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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY



DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

GARY MICHAEL BENN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 88-1-01280-8

BRIEF OF RESPONDENT

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

1. Did the trial court properly deny defendant's motion to dismiss the "single act" aggravating factor in the second trial where the defendant was not "acquitted" of aggravated murder in the first degree in the first trial?
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3. Did the trial court properly exercise its discretion in limiting the scope of the defendant's cross-examination of the state expert witnesses?
4. Was the error in admitting Jack Dethlefsen's statements to Monte Benn harmless where the testimony was consistent with the defendant's theory of the case?
5. Did the trial court properly deny defendant's motion to dismiss on double jeopardy grounds where the defendant failed to show that double jeopardy barred the state from retrying the defendant?

B. STATEMENT OF THE CASE.

1. First Trial

On May 1, 1990, Gary Benn, hereinafter “defendant” was convicted by a jury in Pierce County Superior Court of two counts of first degree murder. State v. Benn, 120 Wn.2d 631, 638, 845 P.2d 289 (1993). The jury further returned a special verdict finding the following aggravating circumstance: multiple victims killed as part of a common scheme or plan. Benn, 120 Wn.2d at 647. Defendant was sentenced to death after the jury found that there were not sufficient mitigating circumstances to warrant leniency. Benn, 120 Wn.2d at 647.

Defendant filed a direct appeal. The Supreme Court affirmed defendant’s conviction and sentence. Benn, 120 Wn.2d at 695. Defendant filed a personal restraint petition, which was subsequently denied by the Supreme Court. In re Benn, 134 Wn.2d 894, 952 P.2d 116 (1998). Defendant then filed a writ of habeas corpus in the Western District of Washington. Benn v. Lambert, 283 F.3d 1040, 1051 (9th Cir. 2002). The 9th Circuit held that the state withheld material exculpatory and impeachment evidence in violation of Maryland v. Brady, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and affirmed the District Court’s decision granting defendant’s writ of habeas corpus. Benn, 283 F.3d at 1062.

2. Second Trial

On September 22, 2003, the State filed a corrected refiled Information in Pierce County Superior Court cause number 88-1-01280-8 with two counts of aggravated murder in the first degree. CP 115-116.

On that date, the parties appeared before the Honorable Vicki L. Hogan for a jury trial. RP¹ 1. Prior to trial, the defense made a motion to dismiss on grounds of double jeopardy. CP 13-24. The defense argued that the federal and state double jeopardy clause was violated because the prosecutor was trying to obtain a conviction. Id. The state argued that double jeopardy does not bar retrial because there was no evidence that the state intended to “goad” the defendant into a mistrial which is required under the federal double jeopardy clause. Oregon v. Kennedy, 456 U.S. 667, 673, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982). CP 34-52. The state further argued that State v. Gocken, 127 Wn.2d 95, 102, 896 P.2d 1267 (1995) held that the Washington double jeopardy clause does not provide greater protection than its federal counterpart. Id. The trial court denied defendant’s motion to dismiss based on double jeopardy. CP 117-118.

The court issued an order and entered the following findings:

The double jeopardy clause of the Washington State Constitution is identical in thought and purpose as to its counterpart in the United States Constitution. When a conviction has already been reversed and a new trial ordered, dismissal on double jeopardy grounds is an

¹ “RP” refers to the Verbatim Report of Proceedings held on September 22- November 7, 2003.

extraordinary remedy. The court is not bound by the Pennsylvania authority cited by the defense and specifically declines to adopt the second prong of the test from the case cited by defense counsel.

Id.

The defendant also made a motion in limine to compel disclosure of a letter that the Ethics Committee of the American Academy of Forensic Sciences (AAFS) sent to Rod Englert. RP 207. The defense argued that the letter was material because it constitutes impeachment evidence with regard to the witness' credibility and bias. RP 210. The State argued that the letter was not discoverable material. RP 226. The State further argued that the allegations contained in the complaint were baseless allegations as the complaints were alleged by five people who were Englert's rivals and competitors. RP 219-221. The court made a finding that the letter does not represent Brady material and that it is collateral to any issues regarding the guilt or innocence of the defendant. RP 231. The court entered an order denying defendant's motion to disclose Englert's letter. CP 207-208.

Prior to defense counsel's cross-examination of Rod Englert, the state renewed its motion in limine to exclude the defense from cross-examining the witness regarding any accusations contained in the letter. RP 1932. Defense counsel indicated that he believed that he could inquire into the underlying data in the complaint filed at the American Academy. RP 1938. Defense counsel argued that he had actual transcripts of Mr.

Englert testifying in a manner that was inconsistent with a transcript from another trial. RP 1941. The defense counsel further indicated that he had a letter that was written by Herb McDonnell who indicated that Englert had disappointed him. RP 1957. The state argued that the letter would constitute inadmissible hearsay and that the letter was further a comment on the credibility of Englert. RP 1957. The court again indicated that she would not allow the defense to go into the underlying data alleged in the complaint. RP 1943. The court clarified that the defense can cross examine the witness on specific subjects that the witness has taken, about blood stain patterns, and about the articles that he has written about crime scene investigations. RP 1953.

The state also made a motion in limine to admit the former testimony of Walter Pete Harman. RP 280. Walter Hartman testified in the former trial that the defendant attempted to hire him to murder Jack Dethlefsen. RP 281. However, he died prior to the second trial. The prosecutor argued that Hartman's former testimony is admissible under ER 804(b)(1) because the witness is unavailable, the witness was sworn to testify at the previous trial, the defendant was present during the prior testimony, and the defendant was afforded the opportunity to cross examine the witness. RP 281. The defense argued that since the defense counsel chose not to cross-examine the witness in the first trial, the testimony should be excluded. RP 289. The court granted the state's

motion to admit Walter Pete Harmon's former testimony. RP 296. The court made the following findings:

The court finds that Walter Hartman is unavailable as that term is defined in ER 804(a)(4)(death). The court finds Mr. Hartman's testimony from the 1990 trial is former testimony as that term is defined in ER 804(b)(1). The court finds the defendant had the opportunity and similar motive to cross-examine Mr. Hartman at the 1990 trial, even though no questions were actually asked. The court finds further that the defense should be allowed to impeach Mr. Hartman under ER 806, provided the impeachment is presented in proper form.

CP 284-285.

At trial, the state presented the transcript of Hartman's sworn testimony from the previous trial. RP 1499. Charles Bonet, a former investigator, testified in defendant's case in chief to impeach Hartman. RP 2121. According to Bonet's testimony, Hartman told him during a defense interview that he drank alcohol and that he was taking about 6 valiums a day with his alcohol. RP 2122, 2123. Bonet further testified that Hartman stated that he approached the defendant and stated that he would "take care" of Jack Dethlefsen in exchange for the 1978 Bronco and money. RP 2126.

During the cross-examination of one of the state expert witnesses, Michael Grubb, defense counsel questioned the expert regarding learned treatises. RP 1819-1840. The state objected to the use of these learned treatises on the ground that defense counsel was trying to elicit the "substance of what these [experts] say" in these learned treatises. RP

1848. The court sustained the objection. RP 1849. However, the defense counsel was able to elicit on cross-examination of Grubb that the various literature cautions against “eyeballing” the size of the blood stains. RP 1822. He further elicited from Grubb that the literature indicates that one needs to “focus in on the preponderance of the size in categorizing it as a certain pattern” and that the literature says that “high velocity blood spatter stain should be no greater than the preponderance or larger than .1 millimeter. RP 1825; RP 1829. He further elicited from Grubb that the literature states that a presumptive test is merely a detection tool. RP 1838-1839.

Rod Englert also testified in the state’s case in chief. During his testimony, Englert stated that Jack Dethlefsen and Mike Nelson were both shot in the chest first prior to being shot in the neck and head. RP 1907-1908. He testified that Jack Dethlefsen was shot while he was sitting on the couch whereas Mike Nelson was shot between the dining room and entry way. RP 1907. The shots to the chests were at a distance whereas the head shots were contact wounds. RP 1909. He found 13 stains on the boot consistent with high velocity blood spatter from a gunshot wound consistent with back spatter. RP 1894; RP 1904-1905. He further testified that the blood on the left heel of the boot was very close to the blow back of blood found the contact wound to the back of Mike Nelson’s head. RP 1910.

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 and thus, double jeopardy did not terminate as to that factor. CP 423-435. 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.

The defendant testified at trial. RP 2276. Defendant testified that he went to visit Jack Dethlefsen the day of the incident. RP 2291. The defendant found Mike Nelson at Jack's residence when he arrived. RP 2291. According to the defendant's testimony, Jack and Mike were in the middle of an argument. RP 2291. He noticed that there was blood on the

door of the kitchen and that Jack had dried blood on his head. RP 2293. Defendant testified that Mike said to Jack that he “should have finished what [he] started Friday.” RP 2301. At that point, the defendant testified that Jack shot Mike. RP 2303. He testified that when he attempted to leave, Jack pointed the gun at him. RP 2307-2803. The defendant then grabbed the gun and shot Jack in self defense. RP 2307-2308.

Monte Benn, the defendant’s brother, also testified in the defendant’s case in chief. RP 2479. On cross-examination, Monte testified that Jack was very weak up to two weeks prior to the incident. RP 2489. The defense counsel objected on hearsay grounds when Monte testified that “Jack told me that he was beat up in his kitchen, and that if I saw Gary, he wanted to talk to him about it.” RP 2490. The trial court overruled the defendant’s objection and permitted the testimony. RP 2490.

In closing argument, the defense counsel argued that the evidence indicated that Jack was involved in a violent fight days prior to the incident and that Jack’s statements to Monte Benn shows that Jack “didn’t blame Gary Benn for his injuries... He didn’t tell Monte Gary came over here and beat me up. He just said that he wanted to talk to Gary about it.” RP 2688-2690.

On November 7, 2003, the jury found the defendant guilty of both counts of murder in the first degree. CP 487-490. The jury also returned a

special verdict on both counts finding that the state proved the presence of a “single act” aggravating factor beyond a reasonable doubt. Id.

Defendant filed a timely notice of appeal. CP 510.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION TO DISMISS THE “SINGLE ACT” AGGRAVATING FACTOR WHERE THE DEFENDANT WAS NOT ACQUITTED OF ANY OF THE AGGRAVATING FACTORS IN THE FIRST TRIAL.

The Fifth Amendment to the United States Constitution states:

“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...” Const. Art. 1, § 9 declares: “no person shall be... twice put in jeopardy for the same offense.” Because of the similarity of these jeopardy provisions, the language of the state constitution receives the same interpretation as that which the United States Supreme Court gives to the jeopardy provision of the federal constitution. State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959).

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. Hescoek, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). Before a prosecution will be barred under this provision three elements must be met:

- (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for

the same offense. The first two elements determine "former" jeopardy, which is a prerequisite to "double" jeopardy. When "former" jeopardy is assumed or established, the third element determines "double" jeopardy.

State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

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. Corrado, 81 Wn. App. at 646. 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. Corrado, 81 Wn. App. 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. 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. Corrado, 81 Wn. App. 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).

In Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L.Ed.2d 588 (2003), the United States Supreme Court applied these principles in the context of capital sentence proceedings. In that case, the

defendant was convicted of first, second, and third degree murder in addition to other charges. Sattazahn, 537 U.S. at 103. At the penalty phase, the commonwealth presented evidence of only one statutory aggravating circumstance: commission of the murder while in the perpetration of a felony. Sattazahn, 537 U.S. at 104. The jury was unable to reach a decision as to whether the aggravating circumstance existed which would make him eligible for the death penalty. Id. Pursuant to Pennsylvania law, the trial court discharged the jury as hung and entered a sentence of life imprisonment. Sattazahn, 537 U.S. at 104. The U.S. Supreme Court held that there was no double jeopardy bar to retrying Sattazahn on either the capital offense or the lesser charge of first degree murder² because jeopardy had never terminated with respect to either offense. Sattazahn, 537 U.S. at 112-115. The Court reasoned that the relevant inquiry for double-jeopardy purposes was not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an “acquittal” based on findings sufficient to establish legal entitlement to the life sentence – *i.e.*, findings that the government failed to prove “one or more aggravating circumstances” beyond a reasonable doubt. Sattazahn, 537 U.S. at 108. If a jury unanimously concludes that a State has failed to meet its burden of

² In Sattazahn, 537 U.S. at 112, the court stated that “first degree murder” is a lesser included offense of “first-degree murder plus aggravating circumstance(s).”

proving the existence of “one or more aggravating circumstances”, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).” Sattazahn, 537 U.S. at 112. Since the jury in Sattazahn did not unanimously conclude that Pennsylvania failed to prove any aggravating circumstances, the defendant was not acquitted of the greater offense. Consequently, double jeopardy did not terminate to the greater offense of “murder plus aggravating circumstance(s).” Id. Thus, there was no double jeopardy bar to Pennsylvania’s retrying the defendant on the offense of aggravated murder in the first degree³. Sattazahn, 537 U.S. at 112-113. In Sattazahn, the U.S. 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 sentencing court found that only one aggravating circumstance was present even though the state presented evidence of two statutory aggravating circumstances⁴. Id. The defendant

³ In the second trial, Pennsylvania presented evidence of the same aggravating circumstance alleged at the first trial in addition to a second aggravating circumstance of defendant’s significant history of felony convictions involving the use or threat of violence to the person. Sattazahn, 537 U.S. at 105.

⁴ In Poland, 476 U.S. at 149, the State alleged that the following aggravating circumstances were present: (1) that defendants had “committed the offense as consideration for the receipt, or in expectation of the receipt, of [something] of pecuniary value,” and (2) that defendants had “committed the offense in an especially heinous, cruel, or depraved manner.”

successfully challenged his conviction and death sentence on appeal. On remand, the defendant was again convicted of first degree murder. The state argued the same two aggravating circumstances in addition to another 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. The U.S. Supreme Court held that the trial judge's rejection in the first trial of one of the aggravating circumstance was not an "acquittal" of that circumstance for double jeopardy purposes. Poland, 476 U.S. at 157.

In Arizona v. Rumsey, 467 U.S. 203, 211, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984), the Supreme Court held that the defendant was "acquitted" of a second death sentence. In that case, the state argued the presence of three statutory aggravating factors in the first trial. Rumsey, 467 U.S. at 205. The trial court explicitly found that no statutory aggravator existed. Rumsey, 467 U.S. at 206. The Court held that the trial court's findings denying the existence of the statutory aggravating factors amounts to an "acquittal" and thus bars the state from retrying the defendant of the death penalty. Rumsey, 467 U.S. at 211.

In this case, the trial court properly denied defendant's motion to dismiss the "single act" aggravating circumstance where defendant was not "acquitted" of aggravated first degree murder in the first trial. In the first trial, the defendant was convicted of two counts of murder in the first degree. Benn, 120 Wn.2d at 638. The jury was presented with the

following two aggravating circumstances: (1) common scheme or plan or (2) the result of a single act of the person. CP 516. The jury unanimously found that the “common scheme or plan” aggravating factor was present but left the “single act” aggravating factor blank⁵. Id. 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.

Defendant claims that the double jeopardy clause prohibited the State from seeking the “single act” aggravating factor in the second trial. Appellant’s brief at 17. Defendant’s argument is without merit. The jury did not acquit the defendant of aggravated murder in the first degree in the first trial because the jury found that one aggravating factor was present. Pursuant to Sattazahn v. Pennsylvania, jeopardy did not terminate. The fact that the jury was not able to reach a determination as to whether the “single act” aggravating factor was present did not amount to an “acquittal” of that aggravating factor for double jeopardy purposes. Consequently, double jeopardy did not bar the state from retrying the defendant of murder in the first degree and seeking the “single act” aggravating factor in the second trial.

⁵ It should also be noted that the special verdict form asked the jury to answer “yes” or “no” to both aggravating factors. The jurors left the “single act” aggravating factor blank.

Defendant's reliance on United States v. Green, 355 U.S. 1842 L. Ed. 2d 199, 78 S. Ct. 221 (1957) and State v. Kirk, 64 Wn. App. 788, 828 P.2d 1128 (1992) is misplaced where the facts of those cases are distinguishable from the case before the court. In both cases, the court held that a finding of guilt on a lesser included offense is an acquittal on the greater charge. Green, 355 U.S. at 191 (jury's verdict on the lesser included offense of second degree murder constitutes an "implicit acquittal" on the charge of first degree murder); Kirk, 64 Wn. App. at 792 ("a finding of guilt on a lesser included offense is an acquittal on the greater charge"). However, in this case, there was no acquittal because the jury found defendant guilty of murder in the first degree and further found that an aggravating factor was present. Since defendant was not acquitted of the greater charge of aggravated murder in the first degree, jeopardy did not terminate as to any of the aggravating factors. Thus, double jeopardy did not prevent the state from trying the defendant on the "single act" aggravating factor in the second trial.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE FORMER TESTIMONY OF WALTER HARTMAN WHERE HE WAS UNAVAILABLE AND THE DEFENSE HAD A FULL OPPORTUNITY TO CROSS-EXAMINE THE WITNESS IN THE PRIOR PROCEEDING.

- a. The Trial Court Properly Exercised Its Discretion In Admitting Walter Hartman's Former Testimony Under ER 804(b)(1).

The appellate court reviews a trial court's decision on the admissibility of evidence for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 20, 482 P.2d 775 (1971).

ER 804(b)(1) states the following:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) **Former Testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1).

Under ER 804(b)(1), former testimony of an unavailable witness is admissible if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by examination. “Similar motive” does not mean “identical motive.” State v. DeSantiago, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003) citing, United States v. Salerno, 505 U.S. 317, 326 (1992)(Blackmun, J., concurring). In United States v. Salerno, 505 U.S. 317, 326, 1220 L. Ed. 2d 255, 112 S. Ct. 2503 (1992), Justice Blackmun further indicated that the “similar motive inquiry” is inherently a factual inquiry.

The cases dealing with the “similar motive” requirement have indicated that in determining similarity of motive the court should look first to what examination in fact occurred at the prior proceeding, in order to determine whether the prior examination was “the equivalent of what would now be done if the opportunity to examine were presented.” Salerno, 974 F.2d at 239. If that initial inquiry is not conclusive, the court should then turn to an objective inquiry, asking whether a reasonable examiner under the circumstances would have had a similar motive to examine the witness. Id. This latter inquiry ensures that the failure to vigorously examine the witness—for tactical reasons or otherwise—does not insulate the prior testimony from admission. Id. If the examination at the prior proceeding provided the rough equivalent of what cross-examination would be at the current proceeding, then the “similar motive”

requirement is satisfied, and the court need not address the elusive issue of motive in the abstract. Salerno, 974 F.2d at 240.

For instance, in State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002), Division One held that the motives were similar where the witness who testified at the first trial was unavailable at the second trial. This case involved multiple co-defendants who were charged with several counts arising out of a series of eight home invasion robberies. Israel, 113 Wn.App. at 254. Co-defendants King and Israel moved for severance each seeking to be tried individually. Id. Co-defendant King had two trials. In the first trial, he was tried separately from the other co-defendants for his role in one of the robberies. In the second trial, he was tried along with another co-defendant for the conspiracy charge. Id. In the second trial, the state offered a videotaped testimony from a witness who testified in the first trial. The defendant argued on appeal that the testimony was improperly admitted because he was denied his right to cross-examine the witness on questions related to the conspiracy charge. Israel, 113 Wn.App. at 292. The court held that even though conspiracy was not at issue in the previous trial, ER 804(b)(1) does not require that the issues at the prior proceeding be identical. Id. The court stated the following:

[T]he issues in the first proceeding, and hence the purpose for which the testimony was there offered, must have been such that the party against whom the testimony is later offered... had an adequate motive for testing the credibility

of the testimony given in the earlier proceeding and offered in the later proceeding.

Israel, 113 Wn. App. at 292, citing, 5C Karl B. Tegland, Washington Practice: Evidence § 804.18, at 100 (4th Ed. 1999).

A tactical decision by defense counsel not to cross-examine a witness does not insulate the prior testimony from admission. Salerno, 974 F.2d at 239; United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980)(testimony of co-defendant at prior suppression hearing admissible even though defendant declined to cross-examine co-defendant at hearing). A decision not to cross-examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense. In re Brown, 143 Wn.2d 431, 451, 21 P.3d 687 (2001).

“If the party against whom [the testimony is] now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine.” United States v. Pizarro, 717 F.2d 336, 349 (7th Cir. 1983). Consequently, the inquiry under this hearsay exception focuses not on the extent of cross-examination at the former proceeding, but on whether the party’s handling of the testimony was “meaningful in light of the circumstances which prevail[ed] when the

former testimony [was] offered.” Id., citing, McCormick, Evidence § 255, at 616 (2nd Ed. 1972).

In this case, the trial court properly exercised its discretion in admitting the prior testimony of Walter Hartman. Walter Hartman was unavailable under ER 804(a)(4) because he died prior to the second trial. CP 136. Furthermore, the defense had an opportunity to cross-examine the witness. The defendant chose not to cross-examine the witness even though he was provided the opportunity to do so⁶.

Moreover, the record supports the trial court’s factual finding that the underlying motive to cross examine Hartman in the first and second trials was the same. CP 284-285. The defense theory in both the first and second trials was that defendant acted in self-defense. Benn v. Lambert, 283 F.3d 1040, 1044; State v. Benn, 120 Wn.2d 631, 659, 845 P.2d 289 (1993). Hartman testified that the defendant attempted to hire him to murder Jack Dethlefsen. RP 281. The defendant’s motive to cross-examine Hartman would be to undermine his credibility. This objective motive was the same in both trials. The fact that the defendant chose not to cross-examine the witness did not affect the underlying motive to cross-examine the witness. The focus is upon the motive underlying the cross-

⁶ In In re PRP of Benn, 134 Wn.2d 868, 894, 952 P.2d 116 (1998), the Court found that counsel’s failure to cross-examine Walter Hartman did not amount to ineffective assistance of counsel where the defendant had directed counsel not to cross-examine Walter Hartman. The court held that no ineffective assistance of counsel claim can be made if the defendant preempts trial strategy. Id.

examination rather than the actual exchange that took place. United States v. McClellan, 868 F.2d 210, 215 (7th Cir. 1989).

Moreover, the trial court in the second trial permitted the defense to impeach Hartman's credibility by introducing impeachment evidence through Charles Bonet. RP 2120. Bonet testified that Walter Hartman drank alcohol and was taking six valiums a day with alcohol to relieve his pain. RP 2123. He testified that Hartman was unemployed at the time of the incident. RP 2123. Bonet further testified that Hartman indicated that he approached the defendant and that he agreed to "take care" of Jack in exchange for a '78 Bronco and some additional money. RP 2126. It should be pointed out that this impeachment evidence was admitted to confront Hartman without the State having an opportunity to ask Hartman about these incidents. Thus, the defendant was able to adequately impeach Hartman's testimony in the second trial.

b. The Admission Of Walter Hartman's Former Testimony Did Not Violate The Confrontation Clause.

The Sixth Amendment's Confrontation Clause, made applicable to the states through the Fourteenth Amendment, provides "(i)n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." The admission of a statement at trial does not violate the confrontation clause of the U.S. Constitution or article I, section 22 when the statement is endowed with adequate indicia of

reliability. State v. Thomas, 150 Wn.2d 821, 855-856, 83 P.3d 970 (2004). Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. Id. A statement that qualifies for admission under a firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. White v. Illinois, 502 U.S. 346, 365, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992).

Testimonial statements of witnesses who are absent from trial can be admitted only if the State shows that the declarant is unavailable at the time of trial and the defendant had a prior opportunity to cross-examine. United States v. Crawford, 541 U.S. 36, 124 S. Ct. 1354, 1369 (2004). The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is necessarily effective in whatever way, and to whatever extent, the defense might wish. State v. Jenkins, 53 Wn. App. 228, 235, 766 P.2d 499, review denied, 112 Wn.2d 1016 (1989).

In this case, the admission of Hartman's prior testimony does not violate the confrontation clause. As argued above, Hartman's testimony was admissible under ER 804(b)(1). ER 804(b)(1) is a firmly rooted hearsay exception and is therefore reliable. Furthermore, the defendant was provided an opportunity to cross-examine the Walter Hartman in the first trial. Consequently, the admission of Hartman's testimony did not violate defendant's confrontation rights.

3. THE TRIAL COURT PROPERLY
EXERCISED ITS DISCRETION IN LIMITING
THE SCOPE OF THE DEFENDANT'S
CROSS-EXAMINATION OF THE STATE'S
EXPERT WITNESSES.

In securing the Sixth Amendment right of confrontation, the defense has a right to cross-examine witnesses to elicit facts that tend to show bias, prejudice, or interest; “but the scope or extent of such cross examination is within the discretion of the trial court.” State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). The trial court may reject cross examination where circumstances only remotely tend to show the witness’ bias or prejudice, or where the evidence is merely argumentative or speculative. State v. Buss, 76 Wn. App. 780, 788, 887 P.2d 920 (1995). The scope of cross examination lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of that discretion. State v. Hoffman, 116 Wn.2d 51, 95-96, 804 P.2d 577 (1991).

a. The Trial Court Properly Exercised Its
Discretion In Limiting The Defense Cross-
Examination Of The State’s Expert Witness
Regarding Learned Treatises Where The
Purpose For Which They Were Used By
Defense Counsel Was Improper.

Medical Books and treatises are not generally admissible to prove the truth of the statements contained therein, but may be used in the cross-examination of experts for the purpose of testing their knowledge or for

contradicting or discrediting them. Dabroe v. Rhodes Co., 64 Wn.2d 431, 437, 392 P.2d 317 (1964). ER 803(a)(18) states the following:

- (1) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert 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.

A textbook or treatise may be used to cross-examine an expert witness if the witness recognizes that the textbook or treatise is authoritative, whether or not the witness relied on it in forming his opinion. Dabroe, 64 Wn.2d at 437; State v. Mesaros, 52 Wn.2d 579, 583, 384 P.2d 372 (1963). The burden of proving that the treatise is authoritative is on the cross-examiner. Burns v. Miller, 42 Wn. App. 801, 803, 714 P.2d 1190 (1986).

If the treatise is admitted, relevant statements from the treatise may be read into evidence. The purpose of the last statement of the evidence rule was to prevent a jury from riffling through a learned treatise and drawing improper inferences from technical language it might not be able properly to understand without expert guidance. United States v. Mangan, 575 F.2d 32 45 (2nd Cir. 1078).

In this case, the trial court properly exercised its discretion in limiting the defendant's cross examination of expert witnesses with learned treatises. The defendant's use of these learned treatises was

improper. During the cross-examination of the witness, the defense asked the witness what the literature “recommends”, RP 1838, “talks about”, RP 1822, “suggests”, RP 1823, and “referred to”, RP 1824. Instead of discrediting or impeaching Grubb by reading portions of the treatise, defense counsel attempted to elicit the substance of what these articles stated. ER 803(a)(18) does not allow a party to admit the treatise to prove the truth of the statements contained therein. The purpose for which the learned treatises was used by the defense was improper under ER 803(a)(18). Thus, the trial court properly exercised its discretion in limiting the scope of cross-examination regarding these “learned treatises.”

Moreover, defendant fails to show any prejudice where the trial court did not limit any meaningful cross-examination of the state’s experts. Defendant claims on appeal that the court’s ruling limited his ability to discredit Grubb’s conclusion that the stains were so small that they could only have come from a “high velocity blood source”. Appellant’s brief at 28. Defendant’s argument is without merit. Despite the court’s ruling, the defense counsel was able to elicit that the literature indicates that “high velocity” blood spatter should be no greater than .1 millimeter in size. RP 1829-1830. However, Grubb’s measurements of the blood spatter found on the defendant’s left foot were .17 millimeters to .5 millimeters. RP 1798. Defense counsel further elicited from Grubb that literature cautions against “eyeballing” the size of blood stains, and

that one needs to focus on the “preponderance” of the size in categorizing the blood stains as certain patterns. RP 1822, 1825. Furthermore, the defense counsel elicited from Grubb that the literature also indicates that a presumptive test is only considered a detection tool. RP 1838-1839. These statements were all elicited without any objection from the state. Moreover, the defense counsel was also able to cross-examine Rod Englert regarding the learned treatises. RP 2047. During his cross-examination, the defense counsel was able to elicit that the literature recommends that “these presumptive tests are merely detection tools” and are not “confirmatory.” RP 2047. Consequently, the defense was not prevented from adequately cross-examining the witness regarding the learned treatises.

b. The Trial Court Properly Granted The State’s Motion To Prevent The Defense From Impeaching Englert Regarding The Baseless Complaints Alleged In The AAFS Letter Under ER 608(b).

ER 608(b) states in pertinent part:

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime was provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on the cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to

which character the witness being cross-examined has testified.

Washington case law allows cross-examination under ER 608(b) into specific instances that are relevant to veracity. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). The instance of conduct must meet four requirements: (1) the instance must not be remote in time; (2) it must be probative of truthfulness; (3) it must meet ER 403's requirement that its probative value outweighs the danger of unfair prejudice; and (4) it must comply with ER 611(a)'s prohibition against "harassment or undue embarrassment" of witnesses. State v. Wilson, 60 Wn. App. at 893. Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue. Id.

For instance, in State v. Griswold, 98 Wn. App. 817, 991 P.2d 657 (2000), Division III held that the trial court properly refused to admit a prior false statement made by the victim because the matter was collateral to the issues in the case. The defendant was convicted of third degree child molestation. Griswold, 98 Wn. App. at 819. The trial court found that the victim's prior false statements were not admissible under ER 608(b). Griswold, 98 Wn. App. at 831. The victim had previously stated that she had quit her paper route because she feared the defendant. Griswold, 98 Wn. App. at 822-823. However, the victim admitted at an interview she lost the job because she had occasionally thrown away some

of the papers. Id. The appellate court held that trial court properly exercised its discretion in excluding the statement under ER 608(b) as it was not germane to the guilt issues at trial. Griswold, 98 Wn. App. at 831.

In this case, the trial court properly exercised its discretion by granting the state's motion to exclude the defense from eliciting facts underlying the complaints discussed in the AAFS letter. Defendant claims that he should have been permitted to impeach Englert regarding (1) a "false statement about his educational and teaching experience" that was alleged in the complaint as well as (2) the fact that Englert has testified inconsistently in other trials. Appellant's brief at 35-36.

First, the trial court properly exercised its discretion by not allowing the defense to cross-examine Englert regarding these complaints because defendant did not make an adequate offer of proof. Defendant failed to show that these allegations satisfy the four requirements set forth in State v. Wilson, 60 Wn. App. at 893, for their admissibility under ER 608(b). The defense did not articulate that these allegations were (1) not remote in time, (2) that it was probative of Englert's truthfulness, (3) it meets ER 403's requirements that its probative value outweighs the danger of unfair prejudice, and that (4) these statements comply with ER 611(a)'s prohibition against "harassment or undue embarrassment." The defense merely argued that this evidence was admissible to impeach the expert

witness. RP 1940. The state argued that these allegations were baseless because they were alleged by 5 witnesses who were Englert's rivals in the same field. RP 1940-1941; RP 219-221; RP 1947. Confronting Englert with these allegations on cross-examination would have caused "undue embarrassment" under ER 611(a). RP 223. The trial court properly exercised its discretion in limiting the scope of cross-examination in regards to these baseless accusations where the evidence was clearly speculative.

Furthermore, the trial court properly excluded the defense from confronting the witness with these allegations because they were not "germane" to the guilt issues at trial. It should be pointed out that the defense never argued that Englert's prior testimony was inconsistent with his testimony at the trial in the instant case. Furthermore, the allegation by McDonnell that Englert may have given false statements regarding his prior teaching experience is further speculative and is collateral to the guilt issues at trial.

Assuming *arguendo* that the trial court erred in excluding this evidence, Englert's testimony was cumulative to other testimony in the case. Englert testified to the following: (1) both Dethlefsen and Nelson were each shot in the chest first prior to being shot in the neck and head area, RP 1874; (2) the head wounds were contact gunshot wounds, RP

1881; (3) he observed 13 blood stains on the outside heel of defendant's left shoe, RP 1894; (4) the blood spatter on the left boot was high velocity blood spatter consistent with back spatter from a gunshot, RP 1904-1905; (5) Jack Dethlefsen was shot as he was seated on the couch while Mike Nelson was shot while standing between the dining room and entryway, RP 1907; (6) the pattern on the glass found by Dethlefsen's body matched the print of the right boot, RP 1909; and (7) the high velocity blood spatter found on the defendant's left heel was from the contact wound from Mike Nelson's head. RP 1910.

This testimony was cumulative to testimony from other witnesses at trial. Dr. Howard testified that he performed autopsies on Nelson and Dethlefsen and testified that (1) the chest wounds on Nelson and Dethlefsen's bodies were distant gunshot wounds, RP 1354, RP 1310; (2) the gunshot wound to the heads were contact gunshot wounds, RP 1312, 1358-59; (3) the victims were shot in the chest prior to being shot in the head, RP 1367, (4) Nelson was standing upright in a standing position when he was shot, RP 1369; and (5) the blood spatter found on the defendant's boot was consistent with high velocity blood spatter from a contact gunshot wound. RP 1421. Chris Sewell testified that he examined the boots and found tiny specs of blood on the left heel of the boot. RP 1524-1531. Michael Grubb also testified that he found 14 very tiny blood

stains on the left boot heel which were high velocity blood stains consistent with gunshot back spatter, RP 1794, and that the head wound to Nelson was the source of the firearm back spatter found on the boot. RP 1814. Consequently, Englert's testimony was cumulative to other testimony that was presented at trial.

4. THE ADMISSION OF HEARSAY STATEMENTS THAT JACK DETHLEFSEN MADE TO MONTE BENN WERE HARMLESS ERROR WHERE THE EVIDENCE WAS CONSISTENT WITH THE DEFENDANT'S THEORY OF THE CASE.

It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Id. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. State v. Stevens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

In this case, the State acknowledges that Jack Dethelfsen's statement to Monte Benn that he was "beat up" in the kitchen and that he wanted to talk to the defendant was hearsay, but that any error in admitting the testimony was harmless. RP 2489-2490. Based on the record, the

testimony was elicited to show that Jack Dethlefsen was in a weak condition on the day of the incident, which was relevant to rebut the defense theory that Jack was the first aggressor. Id.

The State acknowledges that these statements elicited from Monte Benn constitute hearsay⁷ testimony. However, Jack's hearsay statements to Monte Benn were consistent with the defendant's theory of the case. The defense theory of the case was that Mike Nelson had injured Jack Dethlefsen the Friday prior to the incident. RP 2302. Defendant testified that he went over to Jack's residence on the day of the incident and observed that Jack and Mike were involved in a heated argument. RP 2326. He testified that he saw dried blood on Jack which would show that Jack had been involved in a fight. RP 2292-2293. Dr. Howard also testified that he observed older injuries on Jack's face that were several days older than the incident. RP 1288. The defendant testified that he heard Mike Nelson say to Jack that he "should have finished what [he] started... on Friday." RP 2302. The defense counsel argued in closing argument that:

We also know that he didn't blame Gary Benn for his injuries, we know that. Because when he talked to Monte, who Monte says they were fairly close, they saw each other, Monte says he went over and brought him burgers, took care of him while he was hurt. He didn't tell Monte Gary came over here and beat him up. He just said that he

⁷ ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."

wanted to talk to Gary about it. We also know that by February 10, 1988 Jack Dethlefsen was no longer using his walker...

RP 2690. Thus, Jack's statements that he was "beat up" a week prior to the incident were consistent with the defense theory that Mike Nelson, rather than the defendant "beat up" Jack.

Furthermore, the state did not argue in closing argument that Jack's statements showed that the defendant rather than Mike Nelson "beat up" Jack Dethlefsen. Contrary to defendant's argument, the prosecutor actually argued that the fact as to who "beat up" Jack prior to the incident does not matter. RP 2490. Although the statements were hearsay and should not have been admitted, any error was harmless beyond a reasonable doubt.

5. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS ON DOUBLE JEOPARDY WHERE THE DOUBLE JEOPARDY CLAUSE DOES NOT PROVIDE DEFENDANT WITH ANY RELIEF.

Double Jeopardy generally does not bar a retrial following a mistrial. Oregon v. Kennedy, 456 U.S. 667, 676-677. However, even where the defendant moves for a mistrial, there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial. Id. Under federal law, a second trial will be barred if the prosecutor intended through

his or her misconduct to “goad” the defendant into requesting a mistrial. Oregon v Kennedy, 456 U.S. 667, 673 (1982).

For instance, in Oregon v. Kennedy, *supra*, the prosecutor asked a witness whether the reason he had never done business with the defendant was “because he was a crook.” Kennedy, 456 U.S. at 668. The trial court granted defendant’s motion for a mistrial. Id. In the second trial, the defendant moved to dismiss the charges because of double jeopardy. Id. The trial court found as a fact that it was not the intention of the prosecutor to cause a mistrial. Id. The U.S. Supreme Court held that double jeopardy did not bar retrial because the prosecutor did not “goad” the defendant into requesting a mistrial. Kennedy, 456 U.S. at 679. This standard calls for the trial court to make a finding of fact. Kennedy, 456 U.S. at 675. “Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.” Id.

On remand, the Oregon State Supreme Court formulated a different test based on the Oregon State Constitution. The Oregon test bars reprosecution where (1) the prosecutor’s misconduct was so prejudicial that it could not be cured short of a mistrial; (2) the prosecutor knew the conduct was improper; and (3) the prosecutor either intended a mistrial or was indifferent to the possibility. Oregon v. Kennedy, 295 Or.

260, 276, 666 P.2d 1316 (1983). Under the Oregon analysis, neither inadvertent actions nor conscious actions that were not designed to prejudice the defendant bar retrial. Hopson, 113 Wn.2d at 282.

Washington courts have not embraced either the federal or the standard declared by the Oregon Supreme Court in Oregon v. Kennedy. State v. Hopson, 113 Wn.2d 273, 283-284, 778 P.2d 1014 (1989).

Washington courts have twice declined to decide whether to adopt the Oregon rule, because in both cases, it was determined that double jeopardy would not bar retrial under either the federal or the Oregon rule. State v. Hopson, 113 Wn.2d at 282 (fire inspector referred to defendant's "booking photograph" a few minutes after cautioned to mention criminal history); State v. Lewis, 78 Wn. App. 739, 745, 898 P.2d 874 (1995)(prosecutor persisted in asking prejudicial questions, without foundation, ignoring sustained objection). In Hopson, 113 Wn.2d at 283, the court emphasized the "narrow difference" between the two tests, noting that both require a rare and compelling set of facts. "When a set of facts that would require different results under the Oregon and federal analysis is before the court, we will determine the scope of" the Washington clause. Id.

In the case before the court, the trial court properly denied defendant's motion to dismiss on double jeopardy grounds where defendant failed to demonstrate how the federal or state double jeopardy

clause provided him with any protection. Defendant not only seeks an application of the principles of Oregon v. Kennedy, 456 U.S. at 673, but further claims that this court should find that the Washington's Double Jeopardy Clause provides greater protection than its federal counterpart under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). However, defendant fails to show how the principles of double jeopardy as stated in Oregon v. Kennedy apply in his case. Appellant's brief at 39.

Oregon v. Kennedy, *supra*, deals only with cases where the defendant requests a mistrial due to prosecutorial misconduct. In this case, defendant never made a motion for mistrial based on prosecutorial misconduct nor was a mistrial declared. Furthermore, it should be pointed out that the trial court never made a factual determination of prosecutorial misconduct. There has never been a finding by the Washington Supreme Court, neither on defendant's direct appeal nor in his personal restraint petition that prosecutorial misconduct had occurred. State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993); In re Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). Further, a reference hearing was held where testimony by the prosecution was elicited. CP 34-52. After hearing the testimony from the witnesses, there was no specific finding by the Superior Court that the prosecution committed misconduct by withholding exculpatory evidence. Id. Although the 9th Circuit did not approve of the state's actions in dicta,

it did not specifically hold that there was prosecutorial misconduct. Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002).

In Oregon v. Kennedy, 456 U.S. at 676, n. 6, the U.S. Supreme Court was careful to point out that retrial following reversal on appeal is governed by a different principle. “This court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence.” Kennedy, 456 U.S. at 676 n. 6. Kennedy provides no support for the proposition that barring retrial is an appropriate response to the State’s failure to disclose exculpatory evidence in violation of its obligation under Maryland v. Brady. See Ball v. United States, 163 U.S. 662, 671, 41 L. Ed. 300, 16 S. Ct. 1192 (1896). Retrial following a reversal has always been permitted with the exception of a reversal upon the insufficiency of the evidence. Ball v. United States, 163 U.S. 662 (1896); Burks v. United States, 437 U.S. 1, 16, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978).

Defendant’s reliance on Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321, 325 (1992) and State v. Rogan, 91 Haw. 405, 423, 984 P.2d 1231 (1999) is misplaced where those cases are clearly distinguishable from the case before the court. In each of these cases, the courts held that

there was prosecutorial misconduct. In Rogan, supra, the Hawaii Supreme Court held that the prosecutor's comment that "this is every mother's nightmare. Leave your daughter for an hour and a half, and you walk in, and here's some black, military guy on top of your daughter" in closing argument constituted prosecutorial misconduct. Id. The court found that the misconduct was so egregious that reprosecution of the defendant was barred by the double jeopardy clause. Id. Similarly, in Commonwealth v. Smith, the trial court found that there was prosecutorial misconduct when the commonwealth withheld exculpatory evidence during his first trial. Smith, 532 Pa. at 181-182, 186.

Unlike Smith and Rogan, there was never a factual finding of prosecutorial misconduct in this case. The Western District of Washington granted defendant's writ of habeas corpus, reversing defendant's convictions and death sentence which was affirmed by the ninth circuit on the grounds that the state failed to disclose exculpatory evidence under Maryland v. Brady, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Benn v. Lambert, 283 F.3d 1040, 1062 (9th Cir. 2002). The remedy for a Brady violation is the reversal of the judgment of conviction and remand of the case for further proceedings, including retrial. Kyles v. Whitley, 514 U. S. 419, 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995); United States v. Bagley, 473 U.S. 184, 2 L. Ed. 2d 199, 78 S.

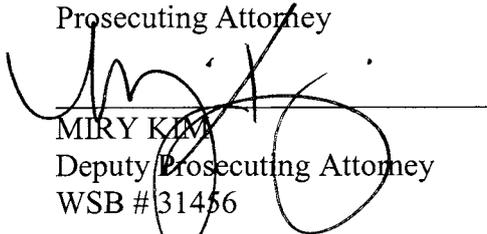
Ct. 221 (1957(1985)). Consequently, the trial court properly exercised its discretion in denying defendant's motion to dismiss where the double jeopardy clause did not provide defendant with any protection.

D. CONCLUSION.

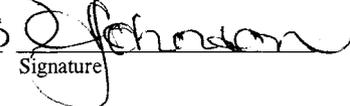
For the foregoing reasons, the state respectfully requests this court to affirm defendant's conviction and sentence below.

DATED: FEBRUARY 2, 2005

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MIRY KIM
Deputy Prosecuting Attorney
WSB # 31456

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

2/2/05 
Date Signature

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STATE OF WASHINGTON
BY  DEFENDANT