NO. 47011-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PIERCE,

Appellant.

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

The Honorable Keith Harper, Judge
The Honorable Sally Olsen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding that there was no government misconduct justifying dismissal under CrR 8.3(b). (Memorandum Opinion on Motion to Dismiss, CP 1460).

2. The court erred in finding that the actions which resulted in discontinuation of appellant's medications were minor acts of negligence. CP 1460.

3. The court erred in finding that the events which led to discontinuation of appellant's medications should not be imputed to the State's responsibility. CP 1461.

4. The court erred in finding that the misconduct was an action of negligence beyond the State's control. CP 1461.

5. The court erred in finding there was no nexus between Conmed employees and the prosecutors. CP 1460-61.

6. The court erred in finding there was no arbitrary action which would justify dismissal under CrR 8.3(b). CP 1462-63.

7. The court erred in finding jail staff did not act with deliberate indifference to appellant's medical needs. CP 1469.

8. The court erred in denying appellant's motion to dismiss the charges under CrR 8.3(b).

9. The court erred in denying appellant's motion for mistrial after a witness improperly referred to the prior appeal in this case.

10. The court erred in ruling evidence that appellant shoplifted a pellet gun was relevant and admissible as res gestae, preparation and plan, and identity. CP 696 (1.b); CP 754 (conclusion of law 5).

11. The court erred in ruling evidence of the pellet gun theft was relevant to prove elements of robbery and theft. CP 696 (1.c); CP 755 (conclusion of law 6).

12. The court erred in ruling that evidence of the pellet gun theft was probative and not unduly prejudicial. CP 696 (1.d); CP 755 (conclusion of law 7).

13. The court erred in permitting the sheriff's deputy to offer his opinion that the person in the ATM surveillance photograph was appellant. CP 698 (3.d), 760.

14. The court erred in refusing to give the proposed cautionary instruction regarding informant testimony.

15. Cumulative error denied appellant a fair trial.

Issues pertaining to assignments of error

1. While appellant was incarcerated during trial, his psychotropic medications were discontinued, due to a faulty medication policy and deliberate indifference of the jail's medical staff. Appellant

was rendered incompetent and involuntarily absent from the proceedings during a full day of testimony, and the trial court declared a mistrial. Where arbitrary action and governmental misconduct prejudiced appellant's rights to confrontation, due process, and a fair trial, should his motion to dismiss have been granted? (Assignments of Error 1-8)

2. Appellant's convictions were reversed on appeal and his case remanded for retrial. In violation of a pretrial ruling excluding reference to the procedural posture of the case, a jailhouse informant testified that he had advised appellant on his appeal for prosecutorial misconduct. Where this serious trial irregularity was so inherently prejudicial that it rendered the court's attempted curative instruction ineffective, should the court have granted appellant's motion for a mistrial? (Assignment of Error 9)

3. Did the admission of evidence that appellant committed a crime unrelated to the charged offenses allow the jury to convict him based on criminal propensity and deny him a fair trial? (Assignments of Error 10-12)

4. The court allowed a law enforcement officer to identify appellant as the person depicted in a surveillance photograph. Where there was no showing that the officer was more likely to correctly identify appellant from the photograph than the jury, did admission of the opinion

testimony unfairly invade the province of the jury? (Assignment of Error 13)

5. The State relied on testimony from jailhouse informants who received favorable consideration in exchange for their testimony implicating appellant. Did the court's refusal of the proposed defense instruction cautioning the jury on the use of informant testimony deny appellant the right to a fair trial by an adequately instructed jury? (Assignment of Error 14)

6. Does cumulative error require reversal of appellant's convictions? (Assignment of Error 15)

B. STATEMENT OF THE CASE

1. Procedural History

In March 2009, the Jefferson County Prosecuting Attorney charged appellant Michael Pierce with multiple counts arising from the murder of Patrick and Janice Yarr. CP 1-6. In May 2010 he was convicted after a jury trial of two counts of first degree murder, first degree robbery, first degree burglary, first degree arson, theft of a firearm, unlawful possession of a firearm, and second degree theft of an access device. CP 30-40. This Court reversed his convictions on appeal and remanded for a new trial. CP 57-58.

The case was set for jury trial in Jefferson County Superior Court before the Honorable Keith C. Harper. Judge Harper conducted pretrial evidentiary hearings and issued rulings on the parties' motions in limine. CP 657-59, 668-71, 693-765. The case proceeded to trial, but after several days of testimony one of the jurors informed the court that she believed she might have been a witness to some of the events described at trial. CP 690. At the parties' joint request, the court declared a mistrial and ordered a change of venue to Kitsap County. CP 685-92.

The second retrial commenced in Kitsap County Superior Court before the Honorable Sally Olsen in February 2014. After several days of testimony, it was discovered that the medical staff at the Kitsap County Jail had stopped giving Pierce his psychotropic medications. CP 968. The court recessed the proceedings to address the situation. After a competency evaluation and hearing, the court ruled that the withholding of medications rendered Pierce incompetent throughout a full day of testimony. It declared a mistrial on a finding of manifest necessity. CP 920-25, 966-73.

Following this second mistrial, the defense filed a motion to dismiss under CrR 8.3(b) and for violation of double jeopardy and due process. CP 975-1035. After a four-day evidentiary hearing, the court denied the motion. CP 1450-75.

A jury was empaneled and the next retrial commenced on October 20, 2014. The jury returned guilty verdicts as well as special verdicts finding Pierce was armed with a firearm and committed the murders in the course of first degree robbery and first degree burglary and that the arson involved a fire which was manifestly dangerous to human life and damaged a dwelling. CP 1902-15. The court imposed an exceptional sentence with firearm enhancements, for a total of 1404 months confinement. CP 1950-59. Pierce filed this timely appeal. CP 1962-63.

2. Substantive Facts

Janice and Patrick Yarr lived on a farm on Boulton Road, just off Highway 101 in Quilcene. Janice worked as a bookkeeper for a construction company, and Patrick operated a logging truck and raised cattle. 35RP[1] 65-66.

On the evening of March 18, 2009, Merle Frantz was driving home to Quilcene from Kitsap County. 35RP 188. As he passed the Yarrs' farm at 8:11, he noticed a small fire about the size of a bonfire. 35RP 189-90. He did not report the fire at the time because it did not look big enough to bother about. 35RP 190.

John McConaghy was driving on Highway 101 around 8:20 p.m. when he saw a structure fire with huge flames. 36RP 239-40. He drove

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[1] See Appendix for list of transcripts included in the Verbatim Report of Proceedings.

up to Boulton Road as his passenger called 911. McConaghy ran to the house, which was completely in flames, and banged on the windows and doors to see if anyone was inside. 36RP 240. He ran around the house to the lower level and banged on a window down there but got no response. At that point he heard glass breaking upstairs. 36RP 241-42.

When firefighters arrived at 8:38, the fire had blown through the roof. The heaviest concentration was in the corner where the kitchen and carport were located, and it appeared that was where the fire started. 36RP 265-66, 273. After the fire was suppressed, firefighters searched the building. 36RP 276-77. Two bodies, later identified as Patrick and Janice Yarr, were discovered in the kitchen. 36RP 278-79; 39RP 774. The bodies were face down, and the majority of their heads were missing. 36RP 342. Spent bullets were found under their heads as well as in a bedroom below the kitchen. 36RP 368, 383. After an autopsy, the medical examiner determined that the Yarrs had died from massive head trauma caused by high energy gunshot wounds and were dead before the fire started. 39RP 773; 44RP 1595, 1597.

A sheriff's department fire investigator determined that the fire had started in the kitchen/dining room area, and the majority of the fire was in that location. There was no damage to the lower level of the daylight basement home. 36RP 350-53. Burnt char on the kitchen floor showed

the outline of what appeared to be flammable liquid, and investigators noticed an odor of gasoline. Samples were collected and sent to the crime lab, which confirmed the presence of gasoline. 36RP 354; 37RP 477. The investigating team determined that the fire was intentionally set by introducing open flame to gasoline in the area where the bodies were found. 36RP 369. A trailer of gasoline from the threshold of the door to the bodies was used so that the arsonist could start the fire but not get burned, and once the gasoline was ignited, the door was closed. 37RP 617-18; 38RP 644, 647. The arson investigator concluded the fire was intentionally set to conceal evidence of murder. 38RP 651.

Forensic analysis of the spent bullets found under the Yarrs after the fire showed they were .25 caliber class. 44RP 1520. The Yarrs' daughters testified that their father owned guns and he kept one of them, a rifle, upstairs near the sliding glass door between the kitchen and dining room so that he could shoot coyotes or cougars that might attack his animals. 35RP 74-75, 109-11. Yarr's friend Wallace Bowman testified that Yarr owned a .25-06 sporting rifle, but he believed Yarr stored that gun in a bedroom in the basement. CP 606.[2] Investigators located antique firearms, and double barreled shotgun, and a rifle case in the downstairs

[2] Bowman was unavailable to testify, and by agreement a video of his testimony at the first trial was played for the jury. 36RP 425. A transcript of the testimony is attached to the State's motion, contained in the clerk's papers at pages 599-614.

office of the house. 37RP 484-86. They found two rifles in the master bedroom. One was a Ruger M-77 chambered in .300 Winchester Magnum, and the other a Savage 99, chambered in .300 Savage. 37RP 488. Investigators did not locate a .25-06 rifle, nor did they find any guns in the kitchen area. 37RP 530.

Michelle Hamm, the Yarrs' daughter testified that it was her parents' routine to eat dinner between 6:00 and 6:30. After dinner, her father would shower in the downstairs bathroom and then make some business calls. Her mother would do bookkeeping tasks for the farm and business. 35RP 69-72. Patty Waters, the Yarrs' younger daughter, spoke with her parents for about 15 minutes a little after 6:00 on the evening of March 18, 2009. Her mother was cooking dinner while Waters spoke to her father, and the call ended when dinner was ready. 35RP 113-15.

Kenneth Woodcock, a longtime friend of Patrick Yarr's, called the Yarrs' home at 6:30, and the fax machine picked up. He called back at 6:42 and got the answering machine. 46RP 1853.

Gregory Brooks lived in a small house on Boulton Road next to the Yarrs' barn and garage. 35RP 151. On March 18, 2009, he got home from work, put some laundry in the dryer, then drove up to the Yarrs' house to ask about some work. 35RP 152. He arrived at the house sometime between 6:50 and 7:10. 35RP 153. Brooks noticed that Janice's

car was parked in front of the garage, and he saw the truck that Patrick drove. 35RP 153. He knocked on the door a few times and waited a couple of minutes, but no one answered. He looked through the window in the door but did not see anyone and noticed nothing unusual. 35RP 152-54. Brooks drove back to his house, packed a bag, and left to go to his girlfriend's. 35RP 152. He did not notice any activity as he drove back past the Yarrs' house, no lights were on, and he saw no signs of a fire. 35RP 155-56, 166.

DeEtte Broderson talked to Patrick Yarr on the telephone about business on the evening of March 18, 2009. 35RP 177. Broderson usually called Yarr between 7:00 and 8:00 in the evening. 35RP 179. When he was talking to Yarr that night it sounded like Yarr was eating, and he had the impression that Yarr ended the call because another call was coming in. 35RP 180-81. After Broderson spoke to Yarr that night, he watched either Wheel of Fortune or Greta van Susteren. Both shows aired between 7:00 and 7:30. 35RP 179; 39RP 787.

Based on the timing of these contacts with the Yarrs and the discovery and description of the fire, an arson investigator concluded that the fire started sometime between 7:30 and 7:50. 38RP 643. The investigator believed the fire was burning for 20-40 minutes or a little longer before the first witness saw it. 38RP 645.

On March 18, 2009, Pamela Roberts was driving home from work along Highway 101 toward Quilcene. 40RP 1078-79. As she went around a curve near Boulton Farm at around 7:45, she saw a man walking along the road. 40RP 1081, 1083. He was a large man, and he was walking briskly. 40RP 1083. The man was wearing a hoodie, which he pulled over his face as Roberts passed. 40RP 1084. Roberts also saw a distinctive black jacket with some sort of texture on the back. 40RP 1086, 1106.

Laura Meynberg lived in Port Townsend and worked in Renton. In 2009 her husband had a charter flight business, and when he had flights between Port Townsend and Boeing Field, she would ride with him to get to work. 40RP 1029, 1031-32. She returned from maternity leave in March 2009 and worked Tuesday through Thursday. Her husband's parents in Quilcene babysat their daughter, and they would pick her up after work. 40RP 1032-33. Her husband preferred to drive from Port Townsend to Quilcene on Highway 101, although they sometimes took an alternate route. 40RP 1035. Meyenberg would have flown to Seattle with her husband on March 18, 2009, which was a Wednesday. At the time of trial, she did not have a specific recollection of this date, but she checked her husband's schedule to confirm that they had flown together, and she described how their commute typically progressed. 40RP 1036.

Meyenberg testified that she and her husband would have arrived at the Jefferson County airfield at 7:00 and would have driven to Quilcene to pick up their daughter. They would have then headed back to Port Townsend sometime between 7:30 and 7:45. 40RP 1038-38.

Meyenberg also described an event that had caught her attention one night as she and her husband were driving home. She said they were headed north, with her husband driving. They went up an incline, and as they headed back down she saw a man walking north on their side of the road. He was walking quickly and had his head covered. 40RP 1038-38. As they got closer, the man pulled a hood or something over his face. 40RP 1040. The man was large and square and white. 40RP 1039-40. A little while later she saw a white car perpendicular to the road on a farm turnout. She commented that it looked like a Corolla, but her husband said it was a Honda Civic. 40RP 1041.

Meyenberg could not say when this occurred other than it was during the Spring of 2009. 40RP 1043. Nor could she say what road they were on. 40RP 1044. She did not remember the incident until July 2013, when she was serving as a juror and heard Pamela Roberts testify about a similar incident. 4RP 2007; 40RP 1042, 1048. She acknowledged that the most she could say was that she saw a big man walking down a road. She did not remember what road, she did not remember what day, and she was

not sure whether the big man and the little Honda were linked. 40RP 1049.

Annabelle Leigh lived in Quilcene in March 2009, and she remembered seeing the fire as she drove home from Poulsbo. 47RP 2023. She also saw a large, heavyset man by the side of the road at the interchange of Highway 101 and Highway 104, about 2 miles from Boulton Road. The man was wearing a hooded shirt and dark clothing, and he had a duffle bag. He had facial hair, and his hood was all the way up. 47RP 2023-25, 2063.

Sergeant Mark Apeland of the Jefferson County Sheriff's Office was the lead investigator in the case. On March 26, 2009, Apeland contacted the Yarrs' bank to see if their accounts had been accessed after they were killed. 38RP 684, 701. Bank records showed that Janice Yarr's debit card was used to withdraw $300 from the ATM at the US Bank in Quilcene at 8:10 p.m. on March 18, 2009. 38RP 387-90. Apeland obtained a series of still images from the ATM surveillance camera for that time. 38RP 703. The photographs showed a large, heavy-set man wearing a baseball cap with a sunburst pattern on it, covering the lower part of his face with his tee shirt as he used the ATM. 38RP 705, 708-10, 715. Apeland viewed the photos several times at the bank, then had the images placed on a CD, which he took to the sheriff's department. 38RP

706. After looking at the images a few more times, Apeland was confident the man was Michael Pierce. He knew Pierce from previous contacts, including a face-to-face conversation a year earlier. 38RP 715-16. Pierce is six feet, three inches tall, heavy set, and weighed about 300 pounds the last time Apeland saw him. 38RP 716. Once Apeland determined that Pierce was a suspect, he developed a plan to place Pierce under surveillance and arrest him for using the ATM card. 38RP 717, 719.

Pierce was arrested on March 28, 2009. He told Apeland and Detective Joel Nole that he attended school in Port Angeles and lived part time with his girlfriend in Sequim and part time with his mother in Quilcene. 39RP 793. Pierce and his girlfriend had lived on Boulton Road for about a year before moving in with his mother and then to Sequim. 40RP 1132; 42RP 1200. While they lived on Boulton Road, Pierce did odd jobs for Patrick Yarr. 39RP 756, 760; 40RP 1132. Pierce denied using the Yarrs' debit card on March 18. He said he had used the ATM at the Quilcene US Bank about 10 days earlier to withdraw cash using his mother's card. 39RP 794.

Apeland obtained a warrant for Pierce's bank records. 38RP 727. Pierce had an account at the US Bank in Quilcene. Records showed that he did not access his account at the ATM in Quilcene on March 18, 2009.

38RP 732. There was also no record that Pierce's mother's debit card was used at that branch on that date. 38RP 734.

Deputies also obtained warrants to search the house Pierce shared with his girlfriend, his mother's house, and cars belonging to Pierce, his girlfriend, and his mother. 39RP 795-96. Nothing of evidentiary value was found in either house or in a shed outside the house in Sequim. 39RP 815-16. No firearms were found. 39RP 829.

While police were searching the house in Sequim, Pierce's neighbor told them he had seen Pierce place two trash bags in the dumpster. 39RP 767, 816. The deputies located the two bags and searched them. 39RP 816. Inside one of the bags they found a large tee shirt and a pair of men's socks, both soaking wet. 39RP 817-18. The clothing was sent to the crime lab for analysis, where it was determined that none of the stains on the tee shirt was blood. 43RP 1403.

An accelerant detection canine handler participated in the search of the Sequim home. 46RP 1919. In addition to walking the dog through the home, the handler had the dog examine all the shoes found in the home, a pile of laundry from the laundry room, and the clothing found in the dumpster. 46RP 1929-34. The dog did not alert on any of these items. 46RP 1935. The dog was also used in the search of Pierce's mother's home and did not alert on anything. 46RP 1935-36.

Investigators searched a Jeep belonging to Pierce, his mother's Dodge Stealth, and a white 1987 Honda Accord registered to Pierce's girlfriend, Tiffany Rondeau. 39RP 826. A forensic scientist from the crime lab searched the vehicles for trace evidence, hairs, fibers, blood, possible weapons, and anything related to the crime. She swabbed for blood on the exterior handles and trunk release and on the carpets and seats inside. 40RP 985-86. No trace evidence of blood, hair or fibers was found to link the cars to the murder scene. 40RP 988-90, 1005-11, 1015.

There was no floor mat on the driver's compartment floor of Rondeau's Honda. 39RP 831. There was an after-market floor mat on the front passenger floor, and the stock driver's side floor mat was found in the trunk. 39RP 832, 844. At a later date Detective Nole was examining photos taken of the interior of the car when he noticed a debris line in the foot well of the driver's compartment, which looked like a floor mat had been there at one point but was removed. 39RP 844-45. There was also a significant amount of debris on the floorboard, and it looked like the car had not been vacuumed in a very long time. 40RP 1013.

The trunk of Rondeau's Honda was full of clothing, a coat, a backpack, personal shampoo and deodorant, school papers, a jack, carburetor cleaner, a tool set, a piggy bank, a butcher block knife set, and some newspapers. 39RP 835-40. Deputies seized a Chicago Cutlery

butcher block kitchen knife set found in the trunk. 43RP 1352, 1376. Deputy Apeland called Michelle Hamm and asked if her mother owned a knife block and asked her to describe it. 43RP 1384. Hamm and Waters then went to the sheriff's office to look at the knife block from Rondeau's car, and both said it belonged to their mother. 43RP 1355.

The knife block and knives were sent to the crime lab and tested for blood and DNA. There was no blood on the knife block. 43RP 1408. There was a mixture of DNA from at least three contributors, one of whom was Pierce. 43RP 1409. Patrick Yarr was excluded as a contributor, and Janice Yarr was either excluded, or the comparison was inconclusive.[3] 43RP 1411-12; 45RP 1761-65. There was also a mixture of DNA on the knife handles. Pierce was a possible contributor, but both Patrick and Janice Yarr were excluded as contributors. 43RP 1413.

Pierce's mother, Ila Rettig, testified that she recognized the knife block taken from the trunk of Rondeau's car. She had received it from an elderly man she used to care for, when he moved to assisted living. 45RP 1781. She in turn gave it to Pierce and Rondeau for their house in Sequim, but they put it in the trunk of Rondeau's car and left it there. 45RP 1784-85. Pierce's stepmother remembered seeing the knife block in

[3] The crime lab forensic scientist testified that the results as to Janice were inconclusive, but the defense expert's opinion was that Janice was excluded as a source of the DNA on the knife block.

Rondeau's trunk, along with a lot of other junk, in December 2008. 45RP 1819. Richard Merrill, the brother of the man Rettig cared for, testified that his brother had given him a Chicago Cutlery set, like the one he owned, in 1977.[4] CP 1696, 1706. His brother had given many of his belongings to Retting when he moved to assisted living. CP 1700.

There was evidence at trial that on March 18, 2009, Pierce was at school in the morning and went to his mother's house in the afternoon to change a tire on her car. Pierce drove Rondeau's Honda to his mother's house because it got better gas mileage than his Jeep. 40RP 1137-38. He took the tire off his mother's car, put it in the back seat of the Honda, and drove it to the Les Schwab in Port Townsend. After the tire was fixed Pierce and his mother went to the QFC. 42RP 1206-07. They returned to his mother's house and had dinner together. Pierce left around 6:30. 42RP 1209.

Rondeau called Pierce just before 8:30 p.m. to ask when he would be home. He did not answer her call, but he arrived home shortly after that. 40RP 1138. The next morning Pierce and Rondeau had final exams, and Pierce left the house between 6:00 and 7:00 a.m. 40RP 1139.

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[4] Merrill was unavailable to testify, and by agreement of the parties a transcript of his testimony was read to the jury. 46RP 1994. The transcript is attached to the defense motion, clerk's papers 1688-1713.

At trial, Michael Donahue testified that he visited Tommy Boyd in Quilcene on the evening of March 18, 2009. 44RP 1555. While they were watching a video Pierce showed up unexpectedly. 44RP 1558. Pierce was wearing a brand new tan coat and clean looking clothes. Donahue said he noticed that Pierce smelled clean, like he had just gotten out of the shower. 44RP 1559-61. Donahue admitted that he had told a defense investigator in May 2009 that Pierce was not dirty, or smelly, or bloody, but he did not say that Pierce smelled like he had just showered. 44RP 1570-71.

Karen House, a clerk at Henery's Hardware in Port Townsend, testified that Pierce came into the store on March 18, 2009, asked to see a pellet pistol, then took the pistol from the store without paying for it. 39RP 908, 911-12, 916. She followed him out of the store and saw him drive away in a white Honda. 39RP 912. House testified that Pierce was wearing a tannish-green baseball cap with a starburst pattern on the front. His jacket had writing and drawings on the back. 39RP 912. The surveillance video from Henrey's showed Pierce in the store from 6:40 to 6:44 p.m. 39RP 918; exhibit 51.

Police also learned that Pierce had renewed his driver's license on March 12, 2009. They spoke to the Department of Licensing employee who helped Pierce, and she reported that she remembered he was wearing

a hat with a sunburst logo on it and a coat from Peninsula College. Police showed her photos from an ATM machine, and she recognized the person in the photos as the person who had been in her office. 39RP 927-28.

Apeland testified that it is 17 miles from Henery's Hardware to the Yarrs' house. It takes about 22 minutes to drive from Henrey's to Boulton Road driving at the speed limit, and 24 minutes from Henery's to the Yarrs' house. 35RP 204; 36RP 220. Time could be shaved off by driving above the speed limit, and speeding was possible on parts of the drive, but it is unlikely anyone could drive above the speed limit on the entire route. 36RP 223-31. Apeland testified that in his experience he has seen people drive 50 to 55 miles per hour in Port Townsend and in excess of 100 miles per hour on Highway 101. 45RP 1740-41.

A technical surveillance specialist testified that he compared a series of photographs taken of Pierce after his arrest with the ATM surveillance photographs and the video from Henery's Hardware. 43RP 1440, 1445. His opinion was that Pierce was the person in the surveillance photos and video. 43RP 1441-45.

Much of the State's case rested on statements Pierce allegedly made to others. In the hospital shortly after his arrest, Pierce spoke to jail superintendent Steve Richmond. Richmond testified that Pierce said, "I didn't shoot those people. I couldn't do something like that, and I am

devastated by what I saw. I have nightmares, and it scares me." 44RP 1665-66. Richmond reminded Pierce that anything he said would go to the prosecutors, and Pierce responded that he needed to get it off his chest because it scared him. 44RP 1658-59. Pierce said he knew he could trust Richmond and wanted to tell him who shot those people. 44RP 1662. Pierce repeated that he did not shoot them but said he knew who did, and he didn't want the shooter to get him. He said he couldn't sleep because he couldn't get the thoughts out of his head. 44RP 1664.

Bradley Reynolds was housed with Pierce in the Jefferson County Jail. 42RP 1237. He was provided a plea agreement in exchange for information about Pierce. He pled guilty to a reduced charge and was sentenced to nine months, instead of the 43-57 month sentence he was facing before the deal. 43RP 1331-32. Reynolds testified that Pierce talked to him about the crimes he was charged with, saying he went to the Yarrs' house to collect a debt they owed him. Reynolds testified that Pierce said the knife block came out of the house, he put it in the trunk of the car, and he would prove he bought it at Wal-Mart. Reynolds also said Pierce mentioned his girlfriend providing an alibi. 43RP 1310-11. Then, after Pierce returned from some appointment, he was worried he would be convicted because "they think I am a monster." Reynolds said he asked Pierce why, and Pierce said "Because I killed those two." 43RP 1313.

After that Reynolds and Pierce had a falling out that ended in a physical altercation, and Reynolds arranged to provide information to the State. 43RP 1330.

Richmond Dhaenens was housed with Pierce in the Jefferson County Jail from July to September 2013. 44RP 1606-07. Dhaenens testified that Pierce said he knew the Yarrs because they owed him a substantial debt, and he went to their house to collect it. 44RP 1609-10. He testified that Pierce said he would give his cell phone to his "old lady" so she could use it to make phone calls and he could prove he was somewhere else. 44RP 1610. Dhaenens testified that Pierce was happy that the family could not identify the knife block, because that was good for his hearing. And he said that Pierce was very nervous about his ear and whether it could be used to identify him in the pictures from the ATM. 44RP 1611-12. Dhaenens testified that he heard Pierce say he was happy he was seen on the road when he ran out of gas, because it helped with his hearing, even though he covered his face when someone saw him. 44RP 1613-14. Finally, Dhaenens testified that Pierce became upset when watching an episode of Sons of Anarchy that showed a murder scene in a kitchen. Pierce was disturbed by how real it looked and could not continue watching. Dhaenens claimed that Pierce nonetheless said the person in the show was not cleaning up properly and the better way to

dispose of evidence was to burn it. 44RP 1614-15. Dhaenens said that he gathered most of this information by eavesdropping on Pierce's conversations with others. 44RP 1617. He admitted that Pierce never directly said he killed the Yarrs. That was just Dhaenen's conclusion from the things he overheard. 44RP 1620.

Like Reynolds, Dhaenens agreed to provide information about Pierce only if he received something in exchange. 44RP 1618. At his request, the prosecution arranged to have Dhaenen's probation changed from Jefferson County to Kitsap County. 44RP 1615-16.

Jay Dodoro committed a string of burglaries and other felonies in 2012 and 2013. 44RP 1635-36, 1642. In January 2013 he was in the Jefferson County Jail for six to eight hours. 44RP 1637. Dodoro testified that during that time he had a brief exchange with a heavy man who said he was in jail for the people he killed in Quilcene. 44RP 1638.

Christopher Haltrom was housed in the Jefferson County Jail at the same time as Pierce and Dhaenens. 45RP 1804, 1806. Haltrom testified that Pierce mostly kept to himself. Although he said some things about his hearings, Pierce did not say that the family could not identify the knife block and that helped him. 45RP 1811-12. Pierce never talked about the ATM or about a picture of his ear. 45RP 1812.

Jeffrey Jolobois was in the Jefferson County Jail with Pierce in March and April 2013. He testified that although Reynolds was in the same area, he never saw Reynolds talking closely with Pierce, and he never heard Pierce talk to Reynolds about his case. 46RP 1947.

Geoffrey Loftus, a psychology professor and expert in human perception and memory, testified for the defense. 46RP 1953. He explained that information gets stored in memory in two ways. The first is by direct perception or conscious experience as the event occurs. Such information is generally accurate. 46RP 1957. The second type of information stored as memory is post-event information. Information gathered after the event occurs may be integrated into the witness's memory, and it is not always possible to determine whether the memory is accurate. The witness is not able to distinguish between conscious experience and post-event information and will perceive any memory he or she has of the event as real. 46RP 1958-59. Moreover, memory can evolve over time due to post-event information, becoming more complete and detailed, seeming to be more real. 46RP 1962. If a witness is given information when interviewed by law enforcement, that information can become integrated into the witness's memory, even though it was not directly perceived by the witness. 46RP 1963. When a witness

remembers more details over time, it is probably the result of post-event information being added to the memory. 46RP 1966.

Defense counsel argued in closing that Pierce was not at the Yarrs' house and did not commit the crimes. The shooter would have a significant amount of blood on him from the type of head wounds, and if the shooter had gotten into a car the blood would have transferred to the vehicle. 48RP 2141-43. There was no evidence of blood in any of the cars to which Pierce had access. 48RP 2143. There was no blood or trace evidence in Pierce's home or on any of his clothes. 48RP 2146-47.

C. ARGUMENT

1. ARBITRARY ACTION OR GOVERNMENTAL MISCONDUCT PREJUDICED PIERCE'S CONSTITUTIONAL RIGHTS, AND THE CHARGES SHOULD BE DISMISSED.

a. **The inexcusable discontinuation of Pierce's medications by jail medical staff rendered Pierce incompetent to stand trial, violating his rights to confrontation, due process, and a fair trial.**

On March 10, 2014, during the course of the first trial in Kitsap County, defense counsel noticed that, in contrast to Pierce's previous demeanor in the courtroom, he appeared weary, sullen and withdrawn, and he was sweating. He was less engaged than previously and less able to make eye contact. He focused on immaterial details, and he became agitated when counsel tried to redirect his attention. His comments about

the testimony during a break seemed distorted. During an afternoon break Pierce told his attorneys that he had not received his medications at the jail for the past four days. CP 943-50. Defense counsel informed the court of the situation, explaining that the medications were necessary to enable Pierce to focus on and attend to the proceedings. 16RP 1065-66. The court recessed for the day, directing detention staff to look into the situation and provide an answer first thing in the morning. 16RP 1066.

The next morning Pierce was seen by Dr. Kapil Chopra, a psychiatrist contracted to provide psychiatric services to inmates at the Kitsap County Jail. Dr. Chopra ordered that Pierce's medications be reinstated. 28RP 198-99. On March 14, 2014, the court ordered an evaluation to determine whether Pierce had been competent on March 10 when he was not receiving his medications. 20(A)RP 6-8.

Dr. Richard Yocum evaluated Pierce and testified at the competency hearing on March 21, 2014. 21RP 1106. Yocum testified that Pierce has a well-documented mental health history going back 20 years, which includes diagnoses of schizoaffective disorder, schizophrenia, or psychotic disorder NOS. 21RP 1107. This is a permanent condition, the primary treatment of which is psychotropic medication. 21RP 1108. Pierce's symptoms include auditory and/or visual hallucinations, and the medications reduce the bothersomness of the

hallucinations, helping him to think and understand better. The medications also allow him to rest and sleep better. 21RP 1109. Untreated, he would not be able to work with his attorney on his defense or consult in a rational manner and may not understand the legal proceedings. 21RP 1110-11. Yocum noted that when on his medications Pierce understands the legal proceedings, has a good relationship with his attorney, and is competent to go forward. 21RP 1113-15. On March 10, however, after not having received his medications for four days, Pierce likely did not understand the legal proceedings and did not have the capacity to assist his attorney. 21RP 1116.

Based on the expert's conclusion that Pierce was incompetent during a full day of trial, the State moved for a mistrial. 21RP 1123-24. The court asked defense counsel whether there was any objection to the motion for mistrial. 21RP 1124. Counsel responded that he was torn, because trial had been going well. But given that Pierce was incompetent, he did not see any way to remedy the matter short of a mistrial. He declined to join the State's motion, however. 21RP 1124-25. The court said it took counsel's response as acceptance. 21RP 1125. Defense counsel then informed the court that he wanted to investigate whether there were grounds for dismissal based on state actions which rendered Pierce involuntarily absent from the proceedings. 21RP 1125-26.

The court granted the State's motion and declared a mistrial. It entered findings that Pierce was dependent on the jail staff to administer his medication, and it was through no fault of his own that he had not received his medication for three or four days. CP 968. The court found that Pierce was unable to effectively assist his attorney and fully participate in his defense based on the deleterious effects he suffered as a result of being off his medications. CP 972. He was substantially impaired during the State's case in chief when numerous witnesses testified against him, and being unmedicated noticeably affected his in-court demeanor and appearance. CP 972. He was rendered involuntarily absent from the proceedings on March 10 by the Kitsap County Jail or its contracted medical provider's failure to give him his prescribed medications. CP 971. The court concluded that Pierce's constitutional rights to a fair trial, due process, and confrontation had been violated, and nothing short of a new trial could adequately protect these rights. The court ruled that a mistrial was a manifest necessity to protect Pierce's rights and serve the ends of justice. CP 971-72; 21RP 1135-36.

b. Pierce moved to dismiss the charges.

On May 7, 2014, Pierce signed a waiver of speedy trial to October 31, 2014, to allow counsel time to investigate and file a motion to dismiss. Supp. CP (Sub. No. 927, Waiver of Speedy Trial); 4RP 2091. On July 18,

2014, the defense filed a motion to dismiss the charges, arguing that Pierce was prejudiced by arbitrary action or governmental misconduct, justifying dismissal of the charges under CrR 8.3(b). Counsel also argued that outrageous government misconduct and cruel and unusual punishment violated Pierce's right to due process, and that double jeopardy barred retrial because government misconduct necessitated the mistrial. CP 974-1035.

The court held an evidentiary hearing on the motion to dismiss. At the hearing it was established that Kitsap County Jail contracts with Conmed to provide medical services to inmates. Conmed has similar contracts with Pierce, Cowlitz, and Yakima counties. It does not contract with Jefferson County. CP 1270.

Conmed has a Psychotropic Medication policy intended to "outline procedures ensuring inmates requiring psychotropic medication are evaluated and monitored by a psychiatrist in a timely manner." CP 1126. This policy sets out the procedure for bridging psychotropic medications:

> If an order is due to expire prior to the next scheduled visit by the Psychiatrist or physician designee, medical staff will obtain a verbal telephone order for a "Bridge Order" to continue that medication for up to a maximum of fourteen (14) days.
>
> Inmates newly incarcerated who were prescribed psychotropic medications immediately prior to their arrival/transfer may have those medications continued up to a maximum of fourteen (14) days providing there is adequate documentation at the time of

> intake and a verbal order from psychiatrist or prescribing designee on call is obtained.

28RP 201; CP 1128. Karen Nygaard, a Health Services Administrator employed by Conmed to oversee the medical and mental health department at the Kitsap County Jail, testified that abruptly cutting off a patient from mental health medications should be avoided, and the goal of the policy is not to stop an inmate's medications just because he or she has not been seen by the psychiatrist. CP 1194-95, 1216-17. Nygaard acknowledged that Conmed's policy could possibly have that effect, however. CP 1217. That was the case with Pierce.

Pierce was transferred to Kitsap County Jail from Jefferson County on February 21, 2014. Because he was prescribed psychiatric medication, medical staff at the jail obtained a temporary, or "bridge," prescription order so that Pierce could continue receiving his medications. 29RP 230. The bridge order had an end date of March 7, 2014, so that Pierce could not receive medications after that date unless specifically authorized by the jail psychiatrist or another bridge order was obtained. CP 1213. Pierce was seen by a mental health professional on February 27, and she put him on a list to be seen by Dr. Chopra, the jail psychiatrist, on March 4, 2014. 29RP 230; CP 1232.

Chopra saw inmates at the jail once a week. 28RP 177. Although Pierce was on Chopra's list of inmates to see on March 4, 2014, Pierce was in court that day. 28RP 180. Julie Weigand, the mental health coordinator for the jail, informed Chopra of the situation, and they agreed he would see Pierce at the lunch break. Weigand told the sergeant that they needed to know when Pierce returned for lunch, but they were never notified, and as a result Chopra did not see Pierce that day. CP 1296-98. A task document was created stating that Pierce's appointment needed to be rescheduled and that the doctor would refill medications as needed over the phone. 29RP 222.

Only nurses can take medication orders from doctors, so Weigand instructed a nurse to call a doctor to get Pierce's medications bridged. CP 1240, 1300-01. The nurse did not follow through. CP 1240. Pierce received his last dose of medication on March 7. The nurse who administered the last dose also failed to call for a new bridge order, even though she knew the medications needed to be continued. CP 1240-42. Pierce did not receive his medications on March 8, 9, or 10. CP 1240. The two nurses received written warnings for their failure to obtain bridge orders. CP 1244.

One issue addressed in the hearing on Pierce's motion to dismiss was the effect that discontinuation of Pierce's medications had on him.

Dr. Chopra finally saw Pierce on March 11, 2014. 28RP 180. Chopra went through an evaluation form on his computer, giving a brief history and then filling in various check boxes. Chopra noted in the evaluation that Pierce had been on his current medications for 15 years, and without them he is paranoid and hears voices. The medications were started when he arrived at Kitsap County Jail, but they had expired four days earlier. 28RP 181. Chopra checked boxes indicating that Pierce denied suicidal ideation; he was disheveled but alert and oriented to time, place and person; he made good eye contact; he was cooperative; he had good recall; his speech was normal; he was not agitated; he had moderate anxiety; his mood was good; his affect was appropriate; his flow of thought was goal directed; his insight was fair; his thought content was rational; he had no delusions, but he was experiencing hallucinations. 28RP 181-95. Based on his evaluation of Pierce, Chopra did not recommend any status or housing change, and he authorized continuation of Pierce's medications. 28RP 198-99. Chopra testified that in his opinion, Pierce was not experiencing severe, painful, or potentially life-threatening symptoms as a result of the abrupt discontinuation of his medications. 29RP 229.

Dr. Yocum testified that Pierce reported experiencing auditory hallucinations, difficulty sleeping, confusion, and inability to focus, and paranoia while he was off his medications. 28RP 166. In addition to

Pierce's self-report, Yocum listened to recorded telephone calls Pierce made while he was off his medications. Yocum felt that Pierce's self-report was consistent with what he heard in the phone calls, and his opinion was that Pierce was not in acute psychological distress. 28RP 166-67.

Dr. Henry Levine, a psychiatric expert, testified that Pierce had a lengthy psychiatric history which included a prior suicide attempt while he was in jail. 27RP 21. Before he was transferred to Kitsap County Jail he was on very high doses of antipsychotic medications, which he had been on for a considerable amount of time. 27RP 23-24. In Levine's opinion, the abrupt discontinuation of Pierce's medication caused him to experience severe symptoms that were painful and potentially life threatening. 27RP 30-31. Pierce was acutely psychotic on Monday, March 10, 2014, after a weekend of not receiving his medications. He was actively hallucinating, the voices he was hearing were very loud, and he was having difficulty focusing on and understanding the testimony in court. 27RP 31-32. He was very sleep deprived as a result of not having his medication, so that it was impossible to think clearly. 27RP 32. The fact that Pierce was on such high doses of medication made the abrupt discontinuation particularly disturbing. 27RP 34.

Another issue addressed at the evidentiary hearing was the effect and legitimacy of Conmed's policy for bridging psychotropic medications. Chopra testified that when an inmate who takes psychiatric medication is booked in the Kitsap County Jail, the booking nurse obtains a 14 day bridge order from the on-call physician. Within 14 days the inmate is seen by a mental health professional, and then Chopra sees the inmate. 29RP 220-21. Under Conmed's medication bridge policy, if a bridge order for psychiatric medication is about to expire but the inmate has not yet been seen by the jail psychiatrist, medical staff is supposed to obtain a verbal order via telephone to re-bridge the medication for another 14 days. 28RP 201. In Chopra's opinion, these policies and procedures are not medically unsound, because when they are followed correctly they do not result in a disruption in medications. 29RP 230. Thus, he felt it was not by operation of the Conmed policies that Pierce's medications were cut off but rather by the nurse's failure to follow the procedures in the policy. 29RP 232-33.

Nygaard testified that nurses cannot administer medications without an order from a doctor. Because there is a stop date on the bridge order, a new order is needed to continue the medications. The Conmed policy requires a nurse to get a verbal order to continue medications if a bridge order will expire before the inmate is seen by a doctor. CP 1245-

47. Due to the way the policy is written, there have been other instances where a 14 day bridge order for psychotropic medications has been exceeded and the inmates did not receive their medications. CP 1248.

Levine testified that in his opinion, Conmed's policy for bridging medications was neither medically sound nor justified. 27RP 36. By operation of the policy, if a psychiatric patient is not seen by a psychiatrist within 14 days, his medications are discontinued unless further action is taken. 27RP 39. Levine noted that Conmed's policy differs from the ABA standard on continuity of care, which provides that a prisoner should be maintained on his or her course of medication or treatment until a qualified professional directs otherwise upon individualized consideration.[5] 27RP 48-49. Whereas, under the ABA standard, medications are continued unless there is an individualized decision to discontinue them, under the Conmed policy medications are discontinued unless medical staff takes specific action to continue them. 27RP 49, 51.

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[5] ABA Standard 23-6.5 on Continuity of Care provides as follows:

> (b) Prisoners who are determined to be lawfully taking prescription drugs or receiving health care treatment when they enter a correctional facility directly from the community, or when they are transferred between correctional facilities—including facilities operated by different agencies—should be maintained on that course of medication or treatment or its equivalent until a qualified health care professional directs otherwise upon individualized consideration.

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-6.5.

The defense argued that the court should dismiss the charges against Pierce because of the State's misconduct. It was by operation of Conmed's bridge policy that Pierce was cut off from his medications. That was a foreseeable and predictable result of the policy, and it was the cause of Pierce's incompetence on March 10. 30RP 266. If the jail's medication bridge policy comported with the ABA standard for continuity of care, Pierce's medications would not have been discontinued as a result of staff inaction, because that standard calls for medications to continue until a qualified professional directs that they be stopped after individual consideration. Counsel argued that the fundamental problem with Conmed's policy is that if staff fails to follow required procedures, the result is discontinuation of medications. 30RP 270-72. This foreseeable outcome could have been prevented with an appropriate policy. 30RP 276. Counsel argued that Conmed's policy, which resulted in the foreseeable consequence of discontinuation of Pierce's medication, constituted arbitrary action or government misconduct. Pierce was prejudiced in that he was rendered incompetent and his constitutional rights to a fair trial, due process, and confrontation had been violated. Dismissal was therefore appropriate under CrR 8.3(b). 30RP 276-78.

The State argued that Pierce's medications were not discontinued as a result of Conmed's policy but of the nurses' negligence. 30RP 283-

84, 290-91. It also argued that Conmed's actions could not be attributed to the Jefferson County Prosecutor's Office. 30RP 289. It argued, moreover, that Pierce could still receive a fair trial following the court's declaration of a mistrial. 30RP 289.

The trial court issued a memorandum opinion denying the motion to dismiss. CP 1450-75. In it the court found that there was no government misconduct which justified dismissal because (i) the negligent conduct did not rise to the level of governmental misconduct that CrR 8.3(b) was intended to punish, and (ii) the State was not in control of the conduct that occurred by the third party, nor was there misconduct by the prosecutor. CP 1460. Specifically, the court stated that nothing but minor acts of negligence resulted in the discontinuation of Pierce's medications. There was no specific intent to disrupt his medication, no egregious conduct, and the nurses' mistakes do not shock the conscience. CP 1460.

The court found that Conmed's actions should not be imputed to the State. Jefferson County did not do business with Conmed. And because the Jefferson County judge had granted the defense protection orders, the prosecutor did not have access to Pierce's medical records and had no control over or opportunity to oversee administration of Pierce's medications. The court found there was no nexus between Conmed employees and the prosecutors. CP 1461-62.

The court further found there was no arbitrary action that would justify dismissal. The Conmed medication bridge policy, if followed, allows for medications to be closely monitored. The actions which resulted in the medications being discontinued were not a product of the policy but an unintended consequence of a violation of the policy due to negligence. CP 1462-63. The court concluded that the Conmed policy did not conflict with the ABA standard on continuity of care. CP 1463.

The court concluded that Pierce had suffered no prejudice that could not be remedied by granting a new trial. Even though Pierce's constitutional rights were violated, the court ordered a mistrial based on manifest necessity, and a new trial would alleviate any prejudice. CP 1464-66. The court also found no deliberate indifference or cruel and unusual punishment that violated Pierce's right to due process. CP 1466-69. Finally, the court found that Pierce consented to the mistrial ruling by not objecting to it, concluding that for this reason, as well as the finding of manifest necessity, double jeopardy did not bar retrial. CP 1471-73.

c. **Discontinuation of Pierce's medication, which rendered him incompetent and violated his constitutional rights to a fair trial, due process and confrontation, constitutes arbitrary action or governmental misconduct.**

The trial court may dismiss a criminal prosecution under CrR 8.3(b), which provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b). A court's decision under CrR 8.3(b) is reviewed for abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Government misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." Michielli, 132 Wn.2d at 239-40, (quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)).

For example, the Court of Appeals affirmed the dismissal of charges under CrR 8.3(b) where a subpoenaed witness failed to appear at the scheduled time. City of Kent v. Sandhu, 159 Wn. App. 836, 839, 247 P.3d 454 (2011). In that case, the trial had previously been rescheduled when the same witness was absent without reasonable excuse. The judge refused to delay again and dismissed the charges, finding that the State's lack of diligence in securing the presence of a witness with a history of not showing up constituted mismanagement. Sandhu, 159 Wn. App. at 839.

Contrary to the trial court's assumption in this case, government misconduct is not limited to acts by the prosecution. See State v. Moore, 121 Wn. App. 889, 91 P.3d 136 (2004). In Moore, the defendant was charged with first degree unlawful possession of a firearm. When the defendant was sentenced on the predicate offense, however, the court

failed to advise him that he could no longer possess a firearm. The prior sentencing court's failure constituted governmental mismanagement, supporting dismissal of the firearm possession charge under CrR 8.3(b). Moore, 121 Wn. App. at 895. See also Sandhu, 159 Wn. App. at 840 (failure of prosecution witness to show up for trial was imputed to State as mismanagement).

In this case, the arbitrary action or government misconduct took the form of failure to provide Pierce with adequate medical care while incarcerated. The State must provide prisoners with the medical care they need during their incarceration. Estelle v. Gamble, 429 U.S. 97, 103-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The government in operating a jail has a duty not only to keep and produce the prisoner when required, but also to keep the prisoner in health and safety. Shea v. City of Spokane, 17 Wn. App. 236, 241, 562 P.2d 264 (1977) aff'd, 90 Wn.2d 43, 578 P.2d 42 (1978). "The duty to the prisoner arises because when one is arrested and imprisoned for the protection of the public, he is deprived of his liberty, as well as his ability to care for himself." Shea, 17 Wn. App. at 241-42. "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." Estelle, 429 U.S. at 103.

Pierce was in jail and dependent on the State for medical care as a result of the prosecution of this case. Because he was deprived of his liberty and consequently his ability to care for himself, the government had the duty to provide his medical care. Shea, 17 Wn. App. at 242. This duty is so intertwined with the government's duty as custodian that the government cannot be relieved of liability for the negligent exercise of that duty by delegating it to an independent contractor. Id. (City of Spokane liable for negligent acts of physician contracted by jail to provide medical care for inmates). In this case, the government contracted with Conmed to fulfill this duty in Kitsap County, as well as other counties in Washington. The trial court's attempt to separate the actions of Conmed employees from the State fails, because the State has a nondelegable duty to provide adequate medical care to inmates. The actions by Conmed are therefore imputed to the State, the prosecuting authority in this case.

Actions of those acting on behalf of the State are similarly imputed to the prosecution with regard to the duty to disclose exculpatory evidence. This duty is not limited to information known to the prosecution; the prosecutor's good or bad faith is unimportant. Instead, knowledge of others acting on behalf of the government is imputed to the prosecution. State v. Davila, 183 Wn. App. 154, 168-69, 333 P.3d 459 (2014), aff'd, 357 P.3d 636, 644 (2015) (Crime lab is arm of the State

whose knowledge is imputed to the prosecution); In re the Pers. Restraint of Brennan, 117 Wn. App. 797, 804, 72 P.3d 182 (2003). Disclosure is required of information in the government's possession, whether actual or constructive. Brennan, 117 Wn. App. at 804. The purpose of the rule is not to police the good faith of the prosecution but to ensure the fairness of the trial. Davila, 183 Wn. App. at 169.

Similarly, fairness to the defendant underlies the purpose of CrR 8.3(b). State v. Whitney, 96 Wn.2d 578, 637 P.2d 956 (1981); Sandhu, 159 Wn. App. at 841; State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (1996). Pierce's right to a fair trial was directly impacted by parties contracted by the State to fulfill its duty to provide medical care to inmates. The specific knowledge of the Jefferson County Prosecutor's Office of the action of those parties is irrelevant.

The government misconduct in this case consisted not only of Conmed employees violating proper procedure but also of a faulty policy which created an unacceptable risk that Pierce's medications would be arbitrarily discontinued. Conmed's policy requires medical staff to obtain a bridge order if medications are due to expire before the inmate sees a psychiatrist. If this procedure had been followed, there would not have been an erroneous discontinuation of Pierce's medications. But focusing

solely on the inexcusable conduct of Conmed employees in failing to follow the procedure ignores the flaw in the policy itself.

Conmed's policy allows medications to be bridged for a maximum of 14 days per order and requires staff to call for additional orders to prevent discontinuation of the medications. Thus, by operation of the policy, each bridge order has a stop date. Action is required by medical personnel to continue medications past that date—either the jail psychiatrist sees the inmate and orders the medication to continue, or a new bridge order is obtained. The problem with this policy is that, if medical staff fails to act, medications are automatically discontinued, even though discontinuation is medically harmful. The policy places the burden of staff error on the inmate. By contrast, under the ABA standard, medication is continued until a qualified professional orders discontinuation after individualized consideration. Thus, an inmate's medications will not be arbitrarily discontinued due to scheduling issues, miscommunications, or other staff errors. As Dr. Levine testified, Conmed's policy is neither medically sound nor necessary. It constitutes arbitrary action, and its application in the medical care of inmates constitutes government misconduct.

d. **The deliberate indifference to Pierce's medical needs by jail medical staff violated Pierce's right to due process.**

The State's conduct may be so inappropriate that it violates due process. State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). State conduct violates due process when it is so shocking that it violates fundamental fairness. Id. In determining whether state misconduct violates due process, the court considers the totality of the circumstances. Each case is resolved on its own unique facts. Id. at 21. Thus, while there is no Washington case dealing with withholding psychotropic medications from a defendant incarcerated during trial, this Court can consider the serious physical impact on Pierce from the abrupt discontinuation of his medications, the fact that he was rendered incompetent to stand trial, the fact that the serious error resulted from a faulty policy and the deliberate indifference of the medical staff, and determine that under the totality of these circumstances Pierce was denied due process.

While a prisoner is incarcerated, the State restricts completely his ability to secure medical care on his own behalf. For that reason, the State must provide inmates with needed medical care. Estelle, 429 U.S. at 103-05[6]. While mere negligence in the provision of medical care is not a

[6] The substantive due process clause of the 14th Amendment imposes the same duty on the government with regard to pre-conviction inmates as the 8th Amendment imposes

constitutional violation, where jail staff acts with deliberate indifference to a serious medical need, the inmate is denied due process. Deliberate indifference may be found when a prison official ignores the instructions of an inmate's treating physician. Wakefield v. Thompson, 177 F.3d 1160, 1165 (9th Cir. 1999). In Wakefield, an inmate was prescribed psychotropic medication to control his delusional disorder. The plaintiff alleged that shortly before his release from prison, his doctor ordered that two weeks of medications be dispensed at the time release. Despite that instruction, the official responsible for his release failed to dispense the necessary medication and refused to contact prison medical staff or make any other effort on his behalf. Wakefield, 177 F.3d at 1162. These allegations were sufficient to support a finding of deliberate indifference to the prisoner's medical needs. Wakefield, 177 F.3d at 1165.

Similarly, in this case, the evidence showed that Pierce was prescribed psychotropic medications which were necessary to control his auditory hallucinations, help him sleep, and allow him to focus his thoughts and attention. Medical staff at the jail knew of the importance of continuing these medications and were directed by policy and procedure to ensure that the medications were not disrupted. Moreover, staff were aware that the bridge order for Pierce's medication would expire before

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with regard to post-conviction prisoners. Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir. 2002).

Pierce could be seen by the jail psychiatrist. Nonetheless, both the nurse who was directed to obtain another bridge order and the nurse who dispensed the last dose of medication failed to obtain the necessary order to allow Pierce's medication to continue. The staff exhibited deliberate indifference to Pierce's serious medical needs, violating his right to due process.

e. The arbitrary action and governmental misconduct prejudiced the defense.

The second necessary element for dismissal under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. Michielli, 132 Wn.2d at 241. "[D]ismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused." State v. Martinez, 121 Wn. App. 21, 30, 86 P.3d 1210 (2004) (citing State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003)). The purpose of CrR 8.3(b) is to ensure that a person charged with a crime is treated fairly. The prejudice requirement is not satisfied merely by expense, inconvenience, or additional delay within the speedy trial period. The misconduct must interfere with the defendant's ability to present his case. Sandhu, 159 Wn. App. at 841.

The court below found there was no prejudice justifying dismissal because Pierce could obtain a fair trial once a mistrial was declared and his competency was restored. The court applied an erroneous legal standard in denying the motion to dismiss on this basis. A decision is based on untenable grounds, and thus constitutes an abuse of discretion, when it was reached by applying the wrong legal standard. Martinez, 121 Wn. App. at 30.

In Martinez, the State failed to disclose exculpatory evidence to the defense until just before resting its case. Martinez, 121 Wn. App. at 26-27. The jury was unable to reach a verdict, and the court declared a mistrial. The State refiled the charges, but the court granted the defense motion to dismiss under CrR 8.3(b). Martinez, 121 Wn. App. at 29. The Court of Appeals found sufficient evidence in the record to support the trial court's finding of governmental misconduct. Martinez, 121 Wn. App. at 30-31. In upholding the order of dismissal, the Court of Appeals did not focus on whether the defendant could have received a fair trial following the mistrial, once the exculpatory evidence was disclosed. Instead, it focused on the nature of the State's misconduct and the prejudicial impact on the trial which ended in mistrial. See Martinez, 121 Wn. App. at 32-35 (noting that defendant would not have received a fair trial if the exculpatory evidence had not been disclosed; fact that it was disclosed just

before State rested did not diminish prejudicial effect of surprising defense; State's omission misled trial judge into making ruling regarding admissibility of evidence in first trial; late disclosure compromised defense counsel's ability to adequately prepare and defend). The Court held that dismissal was appropriate because the State's misconduct violated principles of fundamental fairness. Martinez, 121 Wn. App. at 35. The Court of Appeals noted that if the most severe consequence from withholding exculpatory evidence until late in the trial is that the State may have to try the case twice, "it will hardly be seriously deterred from such conduct in the future." Martinez, 121 Wn. App. at 36.

The same reasoning applies here. It was the State's misconduct in failing to ensure adequate medical care of an inmate, completely dependent on the State for such care due to the ongoing prosecution, which rendered Pierce incompetent and prejudiced his constitutional rights to confrontation, a fair trial, and due process. The State's misconduct violated the principles of fundamental fairness, and this prejudice is sufficient for dismissal under CrR 8.3(b), regardless of whether a subsequent trial was possible. The question is not, as the trial court stated, whether Pierce could receive a new trial following the mistrial. Having to try the case a second time would hardly deter the State from future similar misconduct. The purpose of CrR 8.3(b) is to see that one charged with a

crime is fairly treated. Sandhu, 159 Wn. App. at 841. The violation of principles of fundamental fairness by the State in this case is sufficient prejudice to warrant dismissal under the rule. See Martinez, 121 Wn. App. at 36.

Not only did the arbitrary action and government misconduct prejudice Pierce's rights to be present and confront witnesses, to a fair trial, and to due process, it also necessitated a waiver of speedy trial to allow counsel time to investigate the circumstances and prepare the motion to dismiss. 4RP 2091. Because Pierce was forced to choose between his right to a speedy trial and his right to adequately prepared counsel, the arbitrary actions were sufficiently prejudicial to warrant dismissal. See Michielli, 132 Wn.2d at 244-45 (dismissal proper where State's late amendment of information forced defendant to either go to trial unprepared or give up his speedy trial right).

In Michielli, despite having all the evidence needed to file all the charges ultimately brought against the defendant at the time the original information was filed, the State delayed bringing the most serious of the charges until five days before trial was scheduled. The Supreme Court noted that "[e]ven though the resulting prejudice to Defendant's speedy trial right may not have been extreme, the State's dealing with Defendant would appear unfair to any reasonable person." Michielli, 132 Wn.2d at

246. Likewise, here, forcing a criminal defendant, who is completely dependent on the State for medical care during his pretrial incarceration, to bear the burden of staff error in administration of medication would appear unfair to any reasonable person. This is especially true in light of the serious impact that improper discontinuation of medication can have on the defendant's constitutional rights, as well as the fact that a medication policy consistent with the ABA standard would have protected the defendant from this risk.

The defense demonstrated arbitrary action and governmental misconduct which prejudiced Pierce's rights to confrontation, a fair trial, and due process. The charges against him should be dismissed with prejudice.

2. THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL DEPRIVED PIERCE OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

When Bradley Reynolds testified at trial, he told the jury that he and Pierce had things in common which set them apart from the other inmates, who were not the same caliber of outlaw. 42RP 1240. The prosecutor asked Reynolds if he and Pierce discussed legal matters and what triggered such conversations, and Reynolds responded, "You've got to picture yourself as somebody that is seasoned in doing time." 42RP 1241. Defense counsel objected and made a record that he believed

Reynolds was under the influence of some substance. 42RP 1241-47. The court directed Reynolds to limit his answers to what the prosecutor asked. Over defense objection the court and allowed the prosecutor to ask more direct questions to avoid improper testimony. 42RP 1248-49.

Reynolds testified that Pierce started talking specifically about why he was in jail after about a week. 42RP 1251-52. The prosecutor asked Reynolds if Pierce had asked him for legal advice, and Reynolds said he had. When the prosecutor asked Reynolds why Pierce would think he could get legal advice from him, Reynolds responded, "because I spoke some legalese to him… and he talked to me about his appeal and prosecutorial misconduct." 42RP 1252.

Defense counsel objected and moved for a mistrial. 42RP 1252. Counsel noted that when Reynolds mentioned the appeal, he saw the jurors writing in their notebooks. 42RP 1253. He argued that the parties had been trying to avoid reference to the procedural history of the case from the outset, and indeed venue had been changed to obtain a jury who was not aware that Pierce had previously been convicted. 42RP 1253-54. But because the jury knew this case had been going on since 2009, it would clearly understand that the words "appeal" and "prosecutorial misconduct" referred to this case. 42RP 1254-55. The court reserved

ruling, and counsel filed a motion for mistrial and brief in support. 42RP 1256; CP 1639-45.

Counsel argued that Reynolds' testimony was a serious error, which the court had tried to avoid by ruling in limine that there should be no reference to the prior trial and testimony, only to hearings and statements. 8RP 26; 43RP 1263. Because of Reynolds' testimony, the jury could infer that Pierce had previously been convicted of these charges and that his convictions were reversed on a technicality. 43RP 1264.

The court found that Reynolds' reference to Pierce's appeal was a serious error, but since he did not refer to a specific appeal and the jury would be instructed not to speculate, the error did not require a mistrial. The court noted that while there had been testimony about prior proceedings, this was the first reference to an appeal. 43RP 1274. The court denied the motion for mistrial. 43RP 1276. The court agreed with the parties that instructing the jury to disregard the word "appeal" would draw unnecessary attention to it. 43RP 1276. Instead, it instructed the jury to disregard the last answer. 43RP 1308.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102

(1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity "prejudiced the jury, thereby denying the defendant his right to a fair trial.").

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether a trial irregularity warrants a mistrial, the court considers (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the court properly instructed the jury to disregard it. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). An appellate court reviews a decision on a motion for mistrial for an abuse of discretion. Emery, 174 Wn.2d at 765.

In this case, despite the pretrial ruling prohibiting reference to the procedural history of the case, the prosecutor asked Reynolds why Pierce sought his legal advice, and Reynolds responded that Pierce talked to him about his appeal. This was a serious irregularity not involving cumulative evidence, which was not cured by the court's instruction to disregard. The court abused its discretion in denying Pierce's motion for mistrial.

First, as the trial court recognized, Reynolds' reference to Pierce's appeal was a serious irregularity. The trial court had ruled in limine that references to the procedural history of the case were excluded, to mitigate any potential that the jury may learn this was a retrial, and it directed that all witnesses be instructed about this ruling. CP 668-71; 1RP 352, 3RP 1545-46. That Pierce had previously been tried and convicted and that his convictions were reversed on appeal were irrelevant to the issues before the jury and could only lead to confusion, speculation, and undue prejudice. Thus, such evidence was properly excluded. See ER 401, 402, 403. The parties and witnesses throughout the trial had been careful to refer to prior hearings, not specifying the nature of the prior proceedings. But the prosecutor's questioning of Reynolds opened the door to improper reference to Pierce's appeal, and Reynolds walked through as invited.

The second factor is whether the trial irregularity involved cumulative evidence. If the evidence was cumulative, a mistrial may not be necessary. Hopson, 113 Wn.2d at 284. Here, there was no other evidence regarding Pierce's appeal on grounds of prosecutorial misconduct, and the trial court correctly noted that the evidence was not cumulative. In fact, in compliance with the court's ruling, great effort had been made to prevent the jury from learning the procedural posture of the

case and specifically that this was a retrial following conviction and appeal. This factor weighs in favor of mistrial as well.

The third factor is whether the trial court properly instructed the jury to disregard the irregularity. Hopson, 113 Wn.2d at 284. The court below found that instructing the jury to disregard Reynold's reference to Pierce's appeal would draw undue attention to the improper testimony. Instead, it opted for a more vague instruction, telling the jury to disregard Reynolds' last answer. This instruction could not effectively cure the prejudice from Reynolds' improper testimony, however.

As counsel argued below, several jurors reacted to Reynolds' reference to the appeal by immediately writing in their notebooks. It is very likely that reference to the appeal caused the jury to understand that the prior hearing referred to by so many witnesses was a prior trial resulting in conviction. No instruction to disregard could remove the prejudice created by this inherently prejudicial information. See State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (no instruction could remove the prejudicial impression created by testimony that defendant charged with assault with deadly weapon had previously stabbed someone).

The balance of these factors demonstrates that there is substantial likelihood the trial error affected the jury's verdict. An obvious

characteristic of this case was that it had been going on for a long time. The crimes had occurred five and a half years before the trial, and the jury heard numerous references to other hearings and statements in the interim. It had to be clear to the jury that many of the witnesses in this trial had testified before about the same matters. The logical conclusion a lay person would draw from these circumstances and from Reynolds' reference to Pierce's appeal is that Pierce's convictions had been reversed on a technicality, necessitating a retrial.

Given the seriousness of the irregularity and the fact that the improper testimony was not cumulative of other evidence, the irregularity was so inherently prejudicial that it rendered the court's attempted curative instruction ineffective. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The serious trial irregularity in this case deprived Pierce of a fair trial, and the court abused its discretion in refusing to grant a mistrial. This Court should reverse Pierce's convictions and remand for a new trial.

3. THE ERRONEOUS ADMISSION OF EVIDENCE THAT PIERCE STOLE A PELLET PISTOL ALLOWED THE JURY TO CONVICT HIM BASED ON HIS CRIMINAL PROPENSITY AND DENIED HIM A FAIR TRIAL.

Prior to trial the defense moved to exclude evidence that Pierce had stolen a pellet pistol from Henrey's Hardware on the evening of March 18, 2009. Pierce was never charged with that crime, and counsel argued that the only link between that offense and the charged crimes was the State's speculation that Pierce used a gun to force his way into the Yarr residence. Because there was no evidence of that, the theft was not part of the res gestae of the charged crimes. 1RP 159-63. The trial court ruled that the evidence was admissible as res gestae and to show preparation and plan for committing the charged acts and identity of Pierce and his clothing. It found that the State's theory that Pierce used the pellet pistol to commit the robbery was not unduly speculative, and it felt that evidence that Pierce had shoplifted was not significantly prejudicial. 1RP 270-71; CP 696, 752-56.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court has noted the reasoning underlying this rule:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)), review denied, 124 Wn.2d 1022 (1994).

Evidence of other crimes is sometimes admitted under the res gestae exception to ER 404(b) to complete the story of the crimes being tried. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168, review denied, 113 Wn.2d 1002 (1989). Res gestae evidence is admissible to prove the immediate context of happenings near in time and place to the charged crime. Id. To qualify as res gestae, "[t]he other acts should be inseparable parts of the whole deed or criminal scheme." Id.

Evidence of Pierce's theft of a pellet gun from Henery's is not res gestae because it is not an inseparable part of the charged crimes. It is not part of the same transaction. Mutchler, 53 Wn. App. at 901-02. In the absence of evidence that Pierce stole the pellet pistol, the jury still would have heard as complete a story as possible about what occurred at the Yarr

residence. That is because there is no evidence connecting the pellet pistol to the charged offenses. The State's use of this evidence to prove plan or preparation rests on speculation. There was no evidence that a gun was used to gain entry into the house and no evidence that any gun other than a high powered rifle was used to commit the crime. Even the jailhouse informants who claimed Pierce admitted going to the Yarrs' house that night said he went there to collect a debt he was owed. They said nothing about a forced entry or the pellet pistol. The State cannot rely on guess, speculation, or conjecture to prove its case. State v. Prestegard, 108 Wn. App. 14, 22, 28 P.3d 817 (2001).

To be admissible under ER 404(b), evidence of other crimes must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Pierce's presence at Henery's at 6:44 p.m. on March 18, 2009, could be relevant to show he was in a location from which he could possibly have made it to the Yarr residence at the relevant time. His appearance at Henery's, his stature and clothing, was also relevant to identify him as the person in the ATM surveillance photos. But the fact that Pierce stole a pistol from Henery's served no purpose other than encouraging the jury to speculate that Pierce was a criminal type, acting in accordance with his

criminal propensity. ER 404 is intended to prevent application by jurors of the common assumption that "since he did it once, he did it again." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

Further, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Salterelli, 98 Wn.2d at 361-62. Evidence is unfairly prejudicial if it is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). The trial court discounted the prejudicial nature of evidence that Pierce stole the pellet pistol, saying the jury would not think Pierce murdered two people because he is a shoplifter. This reasoning ignores the fact that Pierce was also charged with burglary, robbery, and theft. The jury could make the leap from Pierce's propensity to steal, as the State apparently did, that he intended to steal from the Yarrs and things went wrong, which led to the murders and arson.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." Id.

At trial, the clerk at Henery's described the theft of the pellet pistol in detail, saying she felt scared and deceived. 39RP 911. She identified Pierce as the man who stole the pistol. 39RP 916. The jury was also shown the surveillance video from Henery's. The prosecutor relied on the incident in closing, arguing that the Henery's Hardware video showed Pierce shoplifting a pellet pistol, which resembled a firearm. He argued that it was the sort of thing you could use in a robbery to fool a person into thinking it was a real gun. 48RP 2104-05. The prosecutor returned to the theft incident in rebuttal. In response to the defense argument that Pierce could not have gotten to the Yarrs' house in time to commit the crime, the prosecutor argued that it does not take very long to commit a crime. He said the jury could see that from the theft at Henery's. 48RP 2224-25.

The prosecutor used this evidence of an uncharged and unconnected crime to show Pierce's criminal propensity, inviting the inference that Pierce must have committed the robbery he was charged with, which led to the murders and arson, because he has a propensity to steal things. The rule against propensity evidence was made to prevent just this type of unfair inference.

The evidence against Pierce was not overwhelming. No one saw Pierce at the Yarrs' house that night, and police never found any trace evidence connecting Pierce to the crimes. The testimony placing Pierce at

the scene came from jailhouse informants, who received favorable treatment from the State for their testimony. Under these circumstances, there is a reasonable probability the jury's verdict was affected by the improper propensity evidence, and Pierce's convictions must be reversed.

4. IMPROPER ADMISSION OF OPINION EVIDENCE IDENTIFYING PIERCE IN SURVEILLANCE PHOTOS INVADED THE PROVINCE OF THE JURY.

Prior to trial, the defense moved to exclude testimony from sheriff's deputies identifying Pierce in the surveillance photos from the ATM. CP 429-33. Deputy Mark Apeland testified that he first viewed the photos at the bank, then took them to his office to view with some other deputies. Apeland thought the person in the photos looked familiar, and one of the other deputies suggested it was Pierce. At that point Apeland was certain it was Pierce, and he looked at Department of Licensing and booking photographs to confirm his belief. 1RP 117-19. Apeland had arrested Pierce in 2004, 2005, and 2008, and in 2008 he had had a 20 minute conversation with Pierce. 1RP 119, 121. Apeland explained that he recognized Pierce's unique features, such as his large face and frame. 1RP 123.

Trial counsel argued that allowing Apeland to give his opinion that the person in the surveillance photos was Pierce invaded the province of the jury. Although Pierce's appearance had changed somewhat in the

intervening time before trial, the jurors would have the opportunity to compare the surveillance photos to several photographs taken at the time of Pierce's arrest. Apeland therefore had no special insight or knowledge about Pierce's appearance that would be helpful to the jury. 1RP 176-78.

The court ruled that Apeland's opinion identifying Pierce from the ATM photos would be admitted, based on his numerous prior contacts with Pierce. 1RP 274. The court found that his opinion would be useful to the jury and was therefore admissible under ER 701. 1RP 276.

A trial court's ruling admitting evidence is reviewed for abuse of discretion. State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Id.

Under ER 701, a lay witness may testify to an opinion if it is rationally based on the witness's perception and helpful to a clear understanding of the fact in issue. George, 150 Wn. App. at 117. Opinion testimony identifying persons in a surveillance photograph runs the "risk of invading the province of the jury and unfairly prejudicing [the defendant]." George, 150 Wn. App. at 118 (quoting U.S. v. La Pierre, 998 F.2d 1460, 1465 (9th Cir.1993)). Thus, such testimony is admissible only where there is "some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury."

George, 150 Wn. App. at 118 (quoting State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). Opinion testimony may be appropriate if the witness has had sufficient contacts with the person or if the person's appearance has changed significantly since the photograph was taken. See La Pierre, 998 F.2d at 1465.

In George, armed robbers entered a motel lobby and stole cash and a television set, and the defendants were arrested after exiting a van which was seen leaving the area. A poor quality surveillance video recorded the robbery. The video and several stills were shown to the jury at trial. In addition, a police officer was permitted to identify two of the people in the video as the defendants by their build, how they moved, what they were wearing, and his impressions from talking to them later. George, 150 Wn. App. at 115-16.

The defendants objected to the officer's identification, and the Court of Appeals held that the trial court abused its discretion in allowing it. Id. at 118-19. The officer had observed one of the defendants as he exited the van and ran away and again at the hospital that evening. He observed the other defendant as he exited the van and was handcuffed and while he was at the police station in an interview room. These observations fell short of the extensive contacts needed to support a

finding that the officer knew enough about the defendants to express an opinion that they were the robbers in the video. Id. at 119.

In this case, as in George, the trial court abused its discretion in admitting lay opinion regarding the identity of the person in surveillance photographs. Over defense objection, Apeland was permitted to give his opinion that the person depicted in the poor quality ATM photos was Pierce. Apeland's encounters with Pierce—arrests several years earlier and a face to face conversation a year before the ATM photos—were no more extensive than the ones found insufficient in George. Apeland was no more likely to correctly identify Pierce from the photos than the jury. See Hardy, 76 Wn. App. at 181 (officer who had known defendant for several years was in better position to identify him in grainy videotape than jury). Apeland's opinion testimony was an impermissible invasion of the province of the jury. See State v. Jamison, 93 Wn.2d 794, 799, 613 P.2d 776 (1980) (close familiarity of lay witnesses with defendant insufficient to permit them to identify defendant in surveillance photo, where jury was able to compare defendant's appearance with photos to make the critical determination).

The court below also relied on the fact that Pierce's appearance had changed since the ATM photos were taken, in that he had gained weight and his hair was longer. CP 760. Opinion testimony may be

admissible if it can assist the jury in understanding matters not within their common experience, such as when the defendant's appearance has been altered prior to trial. Jamison, 93 Wn.2d at 799. It can hardly be said that the changes in appearance relied on by the court to justify admission of Apeland's opinion—weight gain and longer hair—were outside the common experience of the jurors, however. In fact, Apeland testified he was able to identify Pierce from the ATM photographs even though Pierce had gained weight since Apeland last saw him. 38RP 716. Moreover, in addition to the ATM photos, the jury was shown numerous photos of Pierce taken just ten days after the ATM photos were taken. There is no reason to believe Apeland could offer the jury any assistance in determining whether the photographs depicted the same person. Instead, the opinion served merely to unfairly bolster the state's case by invading the province of the jury.

5. THE COURT SHOULD HAVE GIVEN THE PROPOSED INSTRUCTION REGARDING TESTIMONY OF THE JAILHOUSE INFORMANTS.

The defense proposed an instruction cautioning the jury as follows:

> You have heard testimony from Bradley Reynolds and Richmond Dhaenens, witnesses who received a beneficial plea bargain from the government in connection with this case. For this reason, in evaluating the testimony of Bradley Reynolds and Richmond Dhaenens, you should consider the extent to which or whether their testimony may have been influenced by this benefit. In addition, you should examine the testimony of Bradley Reynolds

> and Richmond Dhaenens with greater caution than that of other witnesses.

CP 1721. The court refused the instruction, stating that there was no Washington case to support it, and WPIC 1.02 seemed sufficient. 47RP 2092.

The testimony of a jailhouse informant is inherently untrustworthy. Banks v. Dretke, 540 U.S. 668, 701-02, 124 S. Ct. 1256, 157 L.Ed.2d 1166 (2004); On Lee v. United States, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L.Ed.2d 1270 (1952). The use of informant testimony is strongly correlated to wrongful convictions. See e.g. Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice, 77 (2009) ("often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the incentive to lie"; in study of 51 wrongful capital convictions, "each one involve[ed] perjured informant testimony accepted by jurors as true.").

Because it has "long recognized the 'serious questions of credibility' informants pose," the Supreme Court has allowed defendants broad latitude in cross-examination. In addition, the court has "counseled" the use of "careful instructions" to the jury regarding the credibility of the informant. Banks, 540 U.S. at 701-02 (quoting On Lee, 343 U.S. at 757).

The defendant is entitled to have informant credibility issues "submitted to the jury with careful instructions." On Lee, 343 U.S. at 757.

In federal courts, the use of informant testimony is usually accompanied by an instruction requiring the jury to view the testimony with "caution" or "great care." Banks, 540 U.S. at 701 (citing 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed.2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on informant testimony)). There is a consensus in federal courts that the informant-credibility instruction is necessary when an informant's testimony is uncorroborated because the general credibility instruction is not sufficient. United States v. Luck, 611 F.3d 183, 187 (4th Cir. 2010) (finding ineffective assistance of counsel where attorney fails to request informant instruction). Informant testimony raises special concerns about the person's incentive to fabricate for his or her own benefit. Id. The general credibility instruction does not sufficiently caution jurors as to the importance of corroboration when evaluating an informer's testimony. Id. at 189 ("the informant instruction is *sui generis*; it alerts jurors to the potentially unique problems that inhere where an individual is paid to inculpate a defendant.").

Other states similarly require instructions on evaluating the credibility of a jailhouse informant based on the unique concerns that arise. The Connecticut Supreme Court held that an informant instruction, like an accomplice instruction, should be given to the jury because informant testimony is "inevitably suspect." State v. Patterson, 886 A.2d 777, 789 (Conn. 2005). The court held that, "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused," therefore, a defendant is entitled to a specific instruction regarding how to measure the informant's credibility. Id. at 790; see also Moore v. State, 787 So.2d 1282, 1286 (Miss. 2001) (abuse of discretion for trial court to refuse cautionary instruction regarding informant testimony); Dodd v. State, 993 P.2d 778, 784 (Okla. Crim.App. 2000) (requiring cautionary instruction "in all cases" where jailhouse informant testifies).

California has enacted a statute requiring that a court "shall" provide an informant credibility instruction for any in-custody informant. Cal. Penal Code § 1127a. The California provision was recommended by a commission which "concluded that the testimony of in-custody informants potentially presents even greater risks than the testimony of accomplices, who are incriminating themselves as well as the defendant."

California Commission on the Fair Administration of Justice, Report and Recommendations Regarding Informant Testimony, (Report on Informant Testimony), p. 6 (2006)[7].

No Washington case has required a specific instruction addressing the methods by which the jury should measure the credibility of a jailhouse informant. Only Division One of the Court of Appeals has considered the issue, holding the trial court did not abuse its discretion in refusing to give a cautionary instruction. State v. Hummel, 165 Wn. App. 749, 777-78, 266 P.3d 269 (2012), review denied, 176 1023 (2013). Division One compared the proposed instruction to one cautioning the jury on cross-racial eyewitness identification, which the Washington State Supreme Court has held is not a required instruction. Hummel, 165 Wn. App. at 778-79 (citing State v. Laureano, 101 Wn.2d 745, 768, 682 P.2d 889 (1984)).

There is a significant difference between cross-racial identification and a paid informant's testimony, however, in that the informant may have an interest in testifying against the defendant. For this reason, the weight of authority from the Supreme Court and other courts suggests that a cautionary instruction is not only appropriate, but important and necessary. Pierce's requested instruction would have informed the jurors

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[7] http://www.ccfaj.org/documents/reports/jailhouse/official/official%20report.pdf

regarding the weight they should give the testimony of the jailhouse informants, accurately stated the law, and was necessary to ensure Pierce could present his defense and receive a fair trial.

An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct., 2528, 81 L.Ed.2d 413 (1984); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Washington courts require a particular instruction when the prosecution relies solely on the uncorroborated testimony of an accomplice. WPIC 6.05. The Note on Use for WPIC 6.05 instructs courts to "[u]se this instruction, if requested by the defense, in every case in which the State relies upon the testimony of an accomplice." Note on Use, WPIC 6.05. The accomplice credibility instruction should be given in most instances and is imperative when the accomplice offers critical information that is not substantially corroborated by other evidence. The Washington Supreme Court ruled:

> We hold: (1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration.

State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds in State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

The court below refused to give the proposed instruction, noting it was not a pattern instruction and there was no Washington law to support it. The mere fact that there is a body of pattern instructions does not mean that the court should not give non-pattern instructions. State v. Studd, 137 Wn.2d 533, 547-49, 973 P.2d 1049 (1999). Further, the defense proposed instruction finds ample support in the law as explained by the United States Supreme Court, federal courts, and other state court authority. See Banks, 540 U.S. at 701; State v. Land, 121 Wn.2d 494, 851 P.2d 678 (1993) (Washington Courts will look to federal decisions as persuasive authority in assessing analogous situations under state law); State v. Terrovona, 105 Wn.2d 632, 639-41, 716 P.2d 295 (1986) (in the absence of persuasive Washington case authority, court looks to federal cases for appropriate rule).

The instruction proposed by Pierce would accurately state the law. Courts must give instructions to guide jury deliberations with the purpose

of ensuring a fair trial. Courts tell juries to weigh accomplice testimony with great care because of the significant motive accomplices have to fabricate testimony. Harris, 102 Wn.2d at 155. An informant has far greater incentive to fabricate than an accomplice, as the informant does not need to implicate himself to testify against the defendant. Report on Informant Testimony, p. 6. The general credibility instruction does not sufficiently convey this concern to the jury.

In this case, Reynold and Dhaenens were each granted special consideration in exchange for their testimony against Pierce. Reynolds' charges were reduced so that he was sentenced to only nine months, rather than the 43-57 months he faced. And Dhaenens had his probation transferred to Kitsap County, to accommodate his living arrangements. Both informants agreed to provide information against Pierce only if they were promised consideration from the State.

In Patterson, a Connecticut case, the State similarly used an informant who had an obvious motive to curry favor in exchange for leniency, and the defense explored his motive to lie and his extensive criminal history during cross-examination. Patterson, 886 A.2d at 787. The jury heard of his uses of aliases and false statements when arrested, as well as his numerous pending charges and the benefit he expected from testifying. Id. Notwithstanding the opportunity to cross-examine the

informant, the Connecticut Supreme Court ruled that the defendant was entitled to an instruction on the caution with which they jury should view the informant's statements. Id. at 789-90. It rejected the claim that such an instruction interfered with the jury's role in weighing witness credibility or was adequately addressed in the general credibility instruction. Similarly, Pierce was entitled to "careful instruction" explaining the means by which the jurors should assess the credibility of these witnesses who possessed a uniquely powerful incentive to fabricate. See Banks, 540 U.S. at 701; Agers, 128 Wn.2d at 93.

The court's general credibility instruction did not sufficiently caution the jury regarding the testimony of jailhouse informants. See WPIC 1.02[8]; CP 1851. The jailhouse informants were critical to the State's case. There is no denying that the jury was significantly affected by testimony that Pierce said he went to the Yarrs' house, he took the knife block, he killed those two people, he was spotted on the road near

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[8] 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (3d Ed) provides:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

the house, and the best way to cover up evidence of a murder in a kitchen is to set the place on fire. The failure to instruct the jury regarding the care with which it should evaluate the informants' testimony denied Pierce his right to a fair trial by an adequately instructed jury. See Patterson, 886 A.2d at 473; Harris, 102 Wn.2d at 155. Pierce's convictions should be reversed and his case remanded for a new trial with proper instructions.

6. CUMULATIVE ERROR REQUIRES REVERSAL OF PIERCE'S CONVICTIONS.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these

errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case the jury heard improper reference to Pierce's prior appeal, it was encourage to speculate based on evidence of Pierce's criminal propensity, law enforcement officer's gave his opinion that Pierce was the person in the ATM surveillance photos, and the jury was permitted to consider the testimony of jailhouse informants without proper cautionary instructions. Although Pierce contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdicts. Reversal of his convictions is therefore required.

D. CONCLUSION

For the reasons argued above, this Court should reverse Pierce's convictions and dismiss the charges or remand for a new trial.

DATED November 24, 2015.

Respectfully submitted,

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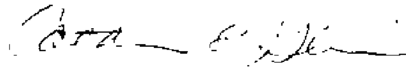
Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. Michael Pierce,* Cause No. 47011-0-II as follows:

Michael Pierce DOC# 750786
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
November 24, 2015

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