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NO. 31601-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

FRANK LAZCANO,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION.

Frank Lazcano went to a friend's house to confront Marcus Schur about property Mr. Schur had stolen. Mr. Schur fled, someone fired shots, and Mr. Schur never returned home. Mr. Lazcano was charged with burglary and pled guilty to trespass. Sixteen days later, police discovered Mr. Schur's body and charged Mr. Lazcano with felony murder based on the predicate crime of burglary.

Mr. Lazcano was put twice in jeopardy for the same offense by being prosecuted for burglary and then for felony murder based on the same burglary when the State did not diligently investigate Mr. Schur's disappearance and demise at the time of the original prosecution. Additionally, because Mr. Lazcano did not directly encourage and facilitate participation by another person in the burglary or know someone would shoot at Mr. Schur, there was insufficient evidence to convict Mr. Lazcano as an accomplice to felony murder while armed with a firearm. Finally, the State's use of testimonial statements from a non-testifying suspect and its emphasis on out-of-court agreements that its witnesses made with the State to tell the truth denied Mr. Lazcano a fair trial.

B. ASSIGNMENTS OF ERROR.

1. Frank Lazcano's conviction for felony murder based on first degree burglary violates double jeopardy.

2. The court erroneously denied Mr. Lazcano's pretrial motion to preclude the State from twice prosecuting him for the same offense of burglary.

3. There was insufficient evidence to prove Mr. Lazcano committed the offense of first degree murder while armed with a firearm.

4. The use of testimonial statements from another suspect violated Mr. Lazcano's state and federal rights to confront witnesses against him.

5. The prosecution committed misconduct by repeatedly eliciting that its witnesses had entered into agreements with the prosecution to receive specific benefits in exchange for telling the truth when testifying.

6. Cumulative prejudice resulting from improperly admitted evidence denied Mr. Lazcano a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. It is constitutionally prohibited to prosecute a person two times for the same offense, including greater and lesser offenses. Mr. Lazcano was prosecuted for a burglary and then, after he pled guilty to a reduced charge, he was charged with a same burglary as the predicate offense for felony murder. At the time of the first prosecution, the State had ample reason to believe a greater crime had been committed but did little to investigate the more serious offense. Does it violate double jeopardy to prosecute and punish Mr. Lazcano two times for the same offense?

2. To be an accomplice to felony murder while armed with a firearm, the prosecution must prove the accused person participated in the predicate felony, was an accomplice to the person who caused the victim's death, and was an accomplice to the person who was armed with a firearm. Even if there was evidence that Mr. Lazcano committed burglary by unlawfully entering another person's home, there was insufficient evidence that he was an accomplice to the person who fired the gun. Does the insufficient evidence of accomplice liability as required for felony murder while armed with a firearm require reversal?

3. The Confrontation Clauses of the state and federal constitutions prohibit the admission of testimonial evidence without an opportunity to cross-examine the declarant. The prosecution elicited evidence from a police officer that another suspect described Mr. Lazcano's involvement in part of the incident. When another suspect implicates the accused person to the police, is his statement testimonial even if it does not include all details of the incident?

4. A prosecutor impermissibly vouches for the truthfulness of his witnesses when he elicits testimony that the witness has entered into an out-of-court agreement with the prosecutor to receive lenient treatment if he or she tells the truth in court. The prosecutor elicited testimony from four witnesses that they would receive benefits from the State if they told the truth at trial. Did the State impermissibly seek a verdict on inadmissible promises that it would police the truth of its witnesses's testimony?

D. STATEMENT OF THE CASE.

In mid-December 2011, Marcus Schur and his brother David Cramer broke into Ben Everson's home and stole "lots" of property, including two rifles belonging to Daniel Lazcano. 2RP 190; 3RP 258-

59.[1] When Mr. Everson's mother Susan Consiglio confronted Mr. Schur, he confessed. 2RP 201. Daniel spoke to Mr. Schur on the telephone about returning the property but Mr. Schur was evasive and told Daniel that his brother Frank needed to see him to resolve it. 2RP 204-05; 7RP 787.[2] Mr. Schur returned two stolen rifles by leaving them outside Mr. Everson's home but did not bring back anything else. 7RP 780.

Because Ben Everson was in jail at the time of Mr. Schur's break-in, Daniel and his older brother Frank felt responsible for helping Mr. Everson get his property returned. 4RP 605-08. They looked for Mr. Schur at the home of his ex-wife, Ambrosia Jones, but did not find him there. 2RP 220.

On December 27, 2011, Ms. Consiglio told Daniel that Mr. Schur was at Nick Backman's house. 2RP 205. Frank was spending the day with his uncle Travis Carlon and his family. 6RP 406, 408. Later in the afternoon, Daniel and his girlfriend came to Mr. Carlon's home.

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[1] The verbatim report of proceedings from trial and sentencing are contained in consecutively paginated volumes and are referred to by the volume number on the cover page. Additional transcripts are referred to by date of the proceeding.

[2] Daniel and Frank Lazcano are referred to by first name when necessary for clarity. Any references to Mr. Lazcano pertain to Frank Lazcano.

7RP 785. Daniel asked Frank to go with him to speak to Mr. Schur. 7RP 787.

Shortly before 5 p.m., Daniel drove Frank to Mr. Backman's house in a white sedan that Daniel regularly drove, which belonged to their stepfather Eli Lindsey. 3RP 305; 4RP 435, 439; 7RP 789. Once they got to Mr. Backman's home, Daniel asked Frank what he should do. 7RP 790. Frank told him to "hang tight" in the car while he went inside. 7RP 789-90.

Frank was friendly with Nick Backman and they had visited each other's homes. 3RP 287. Frank knocked on the front door of the porch and David Cramer answered. 3RP 261-62. Frank could see Mr. Backman inside. 7RP 790-91. Frank thought Mr. Backman gave him a nod. 7RP 791. Frank would be generally welcome to come into Mr. Backman's home upon knocking. 2RP 287.

Frank asked Mr. Cramer if he was the person who had robbed him, and Mr. Cramer said, "Yeah," then reached for his pocket. 7RP 791-92. Frank thought Mr. Cramer was reaching for a weapon and punched him. 7RP 792. Frank saw Mr. Schur running out the back door of the house and he ran through the house after him. 7RP 793.

As Frank ran after Mr. Schur, Mr. Schur's ex-wife Ms. Jones yelled at Frank and tried to block him. 3RP 227. He pushed her out of the way because there was no room to get past her and kept running. 7RP 795-96.

Once outside, it was "very dark," raining, and wet. 3RP 345; 7RP 799-800. Frank saw Mr. Schur go around the garage. 7RP 795. Frank followed and heard shots. 7RP 796. Two bullets hit the ground in front of him. 7RP 796. He looked to his right and saw his brother holding a rifle. *Id.* He heard a noise and realized his brother had hit Mr. Schur, who was lying in shrubbery. 7RP 798.

Frank went to Mr. Schur and tried to help. 7RP 800. Frank realized Mr. Schur was taking his last breaths and "then he was gone." 7RP 803.

Frank and Daniel put Mr. Schur's body into the car's trunk. 7RP 805. Daniel was in shock and inconsolable. 7RP 807. He said "gun" and Frank realized Daniel had left the gun on the street. 7RP 801. Frank reversed the car and picked it up. 7RP 806-07. Frank drove to Travis Carlon's home "for advice." 7RP 807-08. Mr. Carlon drove his own car and told Frank to follow him. 7RP 807-08. They drove to a rural area called Hole-in-the-Ground and Mr. Carlon told Frank and Daniel to

dispose of the body in the water. 4RP 415. Frank put Daniel's gun in Mr. Carlon's car and Mr. Carlon threw the gun into the Spokane River. 4RP 418, 422-23. It was later recovered by police. 5RP 550, 556-67.

Meanwhile, Nick Backman's next door neighbor James Wendt had called 911 when he heard multiple shots being fired near his house. 3RP 306. Mr. Wendt saw two people get into a white car and put a long object inside that he suspected was a gun. 3RP 315. Another neighbor also heard loud banging sounds and saw people loading something big, possibly a person, into a white car. 3RP 332, 335. She also saw the car start driving away, stop, someone pick up something long and jump back into the car before driving away. 3RP 335. Mr. Backman saw something long and metal being put in the car before it drove away. 3RP 284.

David Cramer had followed Frank out the back door. 2RP 264. He heard multiple shots. 2RP 269-70. He looked for Mr. Schur and could not find him. 2RP 273. He saw Daniel's white sedan driving away with Frank and Daniel inside. CP 25.

Police came and searched the area. They did not find Mr. Schur. CP 36. Ms. Jones and Mr. Cramer also looked for Mr. Schur after

hearing the shots and could not find him. 2RP 230, 269-70. Mr. Cramer called his mother to tell her Mr. Schur had been killed. 2RP 271.

Detective Tom Cox interviewed Frank. 3RP 359-61. Frank said he went to Mr. Backman's house to get Mr. Schur to return the stolen property. 3RP 361. He described running after Mr. Schur but told Detective Cox that Mr. Schur disappeared and he did not see him again. 3RP 364. He denied that Daniel was with him. 3RP 364-65.

Daniel also spoke to Detective Cox. 3RP 373. Daniel denied being part of the incident and said he was in Spokane with his girlfriend. 3RP 374. He admitted he drove a white car. *Id.* Detective Cox asked Daniel about Frank, and Daniel said Frank went to the house to retrieve his belongings. 3RP 375.

Detective Cox looked for Mr. Schur by calling his mother and half-brother, as well as his community custody officer, none of whom had seen him since he ran out of Mr. Backman's house. CP 35-36. He closed the case. CP 36. Frank was charged with residential burglary and assault in the fourth degree for unlawfully entering Mr. Backman's house and hitting Mr. Cramer. CP 75-76. Pursuant to a plea bargain, Frank pled guilty to the reduced charge of criminal trespass in the first degree. CP 67-73. He was sentenced on March 9, 2012. CP 65.

On March 25, 2012, someone found Mr. Schur's body floating in shallow water. 5RP 655. He had two bullet wounds, one in the left shoulder and other in the left hip. 5RP 676-77.

The State charged Frank with first degree murder while armed with a firearm under the alternative theories of felony murder or premeditated intentional murder. CP 16-17. He was also charged with unlawfully disposing of human remains and kidnapping in the first degree with a firearm. CP 17-18.

The court denied Frank's pretrial motion to dismiss the allegation of felony murder based on burglary as a double jeopardy or collateral estoppel violation. 2/22/13RP 36-42; CP 19-23.

After a jury trial, Frank was convicted of first degree murder while armed with a firearm. CP 229, 232. In a special verdict form, the jury explained it unanimously agreed only on the felony murder allegation, and the State had not proven premeditated murder. CP 233-34. He was also found guilty of unlawfully disposing of the body and not guilty of kidnapping. CP 230-31.

Based on his lack of criminal history and lack of intent to harm Mr. Schur, the court sentenced Frank to the low end of the standard

range. 8RP 985-86. Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **By twice prosecuting and convicting Mr. Lazcano for the same allegations of burglary, he received multiple convictions violating his double jeopardy rights**

a. *Multiple convictions for the same offense violate double jeopardy.*

Under the double jeopardy provisions of the state and federal constitutions, "[n]o person shall be . . . twice put in jeopardy for the same offense." Article I, § 9; U.S. Const. amend. 5.[3] A person is "twice put in jeopardy" when, after a final determination in one prosecution, the State prosecutes her for an offense that is the same in fact and law as the first. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 3 L.Ed.2d 1054 (1977); *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).

In *Harris*, the defendant was convicted of felony murder based on a death that occurred in the course of a robbery with firearms. 433 U.S. at 682. After that conviction, he was charged with robbery based

on the same incident. *Id.* The Supreme Court reversed the second conviction because robbery was an element of the felony murder conviction the prosecution had already obtained. *Id.* This successive prosecution for the same offense violated double jeopardy. *Id.*

Similarly, in *Brown v. Ohio*, 432 U.S. 161, 162, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), Wickliff City police caught the defendant driving a stolen car and shortly afterward, he pled guilty to joyriding, a misdemeanor defined as operating a car without the owner's consent. Later, county prosecutors charged him with felony auto theft for stealing the car from a parking lot one week earlier. *Id.* Ohio law defined joyriding as a lesser included offense of auto theft. Id. at 167.

The United States Supreme Court reversed the second conviction because this successive prosecution of a greater and lesser included offense constituted a double jeopardy violation.

> As is invariably true of a greater and lesser included offense, the lesser offense joyriding requires no proof beyond that which is required for conviction of the greater auto theft. The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.

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[3] The Fifth Amendment to the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb."

Id. at 168.

The *Brown* Court explained that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.* at 168 (quoting *In re Neilsen*, 131 U.S. 176, 188, 9 S.Ct. 672, 33 L.Ed. 118 (1889)). It is "immaterial" whether the lesser offense conviction came first, or vice versa. *Id.* "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Id.* at 169.

Where successive prosecutions occur, double jeopardy protects the accused person from efforts by the prosecution "to secure additional punishment after a prior convictions and sentence." *Brown*, 432 U.S. at 165-66. The clause's intended purpose is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Mr. Lazcano was accused of unlawfully entering Nick Backman's home with the intent to commit a crime therein and he pled guilty to a reduced offense of criminal trespass in the first degree. CP 67, 73-75. Having obtained a final conviction based on Mr. Lazcano's unlawful entry into the home, the Double Jeopardy Clauses of the state and federal constitutions barred the State from prosecuting him for a greater offense predicated on that same crime.

b. *Mr. Lazcano's felony murder prosecution rested on the same predicate offense for which he was previously prosecuted and convicted.*

Offenses are the same for double jeopardy purposes when, as charged, the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004). The *Blockburger* test requires the court to determine "whether each provision requires proof of a fact which the other does not." 284 U.S. at 304. Proper application of the *Blockburger* same elements test focuses on "the facts used to prove the statutory elements." *Orange*, 152 Wn.2d at 818-19. Separate prosecutions for greater and lesser offenses will generally violate double jeopardy because the lesser will

require no proof beyond that which is required for the greater. *Brown*, 432 U.S. at 168; *see also State v. Laviollette*, 60 Wn.App. 579, 583, 805 P.2d 253 (1991), *aff'd*, 118 Wn.2d 670, 826 P.2d 684 (1992).

On January 3, 2012, the prosecution charged Mr. Lazcano with residential burglary and fourth degree assault. CP 75-76. Count 1 alleged he committed residential burglary by entering or remaining unlawfully in Nick Backman's home, at 209 SE Bluebird Street, on December 27, 2011, with the intent to commit a crime against a person or property therein. CP 75. Count 2, assault in the fourth degree, alleged he intentionally hit David Cramer on December 27, 2011. CP 76. Both incidents occurred at the same location. CP 25.

The prosecution amended the charging document on March 9, 2012, pursuant to a plea bargain. CP 65, 67, 72. The prosecution reduced the charges to one count of criminal trespass in the first degree for knowingly entering or remaining unlawfully in a building located at 209 SE Bluebird Street on December 27, 2011 (Mr. Backman's home). CP 73. The prosecution offered this plea bargain "to settle this case" based on its "recognition of the inherent uncertainties in the trial and appellate processes, and of the defendant's willingness to take responsibility for his actions." CP 72.

Criminal trespass in the first degree is a lesser included offense of first degree burglary. *State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987) (citing with approval Court of Appeals opinion, 45 Wn.App. 885, 889, 728 P.2d 1079 (1986), which provided, "each of the elements of first degree criminal trespass is a necessary element of first degree burglary."); *see also State v. J.P.*, 130 Wn.App. 887, 895, 125 P.3d 215 (2005) ("Criminal trespass is a lesser included offense of burglary."). Criminal trespass occurs when a person "knowingly enters or remains unlawfully" in a building. RCW 9A.52.070. First degree burglary is criminal trespass with the added elements of intent to commit a crime against a person or property therein, as well as being armed with a deadly weapon or assaulting another. *See J.P.*, 130 Wn.App. at 895.

Less than one month after Mr. Lazcano pled guilty and was sentenced, the prosecution filed new charges against Mr. Lazcano based on the same incident but adding the accusation of murder. CP 6. It alleged he committed first degree murder by the alternative theories of premeditated murder or felony murder based on either: burglary in the first degree, robbery in the first degree, or kidnapping in the first degree. CP 6. First degree burglary was based on the alternative means

of being armed with a deadly weapon or assaulting either Mr. Cramer or Ms. Jones. CP 126.

The only theory of felony murder the State presented to the jury was first degree burglary. CP 124-26 (Instructions 9 and 10). By special verdict, the jury found the State only proved the allegation of felony murder, not premeditated murder. CP 233-34.

The original burglary charge and the felony murder based on burglary involved the same building and the same incident. CP 16-17; CP 75-76. The predicate felony is an element of the greater offense of felony murder. *Harris*, 433 U.S. at 682 (felony murder based on robbery includes robbery as necessary element); *Whalen v. United States*, 445 U.S. 684, 691, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (proof of rape is necessary element of felony murder based on rape); *see* RCW 9A.32.030(1)(c).[4]

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[4] A person commits first degree felony murder when:
He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.
RCW 9A.32.030(1)(c).

Jeopardy attached when, after the State charged Mr. Lazcano with residential burglary and fourth degree assault, he "settle[d] this case" by pleading guilty in March 2011 to criminal trespass in the first degree. CP 67, 72. He was sentenced to time served based on his custodial detention when arrested and jailed. CP 65. Because his conviction was final, the State was prohibited from later prosecuting Mr. Lazcano for the crime of unlawfully entering property of another. *See State v. Daniels*, 160 Wn.2d 256, 265, 156 P.3d 905 (2007).

c. *By quickly closing its investigation into the shooting, the State cannot avoid double jeopardy based on information learned after the first prosecution.*

Before trial, Mr. Lazcano moved to prohibit the prosecution from relying on burglary as the predicate offense for felony murder based on double jeopardy. CP 19-27; CP 64-77. The court agreed it was a "big problem" that Mr. Lazcano had been convicted of an identical offense but found that the prosecution was not collaterally estopped from this second prosecution because it did not definitively confirm Mr. Schur's death until after jeopardy terminated in the initial burglary prosecution. 2/22/13RP 39, 41-42.

Although the United States Supreme Court has never addressed this principle in detail, it said in a footnote in *Brown* that while double jeopardy bars successive prosecutions,

> an exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.

432 U.S. at 449 n.7. As authority for this proposition, *Brown* cited *Diaz v. United States*, 223 U.S. 442, 448-449, 32 S.Ct. 250, 56 L.Ed. 500 (1912).

The *dicta* in *Brown*'s footnote must be strictly applied based on the well-established prohibitions against double jeopardy that bar successive prosecutions. *See People v. Rivera*, 445 N.Y.S.2d 678, 680 (N.Y. Sup. Ct. 1981) ("while the exception is viable it can operate only when the double jeopardy clause itself would not be violated. It cannot be used to circumvent the principle that a person cannot be tried twice for the *same offense.")*

The prosecution bears the burden of showing it used due diligence before the first trial and did not discover the facts necessary to prosecute the greater offense. *See United States v. Reed*, 980 F.2d 1568, 1578-79 (11th Cir. 1993) ("It is the government's responsibility to rebut

the presumption of a double jeopardy violation" involving its due diligence); *see also United States v. Maza*, 983 F.2d 1004, 1009-10 (11th Cir. 1993); *United States v. Ragins*, 840 F.2d 1184, 1193 (4th Cir. 1988).

In *Diaz*, after the defendant was prosecuted for assault, the victim died from his injuries and he was charged with manslaughter. 223 U.S. at 444, 464. The *Diaz* Court found no double jeopardy violation for several reasons. First, jurisdictionally the justice of the peace who presided over the assault charge lacked power to hear a homicide allegation, so the prosecution could not have brought the murder charge at the time of the assault charge. *Id.* at 448-49. Second, the two offenses had different elements and did not meet the same offense test required for double jeopardy. *Id.* Third, it was not possible to accuse the defendant of homicide until the victim of the assault died, which occurred after the initial prosecution. *Id.* at 448-49.

Even though *Diaz* rested on several grounds not present in Mr. Lazcano's case, the prosecution cited the "Diaz exception" in the trial court as the basis for the court to find the interest of justice favored permitting the felony murder-burglary charge in a second prosecution. CP 88-90; 2/22/13RP 30. But *Diaz* does not authorize a broad interest-

of-justice exemption to double jeopardy. The narrow exception usually arises when the prosecution could not have proceeded on a charge during the earlier prosecution because the necessary facts had not yet occurred. *Diaz*, 223 U.S. at 448-49; *see Ragins*, 840 F.2d at 1193.

This "undiscovered crime" exception "was not intended to permit the government to reprosecute a defendant simply because it has discovered more evidence strengthening its case; indeed, if the exception were so construed, it would swallow the successive prosecution rule itself." *Ragins*, 840 F.2d at 1193.

One of the only published cases discussing the *Diaz* exception in Washington involved a case where the prosecution had no information indicating the possibility of a more serious offense at the time it filed its initial charges. In *State v. Higley*, 78 Wn.App. 172, 180, 902 P.2d 659, *rev. denied*, 128 Wn.2d 95 (1995), the defendant entered into a deferred prosecution for a DUI but later the State filed vehicular assault charges stemming from the same incident. The *Higley* Court found no double jeopardy violation for two reasons. First, jeopardy does not attach when a person enters into a deferred prosecution agreement. Second, medical professionals thought the victim of the car crash did not have serious injuries. But later, after the initial DUI charge was filed, the victim

learned her injuries were serious. *Id.* at 181. The State had no reason to question the initial medical assessment and the essential information necessary for a greater charge did not exist when the State filed less serious charges.[5]

Unlike *Diaz* or *Higley*, there was substantial reason for the State to have investigated and pursued the possibility of filing greater charges at the time Mr. Lazcano pled guilty to a lesser charge. Absent such efforts by the prosecution, it has not satisfied the requirement that the necessary facts had "not been discovered despite the exercise of due diligence." *Brown*, 432 U.S. at 449 n.7.

First, the State was aware at the time it filed the initial charges that it was obligated to join charges under the mandatory joinder laws. CrR 4.3. The only narrowly construed exception is for extraordinary circumstances involving either the "regularity of the proceedings" or reasons "extraneous to the action of the court." *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995). The burglary and felony

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[5] The only other published Washington case construing the due diligence requirement of the *Diaz* exception was a case where preliminary reports indicated another person was responsible for a fatal car crash, leading the State to charge only intoxicated driving. *State v. Escobar*, 30 Wn.App. 131, 135-36, 633 P.2d 100 (1981). When the State received new information showing the defendant's reckless driving proximately caused the accident, the State charged

murder charges were related and mandatory joinder rules would require a single prosecution. Closing an investigation without reasonably pursuing evidence indicating the commission of greater offenses is not an extraordinary circumstance.

In order for the prosecution to file a charge, it need not be convinced that it would prevail at trial. In fact, for any crime against a person such as a homicide, RCW 9.94A.411(2)(a) makes it mandatory for the prosecution to file a charge when it is plausible that a reasonable and objective fact-finder would find sufficient evidence to convict. Before making charging decisions, "[t]he prosecuting attorney shall ensure that a thorough factual investigation has been conducted." RCW 9.94A.411(b). If further investigation is required but there is probable cause, the prosecution may file the charge while also ensuring law enforcement's commitment to timely engaging in additional investigation. RCW 9.94A.411(b)(2).

At the time of the initial prosecution, there were many reasons to believe a homicide had occurred but the prosecution filed less serious charges to settle the case. Numerous witnesses heard multiple gunshots

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the more serious offense of negligent homicide but purposefully did not use the predicate of intoxicated driving as the basis of the new charge. *Id.* at 137.

immediately after Mr. Lazcano followed Mr. Schur outside. 2RP 229, 269-70; 3RP 283, 311. Just after hearing the shots fired, Mr. Backman's neighbor saw someone pick up something long that looked like a gun and get into a white sedan similar to Mr. Lazcano's. 3RP 311, 315. Another neighbor saw more than one person "loading something big" that looked like a person into a white car. 3RP 335-36.

David Cramer told police he saw Frank leaving Mr. Backman's home in a white car with another person who looked like Daniel. CP 25. Several witnesses saw Daniel Lazcano or his car at the scene. 2RP 228; 3RP 273, 284-85, 308, 332-33, 335; CP 25.

Marcus Schur never returned home after the shots were fired. 2RP184. None of Mr. Schur's friends or family heard from him. 2RP 184; CP 36. On January 2, 2012, six days after the shooting, Deputy Cox wrote in his report, "Marcus has not been located. I recommend this case be closed pending any additional information obtained from Marcus Schur once he is located." CP 36.

Before the police could rationally decide Mr. Schur's disappearance was not evidence of a homicide, the police needed to at least diligently look for him. If the State's theory of Mr. Schur's disappearance was that he was alive but hiding from Mr. Lazcano, the

police should have spoken to other acquaintances, looked in places Mr. Schur frequented, or checked bus lines and taxi records over the course of several days. If he was alive but injured, they should check hospitals, pharmacies, or stores selling first aid items. If he had suddenly fled on a meth binge, as the prosecutor implied, police should have checked other city's law enforcement agencies or places that Mr. Schur would be likely to buy or use drugs. 2/22/13RP 31.

No such investigation occurred. *See* CP 32-36. The only efforts the police documented were one drive through the town of Malden shortly after the incident and telephone calls to a few people who knew him well. CP 33, 35-36. Having received no information that anyone saw or heard from Mr. Schur after shots were fired in his vicinity, they closed the case in less than one week's time. CP 35-36.

Police can search for a missing person's whereabouts, find no evidence the person is alive, and use that lack of evidence to show he must have been killed. In *State v. Hummel*, 165 Wn.App. 749, 770, 266 P.3d 269 (2012), *rev. denied*, 176 Wn.2d 1023 (2013), the defendant's wife disappeared, leaving her personal effects behind. Police found no evidence of blood and no trace of her body. *Id.* at 757. They searched large databases and found no records she was living elsewhere. *Id.* at

757, 774-77. Mr. Hummel was convicted of first degree premeditated murder despite the lack of evidence confirming her death.

Numerous cases show a murder charge can be prosecuted without recovering the body. *See, e.g.*, *State v. Mason*, 160 Wn.2d 910, 916, 162 P.3d 396, 399 (2007) (defendant convicted of aggravated first degree murder where victim disappeared after earlier argument with defendant and blood found in apartment); *State v. Quillen*, 49 Wn.App. 155, 160, 741 P.2d 589 (1987) (affirming murder conviction where "Chris Duffy disappeared; his body was never found" and murder weapon not found); *State v. Sellers*, 39 Wn.App. 799, 803, 695 P.2d 1014 (1985) (victim's body never found but sufficient evidence murder where when two people saw the shooting and victim placed into defendant's car).

In fact, "to require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable and would lead to absurdity and injustice" since requiring that a body be produced would afford a defendant "absolute immunity if he were cunning enough to destroy the body or otherwise conceal its identity." *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967).

Mr. Schur's disappearance was coupled with clear evidence of him being chased and multiple shots fired, with one witness seeing what looked like a body being put in Mr. Lazcano's car. 3RP 269-71, 283, 335-36. Others saw what looked like a gun being loaded into Mr. Lazcano's car. 3RP 311. 315, 336. The narrow exception to the double jeopardy prohibition on successive prosecutions requires the prosecution to have diligently pursued available information and investigation when filing its initial charge. *Brown*, 432 U.S. at 169 n.7.

The prosecution may not avoid the double jeopardy ramifications of its charging decisions by turning a blind eye to the likelihood that a more serious offense occurred. The State has not satisfied its due diligence obligation when it closes a case and prosecutes a lesser charge based on the same offense rather than pursuing a homicide investigation. RCW 9.94A.411(2)(a); CrR 4.3. Double jeopardy barred the later prosecution of Mr. Lazcano for the same burglary that served as the basis for his felony murder conviction.

d. *The double jeopardy violation requires reversal.*

Mr. Lazcano pled guilty to an incident that occurred on the single day as part of the same offense. His conviction for the lesser offense of trespass, based on the same burglary that was an essential

element of felony murder, violates double jeopardy and requires dismissal of the second offense. *Brown*, 432 U.S. at 169-70.

2. **There was insufficient evidence of Mr. Lazcano's culpability for actions of another person as required to convict him of felony murder while armed with a firearm.**

Even assuming there was sufficient evidence Mr. Lazcano committed first degree burglary, Mr. Lazcano was unarmed. His conviction for felony murder while armed with a firearm rests on his culpability for another person's conduct. But Mr. Lazcano did not know his actions would further someone else shooting another person outside the home. There is inadequate evidence of his complicity for another person's conduct as required for the greater offense of felony murder while armed with a firearm.

a. *The prosecution must prove that the accused person committed all essential elements of a crime.*

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010); *see also State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (inferences of accused person's intent "may not be inferred from evidence that is 'patently equivocal'").

When legal culpability is imposed for the actions of another, the State must prove the evidence showed beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001). A person may be convicted as an accomplice of another person if:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020 (3).

Accomplice liability may not rest on a person's mere presence at the scene even with knowledge of ongoing criminal activity. *In re Wilson,* 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). It may not be predicated on knowing that his or her acts will promote or facilitate "a crime" rather than the crime charged. *State v. Grendahl,* 110 Wn.App. 905, 907, 911, 43 P.3d 76 (2002).

Accomplice liability does not extend to acts or crimes that are merely foreseeable. *State v. Stein*, 144 Wn.2d 235, 246, 27 P.3d 184 (2001). As the *Stein* Court held,

> Clearly then, under this Court's holdings in *Roberts* and *Cronin*, the accomplice liability statute, RCW 9A.080.020, requires knowledge of "the specific crime," and *not merely any foreseeable crime* committed as a result of the complicity.

Id. (emphasis added). The accomplice is culpable only for offenses within the accomplice's purpose. *Roberts*, 142 Wn.2d at 512; *Cronin*, 142 Wn.2d at 579; *State v. Trout*, 125 Wn.App. 403, 410, 105 P.3d 69 (2005) ("the culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge").

The "knowledge" requirement does not mean passive awareness. *Stein*, 144 Wn.2d at 246. Instead, it requires the accomplice act while

knowing of the specific criminal purpose of the offense for which he or she is prosecuted. *Id.*[6]

The drafters of Washington's accomplice liability law intended a complicity requirement akin to the Model Penal Code. *Roberts*, 142 Wn.2d at 510-11; *State v. Jackson*, 137 Wn.2d 712, 722-23, 976 P.2d 1229 (1999). Similarly to RCW 9A.080.020(3), the Model Penal Code provides an accomplice must have "the purpose to promote or facilitate the particular conduct that forms the basis of the charge." Model Penal Code § 2.06(3)(a) (1985).

Said another way, Washington's accomplice liability law is premised on the principal pronounced by Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir. 1938),

> To be an accomplice, a person must associate with the undertaking, participate in it as something he desires to bring about, and seek by his actions to make it succeed.

---

[6] As the *Roberts* Court clarified, the accomplice needs "general knowledge of that specific crime," not specific knowledge of every element, meaning the accomplice is liable even if the principal commits the charged crime in a different manner than the accomplice anticipated, but is not liable if the principal commits a different or additional crime. *Roberts*, 142 Wn.2d at 512; *see State v. Davis*, 101 Wn.2d 654, 656, 682 P.2d 883 (1984).

Wilson, 91 Wn.2d at 491; *see Nye & Nesson v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed.2d 919 (1949) (adopting same standard).

b. *To be guilty of felony murder, the State needed to prove Frank Lazcano was an accomplice to his brother Daniel.*

When felony murder involves accomplice liability for both the underlying felony and the shooting, there are two layers of accomplice liability that must be established. *State v. Carter*, 154 Wn.2d 71, 77, 109 P.3d 823 (2005). First, the people accused of the offense must commit the underlying felony, as either accomplices or principles. *Id.* Second, the accused person must be legally accountable for the actions of the person who caused the death. *Id.* "To be a participant in felony murder," a "'participant' must be a principal (i.e., one who actually participates directly in the commission of the crime) or an accomplice (i.e., one who meets the statutory definition of accomplice)." *Id.* at 80.

To convict Frank Lazcano of felony murder based on first degree burglary, the prosecution had to prove (1) Daniel Lazcano was an accomplice in the first degree burglary; and (2) Daniel's act of shooting Mr. Schur occurred in the course of, in furtherance of, or in

the flight from the first degree burglary to which he was an accomplice. *Carter*, 154 Wn.2d at 80-81.

i. *Daniel was not an accomplice to first degree burglary.*

Daniel was not actually involved in the first degree burglary. He did not enter the home and did not encourage Frank to enter the home unlawfully. Frank told Daniel to "hang tight" while Frank went to retrieve stolen property from Marcus Schur. 7RP 790. When Daniel asked what he should do if someone inside had a gun, Frank said to "bail" and "run the other way," because he did not plan on forcing his way in or fighting with weapons. 7RP 790, 814.

Frank knew Mr. Backman and Mr. Schur. 3RP 285-87; 7RP 776-77. Frank knocked on the door and waited for someone to answer his knock before entering the home. 7RP 790. Frank's purpose was "to talk to Marcus about getting stuff back." 7RP 789. He hoped Mr. Schur would be cooperative. *Id.* He did not wear a mask or break the door to enter. Daniel was not knowingly aiding Frank in an illegal entry of the home.

Burglary requires an illegal entry and intent to commit a crime inside the home. *See State v. Allen*, 127 Wn.App. 125, 131, 110 P.3d

849 (2005). The State did not prove Daniel knowingly aided Frank in illegally entering the home or intending to commit a crime therein.

Daniel's decision to leave the car with a gun was not part of the plan between Frank and Daniel and not for the purpose of furthering the burglary. 7RP 789. Frank told Daniel to "hang tight" in the car and Daniel did not say he intended to disregard this directive. 7RP 789.

Daniel's mere presence at the scene, knowing that Mr. Lazcano intended to confront Mr. Schur, does not establish his accomplice liability to first degree burglary. Furthermore, Frank did not know Daniel would leave the car and insert himself in the incident.

ii. *Daniel's act of shooting Mr. Schur was not part of the burglary.*

For a killing to occur in the course of, in furtherance of, or in immediate flight from a felony, "more than a mere coincidence of time and place is necessary." *State v. Brown,* 132 Wn.2d 529, 607–08, 940 P.2d 546 (1997) (footnotes omitted). There must be an "intimate connection" between the killing and the felony so the killing occurs as "part of the res gestae' of the felony." *Id.* A "causal connection" must clearly be established. *Id.*

Daniel's decision to shoot Mr. Schur occurred close in time to the burglary but not with the intent to further a burglary that he did not know had occurred. He only knew that Frank would confront Mr. Schur and may have thought it possible Mr. Schur would flee, but not in relation to a burglary. 7RP 789-90. Absent Daniel's complicity in the underlying felony, his later actions do not constitute felony murder.

Additionally, Frank did not know that Daniel would participate in the burglary or would independently assault Mr. Schur that night. 5RP 622; 7RP 789-90. Frank carried no weapon into the house, as the prosecution conceded. 7RP 912. Daniel confessed his responsibility for the shooting to several people, but he insisted that he had not intended to shoot Mr. Schur. He "didn't mean it" but the gun "went off" when he was trying to scare Mr. Schur. 5RP 611, 614-15. He had not told Frank that he would arm himself. 5RP 624. Daniel did not know about the manner of entry into Mr. Backman's home and was not involved in it, as well as the assaults inside the home. Daniel's own efforts to locate and confront Marcus Schur outside the home do not make his shooting part of the burglary as required for felony murder.

iii. *To be guilty of an enhanced crime based on a firearm enhancement, the State needed to prove Frank Lazcano facilitated or encouraged his brother's use of a firearm.*

When the charged offense includes an additional penalty for being armed with a firearm, the firearm enhancement "becomes the equivalent of an 'element' of a greater offense than the one covered by the jury's guilty verdict." *State v. Recuenco*, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008) (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 494 n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Mr. Lazcano was charged with the greater offense of felony murder while armed with a firearm. CP 16-17.

The firearm enhancement statute extends liability to an accomplice. RCW 9.94A.533(3) (directing additional punishment if the State proves "the offender or an accomplice was armed with a firearm"). But a person is not an accomplice to the greater offense that includes the firearm enhancement unless the prosecution proves his or her complicity to "the charged offense."*Roberts*, 142 Wn.2d at 510. For Mr. Lazcano, the charged offense was felony murder while armed with a firearm. CP 16-17; *Recuenco*, 163 Wn.2d at 434-35.

To be an accomplice, the State must prove the person had "the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*" and he "will not be liable for conduct that does not fall within this purpose." *Roberts*, 142 Wn.2d at 510-11 (quoting Model Penal Code § 2.06 cmt. (6)(b) (1985) (emphasis in *Roberts*)). Frank Lazcano did not encourage the shooting. He did not associate with the greater offense of being armed with a firearm during a burglary or "participate in it as something he desires to bring about, and seek by his actions to make it succeed." *Wilson*, 91 Wn.2d at 491 (quoting *Peoni*, 100 F.2d at 402).

Frank Lazcano did not plan or encourage his brother's participation in the burglary, and in fact, his brother played no role in the entry into the home. He did not know that his brother would leave the car and fire shots at Marcus Schur. He did not encourage his brother to do so. He did not directly facilitate or encourage the use of the firearm. *See e.g.*, *United States v. Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002) (construing similar federal firearm enhancement and holding accomplice must directly facilitate or encourage use of firearm).

d. *Insufficient evidence of liability for another person's conduct requires reversal.*

Absent proof of every essential element, a conviction must be reversed and the charge dismissed. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). There was insufficient evidence that Daniel Lazcano caused Marcus Schur's death as a participant in the first degree burglary of Mr. Backman's home or that Frank Lazcano directly encouraged or facilitated his brother's shooting, which requires reversal of his conviction for the offense of being armed with a firearm during the felony murder.

3. **By vouching for its witnesses' truthfulness and relying on testimonial statements of a non-testifying co-defendant, the prosecution violated Mr. Lazcano's right to a fair trial.**

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). In the case at bar, the prosecution used Daniel Lazcano's statements to police

implicating his brother Frank in violation of the Confrontation Clause and also impermissibly vouched for the truthfulness of its witnesses, which denied Mr. Lazcano a fair trial.

a. *The prosecution violated the Confrontation Clause by eliciting a non-testifying co-defendant's testimonial statements to others out of court.*

Under the state and federal constitutions, an accused person has a right to confront witnesses against him. *Crawford v. Washington,* 541 U.S. 36, 42, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); U.S. Const. amend. 6; Const. art. I, § 22. Unless the defendant had a prior opportunity to confront an unavailable witness, the confrontation clause prohibits admission of the witness's "testimonial" statements when the witness does not take the stand at trial. *Crawford,* 541 U.S. at 59.

Statements made by a suspect to the police in the course of investigating a completed offense are testimonial. *Crawford*, 541 U.S. at 52. Detective Cox questioned Daniel Lazcano after Frank was arrested and during his investigation of a reported crime. 3RP 372-75. They suspected he was involved in the incident. 3RP 365. His statements were "obviously obtained for the purpose of creating evidence that would be useful at a future trial." *Lilly v. Virginia*, 527 U.S. 116, 125, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

The trial court deemed Daniel's statement about the incident to police officers to be non-testimonial because it was not relied on "for its truth" due to its inaccuracy about Daniel's involvement in the incident. 2RP 215-16; 3RP 373. The court also reasoned that Daniel's statements about why Frank went to Mr. Backman's house were admitted for "a limited purpose. That purpose is to show the knowledge of Frank and Dan Lazcano, and intent that they might have had." 3RP 375.

These justifications misapprehend the factual accusations contained in Daniel's statement and misapply the confrontation clause. The hearsay-based notion that "a statement is offered for a purpose other than to prove the truth of the matter asserted" does not "immunize[ ] the statement from confrontation clause analysis." *Mason*, 160 Wn.2d at 922. If a statement was intended to establish a fact and it is reasonable to expect the police or prosecution would use that statement, it is testimonial. *Id.* at 921-22.

While Daniel's statement might not have been true regarding his own involvement, he inculpated Frank. He told police that Frank went to the house looking for Mr. Schur so that he could retrieve his belongings from Mr. Schur and this occurred right before Mr. Schur was last seen alive. 3RP 373-75. Daniel's testimony described Frank's

actions and his intent. 3RP 374-75. The fact that both Frank and Daniel initially denied Daniel's presence at the scene was used as evidence of the joint action between the two. 3RP 214. Daniel's statement to police incriminated Frank and, while it might not have been the whole story, it was used as evidence showing what happened and who was involved in it. Daniel and Frank's knowledge and intent are not exceptions to the confrontation clause but rather elements that the prosecution needed to prove. 3RP 373; CP 124-25.

Accomplice statements implicating another person are "presumptively unreliable" and have long been excluded absent an opportunity to confront the other suspect. *Lilly*, 527 U.S. at 131; *see Bruton v. United States*, 391 U.S. 123, 136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (such statements are "inevitably suspect"). Frank had no opportunity to cross-examine Daniel about his statements to the police. The admission of these testimonial statements of a non-testifying alleged accomplice violated the Confrontation Clauses of the state and federal constitutions.

b. *The prosecution is prohibited from injecting evidence that witnesses entered into formal agreements to "tell the truth" in return for reduced charges.*

In *State v. Ish*, 170 Wn.2d 189, 199, 241 P.3d 389 (2010), the Supreme Court held that the prosecution improperly vouches for the truthfulness of its witnesses when it asks witnesses about their promises to testify truthfully during direct examination. "Evidence that a witness has promised to give 'truthful testimony' in exchange for reduced charges ... is generally self-serving, [and] irrelevant." *Ish,* 170 Wn.2d at 198. The court held that a witness's "out-of-court promise to testify truthfully was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind [the witness's] testimony." *Id.* at 199.

Even though the Supreme Court opinion *Ish* had been issued before Mr. Lazcano's trial, the prosecution repeatedly elicited its witnesses's out-of-court promises to tell the truth based on agreements with the prosecution. On direct examination, the prosecutor asked Travis Carlon, Jamie Whitney, McKyndree Rogers, and Ben Evenson, about their out-of-court agreements with the prosecutor to receive reduced or non-prosecuted charges, and elicited from each that the

agreement hinged on their promise "to tell the truth" in court. RP 425, 446, 474, 619.

Ben Evenson testified as a State's witness about statements Frank and Daniel made to him. He said Frank admitted he went to find Mr. Schur, he punched David Cramer, and he and Daniel carried the body away from the shooting. 5RP 608, 615-16. Daniel told Mr. Evenson that he shot Mr. Schur. 5RP 610-15. Mr. Evenson also said Frank was planning on covering for Daniel because Daniel is his younger brother. 5RP 617.

In exchange for his testimony, Mr. Evenson was promised that his pending charges for robbing a liquor store would be reduced to a misdemeanor with a time served sentence. 5RP 618-19. The prosecutor asked him, "in exchange for all that, you have a duty to do something. You have to do something. Right?" 5RP 619. The prosecutor asked Mr. Evenson to explain what he had to do, and Mr. Evenson answered, "Tell the truth." *Id.*

Mr. Carlon testified for the prosecution about how he helped Frank and Daniel hide Mr. Schur's body and then he hid the gun used in the shooting. 3RP 413-23. The prosecutor asked Mr. Carlon, "Your agreement to *testify truthfully* was obtained when the prosecutor

promised certain leniency towards you in regards to your involvement in this case, right?" 4RP 408 (emphasis added). Mr. Carlon said yes. *Id.*

At the end of Mr. Carlon's direct testimony, the prosecutor elicited more detail about the out-of-court "deal in this case" in which Mr. Carlon was prosecuted "for what's called Rendering Criminal Assistance, a felony, [and] the prosecutor has agreed to make a certain sentencing recommendation to the judge?" 4RP 424. Mr. Carlon said yes. The agreement included the prosecutor's promise to prosecute Eli Lindsey for a gross misdemeanor of rendering criminal assistance and not to prosecute Mr. Carlon's wife. *Id.* Then the prosecutor asked,

> Q. And what is it that you understand your obligation here is, to get that benefit? What's your – what do you have to do on the witness stand?
> A. [Mr. Carlon]: I have to tell the truth.

4RP 424.

Frank Lazcano's girlfriend Jamie Whitney also testified for the prosecution. Ms. Whitney discussed Frank's actions on the night of the incident, how Mr. Carlon told her that Daniel "shot Marcus" and that she should tell Frank to get rid of the car they used that night. 4RP 42-54. The prosecutor asked her if she had "an arrangement, a deal in essence, with the prosecutor." 4RP 445. The prosecutor asked Ms.

Whitney to describe that deal. 4RP 446, Ms. Whitney said, "Tell the truth," and the prosecutor explained that in exchange she would avoid prosecution for lying to police or assisting in destruction of the car used in the shooting. 4RP 446.

McKyndree Rogers, Daniel's girlfriend, testified for the prosecution. She was at Mr. Carlon's house the day of the incident. 4RP 475-76. She testified about what she observed Daniel and Frank doing on the night of the incident. 4RP 477-88. The prosecutor asked her, "in exchange for you being truthful, you're not going to be charged for lying to the police or any cover-up involved in the murder of Marcus Schur?" 4RP 475. She answered, "Yup." *Id.*

The prosecution did not elicit any of this testimony on rebuttal, in response to an attack on the witness's credibility, as *Ish* indicated might be permissible. Instead, the State questioned each witness about his or her out-of-court agreement with the prosecution to "tell the truth" in exchange for a specific benefit from the prosecution before any witness's credibility was challenged.

Although Mr. Lazcano did not object to the prosecution's disregard of the rule set forth in *Ish*, the prosecution is presumed to know the law and to keep abreast of changes in the law. RPC 1.1, cmt.

6 ("a lawyer should keep abreast of changes in the law and its practice."). The prosecution "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated" and must function within the bounds of established law. *State v. Monday,* 171 Wn.2d 667, 676, 257 P.3d 551 (2011). The State's failure to follow the dictates of *Ish* and to repeatedly elicit that its witnesses would receive certain benefits if they told the truth demonstrates a flagrant and ill-intentioned circumvention of the requirement that the prosecution not seek a verdict based on inadmissible evidence or improper appeals to the jury.

c. *Eliciting prejudicial and impermissible testimony denied Mr. Lazcano a fair trial.*

Admission of evidence in violation of the "bedrock" right of confrontation requires reversal unless the State proves beyond a reasonable doubt the unconfronted evidence did not affect the outcome of the case. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"); *United States v.*

Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict).

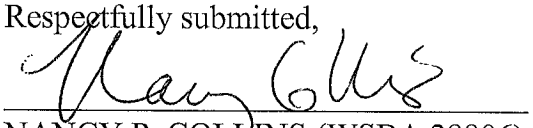
In addition to eliciting Daniel's testimonial statements to the police inculpating Frank without the ability to cross-examine him, the prosecution impermissibly bolstered and vouched for the testimony of critical witnesses by using Daniel's out-of-court statements against Frank. Frank could not confront Daniel. He could not challenge the prosecutor's claim that it would ensure the truthfulness of the witnesses who testified about what Frank and Daniel said about the incident by giving benefits to these witnesses if they told the truth. The State exacerbated the confrontation clause violation by repeatedly insisting the witnesses who testified about what Frank and Daniel said were bound to tell the truth by virtue of agreements enforced by the prosecution. These errors deny Mr. Lazcano his right of confrontation and undermine the fairness of the trial.

F. CONCLUSION.

Frank Lazcano's conviction for first degree murder while armed with a firearm violates double jeopardy, is not supported by sufficient evidence, and was based on impermissibly elicited evidence, requiring reversal.

DATED this 31st day of December 2013.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant