or the department of corrections."

v. Knighten, 109 Wn.2d 896, 901-02, 748 P.2d 1118 (1988) (court not bound by erroneous concession).

Our review of the record shows that Norman failed to establish that Milam was committing felony escape when he was killed. Norman's brief opposing restitution stated in part:

> The defense shows that at the time of his death, Terrell Milam had escaped from Pioneer Fellowship House, a federal halfway facility where he had been committed for a probation violation. Therefore at the time he was killed, Milam had or was in the process of committing the felony crime of escape from a facility where he had been placed in violation of both his state and federal supervision.
>
> . . . .
>
> . . . . [T]he defense maintains that Terrell Milam was engaged in the federal crime of escape at the time of his death, which was a felony by reason of his being absent without permission from the federal institution where he was being housed in connection with a prior conviction.

(Footnotes omitted.)

To support its restitution request, the State presented the affidavit of the crime victims unit supervisor for the CVC program of the Washington Department of Labor and Industries. She testified, "Available information at the time of adjudication from Department of Corrections indicated that Mr. Milam was in violation of parole, but that was not deemed a felony crime." And in response to defense counsel's request for additional information, she explained:

> At the time this claim was adjudicated on 10/20/2005, the program made contact with Seattle Police Department and the Department of Corrections in order to determine if Mr. Milam met the eligibility requirements of the Crime Victims Compensation Program. We specifically asked both entities if Mr. Milam was committing a felony crime at the time of his death. Seattle Police Department indicated that there was no evidence that he was in the commission of a felony crime at the time of his death. The Department of Corrections indicated that Mr. Milam was in violation of parole but that is not a felony crime.

And Norman also relies on 18 U.S.C. § 751(a). That provision provides in part:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate judge, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both . . . .

(Emphasis added.)

The record does not establish that Milam was committing the crime of felony escape when he was killed. The Department of Labor and Industries determined after careful review that Milam's family was entitled to benefits because Milam was not committing felony escape when he was killed. And the above quoted code requires a showing that the escape must be from custody or confinement on a felony charge or any criminal conviction. Norman presents insufficient evidence to demonstrate the trial court abused its discretion in ordering restitution to Milam's family.

Statement of Additional Grounds (SAG)

Norman's SAG presents the same arguments about the gang affiliation evidence that are discussed in his appellant briefs. Therefore, we decline to address further this contention.

Norman next argues a confrontation clause violation occurred when Detective Takemoto testified to statements by Justice that Justice saw Norman at "the spot" on the night of the murder and rode in the car with Norman. But even assuming an error, Burk and Norman gave the same testimony. Any error was harmless.

Norman next argues the court violated his confrontation rights by preventing his counsel from cross-examining Anderson about the details of the reduction in prison time he would receive for his cooperation. The portion of the record cited by Norman fails to support this contention.

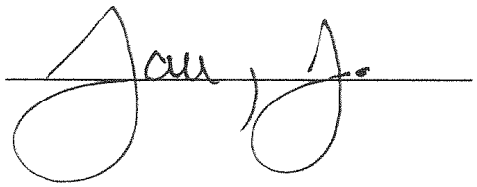
Norman next argues the court erred by failing to give a limiting instruction regarding the use of gang evidence. But our review of the record shows that the court gave such an instruction.

Norman also argues that the State relied on perjured testimony from Anderson and Detective Cobane about the deal Anderson would receive for testifying. The record fails to support this contention. And Anderson acknowledged he was testifying in exchange for a reduction in prison time.

Norman also argues that portions of the State's closing argument constitute prosecutorial misconduct. The record shows no objection to the challenged argument. And the argument is neither flagrant nor incurable.

CONCLUSION

Because (1) the gang affiliation evidence established witness bias, (2) any confrontation clause violation was harmless, (3) the court properly redacted confinement time, and (4) the audience applause warranted no mistrial, we affirm Norman's judgment and sentence. In addition, Norman's supplemental assignments of error are without merit. And because the trial court properly ordered restitution, we affirm the restitution order requiring Norman to reimburse the CVC fund.



WE CONCUR: