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NO.

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THE SUPREME COURT  
STATE OF WASHINGTON

**F I L E D**  
DEC 28 2005

STATE OF WASHINGTON, PETITIONER,

v.

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

GARY MICHAEL BENN, RESPONDENT

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Court of Appeals Cause No. 31122-4

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PETITION FOR REVIEW

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Appendix A	
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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this court to accept review of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of the partially published opinion, filed on November 15, 2005, in the State of Washington v. Gary Michael Benn, in COA No. 31122-4-II. See Appendix A.

C. ISSUES PRESENTED FOR REVIEW.

1. Did the court below erroneously find the double jeopardy clause was applicable to defendant's non-capital sentencing proceeding when that decision conflicts with the United States Supreme Court decision in Monge v. California?
2. Did the court err in finding that the double jeopardy clause was implicated by re-submission of a special verdict form asking a jury to determine whether an aggravating factor was applicable to defendant's crime in a retrial following defendant obtaining a new trial when that decision conflicts with the United States Supreme

Court decisions in Satterzahn v. Pennsylvania and Poland v. Arizona?

3. Did the Court of Appeals err in finding that an unanswered jury question regarding the existence of an aggravating factor was the equivalent of an “implicit acquittal” when under the given jury instructions the unanswered question was a statement that the jury was unable to agree whether the factor applied?

4. Should this petition for review be stayed pending the decision in State v. Linton, Supreme Court Case No. 75784-4, a case pending review before this court, as it presents some of the same legal issues for review?

D. STATEMENT OF THE CASE.

A jury found defendant, Gary Michael Benn guilty of two counts of first degree murder, found the existence of an aggravating circumstance and returned a death verdict. Benn exhausted his state remedies without obtaining relief from his judgment or sentence. State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993), cert. denied, Benn v. Washington, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331, 1993 U.S. LEXIS 6691, 62 U.S.L.W. 3319 (1993); In re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). However, Benn was successful in obtaining federal

habeas relief. Benn v. Lambert, 283 F.3d 1040, (9th Cir. 2002), cert. denied, Lambert v. Benn, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002). This case stems from his retrial following the grant of a new trial by the federal courts. The State did not seek the death penalty upon retrial. Opinion below at p. 4.

On September 22, 2003, the state filed a refiled a corrected Information in Pierce County Superior Court cause number 88-1-01280-8 charging two counts of murder in the first degree with aggravating circumstances. CP 115-116. The defendant made a motion to dismiss the aggravating factors at the end of the state's case in chief. CP 411-419; RP 2099. The defense argued that double jeopardy barred the State from proceeding on the "single act" aggravating factor because the jury left that aggravating factor blank in the first trial. Id. The State argued that the defendant failed to establish that the jury in the first trial acquitted the defendant of the "single act" aggravating factor such that double jeopardy would have terminated as to that factor. CP 423-435. The first jury was asked to determine whether either or both of two aggravating circumstances applied to defendant's crimes: whether the deaths were (1) part of a common scheme or plan or (2) the result of a single act of the person. CP 516. The first jury unanimously answered "yes" in finding the "common scheme or plan" aggravating circumstance but did not answer

"yes" or "no" as to the "single act" aggravating circumstance. Id. The court denied defendant's motion to dismiss the "single act" aggravating factor and entered the following order:

The court finds that the State has conceded there is insufficient evidence of a "common scheme or plan" to instruct the jury on that portion of the charged aggravating circumstance. The court finds further that, because the jury left the "single act" portion of the special verdict form blank at the 1990 trial, the jury was not unanimous as to that alternative of the charged aggravating circumstance. Because that portion of the special verdict form was left blank, the jury did not unanimously find it was not an aggravating circumstance, and therefore, jeopardy did not attach to the alternative aggravating circumstance.

CP 440-441. In the second trial, the State presented evidence of the "single act" aggravating factor. The jury found defendant guilty of both counts of murder in the first degree and unanimously found that the "single act" aggravating factor was present. CP 488, 490. The court sentenced defendant to a sentence of life without the possibility of parole. CP 493-500.

Defendant timely appealed his judgment and sentence to Division II of the Court of Appeals. In a partially published opinion, the Court of Appeals vacated the aggravating circumstances special verdict finding that double jeopardy barred re-litigating the "single act" issue in the second trial. The court otherwise affirmed the convictions, but remanded for imposition of a sentence on murder in the first degree.

The State now seeks review of the decision vacating the verdict on the aggravating circumstance.

E. OVERVIEW OF ARGUMENT

This case was returned to the trial court after defendant successfully obtained a new trial in the federal courts. While defendant had been given the death penalty by the first jury, the retrial was a non-capital proceeding. The Court of Appeals ruled that submitting a question to the second jury in a non-capital case about the applicability of an aggravating factor would violate double jeopardy if the first jury had implicitly "acquitted" defendant of that aggravating factor. As will be discussed below, this decision is erroneous for multiple reasons. First, the decision below is in conflict with the decision of the United States Supreme Court in Monge v. California, 524 U.S. 721, 724, 118 S. Ct. 2246, 141 L.Ed.2d 615 (1998) which holds that the double jeopardy clause is not applicable to non-capital sentencing proceedings. Secondly, even under capital sentencing jurisprudence -where there is double jeopardy protection- the actions taken in the trial court below would not violate double jeopardy. Sattazahn v. Pennsylvania, 537 U.S. 101, 154 L.Ed.2d 588, 123 S. Ct. 732 (2003); Poland v. Arizona, 476 U.S. 147, 90 L. Ed. 2d 123, 106 S. Ct. 1749 (1986). Finally, the court erred in finding that the first jury's verdict form that expressed an inability to agree constituted an "implied acquittal."

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT BELOW ERRED IN EXTENDING  
DOUBLE JEOPARDY PROTECTIONS TO A  
NON-CAPITAL SENTENCING PROCEEDING IN  
CONTRAVENTION OF CONTROLLING  
SUPREME COURT PRECEDENT.

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. State v. Hescocck, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Assuming a court has jurisdiction over a case, jeopardy will attach in a jury trial when the jury is sworn and, in a bench trial, when the first witness is sworn. State v. Corrado, 81 Wn. App. 640, 646, 915 P.2d 1121 (1996). Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final, but not with a conviction that a defendant successfully appeals. Id. at 646-647. A second trial following a successful appeal is generally not barred, however, because the defendant's appeal is part of the initial jeopardy or "continuing jeopardy." Id. at 647. Thus, the successful appeal of a judgment of

conviction will not prevent further prosecution on the same charge unless the reversal was based upon insufficiency of the evidence. Id. at 647-648. Similarly, a retrial following a "hung jury" does not normally violate the Double Jeopardy Clause because this is another instance of continuing jeopardy. Richardson v. United States, 468 U.S. 317, 324, 82 L. Ed. 2d 242, 104 S. Ct. 3081 (1984). "[N]either this court nor the United States Supreme Court has ever held that a hung jury bars retrial under the double jeopardy clauses of either the Fifth Amendment or Const. art. 1, § 9." State v. Russell, 101 Wn.2d 349, 351, 678 P.2d 332 (1984).

The United State's Supreme Court has found that the protections of the double jeopardy clause, which apply in death penalty sentencing proceedings, do not extend to non-capital sentencing proceedings. Monge v. California, 524 U.S. 721, 724, 118 S. Ct. 2246, 141 L.Ed.2d 615 (1998). At issue in Monge was a recidivist sentence under California's "three strikes" law. California's statutes provided Monge with a number of procedural protections surrounding the determination of the existence of his qualifying prior convictions. Monge waived his right to a jury determination on the sentencing issues and submitted the question to the court. The trial judge considered the prosecution's evidence supporting the sentencing allegations, found them to be true, and then imposed the appropriate sentence. On appeal, the California Court of Appeals found

that the evidence presented was insufficient to find that Monge had a qualifying prior conviction. It vacated the sentence and ruled that retrial on the allegation would violate double jeopardy principles. The California Supreme Court reversed the Court of Appeals ruling on double jeopardy and held that the prosecution could seek to retry the sentencing allegation.

The United States Supreme Court took review to resolve a conflict that had been developing among the state and federal courts as to whether double jeopardy principles announced in capital cases also applied to non-capital sentencing proceedings. It held that the double jeopardy clause does not preclude retrial on a sentencing allegation when sentencing a defendant convicted of a non-capital offense. Monge, 524 U.S. at 729.

The Supreme Court explained in Monge that

sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal . . . Where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt.

Id. at 729 (internal citations omitted).

Although commonly referred to as “aggravated first degree murder” or “aggravated murder” Washington’s criminal code does not contain such a crime in and of itself; the crime is premeditated murder in

the first degree accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020. State v. Roberts, 142 Wn.2d 471, 501, 14 P.3d 713 (2000); State v. Irizarry, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). The aggravating circumstances pertain to the sentence to be imposed. The court in Kincaid explained it as follows:

In the statutory framework in which the statutory aggravating circumstances now exist, they are not elements of a crime but are "aggravation of penalty" provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense. The crime for which the defendant was tried and convicted in connection with the death of his wife was premeditated murder in the first degree, and the jury was correctly instructed as to the elements of that offense. The penalty for that murder was properly enhanced to life imprisonment without possibility of parole when the jury unanimously found by a special verdict that the existence of a statutory aggravating circumstance had been proved by the State beyond a reasonable doubt.

Kincaid, 103 Wn.2d at 312. (Footnotes omitted). It is well settled in Washington that the determination of the existence of an aggravating factor relates to sentencing and is not an element of the offense. Consequently, in a case such as this one, where the death penalty is not being sought, the double jeopardy clause is not implicated in relitigating whether a particular penalty provision is applicable to defendant's case. The decision below conflicts with Monge as the Court of Appeals

extended double jeopardy protections to a non-capital sentencing proceeding. This decision is in conflict with a supreme court decision and presents a significant question of law under the United State's Constitution; this provides a basis for review under RAP 13.4(b).

2. APPLICATION OF PRECEDENT APPLICABLE TO CAPITAL PROCEEDINGS SHOWS THAT THE DOUBLE JEOPARDY CLAUSE DOES NOT PRECLUDE THE STATE FROM SEEKING A SECOND JURY'S DETERMINATION OF THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE WHEN THE FIRST JURY FOUND ONE AGGRAVATING CIRCUMSTANCE APPLIED AND COULD NOT UNANIMOUSLY AGREE AS TO A SECOND.

Even if this were a capital case, where the double jeopardy clause applies, there would be no constitutional violation in resubmitting to a second jury the question of whether an aggravating circumstance is applicable to defendant's crime under the circumstances presented by this case.

The United States Supreme Court's decision in Sattazahn v. Pennsylvania, 537 U.S. 101, 154 L.Ed.2d 588, 123 S. Ct. 732 (2003), analyzed whether the double jeopardy clause was implicated when the state sought the death penalty on retrial for a defendant who successfully challenged his conviction for first degree murder where the first jury had not been able to reach a decision as to whether aggravating circumstances existed that would make defendant eligible for the death penalty.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L.Ed.2d 588 (2003). The court held that there was no double jeopardy bar to retrying Sattazahn on the capital offense or the lesser charge of murder because jeopardy had never terminated with respect to either offense. Id., 537 U.S. at 112-115.

In Sattazahn, the United States Supreme Court cited Poland v. Arizona, 476 U.S. 147, 90 L. Ed. 2d 123, 106 S. Ct. 1749 (1986), with approval. In that case, the jury convicted defendant of first-degree murder. Poland, 476 U.S. at 149. At the sentencing hearing, the court found that only one aggravating circumstance was present even though the prosecution presented evidence of two statutory aggravating circumstances. Id. Poland successfully challenged his conviction and death sentence on appeal. On remand, the defendant was again convicted of first degree murder. At the sentencing hearing the prosecution argued the same two aggravating circumstances as in the first trial plus an additional aggravating circumstance. Poland, 476 U.S. at 149-150. The sentencing court found all three aggravating circumstances were present and sentenced defendant to death. Id. On appeal to the United States Supreme Court, the court held that the first trial judge's rejection of one of the aggravating circumstances was not an "acquittal" of that circumstance for double jeopardy purposes. Poland, 476 U.S. at 157. It stated:

We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes.

Poland, 476 U.S. at 155. The court did not view aggravating circumstances as being separate penalties or offenses. Thus, the finding of any particular aggravating circumstance does not of itself "convict" a defendant, and the failure to find any particular aggravating circumstance does not "acquit" a defendant. Only a determination that no aggravating circumstance applied was an "acquittal" barring a second death sentence proceeding.

In this case, in the first trial, Benn was convicted of two counts of murder in the first degree. State v. Benn, 120 Wn.2d 631, 638, 845 P.2d 289 (1993). The jury was asked to determine whether either or both of two aggravating circumstances applied to defendant's crimes: whether the deaths were (1) part of a common scheme or plan and/or (2) the result of a single act of the person. CP 516. The jury unanimously answered "yes" in finding the "common scheme or plan" aggravating circumstance was present but did not answer "yes" or "no" as to the "single act" aggravating circumstance. Id. In the second trial, the State presented evidence of the "single act" aggravating circumstance. The jury found defendant guilty of both counts of murder in the first degree and unanimously found that the

“single act” aggravator was present. CP 488, 490. Under either Satterzahn or Poland, the jury’s determination that the “single act” aggravating circumstance applied to defendant’s crime did not implicate the double jeopardy clause.

The Court of Appeals attempted to avoid having Satterzahn control its decision by focusing on the fact that it was a “plurality opinion” and that the facts more strongly showed that the jury had been unable to reach unanimous agreement. The Court of Appeals did not address the holding of Poland, which was endorsed by six justices, despite the fact that it was cited in respondent’s brief. The Court of Appeals decision conflicts with both Sattazahn and Poland. These cases demonstrate that even in a capital case, the double jeopardy clause does not bar consideration in the second trial of whether certain aggravating circumstances apply even though such factors were not found to exist in the first trial.

3. EVEN IF THE COURT DOES NOT GRANT REVIEW FOR THE FOREGOING REASONS, THE COURT SHOULD STAY CONSIDERATION OF THIS PETITION UNTIL THE COURT ISSUES ITS DECISION IN STATE V. LINTON.

On March 1, 2005, this court granted a petition for review on State v. Linton, 122 Wn. App. 73, 93 P.3d 183 (2004), review granted, 153 Wn.2d 1017, 108 P.3d 1229 (2005), Supreme Court Case No. 75784-4. Linton went to trial on the charge of assault in the first degree, but was

found guilty of the lesser included offense of assault in the second degree when the jury was unable to agree on the charged offense and left that verdict form blank. Linton, 122 Wn. App. at 75-76. The prosecutor sought to retry Linton on the greater charge immediately but the trial judge ruled that this was not permissible because it would expose Linton to double jeopardy. Id. The Court of Appeals, Division I, affirmed this ruling finding that Linton had been impliedly acquitted of the greater charge. Id. at 83.

Some of the same issues presented in Linton are also present in this case including whether a blank verdict form is the equivalent of an “implied acquittal” and the impact State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991) should have on this question.

The Court of Appeals below erred in finding that the "blank" jury form with regard to one aggravating circumstance was the equivalent of an implied acquittal. There are circumstances where the failure of a jury to return verdicts on some counts or on greater offenses will act as an implicit acquittal of those counts if the record is silent as to why the court discharged the jury without it having returned verdicts on all the counts or charges. Green v. United States, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957); State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937). But cases where it is clear that the jury did not complete a verdict form because of deadlock are not controlled by Green. United States v. Bourdeaux, 121

F.3d 1187, 1192 (8th Cir. 1997)(jury indicated by note on verdict form that, after reasonable efforts, it was unable to agree on greater offense; it then found defendant guilty on lesser offense; when defendant obtained new trial he could be retried on greater offense); United States v. Allen, 755 A.2d 402, 408-09 (D.C. App. 2000), cert. denied, 533 U.S. 932, 150 L. Ed. 2d 722, 121 S. Ct. 2556 (2001); State v. Martinez, 120 N.M. 677, 905 P.2d 715, 716-17 (1995).

An express failure to agree is not an “implicit acquittal” despite the presence of a "blank" verdict form. In State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937), this Court indicated that it was the trial court’s failure to make a proper record of the reason it was discharging the jury, rather than the fact of the blank jury forms, that led it to find retrial was barred by double jeopardy.

Had it been made to appear in the record that the court exercised its discretion and discharged the jury on counts two and three because it satisfactorily appeared that there was no probability of their agreeing upon a verdict on those counts, and then the respondent could have been put on trial again as to counts two and three.

Davis, 190 Wash. at 167. The Court of Appeals, in the decision now before the court, improperly equated a blank verdict form with jury silence and improperly found an implicit acquittal on an aggravating factor.

The special verdict form from the first trial shows that the jury was expressing its *inability to agree* as to that circumstance. If it had found

that the aggravating circumstance did not apply, it would have circled "no" on the verdict form. The verdict form shows an express inability to agree, not an implicit acquittal. The court below misapplied Davis.<sup>1</sup>

In reaching the decision below, the Court of Appeals failed to consider the impact of this court's decision in State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991). In Labanowski, this court indicated a preference that juries be instructed that it could consider a lesser offense if unable to agree on the charged offense after full and careful consideration. Prior to that, juries had been instructed to consider the lesser offense *only* after having acquitted defendant of the greater charged offense. When considering Washington cases that concern blank jury forms and whether such indicates an implicit acquittal, the court must examine whether those cases issued before or after this change in the law as to whether a jury could consider a lesser offense before it had decided to acquit a defendant of a greater charge. Before Labanowski, a guilty verdict on a lesser charge coupled with a blank verdict form on a greater offense indicated

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<sup>1</sup> The Court of Appeals also improperly relied upon State v. Hescoek, 98 Wn. App. 600, 989 P.2d 1251 (1999). Hescoek involved a bench trial where the case had been tried to the court on alternative means of committing forgery. The court entered findings of fact and conclusions of law regarding the basis for its determination of guilt; the trial court had found guilt on only one of the means. When the appellate court found that there was insufficient evidence to support the means found by the trial court, the case was dismissed rather than remanded as the court found that the judge's silence to the alternative means was the equivalent to an implicit acquittal. Hescoek has no application to jury verdicts where the jury has expressly indicated its inability to agree.

that the jury had acquitted on the greater offense. After Labanowski, a blank jury form on a greater offense did not hold the same meaning and, thus, should not act as a bar to retrial.

Washington and federal constitutional law is clear that the unanimous decision of twelve jurors finding a criminal defendant not guilty will forever bar his retrial on that offense. However, constitutional law is equally clear that a hung jury is not a bar to retrial. The Court of Appeals' decision erodes the distinction between these two situations. Treating a hung jury as an implicit acquittal gives more power to an individual juror than the legal system envisions. The power to acquit properly belongs only to a unanimous jury – not to one in disagreement. No single juror should have the power to bar retrial of a defendant of the crime charged whenever all the jurors agree that the defendant committed some lesser offense. The lower court's decision to the contrary creates a significant question of constitutional law and an issue of substantial public interest. Review should be granted under RAP 13.4(b)(3) and (4).

In this case, after defendant has successfully obtained a new trial, the State sought to retry defendant on the same charge but sought a lesser penalty upon conviction. As mentioned above, by seeking relief from his conviction in the appellate courts, defendant remained in continuing jeopardy. Defendant was re-convicted of the same crimes and the jury found an aggravating circumstance applied to his crimes just as the first

jury had found. Because the procedural history of this case includes a successful challenge to his conviction by the defendant, this case presents facts closer to those in Sattazahn v. Pennsylvania and Poland v. Arizona than Linton does. Thus, while this case involves some of the same issues as Linton regarding what constitutes an implicit acquittal and scope of protection of the double jeopardy clause, the cases do not present identical issues. If the court does not grant this petition for review outright, then at the least it should defer consideration of this petition for review until the court issues its opinion in Linton.

G. CONCLUSION.

The Court of Appeals' decision that double jeopardy protections are applicable to a non-capital sentencing determination is in error as it conflicts with the holding of Monge v. California. The decision below also conflicts with United States Supreme Court decisions regarding double jeopardy protections in capital cases. The Court of Appeals further erred in finding that a prior jury had implicitly acquitted defendant of an aggravating factor when the special interrogatory indicated only that the jury was unable to unanimously agree. This court should grant review to correct these errors and to uphold the verdict and sentence imposed in

the trial court. At the very least, this court should stay consideration of this petition for review until it issues the decision in Linton.

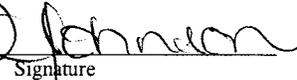
DATED: December 15, 2005.

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WSB # 14811

Certificate of Service:

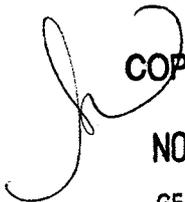
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

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## **APPENDIX “A”**

*Part Published Opinion,  
Court of Appeals Cause No. 31122-4*

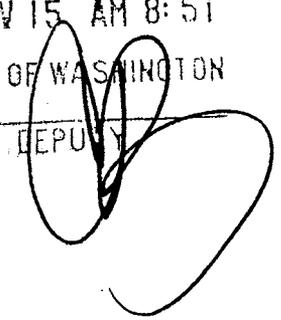


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

GARY MICHAEL BENN,

Appellant.

No. 31122-4-II

PART PUBLISHED OPINION

ARMSTRONG, J. -- Gary Michael Benn appeals his two convictions of aggravated murder. He claims that the trial court erred when it allowed the State to proceed on a "single act" aggravating circumstances theory because a jury implicitly acquitted him of that circumstance in his first trial. He also claims that the court erred in: (1) admitting prior testimony when he did not have the opportunity or similar motive to cross-examine the witness; (2) limiting his cross-examination of the State's expert witnesses concerning learned treatises; (3) excluding a letter he wanted to use to impeach a state witness; (4) excluding prior inconsistent testimony; and (5) admitting a hearsay statement one of the victims made to Benn's brother. Finally, Benn argues that his second trial violated double jeopardy principles because his first trial was reversed for prosecutorial misconduct. We vacate the aggravating circumstances special verdict because the first jury's decision should have prevented the State from relitigating the "single act" issue at the second trial. Otherwise, we affirm the convictions.

## FACTS

### I. The First Trial

In 1988, Gary Michael Benn called the Pierce County Sheriff's Department from the home of his half-brother, Jack Dethlefsen, to report finding Dethlefsen and his friend Michael Nelson dead. *See Benn v. Lambert*, 283 F.3d 1040, 1044 (9th Cir. 2002). Both men had been shot once in the chest and once in the back of the head. *Benn*, 283 F.3d at 1044.

The police found a handgun on the floor between the two bodies and a baseball bat next to Dethlefsen's body. *Benn*, 283 F.3d at 1044. Dethlefsen's head rested next to a gun cabinet, which had a shotgun in it, and the glass face of the cabinet, which had been broken. *Benn*, 283 F.3d at 1044. One of Benn's boots was spattered with blood. *Benn*, 283 F.3d at 1044.

The State charged Benn with two counts of premeditated, first degree murder with the aggravating circumstance that the murders were part of a "common scheme" or "single act." *Benn*, 283 F.3d at 1044. At trial, the defense conceded that Benn had shot both Dethlefsen and Nelson, but it claimed that he did so in self-defense after a spontaneous argument between Benn and Dethlefsen. *Benn*, 283 F.3d at 1044.

The State's theory was that Benn planned the killings to cover up his participation with the victims in an arson insurance fraud scheme. *Benn*, 283 F.3d at 1044. To prove the theory, the prosecution relied on statements that Benn had allegedly made to Roy Patrick, a jailhouse informant who was Benn's cellmate before trial. *Benn*, 283 F.3d at 1044-45.

Even though the prosecuting attorneys had first interviewed Patrick more than a year before trial, they did not identify him as a witness until the day before trial. *Benn*, 283 F.3d at 1048. Moreover, Pierce County Assistant Prosecuting Attorney Michael Johnson lied to the defense, stating that Patrick's identity could not be disclosed because he was in a witness

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protection program. *Benn*, 283 F.3d at 1048. Later, it came out that Patrick was never in such a program. *Benn*, 283 F.3d at 1048. In addition, the prosecution failed to disclose impeaching evidence relating to Patrick as well as critical exculpatory evidence showing that the fire in Benn's trailer, the alleged arson, was an accident. *Benn*, 283 F.3d at 1050.<sup>1</sup>

A jury convicted Benn of both counts of first degree murder. *See State v. Benn*, 120 Wn.2d 631, 638, 845 P.2d 289 (1993). The jury was instructed:

The laws of the State of Washington provide for certain Aggravating Circumstances which may be present during the commission of premeditated first degree murder. Included in these aggravating circumstances are:

(1) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

The *presence* of any aggravating circumstance must be proved by the state beyond a reasonable doubt. Where there is more than one aggravating circumstance alleged, the jury must be unanimous as to which circumstance was *present*. There may be more than one circumstance present.

Clerk's Papers (CP) at 434 (emphasis added).

The corresponding special verdict form read as follows:

As to Count I and II was there more than one victim and were the murders: part of a common scheme or plan yes (Yes or No), or the result of a single act of the defendant \_\_\_\_\_ (Yes or No)?

CP at 510. The jury wrote "Yes" that Benn killed multiple victims as part of a common scheme or plan, but it left the second aggravating factor blank. *See Benn*, 120 Wn.2d at 647. The court sentenced Benn to death. *Cf. Benn*, 120 Wn.2d at 647.

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<sup>1</sup> Later, the Ninth Circuit held that the withheld impeachment evidence "reveal[ed] that Patrick, a critical witness for the state, was 'completely unreliable, a liar for hire, [and] ready to perjure himself for whatever advantage he could squeeze out of the system.'" *Benn*, 283 F.3d at 1059. (quoting *Benn v. Wood*, No. C98-5131FDB, 2000 U.S. Dist. LEXIS 12741, at \*13-14 (June 2000)).

Benn appealed to the Supreme Court, which affirmed his murder convictions and death sentence. *Benn*, 120 Wn.2d 631. The Supreme Court denied his personal restraint petition.<sup>2</sup> Then the United States District Court for the Western District of Washington granted Benn's habeas petition and ordered a new trial. *Benn v. Wood*, No. C98-5131FDB, 2000 U.S. Dist. LEXIS 12741 (June 30, 2000). The State appealed, and the Ninth Circuit affirmed holding that: (1) the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1903), when it withheld evidence that would have seriously undermined Patrick's credibility and when it withheld experts' findings that the fire was accidental. *Benn*, 283 F.3d 1053-54.

## II. The Second Trial

On retrial, the State charged Ben with two counts of aggravated first degree murder. This time, the State did not seek the death penalty and abandoned the arson insurance fraud theory. It also conceded that it could not prove that the murders were part of a common scheme or plan, and it relied solely on the "single act" theory. CP at 440. Before trial, Benn moved to dismiss on grounds of double jeopardy, arguing that the prosecutor's misconduct in the first trial precluded retrial.<sup>3</sup>

Benn also moved to compel the State to disclose a complaint letter that the Ethics Committee of the American Academy of Forensic Sciences (AAFS) had sent to Rod Englert, one

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<sup>2</sup> The court held, (1) Benn was not denied effective assistance of counsel; (2) evidence supported a finding that Patrick was not an agent of law enforcement; (3) the State did not violate *Brady*; (4) Benn was competent to be executed; and (5) the death penalty statute is constitutional.

<sup>3</sup> He argued that under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the Washington State Constitution offers more double jeopardy protection than the U.S. Constitution, and as such, the court should find that re-prosecution is prohibited when the State's conduct is intentionally undertaken to prejudice the defendant to the point of denying him a fair trial. Specifically, he argued that the court should dismiss the information the prosecutor committed misconduct in the first trial.

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of the State's expert witnesses. Benn argued that the letter was material because it impeached Englert, relevant to his credibility and bias. The State argued that the letter was not discoverable and that the allegations in the letter were baseless and forwarded by Englert's rivals and competitors. The court denied Benn's motion.

The State also moved to preclude Benn from cross-examining Englert about accusations in the letter. The court ruled that it would not allow cross-examination on the underlying data in the letter. Later, the court clarified that Benn could cross-examine Englert on which college and graduate courses he had taken, his opinions about blood stain patterns, and articles he had written about crime scene investigations.

Walter Pete Hartman testified in the first trial that Benn attempted to hire him to kill Jack Dethlefsen. Hartman died before the second trial, so the State moved to admit his former testimony. The court granted the motion, ruling that Hartman was "unavailable" as defined in Evidence Rule 804(a)(4). CP at 284-85. The court also found that Hartman's prior testimony was "former testimony" under ER 804(1) and that Benn had had the opportunity and similar motive to cross-examine Hartman at the first trial even though he declined to do so. CP at 284-85. But it ruled that Benn could impeach Hartman under ER 806. CP 284-85. Accordingly, Benn called Charles Bonet, a former investigator, who offered testimony intended to impeach Hartman.

The State also objected to Benn's attempts to impeach one of the State's expert witness, Michael Grubb, on cross-examination, regarding certain learned treatises. The State argued that Benn was trying to elicit the "substance" of the treatises. Report of Proceedings (RP) at 1848. The court sustained the State's objection.

When the State rested, Benn moved to dismiss the aggravating factor, arguing that double jeopardy barred the State from proceeding on the “single act” aggravating factor because the jury left the corresponding verdict form blank in the first trial. In his motion, he emphasized:

the Court discharged the jury without any inquiry into why it had not returned a verdict on the single act aggravating factor. There was no showing that the jury was hopelessly deadlocked. The Court never asked the jury whether it might be able to reach a verdict on that issue after further deliberations. The Court never declared a mistrial, and it certainly never obtained the defendant’s consent to do so.

CP at 414 (footnote omitted).

The court ruled:

Because that portion of the special verdict form was left blank, the jury did not unanimously find it was not an aggravating circumstance, and therefore, jeopardy did not attach to that alternative aggravating circumstance.

CP at 440-41.

Benn also objected to certain hearsay testimony by his brother, Monte Benn. Specifically, Benn objected to Monte’s statement, “Jack told me he was beat up in his kitchen, and that if I saw Gary, he wanted to talk to him about it.” RP at 2490. The trial court overruled Benn’s objection.

The jury found Benn guilty of both counts of first degree murder. The jury also answered “yes” to the aggravating factor special verdict that the murders constituted a “single act.” CP at 488.

## ANALYSIS

### I. Double Jeopardy for the “Single Act” Aggravating Factor

Benn argues that the trial court should have granted his motion to dismiss the single act aggravating factor based on double jeopardy. Whether the first jury’s failure to fill in the special

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verdict on single act aggravating factor bars the second jury from considering the issue is a question of law that we review de novo. *See generally, State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (stating that we review issues of law de novo).

The United States and Washington Constitutions' double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959); *see* WASH. CONST. art. I, § 9; U.S. CONST. amend. V. They both "protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction." *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Where the language of the state constitution is similar to that of the federal constitution, the language of the state constitutional provision should receive the same definition and interpretation that the United States Supreme Court has given to the like provision in the federal constitution. *State v. Linton*, 122 Wn. App. 73, 76, 93 P.3d 183 (2004) (citing *Schoel*, 54 Wn.2d at 391), *review granted*, 153 Wn.2d 1017 (2005). Washington courts have given article I, section 9 the same interpretation that the Supreme Court has given to the fifth amendment. *State v. Gocken*, 127 Wn.2d 95, 103, 896 P.2d 1267 (1995) (citing *State v. Ridgley*, 70 Wn.2d 555, 556, 424 P.2d 632 (1967); *State v. Larkin*, 70 Wn. App. 349, 352-53, 853 P.2d 451 (1993); *State v. Kirk*, 64 Wn. App. 788, 790-91, 828 P.2d 1128 (1992)); *State v. Cochran*, 51 Wn. App. 116, 121-22, 751 P.2d 1194 (1988).

A. Dismissal Without Consent

Benn reasons that collateral estoppel bars the State from relitigating the single act aggravating circumstance because the court discharged the first jury without inquiring into why it had not returned a verdict on the single act aggravating factor; there was no showing that the

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jury was hopelessly deadlocked; the court never asked the jury whether it might be able to reach a verdict on that issue after further deliberations; and the court never declared a mistrial or obtained Benn's consent to do so. Under these circumstances, according to Benn, the first jury's failure to decide the issue operated as an acquittal.

The failure of a jury to answer a verdict form may bar the State from retrying the defendant on the charge. *Green v. United States*, 355 U.S. 184, 188-89, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). In *Green*, the prosecution tried the defendant on alternative charges of first degree and second degree murder as well as one count of arson. *Green*, 355 U.S. at 186. The jury found him guilty of arson and second degree murder but was silent on the first degree murder charge. *Green*, 355 U.S. at 186. The Court of Appeals reversed his second degree murder conviction and remanded for a new trial. *Green*, 355 U.S. at 186. The State again charged Green with first degree murder. *Green*, 355 U.S. at 186. The United States Supreme Court held that the second trial on the first degree murder charge violated the double jeopardy clause, reasoning that when a jury has had a full opportunity to return a verdict, no extraordinary circumstances have prevented a verdict, and the court dismisses the jury without the defendant's consent, the result is the same as a jury finding of not guilty. *Green*, 355 U.S. at 188, 191.

Washington courts have applied the same reasoning. In *State v. Daniels*, 124 Wn. App. 830, 833, 835, 103 P.3d 249 (2004), the State charged the defendant with homicide by abuse and, in the alternative, second degree murder--domestic violence, predicated on either second degree assault or first degree criminal mistreatment. The jury left the verdict form for homicide by abuse blank. *Daniels*, 124 Wn. App. at 836-37. On retrial, Daniels argued that by leaving the verdict form blank, the jury implicitly acquitted her on the homicide by abuse charge and double jeopardy barred retrial on that charge. *Daniels*, 124 Wn. App. at 842.

Relying on *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937),<sup>4</sup> *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), and *State v. Hescoek*, 98 Wn. App. 600, 602, 989 P.2d 1251 (1999), we held in *Daniels* that because the jury had ample opportunity to convict the defendant on homicide by abuse but left the corresponding verdict form blank, and because the record did not show why the court dismissed the jurors without reaching a decision on that charge, the jury's silence operated as an implied acquittal. *Daniels*, 124 Wn. App. 842-44; *cf. Kirk*, 64 Wn. App. at 793-94.

The State relies on *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), claiming that the *Sattazahn* Court held that a non-result on an aggravating factor cannot be an acquittal. But *Sattazahn*, a four justice plurality opinion, does not stand for that simple proposition in all cases. In fact, the *Sattazahn* plurality followed the well-established rule that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Sattazahn*, 537 U.S. at 109 (quoting *Richardson v. United States*, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984)). In that case, the jury convicted the defendant of first degree murder, third degree murder, and various other charges. *Sattazahn*, 537 U.S. at 103. But the jury was "hopelessly deadlocked" on the aggravating factor. *Sattazahn*, 537 U.S. at 104. The

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<sup>4</sup> In *Davis*, the prosecution charged the defendant with (1) vehicular homicide, (2) driving an automobile while intoxicated, and (3) reckless driving. See *Davis*, 190 Wash. at 164. The jury returned a "not guilty" verdict on vehicular homicide and did not return verdicts as to the other counts. *Davis*, 190 Wash. at 164-65. The court discharged the jury without explanation. *Davis*, 190 Wash. at 165. The State retried *Davis* for driving an automobile while intoxicated and reckless driving. *Davis*, 190 Wash. at 164-65. The Supreme Court held "where an indictment or information contains two or more counts and the jury either *convicts or acquits* upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts." *Davis*, 190 Wash. at 166 (emphasis added).

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jury communicated their inability to agree to the judge, who dismissed the jury as “hung” and entered a life sentence. *Sattazahn*, 537 U.S. at 104.

*Sattazahn* appealed and obtained a reversal. *See Sattazahn*, 537 U.S. at 105. On retrial, the State alleged the same and an additional aggravating circumstance. *See Sattazahn*, 537 U.S. at 105. Arguing double jeopardy, the defendant moved to preclude the State from seeking the death penalty. The Court observed that:

the [first] jury deadlocked . . . on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result--or more appropriately, that non-result--cannot fairly be called an acquittal ‘based on findings sufficient to establish legal entitlement to the life sentence.

*Sattazahn*, 537 U.S. at 109 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984)). The Court concluded that under these circumstances, double jeopardy does not prevent the State from seeking the death penalty on retrial. *Sattazahn*, 537 U.S. at 110. *Sattazahn* does not help the State here because the trial court did not find that the jury was “hopelessly deadlocked” on the single act aggravating circumstance.

This case is more like *Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997). In *Terry*, the State charged the defendant with “Murder by intentionally or wantonly causing the death” of the victim, among other charges. *Terry*, 111 F.3d at 455. The jury found the defendant guilty of wanton murder and left blank the forms for intentional murder and other charges. *Terry*, 111 F.3d at 455. Neither the defendant nor the prosecutor objected when the court dismissed the jury without having answered the other verdict forms. *Terry*, 111 F.3d at 455. The Sixth Circuit reversed the wanton murder conviction for insufficient evidence and held that the State’s retrial of the defendant on intentional murder violated double jeopardy principles because the first jury

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had the opportunity to convict of intentional murder in the first trial and did not. *Terry*, 111 F.3d at 458.

Here, like the offenses in *Terry*, “single act” and “common scheme or plan” are equally culpable, separate aggravating circumstances. The jury had a full opportunity to find that the murders were part of a “single act” at the first trial, and it did not. Thus, jeopardy on the “single act” aggravating circumstance ended with the first trial. The trial court should have dismissed the single act aggravating factor allegation. Accordingly, we must vacate Benn’s sentence and remand for resentencing on two counts of first degree murder.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## II. Testimony of Walter Hartman

### A. No Cross-Examination

At Benn’s first trial, the State called Walter “Pete” Hartman, who testified that Benn had asked him to shoot someone named Jack. Hartman claimed that Benn drove him to Dethlefsen’s home, described how he was to shoot Dethlefsen when he answered the door, and showed Hartman a gun he was to use to kill Dethlefsen. Hartman testified that Benn said he wanted Dethlefsen to die because Dethlefsen had molested, raped, or assaulted members of his family.

After the State’s direct, Raymond Thoenig, one of Benn’s attorneys, requested an ex parte hearing. At that hearing, Thoenig told the court that Benn had decided not to testify and had directed counsel not to call any other witnesses on his behalf or to cross-examine Hartman. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 894, 952 P.2d 116 (1998). He explained that he interpreted *State v. Jones*, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983), to require that he defer to

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Benn's wishes even if he disagreed with them. *Benn*, 134 Wn.2d at 894. Accordingly, defense counsel did not cross-examine Hartman.

The Supreme Court has since explained that Thoenig was mistaken about the effect of *Jones*. *Benn*, 134 Wn.2d at 894. Rather, "*Jones* holds that the decision whether to plead insanity rests with the defendant personally, and a competent defendant's decision to waive the insanity defense cannot be overridden." *Benn*, 134 Wn.2d at 894. It does not hold that a defendant controls all aspects of his defense, including trial strategy. *See Benn*, 134 Wn.2d at 894.

B. Admission of Prior Testimony

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003); *see also, State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when it exercises its discretion on manifestly unreasonable or untenable grounds or reasons. *Finch*, 137 Wn.2d at 810.

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The confrontation clause places two conditions on the admission of former testimony. The State must show that the declarant is unavailable at the time of trial and that the defendant had a prior opportunity to cross-examine him. *See generally, Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding that the confrontation clause bars out-of-court testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant). Similarly, under ER 804(b)(1), "former testimony of an unavailable witness is admissible only if the party against whom it is offered 'had an opportunity and similar motive to develop the testimony by . . . cross . . . examination' when the witness testified." *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d

1065 (2003) (citing ER 804(b)(1)). The former testimony in this case is inadmissible if it fails to satisfy either the confrontation clause or ER 804. *DeSantiago*, 149 Wn.2d at 411. It is undisputed that Hartman was “unavailable” both under the confrontation clause and ER 804. The question remains whether Benn had the “opportunity” and a “similar motive” to cross-examine him when he gave his prior testimony.

1. Opportunity to Cross-Examine

Benn essentially argues that an “opportunity” to cross-examine cannot be adequate or effective if defense counsel mistakenly believes he is prohibited from conducting any cross-examination at all. Br. of Appellant at 27. At the heart of Benn’s argument is his claim that Thoenig was ineffective;<sup>5</sup> in the alternative, he maintains that it was “unfair” to admit Hartman’s testimony. Br. of Appellant at 25.

Whether Benn’s counsel was ineffective in the first trial is not properly before us;<sup>6</sup> in fact, the Supreme Court has already decided that counsel effectively represented Benn in the first

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<sup>5</sup> Benn notes that if counsel had “[s]hepardized’ *Jones*,” they would have found *State v. Ortiz*, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985), “listed as a case which ‘explained’ *Jones*.” Br. of Appellant at 21 n.6.

<sup>6</sup> Benn is on direct appeal from his second trial; not his first. The record of the hearing in which counsel allegedly made his remarks about the *Jones* case and his reasons for failing to cross-examine Hartman is not properly before this court. Further, we have no evidence that the transcript of that hearing was ever presented to the court below. “An appellate court may decline to address a claimed error when faced with a material omission in the record.” *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999) (citing *Am. Oil Co. v. Columbia Oil Co.*, 88 Wn.2d 835, 842-43, 567 P.2d 637 (1977)) (declining to consider alleged error where party made no effort to remedy critical gap in transcript of proceedings); *In re Marriage of Ochsner*, 47 Wn. App. 520, 528, 736 P.2d 292 (1987) (refusing to consider trial court’s denial of attorney fees because record did not include report of proceedings for separate hearing held on that issue); *State v. Detrick*, 90 Wn. App. 939, 941 n.1, 954 P.2d 949 (1998) (refusing to review claimed error in denying motion to sever where motion was not included in record); *State v. Garcia*, 45 Wn. App. 132, 140, 724 P.2d 412 (1986) (declining to address ineffective assistance claim where

trial. *Benn*, 134 Wn.2d at 894. It reasoned that “[n]o ineffective assistance claim can be made if the defendant preempts counsel’s trial strategy.” *Benn*, 134 Wn.2d at 894 (citations omitted).

And there is no dispute that the court *offered* Benn the opportunity to cross-examine Hartman at the first trial; and it took no action to prevent or restrict cross-examination. *Cf. United States v. Wingate*, 520 F.2d 309 (6th Cir. 1975) (holding that the district court denied the defendant an opportunity to cross examine when it specifically denied counsel’s request to cross-examine a witness as to the defendant’s involvement in a conspiracy). Benn chose to preempt his attorney’s recommended course of action and pass up the opportunity to cross-examine Hartman. Accordingly, Benn has not shown that he was denied the opportunity to confront Hartman.<sup>7</sup>

## 2. Similar Motive

In considering whether a defendant had a “similar motive” for purposes of the ER 804 analysis, we ask not “simply whether at the two proceedings the questioner takes the same side of the same issue.” *United States v. DiNapoli*, 8 F.3d 909, 912 (2nd Cir. 1993). We also ask

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appellant failed to provide relevant record or photograph to which counsel allegedly should have objected)).

<sup>7</sup> Moreover, any error was harmless beyond a reasonable doubt. *See, e.g., State v. Dahl*, 139 Wn.2d 678, 688, 990 P.2d 396 (1999) (violations of a defendant’s constitutional rights under the confrontation clause are subject to the harmless error analysis); *see also*, RAP 9.1, 9.2(b), 9.6.

The trial court permitted Benn to impeach Hartman’s credibility through the testimony of Charles Bonet, an investigator for the Department of Assigned Counsel. Bonet testified that Hartman told him that he was unemployed and that he was taking about six valiums a day in addition to drinking; he could drink a fifth of whiskey without feeling its effects; Hartman said that when Benn first mentioned Dethlefsen, he and Benn were drinking gin, which does affect him; a few days later he “approached Gary outside [Benn’s trailer] and Gary made him an offer” to “take care” of Jack in exchange for Benn’s 1978 Bronco; Hartman said “I will [take] care of it. I know some people.” RP at 2126. This story was remarkably different from Hartman’s testimony.

“whether the questioner had a substantially similar interest in asserting that side of the issue.” *DiNapoli*, 8 F.3d at 912. For example, “[i]f a fact is critical to a cause of action at a second proceeding but the same fact was only peripherally related to a different cause of action at a first proceeding, no one would claim that the questioner had a similar motive at both proceedings to show that the fact had been established (or disproved).” *DiNapoli*, 8 F.3d at 912.

Here, Benn had the same incentive to cross-examine Hartman at both trials to challenge Hartman’s credibility. At both trials, he was charged with two counts of aggravated first degree murder. Hartman testified that Benn asked him to kill “Jack.” And no critical fact arose in the second trial that was not also important in the first trial. We conclude that the trial court did not err in admitting Hartman’s prior testimony.

### III. Cross-Examination of Expert Witnesses

Benn argues that the trial court improperly limited cross-examination of the State’s expert witnesses. Specifically, he asserts that the court violated ER 803(a)(18) and his right to confront adverse witnesses when it precluded some of his cross-examination based on learned treatises. He also argues that the trial court violated his right to confront and impeach witnesses, and to due process when it excluded the letter to Englert from the Ethics Committee of the American Academy of Forensic Sciences, which Benn wanted to introduce to impeach Englert. And he argues that the court erred when it did not allow him to impeach or show bias with Englert’s testimony in previous, unrelated trials.

The trial court has discretion in setting the scope of cross-examination, a decision we will reverse only for a manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984) (citing *State v. Descoteaux*, 94 Wn.2d 31, 39, 614 P.2d 179 (1980)); *State v. Ayala*,

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108 Wn. App. 480, 485, 31 P.3d 58 (2001) (citing *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001)).

A. Evidence From Learned Treatises

Benn argues that the court erred when it limited his cross-examination of the State's experts and accepted the State's argument that such questioning was proper only if the author of the treatise testified and the testifying expert actually relied on the treatise for his analysis. Benn is correct that ER 803 requires neither.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). It is inadmissible unless it falls within certain exceptions. ER 802. If established as authority, statements contained in published treatises on history, medicine, or other science or art are excepted from the hearsay rule when used in cross or direct examination of an expert witness. ER 803(a)(18);<sup>8</sup> see *Miller v. Peterson*, 42 Wn. App. 822, 828, 714 P.2d 695 (1986).

When counsel uses a treatise while cross-examining an adverse expert, the rule requires only that the treatise be “called to the attention of” the witness. KARL B. TEGLAND, 5D WASH. PRACTICE., COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ch. 5, at 417 (2005); see also, KARL B. TEGLAND, 5B WASH. PRACTICE, EVIDENCE LAW AND PRACTICE § 705.8, at 263 (1999) (stating that the expert's knowledge and the basis for the expert's opinion may be probed and

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<sup>8</sup> The text of ER 803(a)(18) reads:

To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

tested on cross examination). The cross-examiner is not required to show that the witness actually relied on the treatise or regards it as authoritative, but only that the publication is generally considered authoritative. *Miller*, 42 Wn. App. at 828; *TEGLAND*, 5D WASH. PRACTICE ch. 5, at 417 (explaining that if the examiner uses a treatise on cross, the burden of proving its authority is on the cross-examiner). The examiner need not elicit this foundation from the witness being cross-examined. *TEGLAND*, 5D WASH. PRACTICE ch. 5, at 417.

The State's expert, Michael Grubb, testified about blood spatter analysis.<sup>9</sup> On cross-examination, Grubb acknowledged that a good scientist must "keep up with the literature." RP at 1819. He stated that he was familiar with the works of Herb McDonnell, William Eckert, Stewart James, Tom Belville, Ross Gardner, and Dr. Henry Lee. He admitted that he considered their works to be learned treatises or reference books.

Benn complains about the court's ruling in the following exchange on cross-examination:

- Q: You classified this as high velocity blood spatter; is that correct?  
A: Yes, I did.  
Q: And you are familiar, as you just testified, with Herb McDonnell's work in this area, correct?  
A: Yes.  
Q: And he has actually given a definition of what the size range of high velocity blood spatter is, has he not?  
A: I am sure he did.  
Q: Would you--

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<sup>9</sup> He testified that when he examined Benn's boots, he found "14 very tiny blood stains" on the lateral side of the left heel and sole. RP at 1794. He also said that because the stains were so small, it was impossible to tell at which angle the blood hit the boot. And he testified that the stains ranged from .17 millimeters to .5 millimeters in diameter, and that stains of that size "can only travel about two feet in the air." RP at 1800. He added that the presence of satellite spatter suggested that the blood originated at only a few inches away instead of the full two feet. He claimed he determined that it was apparent that the stains were in the size range of high velocity, gunshot back spatter. When the prosecution described the crime scene to him and asked him for the most likely source of the blood spatter on the boot, Grubb testified "the head wound of Mr. Nelson is far and away the most likely source of the firearm back spatter on the boot." RP at 1814.

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MR. NEEB: Your Honor, I would object to any question about what Mr. McDonnell has classified. He is not the witness.

THE COURT: Sustained.

RP at 1826. The court had sustained similar objections at least two times before.

In addition, Benn points to the following:

Q: You found no blood drops less than .1 millimeter, correct?

A: That's correct. . . .

Q: You are familiar with the work of William Eckert and Stewart James?

A: Yes, I am.

Q: The Interpretation of Blood Stain Evidence at Crime Scenes?

A: Yes.

Q: Would you consider that a treati[se] in this field as well?

A: Yes, I would.

Q: Would you agree that Dr. Eckert and Mr. James also state that high velocity mist should be less than .1 millimeter in diameter?

MR. NEEB: Object, Your Honor. They are not testifying. They didn't state anything.

THE COURT: Sustained.

RP at 1832-33.

The court erred in sustaining these objections. The author of the treatise need not be present to testify. *See* TEGLAND, 5B WASH. PRACTICE § 705.8, at 263-64. Defense counsel had already established the authority of the treatises through Grubb's testimony. The court should have allowed Benn to impeach Grubb with treatises expressing a view contrary to his opinion. *See* ER 803; TEGLAND, 5B WASH. PRACTICE § 705.8, at 263.

Although defense counsel asked to continue the argument outside the jury's presence, nothing in the record before us shows that Benn made or asked to make an offer of proof about what the treatises say; without such an offer, Benn cannot demonstrate that he was harmed by the court's ruling. We will not consider an alleged error in excluding evidence in the absence of an offer of proof. *See* ER 103(a)(2); TEGLAND, 5 WASH. PRACTICE ch. 1, § 103.6, at 34; *see Kysar v. Lambert*, 76 Wn. App. 470, 490-91, 887 P.2d 431 (1995).

1. Englert

Benn challenges similar rulings made during Englert's cross-examination. He claims he attempted to read the treatises into evidence and cross-examine Englert to show that the experts disagreed with him. The record shows that counsel was apparently *ready* to read from learned treatises when the court sustained the State's objection. But Benn cites to no part of the record where he actually read or asked to read the part of a treatise that he wanted to question the experts about. Again, absent such a showing, Benn cannot show prejudice.

B. Impeachment and Bias Evidence

Prior to trial, Benn moved for disclosure of a letter addressed to Englert from the AAFS Ethics Committee. The State maintained that the letter was not discoverable or admissible. Benn claims that the trial court erred when it denied his motion to disclose the letter and when it precluded him from cross-examining Englert about the contents of the letter.

The State countered that "there is no usefulness to disclosure and there is substantial risk of economic reprisals and unnecessary annoyance or embarrassment from its disclosure." CP at 182. The State argued that the letter contained accusations against Englert by several long-time rivals, opponents, and detractors. And it maintained that unless and until the AAFS Ethics Committee found the allegations against Englert true, the defense should not be allowed to question Englert about the allegations.

The court denied Benn's motion to disclose the letter, finding that the charges in the letter were unsubstantiated and collateral to the issues of the case. Specifically, the court ruled that the letter was undiscoverable and inadmissible, and it ordered the letter sealed with the State and placed in a vault at the Pierce County Clerk's Office with the direction that it "not be released, removed, or opened without a written order signed by this court, or a judge from the Washington

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Court of Appeals or a justice of the Washington Supreme Court.” CP at 210. Neither party designated the letter as part of the record on review; consequently, it is not before us. Without knowing the substance of the letter, we cannot find that the lower court erred when it made its rulings.

1. Prior Testimony in Other Trials to Impeach and as Evidence of Bias

Benn contends that the court should have allowed him to use Englert’s testimony in other trials to impeach his credibility and show his bias. He sought to introduce Englert’s testimony about speeds of high velocity blood spatter and distances the blood spatter travels to contrast it with Englert’s opinion in this case. The court ruled that Benn could question Englert on definitions of high velocity blood spatter in general, but he could not impeach Englert with his prior testimony as to those definitions from other, unrelated trials.

ER 801(d)(1)(i) provides that prior inconsistent statements by a witness are not hearsay when: “[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” A witness’s prior statement is “inconsistent” when it has been compared with, and found different from, the witness’s trial testimony. *See State v. Horton*, 116 Wn. App. 909, 919 n.33, 68 P.3d 1145 (2003). Therefore, “to the extent that a [witness’s] own prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is nonhearsay, and it may be admissible ‘to impeach.’” *Horton*, 116 Wn. App. at 919 n.33 (quoting *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995)).

Englert was available for cross-examination on his prior testimony. The defense should have been allowed to impeach him with testimony from other trials that was inconsistent with his testimony in this trial. But again, Benn made no offer of proof to establish that Englert's prior testimony was inconsistent with his trial testimony. Without such a record, we are unable to say that the court erred in excluding the evidence (the testimony was actually inconsistent) or whether the ruling harmed Benn.

Benn also wanted to offer the prior transcripts as evidence of bias. In particular, he sought to show that Englert varied his opinions from case to case to suit the needs of the party employing him. A defendant has a constitutional right to impeach a prosecution witness with evidence of bias. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). Any error in excluding such evidence is presumed prejudicial, but it is also subject to a harmless error analysis. *Spencer*, 111 Wn. App. at 408. Again, we cannot evaluate whether the court erred without some offer of proof. Benn has not shown that the prior trial transcripts were admissible evidence of Englert's bias.

## 2. Rebutting Evidence By the State

Benn argues that because Englert testified on redirect that he had performed a certain analysis "over a thousand times" and had never been proven wrong, the defense had a right to refute that claim. Br. of Appellant at 38. In fact, Englert did not testify that he has never been wrong. He testified that he uses the phenolphthalein presumptive test for evidence of blood and said, "I have tested where it's negative with phenolphthalein and came back as positive as blood, but just the reverse that I can recall any case where I got a positive and then it comes back negative." RP at 2073.

Before redirect, defense counsel asked to discuss with the court a matter outside the presence of the jury. The court agreed and defense counsel explained:

MR. THORNTON: The witness just testified that he has never seen a case where there was a positive phenolphthalein test that he had conducted where, in fact, the subsequent analysis shows that there was no blood. I have in my possession, not in my immediate possession, but in my office, based upon the Court's ruling that earlier this year on September 22nd, Mr. Englert tested an item of evidence with phenolphthalein and got that positive result. Honolulu crime lab has done subsequent testing on that and determined that that substance that he got a positive reaction for phenolphthalein is not blood.

RP at 2087. Defense counsel also claimed that he had in his possession a copy of a deposition given by Englert in another case where Englert testified that he had never identified something as blood without confirmatory testing. But Englert had earlier testified in Benn's trial that he concluded the boot stains were blood after performing only a presumptive and not a confirmatory test. Defense counsel asked permission to bring in that material to impeach Englert but the court denied the request.

While the court may have erred in its ruling, Benn has not shown that it was reasonably probable that the trial outcome was affected by the error. In contrast, the State has shown that key testimony from Englert was cumulative and any error was harmless beyond a reasonable doubt. Even if Benn had been successful in impeaching Englert on the issue of confirmatory tests and Englert's track record, any reasonable jury would have reached the same result.

For example, Englert testified that both Dethlefsen and Nelson were shot in the chest before being shot in the neck and head area. Similarly, Dr. Howard testified that the victims were shot in the chest before they were shot in the head. Englert also testified that the head wounds were contact gunshot wounds. Similarly, Dr. Howard testified that the chest wounds on

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Nelson and Dethlefsen's bodies were distant gunshot wounds; and the gunshot wounds to their heads were contact gunshot wounds.

Englert testified that he found 13 blood stains on the heel of Benn's left shoe. Similarly, Grubb testified that he found 14 very tiny blood stains on the left boot heel. In addition, Christopher Sewell testified that he examined the boots and found tiny specks of blood on the left heel of the boot.

Englert also testified that the blood spatter on the left boot was high velocity blood spatter consistent with back spatter from a gunshot. Similarly, Dr. Howard testified that high velocity blood spatter from a contact gunshot wound creates extremely small spatter, "often referred to as a mist." RP at 1421. And Grubb testified that the blood stains on Benn's boot were high velocity blood stains consistent with gunshot back spatter.

In addition, Englert testified that Dethlefsen was shot as he was seated on the couch and Nelson was shot while standing between the dining room and entryway. Dr. Howard testified that Nelson was standing in an upright position when he was shot. And Englert testified that the high velocity blood spatter found on Benn's left boot heel was from the contact wound from Nelson's head. Grubb also testified that the head wound to Nelson was likely the source of the firearm back spatter found on Benn's boot.

In all, the testimony from other witnesses duplicated Englert's testimony as to the nature of the wounds and that the substance on Benn's boot was blood. And no witness contradicted this testimony. Given the overwhelming evidence, no reasonable jury would have reached a different conclusion if the court had allowed Benn's impeaching evidence.

#### IV. Monte Benn's Hearsay Statement

Benn argues that the court erred in allowing, over his objection, Monte Benn to testify that Dethlefsen told Monte he had been beaten up in the kitchen and that "he couldn't remember exactly what happened, but he wanted to talk to Gary about it." RP at 2490.

The State concedes that this statement was hearsay. It argues, however, that the hearsay was harmless because it was consistent with the defense theory that Nelson had injured Dethlefsen the Friday before the killings.

Specifically, the State points out that Benn had testified that he went to Dethlefsen's residence on the day of the killings and found Dethlefsen and Nelson involved in a heated argument. He saw dried blood on Dethlefsen's forehead, his t-shirt, and a pillow case. Dr. Howard also testified that he observed injuries on Dethlefsen's face that were several days or even a week older than the incident. And Benn testified that he heard Nelson say he "should have finished what [he] started . . . on . . . Friday." RP at 2302. In closing, Benn's counsel argued that Dethlefsen's statement that he wanted to "talk to Gary" about getting beaten up did not mean that Benn did it. RP at 2690. The State agreed to the extent of conceding that it did not matter who beat up Dethlefsen.

In fact, the State's theory was not necessarily based upon Benn assaulting Dethlefsen in the kitchen on Friday night. Rather, the State argued that Benn formed the intent to kill just moments before the shootings. The State reasoned that even if Dethlefsen was the first aggressor and Benn had the right to defend himself, he did not have the right to execute Dethlefsen and Nelsen by shooting them twice in the head from close range.

We conclude that although the court should have excluded Monte's statement as hearsay, the error did not harm Benn. The statement was not important to the State's case and it was consistent with Benn's theory of the case.

#### V. Second Trial

Finally, Benn claims that the trial court erred when it denied his motion to bar retrial on grounds of double jeopardy because the prosecutors in the first trial engaged in intentional misconduct.

Where a conviction is reversed on appeal, re-prosecution is generally permissible. *United States v. Tateo*, 377 U.S. 463, 465, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964); *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *State v. Cochran*, 51 Wn. App. 116, 118, 751 P.2d 1194 (1988). But double jeopardy bars a retrial where the prosecutor intends its misconduct to provoke a request for mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 672-73, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).

Benn concedes that the facts of his case would probably not satisfy the federal rule announced in *Kennedy*. We agree. *Kennedy* concerns only cases in which a prosecutor goads a defendant into requesting a mistrial. Here, the defendant did not ask for a mistrial; nor did the court order one. And while the Ninth Circuit found abundant evidence of "prosecutorial misconduct," it did not find that the prosecutors goaded Benn into requesting a mistrial. *Benn*, 283 F.3d at 1058 n.11. It also declined to decide the issue of prosecutorial misconduct because the *Brady* violation was so prejudicial that the court reversed and remanded based on *Brady*

alone.<sup>10</sup> *Benn*, 283 F.3d at 1058 n.11.

Nevertheless, *Benn* asks us to apply *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and find that Washington's double jeopardy clause, Washington Constitution article I, section 9, provides greater protection than its federal counterpart where a reviewing court reverses for prosecutorial misconduct. In *Gunwall*, the court used "nonexclusive neutral criteria" to determine whether rights under the Washington Constitution should be interpreted more broadly than under the United States Constitution. *Gunwall*, 106 Wn.2d at 58. These criteria include: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *Gunwall*, 106 Wn.2d at 58; see *State v. Boyce*, 44 Wn. App. 724, 728, 723 P.2d 28 (1986).

But as stated earlier in this opinion, Washington courts have given article I, section 9 the same interpretation as the Fifth Amendment. *Gocken*, 127 Wn.2d at 103 (citing *Larkin*, 70 Wn. App. at 352-53; *Kirk*, 64 Wn. App. at 790-91); *Cochran*, 51 Wn. App. at 121. *Benn's* argument that article I, section 9 affords more double jeopardy protection than the Fifth Amendment fails.

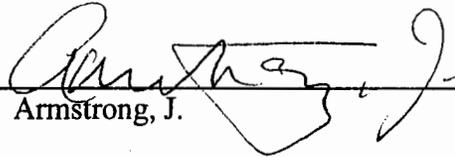
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<sup>10</sup> In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady's* progeny clearly established that the defendant must prove three elements in order to show a *Brady* violation. "First, the evidence at issue must be favorable to the accused, because it is either exculpatory or impeachment material." *Benn*, 283 F.3d at 1052. "Second, the evidence must have been suppressed by the State, either willfully or inadvertently." *Benn*, 283 F.3d at 1052-53 (citing *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). "Third, prejudice must result from the failure to disclose the evidence." *Benn*, 283 F.3d at 1053 (citing *Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)).

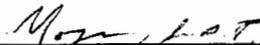
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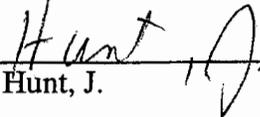
We vacate the aggravating circumstances special verdict and affirm as to all other issues.

We remand to the trial court for resentencing consistent with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *State v. Hughes*, 154 Wn.2d 118, 155, 110 P.3d 192 (2005).

  
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Armstrong, J.

We concur:

  
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Morgan, J.P.T.

  
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Hunt, J.