

No. 43951-4

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

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STATE OF WASHINGTON,

Appellant,

v.

JEFFREY DEAN TUCHECK,

Respondent.

---

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

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BRIEF OF RESPONDENT

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A. SUMMARY OF ARGUMENT

The trial court dismissed criminal charges against Jeffery Tucheck after the State untimely disclosed, during trial, 50 photographs taken by police during the execution of a search warrant. On appeal, the State contends the trial court abused its discretion in dismissing the charges because Mr. Tucheck was not substantially prejudiced by the late disclosure of the photographs and because any prejudice he did suffer could have been cured by a lesser remedy.

Once the jury was impaneled, the Double Jeopardy Clause provided Mr. Tucheck the right to have his case determined by the jury chosen. Retrial is permitted only if there was a “manifest necessity” to discharge the jury. If the late disclosure of the photographs did not substantially prejudice Mr. Tucheck, and if any prejudice he did suffer could have been cured by a lesser remedy, there was no “manifest necessity” to discharge the jury. Therefore, Mr. Tucheck may not be retried. In the alternative, the court did not abuse its discretion in dismissing the charges under CrR 8.3(b) for prosecutorial mismanagement, based on the late disclosure of the evidence, together with the police detective’s repeated improper testimony during trial.

## B. ISSUES

1. Once a jury is impaneled and trial has begun in a criminal case, the Double Jeopardy Clause precludes retrial by a different jury unless the defendant freely consented to a mistrial or there was a “manifest necessity” to discharge the jury already chosen. Is retrial precluded in this case where Mr. Tucheck did not consent to a mistrial and if, as the State contends, there was no manifest necessity to discharge the jury?

2. Cr R 8.3(b) grants trial courts wide discretion to dismiss criminal charges based on prosecutorial mismanagement. Was the court’s decision to dismiss charges against Mr. Tucheck reasonable where the State did not disclose photographs taken of evidence at the scene until after trial had already begun, and where a police detective continued to testify about inadmissible subject matters despite the court’s repeated admonishments?

## C. STATEMENT OF THE CASE

On March 29, 2011, Pierce County Sheriff deputies entered a house in Tacoma to execute a search warrant. RP 117. They found six people inside. RP 120. One of the individuals was Jeffery Tucheck, who was the target of the police investigation. RP 121. Another

individual was Lisa Balkwill, who told police she was renting a room there. RP 122. Police determined the other four people did not live in the house and were not of interest and therefore, they were released. RP 127.

Detective Ray Shaviri entered the house after the deputies had secured everyone inside. RP 120. He spoke to Mr. Tucheck, who told him he did not sell drugs but gave methamphetamine to his friends when they came over to “party.” RP 124. Mr. Tucheck told police they would find about one-half ounce of methamphetamine in his dresser drawer and under the mattress. RP 124. He said he had about a half ounce of methamphetamine delivered to his house every few days. RP 124. Ms. Balkwill told Detective Shaviri that she used methamphetamine but did not sell it. RP 124.

Inside the house, police found methamphetamine, gram scales, plastic baggies, cell phones, cash, and a surveillance camera. RP 173-74. Two cell phones, several baggies, a digital gram scale, and a glass pipe were found in Ms. Balkwill’s room specifically. RP 215-19.

Mr. Tucheck was charged<sup>1</sup> with one count of possession of methamphetamine with the intent to deliver, within 1,000 feet of the

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<sup>1</sup> Ms. Balkwill was separately charged and she and Mr. Tucheck were tried together.

perimeter of a school, RCW 69.50.401(1), (2)(b), 69.50.435, 9.94A.533(6); one count of unlawful use of a building for drug purposes, RCW 69.53.010; one count of unlawful use of drug paraphernalia, RCW 69.50.102, 69.50.412(1); and one count of possession of 40 grams or less of marijuana, former RCW 69.50.101(q) (2010) and former 69.50.4014 (2003). CP 1-3.

On April 11, 2011, defense counsel entered a demand for discovery. CP 84-86. Among other things, counsel requested “[a] list of, copies of, and access to any books, papers, documents, *photographs*, or tangible objects which the Prosecuting Attorney intends to use in the hearing or trial,” and “[a] list of all items or things which were obtained from or belonged to the Defendant, regardless of whether the Prosecutor intends to introduce said items at hearing or trial.” CP 85 (emphasis added).

On December 20, 2011, an omnibus hearing order was filed. CP 9-11. The State asserted it had “contacted law enforcement agencies to request and/or obtain any additional supplemental police reports, forensic tests, and evidence and has made them available to defendant or defense counsel.” CP 9. The State asserted it had provided all discovery in its possession or control to the defense. CP 9.

A CrR 3.5 hearing was held. The trial court ruled that both Mr. Tucheck's and Ms. Balkwill's statements to police were admissible because they were voluntarily made after a knowing and intelligent waiver of Miranda<sup>2</sup> rights. RP 56.

A jury was impaneled and sworn and trial began on Thursday, February 9, 2012. Detective Shaviri was the first witness to testify. The first thing he said was that he works in the "narcotics unit," which is a unit that "does not chase low-level dealers." RP 113. Defense counsel objected and the jury exited the courtroom. RP 113-14. Counsel explained the testimony was improper because it implied that police had targeted Mr. Tucheck because they thought he was a high-level drug dealer, which the State could not prove.<sup>3</sup> RP 114. The court sustained the objection and told the prosecutor to instruct the witness to abide by the court's pretrial rulings. RP 115. When the jury returned, the court instructed them to disregard the detective's testimony about low-level drug dealers. RP 115.

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>3</sup> The court had earlier ruled that the State could not elicit testimony that police had used a confidential informant to purchase drugs at the house. RP 79-84. Such testimony would violate Mr. Tucheck's constitutional right to confrontation because the confidential informant was unavailable to testify. Id.

Detective Shaviri then testified that although he did not participate in the search of the Tacoma house, he was present during the search and was responsible for collecting the evidence found and ensuring it was properly handled and transported to the evidence room. RP 120, 128-29, 132, 169. He explained that when officers search a house and find a piece of evidence, “they will photograph that evidence in place, . . . put a number next to the evidence that’s photographed, and then they will package that evidence.” RP 127-28. Once the evidence is packaged, the officer will bring it to the person responsible for documenting the evidence, who will enter the relevant information into the computer. RP 127-28. Detective Shaviri was the person responsible for documenting the evidence in this case and therefore the officers gave him all of the evidence collected at the scene. RP 128-29, 169.

On cross-examination, Detective Shaviri admitted that police did not find any weapons in the house. RP 143. On redirect, the prosecutor asked why a drug dealer might not have weapons. RP 177. Detective Shaviri responded that guns typically carry sentence enhancements. RP 178. Defense counsel objected and the court sustained the objection, instructing the jury to disregard the testimony.

RP 178. The prosecutor then asked if there were other reasons why a drug dealer might not have guns. RP 178. The detective said, “yes, their background.” RP 178. Defense counsel again objected and the jury left the courtroom. RP 178. Counsel argued the testimony was improper because it opened the door to speculation about Mr. Tucheck’s criminal history. RP 178-79. The court sustained the objection and expressed frustration that she had to instruct the jury more than once to disregard Detective Shaviri’s testimony. RP 180. When the jury returned, the detective said, without being specific, that there were many reasons why a drug dealer might not carry a gun. RP 187.

The prosecutor then asked Detective Shaviri if he thought any of the people he interviewed were not honest about the activities occurring at the house. RP 190. Defense counsel objected and the jury again left the courtroom. RP 190. Counsel explained that the prosecutor was asking for a comment on the truthfulness of a witness. RP 190. The court sustained the objection. RP 191, 194. When the jury returned, the witness testified he writes down what a suspect says even if he does not believe it. RP 194.

The next witness was Pierce County Sheriff Deputy Kory Shaffer. RP 209. He was responsible for searching Ms. Balkwill's bedroom. RP 214. He testified he found a glass pipe in the room. RP 224. The prosecutor asked if he found any other drug paraphernalia in the room and he said he did. RP 225. When the prosecutor asked what he found, defense counsel objected that the testimony referred to items not in evidence. RP 225. Once again the jury left the courtroom. RP 225. Counsel explained that the prosecutor was referring to a syringe loaded with a clear liquid found in Ms. Balkwill's room which was never taken into evidence. RP 226-27. The prosecutor explained the syringe was never collected or tested because police do not collect such dangerous evidence. RP 228. The court told counsel they could brief the issue over the weekend and expressed frustration that the attorneys had not resolved this issue prior to trial. RP 230-33. Trial then adjourned for the weekend.

When the attorneys returned to court on Monday, the prosecutor informed the court that Deputy Shaffer had told her after his testimony on Thursday that there should be a photograph of the syringe in evidence. RP 237. This was the first time the prosecutor had heard that police took photographs of the evidence they found while

executing the search warrant. RP 237. Apparently, the police took about 50 photographs of evidence at the scene.<sup>4</sup> RP 250-53. Detective Shaviri gave the prosecutor the photographs on Friday and she immediately provided them to counsel. RP 237. Mr. Tucheck's attorney was not available on Friday, however, so he did not receive the photographs until right before court on Monday. RP 240; CP 24.

Counsel filed a motion to dismiss the prosecution based on governmental misconduct pursuant to CrR 8.3(b). CP 24-30, 48-50, 56-59. Counsel specifically did not request a mistrial and said the defendants were not willing to waive their constitutional right to be tried by the jury that had already been selected. RP 268-71, 275.

Counsel argued that dismissal with prejudice was the appropriate remedy. The late disclosure of the evidence deprived counsel of the ability to be fully prepared and could change the defense theory of the case. CP 25. The photos presented new information that must be addressed. For instance, they showed an identification card for someone named "Tanner Woolery" in Mr. Tucheck's room, and a United States Postal Service delivery attempt slip, which was never collected. CP 25. Both items could be evidence that someone else lived at the house. Also, the failure to collect the mail delivery slip

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<sup>4</sup> The photographs themselves are not part of the court record.

could be used to show the poor quality of the police investigation. CP 25. The photos also showed four cars outside the house, none of which were searched, and a computer in Ms. Balkwill's room, several backpacks and a suitcase, none of which were collected. CP 25-26. Again, counsel could have used this information to question the thoroughness of the police investigation or their failure to target Ms. Balkwill. CP 25-26. The photos showed several men's hats in Ms. Balkwill's room, which suggested another person was living there, who could have been the source of the drugs. CP 26. They showed a key labeled "laundry room" and another key collected from Mr. Tucheck's person, which were never investigated and could have been evidence that Mr. Tucheck actually lived somewhere else. CP 26-27. Finally, the photograph of Mr. Tucheck's room showed it was very unkempt, which was consistent with the defense theory that Mr. Tucheck was merely a drug user and not a drug dealer. RP 240.

The prosecutor argued dismissal was not warranted because the photographs were not new evidence; they merely documented what the search looked like. RP 238. Thus, the defense was not prejudiced. RP 241. At the same time, the prosecutor argued the court should grant a mistrial because the defendants' cases were thrown into turmoil due to

the introduction of the new evidence. RP 276-77. The prosecutor mistakenly argued that double jeopardy would not preclude retrial if the court granted a mistrial on its own motion rather than the State's motion. RP 316.

The court ruled that the trial was tainted because the new evidence could have affected the attorneys' opening statements and the way in which they cross-examined Detective Shaviri. RP 242, 265-67, 291. The court therefore declared a mistrial and discharged the jury. RP 298. The court expressly found it had "declared a mistrial sua sponte without the direction or request of either counsel." CP 76. The court did not find that a "manifest necessity" justified the mistrial.

The court then dismissed the prosecution pursuant to CrR 8.3(b). RP 330-39; CP 72-77. The court found that neither the prosecutor nor the defense attorneys were aware of the photographs until Deputy Shaffer mentioned them, and that neither codefendant received copies of the photos until after that time. CP 73. The court found the disclosure of the photographs was untimely, which hindered the ability of the defense to prepare for trial. CP 74. Detective Shaviri was aware of the photographs and was obligated to provide them to the prosecutor, which he failed to do. CP 75. The detective also

repeatedly ignored instructions not to testify as to certain matters, which potentially prejudiced the defendants' right to a fair trial. CP 75. The late disclosure of the photographs, together with Detective Shaviri's behavior on the stand, amounted to governmental mismanagement warranting dismissal. CP 75-76.

The State appeals the order dismissing Mr. Tucheck's case but not the order dismissing Ms. Balkwill's case.

D. ARGUMENT

1. **The Double Jeopardy Clause precludes retrial if the late disclosure of the photographs did not substantially prejudice Mr. Tucheck and if any potential prejudice could have been cured by a lesser remedy**

The State does not dispute that the photographs taken during the search were not timely disclosed to the defense. AOB at 9-10, 14. Instead, the State argues that Mr. Tucheck was not prejudiced by the late disclosure. AOB at 10-12, 15-17. According to the State, the proper remedy for the late disclosure was not to discharge the jury but to grant a brief recess or continuance and/or to recall Detective Shaviri to the stand for further cross-examination. AOB at 17, 19.

If this Court accepts the State's argument, it must also conclude there was no "manifest necessity" for aborting the trial. In the absence

of such “manifest necessity,” the State may not retry Mr. Tucheck because his constitutional right to have his case heard by the jury already impaneled was violated.

- a. Once jeopardy attaches, an accused has a fundamental constitutional right to have his case decided by the jury he chose, unless he freely consents to a mistrial or a “manifest necessity” exists to justify a mistrial.

“A basic tenet of our constitutional freedoms is the prohibition against a second trial for the same offense.” State v. Robinson, 146 Wn. App. 471, 477-78, 191 P.3d 906 (2008). The Double Jeopardy Clause of the federal constitution provides that no person shall be “twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. Similarly, article I, section 9 of the Washington Constitution provides: “No person shall . . . be twice put in jeopardy for the same offense.”

The constitutional prohibition against double jeopardy protects defendants from running the same “gauntlet” more than once. Robinson, 146 Wn. App. at 477-78. It also prohibits the State from having more than one opportunity to convict a defendant for the same crime. Id.; Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). In particular, the double jeopardy prohibition

protects the accused's "valued right to have his trial completed by a particular tribunal." State v. Melton, 97 Wn. App. 327, 331-32, 983 P.2d 699 (1999) (quoting Washington, 434 U.S. at 519). The defendant's constitutional "right to be tried by the jury first chosen and sworn to try his case is inviolable." State v. Rich, 63 Wn. App. 743, 749, 821 P.2d 1269 (1992) (internal quotation marks and citation omitted).

When an initial prosecution ends in mistrial, a subsequent retrial increases the emotional and financial burden imposed on the defendant, may give the State an unfair opportunity to tailor its case based on what it learned the first time around, and may increase the chances that an innocent person will be convicted. State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982); Washington, 434 U.S. at 503-04 & n.14. "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Washington, 434 U.S. at 505.

If a jury is discharged after jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for the same crime only if: (1) he freely consents to the mistrial or (2) the mistrial was required by a "manifest necessity." State v. Juarez, 115 Wn. App. 881,

886-87, 889, 64 P.3d 83 (2003); United States v. Dinitz, 424 U.S. 600, 606-07, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). To discharge the jury without the defendant's consent is tantamount to an acquittal "unless such discharge was necessary in the interest of the proper administration of public justice." Jones, 97 Wn.2d at 162. This means that "extraordinary and striking" circumstances must be present which clearly indicate that substantial justice cannot be obtained without discontinuing the trial. Id. at 163. The trial court must "engage in a scrupulous exercise of judicial discretion before foreclosing a defendant's valued right to have his trial completed by a particular tribunal." Melton, 97 Wn. App. at 331-32 (internal quotation marks and citations omitted).

Jeopardy attaches after the jury is selected and sworn. Juarez, 115 Wn. App. at 887. Here, the court discontinued the trial after the jury was selected and sworn and two witnesses had already testified for the State. Therefore, jeopardy attached and the court was permitted to discharge the jury only upon Mr. Tucheck's consent or if a "manifest necessity" clearly indicated that substantial justice would not be obtained without discontinuing the trial. Jones, 97 Wn.2d at 162; Juarez, 115 Wn. App. at 886-87; Dinitz, 424 U.S. at 606-07.

- b. Mr. Tuckeck did not consent to discharge of the jury.

Following the State's tardy disclosure of the photographs, Mr. Tuckeck filed a motion to dismiss the prosecution with prejudice under CrR 8.3(b). CP 24-30, 48-50, 56-59. He specifically did not request a mistrial and asserted he was not willing to waive his constitutional right to have the case decided by the particular jury he had already selected if his motion to dismiss were denied. RP 268-71, 275.

In determining whether the Double Jeopardy Clause bars further prosecution following a mistrial, the United States Supreme Court distinguishes between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent. Dinitz, 424 U.S. at 608-09. Even when judicial or prosecutorial error prejudices a defendant's chances of securing an acquittal, he still has the right "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." United States v. Jorn, 400 U.S. 470, 484, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." Dinitz, 424 U.S. at 608-09. In the absence of the defendant's consent, the "doctrine of manifest necessity stands as a command to

trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.” Id. at 607-08.

Thus, Washington courts hold that if a defendant moves to dismiss a prosecution with prejudice after trial has begun, but does not consent to a mistrial with the possibility of retrial, the Double Jeopardy Clause bars retrial if the trial court nonetheless declares a mistrial without a finding of manifest necessity. Juarez, 115 Wn. App. at 888-89; Rich, 63 Wn. App. at 746-48. The defendant need not move for or agree to the lesser sanction of a mistrial with the possibility of retrial in order to preserve his double jeopardy rights. State v. Martinez, 121 Wn. App. 21, 36, 86 P.3d 1210 (2004).

In Juarez, the defense moved to dismiss the prosecution with prejudice following the State’s untimely disclosure of evidence. Juarez, 115 Wn. App. at 885. When that was denied, counsel moved for a continuance so that he could have time to address the new evidence. Id. at 886. The court granted the continuance but then reconsidered and declared a mistrial, discharging the jury. Id. On appeal, the Court concluded Juarez did not freely “consent” to the

discharge of the jury despite filing a motion to dismiss. Id. at 890.

Therefore, because there was no “manifest necessity” to discharge the jury, retrial was prohibited by the Double Jeopardy Clause. Id.

Similarly, in Rich, the defense moved to dismiss after the State rested its case because the State had failed to prove an element of the crime. Rich, 63 Wn. App. at 746. The trial court denied the motion but then granted its own motion for mistrial. Id. On appeal, the Court held that Rich did not “consent” to the mistrial or waive his right to have his case decided by the jury selected. Id. at 748. Therefore, because there was no “manifest necessity” to discharge the jury, retrial was barred by the Double Jeopardy Clause. Id.; see also State v. Wilmer, 97 Haw. 238, 244, 35 P.3d 755 (2001) (defendant did not “consent” to discharge of jury where counsel filed motion to dismiss and made clear that defendant was not seeking a mistrial); People v. Squires, 100 Mich. App. 672, 675-76, 300 N.W.2d 366 (1980) (defendant did not consent to mistrial by bringing motion to dismiss).

Here, Mr. Tucheck filed a motion to dismiss with prejudice and made clear he was not consenting to a mistrial with the possibility of retrial. RP 268-71, 275. The trial court declared a mistrial “sua sponte without the direction or request of either counsel.” RP 298; CP 76.

Therefore, Mr. Tucheck did not “consent” to the discharge of the jury for purposes of the Double Jeopardy Clause. Retrial is barred unless there was a “manifest necessity” for the court to discharge the jury.

Juarez, 115 Wn. App. at 886-87; Dinitz, 424 U.S. at 608-09.

- c. If the State is correct that Mr. Tucheck was not substantially prejudiced by the late disclosure of the photographs and a lesser remedy could have cured any prejudice that did result, then there was not a “manifest necessity” to abort the trial and Mr. Tucheck may not be retried.

A trial court has discretion to declare a mistrial but that discretion is “not unbridled.” State v. Browning, 38 Wn. App. 772, 775, 689 P.2d 1108 (1984). If discretion is not exercised or is exercised improperly, a mistrial is tantamount to an acquittal and frees the defendant from further prosecution. Id.

If the trial is terminated over the defendant’s objection, the test for lifting the double jeopardy bar to a second trial is the “manifest necessity” standard first enunciated in United States v. Perez, 9 Wheat. 579, 580, 6 L. Ed. 165 (1824). In Perez, the Court declared that trial courts must “exercise a sound discretion” in deciding whether to discharge the jury once jeopardy has attached, and may declare a mistrial only “under urgent circumstances, and for very plain and

obvious causes.” Id. The Court later explained, “the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuance of the proceedings.” Jorn, 400 U.S. at 485. Thus, a “manifest necessity” arises only when there are “very extraordinary and striking circumstances,” or when “discharge [i]s necessary in the interest of the proper administration of public justice.” Browning, 38 Wn. App. at 775-76 (internal quotation marks and citations omitted); Downum v. United States, 372 U.S. 734, 736, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963).

Generally, discharge of the jury is an extreme remedy that is unwarranted even when the State violates the discovery rules by not disclosing evidence until after trial has begun. State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010); State v. Brush, 32 Wn. App. 445, 456, 648 P.2d 897 (1982). CrR 4.7(h)(7) sets forth the available sanctions for a discovery violation. When a party fails to disclose information it was required to disclose pursuant to a discovery rule or court order, “the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance,

dismiss the action or enter such other order as it deems just under the circumstances.” CrR 4.7(h)(7)(i).

The appropriate remedy when the State discloses discoverable information after trial has begun is usually to grant a continuance so that the defense may prepare a response to the new information. Krenik, 156 Wn. App. at 321; Brush, 32 Wn. App. at 456. In Krenik, the State did not disclose until the middle of trial the existence of video surveillance of Krenik’s home. 156 Wn. App. at 317. The Court held the late disclosure of the evidence was error but did not justify a mistrial or dismissal of the charges. The appropriate remedy was to grant a continuance so that Krenik could access the recording. Id. at 321. Similarly, in Brush, the State violated the discovery rules by not disclosing a police officer’s statement until after trial had begun. Brush, 32 Wn. App. at 454-55. The appropriate remedy was to grant a continuance and not a mistrial. Id. at 456.

If the defendant is not substantially prejudiced by the prosecutor’s actions and a lesser remedy could cure any prejudice, there are no “extraordinary and striking circumstances” required in declaring a mistrial. State v. Sheets, 128 Wn. App. 149, 156, 115 P.3d 1004 (2005). Courts consistently hold that, under such circumstances, the

“manifest necessity” standard is not met and the Double Jeopardy Clause bars a retrial. See, e.g., Robinson, 146 Wn. App. at 482-84 (retrial barred where trial court granted mistrial following communication between jury and bailiff where court did not consider whether juror-bailiff communication prejudiced defendant and where court failed to consider lesser remedy such as admonishing jury or providing curative instruction); Sheets, 128 Wn. App. at 158 (retrial barred where trial court granted mistrial after witness testified that complaining witness was “flirting” with him on night of alleged attempted rape, where court could have cured any prejudice resulting from violation of rape shield law by providing limiting instruction); Juarez, 115 Wn. App. at 890 (retrial barred where trial court granted mistrial following State’s late disclosure of evidence, where court should have granted continuance before trial began); Rich, 63 Wn. App. at 748-49 (retrial barred where trial court granted mistrial instead of allowing State to reopen its case after it failed to prove an element of the crime); Browning, 38 Wn. App. at 776 (retrial barred where trial court granted mistrial after prosecutor said multiple times during closing argument that jury instructions were “misleading,” where there was no showing that some less precipitous action would not have

solved the problem); Wilmer, 97 Haw. at 245 (retrial barred where prosecutor's many instances of misconduct resulted in little actual prejudice to accused and any prejudice that did result could have been cured through lesser means than mistrial); Squires, 100 Mich. App. at 673-74, 676 (retrial barred where trial court granted mistrial after defense counsel mistakenly told jury during opening statement that a third person would admit responsibility for crime, where court did not find no reasonable alternative to mistrial existed).

The State contends that Mr. Tucheck was not prejudiced by the late disclosure of the photographs and any potential prejudice could have been cured by granting a continuance and/or recalling Detective Shaviri to the stand. If that is the case, then the court's decision to discharge the jury and dismiss the charges was extreme and unwarranted. Krenik, 156 Wn. App. at 321; Brush, 32 Wn. App. at 456. In other words, there was no "manifest necessity" to discharge the jury. Therefore, Mr. Tucheck's constitutional right to have his case determined by the jury he selected was violated and the Double Jeopardy Clause bars retrial. Jones, 97 Wn.2d at 162; Juarez, 115 Wn. App. at 886-87; Jorn, 400 U.S. at 485.

2. **The trial court did not abuse its discretion in concluding that the State's late disclosure of evidence, together with the police detective's repeated improper testimony, amounted to government mismanagement warranting dismissal**

CrR 8.3(b) gives trial courts authority to dismiss a criminal prosecution "due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." The purpose of the rule is to provide trial courts with a mechanism to protect defendants against arbitrary action or governmental misconduct. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court's decision to dismiss charges pursuant to CrR 8.3(b) is reviewed for abuse of discretion. Martinez, 121 Wn. App. at 30. Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. Id.

The question of whether dismissal is an appropriate remedy is a fact-specific determination that must be resolved on a case-by-case basis. State v. Sherman, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990). If the trial court based its dismissal of charges on inappropriate grounds, this Court may still affirm on any ground within the pleadings and proof. Michielli, 132 Wn.2d at 242.

This Court's review of the lower court's decision is not limited to the trial court's oral statements. Id. A trial court's oral statements are "no more than a verbal expression of [its] informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Id. (internal quotation marks and citation omitted). The trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment.<sup>5</sup> Id.

Before a court may dismiss charges under CrR 8.3(b), the record must show (1) arbitrary action or government misconduct and (2) prejudice affecting the defendant's right to a fair trial. Id. at 239-40. Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. Id.

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<sup>5</sup> Thus, this Court should not rely on the trial court's oral statements to the effect that she was compelled to dismiss the case against Mr. Tucheck because she had already dismissed the case against Ms. Balkwill. See AOB at 19. The court did not incorporate this reasoning into its written decision. CP 72-77. In its written decision, the court expressly found that the reasons justifying dismissal applied equally to both codefendants. CP 76.

- a. The State's untimely disclosure of the photographs together with the detective's repeated improper testimony amounted to governmental mismanagement.

The State acknowledges that the photographs taken during the search were not timely disclosed to the defense and that the untimely disclosure was a mistake. AOB at 9-10, 14. The record supports the trial court's finding that the untimely disclosure of the evidence constituted prosecutorial mismanagement that supported the decision to dismiss. CP 75.

"It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7." State v. Dunivin, 65 Wn. App. 728, 733-34, 829 P.2d 799 (1992). The purpose of CrR 4.7 is "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process." State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). To accomplish these goals, the prosecutor must resolve doubts regarding disclosure in favor of sharing the evidence with the defense. Dunivin, 65 Wn. App. at 733-34.

Here, long before trial, Mr. Tucheck expressly asked the State to provide "[a] list of, copies of, and access to any . . . photographs . . .

which the Prosecuting Attorney intends to use in the hearing or trial,” and “[a] list of all items or things which were obtained from or belonged to the Defendant, regardless of whether the Prosecutor intends to introduce said items at hearing or trial.” CP 85 (emphasis added).” CP 84-86. Aside from the defense request, CrR 4.7(a)(1)(v) imposed an unequivocal obligation on the prosecutor to disclose, no later than the omnibus hearing, “any . . . photographs . . . which the prosecuting attorney intends to use in the hearing or trial.”<sup>6</sup> In the omnibus hearing order, the State asserted it had contacted law enforcement agencies, requested additional evidence from them, and provided it to the defense. CP 9-11.

The prosecutor’s obligation under the discovery rules included the duty to disclose not only information within the prosecutor’s own knowledge or control, but also information “within the knowledge, possession or control of members of the prosecuting attorney’s staff.” CrR 4.7(a)(4). The police are considered to be part of the “prosecuting

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<sup>6</sup> A prosecutor “intends to use” a piece of evidence, for purposes of CrR 4.7, in any situation where the State is aware of the item and there is a reasonable possibility that the item will be used during any phase of the trial. Dunivin, 65 Wn. App. at 734. Furthermore, the discovery obligation is not limited to evidence intended for use in the State’s case-in-chief. The prosecutor’s duty under CrR 4.7 applies to evidence which the rules oblige it to disclose, whether it be considered for use in the State’s case-in-chief, for rebuttal, for impeachment purposes, or in some other way. Id.

attorney's staff" for purposes of the rule. State v. Martinez, 78 Wn. App. 870, 875, 899 P.2d 1302 (1995). Therefore, the prosecutor's obligation to disclose included discoverable materials within the possession or control of the police, regardless of whether the prosecutor knew about them.

In addition, the State has a general obligation to exercise due diligence and disclose facts material to the prosecution soon enough for the defendant to prepare his defense. State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Here, the photographs presented new information that was material to the case. As defense counsel argued, much of the information contained in the photographs was material to the issues of whether someone else lived at the house, whether Mr. Tucheck in fact lived somewhere else, and whether the police conducted an adequate investigation or unfairly focused their attention on Mr. Tucheck. RP 240; CP 25-27.

The trial court found that defense counsel was not aware of the photographs until the prosecutor informed him about them after trial had already begun. CP 73-74. This finding is supported by substantial evidence. Prior to trial, the prosecutor provided the defense with a document that stated there were "photos of items of evidence" but did

not state what the evidence was. RP 250-51. Neither defense counsel nor the prosecutor concluded from this brief, mysterious reference that there were at least 50 photographs taken at the scene. RP 247-53. It is not reasonable to expect defense counsel to be on notice of the photographs when even the prosecutor did not know about them.

The trial court also found that Detective Shaviri was aware of the photographs and failed to provide them to the prosecutor in violation of his duty. CP 75. This finding is also supported by substantial evidence. Detective Shaviri testified he was the lead detective on the case. RP 43. He was present in the house during the execution of the search warrant and was responsible for collecting the evidence, entering the relevant information into the computer, and ensuring the evidence was properly handled and transported to the evidence room. RP 120, 127-29, 132, 169. He also testified that, in general, when officers execute a search warrant, they photograph the pieces of evidence that they find. RP 127-28. Finally, Detective Shaviri is the one who gave the prosecutor the photographs after Deputy Shaffer told the prosecutor about them. RP 237. Under these circumstances, it is not reasonable to conclude Detective Shaviri was unaware of the photographs.

In addition to failing to timely disclose the photographs, Detective Shaviri testified about several improper and unfairly prejudicial matters, despite the trial court's repeated admonitions. The detective testified he was in the "narcotics unit," which did not "chase low-level drug dealers." RP 113. The court sustained the defense objection and instructed the jury to disregard the testimony. RP 115. Detective Shaviri testified that sometimes drug dealers do not carry weapons because guns carry sentence enhancements and because a person's "background" might advise against it. RP 178-80. Again, the court sustained the objections and instructed the jury to disregard. RP 178-80. Finally, Detective Shaviri testified he thought some of the people he interviewed were not being honest. RP 190. Once more the court sustained the defense objection. RP 191, 194.

The State's untimely disclosure of the photographs, where the detective knew about the photographs, together with the detective's repeated improper testimony, amounted to State mismanagement justifying dismissal under CrR 8.3(b).

- b. Mr. Tucheck was prejudiced by the State's mismanagement.

Dismissal under CrR 8.3(b) is an extraordinary remedy available only when the alleged prosecutorial mismanagement has materially

affected the defendant's right to a fair trial. State v. Brooks, 149 Wn. App. 373, 389, 203 P.3d 397 (2009). Where dismissal is sought for a discovery violation, the issue is not whether the evidence itself was “material” in the common sense that if it had been timely disclosed the result of the proceeding would have been different. Id. Instead, the issue is whether the defendant’s right to a fair trial was materially affected. Id. If late disclosure of evidence prevents defense counsel from adequately and timely preparing for trial, or hinders defense counsel’s ability to defend, this may amount to prejudice warranting dismissal. Id. at 390-91; Martinez, 121 Wn. App. at 34-35.

When the State appeals a trial court’s decision to dismiss under CrR 8.3(b), the State bears the burden to prove any prosecution error affecting constitutional rights was harmless beyond a reasonable doubt. State v. Sherman, 59 Wn. App. 763, 768, 801 P.2d 274 (1990).

In Martinez, the State did not disclose until after trial began that the gun confiscated from the assailants was stolen in a burglary of someone else *after* the defendant reportedly showed the gun to a testifying witness. 121 Wn. App. at 25-26. In other words, the gun identified by the witness could not have been the same gun shown to

her by Martinez. Id. The Court held the trial court did not abuse its discretion in dismissing the charges under CrR 8.3(b). Id. at 33-36.

In Sherman, the trial court dismissed the charges after the State failed to provide the defense with a witness list or the IRS records of the complaining witness as ordered at omnibus; filed a motion to reconsider a discovery order and an amended information after the date trial was to have commenced; and attempted to expand the State's witness list on the day of trial. 59 Wn. App. at 766. The Court held the State's failure to produce the IRS records as ordered by the court and agreed to by the State was sufficient in itself to affirm the dismissal. Id. at 768. The late disclosure, combined with the other actions of mismanagement, together compromised defense counsel's ability to prepare for trial, which was an indispensable component of the right to a fair trial and warranted dismissal. Id. at 771-73.

In State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980), the court dismissed the prosecution after the State failed to timely comply with the omnibus order, did not disclose the witness list until one court day before trial, did not timely comply with the bill of particulars, and was tardy in dismissing charges against a codefendant. The Supreme

Court held these actions together “amply support[ed] the trial court's dismissal of the criminal prosecution under CrR 8.3(b).” Id.

Finally, in Brooks, the State failed to provide the victim’s statement until the day before trial; failed to provide the defendant’s statement made to police on the night of the incident; and failed to subpoena the victim for trial. 149 Wn. App. at 376. The court did not abuse its discretion in dismissing the prosecution under CrR 8.3(b). Id.

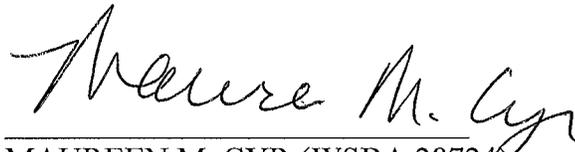
As in the above cases, the State’s multiple incidents of mismanagement together denied Mr. Tucheck his ability to obtain a fair trial and justified dismissing the prosecution. The disclosure, after trial had already begun, of 50 photographs taken at the scene materially affected counsel’s ability to timely prepare for trial. The detective’s repeated improper testimony about forbidden and unfairly prejudicial subject matters, despite repeated admonitions from the trial court, unfairly prejudiced Mr. Tucheck’s ability to obtain a fair trial. The court was well within its discretion to dismiss the prosecution pursuant to CrR 8.3(b).

#### E. CONCLUSION

The Double Jeopardy Clause prohibits the State from retrying Mr. Tucheck if there was no “manifest necessity” to discharge the jury.

In addition, the trial court did not abuse its discretion in dismissing the prosecution due to repeated and prejudicial mismanagement by the State. This Court should affirm the trial court's order dismissing the prosecution with prejudice.

Respectfully submitted this 25th day of July, 2013.

A handwritten signature in cursive script that reads "Maureen M. Cyr". The signature is written in black ink and is positioned above a horizontal line.

MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

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|----------------------|---|----------------|
| STATE OF WASHINGTON, | ) |                |
|                      | ) |                |
| APPELLANT,           | ) |                |
|                      | ) |                |
| v.                   | ) | NO. 43951-4-II |
|                      | ) |                |
| JEFFREY TUCHECK,     | ) |                |
|                      | ) |                |
| RESPONDENT.          | ) |                |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF JULY, 2013.

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# WASHINGTON APPELLATE PROJECT

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