

NO. 36150-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN D. BRIGHTMAN,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Retrial on the charge of first degree murder violated appellant's constitutional right to be free from double jeopardy.

2. Repeated reference to the deceased as the "victim" invaded the province of the jury, violated the presumption of innocence, and denied appellant a fair trial.

3. Improper admission of testimony to impeach appellant on a collateral matter denied him a fair trial.

4. The trial court denied appellant due process by admitting newly discovered evidence without affording the defense an adequate opportunity to investigate.

5. Use of an aggressor instruction deprived appellant of his ability to argue excusable homicide.

6. Cumulative error denied appellant a fair trial.

Issues pertaining to assignments of error

1. Where the jury was given a full and fair opportunity to reach a verdict on first degree murder but was unable to agree and found appellant guilty of second degree murder, did the court's discharge of the jury terminate jeopardy as to the first degree murder charge, barring retrial?

2. Appellant was charged with murdering the deceased but presented a defense that the killing was excusable. Where the commission of a crime was in dispute, was appellant denied a fair trial when the state and its witnesses were permitted to give their opinions that a crime had been committed and appellant was guilty by referring to the deceased as “the victim”?

3. Appellant testified that he worked off and on for a painting company but was not working on the day of the shooting. Where appellant did not assert an alibi defense and there was no evidence making appellant’s financial situation relevant, was testimony from the owner of the painting company that appellant did not work for him impermissible impeachment on a collateral matter?

4. On the last day of the state’s case, the state notified the defense that it would present newly discovered evidence which conflicted with the defense that appellant shot the deceased accidentally. Where defense counsel indicated he needed time to investigate the new witness before he could adequately cross examine her, did the court deny appellant due process by refusing to grant a continuance?

5. Appellant testified that he was fighting with the deceased when his gun went off accidentally. Appellant testified that the deceased threw the first blow, and there was no evidence contradicting this

testimony. Where there was no evidence appellant provoked the fight, did the court improperly give an aggressor instruction?

6. Did cumulative error deny appellant a fair trial?

B. STATEMENT OF THE CASE

On October 1, 1998, Dexter Villa died of a gunshot to the head after fighting with appellant Nathan Brightman. Brightman was charged with first degree murder and unlawful possession of a firearm, and the case went to trial in 1999. CP 1-6. The jury found him guilty of second degree murder, and he pleaded guilty to the possession charge. CP 7-16, 18. The Washington Supreme Court reversed Brightman's conviction and remanded for a new trial. State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005). Brightman was retried on the first degree murder charge. The following evidence was presented at the second trial in January and February 2007, before the Honorable Frank E. Cuthbertson.

Nathan Brightman was 19 years old in the fall of 1998. 8RP¹ 1032. He lived in a house in Gig Harbor owned by his mother. 8RP 1033. He and his two roommates, James Levasque and Jay Benson, split the rent, each paying \$300, and they paid most of the time. 8RP 1034-35.

¹ The Verbatim Report of proceedings is contained in 21 volumes, designated as follows: 1RP—12/4/06; 2RP—1/4/07; 3RP—1/9/07; 4RP—1/17/07; 5RP—1/18/07; 6RP—1/22/07; 7RP—1/23/07; 8RP—1/24/07; 9RP—1/29/07; 10RP—2/1/07; 11RP—2/5/07; 12RP—2/6/07; 13RP—2/7/07; 14RP—2/8/07; 15RP—2/12/07; 16RP—2/13/07; 17RP—2/14/07; 18RP—2/15/07; 19RP—2/20/07; 20RP—3/2/07; 21RP—5/4/07.

On October 1, 1998, Brightman planned to spend the day visiting his grandmother, who was in the hospital in Tacoma. 8RP 1039. Brightman decided to carry a gun that day because he and his 17-year-old roommate Benson had been harassed by some people who said they were gang members. 8RP 1091-92. Brightman had taken the gun from Benson a week or two earlier, because he did not want Benson taking the gun to school and getting in trouble. 8RP 1042-43. Brightman had fired the gun only once. 8RP 1045. Before he left the house, Brightman removed the clip from the gun and placed it in his left pants pocket, then placed the gun in a pouch, which he carried in his jacket pocket. 8RP 1042, 1048-49. Brightman did not believe the gun was loaded. 8RP 1044.

Brightman did not have a car, so Levasque drove him to Tacoma. 8RP 1037, 1040. After dropping Levasque's car off at his mother's house, they took a bus to the hospital. 8RP 1049. On the bus, Brightman removed the gun from the pouch because it was too heavy for his jacket and placed it in his right pants pocket. 8RP 1050.

Brightman visited his grandmother for a short time, and then he and Levasque called some friends, Paul Moritz and Jeremy Crawford, to pick them up. 8RP 1052. They went back to Moritz's apartment. 8RP 1054. Brightman was bored, so he started playing with the gun. He put

the clip in, ejected all the bullets, and then replaced them. When he was done, he took the clip back out and placed in his pocket. 8RP 1055, 1075.

Brightman's friends planned to drive to Port Orchard to buy some marijuana, but Brightman preferred to go home. 8RP 1055. Crawford drove Brightman to the transit center so he could take a bus to Gig Harbor, stopping first at an ATM so Brightman could withdraw some cash. Brightman first tried to withdraw \$50, but he did not have enough money in his account, so he withdrew \$40. 8RP 1057. By the time they got to the transit center, Brightman had just missed the 2:45 bus. 8RP 1061.

Rather than waiting until 3:45 for the next bus, Brightman decided to try to find a ride home. 8RP 1061-62. He saw two men talking in parking lot of Tacoma Community College, adjacent to the transit center, and he approached them. 8RP 1062-63. The two men, Mark Skaggs and Dexter Villa, were talking about their cars, and Brightman tried to join the conversation. 8RP 1063; 10RP 1183. Brightman first asked Skaggs for a ride, offering him money for gas, but Skaggs said he had to get to class. 8RP 1064; 10RP 1184. When Skaggs left, Villa agreed to give Brightman a ride. 8RP 1065.

Brightman explained² that as they were driving, they started talking about marijuana. Brightman asked Villa if he could get him some, and Villa said he could. He gave Villa \$7 for gas and another \$20 for marijuana. Villa's girlfriend of four months testified she had never seen any indication Villa used or possessed marijuana. 11RP 1331. Villa's employer never observed anything that caused him to believe Villa was involved with marijuana. 12RP 1569. No marijuana was found in Villa's car, and there was no marijuana in his system when he died. 10RP 1283; 11RP 1421.

Villa then drove toward Titlow Park. 8RP 1067. He drove toward the pool, turned the car around, and then backed into a small parking area. There were two people in a car next to them, and Brightman believed they were the people Villa was meeting to obtain the marijuana. 8RP 1068-69. When they parked, however, Villa told Brightman to get out of the car. Brightman said he would not leave until he got his money back, and Villa again told him to leave, leaning over to open the door. When Brightman pushed Villa's hand away, Villa hit Brightman in the eye. Villa continued to hit Brightman, and Brightman yelled for help. He tried to fight back, but the seatbelt across his chest was stopping him. 8RP 1070-71.

² Brightman testified at the first trial, and the state introduced his former testimony in its case-in-chief at the retrial. 8RP 1032.

Sean Reilly and Alan Benarczyk were parked in the turn-out near Titlow Park, after spending the afternoon driving around using crack cocaine, when Villa's car arrived. 7RP 785-89. Reilly heard arguing in the car and observed what he thought was confrontational body language. 7RP 794. He saw the passenger get out of the car and move toward the driver's side. 7RP 796. The driver quickly got out of the car as well, and the two engaged in a fistfight. Reilly could tell that both people were fighting, exchanging blow for blow, and neither appeared to be taking the worst of it. 7RP 796-98. Reilly then saw the passenger's arm extended as if throwing a closed fist, he heard the pop of a gun, he saw blood spatter from the driver's skull, and he saw the body drop. He never saw a weapon, and he never saw the passenger point anything at the driver. 7RP 799-800, 851. Reilly saw the passenger kneel down over the body but could not tell what he was doing. 7RP 802. When he stood up, he looked toward Reilly, covered his face, then got into the car and drove away. 7RP 803. Reilly identified Brightman as the passenger. 7RP 805.

Benarczyk noticed a scuffling in the car and saw the two men pulling at each other's clothing. 12RP 1600. He heard one of them say, "Help me," but he could not tell who said it. 12RP 1601. Both men got out of the car. While Benarczyk thought Brightman was holding Villa by the shirt, Reilly did not think either was trying to get away. 12RP 1602;

15RP 1961. Like Reilly, Benarczyk saw Brightman throw a fist motion, he saw smoke, and he heard a pop from a gun, although he never saw a weapon. 12RP 1603-04. When he heard the gunshot, Benarczyk ran away. 12RP 1603.

A third witness, Anthony Riconosciuto, was painting the third floor of his house overlooking Titlow Park when Villa was shot. 7RP 883-84. He called 911 and reported that the man who did the shooting got into a white car and drove off. 8RP 972. At trial, Riconosciuto testified, however, that he had seen only one person outside the car. That person leaned into the car and was shot by the person inside the car. 7RP 909-917.

Brightman explained that when he got out of the car and walked to the front, Villa got out of the car as well. 8RP 1072. Brightman was not afraid of Villa, but he wanted to get his money back. 10RP 1161-62. They started fighting again, both of them landing punches. 8RP 1072-73. Brightman then pulled the gun out of his pocket, intending to hit Villa with it. He told Villa to back away, but Villa kept fighting. 8RP 1074. Brightman hit Villa in the head with the gun twice. The second time, the gun went off, and Villa fell to the ground. 8RP 1074-75. Brightman did not think the gun was loaded, because the clip was still in his other pocket, and he did not remember a bullet being in the chamber. He might have

had his finger on the trigger, although he did not remember whether he did. 8RP 1075.

Villa died as a result of the gunshot wound to his head. 11RP 1415. The medical examiner estimated that the gun was between one inch and three feet away at the time it discharged. 11RP 1400-02. Because he did not find gunpowder on Villa, the examiner believed the wound was more consistent with a shot from the greater distance. 11RP 1402. He did not examine the hat Villa had been wearing, however, and he admitted that the presence of gunpowder on the hat could indicate that the gun was actually closer. 11RP 1395-96.

A firearms expert found gunpowder residue on the hat and estimated that the gun was between three and nine to 12 inches away when it discharged. 12RP 1496. The expert also explained that the type of gun Brightman had was an unreliable and poorly made weapon. It had a plastic safety which breaks easily and could have dislodged if the gun was used to hit someone over the head. Thus, the gun could have discharged accidentally or unintentionally if the user punched someone with the gun in his hand. 12RP 1542-48.

Brightman explained that when Villa fell, he was still holding Brightman's money, so Brightman bent down and picked it up. 8RP 1076. He noticed the other people in the parking area and covered his face with

his coat. 8RP 1076. When he opened the car door to retrieve his hat, he saw the keys in the car, and he got in and drove away. 8RP 1077.

Brightman drove over the Tacoma Narrows Bridge in the HOV lane, ignoring a State Trooper's directive to pull over. 8RP 1078, 1106; 10RP 1289. As he was crossing the bridge, he threw the gun and clip out through the sunroof. 8RP 1078. He parked the car about a mile from his home, threw the keys in the bushes, and ran home. He did not take anything from the car. 8RP 1079.

Later that night, Brightman's roommates returned home with Crawford and Moritz. 8RP 1081. When Brightman told them what had happened, Crawford and Moritz wanted to see if the car was really there, and they asked Brightman to show them. 8RP 1082; 14RP 1893. Brightman refused, but instead described the location. 8RP 1082. Moritz and Crawford drove to Villa's car and removed the stereo, a backpack, and a case of CDs and then returned to Brightman's house. 8RP 1082; 14RP 1887. Brightman told his friends he wanted nothing to do with the items, and Moritz took them when he left. 10RP 1155; 14RP 1888.

The jury found Brightman guilty of second degree murder and found he was armed with a firearm. CP 426, 429. The court imposed a standard range sentence of 275 months with a consecutive 60 month firearm enhancement. CP 435-36. Brightman filed this appeal. CP 443.

C. ARGUMENT

1. RETRIAL ON THE CHARGE OF FIRST DEGREE MURDER VIOLATED BRIGHTMAN'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

At Brightman's first trial, the jury was instructed that it should first consider the charge of first degree murder. If it reached a verdict, it should fill in Verdict Form A with the words "not guilty" or "guilty." If it did not agree on a verdict as to first degree murder, it was instructed to leave Verdict Form A blank. CP 88 (Instruction No. 25). If the jury found Brightman not guilty of first degree murder or was unable to agree on that charge, it was to consider the lesser crimes of second degree murder and first degree manslaughter. CP 88.

During its deliberations, the jury sent the following question to the court:

We are currently deadlocked with some for 1st degree and some for 2nd degree murder. Our instructions seem to indicate that it is our duty, then, to return a verdict of guilty of 2nd degree murder. (instruction 25, p.7). Is this so? If so, when the jury is polled, how must the jurors who prefer "guilty of 1st degree murder" respond?

CP 94. The court did not examine the jury as to the reported "deadlock." Supp. CP (Verbatim Report of Proceedings from August 27, 1999, at 2).

It simply responded, "Please carefully read the instructions." CP 94.

When the jury indicated it had a verdict, the judge informed counsel that he planned to bring the jurors in, ask the foreperson if they had reached a verdict, and then read the verdict forms exactly as they appeared. He would then poll the jury by asking for a show of hands as to each verdict form. Supp. CP (Verbatim Report of Proceedings from August 27, 1999, at 3). Following that, the judge would discharge the jury unless counsel indicated there was an inconsistency or some problem with the verdict form. If counsel found an inconsistency, the judge would ask the jury to return to the deliberation room so that the court and counsel could discuss it. The judge told counsel that if he perceived no internal inconsistency, he would discharge the jury. He asked the attorneys to stop him if he was discharging the jury prematurely in relation to some inconsistency. *Id.* at 4.

The court followed this procedure in reading the verdicts and polling the jury. *Id.* at 5-6. The jury had left Verdict Form A blank. CP 17. The presiding juror filled in and signed Verdict Form B, which reads as follows:

We, the jury, having found the defendant: (1) not guilty of the crime of Murder in the First Degree, or (2) having found the defendant not guilty of the crime of Felony Murder in the First Degree, and being unable to unanimously agree as to Premeditated Murder in the First Degree, find the defendant Guilty ... of the lesser included crime of Murder in the Second Degree.

CP 18.

After polling the jurors, the court noted that 12 hands were raised as to each verdict. The court then stated, "Unless there is additional polling requested or some imperfection in the face of the verdict, I am going to discharge this jury." None of the attorneys responded, and the court discharged the jury. Supp. CP (Verbatim Report of Proceedings from August 27, 1999, at 6).

Brightman's conviction of second degree murder was vacated, and on remand, the state moved to retry Brightman on the charge of first degree murder. CP 48-98. The defense moved to dismiss the first degree murder charge, arguing it violated Brightman's double jeopardy protections. CP 99-116.

The United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Similarly, the Washington Constitution provides that a person may not be "twice put in jeopardy for the same offense." Const. art. I, § 9. The United States Supreme Court has explained the rationale behind the double jeopardy clause as follows:

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...

Green v. United States, 355 U.S. 184, 187-88, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957).

The double jeopardy clause applies where (1) jeopardy has previously attached, (2) that jeopardy has terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law. State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006); State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). Where these elements are satisfied, double jeopardy bars the state from retrying the defendant. Id.

There is no question that jeopardy attached on the charge of first degree murder when Brightman was tried for that offense in 1999. The issue here is whether that jeopardy terminated. Jeopardy is terminated when the defendant is acquitted, the defendant is convicted and the conviction is final, or when the jury is dismissed without the defendant's consent and the dismissal is not in the interests of justice. Ervin, 158 Wn.2d at 752-53.

The United States Supreme Court has held that when a jury convicts on a lesser included offense, after being given a full and fair opportunity to return a verdict on the greater offense, jeopardy on the greater offense terminates. Price v. Georgia, 398 U.S. 323, 328-29, 326, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970) (citing Green, 355 U.S. at 191).

The Washington Supreme Court has held that where a jury considering multiple charges renders a verdict as to one charge but is silent as to the other, its silence acts as an implied acquittal as to that charge and jeopardy is terminated. State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959); State v. Davis, 190 Wash. 164, 166-67, 67 P.2d 894 (1937). The Washington Supreme Court also unanimously agreed that where the jury could not agree on the greater offense but entered a verdict on the lesser offense, double jeopardy barred the state from retrying the defendant on the greater charge, even when the conviction on the lesser offense was vacated. State v. Brown, 127 Wn.2d 749, 756-57, 903 P.2d 459 (1995); accord State v. Kirk, 64 Wn. App. 788, 828 P.2d 1128, (where jury unable to agree on greater offense but returned verdict on lesser charge, and there was no showing that discharge of jury on greater offense was necessary in interests of justice, double jeopardy barred retrial on greater offense), review denied, 119 Wn.2d 1025 (1992).

In 2006, the Washington Supreme Court changed course, holding that where the record indicates the jury was unable to agree on the greater offense and therefore returns a verdict on the lesser offense, jeopardy is not terminated as to the greater offense. Ervin, 158 Wn.2d at 748. In Ervin, the defendant was charged in the alternative with aggravated first degree murder, attempted first degree murder, and second degree felony

murder predicated on assault. Id. at 249. The jury was given “unable to agree” instructions similar to the ones used in Brightman’s first trial. Id. at 749-50. After five weeks of deliberations, the jury announced it was unable to reach a unanimous verdict. The court instructed it to continue deliberations, and two days later, the jury announced that it was still unable to reach a verdict as to the co-defendant, but it had reached a verdict as to Ervin. Id. at 750. The jury had left the verdict forms for aggravated first degree murder and attempted first degree murder blank, and it returned a verdict of guilty on the felony murder charge. Id. at 750-51. Ervin’s conviction was vacated, and on remand he was tried and convicted of second degree murder. Id. at 751.

The Washington Supreme Court rejected Ervin’s double jeopardy challenge. The court recognized that when the jury renders a verdict as to one charge but remains silent as to other charges, its action constitutes an implied acquittal barring retrial on those charges. Id. at 753. The court reasoned, however, that because the jury had left the verdict forms on the first degree murder charges blank, as it was instructed to do if it was unable to agree on those offenses, acquittal could not be implied. Id. at 757. Because there was no acquittal, jeopardy did not terminate. Id. The Court reiterated this holding in State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007) (jeopardy not terminated as to greater offense where “unable to

agree” instructions given and jury left verdict form for greater offense blank).

Contrary to the holdings in Ervin and Daniels, United States Supreme Court precedent holds that jeopardy on the greater charge ends when the first jury is given a full opportunity to return a verdict on that charge and instead reaches a verdict on the lesser charge. Price, 398 U.S. at 326 (citing Green, 355 U.S. at 191). Regardless of whether the jury’s verdict on the lesser offense is considered an implied acquittal on the greater offense, the fact finder’s failure to make a finding has the same effect as an acquittal. Green, 355 U.S. at 190-91.

In Green, the jury found the defendant guilty of arson and second degree murder but failed to find him guilty or not guilty of first degree murder. Green, 355 U.S. at 186. The trial judge accepted the verdicts, entered judgments, dismissed the jury, and did not declare a mistrial. Id. Green appealed, and his conviction was overturned. On remand he was tried again for first degree murder and convicted. Id. The Supreme Court held that double jeopardy prohibited retrial on the first degree murder charge, even though the jury made no finding as to that charge:

[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in

jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.

Id. at 188. The Court did not rely on the assumption that the jury implicitly acquitted Green of first degree murder:

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent.

Id. at 190-91 (internal citations omitted). Since a finding of implied acquittal is not necessary to terminate jeopardy under these circumstances, the mere fact that the verdict indicates the jury was unable to agree on the greater charge does not prevent jeopardy from terminating. Instead, when the jury is discharged without the defendant's consent, such a verdict terminates jeopardy as to the greater offense.

There is no indication in Green that the defendant objected to dismissing the jury after the verdict was entered. Green, 355 U.S. at 186. Rather, the jury was dismissed without his consent in that and he did not agree to a discharge which would continue jeopardy, as there were no

signs that the jury was hopelessly deadlocked. Id. at 191, 194. The same is true here.

At Brightman's first trial, when the jury indicated it had a verdict, the judge informed counsel that he planned to read the verdicts, poll the jurors, and discharge the jury unless counsel indicated there was an inconsistency or some problem with the verdict form. Supp. CP (Verbatim Report of Proceedings from August 27, 1999, at 3-4). The court followed this procedure, and all 12 jurors indicated that they agreed with the verdicts. The court then stated, "Unless there is additional polling requested or some imperfection in the face of the verdict, I am going to discharge this jury." None of the attorneys responded, and the court discharged the jury. Id. at 6.

On retrial, Judge Cuthbertson found that because the defense was given the opportunity to object after the jury was polled but did not, dismissal of the jury did not present any double jeopardy issues. 2RP 42-43, 76. There was no discussion at the first trial about the effect of the jury's inability to agree on first degree murder or whether jeopardy would continue when the jury was dismissed, however. The court only asked counsel to note if there were inconsistencies between the jury's verdict and the individual jurors' responses to the polling questions. There were no such inconsistencies, and therefore no reason for counsel to object.

Moreover, counsel's failure to object cannot be interpreted as consenting to a discharge which continued jeopardy as to first degree murder, because under established Washington and Supreme Court precedent, the verdict received in this case operated to terminate jeopardy as to the greater offense. See Price, 398 U.S. at 326; Green, 355 U.S. at 191; Brown, 127 Wn.2d at 756-57; Kirk, 64 Wn. App. 788.

The court below also found that retrial was appropriate because the record from the first trial indicated the jury was hung as to first degree murder. 2RP 73-75. A hung jury necessitates discharge in the proper administration of justice and therefore does not bar retrial. Richardson v. United States, 468 U.S. 317, 325-26, 104 S. Ct. 3081, 82 L.Ed.2d 242 (1984); State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982). The record must reflect that the jury was "genuinely deadlocked," however. Richardson, 468 at 324-25. A jury's announcement that it is deadlocked is not itself sufficient grounds for a mistrial. State v. Taylor, 109 Wn.2d 438, 443, 745 P.2d 510 (1987) overruled on other grounds by State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991). The court should still make appropriate inquiries about the jury's deliberations. Jones, 97 Wn.2d at 164. While the decision to discharge a jury is within the broad discretion of the trial court, there must be "extraordinary and striking" circumstances to justify the discharge. Jones, 97 Wn.2d at 163.

The record in this case fails to establish that the first jury was genuinely deadlocked as to the first degree murder charge. The jury indicated in its question to the court that it was deadlocked, but the court did not follow up on that announcement. Instead, the court instructed the jury to read the instructions carefully, and the jury continued its deliberations. When the jury returned a verdict and was polled as to unanimity, no splits or divisions were reported. Thus, the record establishes merely that the jury was unable to agree on first degree murder and chose the option of returning a verdict on the lesser offense. This is fundamentally different from a finding of genuine deadlock. See Brazzel v. Washington, 491 F.3d 976, 984 (9th Cir. 2007) (“Genuine deadlock is fundamentally different from a situation in which jurors are instructed that if they ‘cannot agree,’ they may compromise by convicting of a lesser alternative crime, and they then elect to do so without reporting any splits or divisions when asked about their unanimity”).

In Daniels, the Washington Supreme Court held that jeopardy does not terminate when a jury is unable to agree, citing Selvester v. United States, 170 U.S. 262, 269, 18 S. Ct. 580, 42 L. Ed. 1029 (1898). Daniels, 160 Wn.2d at 263. The United States Supreme Court held in Selvester that when a disagreement is formally entered on the record such that there is adequate legal cause to discharge the jury, retrial on the offense as to

which the jury disagreed does not constitute double jeopardy. Selvester, 170 U.S. at 269. The Supreme Court has subsequently elaborated on when disagreement constitutes adequate legal cause to discharge the jury, holding that a trial judge may discharge a jury it finds to be genuinely deadlocked. Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); see also Richardson, 468 U.S. at 324-25 (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial).

The jury's decision to compromise by reaching a verdict on a lesser offense rather than the greater indicates that the jury was unable to agree on the greater offense. But that decision does not necessarily establish that the jury was genuinely deadlocked. Even when a jury expresses that it is unable to agree on a charge, it is possible that with further deliberations the jury may be able to reach a verdict. The court does not know whether that possibility exists, however, unless it inquires. See Jones, 97 Wn.2d at 164. Because the court made no further inquiry after the jury's statement that it was deadlocked, the record does not establish that the jury was genuinely deadlocked. Discharge of the jury after it returned a verdict on second degree murder terminated Brightman's jeopardy as to first degree murder, and his retrial for that offense violated double jeopardy.

This double jeopardy violation requires reversal, even though Brightman was not convicted of first degree murder. The double jeopardy clause is aimed at protecting a defendant against the “risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict.” Price, 398 U.S. at 331 (where petitioner’s retrial for first degree murder violated double jeopardy, reversal required even though petitioner was convicted of lesser offense of manslaughter). “To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly.” Id. More importantly, this court cannot say whether the existence of the first degree murder charge, for which the jury was unwilling to convict Brightman, also made the jury less willing to consider his innocence on the second degree murder charge. See Price, 398 U.S. at 331 (“we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.”); Brazzel, 491 F.3d at 986. Brightman’s conviction must therefore be reversed.

2. REPEATED REFERENCE TO VILLA AS THE “VICTIM” INVADED THE PROVINCE OF THE JURY, VIOLATED THE PRESUMPTION OF INNOCENCE, AND DENIED BRIGHTMAN A FAIR TRIAL.

Prior to opening statements, defense counsel moved to preclude the prosecutors and witnesses from referring to Villa as the “victim.” 6RP 595. The court granted the motion, noting that there was a dispute as to whether Villa was killed accidentally or on purpose, and referring to him as the victim would suggest a legal conclusion. 6RP 597, 599. The prosecutor then argued that he should be able to tell the jury in opening statement that the state’s theory was that Villa was murdered. 6RP 599. The court responded that it preferred that Villa be referred to by name, but the state would be permitted to refer to him as a victim during opening statement if necessary. 6RP 600.

During opening statement, the prosecutor described Villa as the victim of first degree murder. 6RP 614. The prosecutor and the state’s first two witnesses, both law enforcement officers, continually referred to Villa as the victim in describing Villa’s injuries, the scene of the shooting, and the officers’ actions during the investigation. 6RP 632, 633, 634, 638, 672, 673, 676, 677.

Defense counsel then moved for a mistrial. 7RP 752. Counsel argued that referring to Villa as a victim improperly conveyed an opinion as to Brightman’s guilt and invaded the province of the jury, because it was for the jury to decide whether Villa was a victim. 7RP 752, 754. The court responded that its concern was that the term not be used as a legal

conclusion, but, since it was not inaccurate to say Villa was the victim of a shooting, even if it was accidental, the court denied the motion for a mistrial. 7RP 756-57. Defense counsel requested a curative instruction that the jury disregard the improper references to Villa as the victim. 7RP 757. The court denied the request but gave the defense a standing objection. 7RP 758.

Villa was thereafter repeatedly referred to the victim throughout the state's case. See, e.g., 8RP 951 (eye witness); 10RP 1175 (Officer describing investigation at scene); 10RP 1248, 1255 (Officer describing investigation); 14RP 1819 (Investigating officer describing scope of search warrant).

It was error for the court to allow the state and its witnesses to refer to Villa as the victim, because the use of that term presupposes Brightman's guilt of the crime charged.

Witnesses may not offer opinions on the defendant's guilt, either directly or by inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading the fact-finding province of the jury. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). It is also improper for a prosecutor to express his or her personal opinion about the guilt or innocence of the accused. State v. Reed, 102 Wn.2d 140, 145-46,

684 P.2d 699 (1984). Repeated reference to Villa as the victim throughout the state's case expressed the opinions of the prosecutor and state's witnesses that Brightman was guilty of a crime.

Use of the term "victim" is not prejudicial in every criminal trial. Where there is no dispute that a crime occurred and the issue at trial is whether the defendant was the perpetrator, use of the term "victim" does not unfairly prejudice the defendant. But where, as here, the commission of a crime is in dispute, the deceased's status as a victim is not established until the jury returns a verdict. The presumption of innocence remains in force throughout the trial. In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 A. Ct. 1068 (1970). Thus, reference to the deceased as the victim violates the presumption of innocence. See Jackson v. State, 600 A.2d 21, 24 (Del. Sup. 1991).

In Jackson, the Delaware Supreme Court held that "the word 'victim' should not be used in a case where the commission of a crime is in dispute." Jackson, 600 A.2d at 24 (conviction not reversed where trial counsel failed to object). The Court explained:

In such cases [where the commission of the crime, rather than the identity of the perpetrator is in dispute] it is incompatible with the presumption of innocence for the prosecutor to refer to the complaining witness as the "victim," just as it is to refer to the defendant as a "criminal."

Jackson, 600 A.2d at 25. “It is improper for a prosecutor to assume as a given, or to suggest to the jury, the existence of that which is in dispute.” Id. Since use of the term “victim” assumes the commission of a crime, it is a practice to be avoided. Id.

The Jackson court’s reasoning fits well within the framework of Washington law. Washington courts do not permit witnesses for the state to submit an opinion, directly or by inference, that the defendant is guilty. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); Black, 109 Wn.2d 348-49; Dolan, 118 Wn. App. at 329. Calling the deceased a victim is just as wrong as calling the defendant a criminal.

In this case the jury was called to decide whether a crime had been committed. There was no dispute that Brightman was holding the gun that shot Villa. The state’s theory was that Brightman murdered Villa, but the defense presented evidence of excusable homicide. It was the jury’s job to determine whether Villa was the victim of a crime, and Brightman was presumed innocent throughout the trial. The repeated references to Villa as a victim improperly expressed the opinions of state and its witnesses that a crime had been committed, invading the province of the jury and stripping Brightman of the presumption of innocence.

Constitutional error is presumed prejudicial, and the state bears the burden of proving the error was harmless beyond a reasonable doubt.

verdict. Brightman was denied his right to a fair trial, and his conviction must be reversed.

3. IMPROPER ADMISSION OF TESTIMONY TO IMPEACH BRIGHTMAN ON A COLLATERAL MATTER DENIED BRIGHTMAN A FAIR TRIAL.

Brightman testified that he worked for Owens Painting off and on in September and October 1998. 8RP 1033³, 1089. He worked a couple of days a week, and he was paid in cash. 10RP 1165-66. Brightman testified that he had taken the day off from work on October 1, 1998, so that he could visit his grandmother. 8RP 1039.

After this testimony at the first trial, the state was permitted to call Ronald Owens as a witness, to testify that he owned Owens Painting and that Brightman did not work for him. 3RP 125. When the state notified the defense that it planned to call Owens as a witness in the second trial, defense counsel moved to exclude his testimony. 3RP 125. Counsel argued that Owens's testimony was irrelevant and collateral because Brightman did not claim he was working on the day in question. 3RP 127.

The state argued that Owens's testimony was relevant because Brightman had testified about what a hard-working, fine, and upstanding person he was, when the truth was that he did not have a job. 3RP 129. It also argued that testimony that Brightman did not have a job and lied

³ Brightman's testimony from the first trial was read to the jury at the second trial.

about it on the stand showed he had motive to steal a car at gunpoint. 3RP 131.

The court denied the defense motion to exclude Owens's testimony. It found that the state was not attempting to show Brightman had a propensity to commit crimes like this because he was poverty-stricken. Rather, it believed the evidence was relevant to Brightman's motive for the alleged carjacking which led to murder. 5RP 461-62. The court also found that Owens's testimony was relevant to Brightman's credibility, since Brightman said he was employed. 5RP 462. While it recognized that there was a potential that evidence of Brightman's unemployment would be unfairly prejudicial, the court believed the probative value of the evidence to Brightman's motive outweighed that potential. Id.

Ronald Owens testified that he is the sole owner of Owens Painting and is responsible for hiring and firing employees. He had seven employees in September and October 1998, and he knew all of them. 10RP 1238. He did not recognize Brightman and had never spoken to him. He had looked through his payroll records for 1998 and did not find Brightman's name. 10RP 1239. Owens admitted, however, that day laborers are not considered full time and would not be included in payroll records. 10RP 1241.

When a criminal defendant takes the stand, he is subject to cross examination, the same as any other witness. It is well established that a witness cannot be impeached on matters that are collateral to the principal issues being tried. Impeaching testimony is collateral if it could not be shown in evidence for any purpose independent of contradicting the witness. State v. Oswald, 62 Wn.2d 118, 120, 381 P.2d 617 (1963); State v. Putzell, 40 Wn.2d 174, 183, 242 P.2d 180 (1952). The test as to whether a matter is collateral or material is whether the cross examining party would be entitled to prove the matter in its case in chief. Id. Even if a defendant opens the door to a matter on direct examination, the defendant cannot be impeached upon matters collateral to the principal issues being tried. State v. Descoteaux, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), overruled on other grounds by State v. Danforth, 97 Wn.2d 255, 257, 643 P.2d 882 (1982).

In this case, whether Brightman in fact worked as a day laborer for Owens Painting was a collateral matter. Brightman did not assert any defense relating to his employment. He did not claim he could not have committed the offense because he was at work; he specifically said he was not working that day, and he admitted shooting Villa accidentally. If Brightman had said nothing on direct examination regarding his employment, the state would have had no basis to present testimony from

Owens that Brightman did not work for him in its case in chief. The matter was therefore collateral, and the impeachment testimony was improperly admitted. See e.g. Putzell, 40 Wn.2d at 183 (Defendant charged with murder did not deny shooting victim but claimed mental irresponsibility. Where defendant testified he was not carrying a gun years earlier when victim attacked him, evidence that he in fact had a gun was improper impeachment on collateral matter).

Nonetheless, the state argued below and the trial court found that Owens's testimony was relevant to Brightman's motive to commit robbery, which then resulted in murder. 5RP 460-62. The court relied on State v. Matthews, 75 Wn. App. 278, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022 (1995).

In Matthews, the trial court found that evidence that indicated the defendant was in dire financial straits could establish a motive for robbery, which ended in murder. Matthews, 75 Wn. App. at 283. There, the defendant was charged with murder, and the state's theory was that he had attempted to rob the victim. Over defense objection the trial court admitted evidence that the defendant and his wife had filed for bankruptcy. Further testimony by the wife tended to establish that they were living beyond their means. Id. at 284. Mrs. Matthews testified about the value of her wedding ring, the fact that she had to sell it after

Matthews was arrested, their employment status and income, the amount they paid for rent and babysitting, how many cars they owned, and whether they were making payments on their van. Id. at 283.

The Court of Appeals held the trial court did not abuse its discretion in admitting the evidence. The fact that the defendant and his wife were living beyond their means supported the state's theory that the murder was the result of an interrupted robbery by a financially pressured man. Id. Living beyond one's means could reasonably provide a motive for robbery, which in turn could provide a motive for murder of the robbery victim. Id. The court held, however, that evidence of the defendant's financial condition as a motive for robbery should be admitted only where the evidence is highly probative, and the appellate court should closely scrutinize the trial court's decision in light of the state's theory and the record as a whole. Id. at 286.

It is improper to admit evidence of a defendant's financial condition on the theory that poor people are more likely to steal than those with higher incomes. Evidence of the defendant's bankruptcy was properly admitted in Matthews because the focus there was on the fact that the defendant's lifestyle exceeded his income, not just that he was poor. Matthews, 75 Wn. App. at 286. Evidence which shows the defendant was desperate for money can provide an inference for motive. Id. at 287.

The reasoning in Matthews does not apply here. The state's theory that Brightman was motivated to steal a car by his financial condition is purely speculative. There was no indication Brightman was in desperate financial straits. He lived in a house owned by his mother, which he shared with two roommates, and he was not pressured to pay the rent every month. 8RP 1034-35. Brightman did not have the expense of maintaining a car, and there was no evidence of any other expenses, debts, or extravagant lifestyle. The only other evidence regarding Brightman's financial situation was that he had attempted to withdraw \$50 from his account but only had \$40 available. 8RP 1057. Nothing in the record indicated that Brightman was financially pressured or living beyond his means. Nor was there any evidence Brightman took Villa's car for monetary gain. Instead, the undisputed evidence shows he abandoned the car and took none of its contents. 8RP 1079.

Under the circumstances, allowing Owens's testimony on the theory that it established Brightman's motive is no different from saying that anyone who is unemployed has motive to steal a car. This is clearly improper. See State v. Jones, 93 Wn. App. 166, 175-76, 968 P.2d 888 (1998) (improper to admit evidence that defendant is unemployed as motive to commit crime if no other evidence makes financial situation relevant), review denied, 138 Wn.2d 1003 (1999).

At most, Owens's testimony established that Brightman exaggerated when he gave the impression that he was a full time employee. The state's closing argument revealed that impeaching Brightman's credibility on this collateral matter was the real purpose for the testimony. The prosecutor pointed out that Brightman said he took the day off to visit his grandmother in the hospital, but Owens testified he had never heard of Brightman. He argued that Brightman's testimony was a ploy calculated to engender sympathy and paint him in a favorable light, but it was disproved by Owens. 17RP 2207-08.

Not only was the evidence improperly admitted, it was also prejudicial to the defense, and reversal is therefore required. See Oswalt, 62 Wn.2d at 122. Evidence presented by the state that Brightman was unemployed invited the jury to draw the impermissible inference that because he was unemployed he was more likely to commit a crime. See Jones, 93 Wn. App. at 175-76; Matthews, 75 Wn. App. at 285-86. The trial court recognized this potential for prejudice, but the state fought to admit the testimony despite its collateral nature and the unfair inference it permitted. 5RP 462. The appellate court should turn a skeptical eye toward a state claim that an error is harmless where the error arises from the prosecution's deliberate attempt to introduce improper evidence. State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990). Given the lack of

evidence supporting the state's theory that the shooting was intentional rather than accidental, it is reasonably likely this improper inference affected the jury's verdict. Brightman's conviction should be reversed.

4. THE TRIAL COURT DENIED BRIGHTMAN DUE PROCESS BY ADMITTING NEWLY DISCOVERED EVIDENCE WITHOUT AFFORDING THE DEFENSE AN ADEQUATE OPPORTUNITY TO INVESTIGATE.

On the last day of the state's case, defense counsel was informed that the state would be calling Michelle Ramirez Vickery as a witness. 13RP 1673. Vickery was not on the state's witness list for either the original trial or the retrial, but the state had received information from her the day before which it believed was relevant. 13RP 1683. Vickery would testify that she and Brightman were in a relationship prior to 1998, and she saw him with guns all the time, including the gun he was carrying when Villa was shot. 13RP 1676-77, 1679, 1681. The state argued that this evidence was relevant to rebut Brightman's testimony about where the gun came from and to create an inference that Brightman knew what to do with the gun when he shot Villa. 13RP 1681-82.

Defense counsel moved for a continuance or in the alternative to exclude Vickery's testimony. He noted that Vickery had said in an interview in 1998 that she had only seen Brightman with a gun one time, and he needed time to investigate this and other areas of impeachment.

13RP 1675. The court denied the motion, ruling that counsel had enough information to begin cross examination, he could recall Vickery in the defense case if necessary, and in the meantime he could locate other witnesses to impeach her testimony. 13RP 1686.

The defense renewed the motion for a continuance later that day. 13RP 1724. He argued that he had been given a synopsis of Vickery's interview from the previous evening, but he had had no opportunity to have his investigator interview her to develop possible areas of impeachment. Without the opportunity to conduct a sufficient investigation, he was unprepared to cross examine Vickery or represent Brightman adequately. 13RP 1726. Moreover, being forced to call Vickery in the defense case put the defense in an unfair position, giving the impression she was a defense witness and possibly opening the door to testimony about Brightman's previous assault on Vickery. 13RP 1734. The court again denied the motion for a continuance and instead directed the state to wait until the next morning to put Vickery on the stand. 13RP 1735.

The next morning the court described the various limits it would place on Vickery's testimony. The court precluded any discussion of domestic violence between Brightman and Vickery. It ruled she would be able to testify about the number of guns Brightman owned, whether he

traded guns, whether he always carried a gun, and how he concealed the guns he carried. She would also be permitted to testify about the last time she saw Brightman with a gun and to describe the gun. The court found this evidence was relevant to intent, knowledge, and lack of mistake or accident and that the probative value of this evidence outweighed its prejudice. 14RP 1770-71.

Defense counsel objected to the court's ruling. He argued that before the evidence could be admitted, the court had to find by a preponderance of the evidence that Brightman's alleged past conduct occurred. The court could not make such a finding without an evidentiary hearing because the only evidence before the court was two conflicting statements from Vickery, one saying Brightman always carried guns and one saying she had seen him with a gun on only one occasion. 14RP 1773-75. Counsel also argued that Vickery's testimony was not relevant to rebut the defense that the shooting was accidental, because she could testify to no similar incidents. 14RP 1776, 1780. Counsel also disputed that the evidence was relevant to intent. 14RP 1781.

In addition, defense counsel renewed his motion for a continuance. He again asked that the matter be set over until Monday to allow him adequate time to investigate. 14RP 1785. When the court denied the

motion, counsel reiterated that he was not prepared to represent Brightman adequately. 14RP 1786.

The state was permitted to proceed with Vickery's testimony. Vickery testified that she and Brightman were in a relationship from 1995 to 1997 and they had two children together. 14RP 1789. She sometimes lived with Brightman, and during that time she saw him with two or three different guns, which he carried in his front waistband. 14RP 1790. The last handgun she saw him with looked similar to the gun pictured in Exhibit 127, although Brightman's gun was bigger and was silver with no wood on the handle. 14RP 1790-91. That was in 1997. 14RP 1797. Vickery was permitted to testify over defense objection that Brightman was very comfortable with guns. 14RP 1792-93.

The decision whether to grant or deny a motion for continuance rests within the trial court's discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Nonetheless, failure to grant a continuance may deprive the defendant of due process and a fair trial, within the circumstances of a particular case. State v. Williams, 84 Wn.2d 853, 529 P.2d 1088 (1975).

Due process entitles a criminal defendant to a fair chance to get his version of events before the jury so that it can make an unprejudiced decision. State v. Oughton, 26 Wn. App. 74, 75, 612 P.2d 812, review

denied, 94 Wn.2d 1005 (1980). When a defendant is denied a reasonable opportunity to investigate and rebut newly discovered evidence, his due process right to a fair and unbiased trial is violated. Id. at 80.

In Oughton, the defendant was charged with first degree murder in the stabbing death of his girlfriend, and he claimed that she had stabbed herself with his knife after an argument. Id. at 76. On the morning of the third day of trial, the victim's son told the prosecutor for the first time that after his mother's death, he found that all her clothes had been slashed and spray painted gold. Rather than informing the court or defense about this new information immediately, the prosecutor elicited it during the son's testimony that afternoon. Id. at 78. The defense objected to the testimony and moved for a continuance, but the court overruled the objection and denied the motion. Id.

The Court of Appeals found that the prosecutor had violated discovery rules when he failed to disclose the information before it was revealed on the witness stand. Id. at 79. Moreover, the trial court abused its discretion in denying the defense motion for a continuance. The defendant was entitled to a reasonable time to rebut the assertions which suggested he harbored violent feeling toward his girlfriend. Denial of an opportunity to adequately investigate this critical issue resulted in actual prejudice, and reversal was required. Id. at 79-80.

Similarly, in this case, Brightman was denied a reasonable opportunity to investigate newly discovered evidence offered to rebut his credibility on a crucial issue. While there was no discovery violation here, the defense was caught completely off guard by the state's decision to call Vickery as a witness. She had never been on a witness list, and there had previously been no reason to believe she had any information which would be admissible at trial. Thus, until the last day of the state's case, the defense had no reason or opportunity to investigate her claims, and counsel informed the court he was not prepared to conduct effective cross examination. Although the court delayed her testimony until the next morning, counsel needed more time to follow up on potential areas of impeachment, so that he could cross examine Vickery effectively. 14RP 1785-86.

Both the state and federal constitutions guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. Wash. Const. art. I, § 22; U.S. Const. amend. VI; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. Davis, 415 U.S. at 316;

State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. Davis, 415 U.S. 316; Darden, 145 Wn.2d at 620. “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.... As such, the right to confront must be zealously guarded.” Darden, 145 Wn.2d at 620 (citations omitted).

The court below felt there had been enough delays in the trial⁴, and it noted that it had to accommodate the jury as well as protecting Brightman’s sixth amendment right to confrontation. 13RP 1736. This reasoning did not justify the court’s decision. Defense counsel first learned about Vickery’s proposed testimony on a Wednesday, and the court allowed the state to present that testimony on Thursday morning. Defense counsel sought a continuance only until Monday. 13RP 1674-75, 1733. Since no evidence was presented in the case on Fridays, the jury would lose only one trial day if the court granted the requested continuance, while defense counsel would gain four days to conduct this crucial investigation. While the state has an interest in proceeding with trial in a timely manner, that interest does not outweigh the need for

⁴ Court was closed for several days due to snow during jury voir dire, and defense counsel was out of town for a week after the jury was selected. 4RP 291, 297. The court had denied counsel’s motion to dismiss the panel and start voir dire over when he returned. 4RP 293-99.

effective cross examination of a state witness in a criminal trial. See Davis, 415 U.S. at 320.

The court's denial of the motion to continue resulted in actual prejudice to the defense. Vickery's testimony regarding Brightman's familiarity with guns allowed the jury to infer it was less likely he would accidentally discharge a gun, which made it more likely he acted intentionally when shooting Villa. Counsel informed the court that without more time to investigate areas of impeachment, he was unprepared to cross examine Vickery and could not provide Brightman with effective representation. Under these circumstances, denial of the requested continuance violated Brightman's right to due process and a fair trial, and reversal is required. See Oughton, 26 Wn. App. at 79-80; compare State v. Hubbard, 37 Wn. App. 137, 147, 679 P.2d 391 (1984) (where witnesses were available to defense investigators four days before trial, denial of motion for continuance did not require reversal), reversed on other grounds by State v. Hubbard, 103 Wn.2d 570, 693 P.2d 718 (1985).

5. USE OF AN AGGRESSOR INSTRUCTION DEPRIVED BRIGHTMAN OF HIS ABILITY TO ARGUE EXCUSABLE HOMICIDE.

The defense theory of the case was that Brightman was trying to retrieve his money from Villa and defending himself against Villa's blows

when he hit Villa with a gun. The gun went off accidentally and shot Villa in the head. Because the jury could find from the evidence that Brightman was doing a lawful act by lawful means when Villa was accidentally killed, the parties agreed that an excusable homicide instruction was appropriate under the facts of the case.⁵ 16RP 2063, 2070-71, 2085-86.

The state also proposed an instruction that if the jury found Brightman was the aggressor, excusable homicide was not available as a defense. 16RP 2107-08. Defense counsel objected to the proposed aggressor instruction, arguing that it was inappropriate under the circumstances of the case. 16RP 2107-08. An aggressor instruction applies when self defense is asserted as to the crime charged. In this case, the defense position was that Brightman was defending himself from Villa's blows when Villa was accidentally shot. Because Brightman was not contending he killed Villa in self defense, the jury should not be given an aggressor instruction. 16RP 2108, 2112, 2159-60.

The court initially agreed with defense counsel that the aggressor instruction was not a correct statement of the law as to excusable homicide and declined to give it. 16RP 2161. The next day, however, the court announced that it would be giving an aggressor instruction because it

⁵ "Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." RCW 9A.16.030.

believed the instruction accurately stated the law. 17RP 2173. Defense counsel took exception. 17RP 2173.

Over defense counsel's objection, the court gave the jury the following instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon kill, use deadly force, or use non-deadly force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then excusable homicide based on lawful use of force to recover property is not available as a defense.

CP 414 (Instruction No. 21).

Aggressor instructions are not favored and thus should be used sparingly. State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005); State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), abrogated on other grounds by In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). As the Supreme Court has noted,

"few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction." While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.

State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999) (quoting State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)).

It is error to give an aggressor instruction unless it is supported by credible evidence from which the jury can conclude the defendant provoked the need to act in self defense. The provoking act must be intentional and one that the jury could reasonably assume would provoke a belligerent response. Birnel, 89 Wn. App. at 473.

The aggressor instruction should not have been given in this case. First, the defense never argued that Brightman was justified in intentionally killing Villa in self defense. Rather, the defense theory was that the killing was excusable because Brightman accidentally shot Villa while he was defending himself. Moreover, because the evidence did not show Brightman provoked the need to act defensively, the aggressor instruction was inappropriate.

Although the evidence was undisputed that Brightman and Villa were fighting before the gun went off, there was no testimony that Brightman started the fight. Brightman testified that Villa threw the first punch, 8RP 1071, and the state's witnesses could not say who started the fight.

Reilly testified that he did not know who the aggressor was and did not know who swung first, because he only noticed the fight after it started. 7RP 853. Although the court admitted Reilly's prior statement that the passenger started the fight, that statement was not admitted as

substantive evidence but solely for the purpose of impeaching Reilly's credibility, and the jury was instructed to consider the evidence for no other purpose. 7RP 811-17.

Benarczyk testified that he heard someone yell for help, but he could not tell who it was. 12RP 1601. In his taped statement the night of the incident, Benarczyk said it was the passenger who called for help. 12RP 1610, 1638, 1640. Although the first officer who spoke to Benarczyk testified that Benarczyk said he heard the driver yell for help while they were in the car, that officer did not report this to the detective who interviewed Benarczyk, and Benarczyk denied telling the officer that it was the driver who yelled for help. 12RP 1578, 1610; 15RP 1980-81. Brightman testified that he had yelled for help. 8RP 1071.

There was no evidence from which the jury could find Brightman provoked the need to defend himself against Villa, ultimately leading to Villa's death. The state's argument that Brightman went on the attack⁶ was purely speculative, because the state's witnesses could not say who started the fight, and Brightman testified Villa threw the first punch. It is reversible error to give an aggressor instruction when there is no evidence to support it. Birnel, 89 Wn. App. at 473-74; State v. Wasson, 54 Wn. App. 156, 158-59, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989).

⁶ 16RP 2159.

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case, the trial court improperly allowed the jury to consider a charge of first degree murder in violation of double jeopardy, permitted improper opinion as to Brightman's guilt, permitted improper impeachment on a collateral matter, denied Brightman due process by refusing his motion for a continuance to investigate newly discovered evidence, and deprived him of his ability to argue excusable homicide by giving an aggressor instruction unsupported by the evidence. Although Brightman contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Reversal of his conviction is therefore required.

D. CONCLUSION

Retrial on the charge of first degree murder violated Brightman's double jeopardy protections. Moreover, Brightman was denied a fair trial by the improper admission of opinion, the impeachment on a collateral matter, the denial of his motion for a continuance, the improper use of an aggressor instruction, and cumulative error. This Court should reverse him conviction and remand for a new trial, without a charge of first degree murder.

DATED this 1st day of August, 2008.

Respectfully submitted,



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Attorney for Appellant

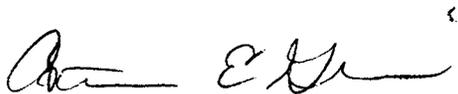
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Designation of Clerk's Papers and Brief of Appellant in *State v. Nathan D. Brightman*, Cause No. 36150-7-II, directed to:

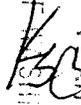
Kathleen Proctor
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Monroe, WA 98272-0777

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



Catherine E. Glinski
Done in Port Orchard, WA
August 1, 2008

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