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DIVISION II
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No. 35623-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Terry Robinson,

Appellant.

Lewis County Superior Court

Cause No. 06-1-00068-9

The Honorable Judges H. John Hall and Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Robinson's second trial violated his constitutional right not to be twice put in jeopardy for the same offense.
2. The trial court erred by discharging the first jury without Mr. Robinson's consent.
3. The trial court erred by discharging the first jury without finding that discharge was necessary to the proper administration of public justice.
4. The trial court erred by discharging the first jury without making a finding of manifest necessity.
5. The trial court erred by discharging the first jury without finding that extraordinary and striking circumstances required discontinuation of the trial, in order to obtain substantial justice.
6. The trial judge's decision to discharge the first jury violated Mr. Robinson's constitutional right to a verdict from the jury that began deliberations on his case.
7. The trial court violated Mr. Robinson's constitutional right to due process by giving an erroneous accomplice instruction.
8. The trial court's accomplice instruction was erroneous because it did not require the jury to find that Mr. Robinson had committed an overt act.
9. The trial court's accomplice instruction was erroneous because it was internally inconsistent.
10. The trial court erred by giving Instruction No. 5, which reads as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. Instruction No. 5, Supp. CP.

11. Mr. Robinson's constitutional right to confront the witnesses against him was violated by the admission of testimonial hearsay.

12. The trial court erred by admitting the prior testimony of Mr. Steel without finding that Steel was legally unavailable.

13. The trial court erred by admitting the prior testimony of Mr. Steel without finding that the prosecution had used good faith in attempting to secure Steel's presence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Terry Robinson was charged with Theft in the First Degree and Trafficking in Stolen Property. On the third day of trial, it came out that the bailiff had communicated with a juror, then the state, about evidence the jury would like to see presented during the trial. Without any inquiry of the jurors, the judge declared a mistrial over defense objection.

Mr. Robinson was convicted of both charges at a second trial.

1. Did Mr. Robinson's second trial and his convictions for Theft in the First Degree and Trafficking in Stolen Property violate his constitutional right not to be twice put in jeopardy for the same offense? Assignments of Error Nos. 1-6.

2. Did the trial court err by discharging the first jury without Mr. Robinson's consent? Assignments of Error Nos. 1-6.

3. Did the trial court err by discharging the first jury without asking the bailiff anything about what had transpired between him and the jury? Assignments of Error Nos. 1-6.

4. Did the trial court err by discharging the first jury without asking the jurors anything about what had transpired between them and the bailiff? Assignments of Error Nos. 1-6.

5. Did the trial court err by discharging the first jury without finding that discharge was necessary to the proper administration of public justice? Assignments of Error Nos. 1-6.

6. Did the trial court err by discharging the first jury without making a finding of manifest necessity? Assignments of Error Nos. 1-6.

7. Did the trial court err by discharging the first jury without finding that extraordinary and striking circumstances required discontinuation of the trial, in order to obtain substantial justice? Assignments of Error Nos. 1-6.

8. Did the trial judge's decision to discharge the first jury violate Mr. Robinson's constitutional right to a verdict from the jury that began deliberations in his case? Assignments of Error Nos. 1-6.

At the second trial, the court gave an accomplice instruction which was inconsistent and contained a clear misstatement of the law. The first part of the instruction required the jury to find that Mr. Robinson aided or agreed to aid his codefendant in the commission of the crimes. The second part of the instruction allowed conviction if Mr. Robinson was present and silently approved of the crimes, even if he took no action and did not express his assent.

9. Was Mr. Robinson denied due process by the trial court's erroneous accomplice instruction? Assignment of Error Nos. 7-10.

10. Did the court's erroneous accomplice instruction improperly allow conviction without proof of an overt act? Assignment of Error Nos. 7-10.

11. Was the trial court's accomplice instruction internally inconsistent? Assignment of Error Nos. 7-10.

12. Did the inconsistency in Instruction No. 5 result from a clear misstatement of the law? Assignment of Error Nos. 7-10.

The prosecution subpoenaed the alleged victim, Daniel Steel, to testify at Mr. Robinson's first trial. Steel testified and was excused. The state did not re-issue a subpoena to secure Steel's attendance at the second trial, and he did not appear to testify. Over Mr. Robinson's objection, the court allowed the state to introduce a transcript of Steel's testimony from the first trial.

13. Did the trial court violate Mr. Robinson's constitutional right to confront witnesses by admitting testimonial hearsay at his second trial? Assignment of Error Nos. 11-13.

14. Did the trial court err by admitting testimonial hearsay without finding that the witness was legally unavailable? Assignment of Error Nos. 11-13.

15. Did the trial court err by admitting testimonial hearsay without finding that the state exercised good faith in attempting to secure the witness' attendance? Assignment of Error No. 11-13.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Terry Robinson was charged with Theft in the First Degree and Trafficking in Stolen Property. CP 24-26. On the third day of trial, the prosecutor revealed that the bailiff had told the state's attorney that the jury wanted to see a certain piece of evidence introduced. RP (9/8/06) 68-69. The state moved for a mistrial, and the defense objected. RP (9/8/06) 68-72. Without hearing from the bailiff or any of the jurors, the court declared a mistrial and excused the jury. RP (9/8/06) 68-72. Mr. Robinson moved to dismiss the prosecution on double jeopardy grounds. RP (11/9/06) 17, RP (11/14/06) 2-19. His motion was denied. RP (11/14/06) 15-19.

The case went to trial a second time. RP (11/20/06) 5-150, RP (11/21/06) 5-100. At the second trial, Mr. Daniel Steel, the alleged victim, did not appear to testify. RP (11/20/06) 5-150, RP (11/21/06) 5-100. He had been excused from further attendance following his testimony at the first trial, and the state did not issue a new subpoena prior to the second trial. RP (11/14/06) 19-24, RP (11/17/06) 2-21, RP (11/20/06) 39-68. The state moved to admit a transcript of his testimony from the first trial. RP (11/14/06) 19-24, RP (11/17/06) 2-21. Defense counsel objected, but the court overruled the objection and admitted the prior testimony. RP

(11/17/06) 2-21, RP (11/20/06) 39-68. The court commented that “it appears to me that Mr. Steel is unavailable”, but did not make a finding that he was legally unavailable. Nor did the court find that the prosecutor had acted in good faith in attempting to secure Steel’s presence. RP (11/17/06) 15-22.

At the conclusion of trial, the court gave the following instruction regarding accomplice liability, without defense objection:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of that particular crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. Instruction No. 5, Supp. CP.

The second jury convicted Mr. Robinson on both counts. He was sentenced on both convictions, and he appealed. CP 14-23, 3-13.

ARGUMENT

I. MR. ROBINSON’S CONVICTIONS VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. A similar prohibition is set forth in Article I, Section 9 of the Washington Constitution. Wash. Const. Article I, Section 9. Both constitutions protect an individual from being held to answer multiple times for the same offense:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Double jeopardy prevents retrial following an acquittal “even though ‘the acquittal was based upon an egregiously erroneous foundation.’” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), *citing Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). The constitutional prohibition against double jeopardy “also embraces the defendant’s ‘valued right to have his

trial completed by a particular tribunal.” *Arizona v. Washington*, 434 U.S. at 503, quoting *Wade v. Hunter*, 336 U.S. 684, at 689, 69 S. Ct. 834, 93 L.Ed. 974, (1949). A second prosecution may be grossly unfair, even if the first trial is not completed:

[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. *Arizona v. Washington*, 434 U.S. at 504-05, footnotes omitted.

Historically, English judges had the power to discharge juries “whenever it appeared that the Crown’s evidence would be insufficient to convict.” *Arizona v. Washington*, 434 U.S. at 507-08. The constitutional prohibition against double jeopardy in the U.S. “was plainly intended to condemn this ‘abhorrent’ practice.” *Arizona v. Washington*, 434 U.S. at 507-08. Accordingly, the double jeopardy clause protects a defendant “against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where ‘bad-faith conduct by judge or prosecutor’ threatens the ‘[harassment] of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict’ the defendant.” *United States v.*

Dinitz, 424 U.S. 600 at 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976),
citations omitted.

Since discharging the jury inevitably implicates the double jeopardy clause, a trial court's discretion to declare a mistrial is not unbridled. *Arizona v. Washington*, 434 U.S. at 514; *State v. Juarez*, 115 Wn. App. 881 at 889, 64 P.3d 83 (2003). Discharge of the jury without first obtaining the accused's consent is equivalent to an acquittal, unless such discharge is necessary to the proper administration of public justice. *Juarez*, at 889. A mistrial frees the accused from further prosecution, unless prompted by "manifest necessity." *Juarez*, at 889. To justify a mistrial, "extraordinary and striking circumstances" must clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Juarez*, at 889. The extraordinary and striking circumstances upon which the judge relies must have a factual basis in the record. *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982).

In this case, Mr. Robinson's conviction following a second trial violated double jeopardy.

First, Mr. Robinson objected to discharge of the original jury. Supp. CP, RP (11/14/06) 5-21. Accordingly, the discharge was equivalent to an acquittal unless supported by "extraordinary and striking

circumstances” indicating that substantial justice could not be obtained without discontinuing the trial. *Juarez, supra*, at 889.

Second, the mistrial was brought on by misconduct of the bailiff, an employee of the court. RP (9/8/06) 68-72. Although the judge has ultimate authority over the jury, “the bailiff is viewed by the jury as speaking on behalf of the judge.” *State v. Johnson*, 125 Wn. App. 443 at 461, 105 P. 3d 85 (2005). As an officer of the court and the judge’s representative, a bailiff “is generally forbidden to communicate with the jury during its deliberations, except to inquire if the jury has reached a verdict.” *State v. Yonker*, 133 Wn. App. 627 at 635, 137 P.3d 888 (2006), *citing* RCW 4.44.300. The bailiff’s improper communication with the jury caused the judge to declare the mistrial. Because the bailiff is an employee of the court and a representative of the judge, these actions fall squarely within the rule set forth in *Dinitz, supra*:

[Double jeopardy] bars retrials where ‘bad-faith conduct by judge or prosecutor’ threatens the ‘[harassment] of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict’ the defendant.

Dinitz, 424 U.S. at 611.

By winning for the prosecutor a second crack at Mr. Robinson with improper feedback gleaned from the first jury, the bailiff (and hence the

trial judge) violated Mr. Robinson's constitutional right to be free from double jeopardy.

Third, the trial court's decision to discharge the jury and declare a mistrial lacked a proper factual basis. Although the trial court's "Order of Mistrial" stated that the mistrial was "based on jury misconduct," this conclusion is not supported by the record. Supp. CP. The only "facts" before the court were those contained in the prosecuting attorney's summary of what he'd learned from the bailiff. RP (11/14/06) 5-21.

The court did not hear directly from the bailiff, and did not make any inquiry of the jurors. It is possible that the bailiff simply overheard a juror musing aloud, or that the bailiff engaged a single juror in improper conversation, outside the hearing of the other jurors. It is also possible that the bailiff expressed his personal opinion on what he thought the jury would want to hear, and that counsel misunderstood. None of these situations necessarily warrant a mistrial. If only one juror were involved, the court could have excused that juror and proceeded without an alternate. Supp. CP, Trial Minutes. If more than one juror were involved, Mr. Robinson could have agreed to a trial by fewer than twelve. Unfortunately, by declaring a mistrial and discharging the jury without developing the record, the trial court foreclosed any alternatives that would have allowed Mr. Robinson to be tried by the jury he'd selected.

Fourth, the trial court did not make the findings necessary to support discharge of the jury and declaration of a mistrial. He did not find that discharge of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking circumstances that required discontinuation of the trial to obtain substantial justice. *Juarez at 889, Supp. CP.*

For all these reasons, Mr. Robinson's second trial violated his constitutional rights under the double jeopardy clause. Accordingly, his convictions must be reversed and the case dismissed with prejudice. *Jones, supra.*

II. THE TRIAL COURT'S ACCOMPLICE INSTRUCTION VIOLATED MR. ROBINSON'S CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE IT ALLOWED CONVICTION WITHOUT EVIDENCE OF AN OVERT ACT.

Under RCW 9A.08.020, a person may be convicted as an accomplice if he, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime," either "(i) solicits, commands, encourages, or requests [another] person to commit it; or (ii) aids or agrees to aid [another] person in planning or committing it." The statute does not define "aid."

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198 at 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, he must

say or do something that carries the crime forward. *State v. Peasley*, 80 Wash. 99 at 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
State v. Peasley, 80 Wash. 99 at 100, 141 P. 316 (1914).

Similarly, in *State v. Renneberg*, 83 Wn.2d 735 at 739, 522 P.2d 835 (1974), the Supreme Court upheld an instruction that included the following language: “to aid and abet may consist of words spoken, or acts done...” In reaching its decision, the Court noted that an instruction is proper if it requires ““some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.”” *Renneberg*, at 739-740, quoting *State v. Redden*, 71 Wn.2d 147 at 150, 426 P.2d 854 (1967). In the absence of physical action, conviction of a crime as an accomplice requires some *expression* of assent.

Here, the trial court’s instruction on accomplice liability allowed the jury to convict if it believed Mr. Robinson was present and silently approved of his codefendant’s crime, even if he was not prepared to assist.

The court instructed the jury as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally

accountable. A person is legally accountable for the conduct of another when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of that particular crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Instruction No. 5, Supp. CP.

Instruction No. 5 explicitly defines "aid" to include assistance given by presence. This portion of the instruction allowed the jury to convict Mr. Robinson if he was present and approved of a codefendant's crimes, whether or not he said or did anything to communicate that approval and whether or not he was willing to assist. Because of this, the instruction violates the "overt act" requirement of *Peasley, supra* and *Renneberg, supra*.

The second and third sentences of the paragraph defining "aid" do not correct this problem. The second sentence ("A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime") identifies one situation that meets the definition of "aid," but does not purport to exclude other possible examples. Thus a

person who is present and unwilling to assist, but who approves of the crime, may be convicted if she or he knows his presence will promote or facilitate the crime. Accordingly, even with this last sentence included, Instruction No. 5 is incorrect: it does not prohibit jurors from concluding that presence plus silent assent or silent approval constitutes “aid,” even where the alleged accomplice is unwilling to assist.

Similarly, the third sentence of the paragraph defining “aid” fails to save the instruction as a whole. Although the third sentence (“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice”) excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent assent or silent approval. Even with the third sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed Mr. Robinson to be convicted as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

III. THE TRIAL COURT’S ACCOMPLICE INSTRUCTION WAS INTERNALLY INCONSISTENT.

When jury instructions are inconsistent, a reviewing court must determine whether the jury was misled as to its function and responsibilities. *State v. Walden*, 131 Wn.2d 469 at 478, 932 P.2d 1237 (1997), citing *State v. Wanrow*, 88 Wn.2d 221 at 239, 559 P.2d 548 (1977); see also *State v. Carter*, 127 Wn. App. 713 at 718, 112 P.3d 561 (2005). Where the inconsistency is the result of a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *Walden, supra*, at 469. In such circumstances, the defendant is entitled to a new trial unless the error can be shown to be harmless beyond a reasonable doubt. *Walden, supra*, at 478. Instructional error is harmless only if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Walden*, at 478.

As noted above, a person is guilty as an accomplice if he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime,” either “(i) solicits, commands, encourages, or requests [another] person to commit it; or (ii) aids or agrees to aid [another] person in planning or committing it.” RCW 9A.08.020. Some overt act is required

for conviction; a person may not be convicted based on their mental state alone, even if they are present at the scene of the crime. *Peasley, supra*; *Renneberg, supra*.

Instruction No. 5 was internally inconsistent. The second paragraph of the instruction, which was based on RCW 9A.08.020, required the jury to find that Mr. Robinson aided or agreed to aid another in the commission of the crime. Under this language, the jury was permitted to convict if it found that Mr. Robinson took some action or expressed his assent to his codefendant's crime. However, the paragraph defining "aid" removed the requirement of action or assent, allowing conviction if Mr. Robinson provided aid simply by being "present," even if he took no action and expressed no assent to the crime. Supp. CP.

The conflict between the second and third paragraphs is based on a clear misstatement of the law. A person may not be convicted based on presence alone, even if they assent to a crime, unless they give some expression of their assent. For example, a journalist who covers trespassing antiwar protesters may personally approve of the protesters' cause and their (illegal) strategy. Such a journalist would likely know that media presence encourages the illegal activity. But arresting, charging, and convicting the journalist would violate the First Amendment.

Similarly, an audience that observes trespassing antiwar protesters might include people who silently approve, people who silently disapprove, and people who are silent and neutral about the protest. Under the last paragraph of Instruction No. 5, a person who silently approves of the illegal activity with knowledge that her or his presence encourages the illegal activity could be arrested, charged, and convicted. Those who silently disapprove, or who are silent and neutral could not be prosecuted, even if they know their presence encourages the activity. This paragraph of Instruction No. 5 allows punishment based on a person's thoughts, and violates the First and Fourteenth Amendments.

Because the inconsistency results from a clear misstatement of the law, it is presumed to have misled the jury in a manner prejudicial to Mr. Robinson. *Walden, supra, at 469*. He is therefore entitled to a new trial. *Walden, supra, at 478*. His conviction must be reversed and the case remanded to the trial court for a new trial.

IV. THE ERRONEOUS ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. SHERMAN'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the states through the Due Process Clause of the

Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 at 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV. A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990). Alleged violations of the confrontation clause are reviewed *de novo*. *State v. Medina*, 112 Wn.App. 40 at 48, 48 P.3d 1005 (2002); *U.S. v. Mayfield*, 189 F.3d 895 at 899 (9th Cir., 1999).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). Testimony from a prior hearing is testimonial hearsay. *See Davis v. Washington*, 126 S. Ct. 2266, 165 L.Ed. 2d 224, 74 U.S.L.W. 4536 (2006) (“[T]estimonial statements of the most formal sort [include] sworn testimony in prior judicial proceedings,” *Davis v. Washington* at 2275-2276). A witness is not unavailable unless the state has made a good faith effort to obtain her or his presence at trial. *Ohio v. Roberts*, 448 U.S. 56 at 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *overruled on other grounds by Crawford, supra*; *see also Barber v. Page*, 390 U.S. 719 at 724-725, 88 S.Ct. 1318, 20 L.Ed 2d 255 (1968); *Whelchel v. Washington*, 232 F.3d 1197 at 1209 (9th Cir. 2000). Good faith means “untiring efforts in good earnest... a thorough, painstaking and systematic

attempt to locate the [witness].” *State v. Rivera*, 51 Wn. App. 556 at 559, 754 P. 2d 701 (1988), *internal quotation marks and citations omitted*. The state is not required to perform a futile act, but “if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.” *State v. Young*, 129 Wn. App. 468 at 481, 119 P.3d 870 (2005), *internal quotation marks and citations omitted*.

The unavailability of a witness and the reasonableness of the state’s efforts to secure her or his attendance are mixed questions of fact and law. *See Hamilton v. Morgan*, 474 F.3d 854 at 858 (6th Cir. 2007). Although the trial court’s findings of fact are entitled to deference, the ultimate issue of unavailability and reasonableness are subject to *de novo* review. *Hamilton v. Morgan, supra*; *see also McCandless v. Vaughn*, 172 F.3d 255 at 265 (3d Cir. 1999); *Windham v. Merkle*, 163 F.3d 1092 at 1102 (9th Cir. 1998); *Jennings v. Maynard*, 946 F.2d 1502 at 1504 (10th Cir. 1991). *But see State v. Hacheney*, ___ Wn. App. ___, 158 P.3d 1152 at 1162 (2007) (reviewing unavailability as a question of fact entitled to deference).

Here, the prosecutor did not fulfill his good faith obligation to secure Steel’s presence. Steel was subpoenaed for the first trial; however, he testified on September 7, 2006, and was excused. RP (9/7/06) 44.

Instead of issuing a new subpoena and attempting to serve Steel, the prosecutor sent Steel a letter with the new trial date, attempted to reach him by phone, and sent a deputy to his house one time. RP (11/17/06) 5-17, Supp. CP. Over Mr. Robinson's objection, the court granted the prosecution's motion to introduce Steel's testimony from the first trial. RP (11/17/06) 19-21. The trial court did not find that the prosecution had acted in good faith, and did not make a finding that Steel was legally unavailable. RP (11/17/06) 19-21.

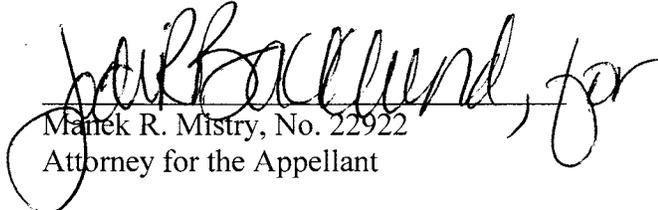
Because Steel was not unavailable, the introduction of his testimony from the first trial violated Mr. Robinson's constitutional right to confront the witnesses against him under *Crawford*. The convictions must be reversed and the case remanded to the trial court for a new trial.

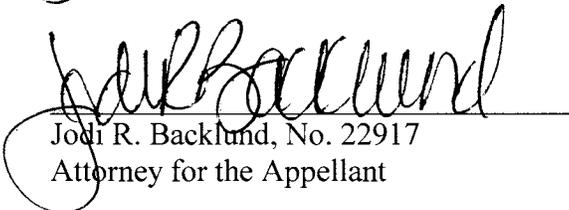
CONCLUSION

For the foregoing reasons, both counts must be vacated and the charges dismissed with prejudice. In the alternative, Mr. Robinson's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on July 19, 2007.

BACKLUND AND MISTRY


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CERTIFICATE OF MAILING ✓

I certify that I mailed a copy of Appellant's Opening Brief to:

Terry E. Robinson
P.O. Box 328
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and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 19, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 19, 2007.



Jodi R. Backlund, No. 22917
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