

NO. 31980-2-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

JOHN KENNETH STEIN, a.k.a. JACK STEIN,
Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Procedural History

Appellant Jack Stein was originally charged with Conspiracy to Commit Murder in the First Degree (Count I), Felony First Degree Murder (Count II), Aggravated First Degree Murder (Count III), Attempted First Degree Murder (Counts IV-VI), and Burglary in the First Degree (Count VII). *See State v. Stein*, 94 Wn. App. 616, 972 P.2d 505 (1999) (partially published), *affirmed*, 144 Wn.2d 236, 27 P.3d 184 (2001). The underlying procedural history up to the point of the remand by the Supreme Court, issued August 3, 2001 are contained in the opinions of this Court and the Supreme Court. *See Stein*, 94 Wn. App. at 619; *State v. Stein*, 144 Wn.2d 236, 249 P.3d 184 (2001). In 1989 the jury returned verdicts on the Second Amended Information of Not Guilty on Counts I through III and verdicts of Guilty on Counts IV through VII. On appeal, this Court, although discerning an instructional error, found sufficient evidence to support the jury's finding of guilt. *Id.* at 628.

Following remand, a new trial concluded in June 2004 and a jury returned verdicts of guilty to the same charges. 25 RP 4256. Mr. Stein was sentenced to the Department of Corrections for a total term of 660 months. *Id.*

B. Factual History

Beginning in 1983, appellant Jack Stein solicited, commanded, encouraged and requested that his stepson, Michael Lynn Norberg, hire a group of hit men to kill attorney Charles E. (Ned) Hall, Thelma Lund and others. Thereafter Jack Stein, with and through Norberg, agreed to engage in or cause the murders by paying for them and aiding in their planning and commission. 21 RP 3636-47, 3672-75; 22 RP 3723-27, 3738-39. Jack Stein's solicitation resulted in the murder of Thelma Lund and three attempts of the murder of Ned Hall. 23 RP 3798-99; 23 RP 3852-93.

Jack Stein considered attorney Ned Hall to be the leader of a group of five who were attempting to control and appropriate the assets of Nick Stein, the appellant's father. 20 RP 3352-63; Ex 29. Jack Stein believed that the "others" involved in the group included: (1) his father's long-term companion and care provider Thelma Lund, (2) Superior Court Judge Tom Lodge, (3) his father's brother George Stein, and (4) Vancouver developer Dale Haagen. 20 RP 3352-63, 3385-88; Ex. 29.

Specifically, Jack Stein accused the group of orchestrating a real estate transaction in which developer Dale Haagen was permitted to steal real property from the family estate. *Id.* Jack Stein claimed Haagen organized the low-priced real estate acquisition, that care-giver Thelma Lund kept Jack Stein from interfering with the transaction, and that uncle

George Stein hired attorney Ned Hall to initiate a limited guardianship to keep Jack Stein from interfering with the transaction. *Id.* In reality, the limited guardianship was initiated with Nick Stein's consent, for the express purpose of protecting the estate assets from overreaching by Jack Stein himself. 20 RP 3339-44; Ex 15.

As early as 1983, Jack Stein expressed his disdain for Ned Hall and his perceived interference with Nick Stein's estate. During a brief confrontation in 1983, Jack Stein told Ned Hall he knew too much about the Haagen real estate contract and that someone may stick a shotgun in Mr. Hall's face and blow his head off. 20 RP 3389-90.

It was around this time that Jack Stein's stepson, Michael Norberg, began soliciting hit men on behalf of Stein. During the 1980's, Norberg was heavily involved in several crimes including theft, burglary, dealing in stolen property, and the manufacture, sale and use of methamphetamine. 21 RP 3673-76; 22 RP 3720-32. Over a period of a few years, Norberg approached several of his unsavory associates in this criminal world to serve as hitmen in this scheme. 21 RP 3636-39; 22 RP 3750-53, 3723-27; 23 RP 3848-51.

One of the first people Norberg approached was Edward Denney. From the first time Denney met Michael Norberg in 1983, Norberg discussed problems his family was having with an attorney holding up the

inheritance owed to his family. 21 RP 3672-75. Norberg also tried to recruit Robert Lemire to kill Ned Hall for Jack Stein, and Lemire and Norberg spent time discussing possible ways to carry out the request. 22 RP 3750-53. They discussed shooting Mr. Hall, and even went to Jack Stein's house one morning to get a shotgun for that purpose. 22 RP 3752. After retrieving the shotgun from Stein's house, Norberg accidentally discharged the gun, causing a scene and foiling their plan. *Id.*

Sometime in 1986, Michael Norberg discussed the plans to kill Ned Hall with a longtime friend, Kevin Arbour. 22 RP 3723-27. Norberg had a list of people to be killed, including Ned Hall, Thelma Lund, and Dale Haagen. *Id.* Norberg explained that Ned Hall and the others stood in the way of his family's inheritance, and that Jack Stein would pay to have them killed. 22 RP 3723-29. It was made clear to Arbour that he would be paid by the Stein family if he killed these people. 22 RP 3723-24.

During the fall of 1986, Norberg got more specific about the plans and asked Arbour to go with him to kill Thelma Lund. 22 RP 3727-29. Norberg wanted Arbour to go with him to Jack Stein's house, pick up a key to Lund's house, then go to Lund's house where they would enter with the key, kill her and make it look like a botched burglary. *Id.* Arbour refused to do so. *Id.*

At the end of 1986, even Jack Stein himself, hinted to Arbour about the plan to kill Ned Hall and the others. In a conversation they had about Arbour assisting in the purchase of a car, Jack Stein told Arbour he would be taken care of financially for helping the family in “other ways”. 22 RP 3738-39.

Then in early April, 1987, the relationship between Jack Stein, Ned Hall, and Thelma Lund deteriorated further when Jack Stein and Ned Hall became embroiled in a number of legal conflicts concerning the Nick Stein guardianship. 20 RP 3396-3400. A string of court proceedings, in which Jack Stein was unsuccessful, preceded and led to the murder of Thelma Lund and the attempted murder of Ned Hall. *Id.*; 17 RP 2845-96; Ex 267.

While representing the limited guardianship for Nick Stein, Hall initiated a lawsuit to invalidate an assignment of a real estate contract, which Jack Stein took from his father following a sale of family real estate to Mr. Haagen. 20 RP 3344-46, 3376-77. During the course of that litigation, Jack Stein threatened the life of Ned Hall, telling his attorney “there were ways other than litigation to take care of Ned Hall.” 18 RP 921-24. Trial court Judge Tom Lodge invalidated the assignment based in part on the testimony of Thelma Lund. 20 RP 3377-78. The ruling was adverse to Jack Stein. *Id.* Shortly thereafter, Ned Hall

frustrated Jack Stein's efforts to gain control over his father's assets when Jack Stein petitioned to become Nick Stein's limited guardian. 20 RP 352. Ned Hall opposed that request and won. *Id.*

Next, in a related interpleader action by Haagen, Judge Lodge enjoined Jack Stein from claiming any interest in the property or the real estate contract, for which Nick Stein was due to receive approximately one million dollars. 20 RP 3369-70. Next, a suit by Jack Stein to rescind the real estate contract with Haagen was also dismissed by Judge Lodge. 17 RP 2828-30. In addition, on a previous occasion in Judge Lodge's courtroom, Jack Stein was held in contempt and his personal injury case was dismissed. 17 RP 2772-78.

Early in 1987, Ned Hall, as limited guardian for Nick Stein, received permission from the court to stop paying a monthly stipend to Jack Stein, which he had been receiving from the estate for over a year. 20 RP 3374-76. Ned Hall took this action because Jack Stein was using the money to pursue frivolous lawsuits against the estate. 20 RP 3388-89.

In the spring of 1987, Michael Norberg was living in a house owned by Jack Stein on Nehalem Street in Portland Oregon. 21 RP 3673-76; 22 RP 3720-22. Jack Stein was also living on Nehalem Street a few blocks away. 21 RP 3673-76; 23 RP 3845-46. A lot of other people were living at Norberg's house at different times – flopping there. 21 RP 3673-

76; 22 RP 3732. Most of these people had criminal records; they were bringing stolen property there, engaging in drug deals and other criminal activity. 21 RP 3673-76; 23 RP 3841-44.

Jack Stein had lost in court, had exhausted every legal means to stop Ned Hall and the others, and felt that eliminating Ned Hall from his father's guardianship would allow him to gain control of his father's considerable assets. 20 RP 3396-3400; 21 RP 3637-47 Ex 267. Frustrated by the foregoing experiences, Jack Stein had Michael Norberg approached more people about killing Ned Hall and Thelma Lund in the spring of 1987. 21 RP 3636-47, 3655, 3673-89; 23 RP 3847-51.

Norberg approached an acquaintance named Roy Stradley and asked him if he was interested in doing "a hit", which Stradley knew meant a contract killing. 21 RP 3636-39. An attorney (Ned Hall) and a caretaker of the grandfather (Thelma Lund) were the targets. 21 RP 3638, 3641. A couple of days later, two weeks before Thelma Lund was murdered, Roy Stradley discussed this plan with Jack Stein and Michael Norberg. 21 RP 3641-47. The three men discussed Stein's belief that Ned Hall and Thelma Lund were blocking every effort Stein made to get Nick Stein's property back. *Id.* Dubious about the offer, Stradley asked Jack Stein if he was personally financing the killings. 21 RP 3637-46, 3655. Jack Stein said yes, and there would be no problem with the money.

Id. Stradley discussed payment terms with Norberg, who said Jack Stein would pay \$10,000 per person killed. 21 RP 3644. Stradley did not agree to take the job. 21 RP 3644-45.

During this same time, Edward Denny would visit Michael Norberg at his Nehalem Street house, down the road from where Jack Stein lived. 21 RP 3673-76. At those visits, Michael Norberg continued to discuss the problems the family was having with the lawyer, and then Norberg offered Denny five thousand dollars to kill the lawyer. *Id.* Norberg told Denny the money would be paid by Jack Stein after his father's inheritance came through. 21 RP 3679-81. Norberg also told Denny about a woman who needed to be kept out of the way, and later said he wanted both of them killed. 21 RP 3676-77.

Also in the spring of 1987, Michael Norberg and his associate Richard Bailey discussed plans to kill Ned Hall and Thelma Lund. 23 RP 3847-51. Norberg told Bailey these people needed to be killed because they stood in the way of Norberg's stepfather, Jack Stein, receiving his inheritance. 23 RP 3848. Michael Norberg told Richard Bailey that Jack Stein would pay several thousand dollars to have these people killed. 23 RP 3849-51.

A few weeks after Norberg offered Denney five thousand dollars for the "job," Denny overheard a conversation between Richard Bailey and

Michael Norberg in the bedroom of Norberg's Nehalem house. 21 RP 3681-83. During this conversation Richard Bailey demanded five thousand dollars down, and five thousand dollars "after the job." *Id.* Norberg told Bailey he would have to talk to "him" about it, and shortly thereafter, Jack Stein arrived at the house. 21 RP 3684-85. Jack Stein and Michael Norberg had a conversation in front of the house while Denny listened from the front porch. 21 RP 3684-87. Norberg told Jack Stein he had someone to do "the job," and he needed five thousand dollars down and five thousand dollars after it was done. *Id.* Jack Stein said "I can't do that," and Norberg said he'd tell "him." *Id.* Then Jack Stein stopped Norberg before he went back to the house and said "o.k.," he'd do it. *Id.* Denny later asked Norberg if he found someone to do "the job," and Norberg said yes. 21 RP 3688-89. Denny then asked Richard Bailey if he had agreed to do the job, and Bailey said yes, he had agreed to do it with Gordon Smith. 21 RP 3689.

So, by April 13, 1987, Michael Norberg had enlisted his "hitman", and the first target was Thelma Lund because she was considered the weakest, most vulnerable link. 22 RP 3727. Richard Bailey was designated as the hitman, and on the night of April 13th, he and Norberg drove from Portland to Thelma Lund's residence in Hazel Dell. 22 RP 3798-99, 23 RP 3852-56. After arriving at Ms. Lund's residence, Bailey

backed out of doing the actual killing when he discovered the target was an elderly woman. 23 RP 3860-62 Bailey and Norberg spent some time arguing about who would kill Lund, but eventually Norberg took over that part of the job. 23 RP 3862-66. Using a key to her house, which had been provided by Jack Stein, they entered Ms. Lund's home, where Norberg beat and strangled her to death. 23 RP 3852-65.

After killing Thelma Lund, Norberg paid Bailey several thousand dollars for "the job" with a promise of more money if he kept quiet about the murder. 23 RP 3868-69.

On the drive back to Portland that night, Norberg tried to convince Bailey to go with him to kill Ned Hall as well, in order to get Hall out of Jack Stein's inheritance troubles. 23 RP 3869, 3880. Although declining to kill Hall that night, Bailey eventually agreed to assist in killing him at a later date. 23 RP 3869-70.

After Thelma Lund's murder, and while Nick Stein was living with Jack Stein, Ned Hall obtained a protection order precluding Jack Stein from contacting Nick Stein. 20 RP 3401-03. Thereafter, began a battle between Ned Hall and Jack Stein over physical custody of Nick Stein. 20 RP 3403-07. This tug-o-war over Nick Stein was later the basis of an abuse of process suit filed by Jack Stein against Ned Hall. 17 RP 2889-91; Ex 267.

In June of 1987, Bailey and others including Norberg, were involved in three separate, unsuccessful efforts to kill Ned Hall. The first attempted hit on Ned Hall occurred in the early part of June, 1987, when Bailey, Norberg, Gordon Smith, and others prepared a crude mixture of napalm bombs to burn down Hall's house. 23 RP 3870-73; 20 RP 3482-86. The plan was to burn the house down with Hall inside, killing him. 23 RP 3876; 20RP 3482-86. Bailey and Smith took the crude napalm bombs to Ned Hall's residence to carry out the plan, but were scared off when Smith thought they had been spotted. 20 RP 3431-32, 3486-87; 23 RP 3873-76.

The second hit on Ned Hall was attempted a short time later when Bailey went back to Hall's residence with Smith and attempted to lure Hall out of his residence and kill him. 20 RP 3432-38, 3490-93; 23 RP 3879-85. Bailey and Smith were armed with guns that Norberg had purchased for them to use to kill Hall. 23 RP 3879-81. Ned Hall refused to open his door, and eventually, Bailey and Smith gave up. 23 RP 3885.

On one occasion, Bailey and Smith went to Norberg's house and falsely claimed to have murdered Ned Hall. 23 RP 3886. Norberg told them he would need to talk to someone about their payment, then told another person at his house to "go get Jack". 20 RP 3489-90. A while later, Norberg left the room to talk to a person who had arrived at the residence,

then came back into the room and demanded proof that Ned Hall was dead before paying Bailey and Smith. *Id.*

The third and final attempted hit on Ned Hall occurred a short time later, on June 14, 1987, when Bailey, Smith, Norberg, and Bailey's younger brother Ricky Bailey, armed themselves with a firearm and two machetes and again went to Hall's residence to kill him. 20 RP 3438-50, 3493-95; 23 RP 3887-91. Smith entered the residence through a bathroom window and eventually fired a shot at Ned Hall through the bathroom door, narrowly missing him. 20 RP 3439-42, 3495-96; 23 RP 3890-93. Smith also slammed the door on Hall's thumb, cutting off the tip. 20 RP 3439-42; 23 RP 3892-93.

Jack Stein's efforts to have Ned Hall killed were partially successful in that, as a result, Ned Hall quickly resigned as Nick Stein's limited guardian. 20 RP 3450-51.

Shortly after the attempts on Ned Hall's life, Jack Stein accompanied Norberg and Bailey on a trip to Oregon, during which Jack Stein expressed satisfaction with the murder of Thelma Lund and the attempts on Ned Hall's life. 23 RP 3897-99, 3902, 3955. Jack Stein was pleased that Ned Hall had withdrawn from the guardianship, but just for spite, Jack Stein still wanted Ned Hall dead. 23 RP 3902-05. Jack Stein asked Bailey

to kidnap Ned Hall and bring him to Stein so he could torture Hall personally. *Id.*

During this trip, they all stopped at a pig farm that was for sale, and Jack Stein discussed buying the farm and giving it to Norberg and Bailey, along with a “slush fund” of money, as payment for the murder of Thelma Lund and the attempts on Ned Hall’s life. 23 RP 3897-3901.

Jack Stein also told Richard Bailey and Michael Norberg to keep their mouths shut if they ever got caught. 23 RP 3905-06. Jack Stein told them if they were caught and didn’t talk, he would pay them a quarter of a million dollars or more and he would hire them an attorney. *Id.*

II. ARGUMENT

A. **The Trial Court Properly Exercised Its Discretion In Finding There Was No Actual Prejudice To Stein’s Rights That Materially Affected His Right To A Fair Trial.**

Dismissal of charges under CrR 8.3(b) is appropriate only where there is (1) arbitrary action or governmental misconduct; (2) prejudice to the rights of the accused which materially affect the accused’s right to a fair trial; and (3) such dismissal is justified in the furtherance of justice. During the lengthy evidentiary hearing related to this issue, the trial court found that Stein failed to adequately substantiate the second and third elements, therefore dismissal was not warranted. CP 1300-06, 1099-1111.

A motion to dismiss under CrR 8.3(b) is committed to the sound discretion of the trial court. *State v. Proctor*, 16 Wn. App. 865, 867-68, 559 P.2d 1363 (1977). The trial court's ruling on such a motion is reviewable "only for a manifest abuse of discretion, i.e., the trial court's decision is manifestly unreasonable, is exercised on untenable grounds, or for untenable reasons." *State v. Miller*, 92 Wn. App. 693, 702, 964 P.2d 1196 (1998). A trial court's exercise of discretion is "manifestly unreasonable" only when it can be said that no reasonable judge would have reached the same conclusion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

A defendant seeking dismissal under CrR 8.3(b) must first show arbitrary action or governmental misconduct, which may consist of simple mismanagement of its case. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). However, even "simple mismanagement" of the type to support dismissal must be of the type historically found sufficient to support dismissal of a criminal charge. *State v. Starrish*, 86 Wn.2d 200, 205-06, 554 P.2d 1 (1975); *State v. Boldt*, 40 Wn. App. 798, 800, 700 P.2d 1186 (1985). A motion to dismiss under CrR 8.3(b) implicates notions of due process; the question to be determined is whether the mismanagement complained of violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," and those conceptions

which “define the community’s sense of fair play and decency.” *State v. Cantrell*, 111 Wn.2d 385, 389, 758 P.2d 1 (1988), quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

In the context of CrR 8.3(b), “mismanagement” refers to truly egregious cases of mismanagement or misconduct by the prosecutor, including unfair gamesmanship or intentional acts that prevent the court from administering justice. *State v. Koerber*, 85 Wn. App. 1, 3-5, 931 P.2d 904 (1996). This concept of “mismanagement” has not been extended to acts of third parties, including state officers, over whom the prosecution exerts no direct control. *State v. Koerber*, supra, 85 Wn. App. at 4-5; *State v. Duggins*, 68 Wn. App. 396, 401-02, 844 P.2d 441 (1993).

Regardless of whether mismanagement occurred, it is well-settled that there can be no dismissal under CrR 8.3 without proof that such mismanagement actually caused identifiable prejudice. See *Michielli*, 132 Wn.2d 229 (1997). The prejudice requirement is clearly established by Supreme Court precedent. See *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). Prejudice will not be presumed, and must be specifically proven by the defendant. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). This rule has been applied in the specific context of delay, and Washington courts have held that mere delay is not enough without proof of actual prejudice. *State v. Wilke*, 28

Wn. App. 590, 624 P.2d 1176, *rev. den.*, 95 Wn.2d 1026 (1981). The determination of “actual prejudice” is based upon the limited question of whether there has been an impairment of the defendant’s ability to defend. *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159, *affirmed*, 13 Wn. App. 630, 536 P.2d 648 (1975).

1. Stein Merely Alleged A Possibility Of Prejudice That Is Inherent In Every Delay; This Is Not Sufficient To Constitute “Actual Prejudice.”

The possibility of prejudice is inherent in every delay and therefore it is not enough to conclude that actual prejudice will result. The standard for proving “actual prejudice” is extremely high, must be established with specificity, and is a threshold that Stein was unable to cross.

In *Haga*, a defendant requested dismissal under CrR 8.3 because of significant pre-accusation delay; two murders committed in 1966 were not charged until 1971, due to the differing opinions of prosecutors responsible for charging decisions. *Id.* The Court found despite the fact that there were great disadvantages due to the passage of five years, including (1) memory loss of witnesses, (2) the unavailability of a psychiatric opinion, (3) the death of certain character witnesses, and (4) the unavailability of certain forensic evidence discovered at the scene, dismissal was improper because the defendant could not prove that the delay caused “actual prejudice” in the presentation of his case. *Id.*, at 634.

In its explanation, the Supreme Court distinguished between actual and possible prejudice, stating that “*possible* prejudice is inherent in any delay, however short; it may also weaken the Government’s case ... however Haga failed to demonstrate that he was *actually* prejudiced by preaccusation delay.” *Id.*, citing *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, L. Ed. 2d 468 (1971) (emphasis provided). Ultimately, although the Court did not define the threshold at which actual prejudice would result, the Court determined that Haga’s many complaints did not rise to the requisite level, and the charges were not dismissed. *Id.*

Stein was not harmed by the delay in hearing his appeal. “In maintaining order in our own house, we should not needlessly trample on the interest of the prosecutor and of the public in securing proper, lasting convictions.” *United States v. Tucker*, 8 F.3d 673 at 676 (9th Cir. 1993). To dismiss the criminal charges against Stein would “undermine rather than preserve judicial integrity.” *Id.*

Under the reasoning in *Haga and Tucker*, Stein was unable to prove that a delay caused him any actual prejudice. Stein had the same opportunities and difficulties analyzed in *Haga*: staleness of evidence, memory-loss of witnesses, and unavailability of experts. And like *Tucker*, dismissal of the charges would have undermined rather than preserved justice.

Stein urged the trial court to find actual prejudice based on the mere passage of time. However, there was no unexcused delay in the retrial of Stein that resulted solely from the State's conduct. In fact, Judge Bryan found the delay in perfecting Stein's appeal was due in large part to the ineffective assistance of appellate counsel and the defendant himself.

It should be noted that Mr. Stein is the most difficult of clients, and not just in regard to his relationship with Mr. Lee, but certainly in regard to that relationship, he was a most difficult client. He attacks his attorneys, he attacks judges and prosecutors. He believes that there is a vast conspiracy against him, and because of the nature of the offenses of convictions, some fear on the part of those he distrusts is not unreasonable.

Mr. Stein disagrees with and tries to fire virtually every lawyer that he's had whenever they don't get the results that he wants on an immediate basis,

...

Because of Mr. Stein's attempt to fire him and because of Mr. Stein's abusive conduct towards him, Mr. Lee effectively abandoned Mr. Stein and any attempt to perfect his appeal. Mr. Lee now, erroneously, takes the position that he could not do anything for Mr. Stein after being fired by Mr. Stein in the spring of 1990. He was still in the case, however, as is reflected by the Court of Appeals' rejection of his withdrawal motion, and as is reflected by Mr. Lee's own correspondence in the record and his own activities in regard to the appeal. Clearly, he had a continuing duty to Mr. Stein to perfect the appeal.

See Appellant's Opening Brief, Appendix A, pages 4-10.

While defendant alleges that the passage of time alone is an indication of the prejudice he has suffered, Washington law clearly establishes that this fact alone is not enough to warrant dismissal, especially where the delay can be attributed in significant part to the defendant and his prior appellate counsel.

2. Defendant Has Not Been Prejudiced Under The *Michielli* Standard Because He Was Not Forced To Make A “Hobson’s Choice” Between Two Constitutional Rights.

Stein cites *Michielli*, 132 Wn.2d 229 (1997) for the proposition that government mismanagement is sufficient to warrant dismissal of criminal charges in the furtherance of justice. However, that case has been clarified and distinguished from cases such as Stein’s.

In *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001), there was a significant delay in DNA testing due to the new assignment of a deputy prosecutor mid-way through the discovery process. Although the court found that the government failed to act with due diligence, it also found that the State’s dilatory actions did not in any way prejudice the defendant, and therefore dismissal was not warranted. Although Woods was subject to numerous continuances and delays, infringing upon his right to speedy trial, the delays were not prejudicial because they “would allow the

defendant an opportunity to present evidence that wouldn't otherwise be available." *Woods*, 143 Wn.2d at 581.

The Court distinguished the situation in *Michielli*, in which a defendant is forced to make a "Hobson's Choice" of constitutional rights, from the situation in which delay will serve only to yield additional information that will aid the defendant in his case in chief:

[I]t was incumbent on *Woods* to show by a preponderance of the evidence that the State's lack of due diligence forced him into choosing between salvaging one constitutional right at the expense of another constitutional right. Indeed, under *Price* and its progeny, lack of diligence by the State, standing alone, is not a sufficient basis for dismissal of criminal charges. For example, in *Michielli*, ... we held that the defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for surprise charges ... Here ... *Woods* was not forced to choose between two constitutional rights, and therefore the trial court did not abuse its discretion in denying *Woods*' motion to dismiss.

Woods, 143 Wn.2d at 584-85 (citations omitted).

More than a mere delay of proceedings is required for dismissal, and contrary to Stein's assertions, simple mismanagement is not sufficient to support a presumption that prejudice has occurred. The presence of a constitutional "Hobson's Choice" is the only appropriate analysis for determining when dismissal is appropriate, and Stein's case is more like *Woods* than *Michielli*. Just like *Woods*, any delays in Stein's case were

not prejudicial, for the simple fact that the delays benefited him, perhaps more so than the State.

Stein cites to Richard Bailey's flip-flopping testimony over the years as a benefit to the State, however, it clearly enhanced Stein's ability to attack the credibility of Bailey. 23 RP 3946-48. Additionally, in the retrial, the State had to make the decision not to call a previously crucial witness, Michael Norberg, who was now out of custody and very hostile toward the State. 22 RP 3793-95; 24 RP 4201; CP 1302. Further, the State had to rely on reading to the jury the former testimony of several witnesses who had either died or were not located. 19 RP 3227-47; 3287-95; 21 RP 3635-60, 3668-3709. In closing argument, Stein's attorney was able to capitalize of these missing witnesses to attack whether the State had met its burden of proof. 24 RP 4200-01.

In *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000), the Court of Appeals examined whether dismissal under CrR 8.3 was warranted after jail officials seized documents, and pro-se inmates were deprived of legal materials as their trial dates approached. The Court found that dismissal was too drastic a measure, and remanded the case for additional fact-finding to determine whether jail officials had a justification for the seizure. The court concluded, "in circumstances in which the prejudice may be contained by suppressing evidence or ordering

a new trial, dismissal is not required.” *Id.* at 300, citing *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995). *Accord*, *State v. Cochran*, 51 Wn. App. 116, 751 P.2d 1194 (1988).

Here, the most potentially compelling evidence against Stein was the testimony of Dr. Lusky, which was discovered subsequent to Stein’s 1989 convictions and elicited during the wrongful death trial in 1990. CP 1184-96. Dr. Lusky testified in the wrongful death trial that during the relevant time period, Stein expressed his frustration with Ned Hall to Dr. Lusky and asked him if he knew where to hire a hit man. *Id.* However, the trial court suppressed that evidence in the retrial. 16 RP 2569-74. The court found this was the appropriate remedy under CrR 8.3 to cure any potential prejudice to Stein do to the delay in the retrial. *Id.*

3. Dismissal Of The Case Is Not In The Interests Of Justice.

Although the issue has not been decided in Washington, the failure to timely perfect the record on appeal has been directly addressed by a New York court. In *New York v. Smith*, 109 A.D.2d 637; 486 N.Y.S.2d 216; (App. 1985), the single ground urged for dismissal was that the government delayed the perfection of an appeal, and the motion judge granted dismissal on that basis. However, on appeal the court remanded the case because “such a ground would not have been an appropriate basis

for dismissing the indictment in the interest of justice” and it was unclear whether there were additional basis for the dismissal. *Id. at* 637; 486 N.Y.S.2d at 216. Not unlike Washington’s CrR 8.3, dismissal in New York is warranted where there is a “circumstance clearly demonstrating that conviction or prosecution of the defendant ... would constitute or result in injustice.” New York Criminal Procedural Laws (CPL) §210.40.

Additionally, the United States Court of Appeals, Third Circuit, was confronted with a case of similar nature. In *Simmons v. Beyer*, 44 F.3d 1160 (Third Cir. 1995), the court found that although a 13-year delay had occurred before defendant’s direct appeal was heard, a new trial was still the best relief to remedy any prejudice suffered by the defendant. That court concluded that any prejudice stemming from delay alone would be a slender reed on which to support unconditional release from custody and that nullification of a state court conviction on grounds unrelated to the merits of the case would be an extraordinary remedy. *Id. at* 1171. The court then held that the state be given the opportunity to retry the defendant.

Because Stein failed to prove there was any actual prejudice to his right to a fair trial, the trial court properly denied his motion to dismiss pursuant to CrR 8.3(b).

4. There Was No Misconduct In The Case At Bar That Requires Dismissal.

Stein claims Judge Roger Bennett committed judicial misconduct by assisting the Attorney General's Office in interviewing reluctant witness, Richard Bailey, when the Attorney General's Office took over the prosecution. As the former lead prosecutor against Stein, Judge Bennett was familiar with the facts of the case and was in a better position than the assistant attorney general to judge the accuracy of what Richard Bailey said. 5 RP 672, 685.

The trial court found Stein's claims of misconduct against Judge Bennett to be without merit. CP 1304. "There is nothing in the record to suggest Judge Bennett encouraged Richard Bailey to testify untruthfully, nor did Judge Bennett use his office to unlawfully coerce or induce Bailey to testify." CP 1303, Finding of Fact 28. Additionally, the trial court found Judge Bennett's actions did not prejudice Stein in any way. CP 1304, Conclusion of Law 8.

The review of a trial court's findings is limited to a determination of whether substantial evidence supports the findings, and, if so, whether the findings support the trial court's conclusions of law and judgment. *Ridgeview Props. v. Starbucks*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); *State v. Halstein*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993) (Generally,

findings are viewed as verities, provided there is substantial evidence to support the findings). Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. *State v. Hill*, 124 Wn.2d 641, 646-47, 870 P.2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Halstein*, 122 Wn.2d at 129. The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. *See Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 405, 858 P.2d 494 (1993); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990).

Here, there is nothing in the record to suggest Judge Bennett used his office to influence Richard Bailey. In fact Judge Bennett's role was limited to introducing a very reluctant witness to the Attorney's General's Office because the witness had recently been released from prison and initially refused to allow anyone except Judge Bennett to contact him. 7 P 1097, 1113-17. Therefore, there was substantial evidence supporting the court's findings in this regard.

B. The Trial Court Correctly Determined The Doctrine Of Collateral Estoppel Prevented Stein From Re-Litigating Issues Previously Decided By The Federal District Court And The Court Of Appeals.

The need for judicial finality is recognized by the principles of res judicata and collateral estoppel, which apply in criminal cases and bar relitigation of issues actually determined by a former verdict and judgment. *State v. Blakely*, 61 Wn. App. 595, 811 P.2d 965 (1991); *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). The principles underlying these doctrines are to prevent re-litigation of determined causes, curtail multiplicity of actions, and prevent harassment in the courts, inconvenience to the litigants and judicial economy. *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). Therefore, the defendant is precluded from arguing issues that were raised and resolved in a prior action. *State v. Bryant*, 100 Wn. App. 232, 996 P.2d 646 (2000), *reversed on other grounds*, 146 Wn.2d 90, 42 P.3d 1278 (2002).

In *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003), the Supreme Court laid out the test for collateral estoppel. The Court held that collateral estoppel applies when the following four conditions are met:

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea of collateral estoppel is asserted a party in privity with the party to the prior adjudication?
- (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is applied?

Id., citing *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

The trial court found that the Federal District Court's decision regarding governmental misconduct was binding on the trial court. 10 RP 1588-97. Effectively, the trial court alleviated the need for the defendant to prove the first prong of CrR 8.3(b); that is that there was arbitrary action or governmental misconduct. The trial court then narrowed the focus of the hearing to the issue of whether the defendant's right to a fair trial had been prejudice. *Id.*

The trial court also found collateral estoppel barred Stein from re-litigating the issues of whether the trial court in 1989 violated his right to retained counsel of choice and, thereby, his speedy trial right. This Court, in the unpublished portion of its opinion, addressed these issues and found both to be without merit. *Stein*, 94 Wn. App. 616, Slip Opinion at 48-51.

Prior to the 1989 trial, the Superior Court entered findings of fact and conclusions of law supporting its denial of Stein's motion to remove his attorneys. On appeal, this Court specifically said, "the record we do have contains substantial evidence to support the court's factual findings." Slip Opinion at 23. This Court went on to find the following:

Here, nothing in the record indicates an actual conflict, i.e., that defense counsel represented the interests of Stein's cousin, that the cousin's interests were adverse, or that the cousin was privy to any confidential information. Nor does the record indicate that the alleged conflict adversely affected trial counsel's defense of Stein. Nor does the record support Stein's contention that the trial court failed

to conduct proper inquiry once it became aware of a potential conflict. The court considered the conflict issue during at least three hearings on the record. It interrogated defense counsel in closed proceedings; reviewed the memoranda filed in connection with Stein's motion; heard the testimony of witnesses, including Stein; and heard argument of counsel.

...

Here, Stein did not demonstrate an actual conflict of interest or show that replacement counsel was immediately or prospectively available. In addition, (1) defense counsel did not separately move to withdraw until after the jury was impaneled; (2) defense counsel had requested and obtained three previous continuances; (3) the recusal of the entire Clark County bench had necessitated the special appointment of a trial judge; (4) Stein's relationship with counsel remained cooperative and cordial; and (5) counsel's performance was highly competent and, thus, withdrawal would have prejudiced Stein. Stein's general loss of confidence or trust in his counsel was insufficient to warrant the appointment of new counsel under the circumstances here. The trial court properly exercised its discretion in denying Stein's motion.

Slip Opinion at 25-28 (citations and footnotes omitted).

Additionally, this Court thoroughly reviewed the record regarding Stein's speedy trial right and found his argument to be without merit. Slip Opinion at 48-51.

These issues were thoroughly considered by the trial court in 1989 and reviewed by this Court on appeal. A review of the Supreme Court decision in *State v. Stein*, 144 Wn.2d 236, 249, 27 P.3d 184 (2001) reveals that the Court declined to review both issues, which makes the judgment

of the Court of Appeals a final determination. *State v. Sherwood*, 71 Wn. App. 481, 860 P.2d 407 (1993).

Counsel for Stein places undue weight on the final comment of the Supreme Court remanding the case for a new trial. The Supreme Court said it was “leaving to the sound discretion of the trial court the question of whether further relief is appropriate under CrR 8.3 or other theories raised in Stein’s cross-petition.” 144 Wn.2d at 248. It is clear from this Court’s decision that a record for review of both of the above issues was complete. Slip Opinion at 25-28, 48-51. Unlike the CrR 8.3 issue, there was no need to develop an additional record for review, and therefore no need to remand these issues to the trial court. Such an interpretation just simply cannot be what the Supreme Court intended.

All four of the factors in the *Tili* collateral estoppel test have clearly been met. Additionally, defendant’s reliance on this argument to support his CrR 8.3 motion to dismiss is misplaced. He has failed to allege that any error related to his right to counsel of choice and speedy trial from the 1989 trial is the result of arbitrary action or governmental misconduct that would affect his right to a fair trial, which is clearly the only issue the Supreme Court intended to leave to the sound discretion of the trial court.

C. Evidence Of The Murder Of Thelma Lund, And Stein’s Plan To Kill Judge Lodge Were Properly Admitted.

1. The State Was Not Barred By Collateral Estoppel From Using Relevant Evidence Of The Murder Of Thelma Lund, Nor Evidence Of The Conspiracy To Kill Others, Including Judge Lodge Despite Stein’s Acquittal To Those Charges In The Prior Trial.

This Court recently reviewed this same issue in *State v. Eggleston*, 129 Wn. App. 418, 118 P.3d 959 (2005). The Court recognized collateral estoppel “does not always bar the later use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.” *Id.* at 963, citing *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1974). “Collateral estoppel in criminal cases is ‘not to be applied with a hypertechnical and archaic approach ... but with realism and rationality.’” *Id.*, citing *Ashe*, 397 U.S. at 444.

“[D]ouble jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible.” *States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) (quoting *Pettaway v. Plummer*, 943 F.2d 1041, 1046 (9th Cir. 1991), *overruled on other grounds*, *Santamaria v. Horsley*, 133 F.3d 1242, 1245 (1998)).

The Supreme Court limited *Ashe* in *Dowling* where it held that acquittal in a criminal case does not preclude

the prosecution from offering evidence from the acquittal trial in a later action if the ultimate fact issues are not the same and the government does not have to prove beyond a reasonable doubt in the second trial the very issue it failed to prove beyond a reasonable doubt in the first trial. *Dowling v. United States*, 493 U.S. 342, 348-49, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Furthermore, evidence tending to prove an issue is admissible when an acquittal on a criminal charge in an earlier proceeding did not necessarily represent a jury determination of that issue. *See Dowling*, 493 U.S. at 350, 110 S.Ct. 668.

Eggleston, 129 Wn. App. at 964

As in *Eggleston*, the only factor in the collateral estoppel test at issue here is whether the current jury necessarily decided the same issue the prior jury decided. *Eggleston*, 129 Wn. App. at 963; see also, *Tili*, 148 Wn.2d at 361. In other words, to convict Stein of three counts of attempted murder in the first degree and one count of burglary in the first degree, would the jury in the 2004 trial have had to reach a conclusion “directly contrary” to the first jury’s decision? *Dowling* 493 U.S. at 350, 110 S. Ct. 668, 107 L. Ed. 2d 708.

Ironically, the basis for the Supreme Court’s ruling remanding Stein’s case for retrial makes clear that it is impossible to say the 2004 jury necessarily decided the same issue the prior jury decided in acquitting Stein of the murder of Thelma Lund.

In the original trial, Stein was charged with the following crimes: I. conspiracy with Michael Norberg, Gordon Smith , and Richard Bailey to commit first degree murder; II. felony first degree murder of Thelma Lund; III. aggravated first degree murder of Thelma Lund, based upon the aggravating factors of solicitation, and commission of the murder during the course of burglary; IV.-VI. criminal attempts to commit the first degree murder of Charles (Ned) Hall on three separate dates; and VII. burglary in the first degree. *Stein*, 94 Wn.App. at 619.

That jury was instructed under two alternative theories of liability: conspiracy and accomplice liability. *Stein*, 144 Wn.2d at 241. Stein was convicted of the three counts of attempted murder in the first degree of Ned Hall (counts IV-VI) and the burglary in the first degree (count VII), but acquitted of the conspiracy to commit murder and the murder charges involving Thelma Lund. *Stein*, 94 Wn.App. at 620.

The Supreme Court found that “[b]ecause there was no special verdict form to enable the jury to clarify the basis for conviction, it is unclear which set of instructions the jury relied on in reaching its decision to convict Stein of the crimes relating to Hall.” *Stein*, 144 Wn.2d at 243. The opposite conclusion must also, necessarily be true. That is, because the instructions were not clear as to which of the two alternative theories of liability applied to the conspiracy charge and the first degree murder

charges, it is equally unclear which set of instructions the jury relied on in reaching its decision to acquit Stein of the conspiracy and first degree murder of Thelma Lund.

In fact, this Court previously noted the degree to which the prosecutor in the first trial focused on a conspiracy theory of liability and failed to discuss accomplice liability during closing argument. *Stein*, 94 Wn. App. at 627-28. This Court found, “[t]he accomplice liability and [conspiracy] instructions contain significant differences and there is no basis to conclude that the jury relied on the correct accomplice liability instructions in reaching its verdicts.” *Id.*, at 628.

Therefore, the jury in the 2004 trial did not necessarily decided the same issue the prior jury decided in acquitting Stein. Because of the discrepancy in the jury instructions in 1989, the acquittal on the conspiracy and murder charges did not necessarily represent a jury determination of whether Stein was an accomplice to those crimes. As a result, collateral estoppel does not preclude the evidence related to the Thelma Lund murder, nor the evidence related to the overall conspiracy.

Further, even if the ultimate fact issues are the same, the State was not required to prove beyond a reasonable doubt in the 2004 trial Stein’s guilt in the Thelma Lund murder and conspiracy in order to prove his guilt for the crimes involving Ned Hall. In other words, the jury in 2004 did

not have to necessarily believe that Stein was guilty of Thelma Lund's murder, to believe he was guilty of the attempted murders of Ned Hall.

2. Evidence Related To The Murder Of Thelma Lund And Stein's Plot To Kill Judge Lodge Was Properly Admitted Under ER 404(B).

As counsel for Stein concedes, there is a lower standard of proof to admit evidence under ER 404(b), and an acquittal related to that evidence does not necessarily mean the prosecution can not prove a fact by a preponderance of the evidence. See Appellant's Opening Brief, page 30; *Dowling*, 493 U.S. at 348, 110 S. Ct. 668.

Appellate decisions interpreting ER 404(b) make clear, the admission of evidence of "other crimes, wrongs, or acts" is committed to the sound discretion of the trial court and the admission of such evidence will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Norlin*, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998); *State v. Peerson*, 62 Wn. App. 755, 775, 816 P.2d (1991); *State v. Suttle*, 61 Wn. App. 703, 710, 812 P.2d 119 (1991); See also *State v. Terrovona*, 105 Wn.2d 632, 649, 716 P.2d 295 (1986); And see *State v. Benn*, 120 Wn.2d 631, 653-54 845 P.2d 289 (1993). Discretion is not abused when the trial court's decision to admit evidence is reasonable and is based upon tenable

grounds and reasons. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997); *State v. Brown*, 132 Wn.2d 668, 709, 940 P.2d 546 (1997).

“The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case.” *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

Evidence Rule 404(b) provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Emphasis added). While ER 404(b) prohibits the admission of evidence for the sole purpose of showing that the defendant is a “criminal type,” *Lough*, 125 Wn.2d at 853, “[i]f the evidence is offered for a legitimate purpose, then the exclusion provision of rule 404(b) does not apply.” *Id.*

According to the Supreme Court:

To admit evidence of other wrongs under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.

State v. Pirtle, 127 Wn.2d 628, 649, 902 P.2d 245 (1995), *citing State v. Lough*, 125 Wn.2d at 853.

“Relevant evidence” is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Relevant evidence is admissible, but may be excluded when its probative value is substantially outweighed by the danger of its prejudicial impact. ER 402, ER 403.

a. There Was A Preponderance Of Evidence Supporting Its Admission.

In the present case, the trial court properly found by a preponderance of the evidence, based on the State’s offer of proof, that Stein solicited the murders of five people, including Ned Hall, and that his accomplices acted as a result of that solicitation. 14 RP 2280; CP 81-135. Michael Norberg and Richard Bailey were convicted of crimes relating to both the murder of Thelma Lund and the attempted murders of Ned Hall. CP 96-130. In their separate statements on plea of guilty, both identified Stein as the person who solicited their criminal acts. CP 114-30. Moreover, in consolidated wrongful death and criminal profiteering cases, a civil jury found by a preponderance of the evidence that Stein had solicited the murders that Norberg and his associates had committed or

attempted to commit. CP 132-35. Based upon this evidence, the trial court properly found that Stein's connection to other acts relating to the solicitation of other murders and the murder of Thelma Lund had been established by a preponderance of the evidence. 14 RP 2272-95. *Norlin*, 134 Wn.2d at 576-77; *Pirtle*, 127 Wn.2d at 649.

b. The Court Found Several Proper Purposes For The Admission Of The Evidence.

The trial court admitted this evidence on the grounds it showed Stein's intent and motive, and that it was part of the *res gestae* of the crimes. 15 RP 2409-10.

The list of possible bases for admission contained in ER 404(b) is not an exclusive list, and is consistent with pre-rule decisions. In *State v. Messinger*, 8 Wn. App. 829, 509 P.2d 382 (1973), the Court of Appeals held:

Evidence of unrelated crimes or criminal misconduct is admissible to prove: (1) motive, (2) intent, (3) absence of accident or mistake, (4) common scheme or plan, and (5) identity To these classifications may be added several others such as (6) evidence of the criminal acts which are an inseparable part of the whole deed . . . and (7) evidence of other offenses relative and necessary to prove an essential ingredient of the crime charged . . .

8 Wn.App. at 834 (emphasis added).

Proof of motive and intent are recognized as traditional bases for the admission of evidence of other misconduct. 5 K. Tegland, Wash.

Pract., Evidence: Law and Practice §§ 404.24, 404.25., . Proof of motive may encompass a defendant's desire for money or revenge. See *State v. Matthews*, 75 Wn. App. 278, 877 P.2d 252 (1994) (desire for money adequate proof of motive); *Stenson*, 132 Wn.2d at 702 (revenge adequate proof of motive). Where specific intent is at issue, evidence of other misconduct is admissible to show premeditation. See *Pirtle*, 127 Wn.2d at 648-50 (evidence that defendant had pending sentencing on one robbery was admissible on question of premeditation for a second, where it tended to show that defendant intended all along to kill victims of second robbery).

In addition, prior statements of general intent may be admitted on the issue of subsequent specific intent. *State v. Majors*, 82 Wn. App. 843, 919 P.2d 1258 (1996). In *Majors*, the Court of Appeals held that a prior generic statement of intent may be admitted under ER 404(b) on the issue of specific intent in a later crime. Majors was charged with attempted kidnapping in the first degree after he drove up to a teenage girl, pointed a BB gun at her and ordered her to get into his car or he would blow her head off. The trial court admitted evidence that one month prior to the alleged kidnapping effort, the defendant told his girlfriend that he "wanted to find a girl walking down the road, force her into his car, and force her to submit to anal intercourse." *Id.*, at 846. The Court of Appeals, affirming

the defendant's conviction, held that the trial court had properly admitted the statement as evidence of Major's intent to commit a sexual offense against the victim. 82 Wn.App. at 850; See also *Peerson*, 62 Wn. App. 785 (evidence of defendant's prior assaults on drug associates admissible in trial charging subsequent murder of associates on issue of "common scheme or plan" aggravator alleged under RCW 10.95).

Evidence of misconduct is also admissible to prove that the crimes charged were part of a common scheme or plan. 5 K. Tegland, Wash. Pract., Evidence: Law and Practice § 404.20. In *Lough*, the Supreme Court identified two bases for the admission of evidence of a plan under ER 404(b). 125 Wn.2d 847. The first basis, applicable here, occurs where there is a commission of a series of crimes in which each is but a piece of a larger plan. The second basis arises when an individual "devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." *Id.* at 855. In the first instance, according to the Court in *Lough*, "There is no question that evidence of a prior crime or act would be admissible in such a case to prove the doing of the crime charged." *Id.*

Additionally, as expected, Stein claimed he merely expressed disappointment about his legal predicament in the litigation surrounding his father's guardianship, and that Michael Norberg must have acted on his own in soliciting the murders of Mrs. Lund, Mr. Hall and others.

24 RP 4198-42004. Such claims are akin to claims of accident or mistake. Independent of the defendant's motive or intent, the State is entitled to contradict these material assertions by evidence tending to show that the crime charged happened and that the defendant's association with it was not innocent or inadvertent. *State v. Bythrow*, 114, Wn.2d 713, 790 P.2d 154 (1990); *State v. Coe*, 34 Wn.2d 336, 208 P.2d 863 (1949); *State v. Grant*, 83 Wn. App. 98, 105-06, 920 P.2d 609 (1996) (evidence of defendant's prior assaults of victim admissible in domestic violence case to show that charged assault actually occurred); *State v. Roth*, 75 Wn. App. 808, 818-19, 881 P.2d 268 (1994) (evidence concerning death of defendant's former wife admissible in prosecution involving death of defendant's previous wife, to show that charged crime actually occurred and was not result of happenstance or misfortune); *Accord, State v. Fernandez*, 28 Wn. App. 944, 628 P.2d 818 (1981); *See also, e.g., 5 Tegland*, WASH. PRAC: EVIDENCE, §114(4) at 391 (1989).

In *Bythrow*, the defendant was accused of acting alone in the robbery of a gas station two days prior to a donut shop robbery with a codefendant, and the counts were joined. Defendant claimed that he was unaware that his codefendant intended to rob the donut shop until the robbery occurred, and complained that joinder was improper because evidence of the gas station robbery was prejudicial to his defense in the

donut shop robbery. On appeal, the Supreme Court affirmed both convictions, holding that joinder of the offenses was proper. The Court noted that evidence of the gas station robbery would have been admissible in the donut shop robbery under ER 404(b) as “probative of Bythrow’s guilty state of mind and to rebut Bythrow’s claim that he was ‘inadvertently’ present during the Dunkin Donuts robbery.” 114 Wn.2d at 719.

A similar claim was made in *State v. Coe*, which involved prosecution for the robbery and murder of a taxi driver. Defendant claimed that he was unaware that his acquaintance was going to assault and rob the driver, and that any post-murder assistance he provided was due to fear. The state was permitted to show that four days prior to the robbery-murder, the defendant actively participated in an armed robbery of another taxi driver with the same acquaintance. In affirming the defendant’s murder and robbery convictions, the Supreme Court held:

Evidence, if relevant, is not to be excluded because it may tend to show that the accused had committed or may have been a party to the commission of another and different crime. The evidence was relevant as it tended to show that appellant was not the innocent bystander he claimed to be when the attack was made upon the deceased ...

34 Wn.2d at 341.

Washington appellate courts have also long recognized that evidence of other crimes may be admissible when they constitute an inseparable part of the entire episode and evidence of them is necessary to complete the picture for the jury. *See, e.g., State v. Mayes*, 20 Wn. App. 184, 579 P.2d 999 (1978). In *Mayes*, this Court approved the admission of evidence of a conspiracy to smuggle heroin into the federal prison at McNeil Island in order to explain why the defendant had murdered a Tacoma heroin dealer.

The State's theory of this case was that the defendant, Cindy Dickerson, Howard Brown, and Frances Nickel met in California, devised a plan to smuggle heroin to a prisoner at the federal penitentiary at McNeil Island, Washington, and carried out their plan on February 29, 1976. When the delivery was made, it was discovered that some of the heroin was missing. Defendant was singled out as the culprit and told to make up the deficit. The defendant, according to the prosecution, killed Wesley Cameron on March 2 in order to steal heroin from him. On March 3, Cindy Dickerson, Frances Nickel, and Howard Brown delivered this heroin to McNeil Island. Testimony by several of the State's witnesses tended to support this theory. Frances Nickel and Howard Brown testified that they had been tried in federal court in Seattle on conspiracy charges stemming from the heroin deliveries to McNeil prison.

20 Wn.App. at 188.

According to the Court, “[e]vidence that the defendant had participated in a conspiracy to deliver heroin was relevant either to show defendant's motive for killing Cameron, *State v. Goebel*, 36 Wn.2d 367,

218 P.2d 300 (1950), or as an inseparable part of the entire deed.” *Id.*,
citing *State v. Niblack*, 74 Wn.2d 200, 443 P.2d 809 (1968).

When evidence of other crimes constitutes an inseparable part of an entire criminal episode, the *res gestae* exception has been consistently recognized as a separate basis for admission of evidence of other crimes, apart from the non-exclusive list set forth in ER 404(b). See *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997).

According to the Supreme Court:

[T]his court has recognized a *res gestae* or "same transaction" exception to the rule. Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence. Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury."

Id. at 570-71, citing *State v. Lane*, 125 Wash. 2d 825, 831, 889 P.2d 929 (1995) and *State v. Tharp*, 96 Wash. 2d 591, 594, 637 P.2d 961 (1981).

The Court of Appeals correctly observed in *Tharp*:

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "[A] party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

State v. Tharp, 27 Wn. App. 198, 205, 616 P.2d 693 (1980), *aff'd* 96 Wn.2d 591, 637 P.2d 961 (1981). quoting *State v. King*, 111 Kan. 140, 145, 206 P. 883, 885 (1922).

c. The Court Properly Balanced The Probative Value Of The Evidence With The Potential For Undue Prejudice.

The trial court is granted wide discretion in balancing the probative value of evidence against its potential prejudicial impact. *Stenson*, 132 Wn.2d at 702. The balance struck by the trial court will not be disturbed on appeal absent an abuse of discretion. *Norlin*, 134 Wn.2d at 21; *State v. Luvane*, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). All of the foregoing cases involved the trial court having balanced, in favor of admissibility, the probative value of evidence of other acts against the potential prejudice it might engender.

In *State v. Roth*, the defendant complained that the trial court had erred in balancing the probative value of evidence that defendant had thrown a former wife off a cliff while hiking against the prejudice it engendered in his murder prosecution for the drowning of his second wife while rafting. 75 Wn.App. at 881. The Court of Appeals disagreed:

The evidence was undeniably prejudicial to Roth. Indeed, the prejudicial effect of ER 404(b) evidence is recognized to be very great when the defense is that the alleged act never took place, there is no eyewitness or

physical evidence of crime, and the question of guilt necessarily turns on the credibility of the accused version of the events. . . . Nonetheless, it is clear from the record that the trial judge recognized and scrutinized the potential for prejudice, yet reasoned that the evidence was so crucial to a central issue at trial that its probative value outweighed that potential. . . . In light of the broad discretion conferred on the trial judge in this context, we conclude that the trial court acted well within its discretion in determining that the probative value of this evidence outweighed its prejudicial effect.

75 Wn. App. at 822-23.

Contrary to Stein's assertion, the trial court did weigh the fact of Stein's prior acquittal when weighing the probative value of the uncharged criminal conduct against its potential for unfair prejudice. 14 RP 2281-95. In fact, the court was so concerned with this factor that it set over a ruling on the issue of how to handle the prior acquittal to a later date when Stein was represented by counsel and could be prepared to respond. 14 RP 2281-94.

Thereafter, when Stein was represented by counsel, the trial court addressed the issue again during a pretrial hearing on May 17, 2004. See CP __, subnumber 1088.¹ According to the clerk's In Court Record, argument was heard on the issue and Stein's attorney proposed a jury instruction based upon the court's ruling. *Id.* Unfortunately, it appears that portion of the verbatim report of proceedings was inadvertently not

¹ Clerk's In Court Record, May 17, 2004, copy attached as Appendix A.

transcribed as it was believed to be a discussion of jury voir dire only. 17 RP 2722. But, it is clear from the available record, the instruction proposed by Stein's attorney, directing the jury to not speculate about the outcome of any prior proceedings, was given by the court in its opening instructions to the jury on May 24, 2004, and possibly in its closing instructions to the jury on June 10, 2004. 17 RP 2726-27. Unfortunately, those parts of the record were also not provided by appellate counsel. By a motion filed with this brief, the State is requesting the record be supplemented with the full report of proceedings from May 17 and 24, 2004, and June 10, 2004.

Regardless, the trial court properly excluded mention of Stein's prior acquittal as well as the outcomes of any other related proceedings. 17 RP 2723-26.

A judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or of collateral estoppel. But once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted. Not only does the inference appellants suggest not flow from the judgment of acquittal ..., but also a judgment of acquittal is hearsay. The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal.

United States v. Viserto, 596 F.2d 531, 537 (2d Cir.), *cert. denied*, 444 U.S. 841, 100 S. Ct. 80, 62 L. Ed. 2d 52 (1979). *See also*, *U.S. v. Sutton* 732 F.2d 1483 (10th Cir. 1984), *cert denied*, 469 U.S. 1157, 105 S. Ct. 909 (1985) (No abuse of discretion to exclude evidence of prior acquittal for related crimes); *State v. Russell*, 33 Wn. App. 579, 657 P.2d 338 (1983), *reversed in part on other grounds*, 101 Wn.2d 349, 678 P.2d 332 (1984) (Not error to exclude defendant's prior acquittal for first degree murder upon retrial of second degree murder charge on which first jury hung). An acquittal shows only that the state failed to meet their burden of proof, and the potential for prejudice in admitting the acquittal is substantial. *U.S. v. Jones*, 808 F.2d 561 (7th Cir., 1986), citing *Sutton*, 732 F.2d 1483.

D. The Testimony Of Judge Lodge, Carol Kyle, And Ken Eisenland, The Former Testimony Of Thelma Lund And Nick Stein, And The Out-Of-Court Statements Of Stein's Co-Conspirators Were Properly Admitted.

1. Judge Lodge's Testimony Was Properly Admitted Because It Was Necessary To The Determination Of Relevant Facts, It Was Limited In Scope As Compared To The Previous Trial, And Stein Waived Any Objection To The Testimony.

In its opinion, this Court expressed concern about the State's extensive use of Judge Lodge as a witness in the 1989 trial. Slip Opinion, at 31-34. While recognizing there "was no absolute rule prohibiting judges from testifying in criminal proceedings regarding collateral matters

over which they have presided”, the Court was concerned “a jury might misunderstand a judge’s testimony under these circumstances as an official testimonial and, thus, the testimony would unfairly advance the interests of a party.” Slip Opinion at 32-32, citing *U.S. v. Frankenthal*, 582 F.2d 1102, 1108 (7th Cir. 1978); Canon 2 of the Code of Judicial Conduct.

Here, the State deferentially questioned Judge Lodge, who was allowed to provide detailed explanations of his decisions and various points of law. Further, the record of Stein’s previous legal proceedings, as well as the testimony of other witnesses, established much of the substance of Judge Lodge’s testimony. Thus much of Judge Lodge’s testimony was not strictly necessary and it had the potential to unfairly influence the jury.

Slip Opinion at 34.

Heeding this Court’s warning about the use of Judge Lodge’s testimony in the 1989 trial, the State proceeded to present very limited testimony from Judge Lodge related to only four of the prior civil litigations giving rise to Stein’s motive. 17 RP 2799-2834. During Judge Lodge’s testimony, the only objections by the defense were related to the admissibility of two exhibits. 17 RP 2774, 2793-2802.

Further, the trial court took steps of its own to limit any impact of the former judge testifying by having co-counsel publish exhibits admitted through Judge Lodge. 17 RP 2808-17, 2825-26.

And unlike in the 1989 trial, the witness was no longer a sitting judge, but rather a retired judge, and had not been on the bench for more than seven years. 17 RP 2766.

Finally, in his opening brief, Stein claims he objected to the former judge's testimony, thus preserving the issue for review. Appellant's Opening Brief, at page 47. However, Stein merely filed a general objection to the testimony of any former or current judges. 15 RP 2437-38. Later, when the trial court specifically asked Stein's trial counsel whether there was any objection to the State's proposed testimony of Judge Lodge, counsel had no objection to the proposed testimony, noting the State provided advance warning of what the testimony would be and what specific exhibits would be admitted through him. 17 RP 2730-32. The court further allowed Stein's attorney to raise any additional objections throughout the course of the testimony and to be heard on the issue outside the presence of the jury. 17 RP 2732. No further objections to the substance of Judge Lodge's testimony were raised, therefore, this issue was waived.

But Stein waived any error by failing to object either before or during trial. *In re Dependency of Penelope D.*, 104 Wn.2d 643, 659, 709 P.2d 1185 (1985) (a jury can properly consider testimony admitted without objection); *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967) (testimony admitted without objection is not reviewable on appeal; ER 103(a)(1)).

Slip Opinion, at 34.

2. The Trial Court Properly Admitted Statements Of The Co-Conspirators Because The Evidence Showed The Conspiracy Existed And That Stein Was Part Of It.

A trial court is accorded great discretion in admitting or refusing to admit evidence, and its decision will not be overturned absent a showing of an abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Under ER 801(d)(2)(v), an out-of-court statement is not hearsay when the statement is made by a co-conspirator of the party against whom it is offered, and the statement is made during the course of and in furtherance of the conspiracy. *State v. Miller*, 35 Wn. App. 567, 668 P.2d 606 (1983) held that an acquittal on the conspiracy charge does not bar the use of the declarant's statement. Additionally, the hearsay exception is available regardless of whether the defendant is formally charged with conspiracy. A joint venture amounting to a conspiracy in fact is sufficient to invoke the rule. *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984). See also, *State v. Halley*, 77 Wn. App 149, 890 P.2d 511 (1995) (to admit

a co-conspirator's statement under ER 801 (d)(2)(v), the state need establish no more than the basic dictionary definition of a conspiracy, an agreement made by two or more persons confederating to do an unlawful act).

Before admitting the co-conspirator's statements, the trial court must only find that the State presented sufficient evidence establishing conspiracy and that the statements were made in furtherance of the conspiracy. *State v. St. Pierre*, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988).

After hearing overwhelming testimony of Stein's motive to kill Ned Hall, Thelma Lund, and others, from some twenty-two witnesses, and having considered the prior testimony of Roy Stradley, who testified in 1989 that Stein had directly admitted his participation in the conspiracy, the trial court found the state had shown a criminal conspiracy existed and that Stein participated in the conspiracy. 20 RP 3473-74; 21 RP 3635-60. Once this threshold showing was made, the court properly allowed the statements of other co-conspirators to be introduced. 20 RP 3474.

3. The Testimony Of Carol Kyle And Ken Eisenland Was Properly Admitted As They Did Not Testify Regarding Any Privileged Communications Between Themselves And Stein.

The testimony of Ken Eiesland did not deal with confidential communications. Mr. Eiesland, testified that Ned Hall mentioned in Stein's presence that he intended to purchase a new car. Eiesland overheard Stein say Ned wouldn't have any need for a new car. 18 RP 2921. Stein said there were was other than litigation to take care of Ned Hall. 18 RP 2922. Eiesland then asked Stein if he planned to shoot Ned Hall, and Stein replied, "[d]on't worry about it." *Id.*

This exchange does not fall within the attorney-client privilege. The privilege contained in RCW 5.60.060 does not cover communications made in anticipation of the commission of a crime. *State v. Richards*, 97 Wash. 587, 167 P. 47 (1917); *State v. Metcalf*, 14 Wn. App. 232, 540 P.2d 459 (1975). Arguably, the statements do not even qualify as privileged communications, because they were not made in the context of seeking legal advice.

In any event, one who contemplates committing a crime cannot relate this fact to an attorney and shield this communication through the privilege. *Clark v. State*, 159 Tex CrR 187, 261 SW.2d 339 (1953); *State v. Phelps*, 24 Ore. App. 329, 545 P.2d 901 (1976).

Additionally, Eiesland's disclosure of Stein's threatening statements directed to Ned Hall was mandated by ethical considerations. See American Bar Association: Standards Relating to the Prosecution

Function and the Defense Function, § 4-3.7, Duty to Report Threatened Crime. Not only was the warning to Ned Hall permitted, it was required. Any value of the attorney-client privilege in encouraging communications between attorney and client is outweighed by the interest of society in preventing injury to persons.

Statements Stein made to Carol Kyle were also not protected by an attorney-client privilege. The mere fact that a witness is an attorney who once met with or represented a person against whom the attorney's testimony is offered, does not prohibit the attorney from testifying as to non-privileged matters. *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass 1950); *State v. Metcalf*, 14 Wn. App. 232, 540 P.2d 459 (1975). Carol Kyle's testimony was limited to one conversation she had with Stein between October 1985 and April 1987, during which he expressed animosity toward Ned Hall and Judge Tom Lodge. 19 RP 3263-66. There was no evidence presented that there was an attorney-client relationship established between Kyle and Stein. The only assertion from Stein that he consulted with Kyle while seeking representation came from Stein during pretrial arguments. 14 RP 2221. However, Ms. Kyle had testified in 1989 that she told Stein she could not represent him because she was not a member of the Washington bar association, and all she could do was try to

refer Stein to a Washington lawyer. 14 RP 2219-20. Thereafter, Ms. Kyle's testimony was admitted without objection. 19 RP 3263-66.

Even if Stein's statements to Eiesland and Kyle were admitted in error, that error was harmless. Evidentiary error is grounds for reversal only if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The error is prejudicial when it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). In other words, the improper admission of evidence is considered harmless error "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Id.* (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). In this case, it is clear there was overwhelming evidence of Stein's guilt, and the testimony of Eiesland and Kyle was of minor significance in comparison.

4. The Tape-Recorded Depositions Of Thelma Lund And Nick Stein Were Properly Admitted Because They Were Not Hearsay, And Their Admission Did Not Violate The Confrontation Clause.

The State introduced the prior testimony of Thelma Lund and Nick Stein from a 1983 civil trial to set aside the assignment of a real estate contract, *Hall v. Stein*, 82-2-01908-2.19 RP 3296-3318. The Confrontation Clause of the Sixth Amendment places two conditions on

the admission of former testimony. The declarant must be unavailable at the time of trial, and the statement must bear sufficient indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 210, 27 L. Ed. 2d 597 (1980). A person who is deceased is “unavailable” pursuant to ER 804(a)(4). ER 804(b)(1) allows the admission of former testimony if the party against whom it is offered “had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.” A trial court’s decision to admit prior testimony into evidence is reviewed for an abuse of discretion. *State v. Neal*, 144 Wash. 2d 600, 609, 30 P.3d 1255 (2001).

Crawford v. Washington, 51 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), did not change the analysis for the admissibility of former testimony of an unavailable witnesses. The 5th Circuit Court of Appeals held in *U.S. v. Avants*, 367 F.3d 433, at 445 (5th Cir. 4/19/2004) that testimonial evidence remains admissible after *Crawford* under hearsay exceptions despite the absence at trial of the person who made the statement if the defendant had the opportunity to cross examine the missing witness about the statement at a previous hearing.

See also, Pilley v. State, 2005 Westlaw 1253099 (Ala.Crim.App. May 27, 2005) (cross-examination at prior trial), *Williams v. U.S.*, 2005 Westlaw 1994137 (D.C., 8/18/2005), *Blanton v. State*, 880 So.2d 798 (Fla. App. 5

Dist. 8/13/2004), (defense counsel's deposition of child sexual assault victim prior to trial satisfied confrontation requirement for admission of recorded statement), *Howard v. State*, 816 N.E.2d 948 (Ind. App. 10/28/2004) (deposition testimony of child sexual assault victim), *Liggins v. Graves*, 2004 Westlaw 729111 (S.D.Iowa 3/24/2004) (prior opportunity to cross-examine at a deposition), and *State v. McGowen*, 2005 Westlaw 2008183 (Tenn.Crim.App., 8/18/2005).

The prior testimony of Thelma Lund and Nick Stein was properly admitted because Stein was a party to the prior proceeding in which they testified, and he had a similar motive and opportunity to develop their testimony through cross examination. ER 804(b)(1). Additionally, the doctrines of res judicata and collateral estoppel bar Stein from re-litigating the issue of admissibility of this evidence. The evidence was admitted in the prior 1989 trial and this Court found the trial court did not abuse its discretion in admitting the evidence. *Stein*, 94 Wn. App. 616, Slip Opinion at page 18.

Here there is no question that Lund and Nicholas Stein were unavailable or that Stein had the opportunity to cross-examine them in the civil suit. See *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 210, 27 L. Ed. 2d 597 (1980) (change of defense attorney between preliminary hearing and trial did not create situation in which admission of witness's former testimony at trial violated defendant's right to confrontation). Thus, the critical issue is whether Stein had a sufficient motive.

In the civil case, Stein's right to property valued at over one million dollars was at stake. The testimony of Lund and Nicholas Stein undermined Stein's presumed defense that Nicholas was competent to sign the deed and assignment and that he did so voluntarily and without undue influence. Given the adversarial nature of the civil suit, Stein had sufficiently similar motive to cross-examine Lund and Nicholas Stein. See *McClellan*, 868 F.2d at 215 (criminal defendant charged with fraudulent transfer of assets had similar motive during bankruptcy proceedings to cross-examine his subsequently disabled ex-wife where several million dollars of debt were at issue and her testimony undermined his credibility). Thus the trial court did not abuse its discretion. *Stenson*, 132 Wash. 2d at 790.

Id.

The need for judicial finality is recognized by the principles of res judicata and collateral estoppel, which apply in criminal cases and bar relitigation of issues actually determined by a former verdict and judgment. *State v. Blakely*, 61 Wn. App. 595, 811 P.2d 965 (1991); *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). The principles underlying these doctrines are to prevent relitigation of determined causes, curtail multiplicity of actions, and prevent harassment in the courts, inconvenience to the litigants and judicial economy. *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). Therefore, Stein is precluded from arguing issues that were raised and resolved in a prior action. *State v. Bryant*, 100 Wn.App. 232, 996 P.2d 646 (2000), *reversed on other grounds*, 146 Wn.2d 90, 42 P.3d 1278 (2002).

Stein also contests the admission of a recorded conversation that occurred during a deposition proceeding in which his father, Nick Stein was present. 18 RP 3084-3102. Counsel for Stein incorrectly characterizes the evidence as statements of Nick Stein offered in violation of the Confrontation Clause. However, as the trial court found, the statements being offered were those of the defendant, Jack Stein, and any statements made by Nick Stein or anyone else in the room were not offered for the truth of the matter asserted, hence not implicating *Crawford* and the Confrontation Clause. 18 RP 3054.

E. The Trial Court Correctly Answered The Inquiry From The Jury.

During deliberations, the jury sent out a written note asking,

With regards to Instruction #9, do we need to have a preponderance of evidence to prove an accomplice under subparagraphs (1) and (2)? Or, will a single piece of evidence in favor of conviction take precedence over evidence in favor of acquittal?

The court responded that “[p]reponderance of the evidence is not the applicable burden of proof in a criminal trial. Refer to Instructions 1, 2, 15, 16, 17, and 21.” CP 1355. While not claiming any error in the court’s jury instructions themselves, Stein claims the court’s failure to provide an additional instruction to the jury clarifying the burden of proof was structural error requiring reversal.

However, a trial court has discretion whether to give further instructions to a jury after it has begun deliberations, and the exercise of that discretion is reviewed for an abuse of discretion. *State v. Studebaker*, 67 Wn.2d 980, 987, 410 P.2d 913 (1966) (when jury was adequately instructed under the facts of the case upon the degree of proof required, that it is the state's burden to prove beyond a reasonable doubt each and every element of the crime charged against the defendant, court did not err in refusing to give additional instruction proposed by defendant); *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120 (1986).

The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979); *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962). Here, the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached. "[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict." *State v. Miller*, 40 Wn.App. 483, 489, 698 P.2d 1123 (citing *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984)), review denied, 104 Wn.2d 1010 (1985).

State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

The trial court exercised proper discretion in referring the jury back to the jury instructions that correctly stated the law. Therefore, there was no error.

F. The Trial Court Correctly Determined That Stein's Multiple Serious Violent Convictions Arose From Separarte And Distinct Criminal Conduct Requiriing His Sentences For Each To Run Consecutively.

On June 16, 2004, the jury returned verdicts of guilty on all counts charged in the Third Amended Information; to-wit: counts I, II, and III, Attempted Murder in the first degree and count IV, Burglary in the first degree. 24 RP 4210-11; CP 1387-90. In 1987 the standard ranges for these crimes were the same as they are today. Pursuant to RCW 9.94A.589 (formerly RCW 9.94A.400), Stein's offender score for counts I, II, and III (serious violent offenses) is calculated by counting only prior or other current offenses that are not serious violent offenses, and other current offenses that are not part of the same criminal conduct as any other current offenses. Because counts IV and III are based on the same criminal conduct, count IV does not count as a separate point in Stein's offender score. And because counts I, II, and III are all serious violent offenses, Stein's offender score is zero. However, pursuant to the law in effect at the time of these crimes, a defendant sentenced for three or more serious violent offenses shall be ordered to serve those sentences consecutively.

Whenever a person is convicted of three or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and distinct criminal conduct, the sentence range for the offense with the highest seriousness level

under RCW 9.94A.320 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the sentence range for other serious violent offenses shall be determined by using an offender score of zero. The sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

Prior RCW 9.94A.400(b) recodified as RCW 9.94A.589(1)(b) (now only requires two current serious violent offenses).

Therefore, the standard ranges for counts I, II, and III are 180 to 240 months each.² Pursuant to former RCW 9.94A.400(1)(b), those counts shall run consecutively. Stein's offender score for count IV is 4, giving him a standard range of 36 to 48 months. Count IV is required to run concurrently with the other sentences.

Stein claims based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2005), that the determination of whether Stein's convictions arise from separate and distinct criminal conduct is a question of fact that must be determined by a jury. However, our Supreme Court recently found otherwise in two opinions that were issued subsequent to the filing of Stein's Opening Brief. The Court held the determination in question may properly be made by the judge. *State v.*

² Standard range is 75% of the standard range for Murder 1; 240-320 months.

Louis, 155 Wn.2d 563, 120 P.3d 936 (2005); *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005) (the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense). Therefore, the consecutive, standard range sentences imposed by the trial court were not in error.

G. The Trial Court Imposed A Standard Range Sentence On Stein, Which Was Not Vindictive.

A trial court retains broad discretion to impose a sentence within the standard range following a remand. *State v. Barberio*, 66 Wn. App. 902, 908, 833 P.2d 459 (1992), *affirmed*, 121 Wn.2d 48, 846 P.2d 519 (1993). A harsher sentence is not presumed to be vindictive when a different judge imposes a harsher sentence following remand, as that judge is not the judge who believed the original sentence was appropriate. *State v. Parmalee*, 121 Wn. App. 707, 711-12, 90 P.3d 1092 (2004).

Further, it is proper for a judge to consider factors that occurred subsequent to the prior conviction in deciding the appropriate sentence following remand. *State v. White*, 123 Wn. App. 106, 114-15, 97 P.3d 34 (2004) (court allowed to consider defendant's prison infraction record following prior conviction).

Following the trial in 1989, the trial judge imposed a sentence at the low end of the sentencing range, despite the State's request for a sentence at the top of the range. 25 RP 4232-33. Consistent with the previous request, the State in 2004 asked for the same top of the range sentence. *Id.*

Rather than granting the State's request, the court imposed a sentence just above the midpoint of the range. 25 RP 4256. In doing so, the court emphasized several factors that supported such a sentence.

I think this is a case that warrants punishment for each of the offenses.

...

I do think that they were motivated by greed. I think that the motivation was to remove people who – or one person who was involved in the estate of Mr. Stein's father. And I see nothing in the record that indicates that there were – the persons who were the object of your contempt were acting inappropriately or somehow not in the best interest of your father.

I think they were acting to protect his estate and that there was a concern that they were – by you, Mr. Stein, that they were blocking your efforts.

These crimes also involved other people. And they were done at the request of Mr. Stein. He wasn't the mastermind in the sense that he planned the specifics of these offenses, these crimes, but he did solicit their activities and their efforts.

Finally, there is so much lack of introspection by Mr. Stein. He simply doesn't see the facts of this case as others have seen it. I think that in his sentencing remarks

that he is – he has addressed whether or not he feels the jury was correct, whether the Court was correct in its rulings, but I didn't hear anything about his feelings for Mr. Hall nor Mrs. Hall.

The notion that napalm couldn't have caused a fire which resulted in death shows really how out of touch he is with the seriousness of these crimes.

25 RP 4256-57

The total standard range was 540 to 720 months. The State requested the same sentence it had requested in 1989; the top of the range of 720 months. The court gave a mid range sentence of 660 months, which is 5 years less than the top of the range requested by the State. Therefore, it cannot be presumed a vindictive sentence, especially in light of the valid reasons cited by the court.

H. The Trial Court Corrected An Error In The Judgment And Sentence By Entering An Order Modifying Judgment And Sentence Correctly Stating The Total Confinement Time Of 660 Months, Making This Issue Moot.

At the request of the Washington State Department of Corrections, and with the concurrence of the State and Stein's attorney, the trial court entered an Order Modifying Judgment and Sentence on December 7, 2004, correcting Section 4.5 (a), page 6 of the Judgment and Sentence.

CP __, subnumber 1209³. That order modifies the total confinement time to 660 months, as ordered by the court. Therefore, this issue is moot.

III. CONCLUSION

The trial court properly exercised its discretion in finding there was no actual prejudice to Stein's right to a fair trial. The doctrine of collateral estoppel prevented Stein from re-litigating issues previously decided against him. Evidence of the murder of Thelma Lund and other crimes committed by Stein were properly admitted to prove his guilt for the charged crimes. The trial court properly exercised its discretion in admitting the testimony of attorneys, the former testimony of deceased witnesses, and the statements of Stein's co-conspirators. And Stein received a legally correct and fair sentence for his crimes. Based on the foregoing arguments, the State respectfully asks this Court to affirm Stein's convictions.

RESPECTFULLY SUBMITTED this 3rd day of January, 2006.


LANA S. WEINMANN
Assistant Attorney General
WSBA #21393

³ Order Modifying Judgment and Sentence attached as Appendix B.

APPENDIX A

FILED

MAY 17 2004

JoAnne McBride, Clerk Clark Co

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

IN COURT RECORD

In re: The State of Washington vs Jack Stein

Atty: Lana Weinmann & Melanie Tratnik	Atty: Suzan Clark & Linda Staples
Cause No.: 88-1-00788-8	Clerk: Sharon Ferguson
Judge: James Stonier	Reporter: Video 9:38 AM
Date: 05-17-04	Hearing Type: Motions

PROCEEDINGS & DECISIONS

Parties present in Court are Lana Weinmann and Melanie Tratnik

Mr. Stein informs the Court that he will be proceeding to trial with Suzan Clark as lead counsel and Linda Staples assisting Ms. Clark. Mr. Stein informs the Court that Mr. McCool will be available to examine several witnesses.

The Court informs Mr. Stein that any work Mr. McCool will perform will be Pro Bono and it will be at the discretion of Ms. Clark.

The Court and counsel discuss the schedule of witnesses and the time allowed for all. The Jury Questionnaire will be given to the Prospective Jurors when they come in on Thursday of this week. The Court requests that we start with 60 Prospective Jurors.

Suzan Clark requests an order to allow counsel to obtain the Jury Book from Court Administration before date of trial. The Court grants the request.

The Court will allow the Jurors to be brought in on Thursday to complete the questionnaire and then the Questionnaires will be available on Friday by 10:00 am to counsel.

Ms. Clark requests information as to the Court's method of jury selection. The Court will put a two-day time limit on selection and the Court will seat two alternates. There will not be time limits put on counsel's voir dire at this time.

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Pre-trial motions - Ms. Clark and Ms. Weinmann have several matters for the Court to hear regarding previous rulings. They need to have several items clarified before trial and also establish how certain issues will be resolved with or without the Jury present in the courtroom.

The State asks for no mention of the former acquittal - Court hears argument on this matter. Ms. Clark presents a proposed Jury Instruction on this issue.

Post trial actions - The State and Defense agree upon the matters that are procedural and statements of witnesses. Affidavits can be identified as an Affidavit from a prior proceeding.

Ms. Clark will provide statements from the people identified by Ms. Weinmann.

The purpose of calling Roger Bennett will be to establish what deals were made during his time in the PA's Office with Jack Stein.

The Clerk will remark exhibits from the 1989 trial.
The State provided the Court will the Power Point Presentation.

The Courts explains his procedures during trial. There will be no talking objections. All objections are to be specific by counsel to the Court.

There will be no interaction between spectators and participants during the trial. This can only happened in the absence of the Jury.
All parties will refer to each other by Ms. or Mr.
Counsel are not to say "thank you" after the Court has made a ruling.

Ms. Clark speaks to the Court as to Mr. Stein's blood pressure
The court will allow a furlough for Mr. Stein for medical appointments to deal with his blood pressure.

The Court has previously excluded Bethany Norberg-Stein. She will be allowed in after she has given her testimony.

All witness will be excluded from the courtroom.

APPENDIX B

CMJ-0-04
12-9-04
FSL

RECEIVED

DEC 09 2004

CRIMINAL JUSTICE DIVISION
ATTORNEY GENERAL'S OFFICE

FILED

DEC 07 2004

JoAnne McBride, Clerk, Clark Co.

**STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

NO. 88-1-00788-8

Plaintiff,

ORDER MODIFYING
JUDGEMENT AND SENTENCE

v.

JOHN KENNETH STEIN, aka
JACK STEIN,

Defendant.

ORDER

THIS MATTER having come on before the undersigned Judge of the above-entitled court upon the court's own motion, and having considered the request of the Department of Corrections to clarify the total confinement time ordered in Section 4.5(a), page 6 of the Judgment and Sentence entered August 16, 2004, and having conferred with counsel for the state, Lana Weinmann, and counsel for the defendant, Suzan Clark, therefore,

IT IS ORDERED that Section 4.5(a), page 6 of the Judgment and Sentenced entered August 16, 2004 is modified in part to read as follows:

"Actual number of months of total confinement ordered is: 660."

IT IS FURTHER ORDERED that the Clerk of the court shall transmit a copy of this order to the Department of Corrections and to:

1 Becky Price, CRS
2 Monroe Correctional Complex/WSR
3 PO Box 777
4 Monroe, WA 98272

5 DATED this 3 day of ^{December}~~November~~, 2004.

6 
7 JUDGE JAMES STONIER

8 Approved:

9 
10 Lana Weinmann, WSBA# 21393
11 Assistant Attorney General

12 
13 Suzan Clark, WSBA# 17476
14 Attorney for Defendant

NO. 31980-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN KENNETH STEIN,
a.k.a, JACK STEIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

2006 JAN -3 PM 4:52

COURT OF APPEALS
CLERK'S OFFICE

VICTORIA ANTHONY declares as follows:

On Tuesday, January 03, 2006, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

NANCY P. COLLINS
DAVID L. DONNAN
WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE, SUITE 701
SEATTLE, WA 98101

Copies of the following documents :

- 1) RESPONDENT'S OPENING BRIEF; 2) MOTION TO FILE OVERLENGTH RESPONDENT'S BRIEF; 3) MOTION TO SUPPLEMENT VERBATIM REPORT OF PROCEEDINGS; 4) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS and 5) DECLARATION OF SERVICE.

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FILED
COURT OF APPEALS
CLERK'S OFFICE

06 JAN -3 AM 9:42

STATE OF WASHINGTON

BY *Kg*

DEPUTY

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

RESPECTFULLY SUBMITTED this 3rd day of January, 2006,
at Seattle, Washington.


VICTORIA ANTHONY
Legal Assistant