

NO. 42068-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

HENRY MUSGROVE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00318-3

BRIEF OF RESPONDENT

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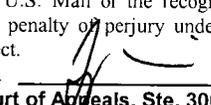
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Double Jeopardy clause prohibited a retrial on the manslaughter charges when, although the acquittal on the felony murder charge precluded a second trial on that specific charge, jeopardy did not terminate on the manslaughter charges as the jury was expressly unable to reach a verdict on those two charges?

2. Whether the collateral estoppel component of Double Jeopardy precluded the State from retrying the Defendant for manslaughter when: (1) even if the jury had decided that the Defendant did not intentionally assault I.D.D., collateral estoppel would not prevent a retrial of the manslaughter charges since the existence of an intentional assault was not an element in either of the two manslaughter charges; and when, (2) the jury's general verdict in the first trial did not definitively reveal the basis for the jury's verdict?

3. Whether the Defendant's claim that the State violated the Double Jeopardy clause by arguing that the Defendant intentionally assaulted I.D.D. is without merit when: (1) the State did not argue in the second trial that the Defendant had intentionally assaulted I.D.D.; and, (2) collateral estoppel would not have precluded such an argument (even if the State had made such an argument) because the existence of an intentional assault was

not an “ultimate fact or issue” in the second trial?

4. Whether the Defendant’s claim of prosecutorial misconduct must fail when the Defendant waived the issue by failing to object below and by failing to otherwise demonstrate that the alleged prosecutorial misconduct was flagrant and ill intentioned, or that the prejudice resulting therefrom was so marked and enduring that corrective instructions or admonitions could not have neutralized its effect?

5. The State concedes that the charge of manslaughter in the second degree must be vacated.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Henry Musgrove, was charged by amended information filed in Kitsap County Superior Court with felony murder in the second degree, manslaughter in the first degree, and manslaughter in the second degree. CP 51-53. After an initial jury trial the defendant was found not guilty on the charge of felony murder, but the jury was unable to reach a verdict on the two manslaughter charges. CP 89, 95. A second trial was then held, and the jury found the Defendant guilty of the two manslaughter charges (and the jury also found that the victim was particularly vulnerable and that the Defendant had used a position of trust to facilitate the crime). CP 175, 176-79. The trial court imposed an exceptional sentence. CP 191-92. This

appeal followed.

B. FACTS

In the first trial the evidence showed that in March of 2006 Amber Musgrove gave birth to I.D.D., the minor victim in this case. RP 770 (10/13/10).¹ Ms. Musgrove had dated the child's biological father, John Hull, for several years, but the couple broke up when I.D.D. was approximately a year and a half old. RP 770 (10/13/10).

Ms. Musgrove began dating the Defendant in October of 2007. RP 771 (10/13/10). Around the beginning of January 2008, the Defendant and Ms. Musgrove, along with I.D.D., moved into an apartment in Port Orchard. RP 772 (10/13/10).

On February 22, 2008 Ms. Musgrove learned that the Defendant had been arrested and was in jail in Tacoma and, as a result, Ms. Musgrove decided to sell a car to an individual in Tacoma in order to raise the money needed to bail the Defendant out of jail. RP 775-77 (10/13/10). Ms. Musgrove also decided to take I.D.D. to the home of Debbie Bostrom (the Defendant's aunt) in Puyallup, where I.D.D. could stay while Ms. Musgrove sold the car and bailed out the Defendant. RP 777-78 (10/13/10).

¹ As there were two trials and the transcripts are not consecutively paginated (rather the transcript from the second trial restarts at page "1") the State has included the date of the transcript with each citation to the report of proceedings.

Ms. Musgrove arrived at Ms. Bostrom's home around 2:00 p.m. RP 779 (10/13/10). The Defendant's father, Henry Musgrove Jr, was at the residence, as was the Defendant's grandmother. RP 778-80 (10/13/10). Ms. Musgrove stayed at the residence for a few hours and then left to go sell her car sometime around 5:00 p.m. RP 779 (10/13/10). Ms. Musgrove said that I.D.D. seemed normal at this time and did not act sick. RP 779 (10/13/10). Ms. Musgrove then left the Bostrom residence and went to sell her car and to bail the Defendant out of jail, but this process took some time. RP 780-81 (10/13/10).

I.D.D. stayed at the Bostrom residence during this time period. Several different family members were in and out of the house during this time, including the Defendant's father, Debbie Bostrom, John Sloan (Ms. Bostrom's boyfriend, and Ms. Bostrom's brother Larry Musgrove. RP 612 (10/12/10), 748 (10/13/10). Ms. Bostrom gave several of the men haircuts while various family members took turns holding I.D.D., and I.D.D. ate some dinner during this time. RP 617-18 (10/12/10). Eventually I.D.D. fell asleep while Mr. Sloan was holding her, and Ms. Bostrom later put I.D.D. down on a couch where the child continued sleeping. RP 618-20 (10/12/10). Ms. Bostrom stated that she did not see or hear anything happen during the time that I.D.D. was at the house that could have caused an injury, nor did she ever hear I.D.D. cry out. RP 620, 623 (10/12/10). Larry Musgrove and John

Sloan also testified that nothing unusual happened to I.D.D. while she was at the house that could have explained an injury to the child. RP 749-50, 756 (10/12/10).

Eventually, Ms. Musgrove and the Defendant returned to the Bostrom residence to pick up I.D.D. RP 781-82 (10/13/10). Debbie Bostrom, Mr. Sloan, and the Defendant's father were all at the residence with I.D.D. when Ms. Musgrove and the Defendant arrived, and I.D.D. was sleeping on the couch. RP 621-22 (10/12/10), 782 (10/13/10). Ms. Musgrove stated that I.D.D. seemed fine at this time, she did not make any concerning noises, nor did I.D.D. make any noises when Ms. Musgrove buckled her into her car seat for the return trip to Port Orchard at midnight or shortly thereafter. RP 782-83 (10/13/10). I.D.D. also did not complain or give any indications of pain or sickness on the drive home. RP 784 (10/13/10).

When they arrived in Port Orchard, Ms. Musgrove and the Defendant brought I.D.D. inside and Ms. Musgrove changed the child into her pajamas. RP 784-85 (10/13/10). I.D.D. did not complain during this time and Ms. Musgrove did not notice anything that caused her any concern. RP 785 (10/13/10). Ms. Musgrove then went to take a bath. RP 785 (10/13/10).

Ms. Musgrove explained that she started the bathwater and got into the tub while the water was still running. RP 786 (10/13/10). She then

stayed in the bath for 10 to 12 minutes. RP 786 (10/13/10). While she was in the bath, Ms. Musgrove could not see the Defendant and I.D.D. (as they were in the living room). RP 801 (10/13/10). Ms. Musgrove did describe hearing what she described as the front door “probably shutting” while she was in the bath. RP 801 (10/13/10).

When Ms. Musgrove got out of the bath she saw I.D.D. holding her stomach as if she did not feel good. RP 785-86 (10/13/10). Ms. Musgrove had never seen the child hold her stomach that way before. RP 786-87 (10/13/10). Ms. Musgrove picked I.D.D. up right away and started trying to comfort the child by holding her, sitting next to her, and rubbing her stomach. RP 787 (10/13/10). Ms. Musgrove tried numerous things throughout the night, including placing I.D.D. in bed with her, but it seemed as if I.D.D. was unable to get comfortable no matter what Ms. Musgrove tried. RP 787 (10/13/10). This discomfort continued throughout the night, and I.D.D. eventually threw up once or twice. RP 822 (10/13/10).

I.D.D. was never able to fall asleep, and in the early morning hours she began to look fatigued or “dazed” and Ms. Musgrove started to worry. RP 787-90 (10/13/10). At approximately 6:30 a.m. Ms. Musgrove grew so concerned that she decided to take I.D.D. to the hospital. RP 788 (10/13/10). On the way to the hospital I.D.D.’s eyes began rolling back into her head and she began to make unusual faces, and Ms. Musgrove knew that something

appeared to be really wrong. RP 791 (10/13/10).

Upon arrival at the hospital I.D.D. was almost immediately taken into an examination room. RP 791-92 (10/13/10). Dr. Mark Eisenberg was working in the emergency room at Harrison Hospital when I.D.D. arrived. RP 883-84. (10/13/10). Dr. Eisenberg noted that I.D.D. looked very ill and listless, but it was not clear what was wrong with the child. RP 884, 886 (10/13/10).

A CAT scan was performed on I.D.D., but the test showed nothing unusual. RP 892 (10/13/10). Several other tests (including blood work, x-rays, and a spinal tap) were performed, but they revealed nothing that would explain I.D.D.'s condition. RP 893-98 (10/13/10). I.D.D.'s heart rate was elevated, and it did not slow down even after IV fluids were administered. RP 893, 898 (10/13/10). I.D.D. briefly became slightly more interactive and seemed a bit better, but her condition then deteriorated suddenly. RP 899 (10/13/10). Her heart rate slowed way down and then eventually stopped altogether. RP 899 (10/13/10).

Dr. Eisenberg and the nurses immediately attempted to revive I.D.D. and there was a moment of "spontaneous circulation" during the resuscitation efforts, but this was brief. RP 900 (10/13/10). I.D.D. was then pronounced dead at 12:01 p.m. RP 901 (10/13/10).

After I.D.D. died Dr. Eisenberg went back and reviewed the results of the tests that had been performed on I.D.D. RP 901-02 (10/13/10). One of the two x-rays showed some evidence of air outside of the intestines in the abdominal cavity, indicating the possible presence of a perforation or hole somewhere in the intestinal tract. RP 902 (10/13/10). At trial, Dr. Eisenberg explained that this is not a common injury as it takes a significant sudden blunt force to cause such an injury, and the Dr. noted that it is most commonly seen in automobile accidents. RP 902 (10/13/10). Although Dr. Eisenberg spoke with the Defendant and Amber Musgrove that the hospital regarding I.D.D.'s history and possible causes of her condition, neither of them gave Dr. Eisenberg any indication that I.D.D. had suffered a possible injury to her abdomen. RP (10/13/2010) 885-86.

Dr. Emmanuel Lacsina, a forensic pathologist, later performed an autopsy on I.D.D. RP 683, 690-91. (10/12/10). An external examination showed numerous bruises. RP 696-701, 711-13 (10/12/2010). These included a deep bruise to the lower left chest (just below the nipple) that extended into the underlying muscle (indicating that a significant amount of force was involved with this bruise). RP (10/12/2010) 699-700. There was also a significant bruise on the right side of the abdomen and several bruises on the head including a deep bruise on the back of the head that was indicative of a blunt force trauma. RP (10/12/2010) 701, 711-13.

In his internal examination Dr. Lacsina found a significant amount of blood in the abdominal cavity and noted that this shouldn't be the case in a normal child. RP 716 (10/12/10). In addition he found foreign material and feces from the bowels in the abdominal cavity. RP 717 (10/12/10). The presence of these materials in the abdominal cavity suggested that there had been a rupture of the bowels. RP 719 (10/12/10).

Dr. Lacsina eventually found that I.D.D. had a one-centimeter laceration of her transverse colon. RP 705 (10/12/10). Although the size of the injury might sound small, Dr. Lacsina explained that any injury of this type was serious, regardless of its size. RP 720 (10/12/10). Dr. Lacsina also found bruising on the wall of the small intestine. RP 721 (10/12/10).

Dr. Lacsina explained that it would take a considerable amount of force to cause a rupture in the colon and that such injuries are most often caused by automobile accidents. RP 722 (10/12/10). The injury itself is caused when there is a blunt force applied to the abdomen that compresses the colon against the spine, rupturing the colon. RP 722-23 (10/12/10). Dr. Lacsina further explained that this type of injury was inconsistent with a child merely falling or tripping. RP 723 (10/12/10). Furthermore, the amount of force required to cause such an injury led him to conclude that the injury was "an inflicted injury." RP 740 (10/12/10).

Dr. Sumner Schoenike, I.D.D.'s pediatrician, also testified. RP 645 (10/12/10). Dr. Schoenike concurred that I.D.D.'s injury was the type usually associated with an automobile accident and that a child with such an injury would have been in immediate pain. RP 657, 664 (10/12/10). Dr. Schoenike also explained that a two-year-old would not likely be able to sleep after sustaining such an injury. RP 666 (10/12/10).

Dr. Yolanda Duralde, the medical director at the Child Abuse Intervention Department at Mary Bridge Hospital also testified. RP 847 (10/13/10). Of all of the medical experts that testified at trial, Dr. Duralde had by far the most experience dealing with child abuse. RP 847-48 (10/13/10). Dr. Duralde agreed with the other witnesses that I.D.D.'s injury was caused by a blunt force trauma RP 857 (10/13/10). Dr. Duralde explained that there is often no injury when a person suffers a blow to the abdomen because the internal organs and intestines are somewhat "free-floating" and the body is therefore able to absorb a lot of energy in that area. RP 858 (10/13/10). Injuries to the abdomen occur when the body is still and when the abdomen is compressed against the child's back or spinal column. RP 847 (10/13/10). She further explained that the injury at issue was not a common injury and usually is associated with automobile accidents. RP 847 (10/13/10).

In addition, Dr. Duralde explained that such an injury could occur in a

child “who is up against the wall or on the floor and then some pressure is placed upon them.” RP 858 (10/13/10).

Dr. Duralde stated that the one-centimeter laceration that I.D.D. suffered was a “significant rupture,” that would have required a “quite a bit of force.” RP 859-60 (10/13/10). The rupture was also large enough that there would be a lot of bleeding, and air and fecal material would escape into the abdomen. RP 859-60 (10/13/10).

Dr. Duralde further explained that there would be a noticeable change in behavior with the child because there would be a lot of pain associated with the trauma, that this pain would continue, and that one would expect to see the child upset and holding his or her stomach. RP 863 (10/13/10). Although injuries to the small intestines can be less painful and can look more like a “tummy ache or the flu,” an injury to the large bowel would be worse than a tummy ache and would be very painful. RP 864 (10/13/10). In addition, the injury would be so painful that the child would not be able to sleep. RP 865 (10/13/10). Thus, the injury had to occur sometime after I.D.D. last slept. RP 868 (10/13/10).

Dr. Duralde also stated that because I.D.D. was able to keep some food down without vomiting and was able to go to sleep at the Bostrom residence, the injury must have occurred sometime after her stay there. RP

868 (10/13/10).

All of the medical experts who testified, therefore, agreed that I.D.D. died as a result of the laceration to her colon and that the injury was caused by a blunt force trauma, and that it would have required a significant amount of force. None of the witnesses specifically opined on whether the inflicted blow itself would have had to have been an “intentional” blow. In fact, none of the experts ever expressed an opinion regarding whether the trauma had been inflicted “intentionally.” Rather, the issue of whether the blow was intentional was something that was raised for the first time in closing arguments, where the State argued that the evidence suggested an intentional assault.

The jury returned a verdict of not guilty on the felony murder charge, but was unable to reach a verdict on the two manslaughter charges. CP 89-95. The trial court then declared a mistrial on the two manslaughter charges with the agreement of both parties. RP 1174-75,1183 (10/20/2010).

Prior to the retrial of the manslaughter charges the Defendant filed a motion to dismiss the charges and argued that a retrial on the manslaughter charges would violate the double jeopardy clause. CP 125. In his motion the Defendant argued that the jury had necessarily found that he had not caused I.D.D.’s death, and that double jeopardy precluded the State from litigating

this fact in the second trial. CP 104. The State responded that because the jury had returned a general verdict the court could not conclude from the jury's general verdict that the jury had found that the defendant did not cause the victim's death. CP 112-14.

The trial court denied the defense motion in a written ruling. CP 125-29. The trial noted that in addressing the felony murder count the jury was called upon to decide if the Defendant had intentionally assaulted the child causing her death. CP 126. The court went on to note that although there was expert testimony, the jury was instructed that they were not bound by the testimony of the experts, and the jury was thus free to disregard this testimony. CP 126.² The trial court reviewed the testimony from the expert witnesses and the lay witnesses and explained, essentially, that the sum of the evidence did not result in a clear conclusion. CP 126-27. Rather, the trial court concluded that,

Put simply, the only fact that is uncontroverted is [I.D.D.'s] death. The "how" and the "who" and the "when" were questions put to the jury. Their general verdict of acquittal on the Murder charge provides little guidance as to how they answered these questions in view of the different

² See CP 65. The trial court also explained the jury could have chosen to disregard the experts' testimony for additional reasons. First, the trial court stated that the testimony of Dr. Lacsina was "somewhat confusing at times and seemed internally inconsistent." CP 126. In addition, while Dr. Duralde's testimony was consistent, she had never examined the child personally, and thus her opinion was based solely on a review of the records. CP 126. Similarly, Dr. Schoenike only examined the child prior to her death. CP 126. Given these facts, the trial court found that the jury could have disregarded the expert's testimony.

scenarios put to them.

Moreover, the question of mens rea is implicated. The jury acquitted Mr. Musgrove of intentionally causing [I.D.D.'s death]. That final judgment does not answer the question of whether Mr. Musgrove recklessly or negligently caused [I.D.D.'s] death. These questions have not been answered, and thus the State may try Mr. Musgrove on the manslaughter charges.

CP 127. The trial court also held that collateral estoppel did not apply because the trial court could not speculate on how the jury reached its conclusion, given the numerous issues that were involved. CP 127-28.

A second jury trial then commenced in March of 2011. The evidence from the State essentially mirrored the evidence from the first trial in most relevant aspects. For instance, Dr. Schoenike, Dr. Eisenberg, Dr. Lacsina, and Dr. Duralde all testified that the I.D.D.'s death was caused by a laceration to her colon that was caused by some sort of blunt force trauma and that a significant force would have been required to inflict the injury. See, RP 608 (3/14/2011); RP 769-70, 821-22, 830-31, 866, 882-83 (3/16/2011). The doctors also explained again that the injury would not have been caused by the child tripping or falling or some other self-inflicted injury. RP 608 (3/14/2011); RP 831, 883 (3/16/2011). In addition, the doctors again testified that I.D.D. would not have been unable to sleep after her injury. RP 830, 889

(3/16/2011).³

As in the first trial, none of the doctors ever used the word “intentional” in describing the type of force that would have been necessary to cause I.D.D.’s injury. In fact, in the second trial none of the above mentioned doctors even went so far as to characterize the trauma as an “inflicted” trauma. Rather, the above mentioned doctors merely described the injury and explained that it must have been caused by a blunt force trauma and that the injury was not something that would be caused by the child falling down or tripping (as much more force would have been necessary to cause the injury).

The State, however, did call one additional witness who did not testify at the first trial, Dr. Clifford Nelson. RP 921 (3/17/2011). Dr. Nelson is a medical examiner and forensic pathologist and he reviewed all of the relevant records and transcripts relating to I.D.D.’s death. RP 921, 930 (3/17/2011). Dr. Nelson agreed that I.D.D.’s death was caused by a blunt force trauma and that it was “way more likely that it’s inflicted than non-inflicted.” RP 932-33, 935 (3/17/2011). He explained that in his experience with similar injuries they are often caused by automobile accidents. RP 936 (3/17/2011). Dr.

³ Dr. Eisenberg also testified that at the hospital neither Amber Musgrove nor the Defendant ever gave the treating staff any information about an event or occurrence that would have lead Dr. Eisenberg to suspect that I.D.D. was suffering from an abdominal injury. RP 779, 787 (3/16/2011).

Nelson also explained that in cases with inflicted injuries the injury has been caused by a punch, a kick, a stomp, a blow with a knee, and that he has “seen it with somebody who has been dropped onto somebody’s knee.” RP 936 (3/17/2011). Finally, as with the other doctors, Dr. Nelson never testified that the injury must have been inflicted “intentionally,” nor did he even use the word “intentionally” in describing the type of blunt force trauma that would have been required.

Dr. Nelson also stated that no matter how the injury occurred, a reasonable person who saw the injury occur (given the significant amount of force necessarily involved in the injury) would recognize that the child “has got to be evaluated” because it would have been a “very significant” injury. RP 936-37 (3/17/2011). Dr. Nelson further explained that,

[Y]ou’re talking about a very significant injury, that if an adult or even an older child saw it, they would say, oh, my God, they are hurt, you’ve got to get that looked at.

RP 937 (3/17/2011).

Dr. Nelson also testified that once a child had been injured as I.D.D. had been the child’s bowels would have stopped, he or she would not be able to pass gas, and the child would not want to eat (and if they did eat anything they would likely vomit). RP 939, 949 (3/17/2011). Thus, Dr. Nelson explained that there was no doubt in his mind that the I.D.D. received some type of penetrating, blunt force abdominal injury that must have occurred

sometime after she was last able to eat, act normal, and pass gas. RP 946-50 (3/17/2011). Dr. Nelson also explained that the fact that I.D.D. was able to sleep and eat at the Bostrom residence was inconsistent with her having been injured at that time because he would not expect “somebody who has had this – this abdominal catastrophe to be able to do those things.” RP 952 (3/17/2011).

In closing arguments, the State did not argue that the Defendant “intentionally assaulted” I.D.D., nor did the State argue that the Defendant had “intentionally” struck I.D.D. In fact, the State never used the word “intentionally” in describing the blunt force trauma. Rather, the State acknowledged that it could not show exactly what type of force exactly had been exerted on I.D.D. RP 1071-72, 1077 (3/21/2011). The State did argue that there must have been a significant blunt force trauma and the medical evidence showed it must have occurred during the 10-12 minutes that the Defendant was alone with I.D.D. Furthermore, the State argued that whatever happened, it was an “inflicted” injury and was, by necessity reckless and/or negligent behavior. RP 1071, 1077, 1154 (3/21/2011).⁴

The jury ultimately found the Defendant guilty of both manslaughter charges, and the jury also found that the Defendant had abused a position of

⁴ The State also argued that, no matter what the actual cause of the injury had been, a reasonable person would have informed the treating doctors at the hospital that I.D.D. had

trust and that the victim was particularly vulnerable. CP 175, 176-79. The trial court then imposed an exceptional sentence. CP 180-81. This appeal followed.

III. ARGUMENT

A. THE DOUBLE JEOPARDY CLAUSE DID NOT PROHIBIT A RETRIAL OF THE MANSLAUGHTER CHARGES BECAUSE, ALTHOUGH THE ACQUITTAL ON THE FELONY MURDER CHARGE PRECLUDED A SECOND TRIAL ON THAT SPECIFIC CHARGE, JEOPARDY DID NOT TERMINATE ON THE MANSLAUGHTER CHARGES AS THE JURY WAS EXPRESSLY UNABLE TO REACH A VERDICT ON THOSE TWO CHARGES.

The Defendant argues that Double Jeopardy precluded a retrial on the manslaughter charges because the jury in the first trial must have found that the Defendant was not responsible for the death of the victim. App.'s Br. at 18. This claim is without merit because, although the acquittal on the felony murder charge precluded a second trial on that charge, jeopardy did not terminate on the manslaughter charges because the jury was expressly unable to reach a verdict on the manslaughter charges. The State, therefore, was allowed to retry the manslaughter charges.

The double jeopardy clause of the Fifth Amendment of the United

possibly suffered an injury to her abdomen. RP 1077 (3/21/2011).

States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” The Washington State Constitution (Art. I, § 9) similarly provides that “[n]o person shall be ... twice put in jeopardy for the same offense.” Washington courts have previously held that Washington's clause provides the same protection as the federal clause. *See, e.g., In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). In applying the double jeopardy clause, the courts have explained that the clause provides three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *State v Gamble*, 137 Wn.App 892, 900, 155 P.3d 962 (2007); *see also, State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995) (*quoting North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)).

For a defendant's double jeopardy rights to be violated, three elements must be present: (1) jeopardy must have previously attached, (2) jeopardy must have previously terminated, and (3) the defendant is again being put in jeopardy for the same offense. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

Generally, jeopardy terminates with a verdict of acquittal. *Corrado*,

81 Wn. App. at 646, 915 P.2d 1121. But jeopardy does not, generally, terminate with a mistrial caused by a deadlocked jury. *Corrado*, 81 Wn. App. at 648, 915 P.2d 1121 (citing *Richardson v. U.S.*, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984); *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *U.S. v. Perez*, 22 U.S. (9 Wheat) 579, 580, 6 L. Ed. 165 (1824)).

The Washington Supreme Court has specifically held that there is no double jeopardy violation in a homicide case where the jury in a first trial acquits the defendant on one charge but is hung on another, and when the State then retries the defendant on the count on which the jury was unable to reach a verdict. In *State v. Ahluwalia*, 143 Wn.2d 527, 528, 22 P.3d 1254 (2001) the jury in the first trial found the defendant not guilty of first degree murder but was unable to reach a verdict on second degree murder. A retrial was held on the second degree murder charge and the defendant was found guilty. *Ahluwalia*, 143 Wn.2d at 528. On appeal the defendant argued that double jeopardy prohibited his retrial on second degree murder after the jury had acquitted him of first degree murder. *Id.*, at 529. The Supreme Court, however, rejected the defendant's double jeopardy claim, and held that the defendant was properly retried for second degree murder because he was "neither convicted nor acquitted of the charge of murder in the second degree in the first trial." *Id.*, at 538. Specifically the Court stated that,

The constitutional double jeopardy provisions do not bar retrial following a mistrial granted because a jury was unable to reach a verdict. The double jeopardy provisions require a final adjudication to bar retrial of a charge.

Ahluwalia, 143 Wn.2d at 538, citing *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (“retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused.”); *State v. Carson*, 128 Wn.2d 805, 821, 912 P.2d 1016 (1996) (“when a jury is discharged because it is unable to reach a verdict on a criminal charge, ... that event does not bar retrial on the charge under double jeopardy clauses.”); *State v. Russell*, 101 Wn.2d 349, 351-52, 678 P.2d 332 (1984).

The Supreme Court in *Ahluwalia* also rejected the defendant’s claim that the two charges were the “same offense” for double jeopardy purposes pursuant to *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). See, *Ahluwalia*, 143 Wn.2d at 539. The Court specifically explained that,

Blockburger does not support Petitioner's argument. The appropriate rule, as stated in this court's decision in *State v. Calle*, is that under the same evidence rule, a defendant's double jeopardy rights are violated if the defendant is convicted of offenses that are identical in fact and law. If each offense as charged “includes elements not included in the other, the offenses are different and multiple convictions can stand.” The same evidence rule does not apply in this case because there were no prior convictions before Petitioner was

brought to trial, after a mistrial was granted in an earlier trial, on the charge of murder in the second degree. This trial resulted in his first conviction.

Ahluwalia, 143 Wn. 2d at 539.

In the present case, as in *Ahluwalia*, there was no double jeopardy violation when the State retried the Defendant on the two manslaughter charges. To the contrary, because the jury was unable to reach a verdict on those two charges in the first trial, jeopardy did not terminate on those charges and the State was entitled to retry the two charges. See, e.g., *Richardson*, 468 U.S. at 324, 104 S. Ct. 3081; *Corrado*, 81 Wn. App. at 648. This was true even in light of the fact that the jury had acquitted the defendant on the charge of felony murder in the first trial. See, *Ahluwalia*, 143 Wn. 2d at 538-39.

B. THE COLLATERAL ESTOPPEL COMPONENT OF DOUBLE JEOPARDY DID NOT PRECLUDE THE STATE FROM RETRYING THE DEFENDANT FOR MANSLAUGHTER BECAUSE: (1) EVEN IF THE JURY HAD DECIDED THAT THE DEFENDANT DID NOT INTENTIONALLY ASSAULT I.D.D., COLLATERAL ESTOPPEL DID NOT PREVENT A RETRIAL OF THE MANSLAUGHTER CHARGES SINCE THE EXISTENCE OF AN INTENTIONAL ASSAULT IS NOT AN ELEMENT IN EITHER OF THE TWO MANSLAUGHTER CHARGES; AND BECAUSE, (2) THE JURY'S GENERAL VERDICT IN THE FIRST TRIAL DID NOT DEFINITELY REVEAL THE BASIS FOR THE JURY'S VERDICT.

The Defendant argues that the collateral estoppel component of the double jeopardy clause precluded the State from either retrying him on the manslaughter charges. App.'s Br. at 18. This argument is without merit because collateral estoppel did not preclude a second trial on the manslaughter charges since the Defendant has failed to show that the jury in the first trial necessarily decided an issue that was identical to an ultimate issue in the second trial.

Washington Courts have previously addressed the applicability of collateral estoppel as it relates to double jeopardy. For instance, in *State v Eggleston*, 164 Wn.2d 61, 187 P.3d 233 (2008) the Washington Supreme Court explained that

The Supreme Court has held collateral estoppel operates in the criminal context and “is embodied in the Fifth Amendment guarantee against double jeopardy.” *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); *see also State v. Peele*, 75 Wn.2d 28, 448 P.2d 923 (1968). When a fact “has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Ashe*, 397 U.S. at 443, 90 S. Ct. 1189. However, collateral estoppel does not exclude all evidence “simply because it relates to alleged criminal conduct for which a defendant has been acquitted.” *Dowling v. United States*, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Eggleston, 164 Wn.2d at 71. The Washington Supreme Court went on to note that,

In Washington collateral estoppel applies in a criminal context only where 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 an injustice on the party against whom the doctrine is to be applied?

Eggleston, 164 Wn.2d at 72, *citing State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003).

In addition, the Court noted that “Initially, the defendant has the burden to ‘demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.’” *Eggleston*, 164 Wn.2d at 72, *citing Dowling*, 493 U.S. at 351, 110 S. Ct. 668. Furthermore, in deciding

whether to apply collateral estoppel in the case of a general verdict, the court's inquiry “must be set in a practical frame and viewed with an eye to all the circumstances and proceedings.” *Eggleston*, 164 Wn.2d at 73, quoting *Sealfon v. United States*, 332 U.S. 575, 579, 68 S. Ct. 237, 92 L. Ed. 180 (1948). Where “a rational jury could have grounded its [general] verdict upon an issue other than that which the defendant seeks to foreclose from consideration” collateral estoppel will not preclude its relitigation. *Eggleston*, 164 Wn.2d at 73, quoting *Ashe*, 397 U.S. at 444, 90 S. Ct. 1189. Thus, under *Ashe*, the court must examine a general verdict to determine if “a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.” *Eggleston*, 164 Wn.2d at 73, quoting *Ashe*, 397 U.S. at 444, 90 S. Ct. 1189.

1. ***Collateral Estoppel did not preclude the State from retrying the Defendant for manslaughter because, even if the jury had decided that the Defendant did not intentionally assault I.D.D., the existence of an intentional assault was not an element in either of the two manslaughter charges and thus there was no relitigation of this issue.***

In order for collateral estoppel to apply, the Defendant must demonstrate that the issue decided in the prior adjudication was identical with the one presented in the second trial. *Eggleston*, 164 Wn.2d at 72, citing *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003).

In the present case the felony murder charge required the State to

prove that the Defendant intentionally assaulted the victim. The manslaughter charges, however, did not require a showing that the Defendant acted intentionally. Rather they required a showing of recklessness or negligence.

Thus, even if this Court could conclusively determine that the first jury determined that the State did not prove that the Defendant intentionally assaulted I.D.D., that jury determination does not in any way resolve the issue of whether the Defendant's actions were nevertheless reckless or negligent.

The Defendant, however, claims that the jury's verdict demonstrates that the jury found that the Defendant was not responsible for the victim's death. This argument, of course, ignores the actual questions put to the jury. The jury was not asked if the defendant was "responsible" for the victim's death. Rather, it was asked: (1) if the defendant intentionally assaulted the victim and thereby caused her death; (2) if the Defendant recklessly caused the victim's death; and (3) if the Defendant negligently caused the victim's death. All the jury's verdict shows is that the jury concluded that the State had failed to prove the first of these questions. The jury's verdict in no way addressed the second and third questions. The Defendant's claim, therefore, that collateral estoppel precluded a second trial is without merit because the issue decided in the prior adjudication (whether there was an intentional assault) was not identical with the one presented in the second trial (whether

the Defendant acted recklessly or negligently). *Eggleston*, 164 Wn.2d at 72, citing *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003).

2. *Collateral Estoppel did not preclude the State from retrying the Defendant for manslaughter because the jury's general verdict in the first trial does not definitively reveal the basis for the jury's verdict.*

In assessing the charge of felony murder the specific question presented to the jury was not whether the Defendant was “responsible” for I.D.D.’s death. Rather the jury was asked only to determine whether the Defendant had intentionally assaulted I.D.D., thereby committing the crime of assault of a child and whether in the course of this crime the Defendant caused the death of I.D.D. CP 67-69.

Although the State readily acknowledges that the jury found the Defendant not guilty of this charge, there are any number of issues upon which the jury could have grounded its decision. For instance, the jury could have concluded that the Defendant did in fact inflict the deadly blow upon I.D.D., but that the Defendant did not *intentionally* assault the child. Such a conclusion, of course, would be entirely consistent with the jury’s inability to reach a verdict on the manslaughter charges (where the issue was not whether the Defendant acted intentionally, but whether he acted with the lesser mental states of recklessness or negligence). Such a conclusion would have been entirely rational in light of the fact that the State was unable to present any

eyewitness testimony or other evidence explaining exactly how or in what way the fatal blow was inflicted. In addition the State was unable to present any evidence that would explain what motive the Defendant might have had for intentionally assaulting I.D.D.

The Defendant, however, argues that the issue of whether I.D.D. was intentionally assaulted wasn't contested and that the attorneys for both sides agreed that there must have been an intentional assault. App.'s Br. at 25. The arguments of counsel are not evidence, however, and the jury was instructed that it had to base its verdict on the evidence. CP 59-60. An examination of the actual evidence presented at trial shows that the question of whether there had been an intentional assault was far from clear (despite the attorney's arguments to the contrary).⁵ As there was no witness who saw I.D.D. being injured the jury was left primarily with the testimony of the medical experts. Although the experts all agreed that the injury must have been an "inflicted" injury, none of the experts ever opined that the injury had to have been

⁵ The State obviously had a strong interest in arguing that the evidence showed an intentional assault since this was a necessary requirement for a guilty finding on the felony murder count. By the same token, defense counsel also had a legitimate strategic reason for arguing that must have been an intentional assault. For instance, if defense counsel was able to convince the jury that there had to have been an intentional assault but that the State had failed to prove that the Defendant was the one who intentionally assaulted I.D.D. (based, for instance, on the lack of any eyewitness or any evidence of motive, etc) then the Defendant stood a good chance of being acquitted on all charges. Stated another way, the defense argument simply picked the weakest part other state's case (that the Defendant intentionally assaulted the victim) and chose to make that the focus in way that potentially could lead to outright acquittal on all charges by forcing the jury to conclude that someone else was responsible for I.D.D.'s injury.

inflicted “intentionally.” In fact, the State is unaware of any place in the record that shows any of the experts even using the term “intentionally” in relation to I.D.D.’s injury.

In short, the issue of whether there had been an intentional assault was clearly an open question for the jury. A rational jury, therefore, could have concluded that the medical evidence showed that I.D.D.’s injury must have occurred during a period of time when the Defendant was alone with I.D.D. and that he must have inflicted the injury, but the jury could have concluded that the evidence did not show that the Defendant had *intentionally* inflicted the injury. A rational jury thus could have determined that the State had not proved that the defendant *intentionally* assaulted the victim, but that same jury could have also been unable to unanimously answer the question of whether the Defendant had recklessly or negligently caused the victim’s death.

Second, a rational jury could have concluded that someone other than the Defendant must have injured I.D.D. because some of the witnesses described that I.D.D. seemed sick earlier in the afternoon while at the Bostrom residence. This, of course, was one of the points raised repeatedly by defense counsel at trial. See, e.g., RP 1103-15 (10/18/2010).

In addition, the jury also heard testimony from the Defendant

(consistent with his taped statement) in which he admitted picking I.D.D. up and holding her up (and that I.D.D. seemed to complain that this hurt her in some way), and that I.D.D.'s reaction caused the Defendant to wonder whether by picking the child up he had made things worse. RP 968-69 (10/14/2010). Thus, a rational jury could have concluded that I.D.D. had in fact sustained the fatal blow earlier in the day at the hands of another actor (as the defense repeatedly suggested) and that this was the proximate cause of I.D.D.'s death. Such a finding, however, would not have precluded that same jury from also concluding that the Defendant had also intentionally assaulted I.D.D. (especially in light of his admissions that he picked up I.D.D. in a way that caused her some degree of pain), but that his assault was not the proximate cause of I.D.D.'s death. In sum, that Defendant's statement all but admits that he touched I.D.D. in a way that she found harmful or offensive, although the Defendant claimed that he did not use enough force to injure I.D.D. A rational jury could have believed the Defendant.

In short, based on the actual evidence presented to the first jury it is impossible to determine with any specificity what the jury actually decided. The relevant, issue, of course, is not what the jury "could have decided," but rather, the Defendant must prove that the jury "necessarily decided" a given issue. Given the record in the first trial, this Court cannot state that the jury necessarily decided that the Defendant did not intentionally assault I.D.D.

While this is certainly one of the possibilities for the jury's verdict, it is not the only rational possibility. The Defendant, therefore, cannot meet his burden of demonstrating that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Eggleston*, 164 Wn.2d at 72, *citing Dowling*, 493 U.S. at 351, 110 S. Ct. 668. Collateral estoppel, therefore, did not preclude the Defendant's retrial on the manslaughter charges.

Given all of these facts, the collateral estoppel component of double jeopardy did not preclude the State from retrying the Defendant for manslaughter because: (1) even if the jury had decided that the Defendant did not intentionally assault I.D.D., this finding did not prevent a retrial of the manslaughter charges because the issue decided in the prior adjudication was not identical with the one presented in the second trial (as the issue in the first trial concerning the existence of an intentional assault was not an element in either of the two manslaughter charges at issue in the second trial); and because (2) the jury's general verdict in the first trial did not definitively reveal the basis for the jury's verdict. The Defendant's claim, therefore, must fail.

C. THE DEFENDANT’S CLAIM THAT THE STATE VIOLATED THE DOUBLE JEOPARDY CLAUSE BY ARGUING THAT THE DEFENDANT INTENTIONALLY ASSAULTED I.D.D. IS WITHOUT MERIT BECAUSE: (1) THE STATE DID NOT ARGUE IN THE SECOND TRIAL THAT THE DEFENDANT HAD INTENTIONALLY ASSAULTED I.D.D.; AND, (2) EVEN IF THE STATE HAD MADE SUCH AN ARGUMENT, THE EXISTENCE OF AN INTENTIONAL ASSAULT WAS NOT AN “ULTIMATE FACT OR ISSUE” IN THE SECOND TRIAL, THUS COLLATERAL ESTOPPEL WOULD NOT HAVE PRECLUDED SUCH AN ARGUMENT.

The Defendant next claims that even if Double Jeopardy did not prevent a second trial, Double Jeopardy was nevertheless violated because the State presented evidence and argued in second trial that the Defendant intentionally assaulted the victim. App.’s Br. at 29. This claim is without merit because, despite the Defendant’s claims to the contrary, the State did not argue in the second trial that the Defendant had intentionally assaulted I.D.D. In addition, because the existence of an intentional assault was not an “ultimate fact or issue” in the second trial, collateral estoppel would not have precluded the State from arguing that the Defendant had intentionally assaulted I.D.D. (had the State chosen to do so).⁶

⁶ As outlined above, when there has been a general verdict as in the present case, collateral estoppel will not work to preclude the relitigation of an issue if “a rational jury could have grounded its [general] verdict upon an issue other than that which the defendant seeks to foreclose from consideration” collateral estoppel will not preclude its relitigation. *Eggleston*, 164 Wn.2d at 73, quoting *Ashe*, 397 U.S. at 444, 90 S.Ct. 1189. As previously argued, a

1. The collateral estoppel component of Double Jeopardy clause was not violated because the State did not argue in the second trial that the Defendant had intentionally assaulted I.D.D.

The Defendant claims that the State presented evidence and argument to the second jury that the Defendant had intentionally assaulted the Defendant. App.'s Br. at 29-32. The record, however, does not support the Defendant's claim.

Rather, no witness for the State ever testified or opined that the Defendant intentionally assaulted I.D.D. Although the State called a number of medical witnesses, none of these witnesses ever opined that the victim must have been "intentionally assaulted" nor did any of the witnesses ever state that the injury must have been the result of an "intentional" act. In fact, the State is unaware of any instance in the record where any witness used the word "intentionally" in any way to describe the manner in which I.D.D.'s injury was inflicted.

It is true that in the second trial one expert witness, Dr. Nelson, testified that I.D.D.'s injury must have been "inflicted." RP 932-33, 935 (3/17/2011). Dr. Nelson, however, never testified that the injury must have been "intentionally" inflicted.

rational jury could have grounded its verdict of several different issues, thus collateral estoppel does not apply. The Defendant's argument, however, fails for the additional reasons outlined below.

Furthermore, although the State clearly acknowledged that the evidence did not show exactly how the injury was inflicted, the State did use the word “punch” or “kick” to describe several possible ways that the injury could have been inflicted. *See*, App.’s Br. at 31-32. The State, however, never argued that that the punch or kick (or other manner of blunt force trauma) had to have been an *intentional* punch or kick. The Defendant’s argument appears to be based on the faulty assumption that all punches or kick are by definition intentional and that it is metaphysically impossible to have an unintentional punch or kick. Any person that has ever stubbed their toe on a table leg or hit their hand on a doorframe knows that the Defendant’s conclusion is based on faulty premise. In addition, it is readily apparent that there are all sorts of reckless or negligent actions that can result in a physical contact such as a punch or kick (even though the actor did not intend to punch or kick the victim).

In short, the Defendant has failed to show a single instance in the second trial where: (1) a witness ever testified about an “intentional assault;” or, (2) the State argued that the there had been an “intentional” assault. Thus, there is simply no merit to the Defendant’s claim that the collateral estoppel component of double jeopardy was violated when the State presented evidence and argument based on an intentional assault. To the contrary, the record demonstrates that the State presented no such evidence or

argument.

This fact that the State presented no such evidence or argument is, of course, not surprising because the issue in the second trial was not whether there had been an *intentional* assault, but rather the sole question was whether the Defendant had acted recklessly or negligently, as discussed further below.

2. ***The collateral estoppel component of double jeopardy was not violated because the existence of an intentional assault was not an “ultimate fact or issue” in the second trial, thus collateral estoppel would not have precluded the State from arguing that the Defendant had intentionally assaulted I.D.D.***

In addition to the reasons outlined above, there was no double jeopardy violation in the present case because collateral estoppel does not prevent the State from rearguing an issue despite an earlier acquittal if that issue is not an “ultimate fact or issue” in the second trial. Rather, collateral estoppel does not exclude all evidence “simply because it relates to alleged criminal conduct for which a defendant has been acquitted.” *Eggleston*, 164 Wn.2d at 71, *quoting Dowling*, 493 U.S. at 348, 110 S. Ct. 668. In addition, the Washington Supreme Court and the United States Supreme Court have specifically held that collateral estoppel does not apply when the previously decided fact was not an ultimate fact or issue in the second trial. *Eggleston*, 164 Wn.2d at 74, *quoting Dowling*, 493 U.S. at 348, 110 S. Ct. 668.

For example, the issue of whether collateral estoppel prevents the

State from introducing certain evidence at a subsequent retrial (after the jury has acquitted on a greater charge) was the specific issue before the Court in *Eggleston*. An examination of the specific facts of *Eggleston*, therefore, is instructive.

In *Eggleston*, the defendant was tried three times for the murder of a police officer. *Eggleston*, 164 Wn.2d at 65. The first trial ended in a mistrial. In the second trial the jury found the defendant not guilty of first degree murder but found him guilty of second degree murder. *Eggleston*, 164 Wn.2d at 65. The jury also answered a special verdict form finding that he defendant had not knowingly killed a police officer. *Eggleston*, 164 Wn.2d at 65. Following a successful appeal the defendant was tried again for second degree murder. *Eggleston*, 164 Wn.2d at 65.

In the third trial the State repeatedly argued that Eggleston knowingly killed a police officer. *Eggleston*, 164 Wn.2d at 65, 67. In addition, the trial court gave two self defense instructions. The first was a standard self-defense instruction to be used if the jury believed Eggleston was unaware the victim was a police officer. The second self-defense instruction limited the availability of self-defense if the jury believed the defendant knew the victim was a police officer. *Eggleston*, 164 Wn.2d at 68. The jury convicted the defendant of second degree murder. *Id.*

On appeal Eggleston argued that the collateral estoppel component of the double jeopardy clause precluded the State from introducing evidence that the defendant knew the victim was a police officer. *Eggleston*, 164 Wn.2d at 71. The Supreme Court first held that the previous jury had erred in filling out the special verdict form because the jury was only supposed to fill out that form if they convicted the defendant of first degree murder. *Eggleston*, 164 Wn.2d at 73. The Court further noted that unnecessary or irrelevant statements in a verdict form may be disregarded, and thus the Court declined to consider the special verdict form. *Eggleston*, 164 Wn.2d at 72-73.

Having chosen to disregard the special verdict form, the Court then turned to the issue of whether a rational jury could have grounded its general verdict upon an issue other than the defendant's knowledge that the victim was police officer. *Eggleston*, 164 Wn.2d at 73-74. The Court ultimately held that a rational jury could have grounded its "not guilty" verdict on a number of factors other than Eggleston's lack of knowledge that the victim was a police officer (including, for instance, that Eggleston lacked premeditation). *Eggleston*, 164 Wn.2d at 73-74. Thus, the Court concluded that "collateral estoppel did not preclude the State from relitigating whether Eggleston knew Bananola was a police officer in the third trial." *Eggleston*, 164 Wn.2d at 74.

The *Eggleston* Court, however, went on to address one further issue

and noted that even if the Court were to consider the jury's answer to the interrogatory, Eggleston still had failed to demonstrate that the jury's answer determines an “*ultimate fact or issue* in the subsequent case.” *Eggleston*, 164 Wn.2d at 74 (emphasis in original), citing *Dowling*, 493 U.S. at 348, 110 S. Ct. 668. The *Eggleston* Court also explained that an “ultimate fact” is a fact “essential to the claim or the defense.” *Eggleston*, 164 Wn.2d at 74, quoting BLACK'S LAW DICTIONARY 629 (8th ed.2004). In addition the *Eggleston* Court addressed the United States Supreme Court holding in *Dowling* as follows,

In *Dowling*, the Supreme Court refused to apply collateral estoppel because the previously decided fact was not an ultimate fact or issue in the second trial. [*Dowling*, 493 U.S.] at 348, 110 S. Ct. 668. There a man was charged with robbing a bank with a gun while wearing a ski mask. *Id.* at 344, 110 S. Ct. 668. During his trial for robbing the bank, the defendant was identified by a robbery victim as the man who wore a mask when he robbed her house, although he had been previously acquitted of that crime. *Id.* at 348, 110 S. Ct. 668. The Supreme Court found collateral estoppel did not bar this testimony because it “did not determine an ultimate issue in the present case.” *Id.* The Court found the testimony admissible because “the Government did not have to demonstrate that Dowling was the man who entered the home beyond a reasonable doubt.” *Id.* Simply stated, collateral estoppel precludes a jury from reaching “a directly contrary conclusion” rather than a conclusion reached by a prior jury. *Id.* (citing *Ashe*, 397 U.S. at 445, 90 S. Ct. 1189).

Eggleston, 164 Wn.2d at 74, citing *Dowling*, 493 U.S. at 348, 110 S. Ct. 668.

Given this backdrop, the *Eggleston* Court rejected the defendant's

claim that State was precluded from offering evidence that the defendant knew the victim was a police officer. Specifically, the Court held that,

Eggleston argues that collateral estoppel prevents the State from offering evidence of motive or different self-defense instructions based on Eggleston's knowledge that Bananola was a police officer. As noted earlier, two self-defense instructions were given in this case: one instruction was predicated on the defendant's knowledge that the victim was a police officer at the time of the shooting and the other was a standard self-defense instruction. Neither evidence of motive nor self-defense instructions are ultimate facts or issues implicating collateral estoppel. This is so because the jury could have found Eggleston guilty without also finding his motive was based on knowing Bananola was a police officer. And, as to self-defense, the jury could have rejected Eggleston's assertion that he acted in self-defense regardless of whether it found that Eggleston knew Bananola's status as a police officer. In fact, the jury rejected both theories of self-defense. Accordingly, we hold that collateral estoppel did not bar introduction of evidence in the third trial that Eggleston knew Bananola was a law enforcement officer.

Eggleston, 164 Wn.2d at 74-75.⁷

In the present case the issue of whether the Defendant intentionally assaulted I.D.D. was an ultimate fact in the first trial, as the felony required charge required the jury to specifically decide whether the defendant had

⁷ This Court recently reiterated the principles spelled out in *Eggleston* and noted that “Collateral estoppel, however, does not bar the later use of evidence merely because it relates to alleged criminal conduct for which a defendant has previously been acquitted.” *State v. McPhee*, 156 Wn.App. 44, 57, 230 P.3d 284 (2010), quoting *Eggleston*, 164 Wash. 2d at 71, and *Dowling v. United States*, 493 U.S. 342, 348, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)). Similarly, this Court explained that If “‘a rational jury could have grounded its [general] verdict upon an issue other than that which the defendant seeks to foreclose from consideration,’ collateral estoppel will not preclude its relitigation.” *McPhee*, 156 Wn.App. at 58, quoting *Eggleston*, 164 Wash. 2d at 73 (alteration in original) (quoting *Ashe*, 397 U.S. at 444, 90 S.Ct. 1189).

intentionally assaulted I.D.D. The existence of an “intentional assault,” however, was not an ultimate fact or issue on the Defendant’s second trial, as the jury was not required to find an intentional assault. Rather, the jury was asked to determine if the Defendant had acted recklessly or negligently. As in *Eggleston*, this was true because the jury in the Defendant’s second trial could have found the Defendant guilty without also finding an intentional assault. See, *Eggleston*, 164 Wn.2d at 74-75. Accordingly, pursuant to *Eggleston*, collateral estoppel did not bar introduction of evidence in the Defendant’s second trial that the Defendant intentionally assaulted I.D.D.

The Defendant’s collateral estoppel claims, therefore, are without merit because: (1) the State did not raise the issue of an intentional assault in the second trial; (2) even if the State had argued that the Defendant intentionally assaulted I.D.D., such an argument would not have violated collateral estoppel because this issue was not an “ultimate fact or issue” in the second trial. In short, the Defendant has failed to show a double jeopardy violation.

D. THE DEFENDANT'S CLAIM OF PROSECUTORIAL MISCONDUCT MUST FAIL BECAUSE THE DEFENDANT WAIVED THE ISSUE BY FAILING TO OBJECT BELOW AND BY FAILING TO OTHERWISE DEMONSTRATE THAT THE ALLEGED PROSECUTORIAL MISCONDUCT WAS FLAGRANT AND ILL INTENTIONED, OR THAT THE PREJUDICE RESULTING THEREFROM WAS SO MARKED AND ENDURING THAT CORRECTIVE INSTRUCTIONS OR ADMONITIONS COULD NOT HAVE NEUTRALIZED ITS EFFECT.

The Defendant next claims that the State committed prosecutorial misconduct by improperly using the victim's prior injuries as propensity evidence in closing argument. App.'s Br. at 36. This claim is without merit because the defendant did not object to the arguments at trial and, even if the argument was improper, the argument was not flagrant and ill intentioned nor did it cause any prejudice that could not have been cured by a curative instruction had the defendant raised an objection below.

A defendant claiming prosecutorial misconduct who has preserved the issue by objection bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill intentioned. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In the present case, prior to the first trial, the Defendant filed a motion in limine asking the court to exclude evidence concerning the injuries to I.D.D.'s ears that occurred well before her death. CP 13-17. When the trial court considered this motion the State explained that evidence of I.D.D.'s prior medical conditions were relevant because the State had to prove how I.D.D. died and thus needed to have the experts rule out any pre-existing conditions as a potential cause of I.D.D.'s death. RP (10/04/2010) 20. The State also explained that the evidence was relevant to explain Amber Musgrove's actions and supported the State's claim that the fact that she took I.D.D. to the doctor despite the injuries corroborated her expected testimony that she was unaware of any abuse, since if she was aware of any abuse she likely would not have taken I.D.D. to a doctor for these relatively minor injuries (especially after CPS became involved). RP (10/04/2010) 20-23. Once the State offered its explanations for the admission of the evidence the Defendant withdrew his objection, stating,

Your honor, if that's the basis – if that's the argument that's going to be used for this particular evidence – which, frankly, it's not one I considered in making my objections to this – I don't think that I would object to that. I think that I would allow that kind of analysis to go forward in this case.

So I'll withdraw my objection based on that representation that the evidence is relevant for that purpose.

RP (10/04/2010) 23. The trial court then asked if the Defendant wanted on

limiting instruction on this issue, but the Defendant declined stating that “no instruction from the Court would be better and allow us to argue the inferences.” RP (10/04/2010) 25.

On appeal the Defendant argues that the State improperly used the evidence of the prior injuries as propensity evidence in closing argument. App.’s Br. at 36. The Defendant, however, did not object to the State’s closing argument at trial.

In determining whether prosecutorial misconduct has occurred, the reviewing court first evaluates whether the prosecutor's comments were improper. If the statements were improper, the court then considers whether there was a substantial likelihood that the comments affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Furthermore, as stated in *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978), unless prosecutorial misconduct is flagrant and ill intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction.

In the present appeal the Defendant cites to two passages from the State’s closing argument as support for his claim that the State made an

improper argument. App.'s Br. at 36. Specifically, the Defendant's claim centers on the State's comment that I.D.D. had unexplained injuries, that these injuries occurred "after the mother starts dating the defendant," and that I.D.D.'s life fell apart after she met the Defendant. App.'s Br. at 36.

In making these comments the prosecutor did not specifically argue that the Defendant was responsible for the prior injuries to I.D.D.'s ears and eye.⁸ The State, therefore, did not expressly violate the pretrial ruling.

In addition, other evidence at trial (admitted without objection) conclusively established that: (1) I.D.D. had been essentially healthy during the first 18 months of her life; (2) I.D.D. only met the Defendant during the last few months of her life; and (3) that at the time of her death I.D.D. had sustained a fatal injury to colon. The evidence also showed that I.D.D. had a number of other bruises including bruises on the right temple, the left side of the head, and the left side of the back of the head (near the top of her head). RP 801-02 (3/16/2011). There was also a bruise to the lower left chest area that extended to the underlying muscle (indicating that a considerable amount of force was involved with this bruise). RP 802, 814 (3/16/2011). Finally, there was a bruise on the right side of the lower abdomen that was likely related to the blunt force trauma that had caused the laceration of the colon.

⁸ These were the only injuries ever addressed in the pre-trial motion.

RP 802, 872 (3/16/2011).

Based on these facts which were admitted without objection the jury could certainly conclude that I.D.D.'s life had indeed "fallen apart" and that this occurred inside the relatively small window of time in which she had known the Defendant. The prosecutor's comment that I.D.D.'s life had "fallen apart" after she met the Defendant was a permissible argument based on the evidence, especially since that comment was not associated with the injuries to the ears or eye. *See*, RP 1080 (3/21/2011).

With respect to the other comment at issue, it is true that the prosecutor did mention I.D.D.'s "prior unexplained" injuries and one could infer that that this was a reference to the injuries to I.D.D.'s ears and eye. *See* RP (3/21/2011) 1053. The prosecutor, however, did not argue that the Defendant caused these injuries. Furthermore, even one could conclude that the State was implying that the Defendant caused these by noting that the injuries occurred after the Defendant met I.D.D., this fact was of little consequence since the jury was well aware that I.D.D. had suffered more serious injuries, including a fatal one, in the small time period that she knew the Defendant. Thus the Defendant cannot show any significant prejudice nor can he show that the comment was flagrant and ill intentioned since the prosecutor's comment (and larger point) was aptly supported by other properly admitted evidence.

In addition, defense counsel below failed to object to the prosecutor's statements now alleged to be misconduct, and the statements, even if in some degree improper, were not so flagrant (especially in light of the evidence discussed above) as to excuse defense counsel's failure to object. The Defendant, therefore, waived objection to the alleged misconduct.

E. THE STATE CONCEDES THAT THE CHARGE OF MANSLAUGHTER IN THE SECOND DEGREE MUST BE VACATED.

The Defendant next claims that Double Jeopardy precludes his convictions for both Manslaughter in the First Degree and Manslaughter in the Second Degree. The State concedes that the Defendant's conviction for the charge of Manslaughter in the Second Degree must be vacated.

At sentencing the State argued that the judgment and sentence should include both manslaughter counts because there was always the possibility that the Manslaughter in the First Degree charge could be reversed on appeal, and the State therefore wanted the Manslaughter in the Second Degree charge to remain as a sort of "backup" charge. See RP (4/25/2011) 56-57. The Defendant argued that the Judgment and Sentence should only include the Manslaughter in the First Degree charge. As neither side presented any legal authority in support of their arguments the trial court indicated that it was "at a loss" but would list both convictions and let the State defend its argument

on appeal. RP (4/25/2011) 57.

The State concedes that the Washington Supreme Court has made it clear that it is error to hold a second conviction “in abeyance” in case of appellate reversal on the top count. In *State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010) the Court stated that a trial court may violate 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. Thus, to assure that double jeopardy proscriptions are carefully observed, “a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.” *Turner*, 169 Wn.2d at 464-65.

Given this clear directive from the Supreme Court, the State concedes that the charge of Manslaughter in the Second Degree must be vacated on double jeopardy grounds and stricken from the Judgment and Sentence.

IV. CONCLUSION

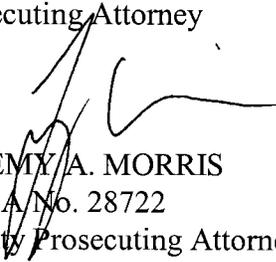
For the foregoing reasons, Musgrove’s conviction and sentence should be affirmed (with the exception of the conviction for the charge of Manslaughter in the Second Degree – which the State concedes must be

vacated on double jeopardy grounds).

DATED January 13, 2012.

Respectfully submitted,

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