

Court of Appeals No. 40945-3-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

RAYMOND GARLAND,

Defendant/Appellant.

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 04-1-05384-8
The Honorable Thomas J. Feltnagle, Presiding Judge**

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PRESENTED.....	1
1. Did the trial court err in permitting the State to impeach Mr. Garland with his trial counsel’s opening statements from the prior trials?.....	1
2. Did the error in permitting the State to impeach Mr. Garland with the opening statements from prior trials deprive Mr. Garland of a fair trial where the evidence was offered as impeachment evidence and witness credibility was the sole issue before the jury?.....	1
3. Did the trial court violate the appearance of fairness doctrine in refusing to hear Mr. Garland’s potentially dispositive motion to dismiss until after Mr. Garland’s trial?.....	1
III. STATEMENT OF THE CASE.....	1-22
A. Factual Background.....	1
B. Procedural Background.....	5
IV. ARGUMENT.....	22-35
1. The trial court’s error in allowing Mr. Garland to be impeached with his defense counsel’s opening statements from the prior two trials deprived Mr. Garland of a fair trial.....	22
a. <i>The trial court erred in permitting Mr. Garland to be impeached with the opening statements of defense counsel from Mr. Garland’s first two trials.....</i>	<i>22</i>

	Page(s)
<ul style="list-style-type: none"> <li style="margin-bottom: 1em;">i. <u>The trial court erred in admitting evidence of the opening statements made by My Garland’s trial counsel in previous trials because those opening statements were not made in the present trial.....</u>24 <li style="margin-bottom: 1em;">ii. <u>The trial court erred in admitting evidence of the opening statements made by Mr. Garland’s trial counsel in previous trials where Mr. Garland’s testimony in the current trial did not contradict his counsel’s opening statement in the current trial.....</u>25 <li style="margin-bottom: 1em;">iii. <u>The trial court erred in admitting evidence of the opening statements made by My Garland’s trial counsel in previous trials where Mr. Garland was asserting inconsistent defenses.....</u>25 	
<ul style="list-style-type: none"> <li style="margin-left: 2em;">b. <i>The impeachment of Mr. Garland through the use of his counsel’s opening statements from the prior two trials deprived Mr. Garland of a fair trial where witness credibility was the sole issue before the jury.....</i>28 	
<ul style="list-style-type: none"> <li style="margin-left: 1em;">2. The trial court violated the appearance of fairness doctrine in refusing to hear Mr. Garland’s potentially dispositive motion to dismiss until after Mr. Garland’s trial..... 	31
<ul style="list-style-type: none"> <li style="margin-left: 1em;">VI. CONCLUSION..... 	35

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Federal Cases

<i>Krulewitch v. United States</i> , 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949).....	30
<i>Matthews v. United States</i> , 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).....	25

Washington Cases

<i>In re Marriage of Wallace</i> , 111 Wn.App. 697, 45 P.3d 1131 (2002), <i>review denied</i> 148 Wn.2d 1011, 64 P.3d 650 (2003).....	31
<i>State v. Acosta</i> , 34 Wn.App. 387, 661 P.2d 602 (1983), <i>reversed</i> <i>on other grounds</i> 101 Wn.2d 612, 683 P.2d 1069 (1984).....	22
<i>State v. Conklin</i> , 79 Wn.2d 805, 489 P.2d 1130 (1971).....	25
<i>State v. Dault</i> , 19 Wn.App. 709, 578 P.2d 43 (1978).....	22
<i>State v. Dominguez</i> , 81 Wn.App. 325, 914 P.2d 141 (1996).....	31
<i>State v. Gostol</i> , 92 Wn.App. 832, 965 P.2d 1121 (1998).....	26
<i>State v. Latham</i> , 100 Wn.2d 59, 667 P.2d 56 (1983).....	28
<i>State v. McDonald</i> , 96 Wn.App. 311, 979 P.2d 857 (1999), <i>affirmed</i> 143 Wn.2d 506, 22 P.3d 791 (2001).....	29
<i>State v. Miles</i> , 73 Wn.2d 67, 436 P.2d 198 (1968).....	28
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	31
<i>State v. Newton</i> , 109 Wn.2d 69, 743 P.2d 254 (1987).....	30

Page(s)

State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996).....22

State v. Williams, 79 Wn.App. 21, 902 P.2d 1258 (1995).....25

Other Authorities

U.S. Const. amend. VI.....31

U.S. Const. amend. XIV.....31

Wn. Const. art. I, § 22.....31

I. ASSIGNMENTS OF ERROR

1. Mr. Garland was denied a fair trial where the trial court erroneously allowed Mr. Garland to be impeached by his trial counsel's opening statements from prior trials.
2. The trial court violated the appearance of fairness doctrine in refusing to hear Mr. Garland's potentially dispositive motion to dismiss under CrR 8.3 until after trial.

II. ISSUES PRESENTED

1. Did the trial court err in permitting the State to impeach Mr. Garland with his trial counsel's opening statements from the prior trials? (Assignment of error No. 1)
2. Did the error in permitting the State to impeach Mr. Garland with the opening statements from prior trials deprive Mr. Garland of a fair trial where the evidence was offered as impeachment evidence and witness credibility was the sole issue before the jury? (Assignment of Error No. 1)
3. Did the trial court violate the appearance of fairness doctrine in refusing to hear Mr. Garland's potentially dispositive motion to dismiss until after Mr. Garland's trial? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

A. Factual Background

November 11, 2004 was Mr. Raymond Garland's 21st birthday.

RP 3386.¹ On the evening of November 11, 2004, Mr. Garland went to

¹ Mr. Garland had two mistrials before a third trial resulted in his convictions. Numerous court reporters were involved in recording the proceedings. The length of the transcript and number of court reporters involved resulted in the transcript not being paginated continuously. Reference to the third trial will be made by giving the RP number for the third trial. Reference to portions of the transcript from the first two trials will be made by giving the RP number followed by the date of the proceeding.

dinner at a Black Angus restaurant with his family. RP 3392. After dinner at the Black Angus, Mr. Garland went with Patrick Lachapelle, his best friend, and Mr. Garland's cousin, Robby, to the bar in the Black Angus. RP 1617-1618, 3388-3398. From the bar in the Black Angus, Mr. Garland, Mr. Lachapelle, and Mr. Garland's cousin went to Cricket's Family Lounge. RP 1618-1619, 3398. Mr. Lachapelle dropped Mr. Garland off at Kiricket's and then went home. RP 1619, 3400.

While Mr. Garland was at Cricket's, he received a call from Mike Behe who told Mr. Garland to meet him at a bar called Bleacher's, so Mr. Garland went to Bleacher's. RP 3403. Bleacher's is across the street from Cricket's. RP 1131. Mr. Garland met Mr. Behe at Bleacher's and stayed at Bleachers for several hours drinking beer and cognac. RP 3403-3413.

Shortly after 12 a.m. on November 12, 2004, Mr. Garland was smoking a cigarette in the parking lot of Bleacher's when several cars pulled into the parking lot and one vehicle struck a telephone pole. RP 3415-3417; CP 1-5. The vehicle that struck the pole was driven by Mr. Earl Brock. CP 1-5. Another vehicle was driven by Mr. Karlton Marcy. RP 3423. Mr. Brock arrived with a group of three cars containing Mr. Brock and his friends. RP 1202-1210.

Mr. Brock exited his vehicle and Mr. Garland commented that Mr. Brock must not have seen the pole. RP 3417-3419. Mr. Brock became aggressive and said, "What the hell are you talking about?" RP 3419. Mr. Marcy exited his vehicle and came up behind Mr. Brock. RP 783, 3423, 3425. Mr. Brock's other friends also exited the cars and went over to where Mr. Brock was confronting Mr. Garland. RP 1212.

The men calmed down and began talking about tattoos. RP 1217. Mr. Garland has a tattoo that says "Prince Charming" on his neck, a tattoo of the number two on his right forearm and a tattoo of the number six on his left forearm. RP 3425-3437. The two and the six tattoos signify "B" (the second letter in the alphabet) and "F" (the sixth letter in the alphabet) and refer to Mr. Garland's friendship with Mr. Lachapelle. RP 3437. The numbers were visible that night and Mr. Brock asked if Mr. Garland was "one of those white boys in the 3-6 Crips." RP 3437-3438. Mr. Garland said he wasn't "3-6 anything." RP 3438.

Mr. Brock challenged Mr. Garland to fight and began taking his coat off to fight Mr. Garland and Mr. Marcy was going to help. RP 940, 942, 1099, 1220, 1262-1263, 1458. Mr. Garland responded by backing up several feet. RP 1220.

A confrontation ensued that resulted in Mr. Brock sustaining fatal gunshot wounds, Mr. Marcy sustaining serious injuries, and Mr. Garland

receiving no injuries but fleeing the scene. RP 317-330, 357, 1588-1589, 3453-3454.

Mr. Brock and Mr. Marcy managed to walk into Bleacher's where they fell to the floor. RP 262, 407, 786-792, 943, 1137, 2295-2296. The bartender called 911. RP 692-699. Mr. Brock died at the scene and Mr. Marcy was transported to the hospital. RP 1770, 1778, 2297, 2299. Mr. Marcy suffered a bullet wound to his leg and scrotum that ultimately required the removal of his left testicle. RP 1588-1589.

Mr. Garland ran from the scene to another bar where he used another man's cell phone to call Mr. Lachappele for a ride. RP 3461. Mr. Lachappele picked Mr. Garland up and took him home. RP 1621-1623, 3462-3463. When Mr. Lachappele picked Mr. Garland up, Mr. Garland was frantic and scared. RP 1621, 1629. Mr. Lachappele asked Mr. Garland what had happened and Mr. Garland said that someone had pulled a gun on him. RP 1651-1652.

Police interviewed witnesses at the scene and learned that the alleged shooter was named "Ray," learned "Ray" had tattoos, obtained descriptions of Ray's tattoos, and learned Ray was celebrating his 21st birthday. RP 1837, 1845. Using the first name of "Ray" and a birthday of November 11, 1983, police identified Mr. Garland as a suspect. RP 1845.

On November 15, 2004, Det. Deborah Heishman applied to Pierce County Superior Court Judge Buckner for an "Order of Trespass" permitting the police to trespass onto the residential property of Ms. Margaret Cook, Mr. Garland's mother, in order to gather evidence to obtain a search warrant to search the property of evidence of Mr. Garland's whereabouts. CP 79-84. Judge Buckner authorized the "Order of Trespass." CP 79.

On November 15, 2004, pursuant to the "Order of Trespass," police trespassed onto Ms. Cook's property and observed Mr. Garland in the kitchen of the residence. CP 92. Det. Heishman applied for and was granted a search warrant to search Ms. Cook's property. CP 87-94.

On November 17, 2004, police served the warrant on Ms. Cook's residence and discovered Mr. Garland at the residence. CP 85. Mr. Garland was arrested on November 17, 2004. RP 1850. During the search, police also located several photographs depicting Mr. Garland holding air rifles. RP 1667, 2076-2077, 2084-2085, 2091, 2119-2120.

B. Procedural Background

On November 18, 2004, Mr. Garland was charged with first-degree murder, first degree assault, first degree unlawful possession of a firearm, and second degree assault. CP 1-5.

On August 12, 2005, the charges were amended as follows: count one was charged as first degree murder committed by the alternative means of intentional murder or murder by a means manifesting an extreme indifference to human life; count two was second degree murder; count three was first degree assault; count four was unlawful possession of a firearm; and count five was second degree assault. CP 14-19.

On September 27, 2005, the State filed its first motions in limine. CP 27-29.

On January 10, 2007, Mr. Brock filed his first set of motions in limine. CP 34-43.

On January 16, 2007, Mr. Brock filed a response to the State's first set of motions in limine. CP 44-53.

On January 16, 2007, the charges were amended again, dropping the second degree assault charge. CP 54-56.

Also on January 16, 2007, Mr. Garland waived his right to a jury trial on the unlawful possession of a firearm charge. CP 57.

On January 17, 2007, Mr. Brock filed a motion for a *Franks* hearing, challenging the validity of the "Order of Trespass" obtained by police to intrude upon the residential property of Brian and Margaret Cook to determine if police could establish probable cause for a warrant to

search that residence and challenging the validity of the warrant obtained pursuant to the “Order of Trespass.” CP 63-105.

On January 17 and 18, 2007, a *Franks* hearing was held before Pierce County Superior Court Judge Felnagle regarding the legality of the “Order of Trespass” and the search warrant obtained pursuant to the “Order of Trespass.” RP 6-272,1-17-07, 1-18-07.² Judge Felnagle found that the “Order of Trespass” and the subsequent search warrant for Ms. Cook’s property were supported by probable cause and denied Mr. Garland’s motion to suppress the evidence found during the search of Ms. Cook’s residence. RP 270, 1-18-07.

Jury trial began on January 24, 2007. RP 185, 1-24-07.

On February 16, 2007, Mr. Garland moved for dismissal of the charges against him on the basis of governmental mismanagement and misconduct under CrR 8.3(b) and for violation of double jeopardy. CP 144-155. This motion was filed a second time on February 20, 2007. CP 156-167.

On February 21, 2007, the State filed a response to Mr. Garland’s motion to dismiss. CP 178-189.

On March 23, 2007, Judge Buckner entered an order denying Mr. Garland’s motion to dismiss. CP 190.

² These two dates are combined in one volume.

Also on March 23, 2007, Judge Buckner entered an order of mistrial on the grounds that the jury had been diminished to only 11 jurors. CP 191-193.

On July 27, 2007, Mr. Garland filed a second set of motions in limine. CP 196-209.

On July 31, 2007, the State filed its responses to Mr. Garland's second motions in limine. CP 210-213.

On August 1, 2007, the State filed a response to Mr. Garland's motion to suppress Mr. Marcy's medical records (CP 214-217) and a response to Mr. Garland's motion to suppress the out of court identification of Mr. Garland by several witnesses. CP 218-224.

On August 6, 2007, Mr. Garland again waived his right to a jury trial on the charge of unlawful possession of a firearm. CP 229.

On August 21, 2007, Mr. Garland's second jury trial began. RP 1266, 8-21-07.

On September 11, 2007, Mr. Garland filed a motion to dismiss the charges against him on grounds that (1) the State had committed repeated discovery violations against Mr. Garland over the course of the first and second trials and (2) Det. Heishman committed perjury and continued to violate court orders regarding discovery. CP 383-400.

On September 19, 2007, Mr. Garland filed a reply to the State's response to his motion for dismissal. CP 405-419. Also on September 19, 2007, Mr. Garland's trial attorney, Ms. Barbara Corey, filed a declaration regarding Det. Heishman's testimony (CP 420-427) and appendices to Mr. Garland's reply to the State's response to Mr. Garland's motion to dismiss. CP 428-507.

On September 24, 2007, Mr. Garland filed a motion for Judge Buckner to recuse herself and for a mistrial. CP 508-518. Also on September 24, 2007, Mr. Garland filed a renewed motion for dismissal and/or mistrial on grounds that the State's repeated discovery violations over the course of two trials prejudiced Mr. Garland's right to a fair trial. CP 519-524. Finally, on September 24, 2007, Judge Buckner recused herself and declared a mistrial in Mr. Garland's second trial. RP 2577, 9-24-07.

On February 25, 2008, Mr. Garland filed a memorandum for nunc pro tunc entry of the orders on the motions in limine. CP 547-548.

On May 9, 2008, Judge Buckner entered a nunc pro tunc order regarding the motions from Mr. Garland's first and second trials. CP 554-558.

On August 15, 2008, Mr. Garland filed a motion for dismissal under CrR 8.3(b) on grounds that the State's repeated discovery violations

over the course of two trials prejudiced Mr. Garland's right to a fair trial.

CP 559-576.

On October 27, 2008, the State filed a response to Mr. Garland's motion to dismiss. CP 617-644.

On December 4, 2008, the State filed a second set of motions in limine. CP 646-661.

On January 27, 2009, Mr. Garland filed a notice that his defense for the third trial would be general denial and/or self-defense. CP 679.

On February 13, 2009, Mr. Garland filed a notice that he would be seeking a Judge from outside of Pierce County to hear the motion to dismiss. CP 751-752.

On May 28, 2009, the State filed a response to Mr. Garland's motion to have a judge from outside of Pierce County hear the motion to dismiss. CP 757-760.

On June 10, 2009, the State filed a memorandum regarding whether or not the trial court was bound Judge Buckner's rulings on the motions in limine where Judge Buckner had recused herself under the appearance of fairness doctrine. CP 763-766. On June 10, 2009, the State also filed a set of "New Responses to Defendant's Motions in Limine." CP 767-776.

On June 16, 2009, Mr. Garland filed supplemental briefing regarding the motion to dismiss. CP 829-884.

On July 29, 2009, Ms. Corey filed a supplemental declaration detailing what the defense anticipated the testimony of the defense witnesses would be at an evidentiary hearing on the motion to dismiss. CP 888-893.

Also on July 29, 2009, the trial court entered an order that the motion to dismiss would not be heard until the end of trial. RP 30-31, 82-83; CP 894-895.

With regards to Judge Buckner's ruling on the motions in limine in the first and second trials, Judge Felnagle ruled that Judge Buckner's rulings would stand unless the party contesting the ruling could demonstrate that the fact that Judge Buckner recused herself somehow changed the circumstances of the case with regard to the motion in limine at issue and required Judge Felnagle to revisit Judge Buckner's ruling on that motion in limine. RP 94. However, because the State filed new briefing on the issue of whether or not gang-related evidence should be admitted, Judge Felnagle held that Judge Buckner's rulings on the admissibility of gang-related evidence would be reviewed. RP 115-116, 121-122.

On July 30, 2009, Mr. Garland filed a notice of emergency interlocutory review to the Washington Supreme Court seeking review of Judge Felnagle's decision to delay hearing Mr. Garland's motion to dismiss until after Mr. Garland's trial. CP 896-898.

On August 3, 2009, Mr. Garland filed a motion to exclude the testimony of "so-called gang expert John Ringer." CP 902-923.

On August 11, 2009, the State filed a certified copy of Mr. Garland's second degree robbery conviction from 2001 for purposes of the bench trial on the current charge of unlawful possession of a firearm. RP 485.

On August 26, 2009, Mr. Lachappele testified that he had been best friends with Mr. Garland since they were both in the sixth grade and that he had never seen Mr. Garland with a gun. RP 1624-1626. In response, the State sought to introduce the pictures of Mr. Garland holding an air rifle that were discovered during the search of Ms. Cook's home. RP 1667. Mr. Garland objected and said that if the court was going to consider admitting those photographs then Mr. Garland was moving for a hearing on the invalidation of the search warrant on the basis that it was predicated on the "Order of Trespass" which was invalid and not supported by any legal authority. RP 1667-1668. The State conducted a voir dire of Mr. Lachappele regarding the photographs and determined

that Mr. Lachappele did not recall the photographs being taken and had never seen Mr. Garland with the rifles depicted in the photographs. RP 1674-1675. Mr. Lachappele was not even 100% sure that it was him depicted in the pictures. RP 1674.

The State offered the photographs to be admitted and Mr. Garland again objected and requested a hearing on the lawfulness of the search. RP 1680-1681. The trial court denied the motion for a hearing and ruled that, at that point in the trial, the State could show the pictures to Mr. Lachappele outside the presence of the jury and ask whether or not he is in the picture without describing the picture. RP 1681. Because Mr. Lachappele had already testified during the voir dire that he was unsure that he was depicted in the photographs, the State decided not to show him the photographs in front of the jury and simply asked if he had been shown photographs and if he was depicted in those photographs. RP 1681-1682, 1690. Mr. Lachappele testified that it appeared he was depicted in the photographs. RP 1690.

On August 31, 2009, Mr. Garland filed a motion to suppress the evidence found during the search of Ms. Cook's residence. CP 1004-1020.

On September 2, 2009, the State filed a response to Mr. Garland's motion to suppress evidence found during the search of Ms. Cook's

residence. CP 1021-1026. This response was directed almost entirely to discussing the admissibility of exhibit 155, the photos found during the search of Ms. Cook's property. CP 1021-1026.

On September 8, 2009, Mr. Garland filed a reply to the State's response to Mr. Garland's motion to suppress. CP 1042-1049. Also on September 8, 2009, Mr. Garland again moved the court for a hearing regarding the admissibility of exhibit 155, the photographs discovered during the search of Ms. Cook's home. RP 1912. The trial court deferred ruling on the motion until a later time. RP 1913.

On September 9, 2009, the Washington Supreme Court issued a ruling denying review of Mr. Garland's case. CP 1050-1054.

On September 9, 2009, a hearing was held regarding the legality of the search of Mr. Cook's home. RP 2076-2116. Counsel for Mr. Garland phrased the motion as a motion to reconsider the trial court's January 18, 2007, ruling finding the "Order of Trespass" and the subsequent search warrant lawful. RP 2083-2084. The State sought to have the photographs admitted to impeach Mr. Lachappele's testimony. RP 2098. Mr. Garland argued that evidence that had been suppressed because it was illegally obtained cannot be used to impeach a witness who is not the defendant and that the photographs could not be used to impeach Mr. Lachappele on his recollection of whether or not Mr. Garland had ever held guns because

that was a collateral issue. RP 2085, 2088. Mr. Garland also argued that the photographs were more prejudicial to Mr. Garland than they were probative of impeaching Mr. Lachappele on a collateral issue. RP 2106-2107. Mr. Garland further reasserted that the search warrants were unlawful under Article 1, §22 and Fourth Amendment because the complaints for the warrants failed to establish the requisite nexus between Ms. Cook's residence and Mr. Garland, who was the thing being sought. RP 2107-2108.

Judge Felnagle upheld his earlier ruling but held that the photographs were admissible for impeachment of Mr. Lachappele only, were subject to a limiting instruction, and admitted only a few of the photographs. RP 2113-2115. Judge Felnagle held that the photographs could be introduced Mr. Lachappele's assertion that Mr. Garland is "a guy that doesn't carry a gun, and didn't carry one on the night in question." RP 2110.

On September 9, 2009, Det. John Ringer testified that he had participated in the search of Ms. Cook's residence and that he had found the photographs in exhibit 155 in a hole in the sheetrock of the ceiling of the garage. RP 2119-2120. Over Mr. Garland's objection, the trial court admitted the photographs. RP 2120.

On September 16, 2009, Mr. Garland renewed the motion to dismiss under CrR 8.3(b) that he brought pre-trial. RP 2417. The trial court again refused to hear the motion finding that it was more important to “get this trial done” than it was to hear Mr. Garland’s potentially dispositive motion. RP 2418. The trial court noted that the Supreme Court had denied Mr. Garland’s petition for review of the trial court’s ruling to hear the motion to dismiss post-trial and held that having the hearing in the middle of trial would be take too long and delay the resolution of the trial too much and that to “try and squeeze it in” would be “counterproductive.” RP 2418-2419.

On September 29, 2009, Mr. Garland filed a motion to admit the prior sworn testimony of Robert Raiford pursuant to ER 804(B)(1). CP 1065-1068. Mr. Garland also filed a motion to prohibit reference to the opening statements made by defense counsel in the prior two trials. CP 1073-1075. A limiting instruction was read to the jury and the photographs were published to the jury. RP 2129.

On September 29, 2009, the State filed a motion to exclude the testimony of defense witnesses. CP 1069-1072.

On October 1, 2009, the State moved to be allowed to impeach Mr. Garland with the opening statements made by Ms. Corey in Mr. Garland’s previous two trials. RP 3470-3472. On October 1, 2009, the State also

filed a memorandum in support of the State's motion to admit evidence of defense counsel's opening statements in the prior two trials. CP 1077-1179. Additionally, the State moved to be permitted to introduce gang-related evidence to impeach Mr. Garland's testimony that the only reference to "Crip" came from Mr. Brock. RP 3472-3473.

On October 5, 2009, the State filed a motion to admit gang-related evidence regarding Mr. Garland's association with the alleged "26 crips" gang. CP 1181-1183.

On October 7, 2009, Mr. Garland filed a response to the State's motion regarding admission of prior opening statements. CP 1184-1193.

On October 8, 2009, Mr. Garland filed a response to the State's supplemental memorandum regarding gang evidence. CP 1194-1201.

Argument on the issue of impeachment of Mr. Garland by use of the prior opening statements was heard on October 8, 2009. RP 3708-3727. The trial court held that, because Mr. Garland's defense had changed between the first two trials and the third trial, the State could introduce the opening statements from Mr. Garland's first two trials to impeach Mr. Garland's testimony that he did not have a gun. RP 3723-3727. Following the court's ruling, Mr. Garland moved for a mistrial on the basis that the State had failed to disclose that it would seek to use the opening statements from Mr. Garland's prior trials until the last witness in

Mr. Garland's case. RP 3727-3737. Counsel for Mr. Garland argued that had she known the State would seek to use the opening statements from the prior trials she would have conducted her examination of Mr. Garland differently and would have called different witnesses. RP 3737-3728. The trial court denied the motion to dismiss. RP 3735-3737.

Argument on the State's motion to admit the gang-related evidence was also heard on October 8, 2009. RP 3748-3771. The trial court reserved ruling until after Mr. Garland testified. RP 3771.

Mr. Garland moved the trial court to reconsider its ruling on allowing the State to impeach Mr. Garland with the opening statements from the prior trials. RP 3778-3787. The trial court refused to reconsider its ruling. 3786-3787. Counsel for Mr. Garland objected to and had a standing objection to the introduction of the evidence of the opening statements from the prior trials. RP 3798. The State introduced evidence that in the two prior trials Mr. Garland's attorney had stated that Mr. Garland had taken out his own firearm and shot Mr. Brock in response to Mr. Brock producing a gun and pointing it at Mr. Garland. RP 3798-3799.

On October 8, 2009, limiting instructions regarding the prior opening statements and the evidence of the "26 crips" gang were filed. CP 1202-1205. Counsel for Mr. Garland objected to the language of the limiting instruction given by the court. RP 3789. The State elicited from

Mr. Garland that on the night of the shooting he did say that he was a member of the “26 block crip.” RP 3809.

During cross-examination of Mr. Garland, the State showed Mr. Garland exhibits 155A and 155B, the photographs taken from Ms. Cook’s residence, and elicited testimony from Mr. Garland that he had posed with the air rifles and had pictures taken with his camera. RP 3806-3807. Mr. Garland testified that he hid the photographs in a hole outside his bedroom because he did not want his mother, Ms. Cook, to find the photographs. RP 3808.

Also on October 8, 2009, the State filed a “partial reply” to Mr. Garland’s motion regarding the use of the defense opening statements from the prior trials. CP 1206-1207.

Mr. Garland objected to the court giving jury instructions numbers 2 and 20. RP 3870-3871. Mr. Garland also objected to the court refusing to give Mr. Garland’s proposed jury instructions numbers 60, 61, and 64. RP 3871-3872.

On October 26, 2009, the jury found Mr. Garland guilty of second degree manslaughter, guilty second degree murder, guilty of second degree assault, and the jury found that Mr. Garland was armed with a firearm during the commission of all counts. CP 1346-1347, 1349, 1351-1353.

On November 4, 2009, Mr. Garland filed a motion for new trial on various grounds including impermissible opinion testimony regarding Mr. Garland's guilt and the credibility of defense witnesses, error in denying Mr. Garland's ability to present evidence that the rifles pictured in exhibit 155 were air rifles, prosecutorial misconduct in closing argument by using impeachment evidence as substantive evidence, error in admitting evidence of defense opening statements from prior trials, error in admitting expert testimony about gunshot residue from an employee of the medical examiner's office, error in refusing to reconsider the issue of whether an order of trespass required the same probable cause as a warrant. RP 1355-1361.

On November 5, 2009, the State filed a response to Mr. Garland's motion for reconsideration and a supplemental response to the motion to dismiss. CP 1362-1365.

On November 12, 2004, the trial court found Mr. Garland guilty of unlawful possession of a firearm in the first degree. RP 4067-4070.

On November 16, 2009, the State filed a response to Mr. Garland's motion for a new trial. CP 1367-1369.

On November 24, 2009, Mr. Garland filed a supplemental motion for new trial based on CrR 7.5. CP 1370-1380.

On November 25, 2009, the State filed a response to Mr. Garland's additional motion for a new trial. CP 1382.

On December 7, 2009, Mr. Garland filed a statement of supplemental authority for his motion to dismiss. CP 1385-1387.

On May 3, 2010, the trial court entered findings of fact and conclusions of law regarding the bench trial on the unlawful possession of a firearm charge. CP 1388-1390.

On April 12, 2010, the trial court denied Mr. Garland's motion for an out of county judge to hear Mr. Garland's motion to dismiss under CrR 8.3. RP 4137-4139. The trial court also denied Mr. Garland's request for an evidentiary hearing on the motion to dismiss. RP 4133-4134.

On May 3, 2010, argument was heard on Mr. Garland's November 4, 2009, motion for a new trial. RP 4144. At oral argument, Mr. Garland made clear that he was moving for a new trial under CrR 7.5(a). RP 4144. The trial court denied Mr. Garland's motion for new trial. RP 4162, 4164. During the hearing, Mr. Garland argued that his conviction for second degree assault should be vacated since the jury found him guilty of manslaughter in the second degree which required a lesser mental state and Mr. Garland's intent with regards to the manslaughter transferred to the injury inflicted on Mr. Marcy. RP 4153-4155. The trial court denied the motion to dismiss the assault charge. RP 4162-4164.

On May 3, 2010, the trial court also finally heard Mr. Garland's motion to dismiss under CrR 8.3(b). RP 4164. The trial court denied the motion to dismiss. RP 4211.

On July 9, 2010, Mr. Garland was sentenced to 346 months total confinement. CP 1399-1412.

Notice of appeal was filed on July 12, 2009. CP 1413. An amended notice of appeal was filed on July 15, 2010. CP 1422-1431.

IV. ARGUMENT

1. **The trial court's error in allowing Mr. Garland to be impeached with his defense counsel's opening statements from the prior two trials deprived Mr. Garland of a fair trial.**

- a. *The trial court erred in permitting Mr. Garland to be impeached with the opening statements of defense counsel from Mr. Garland's first two trials.*

"[W]here contradictory or inconsistent statements are made by a defendant (through counsel) in opening argument and in a defendant's testimony, the statements are admissible for impeachment or to discredit the defendant's case." *State v. Rivers*, 129 Wn.2d 697, 709, 921 P.2d 495 (1996). *See also State v. Dault*, 19 Wn.App. 709, 715-718, 578 P.2d 43 (1978) (attorney's statement at an omnibus hearing regarding the general nature of the defense to the crime charged was admissible on cross examination of defendant to discredit and impeach defendant's testimony);

State v. Acosta, 34 Wn.App. 387, 391-392, 661 P.2d 602 (1983), *reversed on other grounds* 101 Wn.2d 612, 683 P.2d 1069 (1984) (defense counsel's statement to court at omnibus hearing that defense at trial would be an alibi defense were admissible as prior inconsistent statements to impeach the defendant where the defendant claimed self-defense at trial and defendant had not notified the court or counsel of change in the plan of defense).

Rivers, *Dault*, and *Acosta* are all cases where the statements by defense counsel were made in the same trial at which they were offered to impeach the defendant. Thus, the current state of the law in Washington is that the opening statement made by defense counsel in a criminal trial is admissible to impeach the defendant **in that same trial** if the defendant offers testimony which contradicts the statements made in opening argument.

Rivers, *Dault*, and *Acosta*, do not address the situation where a defendant has had a trial or trials that ended in mistrials and the State seeks to use the opening statements from the previous mistrials to impeach the defendant in the subsequent trial. This case presents an issue of first impression as to whether or not opening statements made in a prior trial or trials that ended in mistrials are admissible in the retrial of the defendant.

- i. The trial court erred in admitting evidence of the opening statements made by My Garland's trial counsel in previous trials because those opening statements were not made in the present trial.

As stated above, the current state of the law in Washington is that the opening statement made by defense counsel in a criminal trial is admissible to impeach the defendant **in that same trial** if the defendant offers testimony which contradicts the statements made in opening argument. No authority was cited by the State below and counsel for Mr. Garland on appeal has been unable to find any authority permitting the State to impeach a defendant at a retrial with the defendant's opening statement from a prior trial.³ Accordingly, it was error for the trial court to admit opening statements made by Mr. Garland's trial attorney in **different trials** to impeach him in the current trial.

³ Indeed, in rendering its decision permitting impeachment of Mr. Garland with the opening statements from the previous trials, the trial court did not cite any authority but, instead, appeared to rely on notions of public perceptions of right and wrong:

What if people from the public look in on this case, that know nothing about the history, or anything else, and what will the jurors think in the two cases when they find out, okay, in one case, they say one thing, and then they turn around in the next case and say something entirely different and nobody points it out? That's not fair. That's no way to resolve a legal dispute. That's no way to advance the truth seeking function. These things have to be brought to the jury. You can't just get away with saying one thing and then turning around and saying the almost exact opposite at a later time.

RP 3725-3726. As this court is undoubtedly aware, public perception of fairness is not an authority for the introduction or exclusion of evidence.

- ii. The trial court erred in admitting evidence of the opening statements made by Mr. Garland's trial counsel in previous trials where Mr. Garland's testimony in the current trial did not contradict his counsel's opening statement in the current trial.

As stated above, *Rivers*, *Dault*, and *Acosta* were cases where the State impeached the defendant with the opening statement made by defendant's counsel in that same trial **where the defendant's testimony contradicted the opening statement in that trial**. In its memorandum in support of the admission of prior opening statements, the State acknowledged that Mr. Garland's testimony that he did not have a gun on the night of the shooting did not contradict his trial counsel's opening statement in this case. CP 1080-1081. Therefore, the trial court erred in permitting Mr. Garland to be impeached with any opening statement made by his attorney since Mr. Garland's testimony did not contradict the opening statement made by his attorney in this case.

- iii. The trial court erred in admitting evidence of the opening statements made by My Garland's trial counsel in previous trials where Mr. Garland was asserting inconsistent defenses.

It is undisputed that a defendant has the right to assert inconsistent and even contradictory defenses at trial. *See, e.g., Matthews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) (A criminal

defendant is entitled to jury instructions on inconsistent defenses where any evidence supports each theory; resolving split among circuits; criminal defendant is entitled to jury instructions on inconsistent defenses of entrapment and not committing crime when there is "sufficient evidence from which a reasonable jury could find" the defense satisfied); *State v. Conklin*, 79 Wn.2d 805, 807, 489 P.2d 1130 (1971) (defendant entitled to raise "all defenses, excepting insanity and prior conviction or acquittal," even if they are inconsistent); *State v. Gostol*, 92 Wn.App. 832, 965 P.2d 1121 (1998) (fact that defendant's theory of case was that she was not guilty at all did not preclude her from receiving lesser included offense instruction).

However, where a defendant's asserts inconsistent defenses, the opening statements of a defendant's attorney may not be used to impeach the defendant if the defendant's testimony contradicts the opening statement:

Generally, an attorney representing a client in litigation is authorized to speak for the client concerning that litigation. Thus, an attorney's statement concerning the litigation sometimes qualifies, when offered against the client, as the admission of a party opponent...In criminal cases, however, this rule should be applied with caution, in part due to the danger of impairing the right to counsel...

Although an attorney's statement may sometimes qualify as an admission of the client when offered against the client, it

does not qualify when the attorney is pleading alternatively or inconsistently on the client's behalf.

State v. Williams, 79 Wn.App. 21, 28-29, 902 P.2d 1258 (1995) (internal citations omitted).

The last omnibus hearing was held on January 1, 2006, prior to the commencement of the first trial, and Mr. Garland asserted the general defenses of general denial and self-defense. CP 1447-1448. Mr. Garland maintained the defenses of self-defense and general denial throughout the first, second, and third trials. RP 3713; CP 679, 1189.

The defenses of self-defense and general denial are contradictory: self-defense is an admission that he shot Mr. Brock and Mr. Marcy but that he was justified in doing so; general denial is a denial that he shot Mr. Brock and Mr. Marcy. The only aspect of the defense that changed from the first two trials to the third trial was Mr. Garland's assertion of how he acted in self-defense: in the first two trials Mr. Garland's opening statements indicated that he would claim he shot Mr. Brock with a gun that he brought with him to Bleachers. CP 1077-1079. In the third trial Mr. Garland had refined his self-defense theory of defense to be that he did not have a gun at bleachers and that Mr. Brock and Ms. Marcy were shot during a struggle over a gun produced by Mr. Marcy and wielded by

Mr. Brock. RP 3443-3453.⁴ While this might constitute a change in the particular method of self-defense asserted at trial, it is not a change in the general defense of self-defense that Mr. Garland asserted at every trial.⁵

Mr. Garland asserted the contradictory defenses of self-defense and general denial at the initial two mistrials and in the third trial which resulted in his conviction. Under *Williams*, because Mr. Garland was asserting inconsistent defenses he could not be impeached by any of the opening statements made by his attorney. The trial court erred in permitting such impeachment.

b. The impeachment of Mr. Garland through the use of his counsel's opening statements from the prior two trials deprived Mr. Garland of a fair trial where witness credibility was the sole issue before the jury.

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

⁴

As acknowledged by the State below, because the first two trials ended in mistrials before the State rested in each case, Mr. Garland never testified in the first two trials. CP 1077-1079. Thus, it is impossible to know whether Mr. Garland's testimony in the first two trials would have contradicted the defense opening statements in those first two trials or if Mr. Garland's testimony at those first two trials would have been the same as what he testified to in the third trial.

⁵ CrR 4.7(B)(2)(xiv) only requires a defendant to disclose the general nature of the defense being asserted at trial. CrR 4.7(B)(2)(xiv) does not require disclosure of the defendant's specific theory of defense.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

Mr. Garland testified that he was present at Bleachers on the night of the shooting, got into a confrontation with Mr. Brock, and that Mr. Brock and Mr. Marcy were accidentally shot when Mr. Marcy produced a gun and gave it to Mr. Brock who pointed the gun at Mr. Garland and Mr. Garland struggled with Mr. Brock to avoid being shot. RP 3399, 3412, 3415-3433, 3438-3453. The State presented witnesses who testified that Mr. Garland was the one who produced the gun from his waistband and shot Mr. Brock and Mr. Marcy. RP 1224-1225, 1266-1267, 2295, 2311. Thus, the only issue for the jury to resolve was one of credibility: did the jury believe the State’s witnesses who described Mr. Garland as the man who produced the gun and shot Mr. Brock and Mr. Marcy; or did the jury believe Mr. Garland when he testified that Mr. Marcy produced the gun and handed it to Mr. Brock who then pointed the gun at Mr. Garland and the gun discharged when Mr. Garland stepped forward and struggled with

Mr. Brock in self-defense.

As discussed above, evidence of the prior opening statements was improperly admitted. Such evidence was irrelevant to the current trial since Mr. Garland's testimony in the third trial did not contradict the opening statement made in the third trial. However, the prejudicial impact of the evidence that Mr. Garland's counsel had previously argued that Mr. Garland had a gun on the night in question was heightened since the only issue for the jury to resolve was the credibility of the contradicting witnesses on precisely the issue of whether or not Mr. Garland or Mr. Marcy produced the handgun on the night of the shooting. Admitting the irrelevant and inadmissible opening statements from the previous trials was tantamount to putting Mr. Garland's attorney on the stand and having Mr. Garland's attorney testify that (a) her client was lying and (b) her client was guilty. Given the nature of this case the prejudicial impact of the admission of the opening statements from the prior trials cannot be overstated.

It is true that a limiting instruction was given to the jury that this evidence was admissible only for purposes of determining Mr. Garland's credibility. RP 3797; CP 1202-1203, 1290. However, as the United States Supreme Court has written and the Washington Supreme Court has concurred, "[t]he naive assumption that prejudicial effects can be

overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.” *State v. Newton*, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), citing *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949).

The introduction of the opening statements from Mr. Garland’s first two trials in his third trial prejudiced the jury against Mr. Garland to such a degree that his right to a fair trial was violated.

2. The trial court violated the appearance of fairness doctrine in refusing to hear Mr. Garland’s potentially dispositive motion to dismiss until after Mr. Garland’s trial.

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Wn. Const. art. I, § 22.

“Impartial” means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.

State v. Madry, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972).

When “a claimant presents sufficient evidence of potential bias, [appellate courts] consider whether the appearance of fairness doctrine was violated.” *In re Marriage of Wallace*, 111 Wn.App. 697, 706, 45

P.3d 1131 (2002), *review denied* 148 Wn.2d 1011, 64 P.3d 650 (2003).
“The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial.” *State v. Dominguez*, 81 Wn.App. 325, 330, 914 P.2d 141 (1996).

On September 11, 2007, Mr. Garland first brought his motion for dismissal of his case under CrR 8.3(b) on grounds that the State’s repeated discovery violations over the course of two trials prejudiced Mr. Garland’s right to a fair trial. CP 383-400. This motion was renewed on September 24, 2007. CP 519-524. On July 29, 2009, the trial court entered an order that the motion to dismiss would not be heard until the end of trial. RP 30-31, 82-83; CP 894-895. The trial court held that because “the time required to litigate this motion would delay the commencement of the jury trial”[,], “the appropriate time for hearing the motion [was] at the conclusion of the trial, which [was] expected to last for many weeks.” CP 894-895. In its oral ruling, the trial court noted that Mr. Garland’s case was “nearly 1,200 day[s] old,” that the parties were ready for trial, and that “if [the court were to] go the other direction and we end up having a hearing, there is no way it’s going to happen quickly.” RP 30-31. The trial court’s oral ruling makes clear that that trial court was far more concerned with the fact that Mr. Garland’s case had been in the system a long time and with getting Mr. Garland’s case to trial than it was with the

merits of Mr. Garland's motion or creating even the appearance of a neutral magistrate.

On May 3, 2010, the trial court finally heard Mr. Garland's motion to dismiss under CrR 8.3(b). RP 4164. The trial court denied the motion to dismiss. RP 4211.

Regardless of the merits of Mr. Garland's motion to dismiss under CrR 8.3(b), the trial court had an obligation to address the motion in a manner which upheld the appearance of fairness. The behavior of the trial court in dealing with Mr. Garland's potentially dispositive motion to dismiss did not satisfy the appearance of fairness requirement.

Judge Felnagle's repeated statements of concern for the trial occurring, the age of the case, and the speed at which the trial would be resolved make clear that either Judge Felnagle had already determined in his mind that Mr. Garland's motion was meritless and wasn't worth delaying the trial to hear it or that Judge Felnagle simply wanted to demonstrate his ability to close a case that had been in the system for a very long time. In the first instance, it is clear that Judge Felnagle was not behaving as a neutral and unbiased magistrate. In the second instance, it is clear that Judge Felnagle was concerned more with court system efficiency in clearing cases than with ensuring Mr. Garland received a fair trial at which his rights were respected. In either situation, under the

appearance of fairness doctrine and acting as a presumably independent and neutral magistrate, Judge Felnagle should have addressed Mr. Garland's potentially dispositive motion to dismiss pre-trial rather than waiting until the end of the trial. Indeed, if Judge Felnagle's overriding concern was obtaining a resolution of Mr. Garland's case, then he should have heard Mr. Garland's motion to dismiss pre-trial since the entire trial might have been avoided had Mr. Garland been successful on his motion.

The refusal of the Judge Felnagle to hear Mr. Garland's motion to dismiss until after Mr. Garland had been convicted established: (a) Judge Felnagle had prejudged the merits of Mr. Garland's motion and decided it wasn't worth the court's time to give him a hearing; (b) Judge Felnagle had prejudged Mr. Garland's guilt and decided that Mr. Garland was guilty and that there would be a finding of guilt from the jury; and (c) that it was more important that Mr. Garland's case be tried than it was that Mr. Garland's right to a fair trial be protected. The existence of any one or all of these situations creates serious doubt about Judge Felnagle's ability to hear Mr. Garland's trial impartially.

A reasonably prudent and disinterested observer watching how the trial court dealt with Mr. Garland's motions would not have concluded that Mr. Garland obtained a fair, impartial, and neutral trial. Rather, a reasonably prudent and disinterested observer would conclude that Judge

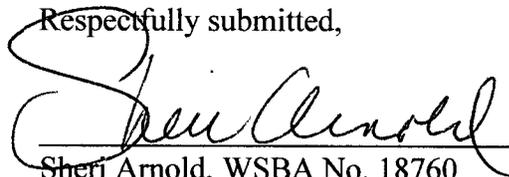
Felnagle was far more concerned with getting Mr. Garland's case tried and of the docket than with ensuring that Mr. Garland received a fair trial. Judge Felnagle's refusal to hear Mr. Garland's potentially dispositive motion to dismiss violated the appearance of fairness doctrine in that Judge Felnagle appeared far more concerned with getting Mr. Garland brought to trial and convicted than with ensuring Mr. Garland's rights to a fair trial were protected.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Garland's convictions and remand his case for a new trial.

DATED this 13th day of June, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sheri Arnold", written over a horizontal line.

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

COUNTY CLERK
PIERCE COUNTY

CERTIFICATE OF SERVICE

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The undersigned certifies that on June 13, 2011, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Raymond W. Garland, DOC # 834942, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362, copies of this Opening Brief. 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 June 13, 2011.

STATE OF WASHINGTON
BY _____
DEPUTY



Norma Kinter