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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD LEE GRIFFIN,

Defendant and Appellant.

B234979

(Los Angeles County
Super. Ct. No. TA109162)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patrick Connolly, Judge. Affirmed as modified.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Thomas C. Hsieh, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Donald Lee Griffin (defendant) appeals from his convictions of murder and attempted murder. He contends that the trial court erred in denying his “*Faretta*” motion¹ to proceed in propria persona; in failing to give the jury an instruction on involuntary manslaughter; that the trial court abused its discretion in denying his motion for new trial based upon newly discovered evidence; and that the trial court imposed unauthorized sentences of seven years to life as to counts 2 and 3, rather than indeterminate life terms. Respondent agrees with defendant’s last contention as do we. The sentences as to counts 2 and 3 are modified but we find no merit to defendant’s remaining arguments and affirm the judgment as modified.

BACKGROUND

1. Procedural history

A four-count information charged defendant in count 1 with the murder of Dirk Jackson (Jackson) in violation of Penal Code section 187, subdivision (a).² Defendant was charged with the attempted willful, deliberate, and premeditated murders of Delana Moore (Moore) and Janice Jacobs (Jacobs) (counts 2 and 3), in violation of sections 664/187, subdivision (a). In count 4 defendant was charged with possession of a firearm by a felon in violation of section 12021, subdivision (a)(1).

The information alleged that in committing the crimes described in counts 1, 2 and 3, defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). As to counts 1 and 2, it was alleged that defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); defendant personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d); and defendant had served seven prior prison terms within the meaning of section 667.5, subdivision (b).

¹ See *Faretta v. California* (1975) 422 U.S. 806, 820-821 (*Faretta*).

² All further statutory references are to the Penal Code, unless otherwise indicated.

As to count 2, it was further alleged that defendant personally inflicted great bodily injury on Moore, within the meaning of section 12022.7, subdivision (a).

After a jury trial, defendant was found guilty as charged. The jury found true the firearm and great bodily injury allegations. On motion of the prosecution the allegations of prior convictions were dismissed.

The trial court denied defendant's motion for new trial and sentenced him to a total of 109 years to life in prison. As to count 1, the court imposed 25 years to life, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), with the remaining firearm enhancements to run concurrently. As to count 2, the court imposed seven years to life, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), with the remaining firearm enhancements to run concurrently. The court stayed the three-year great bodily injury enhancement under section 12022.7, subdivision (a). As to count 3, the court imposed seven years to life, plus 20 years for the firearm enhancement of section 12022.53, subdivision (c), with the firearm enhancement of 12022.53, subdivision (b), to run concurrently. As to count 4, the court imposed concurrently the middle term of two years. In addition, the trial court imposed mandatory fines and fees, ordered defendant to pay \$24,305.14 to the State Victim Compensation Board, and granted 517 actual days of presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

2. Prosecution evidence

On March 18, 2009, Moore and Jacobs were prostitutes working together out of the living room of Jackson's home. Jackson was Moore's pimp. Defendant arranged a meeting that morning and arrived alone in a Chevrolet Impala owned by defendant's ex-girlfriend, Jaynae Cole (Cole). Jackson was present but unseen, remaining in a back bedroom. After the women both agreed to have sex with defendant for \$150, defendant gave Moore the full amount which she took to Jackson in the back room. When defendant informed Moore that he carried a firearm, she took it from him and placed it in a basket in the living room. Moore and defendant then had sex while Jacobs remained in

the room. Jacobs began to have sex with defendant several minutes after he and Moore had finished. Moore remained and went in and out of the room.

After about 30 minutes Moore told defendant to hurry. Defendant replied, "Oh, I thought I get an hour," to which Moore said, "Your hour is almost up." Defendant then began acting "funny" and nervous and demanded his money back. He pulled on his pants, came toward Moore, where she stood in the hallway near the bathroom. When Moore refused to refund his money, defendant became "loud and crazy." She then offered to return half of the money, explaining to defendant he could not have all of it because he had climaxed. Defendant refused the offer and said that he intended to take all of it back. He then went into the living room and retrieved the gun from the basket. Defendant held the gun while screaming at Moore and Jacobs. The two women went into the bathroom where defendant followed them, waving and pointing the gun at them, screaming that he was going to kill them.

Moore testified she told defendant that she had no money on her, but would get it. He nevertheless prevented her from leaving the bathroom. Moore attempted to call Jackson on her cell phone, but defendant knocked the Bluetooth earpiece out of her ear making it impossible for her to complete the call. Jackson then came into the hallway. Moore watched through a crack in the bathroom door as the two men fought. Defendant was in the bathroom facing the hallway when Moore saw him point his gun toward the hall and fire twice. The first shot hit the wall heater next to Jackson. After the second shot hit Jackson, defendant ran to the living room and fired a third shot, hitting Moore in the face just below her right eye.

Moore was interviewed by detectives. A tape recording of the lengthy interview was played at trial. Among other things, Moore stated that the gun was fired while Jackson and defendant were "tussling."³

Jacobs testified that when Moore told defendant to hurry, he replied, "This is how bitches get killed." As defendant dressed, Jacobs telephoned her boyfriend while near the

³ During the interview, Moore spit out a bullet and handed it to one of the deputies.

front door. Defendant approached, took the telephone from her, and closed the front door. Moore and defendant began arguing after defendant demanded his money back. Jacobs was in the bathroom with Moore when defendant came to the door holding a black revolver which he pointed at both women. Jacobs testified that as soon as she saw Jackson appear in the hallway behind defendant, defendant turned, shot Jackson, then turned back and shot Moore. Defendant pointed the gun at Jacobs and fired just as she ducked. The bullet missed her. Jacobs ran out of the house and saw defendant near his car. When he again pointed the gun at her she ran across the street to her neighbors.

One of the neighbors, Mary Daniel, was on her porch when she heard gunfire. She testified that she saw Jackson come out of the house and fall on the grass. She then saw another man run out of the house and leave in a Chevrolet that had been parked on the street. Jacobs next came out screaming that someone was trying to kill her and “Call the police.” Jacobs then ran to Daniel’s house, screaming that someone had tried to shoot her in the head.

Another neighbor, Sean McDonald, testified that he went outside after hearing gunshots and saw a young man walking slowly toward his Impala automobile. The young man yelled something like, “F-- your boyfriend.”

Jackson suffered two gunshot wounds: one fatal wound to the chest and one nonfatal wound to the right leg. The medical examiner testified that he found stippling (pinpoint lesions) around the chest wound, indicating that the gun was likely within a few inches up to two feet away from Jackson when it was fired. There was no stippling or soot (gunpowder debris) found on the victim’s leg, suggesting that the gun was further away when that shot was fired.

Defendant was arrested a few weeks later at Cole’s residence. Police officers surrounded the house, detained Cole when she came out, and then called for defendant to come out of the house. After defendant surrendered, approximately 20 minutes later, inside the house officers found a loaded blue steel revolver inside the bag of a vacuum cleaner.

Crime scene investigators recovered two bullets from the wall heater outside the bathroom. Another bullet passed through the bathroom wall into a bedroom. Firearms expert and crime scene investigator, Los Angeles County Deputy Sheriff David Kim, testified that he conducted ballistics tests which showed that the gun recovered from Cole's house fired the bullets recovered. Deputy Kim explained the functioning of a revolver. He said that in order to fire the weapon the hammer must be pulled back prior to each trigger pull or every two trigger pulls, depending on the setting. The pressure required to fire this particular weapon was less than that required of most revolvers, but any action other than pulling the trigger, such as dropping the gun, would not result in an accidental firing.

At the crime scene Deputy Kim determined the trajectories of the bullet that struck the wall heater and the bullet that struck a wall of the bathroom. He determined that the bullet that struck the heater was fired from inside the bathroom, not from the hallway.

Defendant stipulated for purposes of count 4, felon in possession of a firearm, that he was a convicted felon.

3. Defense evidence

Forensic pathologist Harry Bonnell, M.D., reviewed the coroner's report and Moore's medical records. He testified that the stippling found around Jackson's chest wound and right arm indicated that the arm was slightly crossed in front, over the chest when he was shot. In Dr. Bonnell's opinion, the following facts, described in a hypothetical question, suggested that Jackson was shot during a struggle and that his right hand was near the gun when it was fired: Jackson's right hand tested positive for the presence of gunshot residue; the gun was fired from one inch to one foot from his chest; and the bullet travelled downward, from front to back and right to left, leaving stippling and three holes in his shirt. Dr. Bonnell also opined that the path of the bullet entering the leg was inconsistent with having been fired from an aimed gun.

Defendant testified that he did not see Jackson at the house when he arrived that day, and Moore told him that no one was there except the two women. He agreed to pay \$150 for sex with both women, payable \$75 up front and \$75 when he was finished.

Defendant told Moore about his gun, and asked whether the women were afraid of guns. Moore said she was not afraid and that she had a gun. Defendant handed her his gun, asking whether he would be “robbed” of the gun. She replied that he did not have to worry. Moore then went down a hallway to the back of the house. Defendant did not see where she put the gun. After defendant finished with Moore and had begun having sex with Jacobs, Moore walked around arguing with someone on the telephone, “messing up the mood.” Defendant noticed that Jacobs was acting shyly and asked her age. When she said she was 19, defendant lost interest because he did not “really deal with teenagers.” He told her, “I’m done, I’m good, I’m cool.” Moore told him to hurry because her boyfriend was coming to the house. Defendant replied, “That’s how people get killed,” meaning that conflict could occur when a boyfriend came home suddenly. Defendant then said, “I’m done.”

Moore nevertheless encouraged him to continue, telling him he could go into the back room. He again replied, “I’m done, I’m good.” When Jacobs demanded her money, defendant told her that because he did not finish he should not have to pay. This upset her. Defendant then went into the bathroom to clean up without his gun. Jacobs screamed that he owed her money. Moore tried to calm her down. When defendant asked Moore to let him out of the house, she and Jacobs started arguing about which one of them had the key. As they argued, defendant was by the sink in the back of the bathroom, with Jacobs behind him. Moore was also in the bathroom, standing in front of defendant.

Jackson then appeared in the doorway with a gun and said, “Nigger, break,” which defendant interpreted as a demand for his valuables. Defendant described the following struggle: feeling threatened and in danger, defendant instinctively grabbed Jackson’s hand as Jackson fired two shots, hitting the back wall; as they struggled for the gun, Jackson screamed, “Get the gun, get the gun”; defendant was able to wrest the gun away, but Jackson continued to attack him, attempting to retake the gun; and the gun “went off; that’s all.” Defendant admitted that after he took the gun away from Jackson he pulled the trigger once, shooting Jackson as Jackson advanced toward him. Defendant claimed

that although there were five gunshots in all, he fired just that once. He denied shooting at Jacobs or Moore.

After defendant fired the gun, Jackson gave up fighting and ran outside; defendant ran outside behind him, not knowing that Jackson had been shot. When defendant reached his car, he saw Jacobs running toward him screaming and a man coming around the corner in his direction. Frightened, he drove away.

Defendant admitted having four felony convictions between 2004 and 2007, and that he was on parole at the time of the shooting. His felony convictions included vehicle theft, possession of contraband (a shank) while incarcerated, and possession of narcotics for sale. He admitted owning the gun found in Cole's vacuum cleaner, and that he knew that as a felon on parole he was prohibited from carrying a weapon.

4. Motion for new trial

In support of the motion for a new trial, Gregory Washington (Washington) testified regarding his conversation with Moore after the shooting. He acknowledged having been previously interviewed by Gregory Williams (Williams), defendant's private investigator; that he was acquainted with Moore; and that he had met defendant while incarcerated. Washington testified that when he heard defendant talking about his case in jail, Washington volunteered that he had some knowledge about the case. The remainder of Washington's testimony consisted of evasive answers, denials, or assertions of his Fifth Amendment privilege.

Private investigator Williams, testified that he interviewed Washington in jail on May 12, 2011. Washington told Williams that he had dated Moore for awhile. When Washington asked Moore why she had no teeth she told him that she had some dealings with defendant and another female, during which defendant became upset and angry because he believed someone had taken his wallet. Moore told Washington that the other woman had snatched defendant's wallet. When defendant screamed that someone had taken his wallet and that he felt he was being set up, Moore's pimp came into the room, a tussle ensued, and Moore ran into the bathroom. Moore said that because defendant believed that the other woman gave the pimp the wallet, he started shooting at the other

woman, but hit Moore. Williams's report quotes Washington as saying, "[Moore] said 'if that bitch had not taken his wallet, none of this shit would have happened.'"

The trial court denied the motion.

DISSUSSION

I. *Faretta* motion

Defendant contends that the trial court erred in denying his *Faretta* motion, which he made during the jury instruction conference near the end of trial. Defendant also contends that the court's ruling resulted in a violation of his Sixth Amendment right to self-representation.

The Sixth Amendment right to counsel implies a right of self-representation if the defendant voluntarily and intelligently so elects. (*Faretta, supra*, 422 U.S. at pp. 820-821; *People v. Windham* (1977) 19 Cal.3d 121, 124 (*Windham*).) "When 'a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be.' [Citation.]" (*People v. Danks* (2004) 32 Cal.4th 269, 295, quoting *Windham, supra*, at p. 128.)

However, "in order to invoke an unconditional right he must assert it "within a reasonable time prior to the commencement of trial." [Citations.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 742; see also *People v. Lynch* (2010) 50 Cal.4th 693, 722-723 (*Lynch*).) When the motion is made during trial, self-representation is not constitutionally mandated by the Sixth Amendment, but merely a matter within the broad discretion of the trial court. (See *Lynch, supra*, at pp. 721-722; *Windham, supra*, 19 Cal.3d at pp. 124, 127-128.) "[A] reviewing court must give "considerable weight" to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made.' [Citation.]" (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353 (*Bradford*).) A trial court's "discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Although defendant acknowledges that his motion was made after all the evidence had been presented, he contends that the motion cannot be considered untimely because the trial court did not expressly deny it on that ground. We disagree. The trial court was not required to state the reasons underlying its decision, but only to establish a record sufficient to review the exercise of its discretion. (*Windham, supra*, 19 Cal.3d at p. 129, fn. 6; *Bradford, supra*, 187 Cal.App.4th at pp. 1354-1355.)

“Among the factors to be considered when ruling upon a defendant’s midtrial request for self-representation are [1] the defendant’s reasons for the motion, [2] the quality of defense counsel’s representation, [3] the defendant’s proclivity to substitute counsel, [3] the length and stage of the proceedings, and [4] the disruption or delay that might reasonably be expected to follow if the motion were granted. [Citations.]” (*Bradford, supra*, 187 Cal.App.4th at p. 1353.)⁴ We review the record not only for the trial court’s express consideration of such factors, but also for substantial evidence to support the inference that the court had them in mind when it ruled. (*Id.* at p. 1354.)

Here, the trial court expressly considered the first two factors cited in *Bradford supra*, 187 Cal.App.4th at page 1353. The court heard defendant’s explanation that defense counsel had rebuffed his efforts to communicate and provide input. Defendant felt that his counsel ignored him when defendant pointed out a mistake by the court, and defendant did not want the court to give an instruction regarding voluntary manslaughter. Defendant believed that he was not receiving a fair trial and that counsel was ineffective because he had predetermined defendant’s guilt. The trial court then considered the quality of defendant’s trial counsel’s representation. The court pointed out to defendant that counsel had, in fact, objected to the voluntary manslaughter instruction. The court observed that defense counsel had handled the trial very well and that the interaction

⁴ Defendant suggests that the court was required to conduct an inquiry into his education and competence. This was unnecessary, however, as the court had previously found defendant capable of self-representation when it allowed him to represent himself during the preliminary hearing. In addition, the court still had the questionnaire that defendant submitted at that time.

between defendant and counsel during trial was the most he had ever seen between attorney and client.

Defendant contends that his proclivity to substitute counsel did not support the denial of the motion. It is likely that the trial court found this factor significant. Early in the case defendant had objected to representation by appointed counsel, Mr. Bayne, and had been permitted to represent himself at the preliminary hearing. Defendant changed his mind once the matter was set for trial, one year later. When defendant reluctantly accepted Mr. Bayne's reappointment, the court commented that defendant had toyed with the court. Less than a week later, and twice during trial, defendant made motions under *People v. Marsden* (1970) 2 Cal.3d 118, showing a pattern of asking for new counsel whenever he disagreed with defense counsel's strategies. While we conclude that the trial court did not abuse its discretion, we note that this factor alone is not dispositive. (See *People v. Burton* (1989) 48 Cal.3d 843, 854.)

Defendant's contention that no significant disruption or delay would be caused by the substitution of his trial counsel lacks merit. Defendant's *Faretta* motion came just as the jurors, who had served 10 days, were waiting to hear their instructions and closing arguments. Furthermore, the motion was basically a reaction due to disagreement with the trial court's decision to give a voluntary manslaughter instruction. Under these circumstances, any time granted to defendant for preparation would be significant.⁵

Still, defendant has not demonstrated prejudice. The erroneous denial of a *Faretta* motion is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) Under that test, error is harmless unless it appears from a review of the whole record that it was reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (*Watson, supra*, at p. 836.) Defendant contends that arguing his case *might* have been advantageous because there were witness credibility issues and a defendant's self-defense argument was "strong." As respondent observes, defense

⁵ The trial court granted defendant's renewed motion after the jury was excused.

counsel made self-defense and credibility arguments to the jury and defendant does not claim ineffective assistance of counsel. There is no reasonable probability that the jury would have been more convinced by the same arguments made by defendant, an admitted drug dealer and parole violator who unlawfully carried deadly weapons, than his attorney. In sum, no abuse of discretion or prejudice has been shown.

II. Involuntary manslaughter instruction

Defendant contends that the trial court erred in refusing to instruct the jury regarding involuntary manslaughter. A trial court must instruct on lesser included offenses that are supported by substantial evidence. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) “Involuntary manslaughter is ordinarily a lesser offense of murder. [Citation.]” (*People v. Abilez* (2007) 41 Cal.4th 472, 515.)

“[T]here are three types of predicate acts that may underlie involuntary manslaughter: a misdemeanor, a lawful act, or a noninherently dangerous felony. All three acts require the same mens rea of criminal negligence. [Citations.]” (*People v. Butler* (2010) 187 Cal.App.4th 998, 1012.) Defendant contends that substantial evidence supported a theory that the gun was fired accidentally after defendant brandished the gun or committed an assault and battery upon Jackson.

Defendant’s contention ignores defendant’s testimony in which he admitted that the gun went off twice during the struggle and he was then able to take the gun away from Jackson. After he acquired the gun defendant pulled the trigger and shot Jackson as Jackson came toward him. No involuntary manslaughter instruction is required when the evidence shows that the defendant followed an accidental shooting with an intentional shooting. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 588; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.)

In any event, we agree with respondent that defendant was not harmed by the absence of an involuntary manslaughter instruction. Where the jury resolves the factual issue against defendant under properly given instructions, any erroneous failure to instruct on a lesser included offense is not prejudicial. (*People v. Cook* (2006) 39 Cal.4th 566, 597.) Here, the information alleged that defendant personally and intentionally

discharged the firearm that caused Jackson's death, in addition to doing so while attempting to kill Moore and Jacobs. The trial court instructed the jury that to find the allegation true as to each crime, it was required to find that defendant personally discharged the firearm and intended to discharge the firearm in the commission of each offense. In finding the allegation true, the jury necessarily rejected the claim that the gun went off accidentally. Involuntary manslaughter is not committed by brandishing a weapon and then intentionally shooting the victim. (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1145.)

III. New trial motion

Defendant contends the trial court improperly denied his motion for a new trial based on the newly discovered evidence: Washington's statement that Moore told him that Jacobs had taken appellant's wallet prior to the shooting, which gave rise to the "tussle" with Jackson that resulted in Jackson's death. Defendant also contends that the ruling resulted in a denial of his constitutional rights to a fair trial and due process of law.

A defendant may move for a new trial based upon newly discovered material evidence. (§ 1181, subd. (8).) "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." [Citations.] (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) In ruling on a motion for new trial based on newly discovered evidence, the trial court may resolve credibility issues and determine the materiality of the evidence. (*Id.* at p. 329.)

The trial court found that Washington's testimony was a "roll backwards" and that his statements to Williams did not undermine the credibility of Moore or Jacobs and created no material conflict with any of the evidence given at trial. Defendant contends that Washington was more believable than the two women. Defendant argues that Washington's statements would render the testimony of Moore and Jacobs less credible, bolster defendant's believability, and strengthen his theory of the case. We find no abuse of discretion. "[N]ewly-discovered evidence which would tend merely to impeach a

witness is not of itself sufficient ground for granting a new trial. [Citations.]” (*People v. Long* (1940) 15 Cal.2d 590, 607-608.)

IV. Sentencing error

Defendant contends that the terms imposed on counts 2 and 3 were unauthorized. Respondent agrees. The trial court sentenced defendant to consecutive terms of seven years to life in prison on each count. The only authorized punishment for attempted willful, deliberate, and premeditated murder is life in prison, with the possibility of parole. (§ 664, subd. (a).) Although the minimum parole eligibility period for a life term imposed under section 664, subdivision (a), is seven years, the seven years are not part of the sentence. (*People v. Campos* (2011) 196 Cal.App.4th 438, 447-448; § 3046, subd. (a)(1).) Thus, the trial court should not have imposed seven years to life or included it in the total determinate time imposed.

Respondent asks this court to correct the sentence. Defendant asks that we vacate the sentence on counts 2 and 3 and remand for resentencing. As the error presents a pure question of law, it is correctable without remand. (See *People v. Smith* (2001) 24 Cal.4th 849, 852-853; § 1260.) We modify the judgment accordingly. (See, e.g., *People v. Thiessen* (2012) 202 Cal.App.4th 1397, 1406.)

DISPOSITION

The consecutive life sentences imposed as to counts 2 and 3 are modified to be consecutive indeterminate life terms with the possibility of parole, without specification of the minimum parole eligibility period as to each count, the enhancements remain the same as originally imposed, and the sentences as to counts 1 and 4 are unchanged. The total determinate portion of the sentence is thus 95 years, not 109 years. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to send a certified copy of the same to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST