

NO. 42068-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

HENRY MUSGROVE III,

Appellant.

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

The Honorable Anna M. Laurie, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

A jury acquitted appellant Henry Paul Musgrove, III of second-degree felony murder with a predicate offense of second-degree assault of a child. The jury was unable to reach a verdict on two additional charges of first- and second-degree manslaughter. The defense did not contest evidence by several experts that the cause of death was an intentional blow to the abdomen. The only disputed issue was who was responsible. In acquitting Musgrove, the jury must have concluded it was not he. Therefore, collateral estoppel precluded a new trial on the manslaughter charges where precisely the same issue – who struck the fatal blow – would be litigated again.

The trial court concluded the question of identity was not necessarily decided in the first trial because the jury could have acquitted based on lack the requisite mental state of intent. Even if this is so, the jury necessarily found Musgrove did not commit intentional assault. Therefore, alternatively, even if re-trial was possible, the State should have been precluded from arguing the underlying act for the manslaughter charges was an intentional assault because that theory was clearly rejected by the first jury's acquittal.

Additionally, Musgrove's convictions should be reversed because the prosecutor violated an agreed ruling in limine and made a propensity argument attributing prior unexplained injuries to Musgrove. Finally, at a minimum, the second-degree manslaughter conviction must be vacated

because entry of judgment on both first- and second-degree manslaughter for one homicide violates double jeopardy.

B. ASSIGNMENTS OF ERROR

1. The trial court's denial of appellant's motion to dismiss the first- and second-degree manslaughter charges violated double jeopardy. CP 125-28.

2. The trial court's denial of appellant's motion to preclude evidence and argument on intentional assault on retrial violated double jeopardy. CP 127-28.

3. The prosecutor committed misconduct in arguing guilt based on uncharged misconduct in violation of the court's ruling in limine.

4. The court violated appellant's right to be free from double jeopardy when it entered judgment for both first- and second-degree manslaughter. CP 180-81.

Issues Pertaining to Assignments of Error

1. Under the collateral estoppel prong of double jeopardy, when a factual issue has been decided by a jury, that issue cannot be re-litigated in a subsequent case between the same parties. The first jury acquitted appellant of second-degree felony murder based on second-degree assault of a child. Substantial and uncontested medical evidence showed the cause of death was intentionally inflicted blunt force trauma.

Does collateral estoppel bar a new trial on manslaughter because the first jury necessarily decided appellant did not commit the act that caused the child's death? (Assignment of error 1).

2. The first jury necessarily found appellant did not commit an intentional assault. In the second trial, the State was permitted to present evidence and argument that appellant committed manslaughter by intentionally assaulting the child and recklessly causing her death. Does collateral estoppel require reversal of the convictions because the second jury could have found appellant guilty based on a fact rejected by the first jury? (Assignment of error 2).

3. ER 404(b) prohibits evidence of prior misconduct to show action in conformity therewith on a given occasion. Evidence of the child's prior unexplained injuries was admitted solely to rule out other causes of death and show the mother's credibility in continuing to take her daughter to the doctor despite the doctor's calls to Child Protective Services. In closing argument, the prosecutor argued Musgrove was guilty because these prior injuries occurred since he began dating the child's mother. Should Musgrove's conviction be reversed for prosecutorial misconduct? (Assignment of error 3).

4. Under State v. Womac,¹ double jeopardy precludes entry of two convictions for one homicide. The jury found appellant guilty of both first- and second-degree manslaughter. Did the court violate appellant's right to be free from double jeopardy when it failed to vacate the lesser conviction? (Assignment of error 4).

C. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County prosecutor charged appellant Henry Paul Musgrove, III² with second-degree felony murder, first-degree manslaughter, and second-degree manslaughter. CP 51-53. At the first trial, the jury acquitted Musgrove of second-degree murder and failed to reach a verdict on either of the manslaughter charges. CP 89, 95. Before the second trial, Musgrove moved to dismiss the manslaughter charges on double jeopardy grounds. CP 98-108. The court denied the motion. CP 125-28.

At the second trial, the jury found Musgrove guilty of both first- and second-degree manslaughter. CP 175. By special verdict, the jury also found Musgrove used a position of trust to facilitate the offenses and should have known the victim was particularly vulnerable. CP 176-79. The trial

¹ State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

² The appellant is Henry Paul Musgrove, III. His father, a witness in the case, is Henry Musgrove, Jr. His former wife Amber Musgrove and his uncle Larry Musgrove also testified. This brief references the appellant as "Musgrove" and uses first names for other family members to avoid confusion.

court found substantial and compelling reasons warranted exceptional sentences. CP 191-92. It entered judgment on both counts and sentenced Musgrove to 126 months on count I and 51 months on count II. CP 180-81.

2. Substantive Facts

a. Overview

Henry Musgrove began dating Amber in November 2007. 20RP³ 617. The couple quickly became serious and moved in together later that month. 20RP 644. Musgrove acted as a father figure to Amber's daughter I.D.D. 20RP 643. With her, he experienced many "firsts." 10RP 947. Although Amber was the primary caregiver, Musgrove grew to love I.D.D. as his own daughter. 10RP 948.

On February 21, 2008, Musgrove spent the day helping a friend move. 10RP 949. After a brief stop at home to check in with Amber and I.D.D. around 9 or 9:30 p.m., he went back to help with one more load. 10RP 950. Unfortunately, on that last trip, Musgrove was pulled over and arrested on a warrant for failing to pay child support for his older child.

³ There are 26 volumes (contained in eight physical volumes) of Verbatim Report of Proceedings referenced as follows: 1RP – Sept. 20, 2010; 2RP – Sept. 27, 2010; 3RP – Oct. 4, 2010; 4RP – Oct. 5, 2010; 5RP – Oct. 6, 2010; 6RP – Oct. 7, 2010; 7RP – Oct. 11, 2010; 8RP – Oct. 12, 2010; 9RP – Oct. 13, 2010; 10RP – Oct. 14, 2010; 11RP – Oct. 18, 2010; 12RP – Oct. 19, 2010; 13RP – Feb. 14, 2011; 14RP – Mar. 4, 2011; 15RP – Mar. 7, 2011; 16RP – Mar. 8, 2011 (morning); 17RP – Mar. 8, 2011 (afternoon); 18RP – Mar. 9, 2011; 19RP – Mar. 10, 2011; 20RP – Mar. 14, 2011; 21RP – Mar. 15, 2011; 22RP – Mar. 16, 2011; 23RP – Mar. 17, 2011; 24RP – Mar. 21, 2011; 25RP – Mar. 22, 2011; 26RP – Apr. 25, 2011.

10RP 951. He remained in jail until approximately 10 p.m. on February 22.
10RP 953; 20RP 621.

The morning of February 22, Musgrove's friend Gary was staying with the family, and watched I.D.D. while Amber took a shower. 9RP 824-25. Later that day, Amber dropped off I.D.D. at Musgrove's grandmother's house, so his family could look after the child while Amber sold a car to post Musgrove's bail. 20RP 621-22. Musgrove's grandmother was ill, and two of Musgrove's aunts and an uncle lived there to care for her. 7RP 606-08, 611-12; 8RP 745. That afternoon and evening, I.D.D. was cared for by Musgrove's aunt Debbie Bostrom, Bostrom's then-boyfriend John Sloan, Musgrove's uncle Larry, and Musgrove's father, Henry Musgrove, Jr. 20RP 680, 698, 715, 722. Although some of the family noticed I.D.D. feeling a bit under the weather, it was nothing unusual. See, e.g., 20RP 681, 691; 21RP 714.

Amber and Musgrove picked up I.D.D. shortly after midnight and returned home. 20RP 625-28. Amber got I.D.D. ready for bed while Musgrove unloaded the car. 10RP 957-58, 980; 20RP 628. When Musgrove returned, Amber took a bath while I.D.D. sat on the living room couch and Musgrove had a cigarette on the front porch. 10RP 959. Up until this point, no one noticed anything out of the ordinary with I.D.D.

Amber was in the bath 10 to 12 minutes. 20RP 629. The door was open so she could see part way into the living room, but she did not hear or see anything unusual. 20RP 644-46. She changed into her pajamas and when she returned to the living room, I.D.D. was holding her stomach as if she had a stomachache. 20RP 630-31. She tried to comfort the child, but from that point on, I.D.D. was unable to get comfortable. 20RP 632.

I.D.D.'s condition continued to worsen until she seemed unable to stand. 20RP 655. Around 6:30, Amber and Musgrove decided to take her to the hospital. 20RP 632. Being new to the area, they got lost on the way and arrived about 7:15 or 7:30. 10RP 963; 20RP 633.

At the hospital, the doctors and nurses had many questions, but Amber and Musgrove had no answers. 20RP 658-59. There were bruises on I.D.D.'s forehead, back, and ribcage and she appeared gravely ill. 22RP 758-59, 770-76. Doctors ordered numerous tests but could not determine the cause of her condition. 22RP 763-64. At 10:45, I.D.D.'s heart stopped. 9RP 899. Doctors tried unsuccessfully to revive her until 12:01 p.m. when she was pronounced dead. 9RP 901.

Even after her death, the ER physician did not know what had killed I.D.D. 9RP 908. An autopsy determined the cause of death was a one-centimeter perforation of her transverse colon caused by blunt force trauma to the abdomen. 22RP 818, 820, 865-66.

Musgrove's statement to police was admitted at both trials by stipulation, and his testimony from the first trial was read to the second jury as well. 1RP 2-4; 15RP 16; 22RP 901-02. He also recalled I.D.D.'s symptoms beginning while Amber was in the bath. 10RP 982. He worried she may have been knocked around by the dog or he may have exacerbated her injury by picking her up as he usually did. 10RP 986; Ex. 129. But he acknowledged the doctors said the chances of her injury occurring by accident were slim to none. 10RP 989.

b. First Trial

i. Medical Testimony About Cause of Death

Dr. Lacsina, who performed the autopsy, concluded blunt force trauma to the abdomen caused I.D.D.'s death. 8RP 724. He found a bruise to the lower left chest that extended into the muscle tissue and a one-centimeter laceration of the transverse colon. 8RP 700, 705, 720. He concluded there was a significant amount of force and expressly rejected the idea that this type of injury could have been caused by accident. 8RP 700, 721, 723, 740. He could not think of any Emergency Room procedure that could cause this type of injury. 8RP 726. Nor did he find evidence of any underlying condition that could have led to I.D.D.'s death. 8RP 727. He concluded it must be an inflicted injury because of the amount of force required to rupture the colon. 8RP 722, 740.

Dr. Schoenike, I.D.D.'s pediatrician, also testified he had no underlying conditions or prior injuries that would have predisposed her to a ruptured colon. 8RP 650-51, 654-55. He testified the rupture could only be caused by severe force such as a car accident. 8RP 656.

Similarly, Dr. Yolanda Duralde, medical director at the Child Abuse Intervention Department at Mary Bridge Hospital agreed there was no indication in I.D.D.'s medical records of any pre-existing condition that could have led to her death and the hospital's resuscitation efforts would not have caused these injuries. 9RP 853-54, 869-71. She agreed with Dr. Lacsina's conclusion that blunt force trauma caused the lacerated colon. 9RP 857, 859. She testified the injury would have required significant force to compress the abdomen against the spinal column. 9RP 859. While this type of injury is often seen in car accidents, an even more common cause is inflicted injury. 9RP 859, 877. Although she believed this type of injury could occur accidentally, she concluded I.D.D.'s injury was not accidental because if there had been an accident, the family would be reporting it. 9RP 859-61. Dr. Duralde testified that although most children with this injury survive, by the time I.D.D. arrived at the hospital she was "pretty critical." 9RP 869.

Dr. Eisenberg, who treated I.D.D. in the emergency room, agreed a perforated colon would be caused by a significant blunt force trauma, most

commonly seen in car accidents. 9RP 902. Dr. Eisenberg also testified that even if he had noticed the signs of the ruptured colon, he would not have been able to save I.D.D. 9RP 901-02.

ii. State's Argument on Cause of Death In First Trial

In opposing the defense motion to dismiss at the close of the State's case, the prosecutor argued the only issue before the jury was the identity of the perpetrator. 10RP 934. The prosecutor argued, "[W]e all agree that this child was assaulted, and that that was a nonaccidental injury." 10RP 934. The State further argued, "that's the only conclusion the jury could come to, that there was some sort of an assault . . . someone had to have assaulted her because it was a nonaccidental injury." 10RP 935. The State summarized, "I don't believe that there's any issue about whether or not this was an intentional assault." 10RP 935.

In closing argument to the jury, the State also argued the evidence showed an intentional assault because all the doctors agreed this was an intentional blow to the abdomen. 11RP 1079-80. The prosecutor pointed out that defense counsel conceded in opening this was no accident, although he was free to argue differently now. 11RP 1060. (In closing, defense counsel also agreed the case came down to just one question: who did it. 11RP 1130.)

The State relied on intentional assault to prove the manslaughter charges, as well as the felony murder. With regards to first-degree manslaughter, the prosecutor argued, “You can’t strike a child in the abdomen not knowing there is a risk that you might just kill them.” 11RP

1084. The prosecutor continued:

Was it reckless? The state is going to argue to you, no, it was intentional. It was an intentional blow. This wasn’t a reckless; this was an intentional act. Now reckless is proven if the person acts intentionally. That’s what your instructions say. So my argument is that this wasn’t reckless. This is murder in the first degree. This is the state’s argument for you. Now is it manslaughter in the first degree too? Sure. It’s a lesser charge.”

11RP 1085. Regarding the second-degree manslaughter charge, the state argued, “Was it criminal negligence? . . . Fail to be aware of a substantial risk that death may occur. Obviously, substantial risk that a death may occur when you punch a kid in the gut.” 11RP 1086. The State did not argue there was any culpable conduct other than intentional assault.

c. Motion to Dismiss

After the jury acquitted Musgrove of second-degree murder, defense counsel moved to dismiss the manslaughter charges on grounds of collateral estoppel. CP 98-108. He argued the factual issue of who caused I.D.D.’s death was necessarily decided by the first jury, that it could only have acquitted if it found Musgrove did not commit the intentional assault that led

to her death. CP 104. He argued the cause of death, non-accidental blunt force trauma, was uncontested. CP 103; 13RP 32. There was no evidence of any reckless or criminally negligent conduct. CP 104. Therefore, counsel reasoned, the acquittal meant the State failed to prove the element of identity, whether it was Musgrove who inflicted the injuries. 13RP 14-15; CP 104.

Counsel argued in the alternative that, on re-trial, the State should be precluded from arguing manslaughter based on an intentional assault theory or presenting evidence of intentional assault because the first jury already decided that factual issue in his favor. CP 98-99, 107-08; 13RP 20-21.

The court rejected these arguments. CP 126-28. Because Musgrove did not stipulate to the medical experts' conclusions of an intentional assault, the court concluded the jury could have rejected them and could have found reckless or negligent conduct, such as delay in taking I.D.D. to the hospital, was the cause of death. CP 126-28.

d. Second Trial

i. Testimony on Cause and Timing of Death

As in the first, trial, friends and family members who were with I.D.D. the day before she died all testified that no accidents or injuries occurred. 22RP 622, 627, 687-88, 691, 702-03, 719, 724-25. However, they agreed she was generally not feeling well. 20RP 650, 681-82, 699-700, 724. She ate some pizza and later fell asleep. 20RP 684, 687, 700, 725.

Her condition did not appear serious until the very early morning on February 23, 2008. 20RP 632-33, 669-71. Amber testified that, within five minutes of getting out of the bath, she noticed I.D.D. holding her stomach. 20RP 630-31. Although I.D.D. had had stomach viruses in the past, Amber had never seen her hold her stomach in that way. 20RP 670. After that, I.D.D.'s condition grew worse and worse. 20RP 655, 669. She never cried, but appeared unable to get comfortable. 20RP 631-32. She did not sleep at all. 20RP 657. When they gave her warm water to drink to ease any constipation, she vomited. 10RP 961; 20RP 655; Ex. 129.

Musgrove told police I.D.D. was asleep when they picked her up from Bostrom's care, but at the first trial he testified she was lying awake. Ex. 129; 10RP 955. After they returned home, he thought she was pooping or passing gas while sitting on his lap. 10RP 958-59; Ex. 129. He agreed I.D.D. seemed fine before Amber's bath but began holding her stomach and growing continually worse thereafter. 10RP 977-78, 982; Ex. 129.

When she arrived at the hospital, the doctor found I.D.D. ashen, minimally responsive, and "toxic." 21RP 759-60. Still she did not cry and was given no medication for pain. 22RP 760-61. At one point, she improved a bit and responded briefly to her family's presence, but then declined again rapidly. 21RP 764.

As in the first trial, the medical experts agreed I.D.D. died of blunt force trauma to the abdomen that ruptured her colon. 20RP 605-08; 22RP 820; 23RP 932-33. They testified it would require significant force such as a car accident or a fall from a great height to cause this type of injury. 20RP 607-08; 22RP 769. Absent an accident, the most likely cause was a blunt force blow to the abdomen. 22RP 821-22, 881-83; 23RP 935.

To gauge the timing of the injury, the experts compared the expected symptoms with the witness reports. Dr. Schoenike testified there would be significant discomfort immediately following trauma to the abdomen. 20RP 608. That pain would resolve over the course of an hour or more, and then the patient's condition would rapidly deteriorate due to peritonitis. 20RP 609. A child would cry and be uncomfortable for anywhere from several minutes to several hours after such a blow. 20RP 610. However, a child might not cry out if the wind were knocked out of her or if she were intimidated or threatened. 20RP 609-10. He drew no conclusions about the timing of the injury.

Dr. Lacsina placed the injury at somewhere within less than a day of death due to the lack of inflammation. 22RP 827-28. The symptoms would be first pain, then nausea and vomiting, then fever and abdominal distension, followed by septic shock and death. 22RP 870. He would expect an immediate reaction to the pain of the blow. 22RP 831. He could not say

whether the pain of the blow would subside because pain would also result from blood and stool leaking out of the bowel. 22RP 868. He would expect to see blockage of the intestines and loss of appetite. 22RP 828-29. He found it unlikely a person would be able to sleep. 22RP 829-30.

Dr. Nelson testified it was hard to say how long a person with this injury would seem only slightly ill. 23RP 938. There would be initial pain from the blow, but it would not immediately incapacitate a person. 23RP 938. For a time the person would be able to function normally, but would become weaker and more lethargic and finally unconscious. 23RP 940. He opined the trauma would definitely cause the bowel to stop working and a person would be unable to have a bowel movement or pass gas. 23RP 939.

Therefore, he opined I.D.D.'s injury must have occurred between the time when she was last able to eat, defecate, pass gas and act normally and the time when she was no longer able to do those things. 23RP 946. Based on Amber and Musgrove's accounts of events, he placed that time as between 1:50 and 2:00 a.m. on February 23, while Amber was in the bath. 23RP 947-48, 953, 962. He testified that if nothing happened during that ten minutes, then a significant part of their accounts must be wrong. 23RP 954.

Dr. Duralde testified the discomfort would be immediate and noticeable. 22RP 883-85. While the pain from the blow may subside somewhat, the pain would never become unnoticeable and in fact would

soon start to increase. 22RP 886-87. She opined that if I.D.D. was not in pain, the injury must not have happened yet, but dismissed I.D.D.'s lack of pain at the hospital as shock. 22RP 891-93. She opined a person would not be able to sleep with this injury and concluded the injury must have occurred some time after I.D.D. last slept. 22RP 889.

She would also expect the intestines would be blocked fairly quickly such that a person would be unable to keep food down and would have discomfort from eating. 22RP 884-85. She would also expect the condition to worsen over time. 22RP 885. She concluded that if there was a period of time in which I.D.D.'s condition appeared to remain stable, the injury did not occur during that period. 22RP 887-88. She concluded that if I.D.D. appeared normal at 1:50 but at 2:00 was clutching her stomach, that must be when the injury occurred. 22RP 898-99. Like Dr. Nelson, she opined that if nothing happened during that ten minutes, something else about the story must be wrong. 22RP 900.

ii. Evidence of Prior Injuries

In the second trial, the court adopted its rulings on motions in limine from the first trial. 20RP 558. Those included a ruling on the defense's motion to exclude evidence of I.D.D.'s doctor visits for previous unexplained injuries. The State responded the only purpose of this evidence was to rule out other causes of death and to show Amber's credibility in

continuing to bring her daughter to the doctor even after he alerted Child Protective Services (CPS) on two occasions. 3RP 20-21. On the understanding that that was the only purpose, defense counsel withdrew the objection. 3RP 23. The court offered to instruct the jury as to the limited purposes of proximate cause and credibility, but defense counsel felt that was unnecessary and might be a comment on the evidence. 3RP 24-25.

Subsequently, at the second trial, Dr. Schoenike testified his partner saw I.D.D. for symmetrical bruises to her ears on February 7, 2009. 20RP 599. Because the injury was a red flag for non-accident, CPS was called. 20RP 601. Four days later, he saw her for a red spot, probably a bruise from a finger poke, in her eye. 20RP 602. While this injury could have been self-inflicted, in light of the previous ear bruises, he again notified CPS. 20RP 602-03. Dr. Duralde also testified the ear bruises stood out to her as a sign of child abuse. 22RP 879.

In closing argument at the second trial, the prosecutor suggested Musgrove was likely guilty of causing these prior injuries as well. The prosecutor argued, “She was a normal and healthy child up to 18 months. She falls off her growth chart. She starts going to the doctor with unexplained injuries. Family is being investigated by CPS. This was all after the mother starts dating the defendant.” 24RP 1053. “You know [I.D.D.]’s life falls apart after she meets him.” 24RP 1080. “Dr. Schoenike

tells Amber he thinks [I.D.D.] is abused. She's got these bruises. He reports to CPS. Amber tells Henry. He doesn't go to the next appointment. He doesn't accuse Amber of doing it." 24RP 1073-74.

iii. State's Argument on Cause of Death in Second Trial

In closing arguments in the second trial, the State identified three acts upon which the jury could find reckless or criminally negligent conduct: 1) intentionally striking a child with so much force, 2) delaying seeking out medical attention for the child, or 3) failing to tell the doctors what had happened. 24RP 1076-78. The prosecutor largely focused on an intentional blow, arguing for example, "We know it wasn't an accident. We know it was an inflicted blow. We know it was with significant force. . . . There has to have been reckless conduct." 24RP 1077.

C. ARGUMENT

1. MUSGROVE COULD NOT BE RETRIED FOR MANSLAUGHTER AFTER THE FIRST JURY ACQUITTED HIM OF SECOND-DEGREE MURDER.

When an ultimate factual issue has been decided by a valid final judgment, that same issue may not be litigated again in a future lawsuit between the same parties. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Known by the "awkward phrase" collateral estoppel, this rule nonetheless embodies a vitally important constitutional protection against double jeopardy. Id. at 443, 445. Simply put, collateral

estoppel precludes one jury from reaching a conclusion directly contrary to that of a previous jury. Dowling v. United States, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). A second prosecution violates double jeopardy when the ultimate issue in the second trial was already decided by a previous jury. Id.

Washington's double jeopardy clause, article I, section 9 of the Washington Constitution is coextensive with the federal double jeopardy protection found in the Fifth Amendment and is given the same interpretation by the courts.⁴ State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Application of collateral estoppel is a question of law subject to de novo review on appeal. State v. Eggleston, 164 Wn.2d 61, 70, 187 P.3d 233 (2008) (citing State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007)).

Washington case law states the test: Collateral estoppel precludes relitigation of an issue if these four questions are answered affirmatively:

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

⁴ Both double jeopardy clauses bar trial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the same offense. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

State v. Tili, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003). With scant Washington case law on the collateral estoppel prong of double jeopardy, Washington courts look to federal decisions for guidance. State v. Eggleston, 129 Wn. App. 418, 118 P.3d 959 (2005), aff'd in part, rev'd in part, 164 Wn.2d 61 (2008).

The seminal case is Ashe v. Swenson. In that case, six men were robbed at gunpoint during a poker game. Ashe, 397 U.S. at 437. Ashe was first tried for robbery of one of the poker players. Id. at 438. Four witnesses testified they were robbed and their assailants were armed, but their identification of Ashe as one of the robbers was weak. Id. Defense cross-examination was limited to exposing the weaknesses in the witnesses' identification. Id. Ashe was acquitted. Id. at 439. Six weeks later, Ashe was tried for robbery of a second poker player. Id. at 439-40. The evidence was largely the same but the identification testimony was stronger. Id. at 440. This time, Ashe was convicted. Id.

The court held that “straightforward application of the federal rule [of collateral estoppel] to the present case can lead to but one conclusion,” namely, that the second prosecution was “wholly impermissible.” Id. at 445. The court reasoned that the record was devoid of any indication from which the first jury could have found there was no robbery. The “single rationally conceivable issue in dispute” was whether Ashe was one of the robbers. Id.

“[T]he State could not present the same or different identification evidence in a second prosecution for the robbery . . . in the hope that a different jury might find that evidence more convincing.” Id. at 446.

As in Ashe, the only rationally conceivable disputed issue in Musgrove’s first trial was the identity of the perpetrator. With that issue resolved in Musgrove’s favor by jury verdict of acquittal, the State could not hale Musgrove into court again in hopes that a new jury would decide the issue differently.

a. The First Jury Conclusively Determined Musgrove Was Not Responsible for I.D.D.’s Death.

When there is a special verdict, it is relatively simple to determine what factual issues a jury decided. See Mitchell v. Prunty, 107 F.3d 1337, 1339 n.2 (9th Cir. 1997) (“Special findings . . . are dispositive of the questions put to the jury.”), overruled on other grounds by Santamaria v. Horsley, 133 F.3d 1242 (9th Cir. 1998). However, in the case of a general verdict, the court must determine what factual issue or issues the first jury necessarily decided. Ashe, 397 U.S. at 444. When the jury could not have grounded its verdict on any other issue, the State may not relitigate that issue. Id.

To determine what the jury necessarily decided, the court examines the record in the prior proceeding, the pleadings, the charges, “and other

relevant matter.” Id. The inquiry is not the “hypertechnical and archaic approach of a 19th century pleading book.” Id. In other words, “The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.” Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Courts must instead approach the issue with “realism and rationality,” a “practical frame,” and “an eye to all the circumstances of the proceedings.” Ashe, 397 U.S. at 444.

In its analysis, the court may not consider the jury’s failure to reach a conclusion on other counts. Yeager v. United States, ____ U.S. ____, 129 S. Ct. 2360, 2367, 174 L. Ed. 2d 78 (2009). The inability to reach a verdict on some of the counts is a “nonevent” that does not impact the preclusive effect of the acquittal. Id.

When the entire proceedings are regarded with a practical eye toward all the circumstances, the first jury could only have acquitted Musgrove on the issue of identity. The jury was instructed it should find Musgrove guilty if:

- 1) he committed assault of a child in the second degree,
- 2) he caused I.D.D.’s death in the course of and in furtherance of that crime,
- 3) I.D.D. was not a participant in that crime, and

4) these acts occurred in the State of Washington.

CP 79. Assault of a child in the second degree was defined as assault in the second degree committed by a person over 18 against a child under 13. CP 68. Assault in the second-degree was defined as intentionally⁵ assaults another and thereby recklessly inflicts substantial bodily harm. CP 69.

It was undisputed at trial that someone intentionally assaulted I.D.D., thereby committing second-degree assault of a child. See, e.g., 7RP 586, 597; 11RP 1079-80, 1130 (State and defense opening and closing arguments in first trial). It was undisputed this blow caused her death. See id. It was similarly undisputed I.D.D. was not a participant in the crime, which occurred in the State of Washington. The only disputed issue was the identity of the actor. See id. In acquitting Musgrove, the jury necessarily determined the State failed to prove it was he.

b. The Jury Must Have Decided Musgrove Was Not Responsible Because Substantial and Undisputed Evidence Showed I.D.D. Died from Intentional Assault.

Ashe mandates that the inquiry of what the first jury decided must be reasonable in light of the evidence and argument. 397 U.S. at 444. Specifically, courts should not speculate that the jury might have disregarded substantial and uncontested evidence. Id. at 444 n. 9. “If a later court is

⁵ The jury was also instructed the assaulter need not intend to cause substantial bodily harm or even any harm; he need only intend to touch or strike in a manner offensive to an ordinary person. CP 70.

permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering.” *Id.* (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari: New Trials And Successive Prosecutions, 74 Harv. L. Rev. 1 (1960)).

The medical testimony in this case was uncontested and clear that I.D.D. died from blunt force trauma to the abdomen. 8RP 656, 724; 9RP 857, 859, 902. In the absence of any evidence of a car accident or fall from a great height, the mechanism was almost certainly “inflicted injury.” 8RP 722, 740; 8RP 723; 9RP 859-61, 877. This evidence was undisputed. Neither the State nor the defense presented any evidence of any other possible mechanism of injury. This testimony establishes I.D.D. was intentionally assaulted and that that assault caused her death. The only disputed issue was “who dunnit.”

The only inconsistencies in the medical testimony involved the likely symptoms a child would exhibit and the timing and severity of those symptoms. 8RP 727, 730-35, 740-41; 9RP 863-64, 874-75, 878. The timing and symptoms were relevant only to show the identity of the perpetrator, *i.e.*, whoever was with the child when symptoms began. The inconsistent testimony as to timing only underscores that the only question on which the jury could have found reasonable doubt was the identity of the perpetrator.

None of the evidence reasonably pointed to any other cause of death. The experts testified that by the time I.D.D. arrived at the hospital she was already in shock and could not have been saved, even had they immediately known what was wrong. 9RP 869, 901-02. They did not testify that anyone should have known what was wrong and brought her to the hospital sooner or that such action would have saved her life. Musgrove told police he picked I.D.D. up and feared this may have made things worse, but made clear he did nothing out of the ordinary. Ex. 129. He simply picked up his child, like he usually did, and not in any way that would have injured her. In hindsight, he merely wondered if her stomach problems may have been exacerbated by the movement. Ex. 129.

There was no evidence that Musgrove somehow unintentionally caused I.D.D.'s death. Based on the evidence, the jury could not have acquitted because it doubted there was an intentional assault. It could only have acquitted because it doubted Musgrove was responsible.

c. The First Jury Necessarily Decided Musgrove Was Not Responsible Because Neither Party Argued Anything Other Than Intentional Assault.

Nor did the parties' arguments present opportunity for the jury to decide on any basis other than identity. The State attempted to show that, according to the medical testimony, the injury could only have happened when I.D.D. was alone with Musgrove. 11RP 1022. The defense attempted

to show that, according to the medical testimony, it could have happened while Musgrove had an undisputed alibi: he was in jail. 11RP 1102-06.

Even with regards to the manslaughter charges, the State did not argue there was a reckless or criminally negligent act. 11RP 1080-84. Instead, it argued the intentional assault was also reckless and criminally negligent because those lesser mental states are also established if the defendant acted intentionally. 11RP 1085. Thus, even in attempting to prove manslaughter, the State argued only that there was an intentional assault.

The absence of a formal stipulation or concession does not mean other elements were disputed. See Ashe, 397 U.S. at 444 n.9 (quoting Mayers & Yarbrough, supra). The fact that, technically speaking, the jury had more than one element to decide does not preclude collateral estoppel when the evidence is substantial and undisputed on all the elements save one. Id. The Ashe court specifically noted that if that were the case, collateral estoppel would never apply in a criminal case because every imaginable offense includes more than one element. Id.

In this case, the evidence presented and the arguments of the parties all led directly to the conclusion that I.D.D.'s death was caused by intentional assault. The defense did not contest this issue. The only disputed issue was the identity of the perpetrator.

d. This Court Should Not Assume the Jury Made an Irrational Decision or Failed to Base Its Decision on the Evidence Presented.

The trial court concluded the jury could have based its acquittal on other elements than identity. CP 125-27. But to do so, the jury would have had to disregard not only the undisputed evidence as to the cause of death and mechanism of injury, but also the instructions to decide the case based on the evidence. The court should not presume it did so.

“[J]urors are presumed to follow instructions.” State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). To presume otherwise is to “inevitably conclude that a trial by jury is a farce.” Id. (citation omitted). The first sentence of the jury instructions tells the jury, “It is your duty to decide the facts in this case based upon the evidence presented to you during this trial.” CP 59. The jury was also instructed, “You must reach your decision based on the facts proved to you and on the law given to you,” and, “You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” CP 60, 61.

In the collateral estoppel analysis, the question is whether a “rational” jury could have grounded its verdict on any other issue. Ashe, 397 U.S. at 444. To find a basis other than identity for the acquittal in this case, the court must presume an irrational jury that disregards the evidence.

The United States Supreme Court initially followed such an irrational jury presumption in Hoag v. New Jersey, 356 U.S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958). The facts paralleled those of Ashe: one robbery with several victims and sequential trials. Ashe, 397 U.S. at 441 (discussing Hoag). In assessing what the first jury necessarily decided, the Hoag court stated first that it was “keeping in mind the fact that jury verdicts are sometimes inconsistent or irrational.” Hoag, 356 U.S. at 472. The court then reasoned, “[T]he jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had been taken from them, or for other reasons unrelated to the issue of ‘identity.’” Id.

The trial court’s reasoning in this case bears a striking resemblance to the rejected reasoning from Hoag. See CP 126. The trial court reasoned the jury could have (in contradiction to the uncontested evidence) rejected the idea that I.D.D.’s death was the result of the injuries inflicted or that someone intentionally assaulted her. CP 126. But the Ashe court rejected this reasoning and reversed the conviction on the very same facts where Hoag had affirmed. Ashe, 397 U.S. at 444, 444 n.9.

The first jury’s acquittal is only rational if it found it was not Musgrove who caused I.D.D.’s fatal injuries. The second jury could only have convicted him of manslaughter by directly contradicting that

conclusion. This is precisely what the collateral estoppel prong of double jeopardy prohibits. Dowling, 493 U.S. at 348 (citing Ashe, 397 U.S. at 445). Musgrove must be allowed the benefit of the jury's verdict. Relitigating the factual issue of whether he was responsible for I.D.D.'s death violated Musgrove's constitutional rights not to be twice placed in jeopardy for the same offense. Ashe, 397 U.S. at 446-47.

2. MUSGROVE WAS TWICE PLACED IN JEOPARDY WHEN THE STATE PRESENTED EVIDENCE AND ARGUMENT BASED ON INTENTIONAL ASSAULT.

“[I]f the Government's case depends on facts found in defendant's favor by an acquittal, collateral estoppel precludes the Government from attempting to reprove those facts and, hence, from retrying the defendant.” United States v. Powell, 632 F.2d 754, 757 (9th Cir. 1980) (citing Sealfon v. United States, 332 U.S. 575, 578-80, 68 S. Ct. 237, 239-240, 92 L. Ed. 180 (1948)). In addition to barring retrial, the Ashe court declared, “the State could not present the same or different identification evidence in a second prosecution . . . in the hope that a different jury might find the evidence more convincing.” 397 U.S. at 446.

Thus, even if Musgrove's second trial was permissible, the State should have been precluded from presenting “the same or different” evidence relating to the issue decided by the first jury. The double jeopardy protection of collateral estoppel denies the State a second bite at the apple in

establishing a factual proposition already resolved by a previous jury when the fact was necessarily decided in the first trial and is an ultimate fact in the second. Id. at 443.

Even if the first jury could have acquitted on some other basis than pure identity (such as his mental state), it could not have acquitted without finding Musgrove did not intentionally assault I.D.D. The court should have, at a minimum, precluded the State from presenting argument and evidence in the second trial that Musgrove was guilty of manslaughter based on intentional assault. The failure to exclude this evidence and argument resulted in a strong likelihood the second jury contradicted the first. Under the rule of lenity, that likelihood violates double jeopardy.

a. Intentional Assault Was an Ultimate Fact in the Second Trial.

Musgrove's convictions violate collateral estoppel and double jeopardy because the intentional assault that the jury rejected in the first trial was an issue of ultimate fact in the second trial. The ultimate fact analysis for the second trial differs from the question of whether the issue was necessarily decided in the first trial. Ultimate facts are "those which the law makes the occasion for imposing its sanctions." United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972) (466 F.2d at 245, 245 n.3 (Heaney, J., dissenting) (citing Judge Learned Hand's definition of ultimate facts).

Therefore, if the factual issue, as presented to the jury, would be sufficient for a guilty verdict, it is an ultimate fact, regardless of whether the jury could have based its verdict on some other issue.

In the second trial as in the first, the State's closing argument focused on the idea of an intentional assault as the basis for the charges. 24RP 1076-78. The prosecutor argued, "We know it wasn't an accident. We know it was an inflicted blow." 24RP 1077. The prosecutor repeatedly reinforced the notion that this was an intentional blow:

- "If she got punched at grandma's, she didn't cry then, either. If she got punched when they got home, she didn't cry then either. It doesn't mean that she wasn't struck. It doesn't mean that this wasn't inflicted trauma. . . . We know she was struck in the abdomen." 24RP 1053-54.
- "If [I.D.D.] was struck in the stomach, that doesn't make a lot of noise. If she was sitting on the couch and somebody struck her, it wouldn't make noise." 24RP 1054-55.
- "Nobody punched her after two o'clock. Nobody kicked her after two o'clock." 24RP 1056.
- "Did Amber know [I.D.D.] was punched or kicked in the gut and went to the hospital and kept her mouth shut?" 24RP 1062.
- "Those are the only people who know exactly what happened. Exactly if this was a punch. Exactly if this was a kick." 24RP 1064.
- "Was it a punch? Was it a kick? Was she hit with something? Only the defendant knows what happened." 24RP 1072.
- "He knows she has been struck. Inflicted blunt force trauma." 24RP 1075.

- “What does it mean to be reckless? . . . Knows of and disregards a substantial risk that a death may occur. You cannot strike a child in the abdomen with that much force without knowing there’s a risk you might kill them. . . when you hit or kick a child with that much force, you should know the possibility.” 24RP 1075-76.

Although the prosecutor tossed out the idea of other reckless conduct such as delaying going to the hospital or not telling the doctors what happened, the majority of the argument and evidence related to intentional assault. See Statement of the Case section C.2.d.i, iii, supra. Since this was the predominant argument before it, the second jury was likely to base its guilty verdict on the fact of intentional assault, directly contrary to the first jury’s verdict.

b. Double Jeopardy Is Violated Even If There May Be Another Possible Basis for the Jury’s Verdict.

When jury verdicts are analyzed for double jeopardy violations, the rule of lenity applies. State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008). When the evidence and the instructions permit two convictions for the same offense, double jeopardy is violated, even if the jury could have relied on some other factual basis for the conviction. Id.; State v. DeRyke, 110 Wn. App. 815, 822, 41 P.3d 1225 (2002), aff’d, 149 Wn.2d 906 (2003). Therefore, any ambiguity in basis for the second verdict must be construed in Musgrove’s favor. Reversal is required because the instructions and

evidence permitted the second jury to convict on the very same basis the first jury had already rejected.

Kier illustrates the principle that the defense must receive the benefit of the doubt as to a double jeopardy violation. A jury found Kier guilty of first-degree robbery and second-degree assault. Kier, 164 Wn.2d at 802. The court vacated the second-degree assault conviction under the merger doctrine because the assault was necessary to elevate the robbery to first degree. Id. at 802, 807. The court rejected the State's argument that the convictions were for separate offenses because they were based on separate victims. Id. at 808, 811. Even though the State argued in closing that the robbery pertained to one victim and the assault to the other, the court concluded that, based on the instructions and the evidence, the jury could have convicted Kier for robbing and assaulting the same victim. Id. at 813. The rule of lenity thus required vacating the lesser conviction on double jeopardy grounds. Kier, 164 Wn.2d at 814.

The same is true here. Collateral estoppel embodies the constitutional right to be free from double jeopardy. Ashe, 397 U.S. at 445. The potential for dual convictions in Kier is no different from the acquittal and conviction in this case. See, e.g., Corrado, 81 Wn. App. at 645 (double jeopardy bars trial for the same offense when jeopardy terminated via acquittal or conviction). Once the first jury found Musgrove not guilty of

intentional assault, he could not be placed in jeopardy a second time by having that same question submitted to a second jury. Even if there might be some other possible basis for the second jury's verdict, the strong potential that the jury contradicted his acquittal requires reversal. Kier, 164 Wn.2d at 814; see also State v. Berg, 147 Wn. App. 923, 931, 935, 198 P.3d 529 (2008) (when multiple identical counts alleged, double jeopardy is violated unless jury is instructed to find separate and distinct act for each count); State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (same).⁶

Application of the rule of lenity in this case is consistent with the United States Supreme Court's jurisprudence on this issue. Under Dowling, collateral estoppel does not bar evidence of separate crimes used merely as evidence. Dowling, 493 U.S. at 348-50. But that is not the scenario here.

Dowling was charged with a bank robbery. Id. at 344. The robber was seen wearing a ski mask and armed with a small pistol. Id. Lurking nearby was a white van driven by Delroy Christian; police opined it was to have served as a getaway vehicle. Id. at 345. At trial, Vera Henry testified that, two weeks after the bank robbery, she was robbed by Delroy Christian and a man in a knitted mask with cutout eyes and a small pistol, who she identified as Dowling. Id. at 344-45. The jury was instructed Dowling was acquitted of the Henry robbery and Henry's testimony was admitted solely to

⁶ Contra Santamaria, 133 F.3d 1242.

show the similarity of the mask and gun to the bank robbery at issue. Id. at 345-46.

Dowling argued collateral estoppel barred evidence of the Henry robbery because he was acquitted of that offense. Id. at 348. The court rejected this argument because whether Dowling committed the Henry robbery was not an ultimate issue in the bank robbery trial. Id. Dowling conceded it was not an ultimate issue, and the court declined to extend the doctrine of collateral estoppel to bar all evidence of acquitted charges. Id.

This case is not like Dowling. The other crime in Dowling was an entirely separate incident, and thus the jury's prior acquittal involved an entirely separate factual question. The new jury did not need to decide whether the Henry robbery occurred. It was merely used to show Dowling's association with a potential accomplice and a similar modus operandi.

In this case, the gravamen of second-degree felony murder charge in the first trial is precisely the same act as the manslaughter charge in the second. This is not an unrelated other crime. Musgrove's two trials, like the robbery of the poker game in Ashe, involve the same crime and the same act in the same time and the same place. If the jury accepted the State's argument in the second trial, it likely concluded Musgrove intentionally assaulted I.D.D. But the first jury necessarily found Musgrove did *not* intentionally assault I.D.D. The strong potential that Musgrove's conviction

relies on an ultimate fact already rejected by jury verdict violates double jeopardy. See, e.g., Kier, 164 Wn.2d at 814. Musgrove should not have had to “run the gantlet” on that accusation a second time. Ashe, 397 U.S. at 446.

3. THE PROSECUTOR’S USE OF I.D.D.’S PRIOR INJURIES AS PROPENSITY EVIDENCE DENIED MUSGROVE A FAIR TRIAL.

There was no evidence connecting I.D.D.’s previous bruised ears and poked eye with Musgrove. Before the first trial, Musgrove moved to exclude evidence of these injuries as irrelevant, unfairly prejudicial, and inadmissible character evidence. CP 13-17. The prosecutor agreed there was no evidence Musgrove was responsible and it would use these incidents only to exclude them as an alternate cause of death and to show Amber’s credibility. 3RP 20-21, 24. Defense counsel withdrew his objection on the understanding that these were the only permitted purposes. 3RP 23. The court offered to so instruct the jury, but defense counsel agreed that was not necessary. 3RP 24-25. Despite this agreement, the prosecutor argued that I.D.D. began to have unexplained injuries “after the mother starts dating the defendant.” 24RP 1053. He later emphasized, I.D.D.’s life “falls apart” after she met Musgrove. 24RP 1080.

Prosecutors are quasi-judicial officers with an independent duty to act in the interests of justice and ensure that accused persons receive a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Consistent

with their duties, prosecutors must not urge guilty verdicts on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). Nor may they refer to matters outside the evidence. Id. The trial is not fair when the prosecutor commits misconduct and that misconduct is likely to affect the jury. Fisher, 165 Wn.2d at 747. Even when there is no objection at the time, misconduct requires reversal when it is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by instructing the jury. Id.

The prosecutor committed misconduct in linking these injuries to Musgrove without any supporting evidence. Belgarde, 110 Wn.2d at 507-08. He also committed misconduct in violating the agreed order in limine. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993). Finally, he committed misconduct in raising a propensity argument that encouraged the jury to view I.D.D.'s prior injuries as evidence of Musgrove's guilt on the charged offenses. See United States v. Coats, 652 F.2d 1002, 1004 (D.C. Cir. 1981) (improper use of prior conviction admitted solely for impeachment). Musgrove's convictions should be reversed because "even meticulous cautionary instructions are incapable of erasing an error of this genre." Id.

a. The Prosecutor Committed Misconduct When He Violated the Pre-Trial Ruling and Encouraged the Jury to Convict Based on Propensity.

“[I]t is fundamental to American jurisprudence that a defendant must be tried for what he did, not for who he is.” See, e.g., State v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980). “There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial.” State v. Smith, 103 Wash. 267, 268, 174 P. 9 (1918). Therefore, common law has traditionally excluded evidence of other misconduct by the defendant, for fear juries will convict based on a general propensity to commit crime. McKinney v. Rees, 993 F.2d 1378, 1381 (9th Cir. 1993) (common law rule against propensity evidence has existed at least since 1684); State v. Bokien, 14 Wash. 403, 414, 44 P. 889 (1896) (citing general rule that “it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged”).

The exceptions, under ER 404(b) and ER 609, for example, are carefully guarded and restricted to avoid the forbidden inference of guilt based on character or propensity. See, e.g., State v. Sutherby, 165 Wn.2d 870, 886-87, 204 P.3d 916 (2009) (when admissibility of other offenses is a close call, “the scale should be tipped in favor of the defendant and exclusion of the evidence”) (quoting State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951

of the evidence”) (quoting State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986)); State v. DeVincentis, 150 Wn.2d 11, 18, 74 P.3d 119 (2004) (caution is called for in applying exceptions to ER 404(b)). When evidence of other misconduct is placed before the jury, prosecutors must take care to avoid the propensity inference. See Coats, 652 F.2d at 1004.

In Fisher, a case also involving child abuse, the prosecutor committed misconduct when he exceeded the limits on evidence of uncharged instances of abuse. 165 Wn.2d at 749. The trial court admitted the evidence only to rebut a defense argument regarding the child’s delayed reporting of abuse. Id. at 747. However, the State pre-emptively introduced the evidence without any such argument by the defense. Id. at 747-48. Instead of the permissible credibility purpose, the prosecutor used it to argue guilt based on propensity. Id. The court concluded, “Using the evidence in such a manner after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct.” Id. at 749.

Here, the prosecutor did not carefully avoid the propensity inference. Instead he actively encouraged the jury to indulge. As in Fisher, the prosecutor referred to inherently prejudicial (and entirely unproven) past acts and violated the agreed order in limine by arguing guilt based on propensity. 24RP 1053, 1080. Referring to I.D.D.’s doctor visits for ear bruises and a

poked eye, the prosecutor argued, “She was a normal and healthy child up to 18 months. She falls off her growth chart. She starts going to the doctor with unexplained injuries. Family is being investigated by CPS. This was all after the mother starts dating the defendant.” 24RP 1053. Later he returned to this theme, “You know [I.D.D.]’s life falls apart after she meets him.” 24RP 1080. This was after persuading the court to admit the evidence and defense counsel to drop his objection by assuring them it would only be used to rule out alternate causes of death and show Amber’s credibility as a witness. 3RP 21-24. The prosecutor committed misconduct by using this evidence to argue propensity, particularly after an agreed order to the contrary. Fisher, 165 Wn.2d at 749.

b. Inherently Inflammatory Propensity Evidence of Child Abuse Was Substantially Likely to Affect the Jury’s Verdict.

This misconduct requires reversal because, as in Fisher, the jury was likely influenced by propensity argument on child abuse. It can hardly be denied that evidence of child abuse is inherently inflammatory and likely to arouse an emotional response by the jury. See, e.g., Garcia v. Providence Med. Ctr., 60 Wn. App. 635, 644-45, n.2, 806 P.2d 766 (1991) (child abuse is an emotional and “highly inflammatory” subject); Valmonte v. Bane, 18 F.3d 992, 1004 (2d Cir. 1994) (determining whether an individual has abused a child is “inherently inflammatory”). Additionally, the inference of

guilt due to propensity is one jurors are particularly likely to indulge in. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990).

The argument was also likely to affect the jury because no limiting instruction restricted the jury's use of the evidence. The Fisher court reversed in part on this basis. The court noted that, while the jury was instructed the lawyers' remarks are not evidence, it was not instructed not to consider the previous crimes as evidence of criminal propensity. Fisher, 165 Wn.2d at 749. The same is true in this case.

No further objection was required to preserve this error because Musgrove filed a motion in limine to exclude the evidence. CP 13-17; Fisher, 165 Wn.2d at 748 n.4. The purpose of a motion in limine is to avoid having to comment in the presence of the jury. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). A formal standing objection is not necessary. Fisher, 165 Wn.2d at 748 n.4. Additionally, defense counsel was lulled into a false sense of security by the prosecutor's assurance that it would not be used in an improper manner. 3RP 20-21. Even so, out of an abundance of caution, he renewed his objection twice at the start of the second trial. CP 131; 14RP 2-3; 20RP 557-58.

Under these circumstances, no further objection should be required to preserve error. However, this misconduct was also flagrant, ill

intentioned, and incurable by instruction. Reversal is therefore required even if this Court should deem the objection insufficient.

c. Encouraging the Jury to Convict Based on Propensity Is So Flagrant and Ill-Intentioned That It Cannot Be Cured by Instruction.

The Fisher court found the error preserved by the motion in limine. Fisher, 165 Wn.2d at 748. n.4. But even if that were not the case, the court concluded, “we do not believe that any limiting instruction could have neutralized the prejudicial effect.” Id.

Federal courts have come to the same conclusion regarding improper propensity argument. Coats, 652 F.2d at 1004. In Coats, the defendant’s prior conviction was admitted to impeach his credibility as a witness under rule 609 of the Federal Rules of Evidence. Id. at 1003. In closing, the prosecutor argued it was unsurprising the handwriting expert could not identify Coats as the author of the forged documents, “considering Mr. Coats’ prior involvement with cases of this type.” Id. The appellate court discussed the fact that in general, it is difficult enough for a jury to separate out the permissible use of such evidence. Id. at 1004 (quoting United States v. Carter, 482 F.2d 738, 740-41 (D.C. Cir. 1973)). When there is additional prejudice because the prosecutor uses the evidence in an inappropriate manner, “[L]imiting instructions cannot confidently be held to have eliminated the prejudice. It is asking too much of a jury.” Id.

Evidence of prior crimes is inherently prejudicial and likely to affect the jury. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995); Smith, 103 Wash. at 268. “A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.” Bacotgarcia, 59 Wn. App. at 822. Because the prosecutor used closing argument to urge the jury to follow its natural inclination to use this evidence for an improper purpose, the effect could not be cured by instruction.

The inflammatory effect was even greater because the prior involved child abuse. “[W]here the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors,” an instruction to disregard is futile. State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). To put it bluntly, “[I]f you throw a skunk into the jury box, you can’t instruct the jury not to smell it.” Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

In addition to being incurable by instruction, the misconduct was flagrant and ill intentioned because the dangers of other act evidence and the corresponding restrictions on use of evidence are well established and recognized. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P. 2d 697 (1982); Smith, 103 Wash. at 268; State v. Trickler, 106 Wn. App. 727, 734, 25 P.3d 445 (2001). Additionally, after defense counsel’s objection, the prosecutor

was clearly aware of the issue. 3RP 19. This was not a case where the prosecutor could misunderstand boundaries set by the court; since the prosecutor proposed the limited permissible purposes, he was certainly well aware of what they were. 3RP 20-21. Under these circumstances, the improper conduct was flagrant and ill-intentioned. See Fisher, 165 Wn.2d at 748 n.4 (noting prosecutor was well aware of the pre-trial ruling).

Musgrove was denied a fair trial when the prosecutor violated the agreed ruling in limine and used I.D.D.'s prior bruises to show that her life began to fall apart when she met Musgrove. 24RP 1053, 1080. Reversal is required because the prosecutor essentially argued Musgrove was guilty because he was responsible for prior uncharged acts against the child. Fisher, 165 Wn.2d at 749. As in Fisher, no instruction could have cured the effect when the prosecutor's argument transformed a single event into a pattern of abuse. 165 Wn.2d at 748 n. 4.

4. DUAL CONVICTIONS FOR BOTH FIRST- AND SECOND-DEGREE MANSLAUGHTER VIOLATE DOUBLE JEOPARDY.

Second-degree manslaughter is a lesser degree of first-degree manslaughter, and the convictions should therefore merge. RCW 9A.32.060; RCW 9A.32.070. Unfortunately, the court accepted the State's mistaken argument that it could enter judgment on both, in case one were reversed on appeal. 25RP 56-57. Washington's Supreme Court soundly

rejected this argument in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), and again in State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). At a minimum, double jeopardy requires Musgrove’s conviction and sentence for second-degree manslaughter be vacated.

a. First- and Second-Degree Manslaughter Are the Same Offense.

Double jeopardy prohibits multiple punishments for the same offense. Turner, 169 Wn.2d at 454. To determine whether offenses proscribed by different statutes constitute the same offense, courts use the “same evidence” or “same elements” test, which is very similar to the federal Blockburger⁷ test. Womac, 160 Wn.2d at 652. Two offenses are not constitutionally the same “if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” Id. This test is not necessarily dispositive, but is indicative of whether the Legislature intended to create one offense or several. Id. at 652-53, 655-56.

Washington’s statutes make clear that it did not intend to impose multiple punishments for a single homicide. Id. at 655-56. “One killing equals one homicide; one unlawful homicide equals either one murder, homicide by abuse or manslaughter. Id. (quoting State v. Schwab, 98 Wn. App. 179, 184-85, 988 P.2d 1045 (1999)).

⁷ Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

b. The Lesser Offense Must Be Unconditionally Vacated.

Womac made clear that multiple convictions are multiple punishments, even if only one sentence is imposed. 160 Wn.2d at 654-56. Womac was convicted of homicide by abuse, second-degree felony murder, and first-degree assault. Id. at 647. The trial court entered judgment on all three convictions, but sentenced Womac only on homicide by abuse. Id. The court determined all three were the same offense for double jeopardy purposes and the two lesser offenses must be vacated. Id. at 654-56.

The court rejected the argument that the lesser convictions could stand so long as Womac was only sentenced on the greater. Id. at 656. The court explained that conviction itself has adverse consequences and is “punishment” for double jeopardy purposes. Id. at 656-57. The court “may *not*, however, enter multiple convictions for the same offense without offending double jeopardy.” Id. at 658. The court directed the trial court to vacate the lesser offenses, agreeing with defense counsel that it was unjust to hold these convictions “in a safe for a rainy day. . . then they can sort of rise from the dead like Jesus on the third day and bite my client.” 160 Wn.2d at 651, 660.

Three years later, the court was faced with a similar issue in Turner. Turner was found guilty of first-degree robbery and second-degree assault.

169 Wn.2d at 451. The trial court vacated the assault conviction but also entered a separate order declaring it was a valid conviction upon which Turner could be sentenced if the robbery conviction were overturned on appeal. Id. Similarly, Turner’s co-appellant was found guilty of both first- and second-degree murder. Id. The court conditionally vacated the second-degree murder conviction, but expressly noted it could be revived if the other conviction were reversed on appeal. Id. The court held that a trial court violates double jeopardy, “either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” Id. at 464. The judgment and sentence must not include “any reference” to the vacated conviction. Id. Nor may it be referenced at sentencing. Id. at 464-45.

Under Womac and Turner, the court violated Musgrove’s right to be free from double jeopardy when it entered judgment and sentenced him on both first- and second-degree manslaughter. CP 180-81; Turner, 169 Wn.2d at 464-65; Womac, 160 Wn.2d at 658, 660. The lesser conviction for second-degree manslaughter should be vacated without any reference to its possible reinstatement. Turner, 169 Wn.2d at 464.

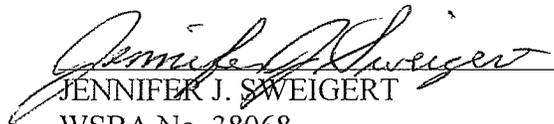
D. CONCLUSION

Collateral estoppel precluded trying Musgrove twice on the question of whether he intentionally assaulted I.D.D., thereby causing her death. Alternatively, his convictions should be reversed because prosecutorial misconduct denied him a fair trial. At a minimum, the second-degree assault conviction must be vacated because the dual convictions violate double jeopardy.

DATED this ^{20th} ~~21~~ day of September, 2011.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 42068-6-II
)	
HENRY MUSGROVE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HENRY MUSGROVE
NO. 773769
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF SEPTEMBER 2011.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

September 29, 2011 - 5:38 PM

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