

NO. 35359-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL EUGENE PEARSON,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state's violation of the mandatory joinder rule requires dismissal of the charges.

2. The court's improper exclusion of relevant evidence denied appellant his right to present a defense.

3. The court's improper exclusion of bias evidence denied appellant a fair trial.

4. Ineffective assistance of counsel denied appellant a fair trial.

5. Cumulative error denied appellant a fair trial.

6. The court's modification of appellant's final, valid, and fully served sentence on his 2000 conviction of custodial assault violated double jeopardy.

Issues pertaining to assignments of error

1. Appellant was charged with second degree felony murder predicated on burglary following the reversal of his conviction for felony murder predicated on second degree assault. Where the current charge was based on the same criminal incident, and the state knew of the facts relevant to the burglary allegation when the original information was filed, does the state's violation of the mandatory joinder rule require that the

current charge be dismissed, notwithstanding the decision in State v. Gamble, ___ Wn. App. ___, 155 P.3d 962 (2007)?

2. Where evidence offered by the defense was relevant to rebut the state's evidence on unlawful entry, and there was no compelling state interest in excluding the evidence, did the exclusion deny appellant his right to present a defense.

3. Did exclusion of evidence that a key prosecution witness's crimes went unpunished, offered to show the witness's bias and motive in testifying for the state, violate appellant's constitutional right to confrontation?

4. In opening statement, defense counsel promised the jury that appellant would testify, explaining what really happened on the night in question and contradicting the state's version of events. At the time he made this promise, however, counsel had not yet decided whether to call appellant as a witness. He ultimately advised appellant not to testify, and appellant followed that advice. Where counsel's broken promise unnecessarily called attention to appellant's decision not to testify and created the impression that the jury had no choice but to believe the state's story, was appellant denied effective assistance of counsel?

5. Where it is reasonably likely trial error, individually and cumulatively, materially affected the jury's verdict, is reversal required?

6. Appellant was sentenced on a custodial assault conviction in 2000. The court imposing the sentence ordered that it be served concurrently with the sentence appellant was serving on the original felony murder conviction. Appellant fully served the custodial assault sentence before his murder conviction was reversed. Did the current sentencing court's modification of that final, valid and completed sentence, by ordering that it run consecutively to the murder sentence, violate double jeopardy?

B. STATEMENT OF THE CASE

1. Procedural History

On May 19, 2000, appellant Russell Pearson was convicted by jury verdict of second degree felony murder predicated on assault and of unlawful possession of a firearm. CP 10, 12. The murder conviction was subsequently reversed in light of the Washington Supreme Court's decisions in In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), and In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). CP 40-45.

On remand, the Pierce County Prosecuting Attorney charged Pearson by amended information with second degree intentional murder, second degree felony murder predicated on residential burglary or second degree burglary, and first degree assault, alleging that Pearson or an

accomplice was armed with a firearm at the time of the offense. CP 53-55; RCW 9A.32.050(1)(a); RCW 9A.32.050(1)(b); RCW 9A.36.011. The amended information also included the firearm possession for which Pearson had been convicted in 2000. CP 53-55. The court subsequently entered an order clarifying that the firearm conviction had not been reversed and was therefore not part of the new trial. CP 137-38.

Pearson moved to dismiss the remaining charges on double jeopardy and mandatory joinder grounds. CP 56-96. The Honorable John A. McCarthy dismissed the first degree assault charge, finding it was barred by double jeopardy. CP 119. The court denied the motion to dismiss the other charges, however, finding they did not violate double jeopardy and that it would be unjust to apply the mandatory joinder rule. CP 119-20.

The case proceeded to jury trial before the Honorable Frederick W. Fleming. The jury found Pearson not guilty of intentional murder but guilty of felony murder and found by special verdict that he was armed with a firearm. CP 245-47. The court imposed a standard range sentence of 215 months with a 60-month firearm enhancement. CP 276. Pearson filed this timely appeal. CP 287.

2. Trial testimony

Tammy Whitman testified that on January 7, 2000, she went with Russell Pearson to his friend Tim Knight's house. Pearson was working on his car, a yellow Volkswagen Rabbit, and they went to Knight's house to get some parts. They ended up staying the night. 5RP¹ 351-52, 354. When Whitman woke up the next afternoon, Tim was asleep in his bed, but Pearson was gone. She called Pearson, and he returned for her about an hour later. 5RP 352-53.

While Pearson was gone, a man walked into the house. He was scraggly looking, with long hair. He kept walking all around the house asking for Tim. 5RP 358. It was obvious the man was tweaking, and Whitman had difficulty understanding him. 5RP 358, 388. She said she was a friend of Pearson's, and the man left. 5RP 358.

After Pearson had returned and he and Whitman were in the garage getting ready to leave, the man, later identified as Rodney Klum, came back. 5RP 359. Klum demanded to know what Pearson was doing there, saying Tim did not want him there, and telling him to leave. He was acting weird, bouncing around, getting close to Pearson, and taking a fighting stance. 5RP 360, 390. Pearson kept telling Klum he did not want

¹ The Verbatim Report of Proceedings is contained in 12 volumes, designated as follows: RP—12/3/05 (motion to dismiss) and 12/13/05 (oral ruling); 1RP—8/1/06; 2RP—8/2/06; 3RP—8/3/06; 4RP—8/7/06; 5RP—8/8/06; 6RP—8/9/06; 7RP—8/10/06; 8RP—8/14/06; 9RP—8/15/06; 10RP—8/16/06; 11RP—9/15/06.

to fight, but Klum kept egging him on. Finally, Whitman heard someone mention guns, and both men retreated to their cars. 5RP 360-61. Pearson told Whitman to get in the car then backed his car up quickly and drove around the corner. 5RP 363. After driving away, Pearson stuck his arm out the window and fired a pistol into the air. 5RP 365. Whitman noticed that Pearson's lip was bleeding and he seemed upset. 5RP 365-66.

Whitman thought Pearson was taking her to a friend's house where she had been staying, but instead he drove to the home of his friend Jim Davis. 5RP 367, 370. Whitman and Pearson went inside, where Davis's family was watching a movie. Davis told Whitman to stay there, and he and Pearson left. 5RP 373-74.

Whitman testified that she saw Davis and Pearson leave, and neither was armed. She explained that when she was first interviewed by police about that night, she was addicted to drugs and very high on Ecstasy. 5RP 375. The detective had asked her, "was there a shotgun?" and she said she thought there was. 5RP 376. She had gotten clean since then, and her response had always bothered her. At the time of trial, she did not feel like she had seen a gun. 5RP 376-77.

According to Whitman, Davis and Pearson were gone about 30 to 45 minutes. 5RP 377. When they returned, Davis was wearing only boxers or shorts. 5RP 379. Davis, Pearson, and Davis's parents went into

another room, and Whitman heard shouting. 5RP 377. About 15 to 20 minutes later, she and Pearson left. Pearson drove his Volkswagen, and Whitman drove his other car. 5RP 380-81. They went to a friend's house, where Whitman stayed for the next week. Pearson stayed there for two to three days, but Whitman did not see him much during that time. She testified that he had pulled his car into a shed, where she believed he was painting it. 5RP 382.

Pearson was later stopped near Bellingham, driving a white Volkswagen Rabbit with no front license plate. 8RP 727. He gave four different names and was arrested for providing false information. 8RP 731. Police found two expended 12-gauge shotgun shells in his car. 8RP 733. He also had \$4,700 in cash. 8RP 733.

The state was unable to locate Tim Knight for this trial, and his testimony from the previous trial was read to the jury. 6RP 475. Knight testified that Pearson was at his house with a girl on January 8, 2000. 6RP 494, 496. Pearson was working on his car, and Knight, who had just finished a six-day rotating shift, fell asleep. 6RP 494, 497. Knight described Pearson as a trusted friend. 6RP 539.

When Knight woke up, he found the garage door closed and Pearson and his friend gone. 6RP 497-98. Knight then heard a knock at the door, and thinking it was Pearson, Knight opened the door to let him

in. A man he had never seen before stepped inside and asked where Klum was. 6RP 498. The man was agitated and kept asking where Klum lived. Although Knight knew Klum's address, he acted like he did not. 6RP 502. The man then pulled a shotgun out of his sweatpants, chambered a round, and pointed the gun toward Knight's feet and legs. He said he wanted to know where Klum was immediately, and Knight described how to get to Klum's apartment. 6RP 503. The man said Knight had better not be lying, fired a round into the floor, and left. 6RP 503.

Police later found a gunshot hole in Knight's floor, a spent shotgun casing in a trash basket, and shotgun pellets under the floor. 5RP 322, 324-27; 6RP 560-61.

The state presented testimony from three witnesses who were at Klum's apartment that evening. First, Jerry Kohl testified that he had been at Klum's apartment fixing a car for Klum. 4RP 122. Klum was not at home when he finished, and Kohl went inside to wait for him. 4RP 126. He sat in the kitchen talking to Matt Carr. 4RP 127. Klum's girlfriend was in the bedroom, and her son was watching television in the living room. 4RP 127. Klum returned to the apartment about 45 minutes later and walked straight to the bedroom. 4RP 129-30. Carr went to the bedroom to talk to Klum, then returned to the kitchen and told Kohl that

Klum had gotten into a fight and punched someone in the mouth. 4RP 131.

At some point, the telephone rang, and Kohl answered it. While he was on the phone, he heard a knock at the door, and Carr went to the door and opened it. Kohl was shouting to Klum that he had a phone call at the time Carr was answering the door. 4RP 131-32. Kohl could not see who was at the door and did not pay much attention until they came inside. 4RP 133. Kohl testified that he saw Pearson and Davis standing in the hallway and Carr standing at the door looking dumbfounded and confused. 4RP 135-37. He admitted on cross examination, however, that he did not really see the exchange at the door. 4RP 185.

According to Kohl, Davis first asked if Carr was Klum, and Pearson said no. Davis then asked if Kohl was Klum, and again, Pearson said no. Then, because Klum was not readily available, Pearson made the comment that someone was going to get shot in the leg or foot. 4RP 138, 144. Kohl told Davis and Pearson that there were kids in the house and it needed to be taken elsewhere. Neither responded to his comment. 4RP 144.

Kohl then heard the bedroom door open, and Davis pulled out a shotgun. 4RP 139. Pearson said, "That's him," and a pistol appeared in his hand. 4RP 140. According to Kohl, Pearson stood with his back

against the wall with his pistol in his hand, pointed toward the ceiling. 4RP 150. On cross exam, Kohl admitted that he testified at the previous trial that he did not pay much attention to Pearson, because Pearson “didn’t seem to have anything to be worried about, no weapon, no nothing.” 4RP 206. This trial was the first time Kohl ever testified that Pearson had a gun, and Kohl had never claimed in police interviews that Pearson had a gun. 4RP 208-10. He suggested that he did not remember about the gun at the previous trial because he would just as soon block the whole incident from his memory. 4RP 208.

Kohl could not see what was happening in the hallway from where he stood, and he moved into the living room to get a better view. 4RP 145-46. From there he saw Davis take two steps toward Klum, pointing the shotgun at Klum’s head. 4RP 146-47. Klum started moving down the hall toward Davis. 4RP 147. Kohl again told them it needed to be taken elsewhere, but no one heard him. 4RP 148. He saw that Klum had a paintball gun, which looked like a real gun. 4RP 148-49.

Kohl testified that Klum and Davis went back and forth, telling each other to drop the gun. On the third round, Davis put the gun to Klum’s neck and pulled the trigger. 4RP 150. Klum was dead before he hit the ground. 4RP 151. Davis and Pearson then ran from the apartment. 4RP 153.

Matt Carr also testified that he was at Klum's apartment on January 8, 2000. 5RP 401. According to Carr, Klum picked him up and drove him to the apartment. On the way there, Klum told him he had been in a fight at Tim's house where he had caught someone stealing out of the garage. Klum said he beat that person up and took some night vision goggles from him. 5RP 403.

At Klum's apartment, Carr sat in the kitchen talking to Kohl, while Klum was fighting with his girlfriend in the bedroom, when there was a knock at the door. 5RP 405-06. Carr asked Kohl if he was going to answer the door, and Kohl said no, because he had been answering it all day. 5RP 407. Carr testified that he opened the door, standing right in back of the door and pulling the door toward him. 5RP 407-08. He saw Davis and Pearson, and when he noticed that Pearson was bleeding, he thought about what Klum had told him. 5RP 407.

Carr testified that Davis asked for Klum, and when he leaned back to yell for Klum, Davis walked through the door. According to Carr, he did not invite the men inside; they just walked in. 5RP 409. On cross, Carr admitted that when he had opened the door like that before, people would enter without specifically being told to come in. 6RP 444. Moreover, Carr admitted that he never told Davis and Pearson to wait outside, and he never told them to get out once they came in. 6RP 444.

Furthermore, he had been to Klum's apartment approximately 100 times over the two months before this incident, and he had seen a lot of people come and go. It was not unusual for him to open the door and see someone he did not know, and it was not unusual for people to just come inside. He had opened the door for complete strangers and let them in a couple of times. 5RP 426-27.

Once inside the apartment, Davis started to pull a shotgun, and Carr made a move for him. Carr testified that Pearson then pulled a revolver on him. 5RP 410-11. He admitted on cross, however, that he had previously testified that Pearson never pointed a weapon or made an aggressive move toward anyone. 5RP 456-57.

According to Carr, he kept telling Davis there was a three year old in the apartment, and they could handle it another way. 5RP 414. He said they should take the fight outside. 5RP 459. Unlike Kohl, Carr testified that Pearson stayed in the doorway and did not say anything the whole time he was there. 5RP 428.

Klum came out of his bedroom about two minutes later, and Davis pointed the shotgun at him. 5RP 411. Although Kohl had testified that neither Davis nor Pearson mentioned missing night vision goggles, 4RP 161-62, Carr heard Davis ask Klum why he had beaten up his friend and taken the goggles. 5RP 411. Carr saw Davis pump the shotgun and heard

Davis and Klum telling each other to put the gun down. He then pushed Pearson out of the way, opened the door, and ran outside. 5RP 414. Carr ran down the stairs, and Davis and Pearson ran past him to the end of the parking lot. 5RP 416.

The third witness who had been present at the apartment was Tamie Hotchkiss, Klum's girlfriend. 4RP 268. Hotchkiss testified that she was standing right beside Klum, on the inside of the bedroom door, when he was shot. 4RP 270. Klum had come into the bedroom just moments earlier. He threw her Tim's cell phone and said he had just beaten someone up. 4RP 274. She and Klum then heard someone at the front door, and Klum stepped into the hall. 4RP 274. Hotchkiss heard Klum and another person talking, although she could not understand what they were saying. She then heard the gun go off and saw Klum fall. 4RP 275.

Klum had a paintball gun and a set of night vision goggles on his belt when he died. 5RP 316. A cell phone was found on the mattress in the bedroom. 5RP 319. Knight identified the goggles and cell phone as belonging to him. 6RP 513. He testified that he did not loan the goggles to anyone, but it was possible he allowed Pearson to use the goggles that night, and it would not be unusual for him to allow Pearson to use the goggles in the garage. 6RP 538-39, 543.

The medical examiner who investigated Klum's death testified that Klum died of a gunshot wound to the head. 7RP 608. Although Klum had controlled substances in his blood, they did not contribute to his death. 7RP 609. The type of injuries Klum suffered were common with a firearm shot at contact range with the head, and the medical examiner believed the muzzle of the weapon was directly touching the skin at the time of discharge. 7RP 596. An inadvertent or unplanned discharge of the weapon would produce the same result. 7RP 625. Thus, the wound was consistent with two people struggling over the shotgun, where the shotgun impacts the head and discharges. 7RP 620.

A firearm expert testified that a photograph of the wound taken by the medical examiner showed massive damage at the point of entry, consistent with a contact or near-contact wound. 4RP 243-44, 254, 262. The oblong shape of the wound could have resulted from the gun being fired at an angle, as if a shorter person had fired the gun to the head of a taller person. 4RP 263, 266. It could also have been the result of a struggle over the gun in which the injured party pulled the gun toward him. 4RP 266.

C. ARGUMENT

1. THE STATE'S UNTIMELY CHARGING OF OFFENSES RELATED TO THE OFFENSES ORIGINALLY TRIED REQUIRES DISMISSAL OF THOSE CHARGES.

Under Washington law, the state must charge all related offenses in a single information. State v. Dallas, 126 Wn.2d 324, 328-29, 892 P.2d 1082 (1995); State v. Anderson, 96 Wn.2d 739, 741, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842, 74 L. Ed. 2d 85 (1982); CrR 4.3.1. If the state fails to timely charge a related offense, the court must grant a defense motion to dismiss the untimely charge, unless "the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted." CrR 4.3.1(b)(3).

Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct, stemming from the same criminal incident or episode. CrR 4.3.1.(1); State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997). In this case, Pearson was charged, tried, and convicted of second degree felony murder based on second degree assault for the death of Rodney Klum. After that conviction was reversed, the state amended the information to charge second degree felony murder based on residential burglary or second degree burglary, for the same

death.² There is no question the new charge was based on the same criminal incident and is therefore a related offense.

The court below nonetheless denied Pearson's timely motion to dismiss the charge, applying the ends of justice exception to the mandatory joinder rule. CP 119-20. This decision was erroneous and must be reversed.

Appellant recognizes that this Court has held that the ends of justice exception is properly applied to permit trial on a related offense following reversal of a conviction based on In re Pers. Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2002). State v. Gamble, ___ Wn. App. ___, 155 P.3d 962 (2007); see also State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004) (Division One). This Court's decision in Gamble is not yet final but is subject to further review³, and the Washington Supreme Court has not weighed in on the issue. Appellant respectfully suggests that both Gamble and Ramos were wrongly decided.

The ends of justice exception may be applied only under extraordinary circumstances which are extraneous to the court's action or the regularity of its proceedings. Dallas, 126 Wn.2d at 333. In Gamble, this Court reasoned that in Address, the Supreme Court made the

² The state also charged second degree intentional murder based on the same incident, but Pearson was acquitted of that offense. CP 245.

³ Gamble filed a petition for review by the Washington Supreme Court on May 10, 2007. Court of Appeals Cause No. 34125-5-II.

“extraordinary decision” to go behind a facially valid judgment and the plain language of the statute on which it was based to determine the legislature’s intent when it enacted the statute. This “nearly unprecedented procedure” triggered the ends of justice exception to the mandatory joinder rule. Gamble, Slip Op. at 15; see also Ramos, 124 Wn. App. at 342.

The conclusion that the decision in Andress created extraordinary circumstances is based on an inaccurate view that the Supreme Court engaged in an about-face repudiation of its earlier decisions upholding assault as a predicate offense for second degree felony murder. But as the Andress court aptly noted:

[T]he court ... has [n]ever addressed, the specific language of the amended statute in connection with the argument again advanced in this case. This is not surprising, because the statutorily-based challenges in Harris, Thompson, and Wanrow were all brought by defendants convicted under the prior version of the second degree felony murder statute, former RCW 9.48.040. We are thus faced with a change in the language of the statute which has never been specifically analyzed in the context here.

Andress, 147 Wn.2d at 609. The Supreme Court’s proper interpretation of a statute and the vacation of invalid convictions do not constitute extraordinary circumstances. See State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996); State v. Darden, 99 Wn.2d 675, 679, 663 P.2d 1352 (1983)(“where a statute has been construed by the highest court of the

state, the court's construction is deemed to be what the statute has meant since its enactment"). The ends of justice exception therefore does not apply in this case.

Moreover, even if the prosecutor originally charged second degree felony murder based on second degree assault relying on prior Washington Supreme Court decisions rejecting application of the merger doctrine, those decisions did not prevent the filing of any related offenses. It is hard to find extraordinary circumstances where a prosecutor made a tactical choice to take the easier path of seeking a murder conviction without having to prove intent to kill, but failed to file related charges. The state here was certainly aware of the evidence supporting a charge felony murder predicated on burglary when it originally charged Pearson in 2000. The prosecutor's purposeful choice cannot be consider an extraordinary circumstance.

Finally, the ultimate injustice the court apparently sought to avoid in Gamble was the inability to hold a guilty party accountable for a crime as a result of enforcement of the mandatory joinder rule. Gamble, Slip Op. at 16; see also Ramos, 124 Wn. App. at 343. By its own terms, however, the mandatory joinder rule contemplates relieving a citizen of the duty of having to defend against a charge once he has already been tried for a related offense. CrR 4.3.1(b)(3). Accordingly, if the state were

allowed to claim that the mandatory joinder rule's application violated the ends of justice every time, as a result of the state's omission, there was no party left to answer for the charge, the exception would swallow the rule. The state could subject the defendant to successive prosecutions until it obtained its desired outcome. See State v. Russell, 101 Wn.2d 349, 353, 678 P.2d 332 (1984)(Mandatory joinder rule directed at protecting defendants from successive prosecutions based on essentially same conduct). Such a result would violate the explicit purpose of the mandatory joinder rule and truly defeat the ends of justice.

2. THE IMPROPER EXCLUSION OF RELEVANT EVIDENCE DENIED PEARSON HIS RIGHT TO PRESENT A DEFENSE AND TO CONFRONT A CRUCIAL STATE WITNESS.

Prior to trial, the state moved to exclude reference to items associated with a methamphetamine lab found in Klum's apartment, noting that these items were attributed to Kohl and not related to Klum's death. 1RP 38. Defense counsel objected. He pointed out that police had located more than enough evidence to charge Kohl with possession of a controlled substance with intent to manufacture, yet he was not charged with that offense because he agreed to cooperate with the murder investigation. The presence of methamphetamine-related evidence was

thus relevant to show Kohl's bias. 1RP 38-39. The court reserved its ruling. 1RP 39.

When the state then moved to exclude all evidence of Klum's drug dealings, defense counsel argued that evidence that Klum sold drugs from his apartment was relevant to rebut the element of unlawful entry. 1RP 40. He explained that Carr would testify that people came to the apartment at all hours, because Klum was dealing drugs, and he would routinely let people into the apartment who asked for Klum. 1RP 41-44. Evidence that Carr would have permitted Davis and Pearson to enter the apartment would tend to prove there was no unlawful entry. 1RP 44. The court reserved its ruling on this issue as well. 1RP 46.

Following Kohl's direct examination, defense counsel told the court that Kohl had said in his interview that Klum had invited him over to look at some methamphetamine oil because he wanted Kohl's help with it. Counsel again argued that it was important for the jury to know this was a drug house, with relaxed criteria for admitting people, because it was relevant to the defense theory of the case that there was an implied invitation to enter. 4RP 162-63. The court asked whether Davis or Pearson knew the apartment was a drug house, where people come and go. When counsel replied that they did not, the court ruled that the evidence was not relevant since it was not within their knowledge. 4RP 164.

Counsel also argued that Kohl's attempted manufacture of methamphetamine was relevant to show his bias, because Kohl was never charged with that offense. 4RP 163-64. The court repeated that it would agree if that was within Pearson's knowledge, but it was irrelevant otherwise. 4RP 165.

During Hotchkiss's cross exam, defense counsel again moved to admit evidence that Kohl was involved in methamphetamine manufacturing. He informed the court that the police had found a box of jars at the apartment and asked Hotchkiss about them. She said in a recorded statement that the jars belonged to Kohl, and he had brought them to the apartment. Counsel sought to ask Hotchkiss if she knew why Kohl was bringing jars to the apartment. 4RP 283. The court sustained the state's objection to the evidence, saying that since neither Davis nor Pearson had any idea about that issue, it was irrelevant. 4RP 284.

During Carr's cross examination, defense counsel informed the court that Carr had testified previously that Klum was probably dealing methamphetamine. Moreover, Carr had testified on direct in this trial that Kohl did not want to answer the door because he had been answering it all day. Counsel again sought permission to introduce evidence that people came to the apartment to purchase drugs and therefore the standards for allowing people to enter were not as stringent as they would be elsewhere.

5RP 419-20. Again, the state objected that the evidence was not relevant to why Davis and Pearson were there, and again the court sustained the objection. 5RP 420-21. Defense counsel made a further offer of proof that he had discovered through interviews and police reports that methamphetamine oil, a methamphetamine lab, mason jars, rock salt, muriatic acid, and tubing were found at the apartment. 5RP 421. The court repeated that none of that was within Pearson's knowledge. 5RP 422.

- a. **Evidence that drugs were sold at the apartment was relevant to rebut the element of unlawful entry, and exclusion of that evidence denied Pearson his right to present a defense.**

Both the state and federal constitutions guarantee a criminal defendant the right to present evidence in his own defense. U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the state's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest

in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).

The felony murder charge in this case was predicated on residential burglary or second degree burglary. CP 136. A burglary requires unlawful entry or remaining in a building. RCW 9A.52.025; RCW 9A.52.030. It was not enough for the state to prove that Davis and Pearson entered the apartment with the intent to commit a crime. A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. Unlawful presence and criminal intent must coincide for a burglary to occur. State v. Allen, 127 Wn. App. 125, 137, 110 P.3d 849

(2005) (reversible error for prosecutor to argue that jury could convict defendant of burglary if he entered building with intent to steal). Thus, to convict Pearson of felony murder as charged, the state was required to prove Pearson or Davis unlawfully entered or remained in the apartment with intent to commit a crime therein, and Klum was killed in the course of that crime. See CP 238 (Instruction 15).

A person enters or remains unlawfully if he is not then licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(3). The invitation, and its scope, may be express or implied. See State v. Douglas, 128 Wn. App. 555, 567, 116 P.3d 1012 (2005) (unlawful remaining occurs when person violates express or implied limits on license, invitation, or privilege).

The defense theory was that Carr's conduct when he answered the door constituted an implied invitation to enter the apartment. 9RP 830. Although Carr testified that he never expressly invited Davis and Pearson to enter the apartment, he also never told them to wait outside. 5RP 409; 6RP 444. Instead, when Davis asked for Klum, Carr leaned back and called for him, and Davis walked into the apartment. 5RP 409. Carr admitted that when he had opened the door in that manner in the past, people had entered the apartment without expressly being invited to do so. 6RP 444.

The state, on the other hand, maintained that Carr did not invite Davis and Pearson into the apartment, and it was unreasonable to infer such an invitation because Carr did not know Davis and Pearson and they had never been there before. 9RP 776-77, 787-88. The state argued that the jury could find, based on the jurors' life experiences, that Carr would not have invited complete strangers into the apartment. 9RP 789.

Evidence that Klum and Kohl were dealing drugs from Klum's apartment would have supported the defense theory of implied invitation. Since people, including strangers, were routinely admitted to the apartment to purchase drugs, it was more likely Carr responded to Davis and Pearson with an implied invitation to enter the apartment in this instance. Thus, the evidence excluded by the court tended to rebut the state's theory that the entry was unlawful.

The right to present evidence in one's own defense is a fundamental element of due process of law. Maupin, 128 Wn.2d at 924. The criminal defendant has "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"). It

follows that one must be allowed to present evidence to rebut or negate the state's proof as to an element of the crime charged. Thus, if the state presents evidence as to unlawful entry, as it must, Pearson must be permitted to present evidence to the contrary. Denying him this opportunity denied him a fundamental element of due process of law.

Because the proposed evidence satisfied the foundational requirement of minimal logical relevancy, it could be excluded only to further a compelling state interest. See Hudlow, 99 Wn.2d at 15-16. No compelling state interest was identified below, because the state argued and the court erroneously found that the testimony was irrelevant.

The court's basis for excluding the evidence was that Pearson and Davis did not know that drugs were bought and sold in the apartment and they did not go there for that purpose. 4RP 164; 5RP 420-21. If the evidence had been offered to show that Pearson expected to be invited into the apartment, the evidence would not have been relevant unless he knew it was a drug house. Instead, the evidence was offered to explain Carr's conduct, and the proper focus was on his knowledge and actions. It was more likely that Carr invited Pearson and Davis into the apartment, even though he did not know them, because he knew that strangers were routinely admitted to purchase drugs. The court's failure to understand this distinction led to its erroneous determination that the evidence was

irrelevant. See, e.g., State v. R.H.S., 94 Wn. App. 844, 848, 974 P.2d 1253 (1999) (court erroneously excluded defendant's testimony based on mistaken impression that defendant's actual knowledge of likelihood of harm was irrelevant to charge of second degree assault).

The trial court's erroneous evidentiary ruling violated Pearson's constitutional right to present a defense. This constitutional error is presumed prejudicial unless the state proves beyond a reasonable doubt that the error was harmless. Maupin, 128 Wn.2d at 928-29. The state cannot meet its burden here.

In Maupin, the defendant's first murder conviction was reversed because the jury was allowed to speculate that Maupin was guilty of felony murder based on rape, when there was no evidence of sexual intercourse. Following remand, Maupin was convicted again. That conviction was also reversed, because the trial court erroneously excluded evidence that the victim had been seen alive with someone other than Maupin the day after the state alleged Maupin kidnapped and murdered her. Maupin, 128 Wn.2d at 920.

In that case, the state had argued in closing that the evidence showed the victim was not kept alive for a period of time but had to have been killed right about the time she was abducted. Id. at 926. The evidence proffered by the defense would have directly contradicted, or at

least raised considerable doubt, as to the state's version of the crime. *Id.* at 926, 930. The Supreme Court held that, under the circumstances, it was impossible to conclude beyond a reasonable doubt that a reasonable jury would have reached the same result had the excluded evidence been admitted. The state therefore had not shown the error was harmless. *Id.* at 930. The Supreme Court noted it was mindful of the trauma a third trial would present to the victim's family. Nonetheless, it was also mindful of Maupin's right to a fair trial on this serious charge, and the significant trial error compelled reversal. *Id.*

Similarly, in this case, the excluded evidence would have raised considerable doubt as to the state's version of events. It was necessary for the state to prove Pearson was in the apartment unlawfully, and it attempted to do that by arguing there was no way Carr would have invited him in. Although defense counsel argued that allowing strangers to enter was the norm at this apartment, 9RP 830-31, that contention was too big of a stretch for the jury because, as the prosecutor strenuously argued, it was completely contrary to normal experience. 9RP 789. If, however, the jury had heard evidence that drugs were sold at the apartment, the jurors would understand that their personal experiences might not apply. They would have a basis for interpreting the evidence as suggested by the defense. Under these circumstances, it is impossible to conclude beyond a

reasonable doubt that the jury would have reached the same result if the excluded evidence had been admitted. The state cannot establish that the erroneous exclusion of evidence was harmless, and Pearson is entitled to a new trial. See Maupin, 128 Wn.2d at 930.

b. The court's improper exclusion of bias evidence denied Pearson a fair trial.

A defendant has a constitutional right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Although a trial court's decision to exclude evidence is reviewed for abuse of discretion, that discretion is limited by the defendant's constitutionally guaranteed right to confrontation. See State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A defendant's right to confrontation includes the right to impeach the state's witness with evidence of bias. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

In this case, the defense offered evidence that when the police responded to the report of Klum's death, they discovered a substantial amount of evidence relating to the production of methamphetamine in the apartment. Although there were clear indications that Kohl was connected to this evidence, he was never prosecuted for his involvement in any

methamphetamine-related offenses. 1RP 38; 5RP 421. Defense counsel argued that Kohl's favorable treatment in exchange for his cooperation in the murder investigation was relevant to establish his bias. 1RP 38-39; 4RP 163-64. The trial court excluded the evidence, however, finding it was irrelevant because Pearson did not know about the drug evidence. 4RP 165⁴.

A similar situation was presented in State v. Kimbriel, 8 Wn. App. 859, 510 P.2d 255, review denied 82 Wn.2d 1009 (1973). There, the Court of Appeals found it was prejudicial error for the trial court to deny the defendant the right to establish a key prosecution witness's bias. Kimbriel, 8 Wn. App. at 865-66. Kimbriel was charged with armed robbery and car theft. He testified that he had acted under duress from one of the other participants, Charles Kaiser, and that he had no advance knowledge that Kaiser had planned the robbery. Id. at 861. In rebuttal, the state called Kaiser, who claimed that Kimbriel had in fact been the chief engineer of the robbery and car theft. Id. at 862. Defense counsel attempted to impeach Kaiser with the fact that he had originally been charged with both robbery and car theft, but the robbery charge had been dismissed. The trial court sustained the state's objection to this

⁴ The court's ruling seems to relate to the defense argument regarding implied invitation. See § C.2.a above. Nonetheless, the court gave no other reason for excluding the evidence of Kohl's bias

impeachment, however. Id. at 862. In addition, the court instructed the jury not to consider the fact that Kaiser had received a deferred sentence on his plea of guilty to car theft when determining his credibility. Id. at 863.

In finding reversible error, the Court of Appeals noted that Kaiser, an active participant in the crime, was a crucial prosecution witness. Therefore, why he was allowed to plead to a reduced charge, why the greater charge was dismissed, and why he received a deferred sentence were legitimate areas of cross examination going to his motive in testifying for the state. Id. at 866. The defendant had a right to develop these matters, and the jury had a right to consider them in assessing the witness's credibility. Id.

In this case, as in Kimbriel, a crucial prosecution witness had received favorable treatment, in the form of criminal conduct going unpunished. Although Kohl was not a participant in the crime charged in this case, he was intimately involved with other criminal enterprises conducted in that apartment. The defense had a right to explore the fact that Kohl was never prosecuted for his crimes, as this related to his motive in testifying for the state, and the jury had a right to consider that evidence in assessing Kohl's credibility.

It is fundamental that a criminal defendant should be given great latitude in attacking the motive or credibility of a prosecution witness, whether by cross examination or through an independent witness. State v. Spencer, 111 Wn. App. 401, 408, 410, 45 P.3d 209 (2002), review denied, 62 P.3d 889 (2003). The court's exclusion of all evidence relating to Kohl's uncharged crimes violates this fundamental principal.

Because a defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses, any error in excluding such evidence is presumed prejudicial and requires reversal unless the error was harmless beyond a reasonable doubt. Johnson, 90 Wn. App. at 69 (citing Davis v. Alaska, 415 U.S. at 318). That presumption cannot be overcome in this case. As noted above, Kohl's testimony was crucial to the state's case. Only Kohl and Carr testified that they had seen Davis and Pearson in the apartment, and Carr testified that he left before Klum was shot. 5RP 414. Thus, it was imperative that the jury make an accurate assessment of Kohl's credibility. Defense counsel demonstrated that Kohl's account of the incident had been embellished since the last trial, establishing for example that Kohl had never before claimed to have seen Pearson holding a gun. 4RP 206, 208-10. It cannot be said that had the jury been presented with additional evidence attacking Kohl's credibility it would have reached the same

result. The court's erroneous exclusion of this evidence denied Pearson a fair trial, and reversal is required.

3. DEFENSE COUNSEL DENIED PEARSON EFFECTIVE REPRESENTATION BY PROMISING AND THEN FAILING TO DELIVER PEARSON'S TESTIMONY AS TO HIS INTENT.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). In this case, defense counsel's failure to deliver on a promise made in opening statement was a critical error in professional judgment which denied Pearson effective representation.

Courts look to the circumstances of the case to determine whether the failure to produce a promised witness constitutes ineffective assistance of counsel. In re Pers. Restraint of Benn, 134 Wn.2d 868, 898, 952 P.2d 116 (1998) (quoting United States v. McGill, 11 F.3d 223, 227 (1st Cir. 1993)). Here, during opening statement, defense counsel first told the jury

that much of the state's evidence would be undisputed. The evidence would in fact show that Pearson was at Knight's house when Klum showed up and attacked him, that Davis and Pearson went to Klum's apartment, that Carr and Kohl were in the apartment, and that Davis entered the apartment looking for Klum. 4RP 115-18. After noting that the state's theory was that Pearson was intent retaliating against Klum for the attack, Counsel informed the jury,

Mr. Pearson's story is markedly different. Mr. Pearson will testify and he will tell you that he was offended by the fact that he was staying at Tim Knight's house and that Tim Knight's property got taken while he was in control of Tim Knight's house, and his goal was to get that property back; that he spoke to Tim Knight about that, they got the directions, they were the wrong directions, and at that time Mr. Davis, you know, shoots the hole in Tim Knight's floor, and starts, you know, acting crazy. By the time they get to the house here, Mr. Pearson doesn't do anything, just sits in the doorway, stands in the doorway. He's not threatening anyone. He's not brandishing weapons at people. He is not saying violent or aggressive things. And then Mr. Davis makes his way down the hallway....

So, what this is really about, I think you will see, is that they went to get some property back; Mr. Klum is an aggressive person earlier in the day, beating people up, taking property; they want to get the property back. And what happens there is not something of intent on Mr. Pearson's part, but something that just got extremely out of control, and part of the reason is that you have two armed men having a confrontation in a hallway, and that's what leads to the shooting death of Mr. Rodney Klum....

Then, after that, Mr. Pearson and Mr. Davis, they split. They're freaked out. They're gonna get out of there. And then Mr. Pearson will explain to you his actions afterwards and why he behaved furtively. He was there and his friend just went off and shot somebody in the head, and he was freaked out by that. And he will explain to you why that happened.

4RP 118-20.

Despite his promise to the jury that Pearson would testify and explain why he went to Klum's apartment and why he behaved suspiciously after Klum was shot, counsel advised Pearson at the close of the state's case not to testify, and Pearson followed counsel's advice. 11RP 892, 899. Under the circumstances here, counsel's broken promise constitutes deficient performance.

Two aspects of counsel's representation must be considered. The first is counsel's initial decision to promise the jurors they would hear from Pearson, who would explain what really happened at the apartment and why. Second is counsel's mid-trial decision to advise Pearson not to testify. Taken alone, each of these decisions could fall within the realm of acceptable professional judgment. Together, however, they cannot be considered part of a reasoned trial strategy. See Ouber v. Guarino, 293 F.3d 19, 27 (1st Cir. 2002) (error in professional judgment for counsel to advise defendant not to testify after promising jury they would hear from her); Anderson v. Butler, 858 F.2d 16, 18-19 (1st Cir. 1988) (counsel's failure to call two expert witnesses promised in opening statement denied defendant effective representation).

In Ouber v. Guarino, the defendant was charged with drug trafficking. She testified at the first two trials on this charge, each of which resulted in a hung jury. Ouber, 293 F.3d at 22. At the third trial, defense counsel promised the jury during opening statement that it would hear from the defendant, who would contradict the prosecution witness and explain what really happened. Counsel asserted that the jury's ultimate decision would hinge on its determination of the defendant's credibility. Id. At the close of the prosecution case, however, counsel advised the defendant not to testify, and she followed counsel's advice. Id. at 24. In closing argument, counsel apologized for not putting on more of a case as promised. Id. at 23.

On habeas review, the First Circuit Court of Appeals held that counsel's conduct was constitutionally deficient. Id. at 30. The heart of the issue was counsel's broken promise that the jury would hear the defendant's story directly from the defendant. The court pointed out that neither the fact that counsel promised the defendant's testimony, nor the fact that counsel advised the defendant against testifying, was alone unacceptable. The combination of these two actions, however, was indefensible. Id. at 27.

When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A

broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.

Id. at 28. While recognizing that an attorney may need to wait until the state's evidence has been presented before deciding whether to call a witness, the court found it was inexcusable for defense counsel to have promised the jury at the outset that the defendant would testify, when the matter was not yet finally decided. *Id.* at 28-29.

Here, as in Ouber, defense counsel promised the jury an explanation from Pearson which would contradict the state's theory as to what happened and affect the jury's ultimate determination. Counsel then reneged on that promise, not because of some unforeseen change in the expected testimony, but because counsel had not yet made the decision whether to present Pearson's testimony at the time he made the promise. As in Ouber, this was a retrial and, although counsel did not represent Pearson in the initial trial, he knew what evidence to expect from the state. Counsel made it clear during the trial, however, that he was waiting until the state had presented most of its evidence to advise Pearson on testifying. 6RP 569; 7RP 626-27. This decision-making approach would not be unreasonable had counsel not also promised the jury Pearson would testify.

It is certainly possible that, on the eve of trial, a cautious lawyer may remain unsure whether a potential witness would be called to testify. And it may not be possible to make the final decision until the state's evidence unfolds. If such uncertainty exists, however, it is unreasonable for the lawyer to throw caution to the wind by promising that the jury will hear from that witness. See Ouber, 293 F.3d at 28. No legitimate trial strategy could have justified promising the jury Pearson's testimony, when counsel had no idea whether he would be able to keep that promise. See United States ex rel. Hampton v. Leibach, 347 F.3d 219, 258 (7th Cir. 2003) (nothing was to be gained from promising jury in opening statement that it would hear from defendant, only to renege on promise without explanation).

Counsel's unprofessional error in promising testimony which he ultimately did not deliver prejudiced Pearson's case. Pearson "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the

outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Pearson's intent in going to the apartment was crucial. In order to convict Pearson on felony murder as charged in this case, the state had to prove not only that Pearson and Davis were in the apartment unlawfully, but also that they went there with the intent to commit a crime. CP 238. The state's theory was that Pearson intended to retaliate against Klum for his earlier attack by assaulting him. 9RP 791. Defense counsel promised the jury that Pearson would testify that his only intent that evening was to recover Knight's property, for which Pearson felt responsible. According to counsel, Pearson would explain that, although Davis's actions got out of control, the intent was never to commit assault or theft. 4RP 118.

Little is more damaging than failing to produce important evidence promised in opening statement. Anderson, 858 F.2d at 17. And when it is the promise of testimony from the defendant which is reneged upon, that damage is particularly acute. Hampton, 347 F.3d at 257. Defense counsel here recognized the damaging potential of his blunder and attempted to address it in closing argument, saying,

At opening, I suggested you might hear from Mr. Pearson, and that didn't happen. So the only thing in front of you is the State's case. So the whole question is, did the State meet their burden? Instruction 3 tells you you can't hold it against Mr. Pearson or make any unreasonable, basically, inferences about his failure to

testify. You can't hold that against him, so I'm going to ask you not to.

9RP 804.

Rather than lessening the prejudice, counsel's backpedaling simply focused attention on the fact that Pearson had not testified. Had counsel not promised that he would, the jury could have been expected to follow the court's instruction not to draw any negative inferences from Pearson's decision not to testify. But instead, the jury was led to believe that Pearson had a story to tell which completely contradicted the state's version of events, and it would have the opportunity to choose between those two versions. In that context, because the jury never heard any explanation except the state's, Pearson's unexplained failure to take the witness stand likely gave the jury the impression that there was in fact no alternate version and the state's theory of the case was correct. There is a reasonable probability that counsel's critical error in professional judgment affected the outcome of the case, and reversal is required.

4. CUMULATIVE ERROR DENIED PEARSON A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors combined together denied the defendant a fair trial State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates

reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case, the trial court improperly excluded evidence relevant to rebut the state's theory on an element of the offense and evidence relevant to impeach the credibility of a crucial state witness. In addition, defense counsel rashly promised the jury testimony from Pearson which he ultimately failed to deliver. Although Pearson contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Reversal of his conviction is therefore required.

5. MODIFICATION OF PEARSON'S FINAL, VALID, AND FULLY SERVED SENTENCE ON HIS 2000 CUSTODIAL ASSAULT CONVICTION VIOLATED DOUBLE JEOPARDY.

At sentencing, the court below imposed a mid-range standard range sentence of 215 months, plus a 60 month weapon enhancement. 11RP 904. The state then noted that when Pearson was sentenced for custodial assault in 2000, the court ordered that 12-month sentence to be served concurrently with the sentence on the original felony murder conviction in this case. Since the sentence the current court was imposing was 30 months less than was imposed on the original murder conviction, the state asked the court to run the sentence consecutively to the sentence on the custodial assault, so that Pearson would not receive credit for time served on that conviction toward this homicide. 11RP 905. Although the custodial assault sentence had been served in its entirety before the original felony murder conviction was reversed, the court followed the state's recommendation and ordered that Pearson serve this sentence consecutive to the completed custodial assault sentence. 11RP 906.

The double jeopardy clauses of the state and federal constitutions prohibit modification of a final, valid, and correct sentence. State v. Hardesty, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996) (citing United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980));

U.S. Const., Amend. V; Wash. Const., art. I, § 9. There was no contention below and no indication in the record that Pearson's sentence on his 2000 conviction for custodial assault was anything other than a valid and correct sentence. The 2000 sentencing court was statutorily authorized to order the custodial assault sentence to be served concurrently with the sentence on the felony murder conviction. See Former RCW 9.94A.400(3)⁵ (recodified as RCW 9.95A.589(3)). There is no authority, however, for the current sentencing court to modify that valid and lawful sentence. See State v. Shove, 113 Wn.2d 83, 87, 776 P.2d 132 (1989) (superior court has no authority to modify sentence except as established by specific provisions of SRA); State v. Brown, 108 Wn. App. 960, 963, 33 P.3d 433 (2001) (same).

Furthermore, Pearson had fully served the custodial assault sentence imposed by the sentencing court in 2000. That court ordered that the sentence run concurrent with the felony murder sentence for which Pearson was incarcerated. The term "concurrent" means "[r]unning together; having the same authority; acting in conjunction; agreeing in the

⁵ That statute provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

same act or opinion; pursuit of the same course; contributing to the same event; contemporaneous.” Black’s Law Dictionary 291 (6th ed. 1990). Pearson served the custodial assault sentence together with the felony murder sentence. His incarceration contributed to the satisfaction of both sentences. His conviction on the original felony murder charge was not reversed until April 2005, almost five years after the 12-month custodial assault sentence was imposed. CP 40-45, 273. Thus, it is clear that the custodial assault sentence has been completed.

Since Pearson has fully served the custodial assault sentence, and the sentence was not under appeal, he has a legitimate expectation of finality in that sentence. See Hardesty, 129 Wn.2d at 312. “[T]he analytical touchstone for double jeopardy is the defendant’s legitimate expectation of finality in the sentence, which may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant’s misconduct in obtaining the sentence.” Id. (no legitimate expectation of finality where defendant obtains erroneous sentence by fraud). By ordering that the custodial assault sentence run consecutive to the felony murder sentence, the current sentencing court modified a final, valid, and fully served sentence. The order violates the double jeopardy protections of the state and federal constitutions, and it must be vacated.

D. CONCLUSION

The ends of justice exception to the mandatory joinder rule is not properly applied in this case, and the charges against Pearson should have been dismissed. The trial court's exclusion of relevant evidence denied Pearson his right to present a defense and to confront a crucial prosecution witness. Moreover, defense counsel's broken promise to the jury denied Pearson effective representations. These errors, individually and cumulatively, require reversal. Finally, the court's modification of Pearson's completed custodial assault sentence violated double jeopardy, and that order must be vacated.

DATED this 18th day of May, 2007.

Respectfully submitted,



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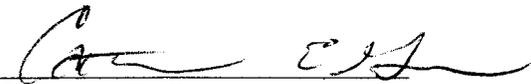
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant and Motion to Extend Time in *State v. Russell Eugene Pearson*, Cause No. 35359-8-II, directed to:

Kathleen Proctor
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Russell Eugene Pearson, DOC# 810747
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Monroe, WA 98272

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Catherine E. Glinski
Done in Port Orchard, WA
May 18, 2007


MAY 18 2007
PORT ORCHARD, WA
98366