

ORIGINAL

No. 77756-0

CA NO. 29915-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN EGGLESTON,

Defendant/Petitioner.

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AMENDED PETITION FOR REVIEW

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A. Identity of Petitioner

Mr. Eggleston asks this Court to review the Court of Appeals decision designated in Section B of this petition.

B. Court of Appeals Decision

A copy of the decision affirming Mr. Eggleston's conviction but remanding for resentencing is contained in Appendix A.

C. Issues Presented for Review

1. The appellate court rejected the double jeopardy/collateral estoppel challenge to admission of evidence, argument, and jury instructions, at the latest trial, on factors that two prior juries had rejected – premeditation and knowingly killing a police officer.

(a) Does the appellate court's view of what was "necessarily decided" by prior juries conflict with controlling authority holding that this must be evaluated in a common sense, not "hypertechnical," way, and holding that double jeopardy bars relitigation of a variety of facts that are not technical elements of the crime (e.g, Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971))?

(b) Does this conflict with State v. Funkhouser, 30 Wn. App. 617, 637 P.2d 974 (1981), which held that "collateral estoppel bars any use in a

subsequent criminal prosecution of *evidence* necessarily determined in the defendant's favor by a previous verdict”?

(c) Does the appellate court's decision that the prior jury's "no" answer to the aggravating factor was not binding conflict with Stow v. Murashige, 288 F. Supp.2d 1120 (D. Hawaii 2003), controlling authority cited within, and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)?

2. The appellate court remanded for resentencing in light of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 25.1, 159 L.Ed.2d 403 (2004), and SB 5477.

(a) Does remand for anything other than a standard range sentence conflict with State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)?

(b) Does retroactive application of SB 5477 violate controlling state and federal *ex post facto* clause protections?

(c) Does imposition of an exceptional sentence following the last appeal violate North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)?

3. The trial court excluded videos made by the state's expert, showing the raid officers as they walked through the house and described what had happened. Did exclusion violate state and U.S. constitutional rights to present a complete defense, ER 106, and the "rule of completeness"?

4. Did exclusion of impeachment and other defense evidence violate Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963), the constitutional right to present a complete defense, and ER's?

5. Did admission of expert opinion on the sequence in which bullets were fired violate the controlling "law of the case" doctrine?

6. Did admission of Mr. Eggleston's prior marijuana deals and possession violate ER 404(b) or the due process right to a fair trial?

7. Did the dismissal of Jurors 4 and 7, without formal inquiry or minor accommodations, violate CrR 6.5 and RCW 2.36.110?

8. Did secrete juror communications with the court violate the right to presence, to be informed of juror communications, and did the dismissal resulting therefrom violate the right to decision by the jury that was first sworn?

9. Did admission of a deputy's prior testimony violate ER 804(a) and the confrontation clause?

10. The instructions on self-defense permitted the jury to find that Mr. Eggleston shot one whom he knew, or should have known, to be an officer, and prevented the jury from considering whether the slain deputy was acting lawfully: (a) did this violate double jeopardy, since prior juries rejected the state's claim that defendant knew the person slain was an officer; (b) did this take an element of self-defense out of the jury's

hands, in violation of United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); (c) did exclusion of evidence concerning the illegality of the raid violate Gaudin; and (d) did these instructions bar presentation of self-defense, and shift the burden of proof?

D. Statement of the Case

1. PROCEDURAL HISTORY

a. The First Trial – All Charges

Brian Eggleston was charged on Oct. 31, 1995, with one count of aggravated first-degree murder, one count of first-degree assault, several drug related charges, and the death penalty. The aggravating factor was: “that the victim was a law enforcement officer ... who was performing his official duties at the time of the act resulting in death, and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.” CP:1102-1107. The jury deadlocked on premeditated murder and the aggravating factor. CP:1121-1127.

b. The Second Trial – Homicide Only

A new trial was held on aggravated murder. This time, the jury found Mr. Eggleston *not guilty* of premeditated murder and the aggravating factor. CP:1494-95. The murder and assault convictions were reversed. State v. Eggleston, 108 Wn. App. 1011, 2001 WL 1077846 (2001).

c. *The Third Trial Now Under Review – Homicide and Assault*

A third trial was then held on assault and second-degree murder. The jury convicted. CP:810-813, 878-894. But the state relied on facts, evidence, and argument that prior juries had determined adversely to the state by rejecting the aggravating factor and premeditation.

2. FACTUAL SUMMARY OF THIRD TRIAL

At about 6:30 a.m. on October 16, 1995, Brian Eggleston lay sleeping wearing his earplugs. He had been up late the night before, bartending. His girlfriend woke up in the morning to go to work and gave him his colitis medicine. Mr. Eggleston went back to sleep. His mother, with whom he lived, lay sleeping in the other bedroom. His father was asleep on the couch in the living room.¹

At about the same hour across town, deputy sheriffs were preparing to serve a search warrant for marijuana. Relying on the word of an informant drug dealer, some deputies had become convinced that fellow officer Brent Eggleston (brother of Brian), his wife and young daughter might also be in the house, and that Brent possessed marijuana.

10/22/02 VRP:1423-43, 1459-70.

¹ 11/7/02 VRP:3232-46 (testimony of Tiffany Patterson re time of going to sleep, waking up, and medicine); 12/2/02 VRP:5193, 5231-32 (testimony of Mrs. Linda Eggleston where people slept and being asleep on the morning of the raid); 12/9/02 VRP:5891-5902.

By approximately 7:00 a.m. the deputies piled out of their van and towards the back door of the Eggleston home, and were about to enter. The deputies swore that they knocked and announced loudly and were clearly dressed as deputies, though their memories of when they knocked, how they knocked, how many times they knocked, and how long it took to knock and announce varied wildly.² The Egglestons swore that they never heard a knock or announcement.³

Several things were, however, clear about this entry. The deputies were not in normal police uniforms, but were dressed largely in jeans and black and some had black hoods pulled over their faces. 10/22/02 VRP:1480, 1565-67. A neighbor said they looked like civilians as they swarmed towards the Eggleston house.⁴ The deputies chose this early

² E.g., 10/22/02 VRP:1414-17 (Deputy Ben Benson's testimony to this effect); VRP:1483-90 (Benson's testimony about how loudly they knocked, announced and entered); 10/23/02 VRP:1736-37, 1744-60 (testimony over objection of raid entry deputy Larsen, about his background training for always executing warrants in this manner, how loudly they knocked and announced, how clearly marked his clothing was as well as that of Bananola, how light it was in the house); 11/6/02 VRP:3028-80 (Deputy Reding testimony about the same things, including about how well marked Bananola's clothing was); 11/7/02 VRP:3277-3311 *et seq* (Deputy Reigle's testimony about his own markings and announcing as well as Bananola's; Bananola was announcing his presence when he turned the corner in front of him, "He was shouting," *id.* VRP:3311).

³ 12/2/02 VRP:5193, 5230-32 (testimony of Mrs. Linda Eggleston); 12/9/02 VRP:5891-93 (Brian Eggleston testimony); 11/5/02 VRP:2918-19 (testimony of Tom Eggleston).

⁴ 12/2/02 VRP:5148-53 (neighbor Elmer Kelly testified that he woke up around 6:30 a.m. on the date of the raid, saw the van pulling up to Eggleston's house from his kitchen window, saw the officers get out, and "They were all civilian clothes. They were just plain clothes.").

hour in the hope of catching all occupants asleep and in bed. 10/2202 VRP:1463-64. They entered the home with guns drawn in the “low ready” position. E.g., 11/7/02 VRP:3300-03, 3311-20. They fanned out in the tiny house and trained guns at whomever they saw. Id.

It was also clear that gunfire burst out in the hallway just past the entry-kitchen, between the bedrooms and the living room. E.g., 11/7/02 VRP:3323. Brian Eggleston was coming from the bedroom. He said that he kept a gun by his bed for protection. He grabbed it, believing intruders were entering and fearing for himself and his family; he left his bedroom and confronted a dark lurking shape in a dark hall, saw the flash of gunfire, and then fired in self-defense – and never entered the living room or fired from there with vision of who Deputy Bananola was.⁵ The deputies testified that any reasonable person would have heard them knocking and announcing and would have recognized them as officers.⁶

The balance of the facts are discussed in the Argument, below; we also invite the Court’s attention to the Opening Brief’s factual summary.

E. Argument Why Review Should be Accepted

⁵ 12/9/02 VRP:5891-5906 (Brian Eggleston testimony). Accord 12/4/02 VRP:5511-23, 5529-38 (testimony of defense expert Kay Sweeney about where Eggleston was positioned at the time the gunfire erupted, that is bedroom hallway, and about how all the shots into Bananola came from that hallway rather than from the living room); 12/2/02 VRP:5230-39 (testimony of Linda Eggleston re awakening to the noise of the deputies in the house, the lighting conditions and difficulty of seeing who the deputies were).

⁶ E.g., 10/22/02 VRP:1483-90.

1. THE APPELLATE COURT'S DECISIONS THAT PRIOR JURIES DID NOT NECESSARILY ACQUIT MR. EGGLESTON OF PREMEDITATING AND OF THE AGGRAVATING FACTOR CONFLICTS WITH SUPREME COURT AND APPELLATE AUTHORITY ON WHAT A PRIOR VERDICT "NECESSARILY DETERMINED" AND ON WHETHER COLLATERAL ESTOPPEL BARS RELITIGATION OF FACTS AS WELL AS ULTIMATE ISSUES.

a. *The Prior Jury Verdict of Second-Degree Murder Is an Implied Acquittal of First-Degree Murder.*

The prior jury verdict of second-degree murder is an implied acquittal of first-degree murder.⁷ The appellate court seemed to agree.

b. *The Prior Jury Verdicts Were Also Implied Acquittals of the Aggravating Factor – the Appellate Court's Decision to the Contrary Conflicts With Santa Maria, Delap v. Dugger and Goldberg.*

The jury's decision against convicting on the greater charge at that second trial also functioned as an acquittal of the aggravating factor.

The appellate court's apparent decision to the contrary conflicts with the rule that collateral estoppel applies to special sentencing verdicts such as deadly weapon allegations, and not just to traditional elements. Santamaria v. Horsley, 138 F.3d 1280, 1290 (9th Cir.) (*en banc*), cert. denied, 525 U.S.

⁷ Price v. Georgia, 398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) ("this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge."); State v. Hescoc, 98 Wn. App. 600, 989 P.2d 1251 (1999) (same).

824 (1998). It conflicts with the rule that collateral estoppel applies to aggravating factors that enhance the penalty for murder to death. Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), cert. denied, 496 U.S. 929 (1990).

There is one more prior jury determination that constitutes an acquittal of the aggravating factor here. At the first trial, the jury “hung” on the aggravated murder count. But there is no such thing as a “hung” jury on an aggravating factor – it is an acquittal. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). The appellate court’s decision to the contrary conflicts with this case, also.

c. ***A Prior Jury Also Wrote “No” and “Not Guilty” on the First-Degree Murder and Aggravating Factor Verdicts; Those Were Express Acquittals, and the Appellate Court’s Decision to the Contrary Conflicts with Stow.***

At the second trial on this homicide, the jury, in addition to entering a verdict of “guilty” on the lesser offense, also handwrote in “Not guilty” on the first-degree murder verdict form (CP:1494) and “NO” on the aggravating factor special verdict form (CP:1495). If there is any question about whether “NO” means “NO” on the aggravating factor verdict, since the jury did not have to reach that question, that is answered by recent federal authority arising in the same context. Stow v. Murashige, 288 F.Supp.2d 1122 (D. Haw. 2003) (citing Supreme Court authority).

d. *The Acquittals Bar Relitigation of those Prior Factual Determinations – and the Appellate Court’s Decision to the Contrary Conflicts with Controlling and Persuasive Authority on What Facts a Prior Verdict “Necessarily Determined.”*

The collateral estoppel component of the double jeopardy clause precludes re-litigation of facts and issues – not just charges – that were resolved against the state at a prior trial: “when an issue of ultimate *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 v. Swenson, 397 U.S. 436, 443 (emphasis added). See also Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 673, 107 L.Ed.2d 708.

It also bars reintroduction of *evidence* necessarily rejected by a prior jury verdict. State v. Funkhouser, 30 Wn. App. 617 (“collateral estoppel bars any use in a subsequent criminal prosecution of evidence necessarily determined in the defendant’s favor by a previous verdict”).

And what facts or issues were necessarily determined by prior verdicts is based on common sense, not “hypertechnical,” comparisons of facts in prior and current cases, under controlling Supreme Court law.⁸

The appellate court’s opinion conflicts with each of these three lines of authority. Viewing the facts, charges, and instructions in Mr. Eggleston’s cases in a commonsense, not “hypertechnical” manner, the only logical

⁸ Ashe, 397 U.S. at 443.

explanation is that the state previously failed to prove that Mr. Eggleston premeditated or knew or should have known that he was killing an officer. There is no other way to explain the jury's decision, at the second trial, to convict Mr. Eggleston of intentional but not premeditated murder. That shows agreement on the fact that Mr. Eggleston shot John Bananola, but rejection of the *mens rea* embodied in the greater charge and aggravating factor. This is clear from the instructions on premeditation at that second trial (CP:1463-1493); they told the jury to convict on that higher charge if they believed that he committed homicide with premeditation and knowingly killed an officer. That the jury failed to convict indicates that they did not find these facts or this *mens rea*.⁹

Similarly, two prior juries rejected the aggravating factor, with its objective as well as subjective prongs. Since there is no doubt that Mr. Eggleston's gunshot killed Bananola, the only plausible reason for rejecting the aggravating factor of *knowingly* killing a law enforcement officer is that he did not *know* it was a law enforcement officer – and no reasonable person would have *known* it, either.

⁹ Even the questions sent out by the hung jury at the first trial indicated that they acknowledged that Mr. Eggleston was the shooter but were struggling with whether his shooting of the deputy was justified. Sub No. 399 (CP:1180-1201) (Question: "If a person acting in Self Defense against an attacker becomes an aggressor or acts aggressively by pursuing the attacker, is he or she still considered by law to be acting in self defense?"); (Question: "To further understand the law as given to us, can 'his ground' as stated in Instruction 31 be interpreted to include the entire house.").

The appellate court's decision therefore conflicts with substantial federal authority on the manner in which to compare the facts necessarily decided by a prior jury, with the facts presented to a later jury. We incorporate by reference Argument Section I on this point from the Opening Brief; see also the following decisions barring relitigation of facts necessarily established on common sense rather than technical readings of prior verdicts: Ashe v. Swenson, 397 U.S. at 438-39 & n.203 (prior acquittal of robbery of one player at poker game meant that the government failed to prove the defendant was one of the masked robbers even though there were other possible, speculative, scenarios that might have accounted for the acquittal – perhaps a technicality about this particular victim not being robbed); Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971) (state barred from prosecuting defendant for bombing murder of a second victim, where earlier jury had acquitted defendant of bombing murder of different victim – even though the acquittal was based on a general verdict so testimony and instructions had to be examined to determine that the prior jury had decided that the state failed to prove defendant mailed the bomb); United States v. Romeo, 114 F.3d 141, 143 (9th Cir. 1997); United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997); United States v. James, 109 F.3d 597 (9th Cir. 1997); State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995).

e. *The Entire Basis of the State's Case and the Exceptional Sentence Was Mr. Eggleston's Supposed Premeditated Execution Style Murder of a Person He Knew to be a Police Officer – Precisely the Facts that Could Not Be Relitigated.*

The entire basis of the state's case was that Mr. Eggleston knew that officers were entering his home, from the time that they knocked and announced, and that he made a conscious decision – equivalent to a premeditated one – to protect his paltry stash of marijuana with a blazing gun. See the summary of those facts in Opening Brief, Argument Section I(E). The double jeopardy error was therefore prejudicial.

2. **THE APPELLATE COURT ORDERED RESENTENCING TO COMPLY WITH BLAKELY AND SB 5477. ITS ASSUMPTION THAT SB 5477 APPLIES RETROACTIVELY CONFLICTS WITH CONTROLLING AUTHORITY ON THE *EX POST FACTO* CLAUSE AND STATUTORY INTERPRETATION.**

a. *The Implicit Assumption that SB 5477 Applies Retroactively Conflicts With Controlling Authority of This Court and the U.S. Supreme Court*

The appellate court remanded for resentencing in conformity with Blakely and SB 5477. This seems based on the assumption that SB 5477 can apply retroactively to Mr. Eggleston, whose convictions and sentences occurred long before that law was enacted.

The appellate court's decision remanding for a possible exceptional sentence following Blakely conflicts with State v. Hughes,

154 Wn.2d 118, which held that the remedy for Blakely error raised on appeal is remand for imposition of a standard range sentence.

Whether SB 5477 can be applied retroactively, notwithstanding Hughes is also an issue of substantial importance that is already pending before this Court in the consolidated cases of State v. Pillatos, et al., Washington Supreme Court No. 75984-7 (re-argument ordered for October 25, 2005). We refer this Court to the full briefing in those consolidated cases. For our purposes, suffice it to say that the assumption that SB 5477 can be applied retroactively to those already found guilty conflicts with RCW 9.94A.537(1), which requires that exceptional sentence factors be alleged by the state prior to trial, not afterwards. It also conflicts with the following controlling rules:

1. absent contrary legislative intent, new laws are presumed to operate prospectively under state¹⁰ and federal¹¹ law, and there is nothing in SB 5477 stating that it is to apply retroactively (only “immediately,” which more likely means prospectively);

2. the *ex post facto* clause “forbids the application of any new

¹⁰ Adcox v. Children’s Orthopedic Hosp. & Medical Ctr., 123 Wn.2d 15, 30, 864 P.2d 921 (1993); Harbor Steps Ltd. Partnership v. Seattle Technical Finishing, Inc., 93 Wn. App. 792, 799, 970 P.2d 797, review denied, 138 Wn. 1005 (1999).

¹¹ Bowen v. Georgetown University Hosp., 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); See Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 844-57, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring).

punitive measure to a crime already consummated”;¹² and

3. SB 5477 is unconstitutional because it chills the exercise of the right to a jury trial by making imposition of an exceptional sentence available only to those who go to trial and not to those who plead guilty.¹³

b. The Implicit Assumption that the State Could Seek an Exceptional Sentence Using the Aggravating Factors of Premeditation and Intentional Killing of an Officer Conflicts with Controlling Authority On Collateral Estoppel

We incorporate the discussion of double jeopardy from Argument Section 1, immediately above, here, and apply it to sentencing.

c. The Implicit Assumption that the State Could Seek an Exceptional Sentence Using the Aggravating Factors of Premeditation and Intentional Killing of an Officer Conflicts with the Real Facts Doctrine

RCW 9.94A.370(2) bars the trial court from relying upon “information” not “proved” at the “trial or at the time of sentencing,” including the facts of a higher crime.¹⁴ The “information” about Mr. Eggleston premeditating, and supposedly knowing he was killing an

¹² Kansas v. Hendricks, 521 U.S. 346, 370, 117 S.Ct. 2072, 2086, 138 L.Ed.2d 501 (1997); U.S. Const., art. 1, § 10; Wash. Const. art. 1, § 23; Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 1 L. Ed 648 (1798).

¹³ State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), and United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

¹⁴ Accord State v. Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991) (citing RCW 9.94A.370(2)) (“real facts” states, “facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range”).

officer, was not *properly* “proved.”

d. **The Implicit Assumption that the State Could Seek an Exceptional Sentence Using the Aggravating Factors of Premeditation and Intentional Killing of an Officer Conflicts with North Carolina v. Pearce**

Under North Carolina v. Pearce, 395 U.S. 711, 724-26, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), a judge can impose a harsher sentence following appeal *only* if it is based on new information arising after the first sentencing. The sentence imposed after Mr. Eggleston’s first trial for assault and the drug crimes was 238 months – *and it was not an exceptional sentence*. The sentence imposed after Mr. Eggleston’s second trial, for murder in the second degree, was 288 + 60 months for the firearm enhancement – *and it was not an exceptional sentence*. CP:1520-1530. The assumption that an exceptional sentence could be imposed now conflicts with North Carolina v. Pearce.¹⁵

3. **AFFIRMANCE OF EXCLUSION OF THE VIDEOS OF THE STATE’S OWN OFFICERS SHOWING BY GESTURES, AT THE RAID SITE, WHAT OCCURRED – GESTURES CONSISTENT WITH THE DEFENSE RATHER THAN THE STATE’S THEORY – CONFLICTS WITH EVIDENCE RULES AND THE RIGHT TO PRESENT A DEFENSE.**

The appellate court’s decision summarizes videos made by state

¹⁵ See State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003) (imposition of exceptional sentence after third trial, following standard range sentences after first two trials, reversed due to Pearce, since trial judge failed to identify facts that were not available at first two sentencing hearings justifying the increase).

expert reconstructionist Rod Englert of deputies on the raid team showing what occurred inside the Eggleston home on the morning of the raid.¹⁶ We also invite this Court's attention to Opening Brief § III. The appellate court's decision also summarizes the controlling law: the constitutional right to present a complete defense (e.g., Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)), the rule of completeness (ER 106), and the best evidence rule (ER 1002). The ultimate question under each of these rules – given the appellate court's ruling that there was nothing of great importance on these tapes for the defense so exclusion was neither harmful nor an abuse of discretion – is whether those tapes supported the defense theory.

These videos were the heart of the defense. John Reding's walk-through in particular showed that these officers placed Deputy Bananola in the entryway to the living room when he was receiving the fatal shots, falling from the hallway into the living room with the shooter out of sight, presumably down the hallway leading to the bedrooms. This is relevant, because the state's theory was that Mr. Eggleston was in the living room area and standing above Mr. Bananola while firing close-range shots into Bananola's head after he was already on the floor with his head on his

¹⁶ Copies in Exhibits: 550, Deputy Cindy Fajardo (2:14 minutes); 561, John Reding (7:17 minutes); 562, Jeff Reigle (5:57 minutes); 563 Warren Dogeagle; 564, Bruce Larson (2:12 minutes).

arm. The Reding video supports the defense theory, impeaches Englert's statements about where Reding really positioned Bananola and what he heard, and impeaches Reding's testimony on those points.

The problem with using the transcripts, instead, is best shown by cross-examination of Englert. 11/26/02 VRP:4910. Englert claimed that when Reding stated that he saw Bananola dive and let out an "ugh," Reding was *not* suggesting that Bananola had been hit. Id., VRP: 4911-12, 4917-21.

Q. And he [Reding] says, "he went 'ugh' like he got hit." Does that not suggest to you that when he went "ugh," he got hit?

A. No.

Instead, Englert claimed his impression was that Bananola was shot "immediately before that and that would be the shot into the foot." Id., VRP:4921.¹⁷ But the video has Reding not only pointing out where Bananola was when he was hit and began falling, but also positioning Bananola falling into the living room while suffering gunshots from

¹⁷ The issue came up once again during the state's cross-examination of defense expert Kay Sweeney, who testified about his own reliance upon the Englert videos, particularly the Englert video of Reding. The state attempted to impeach Sweeney's reliance on what he claimed Reding showed in the video, 12/5/02, VRP:5661, by asking, "Didn't Deputy Reding also state that he saw the defendant in the hallway moving from east to west when he went through the kitchen and fired his shots at the defendant?" Id. The defense objected, arguing that the video itself is the *best evidence* of what it contained. Id. The state continued attempting to discredit Sweeney's claims about the Reding video. Id., VRP:5663. The defense further objected to cross-examination "about what these officers say that involves the use of these videos because I cannot go back and show the videos ..." Id., VRP:5671. The court ruled, "I have no problem with you using the transcript ..." Id., VRP:5673, and, the court overruled this objection. Id., VRP:5673-74.

behind – that is, from the hallway near the bedrooms and not from the living room at all.

The appellate court also failed to address one issue: the video impeached the testimony of state expert Englert and the deputies and was independently admissible for that reason, also.¹⁸

4. EXCLUSION OF OTHER PROFFERED, EXCULPATORY, EVIDENCE CONFLICTS WITH BRADY AND THE RIGHT TO PRESENT A DEFENSE

a. Exclusion of Impeachment Evidence on the Informant Violates Brady.

Steve McQueen was the state’s informant-witness – a drug dealer who provided critical background information concerning Mr. Eggleston’s supposed prior drug-dealing. The state moved to exclude the fact that McQueen originally faced higher charges but that, after agreeing to testify for the state, he was able to plead guilty to reduced charges. 11/4/02 VRP:2798. The defense opposed, on the ground that the evidence tended to show McQueen’s bias and interest. *Id.*¹⁹

¹⁸ ER 613 (prior inconsistent statement admissible for impeachment); *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1998) (right to confront witnesses violated by exclusion of impeachment evidenced with “strong potential to demonstrate the falsity” of alleged victim’s testimony).

¹⁹ The defense also sought to cross-examine McQueen about his prior convictions; the defense asked about his prior armed robbery from 1995 or 1996 and then about his dealings with the elected prosecutor at that time, Mr. Horne, in an attempt to show McQueen’s knowledge of how the system works with deals. 11/4/02 VRP:2817. The state’s objection was sustained, even though the defense explained that its purpose was

The state admitted that prior to McQueen's testimony at the first trial, he entered into a plea bargain that reduced the charges against him – but contended that, in the state's opinion, this had nothing to do with gaining McQueen's testimony. 11/5/02 VRP:2849-50.

The question, however, is not whether the *state* believed that its deal with McQueen was intended to curry McQueen's favor, but whether *McQueen* could have perceived it that way. See Giglio v. United States, 405 U.S. 150, 153-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

b. Exclusion of the Defense Expert Testimony Concerning the Unreliability of the Conclusions Drawn by the State's Expert Violates Brady.

The trial court also excluded defense expert Sweeney's testimony about how contaminated the crime scene was and, hence, about how the state expert's supposedly careful "reading" of the crime scene was based on a house of cards. The trial court stated that it would exclude all evidence of crime scene contamination, including evidence of people moving around in the house, performing aid, searching, taking things like chunks of the walls, without an offer of proof – because otherwise previously *suppressed* bullets might be discussed. 12/3/02 VRP:5353. This misses the point that this was defense inquiry, and the defense can

impeachment by proof of bias in favor of the state. Id.

open the door however they like.²⁰

The appellate court affirmed, ruling that the trial court permitted Sweeney to testify about “what happened during the shooting,” so exclusion of a different portion of the Sweeney testimony should not matter. This deprived Eggleston of the right to present a defense.

c. The Trial Court’s Erroneous Evidentiary Rulings Were So Numerous that They Implicated the Right to Present a Defense.

The trial court excluded evidence tending to show that many of the deputies were lying. It excluded video reenactments of the raid discussed above. It excluded evidence that Deputy Benson lied in his affidavit for the search warrant for the Eggleston home, about whether he really had a prior “controlled buy” with informant McQueen. 9/27/02 VRP:43-47.²¹ It excluded his girlfriend’s evidence tending to show that Eggleston was

²⁰ The defense responded by explaining why contamination of the crime scene is such a critical issue, because it affects the ability to reconstruct what actually occurred after such disruption and delay; it shows the poor quality of the state’s initial investigation; and it caused the state to leave potentially important items at the scene, such as the gold chair with a hair later discovered on it and the glass table with blood spatter later discovered on it. *Id.*, VRP:5365.

²¹ The defense continued by requesting, on cross examination of Benson, to inquire “if he represented to Judge Steiner that that was a controlled buy, and knowing it not to be because that goes to his credibility in a matter that’s directly related to this case obviously, you’re taking an oath when you appear before a judge for purposes of making those statements.” 10/22/02 VRP:1544. The defense also sought to ask about matters that he failed to tell the search warrant judge, *i.e.*, “that there were three other people there; that the second buy that he calls a controlled buy, there was somebody else in the car as well and ... that Steve McQueen is a person whom he knew to have an extensive criminal record.” *Id.*, VRP:1545. The trial court denies this request, calling this an attack on the search warrant. *Id.*, VRP:1547.

awakened by the deputies. 11/7/02 VRP:3272-73. It excluded critical evidence tending to impeach the deputies' different versions of the knock and entry. E.g., 11/7/02 VRP:3365-71.²²

Exclusion of such evidence violates ER 401; ER 406; ER 607, 613. Given the volume of evidence excluded, it also amounts to a violation of due process and the right to present a defense. Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990), cert. denied, 498 U.S. 1091 (1991).

5. AFFIRMING ADMISSION OF EXPERT TESTIMONY THAT HAD PREVIOUSLY BEEN RULED INADMISSIBLE BY THE APPELLATE COURT CONCERNING THE SEQUENCE OF THE SHOTS VIOLATED THE "LAW OF THE CASE."

On the prior appeal, the court ruled that it was error to admit expert testimony on the sequence of the firing of the bullets, because that was so speculative. Eggleston, 2001 WL 1077846, at *15.

The appellate court on the current appeal nevertheless upheld admission, again, of evidence offered by the state's expert concerning the sequence in which the shots were fired – over defense objections.²³ It ruled

²² Reigle testified that on 10/16/95, in prior conflicting testimony, his emotional state was bad, because Bananola was his partner; he continued that when he was asked questions that day – the questions that the defense sought to impeach him with – he was not asked to describe the knock and announce entry. 11/7/02 VRP:3384. The defense was not allowed to place in evidence the transcript showing the he was asked an open ended question to describe the whole entry. See proffered Defense Ex. No. 653, the prior inconsistent statement.

²³ 11/25/02 VRP:4632 *et seq* (defense objections); Id., VRP:4640 (Englert testimony from diagrams about who was in what position for the first set of shots, the next shots, etc.).

that such evidence did not contravene the prior ruling. But precisely the same sort of evidence about the state's speculative theory of the sequence in which the bullets were fired was admitted at retrial.²⁴

This conflicted with controlling authority on the law of the case. Greene v. Rothschild, 68 Wn.2d 1, 10, 402 P.2d 356 (1965).

6. AFFIRMING ADMISSION OF EVIDENCE OF MR. EGGLESTON'S DRUG USE AND SALES – MATTERS IRRELEVANT TO THE QUESTION OF WHETHER HE ACTED IN SELF-DEFENSE OR WITH INTENT TO KILL – VIOLATES ER 404.

a. The Trial Court Admitted Substantial Evidence and Permitted Substantial Argument About Mr. Eggleston's Drug Use and Sales.

The defense moved to exclude evidence that Eggleston had sold or possessed marijuana on previous occasions, and possessed a small amount of marijuana in his home at the time of the raid, on relevance grounds. The trial court denied the motion, and permitted the state to discuss Mr. Eggleston's drug habits in opening, and to admit evidence of past

²⁴ The state began by eliciting the "opinion of Deputy Bananola's position in the Eggleston residence that he went to after the prior exhibit that you saw." Id., VRP:4642. The defense objection was initially sustained, id., VRP:4642-43, but the court then indicated that it would actually permit sequencing testimony. Id., VRP: 4646. So Englert went on to testify about sequencing. VRP:4649-52.

He even opined about when Bananola turned the corner into the living room; he explained how he can tell *by the sequence* of the bullets. VRP:4652-57. Englert continued in this vein, describing what occurred in sequence before each shot was fired, and who fired each succeeding shot. Id., VRP:4658-4716. He covered all the bullets. Id., VRP:4723- 4736.

marijuana sales: “I think the fact that he was involved in drugs is the whole point of this case.” 9/27/02 VRP:175-76; 10/4/02 VRP:268.

Substantial evidence of Mr. Eggleston’s prior marijuana use and sales was then admitted, over objections, through Deputy Benson (10/22/02 VRP:1421-35), informant McQueen (10/28/02 VRP:2114-15, 2123) and girlfriend Ms. Patterson (11/7/02, VRP:3215-16). The trial court ruled that “it tends to prove ... the defendant’s intent to conceal drug activities *and the motive for the shooting.*” *Id.*, VRP:3220 (emphasis added).²⁵

b. Admission of Such Prejudicial Evidence Violated ER 404(b) and the Right to a Fair Trial.

Under ER 404(b), evidence of prior drug possession or distribution is inadmissible, *even in a drug trial*, unless directly relevant to the charged crime. State v. DeVries, 149 Wn.2d 842, 848-49, 72 P.3d 748 (2003). The judge’s rationale in favor of admission was that drug use showed that Mr. Eggleston knowingly protected his stash from discovery by law enforcement officers. This factor, however, had been determined adversely to the state - by rejection of premeditation and knowledge in prior prosecutions. This was not up for debate again.

²⁵ The court also admitted evidence of Eggleston’s prior marijuana sales and use through a variety of deputies. For example, Deputy Dogeagle gave a long description of the drugs involved in prior controlled buys supposedly involving Eggleston. 11/20/02 VRP:4390-93.

Such evidentiary errors establish a federal constitutional claim when the violation of the state evidentiary rule is so egregious that it renders the trial fundamentally unfair and jeopardizes the right to due process of law.²⁶ This rule applies to the situation presented here, that is, the improper admission of “other crimes” evidence.²⁷

The question is whether admission of the evidence “render[ed] the trial so fundamentally unfair as to constitute a denial of federal constitutional rights.”²⁸

The trial court’s erroneous admission of Eggleston’s drug use and sales constituted federal constitutional error under this standard. First, it lacked probative value. The state’s theory was that those who seek to protect their drug stashes are more likely to premeditate and kill law enforcement officers – but these factors were irrelevant (see Argument § 1). Even if this

²⁶ E.g., Carter v. Armontrout, 929 F.2d 1294, 1296-1300 (8th Cir. 1991).

²⁷ Tucker v. Makowski, 883 F.2d 877, 878, 881 (10th Cir. 1989) (improper admission of “other crimes” evidence rose to level of due process violation); United States ex rel. Lee v. Flannigan, 884 F.2d 945, 953 (7th Cir. 1989), cert. denied, 497 U.S. 1027 (1990). See also Estelle v. McGuire, 502 U.S. 62, 70, 72-73 & n.5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (reserving question whether “it is a violation of due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial,” and suggesting that instruction informing jury to consider evidence of prior crimes not found to have been committed by petitioner committed offense charged or informing jury to consider prior crimes evidence linked to petitioner as proof that he had “propensity” to commit offenses such as one charged would violate due process and justify habeas relief).

²⁸ Tucker v. Makowski, 883 F.2d at 881 (discussing standard for evaluating, in federal habeas corpus claim, alleged improper admission of “other crimes” evidence) (numerous citations omitted).

were a proper factor for the jury to consider, there was no real stash worth protecting here – the amount of drugs involved was relatively minimal. Next, the sole issue was self-defense, so introduction of these other crimes gave the jury a different reason to convict – prejudice against marijuana. Further, it was highly prejudicial. A summary of the state’s closing argument references to marijuana appears in Opening Brief Argument Section I(E).

7. AFFIRMING MID-TRIAL DISMISSAL OF JURORS 4 AND 7, DESPITE THE TRIAL COURT’S FAILURE TO PROVIDE MINOR ACCOMODATIONS, CONFLICTS WITH CrR 6.5 AND RCW 2.36.110.

The appellate court describes Juror No. 7’s minor medical problem and Juror No. 4’s request to come in at noon on a single day because of a minor illness. It accurately recites that the trial court failed to make inquiry of Juror No. 4 before replacing her. It neglects to note the trial court’s impatience with Juror No. 7.²⁹

When the court brought Juror No. 7 in to tell her about being excused from service because of her unavailability, No. 7 stated that she actually was able to stay that day. VRP:2696. The court interrupted her with, “Thank

²⁹ Initially, without inquiring of her, the judge stated, “I say call her an alternate and get rid of her and move on. It’s either that or we’re going to cancel court for the rest of the day if she can’t come in here.” 1/31/02 VRP:2611. This juror thereafter told the court that she had made two medical appointments that would conflict with her duties as a juror, and so the ruled, “But Juror No. 7 scheduling a doctor’s appointment in Seattle this afternoon – I, quite frankly counsel, I’m done with Juror No. 7.” 11/4/02 VRP:2685.

you very much,” and dismissed her. Id.

With respect to Juror No. 4, the court had the JA “contact her and excuse her.” Id., VRP:2698. The defense objected, stating, “If she’s available to make a record, I think we should make a record. Id., VRP:2698. The judge dismissed No. 4 sight unseen. Id., VRP:2699-2700.

Mid-trial dismissal of jurors, absent formal inquiry and cause, violates RCW 2.36.110 and CrR 6.5. It conflicts with State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), which explained that CrR 6.5 does not necessarily require a hearing – but it “contemplate[s] a formal proceeding, which may include brief voir dire, before substituting a juror.”

8. THE APPELLATE COURT’S DEFENSE OF THE TRIAL COURT’S DECISION THAT FAILURE TO INFORM THE DEFENSE ABOUT IMPORTANT JUROR COMMUNICATIONS IS DEFENSIBLE, CONFLICTS WITH CONTROLLING AUTHORITY.

Juror Burrows made the now uncontradicted assertion, supported by another juror’s declaration, that he had contacted the judge through her Judicial Assistant during the trial; had informed her of disturbing contacts including threats; and that this interaction was not revealed to the defense.

The appellate court erred in affirming despite this irregularity. First, the trial court’s failure to recuse herself when her own actions were at issue conflicts with CJC 3(D)(1) and the due process-based rule that a criminal defendant is entitled to not only a fair tribunal, but also to a tribunal with the

“appearance of fairness,” in all proceedings.³⁰ Second, dismissal of this juror, without the formality of a full hearing and witnesses on his conduct, where he denied any misconduct, violates RCW 2.36 and CrR 6.5 as discussed in Section VII of the Opening Brief.

Then there is the problem of the judge failing to inform the defense about the court’s and JA’s contacts with juror Burrows. Affirming despite the failure to inform the defense about this conflicts with controlling authority about the right to presence³¹ and holding that failure to disclose such contact is reversible error.³²

Further, one juror failed to reveal knowledge of Eggleston’s prior trials during voir dire, and other jurors discussed those prior trials and their outcome. Receipt of such “extrinsic evidence” is impermissible.³³ It denies

³⁰ See generally In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954); Dimmel v. Campbell, 68 Wn.2d 697, 414 P.2d 1022 (1966); State v. Madry, 8 Wn. App. 61, 504 P.2d 1156 (1972).

³¹ The defendant has a right to presence at every critical stage of the proceedings, and such court contact with a juror about a matter as sensitive as threats is certainly a critical stage. State v. Wroth, 15 Wn. 621, 623-24, 47 P. 106 (1896); State v. Calguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983); State v. Rice, 110 Wn.2d 577, 613, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

³² Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed.2d 654 (1954) (judge’s failure to inform defense of juror’s concern regarding possible influence; notice to the defendant and an opportunity for hearing necessary in this situation, even where the court and prosecutor concluded that the perceived threat had been a joke). Cf. Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (failure to disclose contact with juror about concern during trial can be evaluated for harmless error).

³³ State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994), cert. denied, 536 U.S. 943 (2002); Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271-72, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991); Arthur v. Ironworks, 22

the right to an impartial jury.³⁴ It “undermines one of the most fundamental tenets of our justice system: that a defendant’s conviction may be based only on the evidence presented during the trial.”³⁵ It implicates the confrontation clause.³⁶ It also violates art. I, § 21 of the Washington Constitution, that “the right of trial by jury shall remain inviolate.”³⁷

The appellate court assumed that there was no prejudice, largely because Burrows was dismissed. But dismissal itself violated Mr. Eggleston’s right to be tried by the jury originally empaneled. The appellate court’s decision conflicts with controlling authority holding that such jury misconduct creates a presumption of prejudice that the state can overcome only by showing that it was harmless beyond a reasonable doubt. Remmer v. United States, 347 U.S. at 229; State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986) (applying Remmer

Wn. App. 61, 587 P.2d 626 (1978), review denied, 92 Wn.2d 1007 (1979).

³⁴ Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

³⁵ United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996), amended by, 140 F.3d 1244 (9th Cir. 1998).

³⁶ Sassounian v. Roe, 230 F.3d 1097 (9th Cir. 2000) (“A juror’s communication of extrinsic facts implicates the Confrontation Clause”); Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir. 1997) (*en banc*), cert. denied, 522 U.S. 1008 (1997) (when juror communicates extrinsic facts about defendant to other jurors, that juror becomes unsworn and uncross-examined witness against defendant).

³⁷ State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021 (1992).

prejudice standard).³⁸ It conflicts with the rule that any doubt about whether extrinsic information affected the verdict must be resolved in favor of a new trial.³⁹ And it conflicts with the rule that the number of jurors potentially affected is irrelevant; an effect on even one requires reversal, because it implicates the right to an unbiased *panel*.⁴⁰

9. THE TRIAL COURT EXCUSED DEPUTY GARN AND ALLOWED THE STATE TO READ HIS PRIOR TESTIMONY, DUE TO HIS ALLEGED INABILITY TO TESTIFY WITHOUT BECOMING ANGRY, VIOLENT, AND UNPREDICTABLE; AFFIRMING VIOLATES THE CONFRONTATION CLAUSE.

Former Tacoma Police Department officer Garn testified at Mr.

³⁸ See also State v. Kell, 101 Wn. App. 619, 5 P.3d 47 (2000) (juror misconduct raises “presumption of prejudice,” can be overcome only by “showing that the misconduct was harmless beyond a reasonable doubt (i.e., that the misconduct did not affect the verdict.)”); State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953) (“The burden was upon the state to show that no prejudice actually resulted.”). This is consistent with the prejudice standard embraced by federal courts. United States v. Littlefield, 752 F.2d 1429, 1431-32 (9th Cir. 1985) (explaining “continued vitality of the rule that the government must bear the burden of proof in showing that jury partiality was harmless”); United States v. Delaney, 732 F.2d 639, 642 (8th Cir. 1984) (government bears burden of rebutting presumption of prejudice resulting from juror misconduct); United States v. Hillard, 701 F.2d 1052, 1064 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983) (presumption of prejudice can be rebutted only by showing information harmless).

³⁹ Adkins v. Aluminum Co., 110 Wn.2d 128, 137, n. 11, 750 P.2d 1257 (1988); State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989) (any reasonable doubt that misconduct affected verdict must be resolved in favor of new trial). Cf. State v. Carpenter, 52 Wn. App. 680, 685, 763 P.2d 455 (1988) (absent actual or probable prejudice, presence of extrinsic information in jury room does not require reversal).

⁴⁰ See Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.) (*en banc*), *cert. denied*, 525 U.S. 1033 (1998) (“The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer’s right to a fair trial.”); Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) (“If only one juror was unduly biased or improperly influenced, Dickson was deprived of his sixth amendment right to an impartial panel.”).

Eggleston's prior trials. His testimony was critical to establishing the chain of custody on crime scene evidence. 10/21/02 VRP:1228-30. The state, however, asked that Garn be declared "unavailable" for the third trial because a car accident, recent pain, and a 30-year old diagnosis of PTSD distorted his memory and prevented him from attempting recall of the events surrounding the Bananola shooting without emotional trauma and acting out. CP:1580-1590. The Court of Appeals affirmed.

This conflicts with ER 804(a)(4), which states that a witness is only "unavailable[e]" when he or she "persists in *refusing* to testify concerning the subject matter ... despite an order of the court to do so" or "is *unable* to be present or to testify" (Emphasis added.) While the psychological state of the witness can be considered in whether the witness is available,⁴¹ such a determination cannot generally be based on lay witness testimony alone.⁴² Independent medical corroboration is generally required.⁴³ The appellate court's decision ignores this authority.

⁴¹ State v. Foster, 81 Wn. App. 444, 915 P.3d 520(1996), aff'd, 135 Wn.2d 441 (1998); Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) (witness deemed unavailable due to PTSD).

⁴² See United States v. Ferdinand, 29 M.J. 164, 167-68 CMA (1989) (error to find that accused's 7-year old daughter was unavailable at trial on indecent acts charges, where there was no psychiatric determination that trial participation would be too traumatic for child).

⁴³ E.g., State v. Whisler, 61 Wn. App. 126, 810 P.2d 540 (1991) (94-year old witness unavailable; her doctor state she was too ill to travel to the trial and "[t]he State's duty to make a good faith effort does not require it to urge or attempt to compel a witness to

10. THE SELF-DEFENSE INSTRUCTIONS TOLD THE JURY THAT THERE WAS NO RIGHT TO DEFEND AGAINST FORCE IF EGGLESTON KNEW THAT IT WAS OFFICERS – THAT CONFLICTS WITH THE RULE THAT A CITIZEN MAY DEFEND AGAINST EVEN OFFICIAL FORCE THAT IS EXCESSIVE WHEN IN MORTAL DANGER.

The appellate court acknowledges that there is a right to defend against deadly force, even from arresting officers. Opinion, pp. 19-20.⁴⁴

But it affirmed use of Instruction No. 15:

The use of deadly force by a law enforcement officer is *not excessive* when necessarily used by a law enforcement officer to *overcome actual resistance* to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty. *The service of a search warrant is a legal duty of a law enforcement officer.*

(Emphasis added.) This places no limit on the amount of force, even deadly force, that the officer can use, if he is serving a warrant and believes that he

testify at trial over the advice of the witness's doctors"); Finizie v. Principi, 69 Fed. Appx. 571 (3d Cir. (Pa.) 2003) (district court's reliance on declaration by witness' physician, which explained witness' medical condition and precisely why that medical condition rendered witness unavailable, supported finding of unavailability); People v. Gomez, 26 Cal. App. 3d 225, 240, 103 Cal.Rptr. 80 (1972) (based on testimony of two psychiatrists, court holds "illness or infirmity must be of comparative severity; it must exist to such a degree as to render the witness' attendance, or his testifying, relatively impossible and not merely inconvenient"); People v. Lombardi, 39 A.D.2d 700, 701, 332 N.Y.S.2d 749, 750-51 (1972) (psychiatrist's testimony was crucial to court's determination that witness unavailable, because testifying would endanger witness' mental and physical health).

⁴⁴ See, e.g., State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997) (the person arrested can defend against force designed to injure rather than to arrest); State v. Rousseau, 40 Wn.2d 92, 94, 241 P.2d 447 (1952) (prior controlling state Supreme Court decision⁴⁴ on claims of self-defense against law enforcement officers, in effect at time of this 1996 killing; holding "It is the law that a person illegally arrested by an officer may resist that arrest, *even to the extent of the taking of life if his own life or any great bodily harm is threatened.*") (emphasis added) (citations omitted).

is meeting “resistance” of any kind, even a homeowner’s mere appearance.

Affirming despite an instruction that the officer could use even deadly force to serve a warrant – regardless of the legality of the service, the amount of force, and the nature of the resistance - conflicts with controlling cases Valentine and Rousseau, which permit defense against force designed to injure rather than arrest. It also conflicts with Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), holding that the Fourth Amendment bars an officer from using deadly force against a fleeing suspect, absent proof that the suspect is also dangerous.

Finally, affirming use of these instructions – which told the jury that the officers’ service of the warrant was lawful while the judge simultaneously excluded evidence challenging the legality of the knock and announce procedure supposedly used here (CP:1591-97) – conflicts with United States v. Gaudin, 515 U.S. 506. Gaudin holds that it is impermissible to take any element out of the hands of the jury – even on a question of law, such as the lawfulness of the entry. In this case, the amount of force that the defendant could use depended in part on whether the intruder – here, Deputy Bananola – was engaged in lawful service of a warrant with lawful force. State v. Eggleston, 2001 WL 1077846, at ** 2-3. Hence, the lawfulness of the slain officer’s entry should have been a jury determination under Gaudin.

These instructions relieved the state of proving absence of self-defense. They violated the rule against shifting the burden of proof. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

F. Conclusion

This Court should accept review.

DATED this 17th day of October, 2005.

Respectfully submitted,



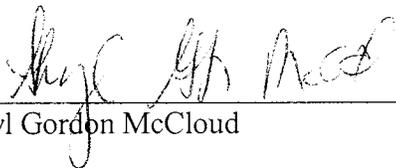
Sheryl Gordon McCloud, WSBA #16709
Attorney for Petitioner Brian Eggleston

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of October, 2005, a copy of the foregoing Amended Petition for Review was forwarded to the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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FILED

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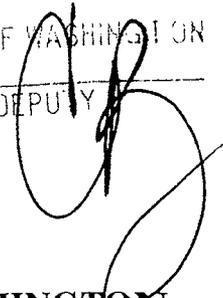
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRIAN EGGLESTON,

Appellant.

No. 29915-1-II

PART-PUBLISHED OPINION

ARMSTRONG, J. -- Brian Eggleston appeals his convictions of second degree murder and first degree assault following shootings that occurred during the execution of a search warrant at his residence on October 16, 1995. We affirm the convictions but vacate Eggleston's sentences and remand for resentencing.

FACTS

In August 1995, Pierce County Deputy Sheriff Ben Benson began investigating Eggleston's marijuana dealing based on information he received from Steve McQueen. McQueen said that Eggleston's brother was a deputy sheriff and was present during one buy at Eggleston's house. Benson confirmed that Deputy Sheriff Brent Eggleston shared his brother's address.

Benson then arranged for McQueen to buy marijuana from Eggleston. In early October 1995, McQueen bought marijuana from Eggleston twice. On October 9, Benson obtained a

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warrant to search Eggleston's home. He decided to serve the warrant early on October 16, before Eggleston was fully awake and before children arrived at the elementary school across the street from the Eggleston residence.

The entry team included Deputies John Bananola, Warren Dogeagle, Jeff Reigle, John Reding, Cynthia Fajardo, Martin Kapsh, and Bruce Larson. Benson was to provide perimeter surveillance. The team wore marked jackets that identified them as sheriff deputies. Bananola wore a reflective vest that had four inch letters stating "Sheriff" on the front and back. He also had long hair and facial hair because of his undercover work. Reding wore a vest with "Sheriff" on the front and back, a helmet with a face shield, and black pants. Dogeagle wore a hooded mask because he was working undercover on a case involving heroin dealers in the same neighborhood. He also wore a cap with a sheriff's insignia and a green raid jacket with "Sheriff" on the front and back. Fajardo wore a black uniform that said "Narcotics" and her name on the front, and Reigle wore a green raid jacket with "Sheriff" on the front and back.

The deputies entered the unlocked back door of the residence using the knock and announce procedure. Reding went in first and saw Thomas Eggleston, Eggleston's father, on the couch in the living room. Bananola followed and turned down a hallway. As Reigle prepared to follow Bananola, gunfire erupted. Reigle saw Bananola heading toward the front door of the residence in a low position. Reigle then saw Linda Eggleston open a door into the kitchen and look at him. He heard Thomas Eggleston tell her to put the gun down.

While covering Thomas Eggleston in the living room, Reding heard the shots and turned to see Bananola coming from the hallway in an upright position and then start to stumble. Reding retreated toward the back door and saw Eggleston move toward the living room with a gun in his hands. Reding fired three shots at him.

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As the deputies withdrew, Dogeagle heard Bananola say, "Put the gun down. Police." Report of Proceedings (RP) at 4419-21. Dogeagle was still in the kitchen when Eggleston came through a door and started shooting at him. Dogeagle returned fire and Eggleston fell backward.

Reding returned to the van to retrieve a ballistic shield and entered the house with the other deputies behind him. They saw Bananola lying face down on the living room floor. He had been shot seven times, with three shots to the head and shots to the shoulder, arm, chest, and foot. Eggleston suffered five gunshot wounds, including wounds to his chest, lower right side, abdomen, groin and knee. Eggleston recovered; Bananola died.

In addition to evidence of the shootings, Tacoma police officers found drugs, drug paraphernalia and cash in Eggleston's bedroom.

The State charged Eggleston by amended information with aggravated murder in the first degree, alleging that he knew or should have known that Bananola was a law enforcement officer performing his duties at the time of his death; assault in the first degree based on his shooting at Dogeagle and/or Reding; unlawful delivery of a controlled substance (marijuana) on October 7, 1995; unlawful possession of a controlled substance with intent to deliver (marijuana) on October 16, 1995; unlawful delivery of a controlled substance (marijuana) on October 5, 1995; and unlawful possession of a controlled substance (mescaline) on October 16, 1995. Several of these counts included sentence enhancements.

These charges resulted in three trials. The first jury returned guilty verdicts on all counts except count I, murder in the first degree. The jury hung on the murder count and the court declared a mistrial. The trial judge sentenced Eggleston on the five counts for which he had been convicted.

The State tried Eggleston again on the first degree murder charge, and the jury found him guilty of the lesser included offense of murder in the second degree. The court had explicitly instructed that if the jury found Eggleston guilty of murder in the first degree, it was to fill out two special verdict forms: one on the aggravating factor (whether he knew or reasonably should have known that Bananola was an officer), and another on the weapons enhancement (whether he used a deadly weapon). In contrast, if the jury found Eggleston guilty of murder in the second degree, it was to fill out only the weapons enhancement special verdict form. Despite its acquittal of the first degree murder charge, the jury answered “no” to the aggravating circumstance special verdict. Clerk’s Papers (CP) at 1495.

Further, the aggravating factor special verdict form expressly stated:

We, the jury, *having found the defendant guilty of Murder in the First Degree*, make the following answer to the question submitted by the court:

Question: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

That Deputy John Bananola was a law enforcement officer who was performing his official duties at the time of the act resulting in death and that Deputy John Bananola was known or reasonably should have been known by the defendant to be such at the time of the killing.

Answer: No.

CP at 1495 (emphasis added).

On appeal, we reversed Eggleston’s murder and assault convictions but affirmed his drug convictions. *State v. Eggleston*, No. 22085-7-II, No. 23499-8-II, 2001 WL 1077846 (Wash. Ct. App. Sept. 4, 2001) (unpublished). We found error in the aggressor and provocation instructions; we also found juror misconduct in the second trial and error in certain evidentiary rulings.

At Eggleston’s third trial, the State’s reconstruction expert, Rod Englert, opined that Eggleston fired into Bananola’s head as Bananola lay on the living room floor. The defense

reconstruction expert, Kay Sweeney, opined that Eggleston was in the hallway when he fired at and killed Bananola. In December 2002, the jury again convicted Eggleston of second degree murder and first degree assault.

In this appeal, Eggleston argues that the second jury's verdict and answer to the special verdict barred the State from presenting evidence in his third trial that he knew Bananola was a police officer or that he premeditated the murder. He also questions the self-defense instructions; various evidence rulings; the dismissal of three jurors; jury misconduct; resentencing on his drug convictions; and his exceptional sentence.

ANALYSIS

I. COLLATERAL ESTOPPEL

Eggleston argues that the collateral estoppel component of the double jeopardy clause precluded the State from introducing evidence that he knew Bananola was an officer performing official duties because previous juries acquitted him of first degree murder and the aggravating factor after being presented with that evidence.¹

A. Collateral Estoppel as a Component of Double Jeopardy Clause

The United States and Washington Constitutions' double jeopardy clauses are "identical in thought, substance, and purpose." *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959); *see* WASH. CONST. art. I, § 9; U.S. CONST., amend. V. They both "'protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same

¹ At the first and second trials, the State argued that Eggleston knew the officers were police officers and, therefore, fired to protect his drug operations. Because Eggleston's argument that the drug evidence should have been barred by collateral estoppel is inextricably linked to his argument that evidence of knowledge should have been excluded as well, our discussion of evidence of knowledge necessarily includes the drug evidence. Thus, we do not discuss it separately.

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offense after acquittal or conviction.” *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (quoting *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)). Where the language of the state constitution is similar to that of the federal constitution, we give the same interpretation to the state constitutional provision as the United States Supreme Court has given the federal constitution. *State v. Linton*, 122 Wn. App. 73, 76, 93 P.3d 183 (2004) (citing *Schoel*, 54 Wn.2d at 391), *review granted*, 153 Wn.2d 1017 (2005).

The doctrine of collateral estoppel is embodied in the constitutional guaranty against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 442-43, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel means that when an issue of ultimate fact has once been determined by a “valid and final judgment,” that issue cannot be litigated again between the same parties in any future lawsuit. *Ashe*, 397 U.S. at 443. But it does not always bar the later use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *See Dowling v. United States*, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Collateral estoppel in criminal cases is “not to be applied with a hypertechnical and archaic approach . . . but with realism and rationality.” *Ashe*, 397 U.S. at 444. It exists where “a fact necessarily determined in the defendant’s favor by his earlier acquittal [makes] his conviction on the challenged second trial . . . impossible unless the fact could be relitigated and determined adversely to the defendant.” *United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) (quoting *Pettaway v. Plummer*, 943 F.2d 1041, 1046 (9th Cir. 1991)), *overruled on other grounds*, *Santamaria v. Horsley*, 133 F.3d 1242, 1245 (1998); *United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982). In contrast, “double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible.” *James*, 109 F.3d at 601 (quoting *Pettaway*, 943 F.2d at 1046). The preclusive

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effect of a jury's verdict is a question of law that we review de novo. *See State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (stating that we review issues of law de novo).

The State argues that Eggleston must satisfy the collateral estoppel test as laid out in *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003). There, the court cited a collateral estoppel test, in which the court held that each of the following questions must be answered affirmatively before a court applies collateral estoppel:

- (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 not work an injustice on the party against whom the doctrine is to be applied?

Tili, 148 Wn.2d at 361 (citing *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)).

Only factor (1) is at issue here, whether the third jury necessarily decided the same issue the first jury decided. Because Eggleston analyzes the issue within the framework of federal law and we have found no Washington case on point, we resolve the question on the basis of the federal cases.

B. Relitigating Ultimate Facts

After a jury determines an issue by its verdict, the State cannot “constitutionally hale [a defendant] before a new jury to litigate that issue again.” *Ashe*, 397 U.S. at 446. In *Ashe v. Swenson*, three or four armed and masked men robbed six men who were playing poker. *Ashe*, 397 U.S. at 437. The State charged Ashe with the robbery of one of the victims. *Ashe*, 397 U.S. at 438. At trial, the judge instructed the jury that if it found that Ashe was one of the participants in the robbery, he was guilty even if he had not personally robbed the victim. *Ashe*, 397 U.S. at 439.

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A jury acquitted Ashe, and the State then charged and convicted him of robbing another one of the previously named victims. *Ashe*, 397 U.S. at 439. Applying collateral estoppel, the Supreme Court reversed, holding that Ashe's acquittal in the first trial foreclosed the second trial because the acquittal verdict could have meant only that the jury was unable to conclude beyond a reasonable doubt that Ashe was one of the bandits. *Ashe*, 397 U.S. at 445. And to convict at the second trial, the jury would have had to reach a conclusion "directly contrary" to the first jury's decision. *Dowling*, 493 U.S. at 348 (citing *Ashe*, 397 U.S. at 445).

The Supreme Court limited *Ashe* in *Dowling* where it held that acquittal in a criminal case does not preclude the prosecution from offering evidence from the acquittal trial in a later action if the ultimate fact issues are not the same and the government does not have to prove beyond a reasonable doubt in the second trial the very issue it failed to prove beyond a reasonable doubt in the first trial. *Dowling*, 493 U.S. at 348-49. Furthermore, evidence tending to prove an issue is admissible when an acquittal on a criminal charge in an earlier proceeding did not necessarily represent a jury determination of that issue. *See Dowling*, 493 U.S. at 350.

A jury convicted Dowling of robbing a bank while wearing a ski mask and carrying a pistol after the government introduced testimony from a woman who claimed that Dowling, similarly masked and armed, was one of two intruders who entered her home two weeks after the bank robbery--even though Dowling had previously been acquitted of the charges in that case. *Dowling*, 493 U.S. at 344-45. The government relied on Federal Rules of Evidence 404(b), which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence. *See Dowling*, 493 U.S. 345. It used the woman's testimony to strengthen its identification of Dowling as the bank robber and to link him to another person implicated in the bank robbery. *Dowling*, 493 U.S. 345.

The Supreme Court held that admitting the woman's testimony did not violate the collateral estoppel component of the double jeopardy clause because the prior acquittal did not determine an issue of ultimate fact actually decided in the bank robbery case. *Dowling*, 493 U.S. at 348. While Dowling's previous acquittal established that there was a "reasonable doubt" as to whether he was the masked man who entered the woman's house, in the context of the robbery trial, the government did not have to prove that he was one of the intruders beyond a reasonable doubt. *Dowling*, 493 U.S. at 348. The Court reasoned that because a jury might reasonably conclude that Dowling was the man who entered the woman's home, even if it did not believe beyond a reasonable doubt that he committed the crimes charged at the first trial, the collateral estoppel component of the double jeopardy clause was inapposite.² *Dowling*, 493 U.S. at 349.

Later, in *Santamaria v. Horsely*, the Ninth Circuit clarified that "collateral estoppel does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence.'" *Santamaria v. Horsely*, 133 F.3d 1242, 1247 (9th Cir. 1998) (citing *Dowling*, 493 U.S. at 348). In that case, a jury found a defendant guilty of murder and

² Eggleston cites to *State v. Funkhouser*, 30 Wn. App. 617, 637 P.2d 974 (1981), a case from this court, for the opposite premise. Currently, no court, state or federal, has commented on *Funkhouser*. In *Funkhouser*, we held that retrial for keeping a false account after acquittal of charges of misappropriating public funds did not subject a defendant to double jeopardy because keeping a false account is not a lesser included offense to misappropriation of public funds. *Funkhouser*, 30 Wn. App. at 623-24. This rule comports with the current cases. But we also held that if the State chose to retry the defendant on the false account charge following remand, the trial court must exclude all evidence which, if believed, would necessarily show defendant's complicity, either as principal or accomplice, in the misappropriation of public funds. *Funkhouser*, 30 Wn. App. at 630. This rule conflicts with the *Dowling* rule. Indeed, *Funkhouser* precedes *Dowling*, and the *Funkhouser* court supports its ruling with federal circuit cases. Thus, the *Funkhouser* case, while not overturned by any court, is arguably no longer accurate law as to this issue.

robbery but found “not true” a sentence enhancement charge that he personally used a knife in the commission of a felony. *See Santamaria*, 133 F.3d at 1244.

A state appellate court reversed Santamaria’s murder conviction, and on remand, the trial court granted Santamaria’s motion to preclude evidence that he personally used the knife during the killing. *See Santamaria*, 133 F.3d at 1244. The trial court agreed with Santamaria that the collateral estoppel component of the double jeopardy clause barred evidence that he used a knife because a jury had already decided that issue in his favor in the first trial. *Santamaria*, 133 F.3d at 1244.

But the Ninth Circuit held that the first jury could have grounded its verdict on an issue other than that which Santamaria sought to foreclose from consideration in the second trial. *Santamaria*, 133 F.3d at 1246. Specifically, even though Santamaria had been acquitted of using a knife, the State was not required to prove beyond a reasonable doubt that he used a knife to obtain a conviction for murder under California law. *Santamaria*, 133 F.3d at 1247. Thus, whether he used a knife was not relitigated under the same standard at the retrial, and the State could not be precluded from presenting otherwise admissible evidence that he stabbed the victim. *Santamaria*, 133 F.3d at 1247.³

Eggleston argues that because in the second trial the State offered evidence that he knew Bananola was a police officer in order to prove premeditation and the second jury acquitted him of premeditated first degree murder, the third trial court should have precluded the State from

³ *Santamaria* also relied on *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 126 L. Ed. 2d 554 (1997), in which the Supreme Court stated that “an acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt.” *Santamaria*, 133 F.3d at 1246.

using evidence that he knew Bananola was a police officer.⁴ He also points out that the second jury specifically rejected the aggravating factor by answering “no” to the special verdict question of whether the State had proven that Eggleston knew Bananola was a police officer. Eggleston reasons that because of these decisions, the State improperly relitigated the aggravating factor at the third trial, citing *Pettaway v. Plummer*, 943 F.2d 1041 (9th Cir. 1991).

In *Pettaway*, the jury convicted the defendant of murder and attempted murder but found in a special verdict that he had not personally shot the deceased. *Pettaway*, 943 F.2d at 1043. The Court of Appeals reversed the murder conviction. *Pettaway*, 943 F.2d at 1043. On remand, Pettaway moved to preclude the State from prosecuting him on the theory that he personally fired the fatal shot. *Pettaway*, 943 F.2d at 1043. The trial judge granted the motion. *Pettaway*, 943 F.2d at 1043. The Ninth Circuit upheld that ruling, holding that the first jury necessarily decided that Pettaway did not personally shoot the victim and that the State could not prosecute him on a theory that would require the second jury to decide that he did shoot the victim. *Pettaway*, 943 F.2d at 1046. But the Ninth Circuit reversed *Pettaway* in *Santamaria*, explaining that although the ultimate fact of whether the State had proven the weapon use beyond a reasonable doubt for the weapons enhancement had been determined, that determination did not necessarily mean that the jury had found Pettaway guilty of murder only as an aider and abetter. *Santamaria*, 133 F.3d at 1245-46. Similarly, *Pettaway* does not prevent the State from offering evidence that Eggleston intended to kill Bananola because he was a police officer.

⁴ He complains that the State offered evidence that Bananola was wearing a vest marked “SHERIFF” across the chest and shouting loudly; that Eggleston was a drug dealer who would want to protect his reputation and drugs; that Eggleston had meager work earnings; and that Eggleston shot Bananola at close range and through the letters H and R on Bananola’s vest.

1. The Effect of the Second Jury's Acquittal of First Degree Murder

In the second trial, the State offered evidence that Eggleston knew Bananola was a police officer in order to prove premeditation. But the State did not have to prove that Eggleston knew Bananola was a police officer to establish premeditation. Premeditated killing is an intentional killing where the defendant, however briefly, considers the consequences of his acts. *See State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982) (explaining that the verb "premeditate" encompasses the mental process of thinking beforehand for a period of time, deliberation, reflection, weighing or reasoning for a period of time, however short); *but see* RCW 9A.32.020(1) (the premeditation required in order to support a conviction of the crime of first degree murder must involve more than a moment in point of time).

Unlike in *Ashe* where the jury necessarily decided that Ashe was not one of the participants in the robbery, the jury in Eggleston's second trial could have found that Eggleston did not know that Bananola was a police officer and still convicted him of premeditated, intentional killing. Conversely, it could have found that he knew Bananola was a police officer and intentionally killed him without the time or opportunity to premeditate. Thus, the second jury's first degree murder acquittal does not alone mean the jury necessarily decided whether Eggleston knew Bananola was a police officer.

Nor did the third jury necessarily decide whether Eggleston knew Bananola was a police officer. In the third trial, the State charged Eggleston with second degree murder. A person commits second degree murder when "with *intent to cause the death* of another person but *without premeditation*, he or she causes the death of such person unless the killing is justifiable." CP at 774 (emphasis added); *cf.* RCW 9A.32.050. Again, the third jury could have decided that Eggleston intentionally killed Bananola without knowing whether he was a police officer or an

intruder. Regardless, under cases like *Dowling* and *Santamaria*, the State was not barred from using evidence that was relevant to showing premeditation for first degree murder, including evidence that he knew Bananola was an officer if it was also relevant and admissible to showing intent for second degree murder.

2. The Effect of the Second Jury's Answer on the Special Verdict Form

Although the court instructed the second jury to answer the special verdict only if it convicted Eggleston of first degree murder, the second jury answered the special verdict after acquitting Eggleston of first degree murder. Specifically, the jury found that the State had not proved beyond a reasonable doubt that Eggleston knew Bananola was a police officer. The question is whether the jury's gratuitous answer is a decision on an issue of ultimate fact that bars a later jury from considering the same ultimate fact.⁵

Here, the second jury's answer is a bar only if it answered an issue of ultimate fact necessary to a valid and final judgment. *See James*, 109 F.3d at 601; *cf. Ashe*, 397 U.S. at 443 (discussing issues of ultimate fact determined by valid and final judgment). In *Ashe*, the jury rendered general verdicts. In considering whether the first jury decided the same issue as the second jury, the Court had to determine whether the first jury actually decided the issue to reach its verdict. *Ashe*, 397 U.S. at 445; *see also Dowling*, 493 U.S. at 348. As part of this inquiry, the Court asked whether the issue in the first trial was an issue of ultimate fact that the jury had to

⁵ Even a clearly erroneous acquittal bars retrial. *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962) (holding that in criminal cases, even an erroneous acquittal prevents a retrial); *Dunn v. United States*, 284 U.S. 390, 394, 52 S. Ct. 189, 76 L. Ed. 356 (1932), *overruled on other grounds*, *Sealfon v. United States*, 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 180 (1948).

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resolve to reach a general verdict of "guilty" or "not guilty." See *Ashe*, 397 U.S. at 443; see also *Dowling*, 493 U.S. at 348.

While the *Ashe* Court may have formulated this test solely to determine which issues the first jury actually decided, the Ninth Circuit has reiterated that the collateral estoppel rule is limited to questions "necessarily decided" in the first case. Cf. *Hernandez*, 572 F.2d at 220; *Schwartz*, 785 F.2d at 681; *James*, 109 F.3d at 600. In other words, an initial jury's response to a question it does not legally have to decide does not preclude a later jury from considering the same issue.⁶ Here, the second jury did not legally have to decide the aggravating factor. In fact, it did so in violation of the court's instructions. Arguably then, the second jury's answer to the special verdict question was not a decision on an issue of ultimate fact that precluded the third jury from considering the same issue.

Even if the jury's answer on the aggravating factor was a binding decision on an issue of ultimate fact, Eggleston has not shown that the third jury decided the same issue differently. The third jury found that Eggleston intentionally shot and killed Bananola. It could have reached this decision without deciding whether he knew Bananola was a police officer. Eggleston may have intentionally shot Bananola, knowing that he was a police officer, to avoid arrest and prosecution. Or he could have shot Bananola, believing him to be an intruder, to protect his

⁶ Unless present charges were "issues of ultimate fact or elements essential to conviction that were 'necessarily decided'" in a previous case, the doctrine of collateral estoppel neither bars the charges nor precludes the government from litigating those issues. See *United States v. Martinez*, 785 F.2d 663, 667 (9th Cir. 1986) (citing *United States v. Hernandez*, 572 F.2d 218, 220 (9th Cir. 1978)); see also *United States v. McCoy*, 721 F.2d 473, 475 (4th Cir. 1983) (stating that an "acquittal can only be explained as the resolution favorably to the accused of a necessary element of proof of the second charge").

stash of drugs. Nothing in the third jury's verdict tells us that the third jury necessarily decided the special verdict question differently than the second jury.

Under *Dowling* and *Santamaria*, the State was entitled to show in Eggleston's third trial that he intended to kill Bananola because Bananola was a police officer. And although the State used the same evidence in attempting to prove premeditation at second trial, Eggleston's knowledge of Bananola's official status was not an ultimate fact the State had to prove in order to convict Eggleston of either first or second degree murder. Thus, the State could use the same evidence in the third trial to prove Eggleston's intent.⁷

3. Self-Defense Instructions

Eggleston argues that the trial court erred when it instructed the jury that if he knew or should have known that Bananola was a police officer, he could use deadly force to defend himself only if he was in actual and imminent danger of death or great bodily harm. Under this instruction, Eggleston could not rely on a reasonable belief that he was in danger; he had to be in actual danger to justify the use of deadly force. Again, he argues that the second jury decided that the State failed to prove he knew Bananola was a police officer and that the challenged instructions erroneously allowed the third jury to decide the same issue differently.

Eggleston's self-defense theory was that he thought the deputies were thugs who were threatening his life and his family and that he was entitled to use deadly force in self-defense.

⁷ Eggleston attempts to distinguish *Dowling* by asserting that premeditation concerns *mens rea* and not evidence of prior crimes under ER 404(b). But the *Dowling* rule is not limited to evidence admitted under ER 404(b). “[C]ollateral estoppel does not ‘exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence.’” *Santamaria*, 133 F.3d at 1247 (citing *Dowling*, 493 U.S. at 348). As the *Santamaria* Court noted, if relevant and probative evidence is not used to prove an issue of ultimate fact that was already decided in a prior trial, collateral estoppel will not preclude the government from introducing that evidence. *Santamaria*, 133 F.3d at 1247.

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He maintained that he used reasonable force under the circumstances.⁸ The State's rebuttal theory was that Eggleston had no right to use any force against the deputies who entered his house because he knew they were law enforcement officers and because they used lawful force in performance of a lawful duty--serving a search warrant.

Accordingly, the court gave the jury two alternative instructions on self-defense. Instruction 13 explained that homicide is justifiable when it is committed in the lawful defense of the slayer, and

- (1) *the slayer did not know that the person slain was a law enforcement officer;*
- (2) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;
- (3) the slayer reasonably believed that there was imminent danger of such harm being accomplished[.]

CP at 777 (emphasis added).

Instruction 14 explained that homicide is justifiable when,

- (1) *the slayer knew that the person slain was a law enforcement officer;*
.....
- (3) the slayer was in actual and imminent danger of death or great bodily harm[.]

CP at 778 (emphasis added).

Eggleston has the burden of showing that the second and third juries decided the same issue differently to establish a collateral estoppel/double jeopardy violation. *See James*, 109 F.3d at 601. But because the jury returned a general verdict on second degree murder in the third trial, we do not know which self-defense theory the State overcame. The third jury may have agreed

⁸ Eggleston argued that the evidence showed that he and his family were asleep when the deputies entered the house and that when they heard noises, Eggleston grabbed his gun and went into the doorway of his bedroom to defend himself and his parents.

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with the second jury that the State had not proven that Eggleston knew Bananola was a police officer. Even so, the third jury could have easily believed that Eggleston executed Bananola with two shots to the head after Bananola was down and seriously disabled. If so, the jury could have concluded that Eggleston faced neither actual nor apparent harm when he killed Bananola. Again, Eggleston has failed to show that the third jury decided the same issue of ultimate fact differently than the second jury.

Moreover, Eggleston did not challenge the self-defense instructions on this basis at the trial court, nor did he make any claim of error based on collateral estoppel. Generally, we will not address a new issue on appeal unless the defendant can demonstrate that it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Under RAP 2.5(a)(3), a defendant must show how an alleged constitutional error actually affected his rights at trial. *See McFarland*, 127 Wn.2d at 334. It is this showing of actual prejudice that makes the error “manifest.” *McFarland*, 127 Wn.2d at 333 (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). A “manifest” error is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). “An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error.” *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Eggleston has not shown that the third jury’s verdict was the result of any alleged error in the self-defense instructions. A reasonable jury could have concluded that Eggleston was not

acting in self-defense, regardless of whether he knew Bananola was an officer. The State presented evidence that Eggleston shot Bananola in the head while he lay disabled on the floor. If the jury accepted this, it could reasonably find that Bananola posed neither an actual nor apparent threat of harm to Eggleston. Accordingly, Eggleston has not shown that he was actually prejudiced by instruction 14 or the admission of evidence that he knew Bananola was an officer; therefore, he has not demonstrated manifest constitutional error.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. JURY INSTRUCTIONS

Eggleston argues that instructions 14, 15, 17, 19, and 20 deprived him of his self-defense claim. In addition, he asserts that these instructions, along with the court's pretrial ruling barring evidence undermining the legality of the search, "[took] a critical element from the jury: whether the officers were acting lawfully." Br. of Appellant at 90.⁹

⁹ For the first time in his reply brief, Eggleston argues that the jury instructions were erroneous because they did not follow the self-defense rule as articulated in *State v. Valentine*, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997). In the alternative, he argues that *Valentine* was not even the law in effect at the time of the crime; instead, *State v. Rousseau*, 40 Wn.2d 92, 241 P.2d 447 (1952), controlled. Further, he argues that when the *Valentine* Court overruled *Rousseau*, it changed the law to Eggleston's disadvantage. He maintains that under the ex post facto clause he is entitled to apply the law in existence at the time of the crime, and therefore, this court should apply the law of *Rousseau*.

In general, an issue raised and argued for the first time in a reply brief is too late to warrant consideration. *State v. Tjeerdsma*, 104 Wn. App. 878, 886, 17 P.2d 678 (2001). Furthermore, in our first decision, we relied on *Valentine* in explaining the law of self-defense. See *Eggleston*, 2001 WL 1077846, at *3. Thus, on retrial, Eggleston was aware of *Valentine*, its date of decision, and that the trial court was following it. Yet he makes his ex post facto argument only cursorily at the end of his reply brief; we decline to consider it.

We review alleged errors of law in a trial court's jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett*, 152 Wn.2d at 266 (citing *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002)); *see also State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *Barrett*, 152 Wn.2d at 266-67 (citing *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)). Further, a jury instruction misstating the law of self-defense amounts to error of constitutional magnitude and is presumed prejudicial. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

A. The Law of Self-Defense

Self-defense has at least the following elements:

(1) At the time of the event the defendant must subjectively believe that he or she is (a) in imminent danger of great personal injury and (b) responding with only that degree of force necessary to repel the danger; and (2) these subjective beliefs must be such that a reasonable person considering only the circumstances known to the defendant at the time would also have entertained them.

State v. Bergeson, 64 Wn. App. 366, 370, 824 P.2d 515 (1992).

Police officers are entitled to use reasonable force in performing their legal duties. *See* RCW 9A.16.020(1). Serving a search warrant is a lawful duty. *See* chapter 10.79 RCW; *State v. Richards*, 136 Wn.2d 361, 371, 962 P.2d 118 (1998). An arrestee may defend against official force only when he is about to be seriously injured or killed. *See Valentine*, 132 Wn.2d at 20-21 (citing *State v. Westlund*, 13 Wn. App. 460, 467, 536 P.2d 20(1975)). In a lawful arrest, the arrestee is not entitled to rely on appearances. *State v. Ross*, 71 Wn. App. 837, 842, 863 P.2d

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102 (1993) (citing *Westlund*, 13 Wn. App. at 466); cf. *City of Seattle v. Cadigan*, 55 Wn. App. 30, 37, 776 P.2d 727 (1989) (concerning the requirement of actual danger).

A reasonable but mistaken belief that the arrestee is about to be seriously injured or that the arrestee is entitled to protect himself from such danger is insufficient. *Ross*, 71 Wn. App. at 842 (citing *Westlund*, 13 Wn. App. at 466); *Cadigan*, 55 Wn. App. at 37. Rather, an arrestee is justified in resisting a police officer's excessive force in making a lawful arrest only if he is actually about to be seriously injured. *Ross*, 71 Wn. App. at 842 (citing *Cadigan*, 55 Wn. App. at 37); see also *State v. Holeman*, 103 Wn.2d 426, 430, 693 P.2d 89 (1985) (citing *Westlund*, 13 Wn. App. at 467).

To raise self-defense before a jury, "a defendant bears the initial burden of producing some evidence which tends to prove that the killing occurred in circumstances amounting to self[-]defense." *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (citing *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (plurality by Williams, J.)). For instance, the defendant must produce some evidence regarding the statutory elements of a reasonable apprehension of great bodily harm and imminent danger. *Janes*, 121 Wn.2d at 237 (citing RCW 9A.16.050¹⁰). Then the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Graves*, 97

¹⁰ RCW 9A.16.050 states:

Homicide is . . . justifiable when committed either:

- (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
- (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.

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Wn. App. 55, 61-62, 982 P.2d 627 (1999) (citing *State v. Miller*, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997)).

B. Arguments

1. Deprivation of Self-Defense Claim

Eggleston asserts that instructions 14 and 15 deprived him of a self-defense claim because they stated that an officer “could basically use any force including deadly force when executing a search warrant;” moreover, if he believed that Bananola and the others were officers, “he could do nothing to protect himself even if they fired the first shot to serve [the] warrant.”

Br. of Appellant at 88; Reply Br. of Appellant at 21.

Instruction 14 states in relevant part that homicide is justifiable when,

- (1) the slayer knew that the person slain was a law enforcement officer;
- (2) the law enforcement officer used excessive force;
- (3) the slayer was in actual and imminent danger of death or great bodily harm; and
- (4) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

CP at 778.

Instruction 15 states:

The use of deadly force by a law enforcement officer is not excessive when necessarily used by a law enforcement officer to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty. The service of a search warrant is a legal duty of a law enforcement officer.

CP at 779.¹¹

¹¹ Instruction 16 explained that “necessary” means “under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force

Not only do instructions 14 and 15 accurately state the law, they allowed Eggleston to argue his theory of the case. So did instruction 13; which explained that homicide is justifiable when committed in the lawful defense of the slayer, and

- (1) the slayer did not know that the person slain was a law enforcement officer;
- (2) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;
- (3) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
- (4) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

CP at 777.

At trial, Eggleston maintained that he did not know that the officers were police; he thought they were thugs threatening him and his family and that his response was reasonable under the circumstances as they appeared to him. Instructions 14 and 15 did not preclude him from arguing this theory; they simply provided the jury with an additional theory to consider, and Eggleston does not argue that instructions 14 and 15 misled the jury.

Eggleston also claims that instruction 17 erroneously “told the jury that it could . . . presume that Eggleston knew that Bananola was an officer.” Br. of Appellant at 89. Instruction 17 reads:

A person knows or acts knowingly or with knowledge that another person is a law enforcement officer when he is aware of that fact or circumstance.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which indicate that another person is a law enforcement officer, the jury is permitted but not required to find that he acted with knowledge that another person is a law enforcement officer.

appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose intended.” CP at 780.

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CP at 781.

Instruction 17 comports with Washington law and allowed Eggleston to argue his theory of self-defense. *See* RCW 9A.08.010(1)(b).¹² It did not tell the jury it could presume that Eggleston knew Bananola was an officer. It simply provided a definition of knowledge that was necessary to interpret instructions 13, 14 and 15. Under that definition, Eggleston could argue that a reasonable person in his situation would not have known that Bananola was a law enforcement officer. If the State failed to prove that he knew Bananola was an officer, the jury would have analyzed his self-defense claim under instruction 13.

Finally, Eggleston asserts that under instructions 19 and 20, even if the jury found he held a reasonable but mistaken belief that he was in imminent danger, he would have no self-defense claim. Instruction 19 states:

Homicide or the use of deadly force involving the killing of a person whom the slayer knew was a law enforcement officer is not justifiable unless the slayer was in actual and imminent danger of death or great bodily harm. A reasonable but mistaken belief of imminent danger is an insufficient justification for the use of force against a known law enforcement officer who was engaged in the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.

CP at 783.

Instruction 20 states:

A person is entitled to act on appearances in defending himself or another, against a person not known to be a law enforcement officer, if that person believes in good faith and on reasonable grounds that he or another is in actual

¹² RCW 9A.08.010(1)(b) states:

KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

- (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for a homicide or a use of deadly force to be justifiable.

A person is not entitled to act on appearances in defending himself or another against a person known to be a law enforcement officer.

CP at 784.

Instructions 19 and 20 accurately stated the law and permitted Eggleston to argue his defense theory. Together they explain that when a person claims self-defense against a known law enforcement officer, he must be in actual or imminent danger of death or great bodily harm. *Cf. Valentine*, 132 Wn.2d at 20-21; *Ross*, 71 Wn. App. at 842; *see also Holeman*, 103 Wn.2d at 430; *Cadigan*, 55 Wn. App. at 30; *Westlund*, 13 Wn. App. at 466-67. Eggleston could have argued that he was in *actual imminent danger* of death or great bodily harm when he shot Bananola.

2. Whether the Officers Were Acting Lawfully

Eggleston also argues that the jury instructions, along with the court's pretrial ruling, prohibited him from challenging the legality of the search in front of the jury, which impermissibly removed an element of his self-defense claim from jury consideration. The State counters that whether the search warrant was properly issued was a legal question for the court, not a factual question for the jury.

Eggleston claims that under *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), a jury necessarily determines the lawfulness of a slain officer's use of force. The *Gaudin* Court explained that "the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *Gaudin*, 515 U.S. at 511. There, the defendant was convicted of making material false statements on loan documents. *Gaudin*, 515 U.S. at 508. The Court said that "materiality" was

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an element of the offense and part of what the government had to prove. *Gaudin*, 515 U.S. at 509. As such, the Court held that the defendant had a right to have the jury decide materiality. *Gaudin*, 515 U.S. at 511.

Here, the legality of the search warrant was not an element of Eggleston's self-defense claim. The State had to prove beyond a reasonable doubt that the officers were acting according to a "legal duty," or a court order such as a warrant, not whether the search warrant would survive an appeal. Chapter 10.79 RCW; *cf. State v. Richards*, 136 Wn.2d 361, 371, 962 P.2d 118 (1998). Moreover, we held in our first opinion that the search warrant was valid. *Eggleston*, 2001 WL 1077846, at *26 (holding that probable cause supported the warrant).

III. EVIDENTIARY ISSUES

A. Did the Trial Court Err in Excluding Certain Evidence?

Eggleston contends that the trial court erred in excluding evidence of: (1) Rod Englert's "moving statement" videotapes; (2) Steve McQueen's alleged deal with the State; (3) Kay Sweeney's testimony about the effect of the crime scene contamination on Englert's conclusions; (4) Deputy Benson's alleged lies in the search warrant affidavit; (5) Tiffany Patterson's testimony about Eggleston's habit of falling asleep after she gave him his morning medication; and (6) Deputy Reigle's prior statement omitting any reference to a "knock and announce" entry into the Eggleston house.

A trial court has broad discretion in ruling on evidentiary matters; we will overturn such rulings only for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion when it takes a view no reasonable person would take or applies the wrong legal standard. *Finch*, 137 Wn.2d at 810. A constitutional evidentiary error is harmless only if, beyond a reasonable doubt, any reasonable jury would have reached the same

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result without the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). We will reverse non-constitutional evidentiary error only if it prejudiced the defendant. *See State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004).

1. Videotapes

At issue here is the admissibility of the “moving statement” videotapes made at the direction of Rod Englert, the State’s crime reconstructionist. Taken at the Eggleston home in April 1996, these videotapes showed Deputies Dogeagle, Larson, Reigle, Fajardo, and Reding reenacting their movements during the shooting while Englert interviewed them and asked questions about their actions. Englert used these videotapes to help form his opinions about the shooting. In each of Eggleston’s trials, the defense sought to introduce the videotapes during Englert’s cross-examination.

The State objected to the tapes in the first two trials because the tapes were too dark. During the first trial, the trial court refused to play the videotapes for the jury because the lighting did not “in any sense” replicate the lighting in the house at the time of the shootings. RP at 1385. The court concluded that the defense could cross-examine Englert from a transcript of the videotapes. The judge at the second trial reached the same conclusion.

When the State again sought to exclude the videotapes in the third trial, the defense announced that it had lightened the tapes and would file the lightened copies the following day.

One week later, the parties and the court viewed the lightened Reding videotape but the voice and the movements were not synchronized. The defense explained that it wanted to use the videos to cross-examine some of the deputies and Englert because “we believe . . . what they told him is inconsistent with what he reports and what his opinion is.” RP at 2034. The parties then viewed the Dogeagle tape, after which the defense stated that it was not particularly

interested in the video. The court asked the parties to review the lightened videos and present argument at another time.

During redirect examination of Deputy Dogeagle, the last deputy to testify, the State asked him about the two transcripts of the video (apparently, the State and the defense had prepared their own transcripts) and a discrepancy in their punctuation. When the State asked the court to display on a screen the parts of the two transcripts it was referring to, the defense objected, arguing that the best evidence would be the video itself. The parties eventually agreed to show the jury Exhibit 735, a shortened version of the lightened Dogeagle tape.¹³ After both parties questioned Dogeagle about the video, the court admitted it for illustrative purposes only since Dogeagle had acknowledged the statements he made therein.

The court then asked about the other videotapes that the defense wanted to introduce, and the parties viewed the videos of Reigle, Larson, and Reding. After the State again objected to their introduction, the defense announced that it wanted to use only the tapes of Reigle, Reding, and Dogeagle: “Those videos are fundamental to my cross-examination of the timing and sequence of shots in this case.” RP at 4885.¹⁴ The defense explained:

This expert has testified . . . about where shots were fired . . . and his theory about the timing of the shots is totally ridiculous when you look at certain parts of the evidence.

This witness has testified that this shooting occurred over a minute and 15 seconds period of time. When you look at what these people do on the videos, when you look at what they say and their movements through this little house, you realize and the jury will realize. . . that this opinion is fundamentally flawed.

¹³ The shortened tape is approximately two minutes long.

¹⁴ The defense did not specify, as Eggleston claims on appeal, that it sought to introduce the full-length Dogeagle videotape.

RP at 4893. The court responded that the jury had already seen the Dogeagle video and that its would admit only the Reigle and Reding transcripts.¹⁵

During its cross-examination of Englert, the defense asked him about Reding's statement on the videotape transcript concerning Bananola's utterance of "ugh" as he started to collapse into the living room. RP at 4911. The issue was whether Bananola was shot before or as he was falling to the floor. The defense again sought to introduce the videotape itself. The State responded that the defense was simply ignoring the deputy's testimony and that the video would not help. The court adhered to its earlier ruling, explaining:

I think they're very misleading, particularly the tape of Deputy Reigle. . . . [O]nce he walks into the kitchen, all you can see of him is a silhouette. All I can see of him is a silhouette, and yet I know if I had been standing there in the position of the cameraman, I would not have seen a silhouette. . . my recollection of the videotape is Mr. Englert specifically instructed each of the deputies to take their time, go through in slow motion and act it out[.] [That] is not an accurate reflection of the time.

With respect to movements . . . this jury has already heard the testimony of these witnesses who have told the jury where they were standing, and I think that the defense counsel is adequately able to make their point without using the video in that regard. I think that the tape is very misleading.

In addition to all of that, it clearly shows . . . a large hole in the wall. The large hole in the wall was . . . not caused by the gunfire itself, but rather was caused by the State's investigators who removed a section of the wall to retrieve the bullets. The Court of Appeals has suppressed the bullets. . . . So we leave ourselves . . . in the very difficult position of having a hole in the wall that would again be misleading to the jury because the jury could be left with the impression that that was caused from the gunfire itself[.] [W]e're not in a position to explain to them why there is this hole in the wall because the bullets are suppressed.^[16]

RP at 4972-75.

¹⁵ The trial court also explained that it had admitted the Dogeagle video because neither party had objected.

¹⁶ This court suppressed three bullets that investigating officers dug out of the wall because their seizure exceeded the scope of the drug warrant and the plain view doctrine.

During the cross-examination of Kay Sweeney, the defense reconstruction expert, the State asked what Reding said about the sequence of events during the shooting. The defense objected, stating that the best evidence of what Reding said was in the video. When the State asked more questions about the deputies' statements on the videotape, the defense again objected on the grounds that it could not show the videos to Sweeney to clarify and support his testimony. The State responded that it was asking only about the deputies' statements, and the court again ruled that the defense could use the transcripts of the videos.

Eggleston argues on appeal that when the court excluded the videotapes during Englert's cross-examination, it violated his right to present a defense.¹⁷ The trial court has discretion to determine the scope of cross-examination; we will reverse a trial court's rulings on that scope only for a manifest abuse of discretion. *State v. McDaniel*, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996); ER 611(b).

The Sixth Amendment to the United States Constitution and Washington Constitution article 1, section 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *McDaniel*, 83 Wn. App. at 185. Although the right is constitutional, it is subject to limitations: (1) the offered evidence must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *McDaniel*, 83 Wn. App. at 185. "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not

¹⁷ Contrary to the statement in the appellant's brief, Eggleston never sought to use the videos in cross-examining the deputies. The defense did ask Reding, Fajardo, and Reigle to show the jury their movements by using diagrams of the house's interior.

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cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). Any attempt to limit meaningful cross-examination, however, must be justified by a compelling state interest. *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983) (citing *People v. Redman*, 112 Mich. App. 246, 255, 315 N.W.2d 909 (1982)).

The trial court may admit demonstrative evidence if the experiment was conducted under conditions reasonably similar to those existing at the actual event. Whether the similarity is sufficient is for the trial court’s discretion. *State v. Stockmyer*, 83 Wn. App. 77, 83, 920 P.2d 1201 (1996). When evidence is not entirely accurate, the court may exclude it to avoid confusing the jurors. 5 KARL TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 403.4, at 368-69 (4th ed. 1999).

A review of the three videotapes at issue shows that the darkness problem identified in Eggleston’s two previous trials was largely overcome. Problems with synchronizing the voice and the movements in the Reding tape do exist, however, and the trial court was correct that Deputy Reigle appears as a silhouette in much of his videotape.¹⁸ Moreover, the Reigle tape clearly shows the hole in the wall left from the removal of the subsequently suppressed bullets. And, as the trial court mentioned, Englert instructs each deputy to repeat his actions in slow motion.

Eggleston now argues that excluding the tapes was error under the best evidence rule and the rule of completeness. ER 1002, ER 106. Generally, a party who wants to prove the contents of a writing, recording, or photograph must use the original. ER 1002; 5C KARL TEGLAND,

¹⁸ The Reding videotape is approximately seven minutes long; the Reigle tape is approximately five minutes long.

WASHINGTON PRACTICE: EVIDENCE § 1002.1, at 238 (4th ed. 1999). And if a party introduces part of a writing or recorded statement, the opposing party may require the introduction of any other part “which ought in fairness to be considered contemporaneously with it.” ER 106; 5 KARL TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 106.1, at 115 (4th ed. 1999). Eggleston did not refer to the best evidence rule until the cross-examination of defense witness Kay Sweeney, which was well after the court made its ruling concerning the videotapes, and the record does not show that he ever argued that excluding the tapes violated the rule of completeness. *See, e.g.*, ER 1002; ER 106. A party may assign error on appeal only on the specific ground of the evidentiary objection made at trial, and that objection must be timely. *See Guloy*, 104 Wn.2d at 422; *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995).

Even if we consider Eggleston’s new arguments concerning the court’s ruling, we find no harmful error. Eggleston does not explain why the Dogeagle and Reigle tapes were essential to his impeachment of Englert. His discussion of Reding’s statements mirrors that made during trial, but he does not point to any flaw in the trial court’s reasoning that the video would not have helped determine whether Reding meant that Bananola was shot before or as he was falling. Moreover, the trial court had valid concerns about the quality of the videotapes, their potential exposure of suppressed evidence, and the deputies’ slow-motion reenactments of their movements. These concerns, coupled with the jury’s visit to the house and the defense counsel’s use of the video transcripts to cross-examine Englert, persuade us that the trial court did not abuse its discretion in limiting Eggleston’s use of the videotapes during Englert’s cross-examination.

2. Steve McQueen--Evidence of Bias

McQueen, a convicted felon, provided the information that launched the Eggleston investigation. When the State sought to prevent the defense from asking about McQueen's original charges, as opposed to those to which he pleaded guilty, the defense responded that the issue went to bias. The matter was left unresolved until the defense asked McQueen on cross-examination if he knew "Mr. Horne." RP at 2817. When the court sustained the State's objection, the defense explained outside the jury's presence that it wanted to ask McQueen whether Horne appeared at his 1996 sentencing and made statements about his cooperation in the Eggleston case.

The State responded that when McQueen pleaded guilty to "several counts of robbery in the first degree" in 1996, it explained to him that reducing the number of charges was unrelated to his testimony in the Eggleston case. RP at 2849. The State told the defense at the time that for McQueen's safety in prison, it would separate him from Eggleston, and that it would tell the sentencing judge that McQueen had cooperated in the Eggleston case. McQueen testified at Eggleston's second and third trials without receiving any benefit. The State took the position that what happened in 1996 was not relevant to McQueen's testimony in 2002, and the defense made no further argument.

Eggleston now argues that the trial court erred in excluding evidence that the State reduced the charges against McQueen in exchange for his testimony against Eggleston. The defendant has a right to cross-examine a witness about possible bias, but the scope or extent of such cross-examination is within the trial court's discretion. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). The trial court may prohibit further questioning where the claimed bias is speculative or remote. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993). Where a

case stands or falls on the credibility of essentially one witness, that witness's credibility or motive must be subject to close scrutiny. *Roberts*, 25 Wn. App. at 834; *see also Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct 763, 31 L. Ed. 2d 104 (1972) (new trial required where State did not disclose promise of leniency to key witness).

Although Eggleston argues that excluding the evidence of McQueen's bias is analogous to the exclusion of the "deal" in *Giglio*, important differences exist. Any evidence of bias here is both speculative and remote; it concerns a promise of leniency that occurred six years before the testimony at issue and that the State largely denies. Moreover, McQueen was not a key witness; he did not testify about the officers' entry into the Eggleston home or the gun battle. His testimony merely set the stage for Deputy Benson's investigation. The trial court did not abuse its discretion in excluding the evidence of McQueen's alleged bias.

3. Kay Sweeney--Contamination Evidence

During Sweeney's direct examination, the defense sought to question him about how the State's investigation contaminated the crime scene and adversely affected the opinions of the State's expert, Rod Englert, about what happened during the shootings. Defense counsel contended that "[o]nce you destroy or modify a scene, the conclusions become unreliable." RP at 5366. The State objected and asked for an offer of proof explaining how the alleged contamination affected the crime scene reconstruction efforts, arguing that Sweeney could not testify simply that the ability to reconstruct the crime scene was hampered because of what the State had done. "It needs to be tied to specific elements of reconstruction and specific items that we're talking about." RP at 5369. The court ruled that Sweeney could testify how the debris left

on the gold chair in the living room could have contaminated the evidence found thereon¹⁹; it also ruled that he could explain how moving items during the investigation might have resulted in blood transfers. The court agreed, however, that the defense had to make an offer of proof about how removing the sheetrock from portions of the wall affected the subsequent bloodstain analysis. (The parties had already stipulated to DNA results showing that certain bloodstains came from Bananola and others from Eggleston.)

In his offer of proof, Sweeney explained that the particulate matter from the removed bloodstained sheetrock could have been spread throughout the house during the investigation, but he acknowledged that he was concerned about only one area of blood in the hallway. He also admitted that he had been able to form opinions about what happened during the shooting despite the crime scene alterations. He did not specifically challenge any of Englert's conclusions.

Following that offer of proof, the court ruled:

Okay . . . [w]ith respect to his comments on the DNA . . . he's not qualified to speak to this issue, but also it flies in the face of the stipulation. . . . So it's inconsistent with the defense's position in signing the stipulation, it seems to me, to have their own expert then attacking the stipulation that they signed and that's already been read to the jury. So I don't want you eliciting any testimony from him in that regard.

[Y]ou can . . . elicit . . . testimony with respect to the chair, [and] with respect to . . . the south facing portion of the north section of the archway. . . . He can talk about any mixtures of blood that weren't stipulated to as to how they could have come to be there by activities that may have occurred after the actual shooting took place . . . but I don't want general, broad testimony of it affecting all of the reliability of all the conclusions, because that's not what, in fact, he has indicated in his testimony.

With respect to the sheetrock, I'm still not going to allow it in. He . . . stated that it didn't change his opinion as to the donor or identity of the blood that was in the north-south hallway which is where the sheetrock is. Although, I understand you want him to talk about how removing it can transfer blood and

¹⁹ A pubic hair was found on the chair early in 1998.

there's some potential there of saying well, somebody else's blood was on the wall, the wall was knocked out, that blood was then dissipated or dispersed somewhere else and therefore this portion of the puzzle we can't put together because we don't know if it was originally on the wall or not, but I didn't hear him testify to that.

Now, if you were going to elicit that type of testimony, that was your opportunity to do so, or I would . . . have him come back in. Unless he's going to testify to something like that, I heard him very clearly that the blood that was on the floor, he doesn't take any issue with the identity of the donor of that blood despite the issue of the sheetrock. . . . [N]obody has testified . . . that somebody else's blood was on that wall that may have changed how this is being reconstructed by him or by Mr. Englert; it's only misleading and prejudicial and gets us into opening the door to evidence that was suppressed.

RP at 5389-92. On appeal, Eggleston claims that this ruling prevented Sweeney from testifying about how sheetrock strewn over the house contaminated vast areas of the crime scene and therefore prevented him from testifying with any reliability about what occurred.

This claim largely ignores the trial court's ruling regarding Sweeney's offer of proof, and it overlooks as well the detail with which Sweeney testified "with reasonable scientific certainty" about what happened during the shooting. RP at 5508-33. Eggleston has not shown that the trial court abused its discretion in restricting Sweeney's testimony about the effect of contamination on Englert's reconstruction efforts.

4. Deputy Benson--Evidence of Lying

Eggleston argues that the trial court erred in excluding evidence that Deputy Benson lied in the search warrant affidavit when he described witnessing two controlled buys between McQueen and Eggleston. The State objected to this proposed line of testimony because this court ruled that the affidavit was valid in Eggleston's previous appeal. The State contended that Eggleston was simply attempting to argue once again that the affidavit and search warrant were invalid. (In upholding the affidavit, we found that it did not refer to the first buy and that

Benson's failure to mention that Eggleston's girlfriend was present during the second buy was not a material omission.)

The defense argued that it was challenging only Benson's credibility, but the State disagreed: "How can the jury be the judge of Benson's credibility unless they know what the legal standard is for issuance of a warrant and the requirements for what's included in a search warrant affidavit." RP at 50. The trial court agreed. But on cross-examination, the court allowed the defense to ask Benson whether the buy he witnessed was technically a controlled buy. Benson admitted here, as he had in prior proceedings, that the transaction was not actually a controlled buy. The defense then sought to cross-examine Benson about whether he lied to the judge to whom he applied for a search warrant about the buy and whether he told the judge that there were other people present. The trial court sustained the State's objection to the question, explaining that it would not allow any attack on the search warrant.

Eggleston now argues that this ruling "violates state evidentiary rules," but he does not explain how such a violation occurred. Generally, a party may not impeach a witness on a collateral matter. *See State v. Griswold*, 98 Wn. App. 817, 831, 991 P.2d 657 (2000). Whether Benson misrepresented the facts of the drug purchases from Eggleston in his search warrant affidavit is collateral to the core issue of how the shootings occurred. The trial court did not err in limiting the defense cross-examination on the issue.

5. Tiffany Patterson--Habit Evidence

Eggleston contends that the trial court erred in not allowing the defense to cross-examine his girlfriend, Tiffany Patterson, about whether Eggleston tended to fall asleep after she gave him his medicine in the morning before she left for work.

Patterson testified on direct that she gave Eggleston his medicine before she left the house on October 16, 1995, and that she did not know whether he was awake afterward. When the defense sought to ask whether the medication consistently made him sleepy, the court ruled against it. “[T]o the extent that you’re trying to show that he acted in conformity with what he may have done in the past in response to medication, I’m not going to allow it. She has no personal knowledge of it.” RP at 3273. The court did, however, allow the defense to refresh her memory with a prior inconsistent statement made during Eggleston’s previous trial. When questioned about her prior testimony that Eggleston went back to sleep after receiving his medicine on October 16, Patterson acknowledged that “he laid back down.” RP at 3275.

Because Patterson had already testified that she did not know whether Eggleston had fallen asleep after she gave him his medicine on October 16, the trial court did not err in preventing her from testifying that he usually did go back to sleep. Habitual behavior consists of semi-automatic and specific responses to specific stimuli. *Wash. State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 325, 858 P.2d 1054 (1993); *see also* ER 406. Patterson’s direct testimony did not support a conclusion that Eggleston’s sleepiness after receiving his morning medicine was habitual. In any event, this questioning was aimed at showing that the deputies awakened Eggleston on October 16, and the defense introduced evidence to that effect when the trial court allowed it to use Patterson’s prior testimony.

6. Deputy Reigle--Prior Inconsistent Statement

During his direct examination, Deputy Reigle testified about the “knock and announce” procedure the deputies employed in entering the Eggleston house on October 16, 1995. RP at 3297-3300. The defense then attempted to cross-examine him about a statement he gave on November 2, 1995, in which he did not mention the knock and talk procedure. This statement

was intended to clarify a statement Reding gave on the day of the shooting. The State objected, arguing that Reigle's earlier statement was not inconsistent with his trial testimony because he had not been asked about the entry procedure in giving the earlier statement. The court agreed and sustained the objection. Reigle testified during cross-examination that he announced his presence when he entered the Eggleston home, and he explained on redirect that he did not describe the entry procedure in the statement he gave on October 16 because he was not asked about it. The trial court did not abuse its discretion in holding that Eggleston's November statement, which was intended to clarify his October statement, was not inconsistent with his trial testimony. *See Finch*, 137 Wn.2d at 810.

B. Did the Trial Court Err in Admitting Certain Evidence?

1. Sequence Testimony

Eggleston argues that because our earlier opinion held that neither the State nor the defense expert had a sufficient factual basis to support an opinion about the sequence of shots, the trial court erred in allowing Englert to testify about the sequence of the gunfire between Eggleston and Bananola. In our first opinion we said:

The trial court did not err in admitting most of the crime-scene-reconstruction testimony. . .

We take issue, however, with the testimony offered by both reconstruction experts concerning the sequence of the shots fired during the gun battle between Bananola and Eggleston . . .

Both of these conclusions are completely speculative. The expert testimony as to who fired first is mere conjecture and should have been excluded.

Eggleston, 2001 WL 1077846, at *15 (footnote omitted).

Englert attempted to testify in this trial about exhibits showing how the events of October 16 unfolded. The defense objected, arguing that the exhibits would illustrate the sequence of shots in violation of our first opinion. The court ruled that the deputies had already testified

about the sequence of gunfire and that Englert was barred from testifying only as to who fired first.

When Englert continued to testify about the movements of Eggleston and Bananola and the sequence of their shots and injuries, the defense moved for a mistrial, arguing that Englert could not testify regarding the sequence of gunfire. The trial court agreed with the State that Englert could testify about the movement of persons as evidenced by the physical evidence in the house and as independently verified by eyewitnesses.

I am interpreting the Court of Appeals opinion as excluding either Mr. Englert or Mr. Sweeney from testifying as to who fired the first shot. . . . [T]o the extent that they are able to talk about other shots due to ballistic evidence, due to blood spatter, or due to trajectory analysis, they may do so, and the Court of Appeals specifically acknowledged that they could testify as to where people were, which is what I understood this testimony to be.

RP at 4646. When the defense continued to object, the court responded:

I don't know how to make it any more clear than that. They can't say this is Shot No. 5. This is Shot No. 6. This is the order in which the shots occurred[.] [B]ut they can talk about the shots occurred in the hallway first then this is where we believe based on this evidence that Deputy Bananola moved, this is where we believe Eggleston moved based on all of this evidence, the testimony, the trajectory analysis, the location of the ballistic evidence, the blood spatter and so forth.

RP at 4649.

Eggleston claims on appeal that Englert testified about “the order in which each bullet was fired, until all were covered,” thus violating the law of the case doctrine. Br. of Appellant at 58; *see Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1965) (law of the case doctrine binds parties and courts to prior appellate holdings until they are overruled).

This claim misrepresents the record. Englert did not testify about the numerical sequence of the shots Eggleston and Bananola fired. Rather, he used the prior testimony about their

injuries and their movements to offer opinions concerning where Eggleston was when he fired at Bananola and what position Bananola was in when Eggleston shot him in the head. This testimony did not violate this court's admonitions about the proper scope of the sequencing evidence. The trial court did not err in allowing Englert to testify as he did about the gunfire between Eggleston and Bananola.

2. Evidence of Eggleston's Drug Dealing

Eggleston contends that the trial court erred in admitting evidence of his drug use, drug dealing, and the drugs found in his home after the shooting.

In Eggleston's previous appeal, we affirmed his convictions for unlawful delivery of a controlled substance (two counts), unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a controlled substance. Before his third trial began, the defense moved to exclude evidence of Eggleston's drug dealing.

The State explained that it wanted to introduce evidence of his drug dealing, not his convictions, to provide a context for the search warrant and the entry into the Eggleston home. The State argued that this evidence was admissible as *res gestae* and to show Eggleston's motive in shooting at the officers. The defense acknowledged that the jury needed to know why the deputies were at the house on October 16, but argued that the drug buys, as well as the drug evidence found in the house, were irrelevant.

The court denied the defense motion, ruling that the drug evidence was relevant to show intent, *res gestae*, and to refute Eggleston's self-defense claim. The court found "the prejudice, if any, to the defendant is very slight." RP at 96.

Under ER 404(b), evidence of other crimes, wrongs, or acts is inadmissible to prove character and to show action in conforming with it. *State v. Thatch*, 126 Wn. App. 297, 106 P.3d

782, 789 (2005). Such evidence may be admissible, however, for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is logically relevant to a material issue. “Evidence is relevant and necessary if the purpose of admitting it is of consequence to the action and makes the existence of the identified fact more probable.” *Powell*, 126 Wn.2d at 259. If relevant, the court also must determine whether the probative value of the evidence outweighs its prejudicial effect. *State v. Barragan*, 102 Wn. App. 754, 758, 9 P.3d 942 (2000).

The drug evidence was admissible to prove Eggleston’s motive and intent.²⁰ Motive is what prompts a person to act; intent is the state of mind with which the act is done. *See Powell*, 126 Wn.2d at 261. Motive demonstrates an impulse, desire, or any other moving power that causes someone to act. *Powell*, 126 Wn.2d at 259 (citing *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). We found evidence of a defendant’s status as a gang member and drug dealer admissible to prove his intent and motive to commit murder in *State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995). “The challenged evidence clearly was highly probative of the State’s theory--that Campbell was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory.” *Campbell*, 78 Wn. App. at 822.

Similarly, evidence that the defendant had sold marijuana the day before he shot a police officer was relevant to show motive in *State v. Lyons*, 459 S.E.2d 770, 782-83 (N.C. 1995).

²⁰ Although the trial court did not base its admission of the drug evidence on the motive exception, we can affirm a trial court on any grounds supported by the record. *State v. Frodert*, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).

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There, the State's theory of the case was that defendant, a known drug dealer, had a motive to kill a law enforcement officer. The court found the drug dealing evidence admissible under ER 404(b). *Lyons*, 459 S.E.2d at 782-83 (evidence of narcotics activities on the premises admissible to show motive and to disprove defense claim that officer executing search warrant was shot in a case of mistaken self-defense).

Evidence of Eggleston's drug dealing, possession, and use before the shooting was also relevant to explain intent to shoot. The evidence supported the State's theory that Eggleston intentionally killed either a law enforcement officer to avoid arrest and prosecution or an intruder to protect his drugs. Given the defense concession that some evidence of Eggleston's drug dealing was admissible, the trial court did not err in finding that the probative value of the evidence outweighed its prejudicial effect. Thus, trial court did not abuse its discretion in admitting the evidence of Eggleston's drug use and dealing.

C. Did the Trial Court Err in Finding Ted Garn Unavailable to Testify?

Ted Garn, a Tacoma Police Department forensic investigator, was assigned to collect evidence from the Eggleston home after the shooting. Under the direction of Detective Melvin Margeson, he measured and photographed the interior of the residence; photographed and collected items of ballistic evidence; and collected Bananola's bloody clothing, the guns Bananola and Eggleston used, the firearms found in Eggleston's bedroom, and blood samples.

At Eggleston's first two trials, Garn testified about collecting the ballistic evidence and blood samples. Defense counsel cross-examined him each time.

In 2001, Garn sustained serious, disabling injuries in a car accident. When the prosecuting attorneys learned that he might not be able to testify at Eggleston's third trial, they talked with Garn to encourage his cooperation. Garn explained that he could not remember any

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of the details of the Eggleston investigation and did not recognize the reports he had prepared. He also said that he had begun receiving treatment for post-traumatic stress caused by his Vietnam service.

Despite his reluctance to testify, Garn responded to a subpoena. He testified at a hearing that he believed he collected evidence at the Eggleston residence, but he could not recall picking up bullets and did not recognize a photograph that he took. Nor could he remember preparing reports. He said that he was experiencing severe pain and tremors as he testified, and he listed six medications that he was taking. Garn explained that he had been receiving counseling and medication for a post-traumatic stress disorder and would be entering the VA hospital for treatment as soon as a bed was available. He told defense counsel that he did not think reviewing documents would refresh his memory; and he could not bring himself to read a paragraph from one of his reports when the prosecuting attorney asked him to do so.

His wife, a registered nurse for 20 years, testified at the same hearing that Garn becomes traumatized and reacts violently when viewing violence on television; he has been told to avoid newspapers, television news, war movies, and crime dramas; and he is in constant pain from his neck and spinal surgeries. "He has a stainless steel plate with six screws on the front side of his neck, and the back of where the spinal column is, they put in some bone donor and some more screws and they wrapped his neck with stainless steel wire so he has no mobility." RP at 1247.

The State also presented a note from Garn's surgeon stating that Garn could not testify at Eggleston's trial due to his neck condition.

The State argued that Garn could not testify because of his memory loss and his physical and mental problems. The defense complained that it had no medical documentation of Garn's difficulties; the State explained that none would be available until after his VA evaluation, which

would take at least two weeks. The court declined to continue the trial, ruling that Garn was unavailable and that his prior testimony was admissible.

Eggleston now argues that the trial court should have required independent medical corroboration that Garn was unavailable to testify.

Under ER 804 a court may admit former testimony when the declarant is “[i]s unable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity.”²¹ ER 804(a)(4), (b)(1); *State v. Whisler*, 61 Wn. App. 126, 131-32, 810 P.2d 540 (1991). If the witness is unavailable because of illness or infirmity, the illness or infirmity must render the witness’ attendance relatively impossible and not merely inconvenient. *Whisler*, 61 Wn. App. at 132 (citing *People v. Stritzinger*, 668 P.2d 738, 746 (Cal. 1983)). The court has a measure of discretion in determining whether the declarant’s infirmity is sufficient to justify a finding of unavailability. 5D KARL TEGLAND, COURTROOM HANDBOOK ON EVIDENCE, Rule 804, at 424 (2005).

In *Whisler*, where the 94-year-old forgery victim had a heart condition, the trial court allowed the State to read her deposition testimony instead of forcing her to testify in person. *Whisler*, 61 Wn. App. at 131. When *Whisler* complained on appeal that no competent expert had testified about the victim’s physical condition, Division One found adequate proof in an affidavit summarizing a conversation her doctor had with the prosecuting attorney, coupled with her daughter’s testimony about her mother’s medical condition. *Whisler*, 61 Wn. App. at 138-39. The court rejected *Whisler*’s complaint that the daughter’s testimony was incompetent because she was not a medical expert: “[She] was certainly competent to testify about facts of her

²¹ Because Garn was subject to cross-examination, admission of his prior testimony does not run afoul of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004).

mother's condition that do not require medical expertise to ascertain." *Whisler*, 61 Wn. App. at 140; *see also Alcala v. Woodford*, 334 F.3d 862, 880 (9th Cir. 2003) (expert medical testimony not essential to establish the existence of a mental infirmity and thus witness unavailability).

Here, the State produced a note from Garn's doctor and Garn's wife testified about his neck surgery, ongoing pain, and his "acting out" as the result of trauma. Additionally, Garn testified that he could not remember much of his investigation, was unable to recognize or review his reports, was experiencing pain, and was taking six medications. In light of this foundation, the trial court did not abuse its discretion in finding him unavailable to testify and in admitting his former testimony under ER 804.

IV. JURY ISSUES

A. Discharge of Jurors 4 and 7

1. Background

On Thursday, October 31, 2002, juror 7 fell and injured herself. The court had scheduled a jury visit to the crime scene that day, but rescheduled it for the following Monday to accommodate juror 7's injury. The court expressed concern about scheduling the site visit soon because of possible vandalism to the house. Rescheduling the site visit involved canceling and rescheduling a bus, adding and rescheduling staff, and juggling witnesses.

On the day of the rescheduled site visit, juror 7 notified the trial court that she had seen a doctor the previous Friday and that she had another appointment in Seattle that afternoon, which would potentially conflict with the site visit. She also told the court that although she thought her injury would be resolved after this doctor visit and another one on Friday, she was still experiencing a lot of pain.

The trial court discussed these conflicts with counsel. Eggleston argued that the court should not discharge the juror until after her Friday doctor's appointment when they might have a better idea of the potential impact of her injury.

Citing the burden of rescheduling the site visit and the risk that juror 7's ongoing medical appointments could further impede her participation in the trial, the trial court decided to discharge juror number 7.²² When the court explained this to her, she said she had been trying to reschedule her appointment for later that day.²³ The court then discharged juror 7 and replaced her with an alternate.

That same day, juror 4 told the court's judicial assistant that she could not get there until noon because she had been vomiting all night and all morning. The State asked the court to discharge the juror. Eggleston argued that the court should postpone the site visit until the juror had recovered and asked the court to contact the ill juror to make a record of the discharge. Aware of the difficulty of rescheduling the site visit and concerned that the ill juror would make the others sick, the court discharged juror 4 without talking with her again; the court replaced her with an alternate.

2. Discussion

Eggleston contends that the trial court erred when it discharged jurors 4 and 7 mid-trial. He argues that the court (1) abused its discretion in finding these jurors unable to fulfill their

²² The court also noted that this was not the first time issues involving juror 7 had arisen.

²³ Eggleston asserts that the juror told the court that she was able to reschedule her appointment and would be able to stay for the site visit. But the record shows that juror 7 merely told the court she had been trying to contact her doctor to see if she could get a later appointment, not that she successfully rescheduled the appointment.

duties and (2) failed to comply with the procedural requirements of CrR 6.5²⁴ and RCW 2.36.110.²⁵ Eggleston maintains that short trial continuances could have accommodated the jurors.

CrR 6.5 and RCW 2.36.110 allow the trial court to replace a juror with an alternate if the juror becomes unable to serve. We review a trial court's decision to remove a juror for abuse of discretion. *State v. Ashcraft*, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). We find none here.

Although a continuance may have accommodated juror 4's illness and reduced the impact of juror 7's injuries, the trial court properly considered the possible consequences of a continuance. The court expressed concern about the difficulty, cost, and vandalism risk in further delaying the site visit. Additionally, the court considered the likelihood that even with a continuance, juror 7's future medical needs might affect her ability to serve. These facts support the trial court's decision to discharge both jurors.

²⁴ CrR 6.5 provides for the selection of alternate jurors, for replacing excused jurors with alternates both before and after the jury begins its deliberations, and for the temporary discharge of alternate jurors after the jury begins its deliberations. It states in part:

If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury.

Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to the replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

²⁵ The court should "excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical . . . defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110.

These discharges did not violate any procedural requirements. Although CrR 6.5 contemplates some sort of formal proceeding, it does not require one. *Ashcraft*, 71 Wn. App. at 462. Such a proceeding is required only when the case has gone to the jury and the alternates have already been temporarily excused.²⁶ *State v. Johnson*, 90 Wn. App. 54, 72, 950 P.2d 981 (1998). Here, the trial court removed jurors 4 and 7 and replaced them with alternates *before* the jury began its deliberations; thus, the court was not required to hold any formal proceedings.²⁷

Further, Eggleston cannot establish that seating alternate jurors amounted to a constitutional error because a defendant has no constitutional right to be tried by a jury that includes a specific juror. *State v. Jordan*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (citing *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995)).

B. Motion for New Trial Based on Juror Misconduct

1. Background

At some point during the trial, juror Thomas Burrows apparently reported to the judicial assistant that he had had brief, passing contact with a man and a woman who had been observing the trial and that he believed he knew these people. The man and woman had apparently been witnesses or listed as witnesses in one of the earlier trials. Burrows also apparently reported that he had been threatened. Neither the court nor the judicial assistant reported this information to counsel.

After Burrows reported these contacts, the prosecutor learned that Burrows might have been a customer at the tavern where Eggleston had worked and that Burrows might have

²⁶ The purpose of a formal proceeding is to verify that the discharged juror was unable to serve and to demonstrate that the alternate is still impartial. *Jordan*, 103 Wn. App. at 227.

²⁷ Eggleston's reliance on *United States v. Tabacca*, 924 F.2d 906, 913 (9th Cir. 1991) (discussing discharge of juror under Fed. R. Crim. P. 23(b)), is also misplaced as that case involved removing and not replacing a juror *after* jury deliberations had started.

communicated with these former witnesses. Before the jury started deliberating, Eggleston stipulated to Burrows's discharge.²⁸ The court discharged Burrows and replaced him with an alternate.

After the verdict, Eggleston discovered Burrows's disclosures to the judicial assistant and learned that although Burrows had been a customer at the tavern, he had not had any contact with Eggleston. After learning this, Eggleston moved for a new trial. In supporting affidavits, other jurors revealed that they had possibly discussed Eggleston's prior trials and the results of those trials during deliberation.

In his motion, Eggleston argued that had he known all the facts, he might not have agreed to dismiss Burrows. In a supplemental pleading, he argued juror misconduct during deliberations. Eggleston also moved to recuse the trial judge, asserting that recusal was appropriate because the judge and her judicial assistant could be witnesses. Before the motion hearing, the trial court limited the hearing to three areas of misconduct: (1) possible discussion of the evidence by members of the jury before deliberations began; (2) possible discussion of a witness by members of the jury before deliberations began; and (3) whether the jurors considered extrinsic evidence during deliberations.²⁹

After hearing testimony from the 16 empanelled jurors, the trial court denied Eggleston's motion for a new trial. In its written findings of fact and conclusions of law, the trial court found that (1) the fact of the prior trials was not extrinsic evidence; (2) communicating the results of the prior trials during deliberation was juror misconduct; and (3) a new trial was not appropriate

²⁸ Burrows was also reported to have been sleeping during part of the proceedings.

²⁹ Eggleston does not raise any issues related to the first two issues on appeal. The record does not show when or why the trial court restricted the hearing to these three issues, excluding the issues related to its discharge of Burrows.

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because there was no reasonable probability that this information had affected the verdict.³⁰ The court found that knowledge of the prior trials was not extrinsic evidence because these facts had been introduced as evidence during the trial and Eggleston had not objected or requested any curative action.

But the court found that “[t]he communication of results of prior trials by one juror to a few other members of the jury during deliberations constituted juror misconduct.” CP at 928. The court also found, however, no reasonable probability that this information had affected the verdict because: (1) only three of the jurors recalled hearing such statements during deliberation; (2) the information about the results of the prior trials was inconsistent, with two jurors hearing that there had been a hung jury and an overturned conviction and one juror hearing that there had been a hung jury and a mistrial; (3) none of the jurors identified the outcome of any specific charge; (4) the information was available to the jury for only a short period of time; and (5) the jury was legitimately aware of the prior trials and the time that had passed between the incident and the current trial, so it was likely that the jury could conclude there had been inconclusive results in the prior trials.

In addition, the trial court found that the juror who had apparently introduced the extrinsic information had not been deceptive during voir dire. Instead, it concluded that this juror, who had disclosed during voir dire that she knew of the previous trials, likely recalled additional details about the earlier trial results as she heard the evidence in the current trial. The court also concluded that other jurors had disclosed knowledge of the earlier trial outcomes during voir dire and that these jurors were excused only if they “so firmly were convinced of the

³⁰ The trial court misnumbered conclusions of law V and VI as III and IV. References are to the correct numbers.

guilt or innocence of Mr. Eggleston that they could not put aside their prior knowledge.” RP at 6607. In fact, during the trial, defense counsel did not challenge an alternate juror after she revealed that she had inadvertently heard about an earlier trial outcome.

2. Failure to Recuse

Eggleston argues that the trial court should have recused itself from hearing the motion for new trial.

The Code of Judicial Conduct (CJC) Canon 3(D)(1)(d)(iii) requires a judge to disqualify herself from a proceeding if her “impartiality might reasonably be questioned,” including instances where the judge is “likely to be a material witness in the proceeding.” Here, although the trial court or its staff could have been witnesses to whether Burrows reported information to the judicial assistant that was not communicated to the parties, the trial court did not address this issue at the motion hearing. The court addressed only issues that did not involve the court or court staff. And, as discussed below, because the trial court properly discharged Burrows and replaced him with an alternate, there was no reason for the trial court to investigate the alleged communications between Burrows and the judicial assistant. Because Eggleston fails to show that the court or its staff were potentially witnesses, he fails to show any violation of CJC Canon 3(D)(1)(d)(iii).

3. Right to be Present

Eggleston next argues that the trial court violated his right to be present at every critical stage of the proceedings when it failed to report Burrows’s contacts with the judicial assistant.

“The core of the constitutional right to be present is the right to be present when evidence is being presented.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985))

(per curiam)). In addition, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” *Lord*, 123 Wn.2d at 306 (citing *Gagnon*, 470 U.S. at 526). Accordingly, a defendant does not have the right to be present during in-chambers or bench conferences between the court and counsel on legal matters where those matters do not require a resolution of disputed facts. *Lord*, 123 Wn.2d at 306 (citing *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992)) (right to be present during hearing on admissibility of prior conviction).

Because the trial court dismissed Burrows and replaced him with an alternate before deliberations, Burrows’s communications to the judicial assistant did not impact Eggleston’s opportunity to defend himself against the charge. Nor did the dismissal require a resolution of disputed facts. Furthermore, the dismissal posed no risk to the fundamental fairness of Eggleston’s trial.

4. Ex Parte Contacts

Eggleston also argues that he was entitled to a new trial because of Burrows’s ex parte contacts with the judicial assistant.

When a trial participant has ex parte contact with the court and the defendant raises the possibility of prejudice, the State has the burden of proving that the communication was harmless beyond a reasonable doubt. *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). Here, Eggleston fails to raise the possibility of prejudice. He argues only that had he been fully aware of the alleged ex parte contacts he would not necessarily have stipulated to Burrows’s dismissal. Although this assertion shows that Eggleston was potentially denied the

opportunity to make an informed decision, it fails to establish how this prejudiced him because Burrows was replaced with an alternate juror before deliberations.

5. Burrows's Discharge

Eggleston argues further that the trial court's findings failed to address Burrows's assertion that he never engaged in juror misconduct warranting his dismissal. He again asserts that a full hearing was required under RCW 2.36.110 and CrR 6.5. Finally, he argues that the discharge was an abuse of discretion.

Because the trial court discharged Burrows before the jury began its deliberations, no formal proceeding was required. Further, because the parties stipulated to the discharge, Eggleston cannot show that the trial court abused its discretion in discharging Burrows. Additionally, even if the discharge was in error, Eggleston can not show prejudice because the court replaced Burrows with an alternate prior to deliberations.

6. Other Jury Misconduct

Eggleston also contends that the trial court erred when it denied his motion for a new trial based on juror misconduct. He argues that he was entitled to a new trial because the juror who allegedly disclosed the results of earlier trials failed to disclose in voir dire her knowledge of the previous trial results. He maintains that juror discussions during deliberations of the facts and results of his earlier trials amounted to introducing extrinsic evidence and justified a new trial.

(a) Standards

We review a trial court's determination of whether juror misconduct warrants a new trial for an abuse of discretion. A trial court abuses its discretion if the decision is manifestly unreasonable or based on untenable grounds. *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d

669 (1997). Eggleston has the burden of showing that the misconduct occurred. *Barnes*, 85 Wn. App. at 668.

“It is misconduct for a juror to fail to disclose material information when asked; to extrajudicially acquire case-specific information during the course of the trial, especially where the judge . . . has given an instruction expressly prohibiting that; and to inject into deliberations extraneous, case-specific information learned outside the trial.” *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (citations omitted). But only juror misconduct that prejudices the defendant warrants a new trial. *Tigano*, 63 Wn. App. at 341.

Generally, once misconduct is shown, we presume prejudice and the State bears the burden of overcoming this presumption beyond a reasonable doubt. *State v. Brenner*, 53 Wn. App. 367, 372, 768 P.2d 509 (1989) (citing *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30 (1986)). But, in deciding whether to grant a new trial, the court must find “[s]omething more than a possibility of prejudice.” *State v. Hall*, 40 Wn. App. 162, 169, 697 P.2d 597 (1985) (quoting *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). Misconduct causes prejudice only if we conclude that the withheld or extraneous information could have affected the jury’s deliberations. *Barnes*, 85 Wn. App. at 669.³¹ With these rules in mind, we examine Eggleston’s specific claims of juror misconduct.

(b) Failure to Disclose

Although a juror’s failure to disclose material facts can amount to prejudicial error, a juror’s failure to disclose knowledge of the earlier trials and their outcomes would not warrant a

³¹ Eggleston asserts that the trial court erred by considering subjective evidence when determining whether he was entitled to a new trial. But the record shows that although the trial court questioned the jurors on whether they kept an open mind, the trial court based its decision on proper objective factors as outlined in *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988).

new trial unless this information would have supported a challenge for cause. *State v. Cho*, 108 Wn. App. 315, 323, 30 P.3d 496 (2001); *Tigano*, 63 Wn. App. at 342. Here, the trial court specifically found that other jurors with similar knowledge were not challenged for cause or dismissed unless the juror was unable to put aside this information. Eggleston does not challenge this finding, thus it is a verity on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). And nothing in the record suggests that this knowledge impaired any juror's ability to be impartial. Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial on this basis.

(c) Fact of Prior Trials

As to the fact of the earlier trials, the trial court found that this was not extrinsic evidence. The trial court found, instead, that this information was presented to the jury during the course of the trial. Eggleston does not challenge this finding; thus, it is a verity. *See O'Neill*, 148 Wn.2d at 571. The trial court did not err in concluding that the information was not extraneous evidence.

(d) Outcome of Prior Trials

Finally, the trial court found that because the parties had revealed during voir dire and through the evidence that this was not Eggleston's first trial, any juror discussion of the earlier trial results did not prejudice Eggleston. The court reasoned that because the jurors knew of the earlier trials and knew that considerable time had passed between the incident and the current trial, the jurors could have easily deduced that Eggleston's previous trials had ended either in hung juries, mistrials, or reversals on appeal; accordingly the court found that this additional information did not prejudice Eggleston. We find no abuse of discretion in this line of reasoning.

V. RESENTENCING ON ALL CRIMES

Eggleston argues that the third trial court erred when it resentenced him on the drug crimes following his third trial. Specifically, he claims that the court should not have recalculated his offender scores on those crimes to include the new murder conviction obtained in the third trial, thereby increasing his criminal history scores for each drug crime. The State argues that the judgments and sentences imposed after the first and second trials were vacated by this court's previous opinion; thus, there was no valid judgment and sentence, and the trial court was obligated to resentence Eggleston for those offenses.

We did not vacate the judgment and sentence for the drug convictions in our previous opinion. *Eggleston*, 2001 WL 1077846, *33. Because we reversed the assault conviction, there was no remaining issue about running the firearm sentence enhancements for assault and one of the drug convictions consecutively. We also clarified that "the drug *convictions* are unaffected by our decision." *Eggleston*, 2001 WL 1077846 at *33-34 (emphasis added). Ultimately, we reversed the assault and murder convictions, affirmed the drug convictions, and remanded for further proceedings. *Eggleston*, 2001 WL 1077846, *33-34.

A. Background

After the first trial, the court sentenced Eggleston on counts II-VI, the assault and the drug crimes.³² The total sentence was 238 months. The court ordered each of the base sentences

³² On count II (assault I), the court calculated an offender score of 4, a seriousness level of XII, a standard range of 129-171 months, and 60 months for the firearms enhancement. The court imposed 160 months plus 60 for that offense. On both counts III and IV (delivery of marijuana in a school zone possession with intent to distribute marijuana in a school zone), the offender score was 8, the seriousness level was III, the standard range was 67-81 months, and the school zone enhancement was 24 months. The court imposed 57 months plus 24 on count III and 48 months, plus 24, plus 18 on count IV. On count V (delivery of marijuana), the court calculated an offender score of 8, a seriousness level of III, and a standard range of 43-57 months. The

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to be served concurrently, the firearm enhancements on counts II and IV to be consecutive, and the school zone enhancements on counts III and IV to be concurrent. The offender scores on counts III through VI were 8, 8, 8, and 4, respectively.

After the second trial, the State argued that the court should resentence Eggleston on all crimes. Specifically, it argued that the court should act as if there had been a single trial and sentencing hearing on all counts. The State conceded that it had not found a case or statute to support this recommendation. Instead, it reasoned that “[t]he fortuity of the mistrial on count I caused . . . Eggleston to be sentenced on different days for count I and the remainder of his offenses.” CP at 1508. Thus, it argued that resentencing on all crimes “is the most logical since it minimizes the effect of the mistrial on the length of the defendant’s sentence.” CP at 1509. The trial judge rejected the State’s recommendation and imposed a sentence for count I, running it consecutively to the previous sentence for count II, the assault conviction, and concurrently with the previous sentences for counts III-VI, the drug convictions. In total, the court imposed 288 months plus the 60 months or 348 months. The court rejected the State’s request for an exceptional sentence.

At the sentencing hearing following Eggleston’s conviction of second degree murder and of first degree assault at the third trial, the State reiterated its argument that the court should treat all of his convictions as though they were rendered in the same proceeding. The State argued that it was “more fair” to “*ignore* the fact that the convictions came out of three separate proceedings and sentence the defendant as though he were convicted in a single trial of all the

court imposed 57 months. On count VI (possession of mescaline) the court calculated the offender score at 4, the seriousness level at I, and the standard range at 3-8 months. The court imposed a sentence of 3 months for that offense.

counts that were charged in this case.” RP at 6642 (emphasis added).

The trial judge agreed, sentenced Eggleston on counts I and II, and re-sentenced him on counts III through VI, raising the offender scores to 9, 9, 9, and 5, respectively, and lengthening the sentences on all four counts.³³ Accordingly, the total sentence was 582 months with counts I and II running consecutively.

B. Sentencing and Resentencing in Washington

Eggleston argues that the trial judge’s resentencing violates double jeopardy principles. He may be correct, but we do not reach a constitutional issue if we can resolve the question on statutory grounds. *See Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753, 752, 49 P.3d 867 (2002). The Sentencing Reform Act of 1981 (SRA) prevents a trial judge from resentencing as the court did here for crimes that were not reversed on appeal.

The meaning of a statute is a question of law we review de novo. *State v. Thomas*, 150 Wn.2d 666, 670, 80 P.3d 168 (2003); *see also Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). Whether a trial court exceeded its statutory authority under the SRA is an issue of

³³ On count I the court used a criminal history score of 4, an offense level of XIII, a standard range of 165-219 months, and a firearm enhancement of 60 months. It imposed an exceptional sentence of 339 months plus the 60-month enhancement. On count II the court used a criminal history score of 0, an offense level of XII, a standard range of 93-123 months, and a firearm sentence enhancement of 60 months. It imposed a high end sentence of 123 + 60 or 183 months. On count III the court used a criminal history score of 9, an offense level of III, a standard range of 51-68 months, and an enhancement of 24 months for a range of 75-92 months; it imposed a sentence of 68 +24 months or 92 months. On count IV the court again used a criminal history score of 9, an offense level of III, and a standard range of 51-68 months plus the enhancements for a total range of 93-110 months--the court imposed a sentence of 68, plus 18, plus 24 months, or 110 months. For count V the court used a criminal history score of 9, and offense level of III, a standard range of 51-68 months and a sentence of 68 months. On count VI the court used a criminal history score of 5, an offense level of I, a standard range of 4 to 12 months, and a sentence of 12 months.

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law, “which we review independently.” *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Under the SRA, the court first calculates the sentencing range. 13B SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW § 3501, at 277 (2d ed. 1998). To compute this range, the trial court must “(1) determine the seriousness level; (2) compute the offender score; and (3) modify the resulting range.” 13B WASHINGTON PRACTICE § 3501, at 277. Although ascertaining the seriousness level is a simple matter of consulting a table, computing the offender score is more complex. 13B WASHINGTON PRACTICE § 3501, at 277. In general, courts consider the nature of the present conviction, prior convictions, and current offenses. *See* 13B WASHINGTON PRACTICE § 3501, at 277; *see also* RCW 9.94A.525. “A prior conviction is a conviction which exists *before the date of sentencing* for the offense for which the offender score is being computed.” RCW 9.94A.360(1) (*recodified as* RCW 9.94A.525 by LAWS OF 2001, ch. 10, § 6, and referencing subsection 589 for “other current offenses”) (emphasis added). “Convictions entered or sentenced *on the same date* as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.400.” RCW 9.94A.360(1) (emphasis added).

A sentencing court may consider subsequent convictions entered *before* the date of sentencing in determining a defendant’s offender score. *State v. Worl*, 91 Wn. App. 88, 93, 955 P.2d 814 (1998) (citing *State v. Collicott*, 118 Wn.2d 649, 664-68, 827 P.2d 263 (1992)) (emphasis added). The offender score includes all prior convictions existing at the time of that particular sentencing without regard to when the underlying incidents occurred, the chronology

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of the convictions, or the sentencing or resentencing chronology.³⁴ *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948 (1995).

Assault is the only crime “current” with the drug offenses because it was the only other conviction obtained on the same day as the drug convictions. Although the original assault conviction was reversed, Eggleston never asked us to vacate the drug sentences and remand for resentencing in light of that reversal. Accordingly, we never vacated those sentences.

The State cites to *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992) to support the proposition that the trial court properly included the murder conviction from the third trial when it resentenced the defendant on the drug charges. However, in *Collicott*, the Supreme Court expressly vacated the sentences at issue and remanded for resentencing. *Collicott*, 118 Wn.2d at 651-52. The Court held that a conviction on another charge that was entered in the interim between sentencing and remand for resentencing was a prior conviction that could be used in calculating defendant’s new sentence. *Collicott*, 118 Wn.2d 665. Here, we did not reverse Eggleston’s drug convictions or vacate the drug sentences in the first appeal. Rather, we affirmed the drug convictions and left the drug sentences intact. The third trial court had no authority to resentence Eggleston on the drug convictions.

C. The Sentences for the Drug Crimes Were Never Found Erroneous

The State contends that when a sentence is not in accordance with the law, the sentencing court has both the authority and the duty to correct it, citing *State v. Pringle*, 83 Wn.2d 188, 193, 517 P.2d 192 (1973). However, quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), the *Pringle* court clarified,

³⁴ Excluding, of course, prior convictions that have “washed” under the SRA rules. *See, e.g.*, RCW 9.94A.525; *In re Jones*, 121 Wn. App. 859, 869-70, 88 P.3d 424 (2004).

When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the [e]rroneous sentence, when the error is discovered. This does not, of course, affect the finality of a correct judgment and sentence that was valid at the time it was pronounced.

Pringle, 83 Wn.2d at 193. At the time the State obtained the drug convictions, it had not obtained a conviction on the murder charge. Thus, the court did not include the murder in its calculation of the offender scores. But this was not error; it was correct. Because this sentencing was correct, *Pringle* does not apply.

Here, the sentences for the drug crimes, as calculated and entered by the first trial court, were valid. We affirmed the drug convictions and expressly declared that they were unaffected by our decision. *Eggleston*, 2001 WL 1077846 at *33. Although the SRA required the third sentencing court to treat these convictions as part of Eggleston's history in sentencing him for murder and assault, the court lacked authority to resentence him on the previously obtained drug convictions to include the murder conviction in the drug crime offender scores. Thus, the sentences for the drug crimes must be reversed, and Eggleston's previous sentences on those counts must be reinstated.

VI. COLLATERAL ESTOPPEL ON COUNTS IV AND VI

Eggleston argues that counts IV (possession of marijuana with intent to distribute in a school zone) and VI (possession of mescaline) were the same criminal conduct; thus, convicting and sentencing him on both crimes violated double jeopardy protections and the same criminal conduct rules for sentencing.³⁵ But these issues are not properly before us. These convictions

³⁵ Although generally the sentencing court determines the sentence range for each current offense by counting all other current and prior convictions as if they were prior convictions for the purpose of the offender score, if the court finds that some of the current offenses encompass the same criminal conduct, the court counts those offenses as one crime. RCW 9.94A.589(1)(a).

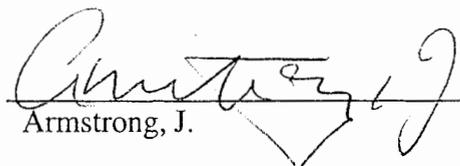
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and sentences followed the first trial. Eggleston may attack those convictions in a personal restraint petition or collateral attack under RAP 16, but he may not challenge them as part of this appeal.

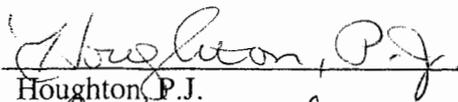
VII. THE EXCEPTIONAL SENTENCE UNDER BLAKELY

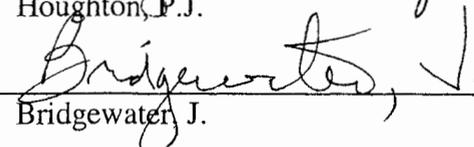
Eggleston argues that the trial court erred in imposing an exceptional sentence based on facts the jury did not decide beyond a reasonable doubt: i.e., “[Eggleston’s] knowledge that the person at whom he was shooting, and whom he killed by firing three shots into his head, one fired from a distance of 18-24 inches, was a law enforcement officer.” Br. of Appellant at 34-36. The State concedes that *Blakely v. Washington*, 124 U.S. 2531, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), requires us to vacate the exceptional sentence and remand for resentencing. We agree. We remand to the trial court for resentencing consistent with *Blakely* and SB 5477, 59th Legislature, Regular Session (Wash. 2005) (conforming the Sentencing Reform Act, chapter 9.94A RCW, to comply with *Blakely*).

We affirm the murder conviction, vacate the exceptional sentence on the murder conviction, and remand for resentencing in accordance with *Blakely*. We affirm the assault sentence and vacate the sentences on the drug crimes; and we reinstate the first court’s sentences for those convictions.


Armstrong, J.

We concur:

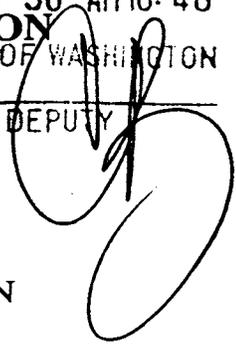

Houghton, P.J.


Bridgewater, J.

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DIVISION II

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN EGGLESTON,

Appellant.

No. 29915-1-II

ORDER AMENDING OPINION

The part-published opinion in this matter was filed on August 31, 2005. This order amends the filed opinion as follows:

Page 7, lines #14 - 15, the following text shall be deleted:

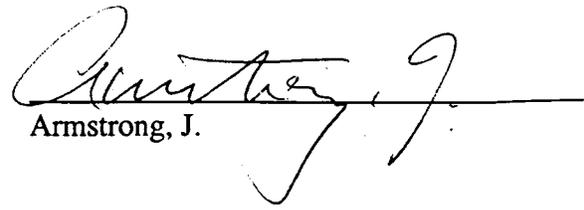
Only factor (1) is at issue here, whether the third jury necessarily decided the same issue the first jury decided.

On page 7, beginning at line 14, the following text shall be inserted:

Only factor (1) is at issue here, whether the third jury necessarily decided the same issue the second jury decided.

IT IS SO ORDERED.

DATED this 30th day of September, 2005.


Armstrong, J.