

NO. 35681-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CECIL DAVIS, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 05-1-00201-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the trial court abused its discretion in denying defendant's motion for mistrial after it concluded that a witness's unsolicited remark did not render defendant's trial fundamentally unfair?
2. Has defendant failed to demonstrate that he received ineffective assistance of counsel?
3. Has defendant failed to demonstrate that the prosecutor engaged in misconduct much less that it was flagrant and ill-intentioned?

B. STATEMENT OF THE CASE.

1. Procedure

On January 12, 2005, the Pierce County Prosecutor's Office filed an information in Pierce County Cause No. 05-1-00201-0, charging appellant CECIL EMILE DAVIS ("defendant"), with one count of murder in the second degree (intentional). The charge pertained to the death of Jane Hungerford-Trapp, and the alleged crime date was April 13-14, 1996. CP 1-3. The information was later amended but it did not change the nature of the charge. CP 24.

Defendant brought a motion to dismiss for preaccusatorial delay and prosecutorial vindictiveness. CP 4, 5-22, 23. The motion was denied. CP 37-38. That ruling is not challenged on appeal.

The Honorable Kathryn J. Nelson presided over the trial. RP 103. There was a motion for mistrial during the middle of the trial based upon a witness's volunteered remarks on matters that she had been instructed not to discuss. RP 711-714. The court denied the motion and later entered a written memorandum setting forth its reasons. RP 711-714; CP 66-70. After hearing the evidence, the jury found defendant guilty as charged of murder in the second degree. CP 60.

At the sentencing hearing, the court found that defendant had previously been convicted of two prior most serious offenses in Washington, based upon a 1986 conviction for robbery in the second degree from Cowlitz County, and a 1990 assault in the second degree conviction from Pierce County. His conviction on murder made him a persistent offender, and the court sentenced him to life without the possibility of parole. CP 62-65, CP 193-204.

Defendant filed a timely notice of appeal from entry of this judgment. CP 207-216.

2. Facts

On the morning of April 14, 1996, Jeffery Fields was climbing a staircase that led up to 27th and Martin Luther King streets in Tacoma, when he came across the body of a woman on one of the landings. RP

416-420. Her pants had been removed and thrown across a nearby bush.

RP 420. When Mr. Fields tried to look at her eyes to see if there was any sign of life or movement, he was unsuccessful because:

I couldn't see her eyes, I couldn't see her nose and her eyes and everything that was —it was—it was unrecognizable. It looked ..like something that caused her face to be traumatized or something because everything was unrecognizable....I couldn't make the difference between her eye and her nose or any parts of her.

RP 422-423. Police were called to the scene and the stairway was blocked off to isolate the crime scene. RP 428-435. Police found a deceased white female laying face down with her leg spread open on the stairwell; there was significant trauma to her head. RP 433-434. She was naked from the waist down and her shirt and bra were pulled over her breasts, exposing them. Id.

A forensic technician came in to document the crime scene by taking video, photographs, and measurements. RP 461-477, 488-489. There were bloody footprints on the victim's body and on the stairway showing a distinctive tread pattern with the word "Diehard" RP 495-505, 835-843, 848-849, 853-855. Police took shoes from the two civilians who had approached the crime scene so as to document their tread patterns. RP 423, 541-542, 734-735. Neither came close to matching the bloody footprints. RP 541-542.

The autopsy of the victim revealed that she suffered massive blunt force trauma to the head as well as to the body. RP 751-773. There was so much damage to the left eye that the eye had retracted inside the orbit. RP 752, 754-755. Her facial features were flattened because the bones had been broken into so many fragments. RP 753, 761-762. Her skull was visible through a split in her flesh. RP 754. He testified that it took a tremendous amount of force to sustain these injuries, and that he has seen comparable injuries on people that have died in automobile accidents in head on collisions. RP 753-754, 765. These injuries could be inflicted with a foot if the person was wearing something heavy. RP 756-757. The victim had defensive wounds and aspirated blood which shows that she was alive through at least part of the attack. RP 760-761, 770. There was also evidence of strangulation, including breakage of the Hyoid bone. RP 773-780. He determined the cause of death as attributable to multiple blunt force injuries and strangulation. RP 780. Each of these injuries were sufficient independently to cause death. RP 780-781.

At the time of the murder, defendant lived intermittently at his mother's house; besides his mother, two of his sisters and several of his nieces and nephews lived there too. RP 560, 575-577. While investigating a different matter, police came in contact with Lisa Taylor, the defendant's sister. She indicated that she wanted to speak with them

privately. RP 632-635, 940-941. When she finally had this private conversation, she implicated her brother to the Hungerford–Trapp homicide. RP 954. This was the first link of the defendant to the homicide, which had remained unsolved. RP 1034. This led the police to interview other family members.

Several of the defendant’s relatives were called to testify. Each had given taped statements to the police back in 1997 regarding what they knew of defendant’s involvement in the Hungerford-Trapp homicide. While each recalled giving the statement, there was virtually no recollection regarding the content of their statement, even after trying to refresh their recollection by reviewing the relevant transcript. Thus, most of the evidence adduced from these witnesses was in the form of recorded recollections.

Pearlie Cunningham, defendant’s sister, told the police that the day before the body was discovered on the stairs, that she had last been with her brother around 10:00 pm. RP 554, 564-565. She further stated that she saw a person who she thought was her brother heading toward the direction of the stairwell where the body was found shortly after 1:00 am. RP 565-571.

Lisa Taylor told police that defendant arrived at his mother’s house one night covered in blood, with his clothes turned inside out, claiming to

have killed some “crack-headed white bitch.” RP 696-699. Taylor told police that defendant said he had stomped her with his boots, strangled her and stabbed her. RP 697, 1033.

Two of defendant’s nieces, Lisa Hubley and Jessica Cunningham, told the police that defendant had said that he had killed a woman by choking her and that he had pointed out the stairwell where it had happened. RP 593-595, 618-21 Another niece, Miesha Smith, recalled that defendant had arrived home covered in blood, his clothes on inside out, and admitting to killing a woman of the stairs near 27th by choking her. RP 656-658. She told police that he said that he had gone into an alley to turn his clothes inside out. RP 658. She said that she could still see the blood that it was all over his hands and face. RP 658. The next day when the body was discovered, he showed her how he had choked her. RP 659. She also said that the defendant would take the kids by the steps near 27th and say “Down Here. Here’s where it all happened at.” RP 661. A nephew, Kylo Cunningham, told police that his uncle had admitting strangling a woman and that she was short on money. RP 679-680.

When police interviewed defendant back in 1997, he admitted that he owned a pair of brown Diehard work boots. RP 1038-1039.

Police executed a search warrant on defendant's mother's house and seized a pair of Sears Diehard boots that were pointed out by Lisa Taylor. RP 795-802, 1034-1035. Experts from the Washington State Patrol Crime Lab examined the boots and concluded that the right boot matched a print found at the crime scene, and that the left boot matched a print found on the victim's body. RP 810-853. After taking the boots apart, the Lab found trace blood on the right boot. RP 888-913.

Two different sets of DNA tests, at two different points in time, were performed on this blood. The DNA (PCR) tests run in 1998 determined that the defendant could not be a source of the blood; Hungerford-Trapp could not be eliminated as a source of this blood. RP 985-990. The probability of a random match in the general population was 1 in 5,500. RP 990-991. The jury also knew that in 2004 the State ran additional DNA tests using improved STR testing methods, which again could not exclude Hungerford-Trapp as the source of the blood, but which increased the probability of finding a random match in the general population to 1 in 840 trillion. RP 991-1006.

The defendant testified in his own behalf. He denied killing Hungerford-Trapp, telling his family he killed her or showing family murders where he had committed the crime. RP 1089, 1128, 1135-37. He denied ever owning a pair of Diehard boots. RP 1087-1089.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL AFTER A WITNESS'S IRRESPONSIVE REMARK.

An appellate court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A reviewing court will find abuse of discretion when the judge's decision "is manifestly unreasonable or based upon untenable grounds." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's denial of a motion for mistrial will only be overturned when there is a "substantial likelihood" that the error prompting the mistrial affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L.Ed.2d 599, 107 S. Ct. 599 (1986); Hopson, 113 Wn.2d at 284.

When reviewing a motion for mistrial based upon a trial irregularity, it must be remembered that the trial court has wide discretion to cure trial irregularities. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). In considering whether a trial irregularity warrants a new

trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

The events leading up to the motion for mistrial are as follows. The State presented the testimony of several of the defendant's family members who were generally all uncooperative, albeit in varying degrees. One of those witnesses was the defendant's sister, Lisa Taylor. Ms. Taylor had been interviewed in 1997 about the Couch homicide, and in the course of that interview she disclosed information about the Hungerford-Trapp homicide, a homicide involving Georgia Ahrens, as well as information about other matters. RP 629- 630. Her disclosure led to other family members being questioned about the Hungerford-Trapp homicide. Prior to the jury hearing any of Ms. Taylor's testimony, the prosecutor brought her into the courtroom, placed her under oath, and instructed her that her testimony was to be limited to the case involving "the woman on the stairs." RP 629-630. She was told specifically that she was not permitted to talk about any of the other investigations the police talked to her about that day. RP 629-630. Ms Taylor indicated that she understood. RP 630. Nevertheless, during her cross examination by defense counsel

things began to go awry. On cross, Ms. Taylor expressed her belief that the transcript of her 1997 interview was not accurate and began to offer reasons as to why it might be inaccurate, including that the police were looking for a scapegoat for things, and chose her brother to be it. RP 706. Her answers became increasingly rambling until the following occurred:

DEFENSE COUNSEL: Did they [the police] tell you anything, what they thought about your—

TAYLOR: Yeah, they had pictures of stuff on the table. There was – had a yellow envelope. When I wasn't saying what they wanted me to say, they will get me back to another subject, left the pictures on the table, walk out. I can prove to you this. [sic] They had Ms. Georgia's pictures on the table. How would I know the way she was when I wasn't there? And then nobody said how she passed away at her trial, so how would I would have known about her head being put between the head—

COURT: Excuse me. We need to stick to the subject.

DEFENSE COUNSEL: I understand.

RP 707. On redirect, the prosecutor asked a series of questions designed to counter this “scapegoat” claim by establishing that she had been the person to give police a lead on the Hungerford-Trapp homicide by bringing up her brother's involvement with the detective. RP 709. The prosecutor also asked whether the detectives who had interviewed her back in January of 1997 had treated her with respect, to which she replied:

TAYLOR: How when you take me and my mama and my nieces and nephews down to the police station, had us out there until 2 or 3 o'clock in the morning. You know, little kids, and you all questioning everybody without a lawyer being there, you know and then you made all these leads. Ten, eleven years old. You know, you guys know better than that. And then to put my brother on death row¹ for this stuff.

DEFENSE COUNSEL: Objection; non-responsive.

COURT: Sustained. Ma'am.

PROSECUTOR: I don't have anything further, Judge.

RP 710-711. The witness was excused and the jury was excused for lunch. After the jury was out of the room, defense counsel moved for a mistrial. RP 711-714. The court denied the mistrial; the prosecutor indicated that he would agree to a limiting instruction and the court indicated that it would be willing to give one. RP 714. After considering the matter over the lunch hour, defense counsel opted not to seek a limiting instruction because "I would not want to underline that in any way shape or form or have it mentioned ever again in this court, so I don't want a limiting instruction." RP 715.

Later the court entered a written memorandum regarding the denial of mistrial, including how it perceived the impact of Ms. Taylor's comments on the jury and the trial. CP 66-70. Based upon the witness's

¹ The defendant was not on death row at the time Ms. Taylor made this statement. CP 66-70.

hostile demeanor and her tendency to ramble and “rant” in her answers, the court concluded that the jury would likely consider her statement regarding death row to be one of hyperbole rather than fact. CP 66-70. The court also found very important that over the course of the trial the jury never heard any other comments of this nature, “so the jury heard nothing that would support any possible conclusion that her comment related to this case or even to this defendant” as the witness had many brothers other than the defendant. Id.

Defendant now asserts the court abused its discretion in denying the mistrial. Defendant challenges the court’s assessment of the prejudicial impact, but the Washington Supreme Court has stated more than once that the trial judge is best suited to judge the prejudice of a statement made at trial. State v. Greiff, 141 Wn.2d 910, 921-922, 10 P.3d 390 (2000); State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). In Greiff, the defense made certain representation as to what an officer would testify to based upon the officer’s prior testimony. When that officer testified at trial, he changed his testimony and indicated that his earlier testimony had been in error. Greiff asked for a mistrial on the grounds that the prosecution should have disclosed the fact that the officer would change his testimony, and that fact that defense counsel’s credibility had been damaged because he was unable to fulfill the representations he had made in his opening statement. The court denied the motion, finding that the jury would be able to understand from what unfolded at trial that the

reason for the discrepancy between what was promised in the opening, and delivered at trial, had more to do with the officer's credibility than defense counsel's. The Supreme Court upheld the denial of the motion for mistrial.

In the instant case before, the trial court assessed Ms. Taylor's demeanor and manner of speaking, and concluded that it was unlikely that the jury would take her comment literally or as a factual statement. From the judge's viewpoint, the jury would conclude that Ms. Taylor was clearly upset and angry at the State for making her testify against her brother, and therefore likely to speak rashly. These observations are entitled to deference as the court could hear the tone of voice in which things were said, as well as observe things that are not captured in the verbatim report of proceedings. Defendant has failed to show an abuse of discretion in the denial of the mistrial.

Defendant also challenges the court's conclusion that "[u]p until Ms. Taylor testified, there was no mention of the defendant being involved in any other incident or investigation". CP 66-70. He asserts that the jury heard repeated references to the fact that defendant had been convicted of killing another person. But a review of what defense claims are repeated references to the fact that the defendant had killed before, show this is not a proper characterization.

Defense counsel claims that references to “a separate investigation” or “a different investigation” or “another case”, see RP 581, 584, 634, informed the jury that the other investigations were of the defendant, and that they were homicide investigations. But a review of these portions of the record reveals that the jury was never informed about the nature of the other investigation or *who* the police were investigating. In fact, Lisa Hubley testified in a manner that would lead the jury to conclude the opposite of what defendant contends:

PROSECUTOR: Is there a reason, Ms. Hubley, why you would lie to the police about information like that to make things worse for your uncle?

HUBLEY: *Well, I didn't know anything, it was like, serious like that. I don't know. Like I said, they didn't straight – whoever interviewed me didn't say, well, do you know you're down here for a homicide of a lady that was found dead on the stairs. It was nothing like that. When they brought us down here, it was for something totally different.*

PROSECUTOR: Okay. The police interviewed you about a separate investigation, right, Ms. Hubley?

HUBLEY: Yes, they did.

PROSECUTOR: And during that interview, the subject changed and you talked about an incident with the woman who was found on the stairs, right?

HUBLEY: Yeah

RP 581. If a jury were to speculate as to the nature of the other investigation based on this testimony, it would conclude that the other

investigation was anything but a homicide. Moreover, there is nothing in this record to imply that the defendant was the suspect in the other investigation.

Defendant also contends that another portion of Ms. Taylor's testimony provided evidence to the jury that he was arrested for a different murder than Hungerford-Trapp's. Ms. Taylor was relating that police had come to her house in 1997 when the kids were at school and when she was home with her mother, her brother, her other brother, Audie, and his wife. RP 635. The prosecutor asked if there was a reason that she couldn't ask the detectives what was going on in front of her family since she asked to speak with them privately. RP 635. Ms. Taylor replied that there was because her "brother, my mother's son, was just arrested for murder and she wasn't dealing with it". RP 635. Ms. Taylor did not identify which brother had been arrested. She has five brothers. RP 554-555. Again, the jury was not told that the defendant had been arrested for murder.

Defendant contends that every time the prosecutor admonished a witness to focus his or her answers to "the woman who was found on the stairs" that this was in violation of the court's order in limine and was essentially equivalent to telling the jury the defendant has committed other murders. The prosecutor's focusing statements to the witnesses were clearly aimed at trying to keep the witnesses in compliance with the court's order in limine rather than aimed at violating the order. The

focusing statement did not reference other investigations, reveal any of the details of the other investigations, or suggest that the defendant was the suspect of the other investigations. There is nothing in these focusing statements from which the jury could conclude that defendant had murdered before. These statements are not evidence of the defendant's other bad acts.

Defendant also points to a single question asked by the prosecutor as providing evidence of other homicide cases. It occurred in the direct examination of Lisa Cunningham, a niece of the defendant who was approximately thirteen back in 1997 when she was interviewed by police. RP 611-613.

PROSECUTOR: Did you realize that, when you were talking to the detectives, it was about serious subject matters?

CUNNINGHAM: No.

PROSECUTOR: Did you think it was a joke that you were down here talking about cases?

CUNNINGHAM: I mean, then, yeah, it was kind of funny to me.

PROSECUTOR: It was?

CUNNINGHAM: Yeah.

PROSECUTOR: *Even though the subject you were talking about was homicide cases?*

CUNNINGHAM: Yeah

RP 613 (emphasis added). Defendant asserts that this reference is evidence of the prosecutor discussing the existence of more than one homicide case. While this question may² indicate multiple homicide investigations, it does not identify the defendant's involvement (or convictions) in more than one investigation.

Lastly, defendant cites to three lines that are from two statements made back in 1997- one by Jesse Cunningham, and one by Miesha [Carter] Smith - that were admitted as recorded recollections. RP 618-619, 656, 660. The recorded recollections admitted pertain to the homicide of Hungerford-Trapp only, but in each recorded statement, there are exchanges where with the detective or the person being interviewed asks a clarifying question to ensure that both are on the same page as to what is being discussed. RP 618-619, 660. Neither of these exchanges expressly indicates that the defendant was involved in another murder. The last challenge is to a comment one of the 1997 detectives makes as she transitions on the tape to another topic. The detective stated; "Miesha, you were speaking to me after we stopped the tape that your Uncle Cecil had made some comments to you about another murder that occurred in the city. Can you tell me about that?" RP 656. While this lead-in to a discussion of the statements defendant made about the Hungerford-Trapp

² There was agreement between the subject and verb in this sentence; both were singular. The end of the sentence does not match the beginning. The jury might just conclude that he misspoke.

homicide may imply that the detective and Miesha had recently been discussing a different homicide, it does not imply that the defendant was involved in the other investigation. Once again, there is no direct evidence of the defendant's involvement in any other murder. The jury knew that there were other investigations going on when the police uncovered the evidence linking defendant to his crime, but it had no idea what those investigations pertained to, or who the suspect might be in the other crimes. Defendant asks this court to assume that the jury would conclude that he was involved, and that the investigations pertained to murder. Such an argument requires this court to engage in speculation by asking it to believe that the jury engaged in such speculation.

Defendant cites to cases that reversed trial courts for admission of evidence that the defendant had committed other murders. The cases are not apposite. The trial court did not rule that any evidence of the defendant's convictions or prior bad acts were admissible. The court limited the evidence to that pertaining to the Hungerford-Trapp homicide. Because the evidence pertaining to this homicide was uncovered in the midst of other investigations, the prior witness statements covered many topics. The parties did their best to exclude reference to objectionable materials, and to limit the evidence to the Hungerford-Trapp homicide. The court was hugely successful in this endeavor, but for the misbehavior of Ms. Taylor. Despite those violations of the court order, the court properly denied the motion for mistrial.

Washington court's have held that where a proper admonishment of the jury may cure the error, and the defendant does not request the instruction, that denial of a mistrial premised on that error is appropriate.. State v. Elmore, 139 Wn.2d 250, 273-274, 985 P.2d 289 (1999); State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995); State v. Ollison, 68 Wn.2d 65, 69, 411 P.2d 419 (1966); State v. Gosser, 33 Wn. App. 428, 435-36, 656 P.2d 514 (1982). Here, the court sustained defense counsel's objection that Taylor's answer was non-responsive. He could have asked that it be stricken, but opted not to for fear that it might call more attention to the answer. While this was clearly a tactical decision on his part, asking for the answer to be stricken and the jury to disregard would have eliminated any possible prejudice. Since counsel did not ask for a curative instruction, denial of the motion for mistrial was appropriate.

Finally, when, as in this case, the inadvertent remark comes from someone who is antagonistic to the State, and when the remark violates specific instruction about excluded subject matter, it is important to remember what the Washington Supreme Court said regarding the appropriate remedy:

It is not the rule that every inadvertent or irresponsible answer of a witness will work a new trial. The law presumes, and must presume, that the jury finds the facts from the evidence the court permits them to consider. Any

other rule would render the administration of the law impractical. The state in criminal trials cannot choose its witnesses. It must call those who have knowledge of the facts, whether they be willfully designing or stupidly ignorant, and if new trials were granted because of their irresponsible answers, the administration of the criminal laws would become so burdensome as to deny to the state the protection afforded by such laws.

State v. Johnson, 60 Wn.2d 21, 29, 371 P.2d 611(1962), citing, State v. Priest, 132 Wash. 580, 584, 232 Pac. 353 (1925). Here, the State took precautions hoping to avoid the very thing that occurred. There is no guarantee that Ms. Taylor would be any better behaved in a subsequent trial. The defendant should not be rewarded for his sister's willful violations of the court's instructions.

A criminal defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials. Brown v. United States, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L.Ed.2d 208 (1973); In re Pers. Restraint of Elmore, 162 Wn.2d 236, 267, 172 P.3d 335 (2007). Defendant asks this court to view the record, keeping in mind information that others knew about the defendant but which was not before the jury. This is inappropriate, the record must be viewed from the context of what the jury knew about the defendant. Other than Ms. Taylor's unsolicited comments, the jury had no information about defendant's other cases. The court determined that her comments were unlikely to affect the jury's deliberation, and properly denied the motion for mistrial.

2. DEFENDANT HAS FAILED TO DEMONSTRATE
BOTH PRONGS OF THE STRICKLAND TEST
REQUIRED TO SHOW INEFFECTIVE ASSISTANCE
OF COUNSEL

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she

was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case,

viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for his failure to object to the admission of evidence that he claims violated the court's order in limine excluding reference to the defendant's other conviction for murder or his being a suspect in a third homicide. As has been discussed thoroughly in the previous argument section addressing the court's denial of the mistrial, the evidence that was

adduced does not establish what defendant claims it does. Except for Ms. Taylor's violations of the court's ruling, none of the challenged evidence establishes that defendant was the subject of another investigation or that he was convicted of any crime. Thus, the challenged evidence does not violate the court's order in limine and defense counsel cannot be held to be deficient for failing to object.

Defendant fails to show that his attorney was so deficient that he was effectively denied his right to counsel. Here the defense counsel brought a motion to dismiss, sought orders in limine, made objections, cross examined witnesses, presented evidence and argued effectively in closing. Defendant cannot show that he was effectively without representation, or that his trial was rendered unfair.

Nor can defendant establish resulting prejudice. Defendant does not assert that he would have been acquitted, but claims that the jury might have considered a verdict on manslaughter had this prejudicial evidence not been admitted. But the evidence of intent in this case is overwhelming just from the condition of Ms. Hungerford-Trapp's body. Defendant literally stomped her face in with numerous blows until her features were virtually unrecognizable; he also strangled her so hard that he broke bones in her neck. Each of these injuries was sufficient to cause death. Defendant wasn't stomping her face and strangling her at the same time. As council argued to the jury, the evidence shows that he killed her and then he killed her again." RP 1172. The evidence regarding her cause of

death and his statements to his family that he had to “kill me a bitch” reflect an intent to kill - nothing less. At trial, defense counsel did not argue to the jury that the evidence suggested recklessness only, and that it should convict of manslaughter; he argued the defendant did not commit the crime. RP1199-1215. On appeal, defendant fails to present an argument about how the trial evidence leads to a conclusion that a manslaughter occurred, rather than an intentional murder. Appellant’s Brief at pp 35-36. It would seem that if neither trial nor appellate counsel can come up with an argument as to why the evidence supports a finding of manslaughter rather than murder, then there is little likelihood that the jury would have given manslaughter much consideration. The evidence in this case was overwhelming that Ms. Hungerford-Trapp was intentionally murdered, and also that this crime was committed by defendant. Trial counsel did the best he could with what he had to work with; the mere fact that defendant was found guilty of this crime does not show prejudice.

This court should reject defendant’s claim of ineffective assistance of counsel.

3. DEFENDANT HAS FAILED TO SHOW THAT THE PROSECUTOR COMMITTED MISCONDUCT, MUCH LESS THAT IT WAS SO FLAGRANT AND ILL-INTENTIONED THAT NO CURATIVE INSTRUCTION COULD HAVE CURED THE PREJUDICE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the

defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting

prejudice that could not have been neutralized by an admonition to the jury.” Id.

Defendant asserts that the prosecutor engaged in misconduct by misstating the reasonable doubt standard and by inferring that defendant was responsible for the delay between when the crime occurred and when the case was brought to trial. There were no objections in the trial court to the arguments defendant now claims are error. RP 1194-1195, 1197, 1230. Therefore, defendant must not only show that the arguments constitute misconduct, but also that the prosecutor’s actions were “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Defendant cannot meet either standard.

- a. The prosecutor’s argument regarding reasonable doubt was proper argument.

The court instructed the jury on reasonable doubt and the presumption of innocence using the standard pattern instruction, which states:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 41-59, Instruction No 2; see, Washington Pattern Jury Instructions Criminal, WPIC 4.01. The court also told the jury that the law was contained within the court's instructions and to "disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions." CP 41-59, Instruction No. 2.

The prosecutor made the following argument to the jury regarding this instruction:

Prosecutor: The burden of proof in a criminal case is beyond a reasonable doubt. It is the highest burden that we put on any party in a court of law. It's a burden that the State accepts, and it's a burden that the State has met and exceeded in this case. The instruction that defines reasonable doubt is Instruction No. 2 in your packet and you can read it there on the screen. That is an instruction that is very important for what it says and also for what it does not say. *What it says is that there is a doubt for which a reason exists, and that means, while you're deliberating, if you want to find the defendant not guilty, you need to say I believe he's not guilty. I'm sorry. I doubt he's not guilty. That's what you should say. I doubt he's guilty and here's why. And you have to fill in that blank.*

The instruction is important for what it...[d]oes not say. Beyond any doubt, all doubt, 100 percent certainty, shadow of a doubt. You know why?, Because there's no such thing as a perfect trial. There is no case that you can come up

with or that you ever heard of, read, or even watched on television where there isn't something else that you could have.

RP 1194-1195 (emphasis added). While he was making this argument, the prosecutor displayed two powerpoint slides, one that showed the court's Instruction No. 2, and one that stated the following:

WHAT IS SAYS

A doubt for which a reason exists.

In order to find the defendant not guilty, you have to say:

"I doubt the defendant is guilty, and my reason is _____."

And you have to fill in that blank.

CP 238-256, at p. 16³ Defendant contends that the italicized portion of the oral argument, and the above slide constitute misconduct by misstating the standard of reasonable doubt which "destroyed" the presumption of innocence. As noted earlier, there was no objection in the trial court.

³ The prosecutor filed a printout of the slides used in his powerpoint presentation. There are eighteen pages of slides, most of which contain six slides to a page. Although the cover sheet does not indicate how the slides should be read, it would appear from looking at the content of the slides and comparing that against the content of the prosecutor's closing argument that, on each page, the left vertical column of slides should be read from top to bottom first, then the right vertical column of slides should be read from top to the bottom.

Neither the argument nor the slide constitute misconduct; rather it is reasonable argument based upon the instructions given by the court. Firstly, the prosecutor reiterated that the State had the burden of proof in a criminal case and that the standard of proof was the highest one employed in a court of law. Then the prosecutor directed the jury to the proper instruction in the instruction packet to find the definition of reasonable doubt, while showing a slide of that instruction overhead. The prosecutor again reminded the jury that the State had the burden of proof and that it was a high burden during his rebuttal argument. RP 1216. It is difficult to see how the prosecutor could be acting in bad faith or trying to mislead the jury as to the presumption of innocence when he directs it to examine the very instruction that sets forth the law on that subject while expressly acknowledging that the prosecution had the burden of proof.

Nor is there any impropriety in the prosecutor's statements or slides regarding reasonable doubt. The argument takes language directly from the instruction- "a reasonable doubt is one for which a reason exists"- and expands on that concept. It also harkens back to an earlier instruction that instructed the jury that:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision on the facts proved to you and the law given to you, not on sympathy, prejudice or personal prejudice. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict

CP 41-59, Instruction No. 1. The prosecutor's argument reminds the jury that its verdict should be the result of consideration and deliberation rather than whim and emotion. A juror who has a reasonable doubt should be able to articulate a reason for that doubt that is based upon the evidence or lack of evidence. There is nothing improper in an argument that asks the jury to make sure that they have properly applied the reasonable doubt standard. There is nothing about this argument that suggest to the jury that it should disregard the law as set forth in the court's instructions.

Moreover, the jury was instructed that it should disregard any argument that was not supported by the law as set forth in the court's instructions. A jury is presumed to follow a court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). If any juror did interpret the prosecutor's argument as one trying to shift the burden of proof onto the defendant, he or she would have immediately disregarded the argument, rather than adopt an incorrect legal standard for deliberations.

Defendant has failed to show that this constituted misconduct much less that it was "flagrant and ill-intentioned." This claim of misconduct has no merit.

- b. The Prosecutor did not imply that the defendant was at fault for the delay in bringing the case to trial.

At the end of his initial closing argument, the prosecutor concluded:

PROSECUTOR: That's Jane Hungerford-Trapp on April 12th of 1996 [showing an in-life photograph]. And that's Jane Hungerford-Trapp after the defendant was through with her [showing crime scene photographs].

It's November 2nd, 2006, and ten and a half years is a very long time to wait for justice. But justice is finally here, not only for Jane Hungerford-Trapp. Justice for Cecil Davis. Veredictim, to declare the truth. Declare the truth in this case. Cecil Davis is a murderer, folks, plain and simple.

RP 1197-1198. At the close of rebuttal argument the prosecutor argued:

PROSECUTOR: You took an oath to render a true verdict in this case, and now it's the time to do that. Now it's judgment day for the defendant. The evidence in this case is overwhelming that the defendant killed Jane Hungerford-Trapp sometime April 13th, early morning hours of April 14th 1996. It's been over ten years, and that a long time.

The State would ask you to return a verdict that holds the defendant accountable for what he did on that stairwell back in 1996. I would ask you to return a verdict that speaks the truth, that the defendant is guilty of murder in the second degree. Thank you.

RP 1229-1230. Defendant contends that these arguments are misconduct because they imply that the defendant was responsible for the delay between the homicide and the time the case came to trial.

It is difficult to respond to this claim because defendant does not explain *how* the prosecutor's argument implies that the defendant is to blame for the delay. There is nothing in the wording of the argument that attributes responsibility for the delay to the defendant or even a lack of responsibility for the delay on behalf of the State. It simply articulates that there has been a delay and that no one has been held accountable for the crime in that time. In his brief, defendant supports his claims by referring to information that was not before the jury. But he fails to explain why the jury would interpret the prosecutor's remarks as blaming the defendant for the delay based upon the information that it had within its knowledge.

The information that was before the jury would lead it to a different conclusion that what defendant asserts. The jury did know that in January of 1997, the police had information connecting defendant to Hungerford-Trapp's homicide based upon the statements of his family members, and the fact that the bloody footprints left at the scene could have been made by a pair of boots that were seized from the defendant's home. It also knew that in 1998, the State ran DNA tests on blood found on those boots that could not exclude Hungerford-Trapp as the source of that blood, but that the probability of a random match in the general population was 1 in 5,500. RP 975-991. The jury also knew that in 2004 the State ran additional DNA tests with improved methods which again could not exclude Hungerford-Trapp as the source of the blood, but which increased the probability of finding a random match in the general

population to 1 in 840 trillion. RP 991-1006. Thus, with this information within its knowledge, the jury would most likely conclude that the delay in the case getting to trial was one of the State waiting for science to develop improved methods of testing a small blood sample so that it had more compelling evidence to meet its burden of proof beyond a reasonable doubt.

There was nothing improper about the argument. It reflected on the long delay in getting the case to a jury without ascribing blame for the delay to anyone. The defendant has failed to show that this was improper argument, much less that it was flagrant and ill-intentioned.

Defendant has failed to carry his burden of showing prosecutorial misconduct. This claim should be dismissed.

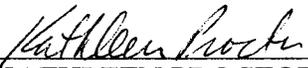
D. CONCLUSION

Defendant has failed to show that the court abused its discretion in denying the motion for mistrial, or that his attorney was constitutionally ineffective, or that the prosecutor committed misconduct. While a witness's refusal to comply with a directive to limit her testimony interjected some error into the proceeding, it did not affect the outcome of

the trial. The defendant still received a fair trial. The evidence was overwhelming that defendant committed murder in the second degree. That conviction should be affirmed.

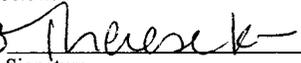
DATED: February 5, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/5/08 
Date Signature

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BY DEPUTY