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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

TERRENCE MILLER,)

Defendant.)

No. 19-1-00773-31
00773-31

DEFENDANT'S MOTION TO EXCLUDE
EVIDENCE ITEMS 3-12 FOR LACK
LACK OF FOUNDATION

I. MOTION

COMES NOW the Defendant, Terrence Miller, through his counsel, Laura Martin and Frederic Moll, and moves this Court to exclude Evidence Items 3-12 as the fatal break in the chain of custody regarding these evidence items render it impossible for the State to lay the necessary foundation for their admissibility. Further, the protection of the confrontation clause as interpreted through Crawford v. Washington, 541 US 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and its progeny precludes the State from rehabilitating these deficiencies in the chain of custody issues. This is so because the detectives are deceased, and their reports constitute testimonial hearsay and are not admissible.

ORIGINAL

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Respectfully Submitted on this 12 day of October, 2020.

Laura Martin

Laura Martin, WSBA# 32897
Frederic Moll, WSBA#36979
Attorneys for Mr. Miller

II. DECLARATION

I am an attorney licensed in the State of Washington. I represent the accused, Terrence Miller, and make this declaration in that capacity. The following are facts, designated as true and accurate by undersigned counsel.

1. Mr. Miller is charged with First Degree Murder for the murder of Jody Loomis.
2. On August 23, 1972, [REDACTED] found Ms. Loomis lying on the ground in the woods off Penny Creek Road.
3. Ms. Loomis was still alive but had been shot in the head. She was mostly naked except for her underpants, a pair of socks, and a pair of boots. Her jeans and the top she had been wearing were next to her, and she was clutching her bra in her hand. Mr. [REDACTED] picked up her body and took her to Steven's Memorial Hospital in Edmonds where she was pronounced dead on arrival.
4. Detective Cook of the Snohomish County Sheriff's office was called to the scene. While there he collected a bike clamp alleged to have been worn around Ms. Loomis' pant leg, a dime that had been in her pocket, in addition to some blood and debris.
5. As there was no morgue at the hospital, Ms. Loomis' body was taken to an empty room located in the basement of the hospital.
6. At the time in Snohomish County there was no medical examiner, instead the county had a coroner system. The coroner was not a pathologist. Instead, the coroner would do basic

1 death investigation by responding to locations where a person had died and removing the
2 body, where necessary, to the Coroner's office for later examination by a pathologist.

3 7. On this night, deputy coroner Ken Christensen was called to the hospital. He had been with
4 the coroner's office since 1970 or 71. Mr. Christensen had no training in evidence
5 collection. He learned on the job. He had never done a homicide investigation on his own,
6 however on this night no other coroners were available. He had been involved in 2 or 3
7 homicide investigations. None of those investigations involved an allegation of sexual
8 assault.

9 8. Mr. Christensen responded to the hospital in his work station wagon. While the wagon was
10 equipped with plastic gloves, sheets, and other items used in the collection of evidence,
11 these items were not used here.

12 9. Because this incident was clearly a homicide vs a natural death, officers were also called to
13 the hospital. Once at the hospital Mr. Christensen waited for the arrival of officers before
14 examining the body.

15 10. Detectives Lewis and Clausen arrived to the hospital and the three entered the room to
16 view the body.

17 11. Ms. Loomis' body was on a gurney with a sheet under her and one over the top of her.

18 12. One of the detectives lifted the sheet. Other than some jewelry, and a pair of glasses, Ms.
19 Loomis had on only a pair of underpants, tall socks, and a pair of boots. The boots had mud
20 and debris on them. Pink tape was adhered to her nipples in a crisscross pattern. The shirt
21 and jeans that were found by Walter Morris and Cathy Gogal were laying next to her on the
22 gurney.

23 13. When interviewed by the defense, Mr. Christensen believed that he had been wearing
24 gloves during the examination but could not be certain. The photographs taken at the time
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1 show that he was not. He explained that as DNA evidence did not exist as a concept in
2 1972 there was no particular concern regarding the transfer of DNA from one item to
3 another. The detectives were also not wearing gloves
4 14. At the direction of the detectives, Mr. Christensen removed Ms. Loomis' boots. When
5 interviewed by the defense, Mr. Christen recalled that the officers wanted the boots to
6 compare tread patterns at the scene. He also recalled that these boots were commonly worn
7 and in style for the time. He referred to them as waffle stompers.
8 15. The boots were placed into plastic bags that came from a cardboard dispenser in the room.
9 He believes that each boot was in its own bag. He did not seal or label the bag as that was
10 not his job.
11 16. Ms. Loomis' pants, jeans, blouse, and bra were each similarly packaged and given to the
12 detectives.
13 17. The detectives left the hospital with the evidence and returned to the scene.
14 18. There is no mention in any report of how the evidence items taken from the hospital were
15 sealed or labeled, where the evidence went from there, how it was stored, whether it was
16 logged or booked into a property room, whether any item of evidence was removed from
17 the bag to a drying room, who touched or had access to the evidence.
18 19. On August 24, 1972, Dr. Alex Robertson performed the autopsy on Jody Loomis' body.
19 Present during the autopsy were various deputy coroners including Mr. Christensen,
20 detectives from the sheriff's office, multiple prosecuting attorneys, and a photographer.
21 During that examination Dr. Robertson removed 2 bullet fragments from Ms. Loomis'
22 head, pubic hairs were removed from her body, and oral, anal, and vaginal swabs were
23 taken. Cytologic smears of the swabs were made for sperm identification. The hairs and
24 smears were provided to the prosecutor. The swabs and bullet fragments were provided to
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1 Detective Clausing. The underpants and pink nipple tape were removed and at least the
2 underwear was bagged but there is no mention of who took custody of these items of
3 evidence.

4 20. That same day, Detective Clausing delivered the swabs to Tacoma General Hospital for
5 microscopic examination.

6 21. No record exists of how these remaining evidence items taken from the autopsy were
7 bagged, sealed or labeled, where the evidence went from the autopsy, how it was stored,
8 whether it was logged or booked into a property room, whether any item of evidence was
9 removed from the bag to a drying room, or who handled the evidence.

10 22. On September 21st, 1972, Detective Clausing sent a letter to the FBI requesting
11 examination on the following evidence items:

- 12 a. (1) piece of lead taken from the brain of the deceased
- 13 b. (2) piece of lead taken from the scalp area of the deceased
- 14 c. (3) left shoe
- 15 d. (4) right shoe
- 16 e. (5) blouse
- 17 f. (6) bra
- 18 g. (7) Levi pants
- 19 h. (8) package of dirt from crime scene
- 20 i. (9) plastic bag containing blood from under head of deceased
- 21 j. (10) plastic bag containing blood and leaf debris

22 23. It appears that the items were examined on November 2, 1972. No name is listed on the
23 examination report. No log exists from the FBI as to who touched these evidence items,
24 whether gloves were used, or how or where they were stored.

25 24. No record exists of when and which items were returned from the FBI, nor what condition
they were in upon return, who accepted the items, nor where or how they were stored upon
return. Given that there is no information about whether and how these items were labeled,
there too exists the question of whether the items returned from the FBI are the same that
were sent to the FBI.

1 25. On April 12, 1974, there is a notation from a Detective Englebretson that he had contacted
2 property officer Espinoza who "located the sealed package back from the FBI." The note
3 does not identify how the items were sealed or what the items were in the sealed package.
4 The note also does not say where the items were located.
5 26. On February 18, 1999, with an eye toward getting evidence items processed for DNA,
6 Detective Joe Ward phoned the Snohomish County Sheriff's Office property room and
7 asked that the Loomis evidence be "re-located to the main property room" and for the
8 "evidence to be verified against the property logs".
9 27. On June 29, 1999, Detective Ward called again to the property room to verify if the
10 property logs had been located and if the evidence was still there.
11 28. In mid-February of 2000 Detective Ward discovered that the evidence was not at the main
12 property room.
13 29. No property logs regarding this case were located at that time.
14 30. On March 7, 2000, Detective Ward located the evidence. Rather than at the main property
15 room where he expected the evidence to have been kept, the evidence was located in a box
16 in the property room that was in the basement of the Mission Building. He does not recall
17 if the box was sealed or how the box was labeled. In the box Detective Ward located
18 evidence items #3, 4, 5, 8, 9 and 10. No other items of evidence were located. In his report
19 he indicated that "there might be more evidence in other storage areas, but without the
20 original property room file, locating them will be very difficult." Items 1,2, 6 and 7 were
21 not in the box. If there had been evidence items above 10, Detective Ward could not say as
22 there were no evidence logs.
23 31. The bullet fragments, bike clamp, dime, oral, anal, and vaginal swabs, smears from the
24 swabs, pubic hairs, pink tape, and underwear were all unaccounted for.
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1 32. Detectives Lewis, Clausing, and Englebretson are all unavailable to answer questions about
2 their investigation because they are deceased.
3 33. On September 9, 2020, Detective Kendra Conley was in the Evidence Control room
4 checking out a piece of evidence from this case. She was shown an old property logbook,
5 kept from the 1970's. The book was being transferred to archives. A thorough review of the
6 logbook revealed one entry related to this case. The entry is dated August 25, 1972 and
7 reads "1 ea. red/black mackinaw, & 1 ea. Bicycho, Kenko 10 speed." The bicycle that Jody
8 Loomis was riding the day she was shot was a Kenko 10 speed. A google search of a
9 red/black mackinaw shows a plaid, flannel style, long sleeved shirt. There is no evidence to
10 suggest that the mackinaw was related to the Loomis case.

11
12 I swear under penalty of perjury of the laws of the State of Washington that the foregoing is
13 true and correct to the best of my knowledge.

14 Signed in Everett, Washington on this 12 day of October, 2020.

15
16 *Laura Martin*

17 Laura Martin, WSBA #32897

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19 **III. LAW AND ANALYSIS**

20 Before a piece of evidence may be admitted it must be shown to be relevant. ER 402.
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22 "Before a physical object connected with the commission of a crime may properly be
23 admitted into evidence, it must be satisfactorily identified and shown to be in substantially the
24 same condition as when the crime was committed." State v. Campbell, 103 Wn.2d 1, 21, 691
25 P.2d 929 (1984).

1 Evidence that is unique and readily identifiable may be identified by a witness who
2 can state that the item is what it purports to be. 5 Karl B. Tegland, Wash. Prac S 402.31
3 (1999). However, where evidence is not readily identifiable and is susceptible to alteration by
4 tampering or contamination, it is customarily identified by the testimony of each custodian in
5 the chain of custody from the time the evidence was acquired. State v. Roche, 114 Wash.App.
6 424, 436 59 P.3d 682 (2002). This more stringent test requires the proponent to establish a
7 chain of custody “with sufficient completeness to render it improbable that the original item
8 has either been exchanged with another or been contaminated or tampered with.” United
9 States v. Cardenas, 684 F.2d 1528, 1531 (10th Cir. 1989). Factors to be considered include the
10 nature of the item, the circumstances surrounding the preservation and custody, and the
11 likelihood of tampering or alteration. Campbell, 103 Wash.2d at 21.

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13 A chain of custody may be sufficiently traced where circumstances demonstrate a
14 reasonable assurance the object proffered into evidence is the same object and is in the same
15 condition as of the time it was obtained. Kennedy v. State (Ind) 578 NE 2d 633, cert den
16 (US) 117 L Ed 2d 521, 112 S.Ct. 1299, remanded on other grounds, (Ind) 620 NE 2d 17; Hall
17 v. State (Miss) 546 So2d 673. The requirement of reasonable certainty is not met when some
18 vital link in the chain of possession is not accounted for, because then it is as likely as not that
19 the evidence analyzed was not the evidence originally received. People v. Williams, 48 Cal.
20 3d 1112, 259 Cal Rptr 473, 774 P2d 146.

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23 It is often noted that “A failure to present evidence of an unbroken chain of custody
24 does not render an exhibit inadmissible if it is properly identified as being the same object and
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1 in the same condition as it was when it was initially acquired by the party.” State v. DeCuir,
2 19 Wn.App. 130, 574 P.2d 397 (1978). What is critical to note about this remedy is that it
3 requires testimony of the person who collected it, to identify it, and to assert that it is in the
4 same condition as when it was collected.

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6 In DeCuir, for example, the defendant provided handwriting exemplars to a detective
7 who gave them to a handwriting expert for review. At trial, the exemplars were admitted over
8 the defendant’s argument for suppression due to the break in the chain of custody, but the
9 court denied the motion finding that the detective was present when the exemplars were made,
10 that the detective testified that no other exemplars were taken, and that the exemplars used at
11 trial were the same ones he collected.

12
13 In State v. Curry, 14 Wn.App. 775, 545 P.2d 1214 (1976), there existed numerous
14 inconsistencies regarding the seizure and handing of substances taken from the defendant.
15 Despite the discrepancies, “all officers who testified regarding the seizure agreed they were
16 taken from the defendant. In addition, the officer who actually seized the substances from the
17 defendant testified that the packet introduced at trial...was the same packet which he had
18 taken from the defendant on the day in question.”

19
20 The idea embodied in DeCuir and Curry is that technical or incidental violations in the
21 chain of custody can be overcome if the evidentiary item in question can be sufficiently
22 identified as being the same object in the same condition as when it was collected. In such
23 circumstances, the questions surrounding these minor problems with the chain of custody go
24 to weight, not admissibility. Functionally, this requires testimony from the person who
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1 collected it. Where there is a breach in the chain that calls into question the veracity of the
2 evidence or the persons who collected or analyzed it, the admissibility should be denied.

3 In State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002), the appellate court
4 overturned the conviction of the defendant based on a breach in the chain of custody. In that
5 case, it was discovered that a forensic scientist, who was tasked with testing evidence to
6 determine if it was a controlled substance, was actually removing and ingesting heroin from
7 evidentiary samples submitted to the lab. The defendant in that case, who had been convicted
8 of a methamphetamine charge, sought to have his conviction overturned and a new trial
9 ordered based on the fact that the forensic scientist in question had conducted the test that
10 determined the substance he possessed was methamphetamine. The State argued that this was
11 not a problem because the scientist [Hoover] only sampled the heroin evidence, and not the
12 meth.

13 The court did not find the State's logic convincing. Noting that Mr. Hoover had
14 indeed only ingested heroin, the court stated: "we do not agree that the chain of custody is
15 thereby rendered intact in the methamphetamine cases that Hoover handled. Hoover's
16 credibility has been totally devastated by his malfeasance...These events are serious enough
17 that a rational trier of fact could reasonably doubt Hoover's credibility regarding his
18 testing...and regarding his preservation of the chain of custody during the relevant time." Id.
19 at 437. The court found that the "evidence of Hoover's malfeasance is more than 'merely'
20 impeaching; it is critical, with respect to Hoover's own credibility, the validity of his testing,
21 and the chain of custody." Id., at 438.

1 A. Chain of custody regarding Evidence Items 3-12 is broken rendering the evidence
2 inadmissible for lack of foundation.

3 In this case, Detectives Lewis and Clausing took shoes, jeans, a blouse, and a bra into their
4 possession. They went from the hospital to the crime scene and purportedly removed the shoes
5 from their plastic bags to compare the tread to tracks. There is no information regarding what
6 happened to the evidence from there. It is clear that a logbook for keeping track of evidence
7 existed, as was revealed to Detective Conley just last month. However, there are no entries
8 regarding booking any of these evidence items into it.

9 Questions critical to the Court's determination regarding chain of custody cannot be
10 answered. Was the evidence sealed and if so how? Was it booked into evidence, placed into a
11 drying room, or did it sit in the detective's car for an unknown period of time? How was the
12 evidence labeled and by whom? Who handled the evidence, had access to the evidence, and where
13 was it stored? Was the storage secure? Importantly, these boots were commonly worn in 1972.
14 They were not unique or unusual Are the shoes and clothing items that are now in custody the
15 same as the items that were collected in 1972? This is especially concerning given that these boots
16 were thoroughly examined by law enforcement and the FBI, but no one noticed the stain until
17 many years later? This begs the question of contamination and whether the boots are those Jody
18 Loomis was in fact wearing when her body was examined at the hospital in August of 1972. Have
19 the items been changed, altered, or tampered with? Only Detectives Clausing and Lewis could
20 answer those critical questions.
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1 Various items of evidence in this case were sent to the FBI in September of 1973. No
2 information exists as to how the evidence was secured once there, who examined the evidence,
3 whether those individuals were wearing gloves or taking any precautionary measures to ensure no
4 transfer of DNA from other evidence items. These are all questions this court does not and cannot
5 know the answers to.

6
7 Giving the State the benefit of the doubt that the evidence that was in a "sealed package" in
8 1974, there are 26 years where this evidence is unaccounted for. The evidence was not where
9 Detective Ward expected it to be. And importantly, once the box of evidence was found, it was in
10 an unsealed condition and there were critical evidence items that were missing, and never found:
11 the bullets, underwear, pink tape, bike clamp, dime, anal, oral, and vaginal samples.

12
13 Because DNA evidence as a concept did not exist in 1972, these detectives were
14 unconcerned that their handling of the evidence in this case could potentially transfer trace
15 amounts of DNA from one item of evidence to another. There would be no reason to believe that
16 they were any more careful or cautious in securing the evidence after it came into their possession.
17 These are not minor or technical violations of the chain of custody, but rather, fatal flaws in the
18 chain that the State must establish. When the case law talks about the chain of custody going to
19 weight, not admissibility, it contemplates that these questions will be put to the detective who took
20 custody of the evidence, here detectives Lewis and Clausung. In that way, a jury would be able to
21 assess the answers to the many questions that exist about the improper handling of this evidence
22 and whether the items the State seeks to admit are in fact the same items and in the same condition
23 as when they were collected. That opportunity is precluded here. This is not a few months or even
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1 a few years where evidence was unaccounted for. This is nearly 3 decades. That critical items of
2 evidence are simply unaccounted for should give the Court grave concerns about the foundation
3 for this evidence.

4 Here there is a fundamental breach in the chain of custody, born not from mere
5 inconsistencies or technical deviations, but from a disregard for the proper handling of critical
6 evidence. Detectives Lewis and Clausing are the the only people who can verify the origin,
7 collection, seizure, storage, and transfer of these evidence items. They are not available to provide
8 testimony that would bridge this foundational gap, and that is fatal to the State's efforts to admit
9 this evidence.
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11 Even if some jurisprudential calculus existed that would somehow allow admissibility on
12 this record, the exclusionary rule should be applied because the defendant is unable to cross-
13 examine the Detectives regarding the many problems with the evidence collection procedures.
14 The axiom that such problems 'go to weight rather than admissibility' can only hold true if the jury
15 is actually allowed to fully consider the problems and hear from the witnesses and assess their
16 credibility when questioned under the crucible cross-examination; only then could the jury
17 determine what weight to give this testimony in light of the problems and inconsistencies already
18 noted.
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20 Here, of course, such consideration is impossible because these witnesses are deceased.
21 Allowing the State to admit such evidence while avoiding a true examination of the manner in
22 which it was collected would be an injustice and a violation of the confrontation clause.
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1 B. The Confrontation Clause bars the Detective's testimonial statements regarding their
2 collection of evidence.

3 In Crawford v. Washington, 541 US 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the
4 Supreme Court unequivocally asserted that out-of-court statements by witnesses that are
5 testimonial are barred, under the confrontation clause, unless witnesses are unavailable and the
6 defendant has had a prior opportunity to cross examine the witness, regardless of whether the
7 witness' statements are deemed reliable by the court.

8 In its decision in Crawford the Court left "testimonial" undefined however it did identify
9 the core class of testimonial statements with which the confrontation clause is primarily concerned:

- 10 1) *Ex parte* in-court testimony or its functional equivalent – that is, material such as
11 affidavits, custodial examinations, prior testimony that the defendant was unable to
12 cross-examine, or similar pretrial statements that declarants would reasonably expect
to be used prosecutorially
- 13 2) Extrajudicial statements ... contained in formalized testimonial materials, such as
affidavits, depositions, prior testimony, or confessions and
- 14 3) Statements that were made under circumstances which would leave an objective
15 witness reasonably to believe that the statement would be available for use at a later
trial.

16 Id. at 51-52.

17 Here, there is no question that these detectives' investigative reports were created for use at
18 a later trial. The primary purpose of their reports was to document and prove past events. It was a
19 written version of the officers' trial testimony. It does not matter under the Constitution, whether
20 the reports are reliable. In Crawford, the Court rightly pointed out that the Confrontation Clause
21 "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by
22 testing in the crucible of cross-examination." Crawford, 541 U.S., 61.

23 These witnesses collected the evidence that would later be used in a trial to convict Mr.
24 Miller. How that evidence was collected, sealed, transported, stored, and where many of the
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1 missing items went would have been inquired into on cross-examination had these witnesses been
2 available for testimony. Information contained in these reports is testimonial. Admission of these
3 reports where the defense cannot cross examine its authors violates Mr. Miller's right to
4 confrontation

5 Without Detective Clausung and Lewis' testimony, the foundation that is required for
6 admissibility of Items 3-12 cannot be met, and the evidence should be excluded.

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8 **IV. CONCLUSION**

9 For the reasons stated herein, evidence Items 3-12 should be excluded for lack of proper
10 foundation for admissibility.

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12 Respectfully submitted, this 12 day of October, 2020.

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14
15 *Laura Martin*
16 Laura Martin WSBA #32897
17 Frederic Moll WSBA # 36979
18 Attorneys for Mr. Miller