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COURT OF APPEALS
DIVISION II

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No. 31122-4-II

STATE OF WASHINGTON

BY 

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

STATE OF WASHINGTON,

Respondent,

v.

GARY MICHAEL BENN,

Appellant.

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

The Honorable Vicki Hogan, Judge

REPLY BRIEF OF APPELLANT

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ARGUMENT

A. THE DOUBLE JEOPARDY CLAUSE PRECLUDED THE STATE FROM SEEKING THE “SINGLE ACT” AGGRAVATING FACTOR A SECOND TIME

The State concedes that jeopardy attached in this case when the jury was sworn. Brief of Respondent (BOR) at 11. It correctly notes that jeopardy may not terminate if the trial court properly declares a hung jury because the jury was hopelessly deadlocked. Id. But it does not dispute that the trial court never asked Benn’s jury whether it was deadlocked on the single act aggravating factor, and that it never declared a hung jury.

The jury’s discharge after failing to make a finding, without a proper determination that the jury was hung, terminates jeopardy. There is no requirement that the jury actually return a verdict. See Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978); Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); State v. Kirk, 64 Wn. App. 788, 828 P.2d 1128 (1992). The State suggests that the holdings Green and Kirk were based on the fact that the jury returned a verdict on a lesser offense, thereby barring retrial on the greater. But the plain language of those cases is not limited to that scenario. See Opening Brief of Appellant (OBA) at 15-17. The State never discusses Crist, in which the jury was dismissed before reaching a verdict on *any* charge. Nevertheless, retrial was barred by the double jeopardy clause.

As expected, the State relies heavily on Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). But in Sattazahn,

the jury was hopelessly deadlocked on the aggravating factor, and the trial court properly declared a hung jury. Defendant's only argument for a double jeopardy bar was a Pennsylvania statute that required a "default" sentence of life without parole under such circumstances. The Supreme Court rejected this extension of Green, while confirming its continued validity in cases not involving a declaration of a hung jury. See OBA at 18-19.

The State relies on Poland v. Arizona, 476 U.S. 147, 90 L. Ed. 2d 123, 106 S. Ct. 1749 (1986). But the reasoning of that case does not survive Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating factors in a capital case are subject to the same proof requirements as elements of an offense. Poland is in any event a peculiar case that is limited to its facts. In Poland, the trial court found that the defendants committed two murders to assist them in stealing over \$200,000, but mistakenly believed that the "pecuniary gain" aggravating factor applied only to contract killings. Poland, 476 U.S. at 149. The court actually made all the factual findings necessary to support the aggravating factor. On retrial, the State was permitted to present the pecuniary gain factor again. Benn's case is distinguishable because the first jury never made any findings of fact regarding the single act aggravating factor.

B. THE TRIAL COURT SHOULD HAVE EXCLUDED WALTER HARTMAN'S TESTIMONY FROM THE FIRST TRIAL

The State's arguments are contradictory. On the one hand, it contends that Benn had every reason to attack Hartman's credibility at the first trial, just as he did at the second trial. BOR at 21. On the other hand, it relies on cases holding that a "tactical decision" not to cross-examine a witness at a prior proceeding does not insulate the prior testimony from admission. BOR at 20. In fact, it is quite clear in this case that Benn *should* have cross-examined Hartman at the first trial, but that he failed to do so for reasons having nothing to do with tactics. Benn was motivated by his fear of Hartman – a fear that may have been delusional or, as the prosecutor maintained, justified. His lawyer incorrectly believed himself bound by Benn's wishes, even though he frankly stated on the record that the choice was a poor one strategically. See OBA at 19-23. The State does not dispute these points.

The State maintains that the only inquiry is whether the defendant's "objective" motivation was the same at each trial, that is, whether he had good reason to attack Hartman's credibility each time. See BOR at 18, citing United States v. Salerno, 505 U.S. 317, 120 L. Ed. 2d 255, 112 S. Ct. 2503 (1992) and United States v. Salerno, 974 F.2d 231, 239 (2nd Cir. 1992) (decision on remand). But the cases do not really say that. In Salerno, the government claimed that prior grand jury testimony of witnesses should always be inadmissible because prosecutors have different motivations in developing grand jury testimony than they do at

trial. The defendants claimed that such testimony should always be admissible by the defense when the government immunized the witness before the grand jury but declined to do so at trial. The Supreme Court rejected both of these abstract positions and remanded for consideration of whether the prosecutors had similar motives at each hearing, on the actual facts of the case. Salerno, 505 U.S. at 323-25.

On remand, the Second Circuit focused primarily on the actual conduct of the government before the grand jury. Salerno, 974 F.2d at 234-37, 240-41.

Nevertheless, as we have noted, the court need not turn to abstract notions of "motive" if what the examiner *actually did* in the prior proceeding was "similar" to what the examination would be in the current one. Our decisions, most notably *Serna*, indicate that this is the preferred inquiry.

Id. at 240 (emphasis in original).

Here, there is no question that what the defense "actually did" at the first trial bore no relation to what it wished to do at the second trial. Nor is there any contention that the defense was following a reasonable strategy the first time. Thus, the motivation was not the same at each proceeding.

Similarly, Benn did not have a true opportunity to cross-examine Hartman at the first trial. He was afraid to do so because he believed Hartman would kill his family if he did, and his attorney erroneously believed he could not make his own decision about the matter.

Thus, Hartman's prior testimony was not properly admitted at the second trial.

C. THE TRIAL COURT IMPROPERLY LIMITED CROSS-EXAMINATION OF THE STATE'S EXPERT WITNESSES

1. The Court Precluded Cross-Examination Based on Learned Treatises

At trial, the prosecutor maintained that defense counsel could not cross-examine the State's experts by quoting from learned treatises because 1) the experts who wrote the treatises would not be called as witnesses, and 2) the defense could not show that the State's experts relied on the treatises in forming their opinions. The trial court accepted this reasoning and frustrated defense counsel's many attempts to use treatises on cross-examination. See OBA at 28-31. Benn has shown that the trial court's analysis was faulty. See OBA at 31-33.

The same prosecutor now abandons the position he took at trial, and accepts that defense counsel had a right to cross-examine the State's experts by reading from the treatises. BOR at 24-25. Nevertheless, the prosecutor continues to argue that the trial court's rulings were correct. He now maintains that the trial court repeatedly sustained his objections only because defense counsel did not phrase his questions in precisely the right way. BOR at 25-26. The prosecutor seems to be saying that defense counsel could have read verbatim from the treatises, but could not summarize or paraphrase the key points that the treatises were making. He cites no authority whatsoever for that proposition, and there is none. As the State notes, there is authority that the defense cannot simply label a

treatise as an exhibit and have it sent to the jury room, but the defense certainly did not ask to do that. Further, the prosecutor did not object on the ground upon which he now relies, and the trial court did not sustain the objections on that basis. The court made it quite clear to defense counsel that he could not bring out what the treatises said in any way, shape or form, and shut down his every attempt to lead into the subject, regardless of how he phrased the questions.¹ For example:

Q: Would you agree with the recommendation of Tom Beville --

MR. NEEB: Objection.

MR. THORNTON: -- and Ross Gardner.

THE COURT: I am going to sustain the objection.

RP 2046.

Defense counsel made it quite clear that he would have been delighted to read verbatim from the treatises:

Q: Are you saying that they [Eckert and James] only limit that definition of .1 to forward spatter?

A: That seems to be what they are saying.

Q: Would you like to know what they say?

MR. NEEB: Objection.

¹ That is the very reason the State can quote defense counsel asking questions about what the literature "recommends" or "suggests." In each case, he was attempting to lead into a discussion of a particular statement in a treatise, and in each case he was shut down completely.

THE COURT: Sustained.

RP 1834.

The State also claims that defense counsel was able to make his key point that the blood drops on Benn's boots could not have been high velocity blood spatter from a gun because they were too small. BOR at 26, citing RP 1829-30. In fact, the transcript shows that counsel was utterly frustrated in that regard.

Q [by Thornton]: You are familiar with what Herb McDonnell a nationally and internationally renowned expert in this area, has had to say with regard to the size of high velocity blood spatter, correct?

MR. NEEB: Object to the over-characterization.

THE COURT: Sustained. Rephrase, Mr. Thornton.

Q: (Continuing by Mr. Thornton) You would rely upon what Herb McDonnell would have to say about the size of the particular high velocity blood spatter, correct, as being an authority in the field, correct?

MR. NEEB: I would object based on what his testimony was in voir dire.

THE COURT: Sustained.

Q (Continuing by Mr. Thornton) Would you agree that the literature says that high velocity blood spatter stain should be no greater than the preponderance, be no greater than .1 millimeter.

A: Yes, but there are different types of high velocity blood spatter, and there is high velocity forward spatter, and there is high velocity back spatter I have just been

talking about high velocity back spatter coming back in the direction of the shooter. They are still high velocity, but they are of a larger size.

Q Okay. You would agree that Herb McDonnell who wrote the treatises on the book Blood Stain Interpretation, does not make that distinction that you are making, correct?

MR. NEEB: I would object, unless Mr. McDonnell testifies.

THE COURT: Sustained.

RP 1820-30.

Mr. Thornton later tried to bring out that Drs. Eckert and James also stated in their treatises that high velocity mist must 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 1833. Mr. Thornton valiantly continued to try to bring out that Eckert and James made no distinction between forward spatter and back spatter, but objections were sustained four more times. RP 1833-35.

In short, Mr. Grubb agreed that *forward* spatter would be less than .1 millimeter, but insisted that the back spatter at issue in this case would be significantly larger. His opinion was apparently novel and unsupported by any of the treatises he viewed as authoritative. Yet defense counsel was never permitted to show that the treatises contradicted Mr. Grubb.

Similarly, the defense was able to bring out through cross-examination of Rod Englert that certain blood tests in this case were only

“presumptive” and not “confirmatory.” Nevertheless, Mr. Englert insisted that he could be sure the stains were blood by combining the presumptive tests with visual analysis. RP 2045-46, 2072-73. Mr. Thornton was shut down every time he tried to show that the authoritative treatises did not accept that method. See, e.g., RP 2046, 2048-49.

Thus, there is no question that the trial court wrongly excluded the most effective cross-examination of the State’s experts available to the defense, and that this error was highly prejudicial.

2. The Defense Was Precluded From Impeaching Rod Englert In Other Ways

The defense was not permitted to cross-examine Rod Englert in a variety of ways besides the use of learned treatises. For the most part, the defense wished to use transcripts of prior trials to show that Englert had testified inconsistently from case to case. See OBA at 35-37. This would tend to show his bias, that is, his tendency to say whatever suited the person paying his bill. Benn also wished to rebut Englert's claim on direct examination that he had concluded that substance was blood, without a confirmatory test, “over a thousand” times, and that he had never been wrong. The defense had actual documentation proving that Englert had made just such a mistake in a prior case. Id. at 37.

The State never directly addresses these errors. It assumes that Benn was merely trying to impeach with collateral instances of misconduct under ER 608(b). BOR at 27-28. Cross-examination by prior inconsistent statement, however, is covered by ER 613. The defense

clearly complied with that rule. It had the transcripts in hand and was prepared to show them to the witness and give him an opportunity to explain them.

Similarly, the State never addresses Benn's right to cross-examine Englert concerning his bias.

Perhaps the most familiar method of impeachment is to demonstrate that a witness is biased or prejudiced against a party, or has some other motive to fabricate testimony . . .

The courts tend to favor impeachment by demonstrating bias, particularly in criminal cases, where the defendant enjoys nearly an absolute right to demonstrate bias on the part of prosecution witnesses. The defendant's right to cross-examine for bias is reinforced by the right to confrontation . . .

Bias may be demonstrated by cross-examination or by introducing extrinsic evidence. Evidence of bias is not considered evidence of a collateral matter and is not excludable on that basis. The rules regarding bias sometimes even trump other, more restrictive rules. *For example, evidence of a witness's prior misconduct may be admissible to show bias even if the same evidence would otherwise be barred by Rule 608.*

5A Teglund, Evidence Law and Practice, §607.7 (4th Ed. 1999) (emphasis added).

The right of a criminal defendant to cross-examine witnesses against him as to their bias is guaranteed by the Sixth Amendment to the United States Constitution. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally

protected right of cross examination." Id. at 316-17 . See also, State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980); State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross examination of prosecuting witnesses to show motive or credibility.") "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52, 83 L. Ed. 2d 450, 105 S. Ct. 465 (1984).

Evidence that is inadmissible on other grounds may be admissible for the purpose of showing bias. Abel, 469 U.S. at 55 (although specific instances of conduct inadmissible under ER 608(b) for purpose of showing "character for untruthfulness", admissible to show bias); United States v. James, 609 F.2d 36, 46-47 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980).

Unlike other, less favored, forms of impeachment, bias may be proven by extrinsic evidence; the cross examiner is not required to "take the answer of the witness." Abel, 469 U.S. at 52; State v. Jones, 25 Wn. App. 746, 750-51, 610 P.2d 934 (1980); State v. Wilder, 4 Wn. App. at 854-56 (" It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross examination of prosecuting witnesses to show motive or credibility.")

Further, the State never addresses Benn's contention that he had a right to rebut Englert's extraordinary claim that he had never been wrong about a substance being blood. Mr. Thornton possessed hard evidence that this claim was false, RP 2088, yet the trial court precluded the evidence without explanation. RP 2090.

The State continues to rely on the red herring that Benn's cross-examination was based on complaints made by other experts to the AAFS. BOR at 30. While those complaints may have triggered some of Benn's investigation into Englert, most of his proposed cross-examination did not involve the fact of the complaints or who had made them.

As a fallback, the State now argues that Englert's testimony was not really important. BOR at 30-32. That is belied by the extraordinary time and expense the State put into obtaining Englert's testimony, defending it against all forms of attack, and developing it at great length before the jury. Englert's direct examination alone spanned 152 pages. See RP 1647-1746; 1867-1919.

D. THE STATE'S USE OF DETHLEFSEN'S HEARSAY
STATEMENTS VIOLATED BENN'S RIGHT TO
CONFRONTATION

The same prosecutor who brought out Dethlefsen's hearsay statements, over objection, now concedes that the admission of the statements was error. BOR at 32-33. He contends, however, that the error was harmless because the statements were consistent with Benn's theory of the case. BOR at 33-34.

It is true that defense counsel tried to offer in closing argument an innocent interpretation of the statements. But he was merely attempting to respond to the prosecutor's argument. Mr. Neeb expressly argued to the jury that Dethlefsen's hearsay statement proved that Gary Benn, rather than Michael Nelson, assaulted Dethlefsen a few days before the killings. See OBA at 39. The prosecutor should not be permitted to argue to the jury that evidence is incriminating, and then argue to this Court that the same evidence is exculpatory.

E. THE SECOND TRIAL IN THIS CASE VIOLATED DOUBLE JEOPARDY

Benn rests on his opening brief.

DATED this 9th day of March, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by United States Mail
a copy of this pleading on the following individuals:

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