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NO. 29915-1

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN THOMAS EGGLESTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 95-1-04883-0

BRIEF OF RESPONDENT

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Appendices

Appendix A

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly allow the State to adduce evidence showing that defendant knew or should of known the victim was a law enforcement officer when defendant killed him?
2. Does defendant's failure to raise his collateral estoppel claim in the trial court, as well as his failure to meet the four prong collateral estoppel test, preclude review of this claim of error?
3. Has defendant failed to show that the collateral estoppel doctrine is applicable when it is premised upon an erroneously completed special verdict form in a previous trial and when the finding on the special verdict is not a material element of the current charge?
4. Did the trial court properly exclude videotapes of poor quality?
5. Did the trial court properly limit defense counsel from attempting to impeach a State's witness with statements a prosecutor made at that witness's sentencing hearing six years earlier?
6. Did the trial court properly limit defense counsel's attempt to impeach a State's witness with information he received a "deal" when there was never any evidence such a deal existed?
7. Did the trial court properly exclude a defense expert's testimony regarding speculative matters and matters contrary to the parties' stipulation?
8. Did the trial court properly limit defense counsel from impeaching State's witnesses with prior statements when the prior statements were not inconsistant with their testimony?
9. Did the trial court properly exclude evidence regarding the defendant's sleep routine when it did not qualify as evidence of habit?

10. Did the trial court properly admit expert opinion when the opinions were supported by scientific evidence generally accepted in the relevant community, and when the experts did not speculate as to who fired the first shot?

11. Did the trial court properly admit evidence of defendant's drug dealing and drug possession when it was relevant to prove motive, intent, absence of mistake, res gestae, and to disprove self-defense?

12. Did the trial court properly admit former testimony of a witness who was unavailable at the time of this retrial?

13. Did the trial court's jury instructions properly articulate the law of self-defense, and allow defendant to argue his theory of the case?

14. Did the trial court properly exercise its discretion when it dismissed jurors who could not carry out their duties, and when it dismissed a juror the parties stipulated should be dismissed?

15. Did the trial court properly exercise its discretion when it concluded beyond a reasonable doubt that there was no reasonable possibility that the juror misconduct impacted the verdict?

16. Has defendant failed to show the trial court violated the double jeopardy clause when it sentenced defendant on drug charges that were not part of the third trial, but were part of the first trial, and the judgment and sentence from that first trial was voided by this court's opinion in defendant's first appeal?

17. Did the trial court properly find that two of defendant's drug convictions were not the same criminal conduct when defendant stipulated to his offender score below, and never raised a same criminal conduct argument before the court after his first, or third trials?

18. Must this case be remanded for resentencing pursuant to Blakely v. Washington, when the basis for the exceptional sentence was not found by the jury?

B. STATEMENT OF THE CASE.

1. Procedure

On October 27, 1995, Brian Thomas Eggleston, hereinafter “defendant,” was charged with one count of unlawful delivery of a controlled substance. CP 1621. On October 31st, defendant was charged, by amended information, with murder in the first degree with aggravating circumstances, assault in the first degree, unlawful delivery of a controlled substance, and unlawful possession of a controlled substance with intent to deliver. CP 1622-30. The amended information alleged that the defendant committed the murder knowing, or reasonably should have know, that the victim, John Bananola, was a law enforcement officer who was performing his duties at the time of the act resulting in his death. The amended information also alleged that the assault in the first degree was committed against Warren Dogeagle, that the delivery of the controlled substance was within 1000 feet of a school, and that the unlawful possession of the controlled substance was committed while defendant was armed with a firearm.

The murder occurred when members of the Pierce County Sheriff's Department (PCSD) were serving a search warrant at defendant's residence. CP 1626-30. The search warrant was being executed because the defendant had sold marijuana to an informant. The Sheriff's Department was particularly concerned because the defendant's brother is

a Pierce County Sheriff's Deputy and had been living with defendant during the period when defendant had been reportedly selling marijuana out of the house. CP 1626-30.

Ron Englert, a criminal reconstructionist, was hired to assist the State in this case. RP 4627-28. In April of 1996, Mr. Englert went to the Eggleston residence with the surviving deputies who served the search warrant. RP 1383. The deputies were told to tell Mr. Englert what they remember occurred, and were videotaped as they related what they each recalled. RP 1383.

On February 24, 1997, the State filed another amended information. CP 1102-07. This information charged six counts. Count One charged defendant with committing murder in the first degree, with the same aggravating circumstance alleged in the previous amended information, as well as a firearm sentencing enhancement. Count Two charged assault in the first degree, with a firearm sentencing enhancement, occurring on October 16, 1995. Count Three charged the defendant with unlawful delivery of a controlled substance, marijuana, on October 7, 1995. This amended information also alleged this delivery occurred within 1000 feet of a school.

Count Four alleged defendant committed the crime of unlawful possession of a controlled substance with intent to deliver, marijuana, on October 16, 1995. This count carried with it two enhancements: that the possession occurred within 1000 feet of a school, and that defendant was

armed with a firearm at the time of the crime. Count Four also alleged in the alternative, that defendant was in possession of more than 40 grams of marijuana, and did so while armed with a firearm. Count Five of the amended information alleged defendant had committed the crime of delivery a controlled substance, marijuana, on October 5th, 1995. Count Six charged the defendant with unlawful possession of a controlled substance, mescaline, on October 16, 1995. CP 1102-07.

Defendant was tried on this amended information, and on May 7, 1997, the jury returned verdicts of guilty to all counts except to Count One, Murder in the First Degree. CP 1121-27, 1640-31. The jury hung on the murder charge and the court declared a mistrial.

On June 12, 1997, the trial court sentenced defendant on the five counts for which he had been convicted. CP 1204-15. On Count Two, the assault in the first degree conviction, the court sentenced defendant to 160 months, plus 60 months for the firearm enhancement. The court calculated defendant's offender score as four for this count, assessing one point for each of the other current convictions. Defendant had no prior felony convictions. CP 1205. Defendant was sentenced to 57 months, plus 24 months for the school zone enhancement on Count Three. Defendant's offender score for this count and Count Five was eight: one point for the assault conviction, one point for the possession conviction (Count Six), and three points each for the current delivery and possession with intent convictions.

On Count Four the court sentenced defendant to 48 months, plus 24 months for the school zone enhancement and an additional 24 months for the firearm enhancement. The court calculated defendant's offender score for this count as eight: one point for the assault conviction, one point for the possession conviction (Count Six), and three points each for the two current delivery convictions. The court sentenced defendant to 57 months on Count Five, and three months on Count Six. The court had the opportunity to conclude that any of the above convictions encompassed the same criminal conduct and did not do so. CP 1205.

The following year defendant was retried on the murder in the first degree charge. On May 20, 1998, the jury returned a verdict of guilty to the lesser included offense of murder in the second degree, having found defendant not guilty of murder in the first degree. CP 1494, 1496. The jury returned a special verdict finding that defendant committed the crime while armed. CP 1641. The court entered these verdicts. The court observed that the jury also completed the aggravating circumstance verdict, but that it had no significance to the verdict the jury returned. CP 1496; RP 5/20/98, pp. 8501-09; Appendix A. The jury answered the aggravating circumstance verdict in the negative.

On July 2, 1998, the trial court sentenced defendant to 288 months for the murder, plus 60 months for the firearm enhancement, and ran that sentence consecutive to the assault in the first degree conviction, but concurrent to the drug convictions. CP 1520-30.

On September 14, 2001, in an unpublished consolidated opinion, this Court overturned defendant's murder and assault convictions, but affirmed his drug convictions. State v. Eggleston, No. 22085-7-II, No. 23499-8-II.

On September 27, 2002, defendant's third trial began with pretrial motions before the Honorable Stephanie Arend. RP 1. At a pretrial hearing the State moved the court to permit it to present evidence by way of prior testimony, because Tacoma Police Department forensics officer Ted Garn was unavailable to testify. CP 1655-65. Accompanying the motion was a note from Garn's Doctor which read, "Mr. Garn physically can not (sic) be expected to testify @ trial due to his neck condition." CP 1665. The court heard testimony from Mr. Garn, who explained he was suffering from post traumatic stress syndrome and suffered memory loss. RP 1228-42. The court also heard testimony from Mr. Garn's wife, Ruth Garn, who explained that Mr. Garn becomes violent, depressed, and paranoid, and that he experiences hallucinations when exposed to things relating to violence. RP 1242-48. The court concluded that Mr. Garn was unavailable to testify and the State would be permitted to use his prior testimony in lieu of his testimony at trial. RP 1366-72. The court concluded that Mr. Garn was unavailable because he lacked memory of the events in question, and his current mental condition prevented him from testifying.

After a lengthy trial, on December 16, 2002, defendant was again convicted of murder in the second degree, and assault in the first degree. CP 810-13; RP 6519-23. The jury returned special verdicts indicating that defendant was armed with a firearm when he committed both of these crimes. Id.

After the trial defendant brought a motion for a new trial based on juror misconduct. CP 847-66. The court held a hearing and heard testimony from all twelve jurors. RP 6527-6612. The trial court concluded that juror misconduct occurred when two jurors heard of results of a prior trial, but concluded beyond a reasonable doubt there was no reasonable possibility that the verdict was affected by the misconduct. CP 921-31.

On January 9th, 2003, defendant was sentenced for the third time. Defense counsel stipulated that the State's calculation of the offender score on the murder conviction was correct. RP 6636. Defense counsel did object, however, to the court re-sentencing defendant on the drug convictions. RP 6640-41. The State noted that the drug sentences imposed after the first trial were incorrect because that judgment and sentence had run the enhancements consecutively and they should have been run concurrently. RP 6643-46. The court proceeded to sentence defendant on all counts.

The court sentenced defendant to an exceptional sentence of ten years above the standard range on the murder conviction, concluding that

defendant knew Deputy Bananola was a law enforcement officer at the time of the murder. The court sentenced defendant within the standard range on all other counts. CP 878-94. The total sentence imposed was 583 months.

This timely appeal followed. CP 895-920.

2. Facts

In early August 1995, Deputy Ben Benson began an investigation into defendant's marijuana sales. RP 1418-19. A man named Steve McQueen had come to the PCSD office and told Deputy Benson and Deputy Bananola about a marijuana grow on the Key Peninsula, in the Gig Harbor area. RP 1420. Mr. McQueen went with the deputies to the Key Peninsula, and showed them the marijuana grow. RP 2764. Mr. McQueen also told the deputies that he bought marijuana from defendant. RP 1421, 2764-66. Mr. McQueen told the deputies that he was buying marijuana from a person whose brother was a deputy sheriff, and this brother was present when McQueen bought marijuana from defendant at defendant's house. RP 2765. Mr. McQueen told the deputies where defendant lived and Deputy Benson confirmed that a sheriff's deputy listed that address as his home address in the Department's records. The sheriff's deputy was Brent Eggleston, defendant's brother. RP 1423.

Deputy Benson began to conduct surveillance of the Eggleston residence and viewed the house on approximately ten different occasions.

Deputy Benson observed Deputy Eggleston at the residence on one occasion, but never saw his patrol car at the house. RP 1433. Deputy Benson informed his supervisors of what he had learned. RP 1435.

Deputy Benson then arranged controlled buys, during which Mr. McQueen would buy marijuana from defendant. RP 1437. Mr. McQueen was to be a “confidential informant,” conducting the buys but not expected to testify if a case went to trial. RP 1438. On October 5, 1995, Mr. McQueen participated in a controlled buy, buying \$120 worth of marijuana from defendant outside Magoo’s Tavern, where defendant worked as a bartender. RP 1442. At about 11:00 p.m., Deputy Benson observed Mr. McQueen and defendant exit the tavern, and get into defendant’s car with two other people. RP 1444. The defendant was in the driver’s seat and the car pulled away from the tavern. The car was only gone for a few minutes, just long enough to drive around the block. RP 1445. While the car was out of sight of Deputy Benson, Mr. McQueen bought three \$40 bags of marijuana from defendant. RP 2791.

On October 7, Mr. McQueen bought \$240 worth of marijuana during a second controlled buy. RP 1449. On October 9th, Deputy Benson used the information he had collected to obtain a search warrant for defendant’s residence. RP 1459-60. Deputy Benson determined he would have the search warrant served on Monday morning because he had information that defendant received deliveries of marijuana on the weekend and sold it during the week. RP 1461.

It was the standard practice of the Sheriff's Department to serve drug search warrants during daylight hours, and the preference was to do so early in the morning because drug dealers are usually asleep and sober at that time. RP 1463-64. Deputy Benson also wanted to serve the warrant before the children arrived at the elementary school directly across the street from the Eggleston residence. By the time the deputies were prepared to serve the warrant Deputy Benson had determined that Deputy Eggleston did not live at the residence, but the entry team prepared for his presence in case he was there at the time the warrant was served. RP 1465, 1478-79. If Deputy Eggleston's patrol vehicle was at the residence, the entry team would not conduct the entry as planned. RP 1478-79.

On the morning of October 16th, the narcotics team prepared for the raid of the Eggleston residence by meeting at a Parkland fire station. RP 1464. Deputy Benson gave the entry team some background information about his investigation, informing them that defendant had sold marijuana, and that they had a search warrant for the house. RP 1468-69. Deputy Benson informed the team that he expected the defendant to be present, his girlfriend, his mother, and possibly a small child. RP 1469. Deputy Benson also related that the information he had was that defendant had a handgun and a shotgun in his bedroom. RP 1470.

The entry team consisted of Deputies Bananola, Dogeagle, Reigle, Reding, Fajardo, Kapsh and Larson. RP 1473-74. Deputy Benson was to

remain outside the house providing perimeter surveillance while the warrant was served by the entry team. RP 1474. As the team approached the residence in the van, there were other PCSD officers who followed in other vehicles. One was a deputy in full uniform, driving a marked patrol car. This was done in order to let any observers know it was a police operation. RP 1479-80.

Deputy Larson was assigned to do the 'knock and announce' because he has a very loud voice. RP 1472. Deputy Dogeagle had the responsibility of ramming the door with the ram if that was necessary. RP 1472.

The team pulled up to the Eggleston residence shortly before 8:00 in the morning. RP 1480. The sun was up, and the entry was conducted during day light hours. RP 1508, 1747, 1750. The entry team van did not have its headlights on when it went to the Eggleston residence. RP 1508. All of the entry team members wore items, which identified themselves as members of the PCSD. Deputy Benson wore a green jacket, which identified him as a PCSD deputy, and had his badge affixed to the front of the jacket. RP 1501; Exhibits 15, 16. Deputy Larson was wearing a vest and jacket, as well as his badge, which clearly indicated that he was with the Sheriff's Department. RP 1744; Exhibits 309, 310. John Bananola wore black fatigues with a reflective vest material on the front and back. RP 1746; Exhibit 110. The jacket had four inch letters stating "SHERIFF" on the front and back. RP 3556.

Deputy Reding wore a heavy tactical vest with "SHERIFF" written on the front and back, a ballistic helmet with a face shield, and black pants. RP 3036-39; Exhibits 311, 312. Deputy Reigle wore a jacket that identified him as a Sheriff's Department deputy. RP 3289-90; Exhibits 31, 32. Deputy Kapsh also wore a jacket, which identified him as a Pierce County Sheriff's Deputy. RP 3660; Exhibits 227, 228. Deputy Fajardo was wearing a BDU uniform that identified her as a PCSD deputy. RP 3961; Exhibits 267, 268. Deputy Dogeagle wore items which identified him as a sheriff's deputy, and also wore a hooded mask because he was working undercover on another case involving heroin dealers who lived in the same neighborhood, and he could not afford to be identified as a deputy by them. RP 4400-01, 4406; Exhibits 280, 281.

Deputy Benson parked the van in the back of the residence. RP 1481-82. The team exited the van and approached the backdoor of the house because this was the door Deputy Benson had observed being the one most frequently used during his surveillance. RP 1432, 1482. Deputy Larson was first to the back door, and knocked loudly five to six times. RP 1483-84. Deputy Larson "knocked and then announced, 'Police. Sheriff's Department. Search Warrant.'" RP 1484. Deputy Larson did this at the top of his voice, then waited a few seconds and repeated the 'knock and announce.' After the second knock and announce, one of the deputies tried the door and it was unlocked, so he opened the door. RP 1485, 1758, 3048. After the door was opened, Deputy Larson again

announced loudly, "Police. Sheriff's Department. We have a search warrant." RP 1486, 1759. As the deputies prepared to enter the house there was a marked patrol car in the backyard with its emergency lights on. RP 3601.

Linda Eggleston, defendant's mother, awoke to a noise, and called out to her son. Defendant told her to stay in her room, and "I'll handle this." RP 3628.

The deputies then waited five to ten seconds before Deputy Reding entered the house. RP 1759-60. Between thirty and forty-five seconds elapsed between the first knock and Deputy Reding's entry. RP 1579. Deputy Reding entered the house, into the kitchen. RP 3051. Deputy Reding observed defendant's father, Tom Eggleston, on the couch in the living room and ordered him to show his hands. RP 3065. Deputy Reding approached him with his gun pointed at Tom Eggleston. RP 3066. When Tom Eggleston complied with the order, Deputy Reding took his finger off the trigger of his gun, and returned the gun to a low ready position. RP 3074.

As the deputies entered the house, they continued to announce "Sheriff's Department. Search Warrant." RP 3093-3103. Deputy Reding did it three times in a loud voice as he went from the kitchen to where Tom Eggleston lay. RP 3093.

Deputy Reigle followed Deputy Bananola into the residence. He observed Deputy Reding make initial contact with Tom Eggleston and saw

Tom Eggleston put his hands up. RP 3302. Deputy Reigle came off Deputy Reding's hip, following Deputy Bananola to the next unsecured area. RP 3304. The team members continued to loudly announce their presence: "Sheriff's Department. Search Warrant." RP 3304-07. Deputy Reigle made this announcement and heard Deputy Bananola make the same announcement as he approached the hallway. RP 3311. Immediately after Deputy Bananola rounded the corner of the hallway, Deputy Reigle prepared to enter the hallway by raising his gun from the low ready position. RP 3322. Gunfire erupted just as Deputy Reigle started around the corner of the hallway. RP 3323-24. Deputy Reigle spun around, believing the gunfire came from the couch area he had just past, but realized it was not coming from there. RP 3323-25. Deputy Reigle saw Deputy Bananola heading towards the front door of the residence, moving low, not standing, and not crawling. RP 3325-26. Deputy Reigle heard Tom Eggleston tell Linda Eggleston, defendant's mother, to "put the gun down." RP 3333. Deputy Reigle then retreated back out the backdoor he had entered. RP 3332-34.

While covering Tom Eggleston, Deputy Reding heard this volley of gunshots. RP 3076. Deputy Reding turned toward the hallway to his right and saw Deputy Bananola coming from the hallway, wearing his clearly visible vest that said "sheriff" on it. RP 3079. Deputy Reding saw Deputy Bananola up-right and then start to stumble. RP 3080. After this initial gunfire, Reding heard Bananola let out an "ugh." RP 3081. As

Deputy Reding retreated towards the back door, he continued to face the hallway from which Deputy Bananola had come. RP 3083-84. Reding saw defendant as he moved towards the living room, past the organ. RP 3083. The defendant moved purposely, and did not appear to be injured. RP 3085. Defendant had a gun in his hands and Deputy Reding opened fire, firing three shots. RP 3086. Deputy Reding's shots did not hit defendant. RP 3086.

Deputy Larson entered the house and observed Deputy Reding make his initial contact with Tom Eggleston. RP 1763-64. Deputy Larson then observed Deputy Bananola as he went around the corner of the hallway. RP 1766-67. Deputy Larson heard gunfire and saw muzzle flash and numerous starbursts. RP 1768. Deputy Larson saw Deputy Bananola running out of the hallway and towards the living room. RP 1769.

Deputy Dogeagle went to the backdoor with the ram, an item used to breach the door if necessary. RP 4395, 4408. Deputy Dogeagle heard Deputy Larson pound on the back of the residence, and announce "Police. Sheriff's Department. Search Warrant." RP 4410. Deputy Dogeagle observed Deputy Larson do this two times. After the second 'knock and announce' the door was opened, and Deputy Larson again loudly announced "Sheriff's Department. Search Warrant." RP 4410. Deputy Dogeagle heard the deputies announce "Police. Search warrant. Sheriff's Department," as they entered the house. RP 4412. Deputy Dogeagle followed Deputies Reding, Bananola, Reigle, and Larson into the house.

RP 4411. Deputy Dogeagle stepped through the entry and into the kitchen and could see Tom Eggleston on the sofa when he heard gunfire. RP 4413.

During the initial gunfire, Deputy Dogeagle could hear “Police, put the gun down.” RP 4417. Deputy Dogeagle observed Deputies Reigle and Larson withdraw after the gunfire. RP 4418. Deputy Dogeagle watched as these two deputies exited and then saw Deputy Reding pass by him. After the first gunshots Deputy Dogeagle heard Deputy Bananola say, “Put the gun down. Police.” RP 4421. Reding fired several shots, “I believe three,” before he exited. RP 4419. Deputy Dogeagle could not tell at what Reding was shooting. RP 4420. After Deputy Reding had fired his three shots there were more gunshots. RP 4420.

Deputy Dogeagle was still in the kitchen, covering two doorways in the house, believing the threat was coming from that direction. RP 4425-26. The defendant came through one of the two doors and started to shoot at Deputy Dogeagle. RP 4426. The defendant raised his gun, pointed it in the direction of Deputy Dogeagle and pulled the trigger. RP 4427. Deputy Dogeagle raised his gun and returned fire. RP 4427. Deputy Dogeagle fired several shots and defendant fell back into the hallway. Deputy Dogeagle remained in the kitchen until the deputies outside re-grouped and re-entered the house.

When the team initially entered the house, Deputy Fajardo entered the residence behind Deputy Dogeagle. RP 3972. She came through the

door and into the foyer and then the kitchen, stopping at the side of the dishwasher. RP 3974-75. Deputy Fajardo yelled, "Sheriff's Department. Search Warrant," and heard Deputy Reding ordering Tom Eggleston to put his hands up. RP 3975-76. Deputy Fajardo then heard gunfire erupt and saw Deputy Reigle retreating towards her. RP 3977. After this initial exchange of gunfire, Deputy Fajardo heard Deputy Bananola say something but could not make out what exactly he said. RP 3983. There was then a second volley of gunfire. RP 3981-83.

Deputy Reding exited the house and retrieved the ballistic shield from the entry team van. As Deputy Reding exited the house he heard more gunfire. RP 3089-90. Deputy Reding re-entered the house with other deputies following him. They re-entered the house and immediately detained Tom Eggleston. RP 3108-09. Deputy Reding observed John Bananola laying face down on the ground, still wearing his reflective vest. RP 3108. Deputy Reding rolled Deputy Bananola onto his back and noticed a 9 mm brass spent casing at Deputy Bananola's waistline. RP 3109, 3112-14. Deputy Reding observed a bullet entry wound between Bananola's right eye and temple, and immediately started performing CPR. RP 3110-12. Deputy Reding and Deputy Kapsh performed CPR until the paramedics relieved them. RP 3112. After the paramedics relieved the deputies, Deputy Reding was standing with Deputy Fajardo at Bananola's feet. Deputy Fajardo observed Deputy Reding bend down and

pickup a piece of metal. RP 4002-03. Deputy Reding commented that it looked like a 9 mm and put it on the arm of the sofa. RP 4003.

Other deputies went down the hallway and detained Mrs. Eggleston and defendant.

Doctor Emmanuel Lacsina, a forensic pathologist who works for the Pierce County Medical Examiner's Office, conducted the autopsy on Deputy John Bananola. RP 2551, 2563. Dr. Lacsina observed thirteen total injuries on Deputy Bananola's body. Seven of the wounds were entrance wounds, two were re-entrance wounds, and four were exit wounds. RP 2576. The doctor detailed the injuries, but could not determine a chronological order. The first wound was labeled gunshot wound A. RP 2576. This injury was a gunshot to John Bananola's head, just below the top of the head, on the left side. RP 2576-78. The bullet traveled from back to front, left to right and downward. Id. The bullet was recovered from the soft tissue of the right side of the neck, close to the jaw line. RP 2578. This bullet injury was sufficient to cause the death of Deputy Bananola. RP 2581. There was no gunshot residue associated with gunshot wound A, so the shot was fired from more than 24 inches from Deputy Bananola's head. RP 2582.

Gunshot wound B entered the top of Deputy Bananola's head, slightly in the back, and traveled left to right in a downward path, perforating the skull, through the right lobe of the brain, and exited through the right ear. RP 2584. This bullet created an exit wound, wound

C. The injury from this gunshot was also a deadly injury. RP 2588. The exit wound for this injury was very irregular, with abrasions around the margins of the wound. RP 2589. The most common reason for an exit wound with abrasions such as these is that the body would be resting against a surface such as a wall or tight clothing. RP 2589. This type of wound is referred to as a shored or supported exit wound. RP 2589.

Gunshot wound D was also located on the top of the head. RP 2590. The wound was on the frontal, left side of the head, in the hairline. RP 2590. The stippling and tattooing, and skull fractures associated with this injury demonstrate this bullet was fired from within 18 to 24 inches of Deputy Bananola's head. RP 2592, 2595. The bullet exited the body, creating injury E. This exit wound also showed areas of abrasion margins, indicating that when the bullet was exiting, that part of the head was in contact with another object. RP 2595. This shoring of the exit wound could have been caused by contact with skin. RP 2597. The same bullet left Deputy Bananola's head and entered his right upper arm, wound H. RP 2596. The bullet was recovered from his arm. RP 2599. The arm also had stippling injuries associated with the gunshot that created gunshot wound D. RP 2599. This bullet was shot from less than 24 inches away, hit Deputy Bananola's head, exited his head which was supported, and entered his arm. RP 2650.

Gunshot wound F was to the right back shoulder of Deputy Bananola. RP 2601. This bullet traveled through soft tissue and exited a

little bit below and to the back of his right armpit. The exit wound associated with gunshot wound F, was wound G. These were superficial wounds that would probably not have been fatal, or incapacitating. RP 2603-06. The sharply downward trajectory lead Dr. Lacsina to believe this injury was probably sustained while Deputy Bananola was crouching. RP 2604. There was no evidence of shoring on exit wound G. RP 2628.

Gunshot wound J entered Deputy Bananola's left arm, and exited as wound K. RP 2631. This bullet then re-entered Deputy Bananola in the left side of his chest. The arm injury was superficial, and showed no signs of stippling so the gunshot was more than 18-24 inches from the injury. The bullet entered the chest, traveling from left to right, and downwards. RP 2632. The re-entry injury was labeled wound L. RP 2631. The bullet traveled between the fifth and sixth rib, nearly grazing the left lung, and grazing the heart, before lodging in the right front of Deputy Bananola's chest. RP 2633. Assuming Deputy Bananola received immediate medical attention, this injury would not have been fatal, and probably would not have had severely restricted his motor functions. RP 2634.

Gunshot wound M entered Deputy Bananola's left chest area and exited after traveling a short distance from where it entered; creating exit wound N. PR 2635-36. Wound M appeared to have portions of Deputy Bananola's Kevlar vest sticking to it. This did not appear to be a fatal

injury, and the gun was probably fired more than 24 inches from the injury. RP 2637.

Gunshot wound O was to the front, inside of Deputy Bananola's left foot. RP 2638, 2648-49. The oblong shape of the bullet indicates it struck something before it hit Deputy Bananola's foot. RP 2639. Dr. Lacsina recovered the bullet from Bananola's foot. While the bullet hit and fractured the bones in Deputy Bananola's foot, the doctor could not say how much mobility he would have lost, but the injury was not fatal. RP 2640-41. This bullet was fired by defendant, hit the floor and then hit Deputy Bananola's foot, while he and the deputy were in the hall, earlier in the incident. RP 4650-52; Exhibit 331.

Deputy Bananola was also shot in the back twice, but the bulletproof vest stopped these bullets, and the only injuries were bruising. RP 2644- 47. One of these bullets traveled through the R in SHERIFF on the vest. RP 2647.

Doctor John Howard, the Pierce County Medical Examiner and a forensic pathologist testified that the successive bullets, which hit Deputy Bananola's head, would have caused immediate incapacitation. RP 4197-98, 4222. The effect of the first of these gunshots, no matter which of the three, would make the body go limp and cause Deputy Bananola to lose all voluntary muscle control within a second. He would have instantly lost his ability to stand and would collapse. RP 4222. If Deputy Bananola was in a crouched position when he was hit by the first of the three fatal

gunshots, he would lose all ability to maintain a crouched position and collapse to the ground. RP 4228. The other injuries could have been incapacitating; such incapacity would have taken a few minutes. RP 4228-29.

Dr. Howard testified with reasonable scientific certainty, that there were no inconsistencies with the theory that Deputy Bananola's arm was in contact with his head when he suffered the gunshot injury that penetrated his skull, exited his head, and lodged in his arm. RP 4237-39. The stippling patterns on the head and arm of Deputy Bananola were consistent with the arm being against the face when the shot was fired. RP 4267.

Mr. Englert testified as to his findings after reconstructing the scene using the statements of the officers, the autopsy report, crime scene reports, diagrams, a video of the scene, numerous photographs, and having visited the scene of the crime. RP 4627-28. From his training and experience, Mr. Englert was able to form an opinion with reasonable scientific certainty about what occurred at the Eggleston residence on the morning of October 16, 1995. RP 4628-29; Exhibits 330-342.

Mr. Englert explained that Deputy Bananola was in the hallway and fired a shot that went through the bathroom door, while defendant fired a shot that ricochet off the floor. RP 4641, 4697. As Deputy Bananola collided with the organ, his gun fired sending another bullet through the wall, through a closet door, and into the dresser. RP 4653,

4697. Deputy Bananola exited the hallway as described by Deputy Reding. RP 4655. Defendant then came into view of Deputy Reding and Reding fired three shots towards defendant. RP 4655. Mr. Englert indicated that the location of Deputy Bananola's body, when found after the gunfire ceased, indicated that he went around the corner into the living room in the period of time relative to Deputy Reding firing at defendant. RP 4655-57.

Deputy Bananola fired his weapon several times while in the living room. RP 4657. Deputy Bananola fired a shot that went through the front door. RP 4658. The deputy then fired another shot into the love seat and another into the television. RP 4658. Deputy Bananola also fired a shot into the ceiling. RP 4669. A trajectory analysis done by Jim Krylo revealed these shots all came from where Mr. Englert placed Deputy Bananola in Exhibit 334. RP 4668-59. The placement of Deputy Bananola at this time was also aided by the autopsy report which indicated that the gunshot injury to his right shoulder was at a very steep angle. RP 4669-70. This is only possible in Mr. Englert's opinion, if the deputy had been very low to the floor.

Mr. Englert explained that the bullet that caused the injury to the shoulder was the same casing Deputy Reding picked up off the floor. RP 4672. He came to this conclusion because the bullet had red oak flooring on it and BDU fibers consistent with Deputy Bananola's clothing. RP

4673. It was also found in the area, there was a bullet like defect in the red oak flooring, and it was the only bullet unaccounted for.

Mr. Englert conclude that Deputy Bananola shot defendant in the groin just prior to defendant putting his bloody hand on the chair in the living room. It was the defendant's blood on the chair and there was a pubic hair found on the chair. RP 4676-78; Exhibits 334, 335. Mr. Englert took into account the trajectories from Deputy Bananola's shots, the blood on the chair, and the castoff blood of defendant, and established that after he had been shot, defendant came around the chair, or somehow came back towards Deputy Bananola who was on the floor. RP 4680.

Deputy Bananola was then shot on the left side of his body. According Jim Krylo's findings, the bullets that hit Deputy Bananola in the back, and lodged in his vest, came from the left and went in at an angle of 15 to 75 degrees. RP 4682. These bullets were fired from the area near the chair. RP 4684. Mr. Englert explained that the evidence supported his contention that these shots occurred in the living room, rather than the hallway, because the wall in the hallway made it impossible for the injuries to be inflicted as the trajectories indicate they were inflicted. RP 4686.

By reviewing Dr. Lacsina's report regarding the shored exit wounds and the re-entry wound, the blood back spatter going up underneath the glass table, the very acute projected blood stains on the wall, the elongated stains of blood on the love seat, and the acute angle of

the blood spatter on the archway, Mr. Englert was able to demonstrate that Deputy Bananola was laying on the living room floor with his head on top of his right arm when he was shot in the head. RP 4699-71, 4718-19; Exhibit 337. Further, the south face of the north archway had blood spatter with Deputy Bananola's brain tissue in it. RP 4706.

The blood spatter on the archway and west wall was the result of three gunshot wounds to John Bananola's head. RP 4708-09. Defendant was in front of Deputy Bananola, shooting down, from the left side. RP 4714. The gunshot that inflicted the head injury that was shored by Deputy Bananola's arm was fired only 18 to 24 inches from his head.

After shooting Deputy Bananola in the head three times, defendant touched the south archway wall and transferred blood onto it and the chair. RP 4722-35; Exhibit 338. Defendant then came into view of Deputy Dogeagle, fired one shot and was shot by Deputy Dogeagle. RP 4696-97, 4735-36; Exhibit 339. This conclusion was supported by the high velocity mist of blood, approximately chest high on the wall, in the area defendant came into Deputy Dogeagle's view. RP 4736. Mr. Englert concludes that defendant then went down the hallway to the bedroom. RP 4736. This conclusion was supported by the drops of blood close to the right side of the wall in the hallway, and the bloody transfer on the bed from defendant's right hand. RP 4736, 4747-48; Exhibit 340.

Mr. Englert testified that the location of the shell casings supported his conclusions as to where the participants were when they each fired

their respective weapons. RP 4740-44; Exhibit 342. The entire gun battle was over in 60 to 75 seconds. RP 4745.

Deputy Bananola fired seven times total, and defendant fired eleven times. RP 4697-98.

C. ARGUMENT.

1. COLLATERAL ESTOPPEL DOES NOT APPLY TO A PREVIOUSLY ANSWERED SPECIAL VERDICT WHEN THE JURY ANSWERED THE SPECIAL VERDICT IN THE PREVIOUS TRIAL CONTRARY TO THE COURT'S INSTRUCTIONS, DEFENDANT NEVER RAISED COLLATERAL ESTOPPEL IN THE SUBSEQUENT TRIAL, THE SPECIAL VERDICT WAS NOT NECESSARY FOR THE JURY TO ACQUIT DEFENDANT IN THE PREVIOUS TRIAL, AND DEFENDANT HAS FAILED TO SATISFY THE FOUR PART COLLATERAL ESTOPPEL TEST.

The second trial jury found the defendant not guilty of murder in the first degree, but guilty of murder in the second degree. That jury also answered a special verdict finding that defendant committed the crime while armed with a firearm. CP 1641. Another special verdict was submitted to the jury, an aggravating circumstance special verdict, which read as follows:

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: _____

CP 1495. The jury filled out the form to this special verdict, answering the question, "no." The court accepted the guilty verdict and the deadly weapon special verdict, but not the aggravating circumstance special verdict. The following is the trial court accepting the verdict at the end of the second trial:

THE COURT: Mr. Greer, are you the presiding juror?

JUROR GREER: Yes, I am.

THE COURT: And has the jury reached a verdict?

JUROR GREER: Yes, we have.

THE COURT: If you'd hand the verdict forms to Mrs. Rose, the judicial assistant.

I'll read the verdicts. Verdict form A, murder in the first degree. We the jury find the defendant not guilty of murder in the first degree, of the crime of murder in the first degree as charged. Verdict form B, murder in the second degree. We the jury, having found the defendant not guilty of the crime of murder in the first degree as charged, or being unable to unanimously agree as to that charge, find the defendant guilty of the lesser included crime of murder in the second degree. Special verdict form, deadly weapon. We the jury return a special verdict by answer as follows: Was the defendant armed with a deadly weapon, pistol, revolver, or any other firearm, at the time of the commission of the crime of murder in the first degree or murder in the second degree? Answer, yes. Both verdict

forms were - - all three verdict forms that I referred to have been signed by the presiding juror.

Report of Proceedings (5/20/98) 8501-02; Appendix A.

Judge Kruse then polled each of the jurors, and each of the twelve confirmed that the verdicts read by the court were their personal verdicts, and the verdicts of the jury. After polling the jury the court accepted the verdicts:

THE COURT: The verdicts will be accepted by the court. I do want to indicate that special verdict form, aggravating circumstances, was also filled out by the jury, but it really has no significance to the verdict that the jury rendered. Ladies and gentlemen of the jury, you are discharged from your duties as jurors in this cause. I will be the sentencing judge in this matter, so I'm not going to say a heck of a lot this afternoon, except to thank you for your unusual and lengthy service as jurors in this cause. I may be in touch with you in the future.

Report of Proceedings (5/20/98) 8505-06; Appendix A.

The court's observations are consistent with the court's instructions. The instructions told the jury to fill out the aggravating circumstance special verdict form only if it convicted defendant of murder in the first degree. CP 1491-93; Instruction 28.

- a. Defendant failed to raise the collateral estoppel challenge below and is therefore precluded from raising this issue on appeal.

Defendant asserts that the trial court erred when it permitted the introduction of evidence that he premeditatedly shot Deputy John Bananola, and that he knew or should have known that Deputy John Bananola was a law enforcement officer. Defendant's objection is based on the legal principle of collateral estoppel. Defendant never asserted this objection at trial. "The failure to make a timely objection to the admission of evidence at trial precludes appellate review." State v. O'Neill, 91 Wn. App. 978, 993, 967 P.2d 985 (1998)(citing State v. Florczak, 76 Wn. App. 55, 72, 882 P.2d 199 (1994)).

Under RAP 2.5(a), claims of error raised for the first time on appeal will be considered if the claimed error concerns (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. The RAP 2.5 exception is construed narrowly. State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999)(citations omitted). An objection to the admissibility of evidence must be made to the trial court in order to preserve a claim of error on appeal. ER 103(a); State v. Davis, 141 Wn.2d 798, 850, n. 287, 10 P.3d 977 (2000). If not raised below, the defendant bares the burden of demonstrating that a claim of error is both

constitutional and manifest. "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999)(citations omitted). Defendant has failed to even address this requirement, and therefore has failed to carry his burden of proof.

Collateral estoppel cannot be raised for the first time on appeal. State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995); In re Marriage of Knutson, 114 Wn. App. 866, 870, 60 P.3d 681 (2003)(see also Cunningham v. State, 61 Wn. App. 562, 566, 811 P.2d 225 (1991), where court held party against whom collateral estoppel was applied in the trial court, could not argue application of a prong of the test on appeal he did not argue below).

Even if the court were to consider reviewing the constitutional nature of the claim, defendant cannot prove the trial court committed manifest constitutional error. While collateral estoppel is a principle based on the federal constitutional prohibition against double jeopardy, that does not automatically make the claim one of constitutional magnitude. For example, it has long been the law in this State, and elsewhere that the exclusionary rule may not be invoked for the first time

on appeal. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995)(a defendant who fails to move to suppress allegedly illegal evidence waives any error associated with the admission of the evidence); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966)("The exclusion of improperly obtained evidence is a privilege and can be waived.").

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude -- that is what is meant by "manifest". If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in Chapman v. California, supra.

State v. Scott, 110 Wn.2d 682, 689-688, 757 P.2d 492 (1988)(citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The prohibition against raising claims of error on appeal exists is because "[t]he appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." Scott, 110 Wn.2d at 685 (citing Seattle v. Harclaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960)).

Numerous cases have looked at claims of error which on the surface may appear to be constitutional, but fail to meet the higher

standard applied to claims of error made for the first time on appeal. A court's refusal to instruct the jury on a lesser included offense is not an error of constitutional magnitude. State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991). The erroneous admission of ER 403 and 404(b) evidence is not an error of constitutional magnitude. State v. Elmore, 139 Wn. 2d 250, 283, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000). The admission of hearsay, absent a timely objection, will not warrant reversal if the declarant is available for examination. State v. Warren, 55 Wn. App. 645, 779 P.2d 1159 (1989) review denied, 114 Wn.2d 1004, 788 P.2d 1078 (1990).

The Court of Appeals has observed that failure to provide argument and analysis as to why a claim raised for the first time on appeal warrants review, will foreclose the issue from being reviewed. State v. Avila, 78 Wn. App. 731, 738, 899 P.2d 11 (1995).

In the present case, the challenge is not of constitutional magnitude because the collateral estoppel component of the Double Jeopardy Clause is not implicated. In Santamaria v. Horsley, 138 F.3d 1280 (9th Cir.) (*en banc*), cert. denied 525 U.S. 824, 142 L. Ed.2d 53, 119 S. Ct. 68 (1998), the court dealt with issue directly. Santamaria had been convicted of murder and robbery, but the jury answered a sentencing enhancement special verdict "not true," finding the defendant did not personally use a

deadly weapon (a knife) in the commission of the crime. Id. at 1280. A state appellate court reversed the murder conviction, holding that an 11-day continuance during jury deliberations was prejudicial error. Id. On remand, Santamaria filed a motion to, among other things, "preclude [the] prosecution's reliance on theory adjudicated in defendant's favor at first trial." Id. The court was faced with one question: "The sole issue we address is whether the jury's verdict of 'not true' on the use of a knife on a weapon enhancement charge precludes the State from presenting evidence and arguing in a retrial that Santamaria used the knife to commit murder." Id.

The Santamaria court held that if the use of the knife was not an ultimate fact necessary for a murder conviction under California law, "then collateral estoppel will not preclude the government from introducing evidence that Santamaria stabbed the victim, because collateral estoppel does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.'" Id. (quoting Dowling v. United States, 493 U.S. 342, 348, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990); citing United States v. Watts, 519 U.S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633, 637 (1997) (per curiam)).

Like the California murder statute evaluated in Santamaria, the Washington murder statute does not require the special verdict finding at issue in this appeal in order to convict defendant of murder in the second degree. The Washington murder statute does not require that a defendant know the victim was a law enforcement officer who was performing his official duties at the time of the act resulting in his death. RCW 9A.32.050(1)(a). Therefore, the collateral estoppel component of the Double Jeopardy clause did not preclude the State from introducing evidence that defendant shot Deputy John Bananola knowing he was a deputy. Because collateral estoppel does not exclude in all circumstances relevant and probative evidence that is otherwise admissible under the Rules of Evidence, defendant has failed to prove a constitutional error occurred.

Because defendant failed to object to the introduction of the challenged evidence at the trial court, and he has not established a manifest error affecting a constitutional right, he is precluded from raising his collateral estoppel challenge for the first time on appeal.

- b. The court specifically instructed the jury to answer the special verdict only if it convicted defendant of murder in the first degree, and therefore by answering the special verdict the jury disregarded the court's instructions and the answer should be ignored as surplusage.

“Superfluous answers, proffered in violation of trial court's instructions, are not part of special verdict and must be disregarded as surplusage.” Floyd v. Laws, 929 F.2d 1390, 1397 (U.S. App.,1991) (see also Tanno v. S.S. President Madison Ves, 830 F.2d 991, 993 (U.S. App. , 1987)). Floyd and Tanno were civil cases in which special verdicts were contrary to the general verdicts. The principle is equally applicable to criminal law. When a jury fails to follow the court's instructions the special verdict is surplusage and can not carry any weight.

In this case the jury was instructed that it should only answer the aggravating circumstance special verdict if it convicted defendant of murder in the first degree. Because the jury ignored the court's instructions, the verdict form was completed in error. The defendant raised no objection at the time the court entered the verdicts and cannot now assert that this verdict, which the court did not enter, had a binding collateral estoppel effect on future proceedings. Defendant might have a different argument if he had requested the aggravating special verdict be answered by the jury regardless of its decision with respect to murder in

the first degree, but that is not the case. The answer was surplusage and must be disregarded.

- c. Defendant has failed to demonstrate that the jury's finding on the aggravating circumstance special verdict meets the four prong collateral estoppel test.

Defendant asserts the principles of collateral estoppel prohibited the State from using evidence defendant knew or should have known Deputy Bananola was a law enforcement officer carrying out his duties. Defendant has failed, however, to even address the standard four part collateral estoppel analysis required for application of the doctrine. Because it is defendant's burden to establish collateral estoppel is applicable, this failure alone should end the analysis.

Before collateral estoppel is applied, affirmative answers must be given to each of the following questions: (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? Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

State v. Tili, 148 Wn.2d 350, 360-361, 60 P.3d 1192 (2003).

The party asserting collateral estoppel bears the burden of proving all four of these questions are answered in the affirmative. State v. Vasquez, 148 Wn.2d 303, 308, 59 P.3d 648 (2002); Thompson v. Dep't of

Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998); State v. Williams, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

Because defendant has not even addressed the four prong test, he has failed to meet his burden and this assignment of error should be rejected. His failure to address the test may be explained by his obvious inability to meet the test as detailed below.

- i. Defendant cannot demonstrate that he meets the first prong of the test because he cannot prove that the special verdict finding is identical with the one litigated in the third trial.**

The issue in the second trial was whether or not defendant committed a premeditated murder and knew the victim was a law enforcement officer. The issue in the third trial was whether or not the defendant committed intentional murder. Admission of evidence is not the same as an identical issue. The cases cited by defendant, with one exception noted below, deal with collateral estoppel being applied to criminal prosecutions that required proof of the issue previously litigated in order to prove an element of the charge in the subsequent proceeding.

The theory that evidence of previously litigated issues was inadmissible in subsequent trials was put to rest in Dowling v. United

States, 493 U.S. 342, 350, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990). The Supreme Court in Dowling concluded that the collateral estoppel aspect of the double jeopardy clause was not violated when evidence of a prior crime was admitted as evidence even though Dowling had been acquitted of that prior crime. In its decision, the Supreme Court limited the scope of constitutional collateral estoppel.

In Dowling, a man wearing a ski mask and carrying a small gun robbed a bank. The government called a witness who testified that two weeks after the robbery, the defendant, while wearing a ski mask and carrying a small gun, burglarized her home. The defendant, relying on Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), argued that the use of such evidence violated collateral estoppel because he had been acquitted of the burglary before the robbery trial. The Supreme Court held that the evidence was not barred by collateral estoppel because the "prior acquittal did not determine an ultimate issue in the present case." Dowling, 493 U.S. at 348. The court declined

to extend Ashe v. Swenson and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

Dowling, 493 U.S. at 348. The court reasoned that "because a jury might reasonably conclude that Dowling was the masked man who entered [the victim's] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite."

Dowling, 493 U.S. at 348-49.

Defendant cites Pettaway v. Plummer, 943 F.2d 1041 (1991), cert. denied 506 U.S. 904 (1992), for the proposition that rejection of the aggravating factor prohibits the government from proceeding on the same theory at a subsequent trial. Pettaway was convicted of murder, but the jury answered a special verdict asking whether the government had proven Pettaway had personally shot the victim "not proven." The Pettaway court concluded that "[i]f the state is allowed to proceed on the theory that Pettaway pulled the trigger himself, it is possible that the second jury would convict Pettaway by reaching a conclusion directly contrary to that reached by the jury in the first trial. This possibility is abhorrent to the principles underlying the Double Jeopardy Clause." 943 F.2d at 1047.

Defendant fails to note that Pettaway was reversed by Santamaria v. Horsley, 138 F.3d 1280 (9th Cir.1998). Santamaria was convicted of murder and robbery, but the jury answered "not true" to a sentence

enhancement charge, that he personally used a knife in the commission of a felony. The Santamaria court overruled Pettaway concluding that:

The second jury, if it convicted Pettaway on retrial based partially (or even solely) on evidence that he shot the victim, would be concluding only that Pettaway committed murder.

...

In this case, the State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement in the first trial. However, to convict him of murder under California law, the State is not required to prove beyond a reasonable doubt that Santamaria used a knife. Therefore, the use of a knife is not an ultimate fact for the retrial, and the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

Santamaria v. Horsley, 138 F.3d at 1280.

Defendant also relies on United States v. Romeo, 114 F.3d 141 (9th Cir. 1997), for the proposition that a prior general verdict prohibits a subsequent trial based on the same mens rea for a related crime. Romeo was charged with: (1) the importation of marijuana, and (2) possession of marijuana with intent to distribute. After a trial by jury, Romeo was acquitted, by a general verdict, of the possession with intent to distribute count, but the jury deadlocked on the importation count, as to which a mistrial was declared. Romeo, 114 F.3d at 142. “The only contested element, and the only contested issue argued to the jury, was Romeo’s knowledge - whether or not he knew that there was marijuana in the car.” Id. The Romeo court held that knowledge was an “an essential element of

the count remaining for retrial, the importation of marijuana. . . . Because the government is foreclosed by collateral estoppel from relitigating the element of knowledge, the district court erred in denying Romeo's motion to dismiss the remaining count.” Romeo, 114 F.3d at 143-144.

Romeo is not analogous to the present case because the aggravating circumstance special verdict in this case did not settle whether or not defendant intentionally killed Deputy John Bananola, but only addressed a sentencing enhancement. The special verdict in this case did not speak to any element the State needed to prove to convict defendant of murder in the second degree.

Defendant cites United States v. James, 109 F.3d 597 (1997), for the same proposition: that collateral estoppel bars “the government from using three robberies as overt acts in a subsequent conspiracy prosecution, where the defendant was acquitted by general verdict of the robberies at prior trials.” Brief of Appellant, at 26. James was actually convicted by the jury of the three robberies, but the convictions were overturned because the government failed to produce any evidence that the banks James was convicted of robbing were insured by the Federal Deposit Insurance Corporation. James, 109 F.3d at 599. After the case was remanded, the government charged James with conspiracy to commit bank robbery. The James court found that the prior robberies were not admissible to prove the overt acts (an element of the crime) necessary for the government to convict James of conspiracy to commit robbery. 109

F.3d at 602. However, the court permitted the government to proceed on the conspiracy charge and said nothing with respect to whether evidence of the three bank robberies could be used in some other manner (e.g. as ER 404(b) evidence). The courts holding was simply that the crimes of which defendant was acquitted could not be the basis of an element of the new crime.

Similarly, the court in United States v. Stoddard, 111 F.3d 1450 (1997), found that where ownership of \$74,000 had been determined adversely to the government in a prior prosecution, the government could not prosecute Stoddard for tax evasion for the same \$74,000. 111 F.3d at 1459-60. The court held that the government was precluded from relitigating ownership of the \$74,000 where that ownership was necessary to prove an element of the new offense. Id. If the elements of tax evasion could be proven by evidence other than Stoddard's alleged ownership of the \$74,000, collateral estoppel would not bar prosecution. Id. In the present case no element of the charge is dependent upon the aggravating circumstance special verdict. The State had to prove defendant intentionally murdered John Bananola. No element of that charge was determined adversely to the State in a prior proceeding.

Defendant's reliance on State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995), is equally misplaced. Kassahun was charged with murder in the second degree, by alternative means of intentional murder and felony murder. Id. at 939-40. The predicate felony for the felony

murder alternative was assault in the second degree of the murder victim. Kassahun was also charged with assault in the second degree of a second victim. The jury “hung” on the second degree murder charge and acquitted Kassahun of the second degree assault charge. At the re-trial, the jury was given a felony murder instruction that permitted it to convict Kassahun of felony murder, even if the predicate felony was the second degree assault perpetrated upon the second victim, an assault for which he had already been acquitted. The court found that this error violated the collateral estoppel component of the Double Jeopardy Clause. Id. at 951. In doing so, the court held that the evidence of the assault on the second victim was admissible, but that Kassahun could not be convicted of felony murder when an element of the crime had been previously adjudicated in his favor. Id.

In Harris v. Washington, 404 U.S. 55, 92 S. Ct. 183, 30 L. Ed. 2d 212 (1971), the Supreme Court reaffirmed the principle “that collateral estoppel ‘means simply that 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.’” Harris, 404 U.S. at 56 (quoting Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). After a letter bomb exploded and killed two people Harris was tried for the murder of one of the victims, and acquitted. Harris was then charged with murder of the second victim of the same bombing. The Supreme Court concluded that the issue of ultimate fact,

who sent the bomb, had been decided by the first trial, and therefore, could not be relitigated. Id. In Harris, the first jury determined that the State had not proven the element necessary to convict defendant: that he mailed the bomb. The second jury would have been asked to answer the same question. In Harris the elements the jury would have been asked to evaluate were identical between the first and proposed second trial. In the present case, the issue as to whether or not defendant knew John Bananola was a law enforcement officer, was not an element necessary for conviction. See Instruction 12; CP 775.

The only case that comes close to supporting defendant's position is State v. Funkhouser, 30 Wn. App. 617, 637 P.2d 974 (1981). Funkhouser was charged with four counts of misappropriating public funds and one count of keeping a false account. The jury acquitted Funkhouser of all four misappropriation charges but convicted him of keeping a false account. However, the trial court set aside the guilty verdict due to an instructional error. Defendant was tried again on the false account charge and convicted a second time. Id. at 621. The court of appeals determined that the trial court erred when it overruled defendant's objections to admission of evidence in the second trial "which, if believed, would necessarily show defendant's complicity, either as principal or accomplice in the misappropriation of public funds." Id. at 630. In the case at bar, defendant raised no such objection at his trial.

In the 22 years since it was published, no court has since cited Funkhouser for the proposition that collateral estoppel prohibits admission of evidence which, if believed, would necessarily show complicity in previously charged crimes which have resulted in acquittals. Further, Funkhouser rests its rational on federal cases and was decided before Dowling v. United States, 493 U.S. 342, 350, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990). As detailed above, Dowling specifically permits the introduction of relevant evidence even if the defendant has been previously acquitted of the criminal activity to which the evidence relates.

Defendant has failed to meet the first prong of the collateral estoppel test that the finding in the second trial was identical to the element litigated in the third trial. Defendant's collateral estoppel claim, therefore, cannot prevail.

ii. Defendant has failed to prove that the aggravating special verdict form amounts to a final judgment on the merits.

The rule of collateral estoppel applies only if an issue was "necessarily decided" in the first case. United States v. McLaurin, 57 F.3d 823, 826 (9th Cir. 1995).

First, defendant asserts the first trial's hung jury had the effect of being an acquittal on the aggravating circumstance special verdict. Brief of Appellant, at 20. Defendant cites State v. Goldberg, 149 Wn.2d 888, 72

P.3d 1083 (2003), for this proposition. That case is entirely different from this one. In Goldberg the jury actually convicted Goldberg of murder in the first degree. The jury came into court and returned its verdict of guilty, and also answered the aggravating circumstance special verdict “No.” Id. at 891. The trial court then polled the jury and learned that the jury was not unanimous with respect to the special verdict. Id. The court ordered the jury to continue to deliberate with respect to the special verdict. The Washington Supreme Court concluded that this was error. “Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered “no” to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final.” Goldberg, 149 Wn.2d at 894.

In defendant’s first trial the jury never “hung” on the special verdict. The jury “hung” on the charge of murder in the first degree and never reached the aggravating circumstance special verdict form. See Verdict Forms A-1, A-2, A-3. CP 1122-24. Because the jury never reached the question of the aggravating circumstance in the first trial, it never answered the question. This is very different from Goldberg where the jury actually answered the special verdict and the court attempted to require unanimity with respect to the special verdict which did not require unanimity. “The constitutional double jeopardy provisions do not bar retrial following a mistrial granted because a jury was unable to reach a

verdict. The double jeopardy provisions require a final adjudication to bar retrial of a charge.” State v. Ahluwalia, 143 Wn.2d 527, 538, 22 P.3d 1254 (2001)(citing Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). “A retrial of an action proceeds de novo and places the parties in the same position as if there had been no trial in the first instance.” State v. Kinsey, 7 Wn. App. 773, 774-775 (1972), review denied, 82 Wn.2d 1002, 1973 (1973). There is no law supporting defendant’s proposition that the double jeopardy clause prohibits the use of a special verdict in a subsequent proceeding when the jury “hangs” on the substantive charge.

The real issue is the applicability of the second trial’s aggravating special verdict form in the third trial. Defendant has failed to prove that this special verdict established anything applicable to the third trial, nor that anything it did decide was identical to the issue in the third trial. First, defendant has failed to demonstrate this is actually a finding. The trial court did not accept this verdict. In fact it specifically noted that the jury had returned verdicts that it was entering, and that the special verdict “had no significance to the verdict that the jury rendered.” RP (5/20/98) 8505; Appendix A. The court was observing that the jury had rendered a verdict and that the special verdict was completed contrary to the court’s instructions. The court did not accept this verdict. Defendant did not object to that decision. Therefore, there is no “prior judgment” upon

which defendant can make his case that the issue was decided in a prior proceeding.

Further, when the special verdict form is read, it is clear that the jury improperly answered the form. The special verdict starts with the following sentence, "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:". The completed special verdict form is indefinite at best. For defendant to argue that the special verdict demonstrates that there was a prior judgment in his favor is the equivalent to the State asserting that the special verdict actually proves that the State proved murder in the first degree. Such ambiguity cannot be the foundation for a collateral estoppel claim. If it is not clear whether an issue was actually litigated, or if the judgment is ambiguous or indefinite, application of collateral estoppel is not proper. State v. Barnes, 85 Wn. App. 638, 651, 932 P.2d 669, review denied 133 Wn.2d 1021, 948 P.2d 389 (1997)(citing Mead v. Park Place Prop., 37 Wn. App. 403, 407, 681 P.2d 256, review denied, 102 Wn.2d 1010 (1984)).

Defendant has failed to satisfy the second prong of the collateral estoppel test, that the improperly answered special verdict amounts to a final judgment on the merits. Therefore, defendant cannot prevail on his claim that collateral estoppel precluded the State from presenting evidence that he knew Deputy Bananola was a law enforcement officer.

iii. Application of the doctrine of collateral estoppel at this juncture would create a great injustice upon the State.

It is defendant's burden to demonstrate that application of the collateral estoppel doctrine would not work an injustice on the State. Defendant has failed to even attempt to assert such. The injustice factor recognizes the significant role of public policy. State v. Williams, 132 Wn.2d 248, 257, 937 P.2d 1052 (1997). The courts may qualify or reject collateral estoppel when its application would contravene public policy. State v. Dupard, 93 Wn.2d 268, 275-76, 609 P.2d 961 (1980). "The judicially created doctrine of collateral estoppel evolved in response to the need to conserve judicial resources and to provide finality for litigants." State v. Barnes, 85 Wn. App. 638, 652-653, 932 P.2d 669 (1997)(citing State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980)).

Given defendant failed to raise this issue below, application at this juncture would create a great injustice on the State. The State would be required to try a very lengthy case for the fourth time. This is one reason the issue must be raised at the trial court. To apply collateral estoppel after the defendant lets the case be tried, would permit the defendant to take his chances on a favorable verdict, and then challenge such on appeal. This defeats the purpose of the collateral estoppel principal: that litigants

not be put through multiple trials. It would contravene public policy to permit defendant to succeed on this claim having not raised it below.

Defendant has waived his collateral estoppel claim of error by not raising it before the trial court. Further, he has failed to demonstrate this claim of error is constitutional and manifest, failed to explain how the special verdict is not surplusage, and failed to satisfy the four prong collateral estoppel test. This claim of error must, therefore, be rejected.

2. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION WHEN IT MADE THE
CHALLENGED EVIDENTIARY RULINGS.

Defendant has assigned error to the trial court's decision to exclude poor quality video tapes, exclude irrelevant testimony, admit relevant crime scene reconstruction testimony, admit testimony of defendant's drug dealing, admit testimony of a prior witness who was unavailable at trial, and exclude evidence that the search was executed illegally after this court held the search was legal.

A party may only assign error on appeal based on the specific ground of the evidentiary objection at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Further, an objection to the admission of evidence at trial based on relevance fails to preserve the issue for appellate

review based on ER 404(b) grounds. State v. Jordan, 39 Wn. App. 530, 539, 694 P.2d 47 (1985), review denied, 106 Wn.2d 1011 (1986), cert. denied, 479 U.S. 1039, 93 L. Ed. 2d 847, 107 S. Ct. 895 (1987).

“A trial court has ‘broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.’ When it takes a view no reasonable person would take, or applies the wrong legal standard to an issue, a trial court abuses its discretion.” State v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000)(quoting Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)(other citations omitted).

Appellate courts will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

It is incumbent upon trial counsel to make timely and specific objections. General objections are insufficient to preserve the claim of error on appeal. Objections must be timely and specific. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). In general, “the appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). These rules are intended “to afford the trial court an opportunity to correct any error,

thereby avoiding unnecessary appeals and retrials.” Avendano-Lopez 79 Wn. App. at 710 (quoting Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

- a. The court properly ruled that the poor quality of the video tapes made by Mr. Englert when he watched the deputies describe what happened in the Eggleston residence, warranted their exclusion. Further, the court’s decision to permit defendant to use the transcripts of the tapes, and ask questions of Mr. Englert as to what happened on the tapes permitted defendant to impeach Mr. Englert to the fullest extent permitted by the rules, even absent the playing of the video tapes.

In April of 1996, crime scene reconstructionist Rod Englert went to the Eggleston residence with the entry team deputies. RP 1383. The deputies were instructed to tell Mr. Englert what they remembered about the entry including where they were and what they saw during the entry. Some of these discussions were recorded on videotapes. In the first two trials defendant attempted to introduce these tapes and the prior judges had refused to permit their admission because the poor quality of the tapes made their introduction more prejudicial than probative. RP 1384-86. In this case, the State moved in limine to exclude the tapes because the lighting was very poor and their admission would be more prejudicial than probative. CP 1642-54. In response to the State’s objection regarding the

lighting on the tapes defense counsel had the tapes altered so that the content of the tapes did not appear as dark as the originals. RP 1388.

The court watched the tape of Deputy Reding, and could tell there were problems with the tape. RP 2032; Exhibit 637. The tape had “some glitches” and defense counsel was concerned they might be caused by the VCR. RP 2032-33. The court then watched the videotape of Deputy Dogeagle’s discussion with Mr. Englert. RP 2034. Defense counsel then told the court “We’re not particularly interested in the video.” The parties then agreed to look at all the tapes and try and determine why the quality of the tapes was so poor. RP 2036. The defense told the court that it wanted to use the tapes involving Deputies Reigle, Dogeagle, Reding and Larson. RP 2037. Court was adjourned for the morning with the understanding that the issue would be raised again before the defense used the tapes.

Use of the video tapes was not raised again for three weeks, during Deputy Dogeagle’s testimony, but after the other deputies testified. RP 4469-70, 4535-50. Exhibit 735, the video tape of Deputy Dogeagle’s conversation with Mr. Englert, was played for the jury. RP 4554. Defense counsel did not object to the playing of Exhibit 735. This exhibit was shown to the jury to clarify the witness’s statements which had been made to Mr. Englert, transcribed from the video tape and referenced

during Deputy Dogeagle's cross-examination. RP 4554-55. Defense counsel then asked questions regarding the video on re-cross-examination. RP 4571-80.

That afternoon the court reviewed the video tapes of Deputies Riegle, Larson and Redding. RP 4585-86. Later in the trial defense counsel offered into admission the video tapes of Deputies Reding, Reigle, and Dogeagle. RP 4882-83. The stated purpose for admission was to cross-examine Mr. Englert and challenge the basis of his opinion. RP 4885-87. The court concluded that the poor quality of the videos made it inappropriate for admission of the video tapes. The court noted that the videos were only a portion of the expert's opinion and that defense counsel could use the transcripts of the tapes and the numerous other statements made by the deputies to impeach Mr. Englert's conclusions. RP 4887-90, 4895-96.

An accused's constitutional right to confront witnesses includes the opportunity for cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). However, the right to cross-examine is limited to "an opportunity for effective cross-examination, not 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); State v. Hudlow, 99

Wn.2d 1, 14-15, 659 P.2d 514 (1983). "[T]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Cross-examination to elicit bias, prejudice, or interest is generally a matter of right. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). However, the right is subject to limitation. The evidence sought to be introduced must be relevant; and 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. State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996).

Under ER 403, the court may exclude relevant evidence that will be confusing to the jury. "Evidence may ... be regarded as confusing because it is not entirely accurate, thus leading to potential confusion among the jurors." Karl Tegland, 5C Washington Practice § 403.4 at 368-69 (2000), citing King v. Ford Motor Co., 597 F.2d 436, 445 (5th Cir. 1979). King was a product liability case that involved litigation of a Ford-manufactured chassis. The appellate court held that the trial court properly exercised its discretion when it refused to admit a picture of a chassis that was similar, but not identical to the chassis at issue in the trial, because the picture might confuse the jury. Id. A Washington court has

similarly ruled that when a video recreation of the crime is made and is not an exact recreation, it is within the trial court's discretion to refuse to admit the video. State v. Stockmyer, 83 Wn. App. 77, 82-85, 920 P.2d 1201 (1996).

In the case at bar, the trial court excluded the videotapes because the poor quality and repetitive nature of the tapes made them not worthy of admission. RP 4889, 4896. With respect to the videotape of Deputy Reigle, the court said, "It was difficult to see anything, and I find it impossible to believe that that was in any way representative of what this witness (Mr. Englert) saw when the videotape was taking place, which I understood you just to say is that the jury could see what it was that he was viewing." RP 4896. After a renewed motion by defense counsel to use the videotapes the court reconsidered the issue and made a lengthy ruling:

There were two prior courts that both ruled that the videotape was misleading and inappropriate to be shown. I don't know if those issues were raised before the Court of Appeals, but the Court of Appeals didn't say anything about it in their decision. So arguably there was an opportunity for the defense to have raised that issue and if they did, the Court of Appeals didn't rule on it so have acquiesced in that ruling by their silence, if it in fact was raised. I see no reason to deviate from the prior court rulings despite the fact that I'm told by defense counsel that these videotapes, the lighting has been enhanced. I think they're misleading, particularly the tape of Deputy Reigle, for the purpose that I stated yesterday, which is that once 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. I was told by defense counsel that it was important for purposes of time. I believe Mr. Olbertz said that two different times to impeach this witness for how much time it actually took for this to take place, but when I questioned him on it, he backed off as a purpose for these being necessary. In fact, my recollection of the videotape is Mr. Englert specifically instructed each of these deputies to take their time, go through in slow motion and act it out is not an accurate reflection of the time. For that purpose, it doesn't assist the defense at all.

With respect to movements, I can appreciate the defense's argument that in some respects, the transcript leaves one wondering when they say well, I was standing here and that person was standing there; however, 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, in the videotape of Deputy Reigle, a large hole in the wall. The large hole in the wall was not - - to my understanding 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, said that the State acted beyond its authority in removing that section of the wall. So we leave ourselves, if we were to show the videotape, in a 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 because we're are not in a position to explain to them why there is this hole in the wall because the bullets are suppressed.

For all of those reasons and the reasons that were articulated by the Court on March 26, 1997, in the verbatim report of proceedings that were provided to me, the videotapes will not be played.

RP 4972-75.

The March 26, 1997, ruling the court referenced was Judge McPhee's oral decision in the first trial excluding the videotapes. Judge McPhee ruled:

I am satisfied that it would be inappropriate - - completely inappropriate to play the videos of these interviews for the jurors. They are conducted under circumstances that cannot, in any sense, be said to be an accurate replication of the lighting that was present in the house at the time of the incident. And looking at the video, that, of course, is the most salient feature of those videos. All other considerations pale in comparison to the light that is visible through the camera lens, including a figure with a vest on it similar to - - or perhaps identical to the vest worn by Deputy Bananola on the morning of the incident. The issue at this point for me is to what extent the audio portion or the transcribed portion of these statements should be presented to the jury during cross-examination of Mr. Englert, and it is that issue that I wish to address at this point.

...

In viewing the videotapes and listening to the audio portion of those tapes, I am satisfied that the information conveyed there, in the audio portion, is entirely sufficient to understand the information given to Mr. Englert. The jury has heard all of the entry team officers, and they have been subject to rigorous cross-examination.

Where reference is made to positioning within the house, or features in the house, or where movements are described which would be better understood if they could see the picture visually, I am satisfied that, because of the jury's prior exposure to these witnesses, their movements, testimony and cross-examination, that all aspects of the

information conveyed to Mr. Englert is understood satisfactorily just by listening to the audio portion.

Report of Proceedings March 26, 1997, pp. 3950-51; CP 1642-54.

The videos would have confused the jury. Thus, the trial court properly exercised its discretion when it excluded the videotapes and limited defense counsel to using the transcripts of the statements in the video. Even if the court permitted the use of the videotapes, they were certainly hearsay, and therefore, only admissible to impeach witnesses.

How much of defendant's objection to the court's ruling has been properly preserved for appeal is questionable. ER 103(a)(2) states: "In case the ruling is one excluding evidence, the substance of the evidence [must be] made known to the court by offer or was apparent from the context within which the questions were asked." The questions were never asked, therefore, defense counsel had to make an offer of proof in order to preserve this assignment of error. When presented with an opportunity to make an offer of proof, defense counsel flat out refused. "I'm not going to sit here and explain my entire cross examination to the defense (sic) before I do it, and that's what they're suggesting." RP 4887. The exclusion of testimony will not be considered on appeal in the absence of an offer of proof showing the substance of that testimony. State v. Negrin, 37 Wn. App. 516, 525, 681 P.2d 1287, review denied, 102 Wn.2d 1002 (1984); Ralls v. Bonney, 56 Wn.2d 342, 343, 353 P.2d 158 (1960); Sutton v. Mathews, 41 Wn.2d 64, 67, 247 P.2d 556 (1952). The

reason for requiring an offer of proof under ER 103 pertains to judicial economy. The offer of proof allows the trial court to properly exercise its discretion when reviewing, reevaluating, and revising its rulings if necessary. State v. Ray, 116 Wn.2d 531, 538-539, 806 P.2d 1220 (1991) (citing Cameron v. Boone, 62 Wn.2d 420, 425, 383 P.2d 277 (1963)). If the party fails to aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer. Smith v. Seibly, 72 Wn.2d 16, 18, 431 P.2d 719 (1967)(citations omitted). It is not the place of a reviewing court to speculate as to what the excluded evidence would have been. Tumelson v. Todhunter, 105 Wn.2d 596, 605, 716 P.2d 890 (1986). Without an offer of proof of the substance of the expert's testimony, it is impossible to determine if defendant was prejudiced by any error pertaining to admissibility. Without prejudice, relief is not warranted. ER 103(a)(2).

Defendant never made an offer of proof with respect to impeaching any of the deputies. On appeal defendant assigns error to the court's exclusion of all of the videotapes but only supports the assignment of error with respect to Deputy Reding's tape. Defendant fails to support the assignment of error regarding any of the other tapes with argument, or citation to the record. Defendant has failed to explain what portions of the tapes of the other deputies would have provided impeachment evidence for any witness.

With respect to the one tape for which defendant does provide argument, defense counsel was able to describe everything in the videotape and question Mr. Englert with respect to every movement on the tape. RP 4902-29. For the most part Mr. Englert agreed with defense counsel's description of what Deputy Redding said happened, and where he was positioned, and what he saw and heard. By using a transcript of the video defendant was able to impeach the witness. Defendant's complaint is that "[t]he transcripts of these videos are not a sufficient substitute [for the playing of the videos]. The deputies making references to 'here' and 'there,' without specificity". Brief of Appellant, at 46. However, Mr. Englert did not deny Reding made the statements, nor where he was standing when making the statements, nor where he was indicating "here" and "there." RP 4902-29.

Defendant relates that the Reding video showed that Bananola was in the entryway to the living room when he was being shot. Brief of Appellant, at 45. Defendant argues this was relevant because it supported his theory of the case, and that it impeached Mr. Englert's conclusion. However, defendant asked Mr. Englert about the very thing he raises on appeal, and Mr. Englert agreed with most of defense counsel's representations as to what Reding said on the video. RP 4907-10. If there is more on the video that defense counsel did not address at trial, that is the fault of counsel, not the court. Defense counsel could have asked any

number of questions that would have elicited the information depicted on the video.

Defendant has cited only one specific instance where defense counsel made a request to play the tape relative to a specific disagreement counsel had with what Mr. Englert indicated the tape related. This following exchange took place before the jury, between defense counsel and Mr. Englert:

- Q: Okay. Reding sees Mr. Bananola in archway; is that accurate?
- A: Falling in the archway, yes, and groaning.
- Q: Okay. In fact, he says - -
So then - - and there's shooting going on.
- A: Shooting had occurred when Reding sees Bananola dive into the living room.
- Q: But Reding says he sees him coming in, falling, going to the ground, correct?
- A: Yes, and he had heard shots fired.
- Q: And he hears an "ugh" so he knows he's hit.
- A: I don't know that he knows that, but he hears "ugh."
- Q: Lets take a look. I would suggest to you that these are transcripts of the video tape that you - -
- A: Which one, do you want me to look at Reding?
- Q: I want you to look at Reding's.
- ...
- Q: On page 5 - - you were standing in the living room watching Reding describe the events to you, correct?
- A: Yes, I was following - -
- Q: Line 2, Reding says, "And he started to collapse or dive for the floor, and he gave out a kind of grunt like 'ugh,' so I had an idea that he was hit." Now that suggests to me that he got shot when he let out that "ugh;" is that what that suggests to you?
- A: Yes.

- Q: So he's getting shot as he's, according to Reding, starting to collapse or dive to the floor, correct?
- A: Well, wait a minute. Are you saying that he was shot at that time, is that what you are suggesting to me?
- Q: I'm saying that Bananola was shot.
- A: At that time when he's diving?
- Q: Yes. When "he let out a grunt so I had an idea he was hit." Reding is suggesting to you that Bananola was hit when he let out the grunt, correct?
- A: No, absolutely not. That's incorrect.
- Q: That's not what he is suggesting on the videotape?
- A: No, not at all. That's not true. I never suggested that. That's not what my opinion was, and that doesn't fit the evidence.
- Q: I know that's not your opinion, and I know it doesn't fit the evidence you care - -

Ms. Amos (prosecutor):
Objection, argumentative.

Q: (by Mr. Olbertz) Care to look at it. I'm - -

Ms. Amos (prosecutor):
Objection, argumentative.

The Court: Sustained.

- Q: (By Mr. Olbertz) So you're saying that Reding said, "... gave out like a 'ugh' so I had an idea that he was hit." You're saying that Bananola was not hit, that Reding was not saying that he was hit when he gave out the grunt; is that your testimony?
- A: No. My impression from listening to him was that he heard shots, he looks to the left, he's with the father, glances to his left and sees Bananola diving in like he'd been hit. He didn't say "like he'd been hit. He said "is hit," and that's the impression - -

Mr. Olbertz: Your honor - - I'm sorry. I didn't mean to interrupt you.

Witness: That's the impression I had in this interview. Never did I get the impression that he was shot while he was diving.

Mr. Olbertz: Could I make a motion your honor?

RP 4909-12.

After the court excused the jury, defense counsel renewed his motion to play the video of the interview. The court denied the motion.

RP 4915.

Defense counsel had not provided the court with a valid basis to reverse its earlier decision. Defense counsel was attempting to use the video to assert that what Reding meant was that John Bananola was hit as he dove back to the living room. Whether Reding meant that or not was irrelevant. Because the tape was only relevant to impeach the witness's findings, what was relevant was whether or not Mr. Englert understood Reding to mean such.

Further, defense counsel never even made an offer of proof that the video demonstrated that Reding meant that John Bananola was shot while he going to the floor. RP 4912-13. He wanted to show the video and let the jury speculate as to what Reding meant. There was no reason for the court to conclude that the video would show that Reding meant what counsel wanted Mr. Englert to say it meant. In fact, defendant does not

even make that claim in his brief to this court. Defendant has not demonstrated that had the video been played it would have offered more impeachment value than the transcript of the video.

Finally, if counsel wished to challenge the validity of the witness's conclusion that Reding meant that John Bananola had already been hit when he entered the living room, he could easily have called Reding to the stand to testify.

Given the court's grave concerns that the video would mislead the jury, it cannot be said that the court abused its discretion in excluding it. Given the inability of defendant to articulate how the video would have improved his cross-examination, defendant cannot show that his right to cross-examine the witness was violated.

Defendant's reliance on the best Evidence Rule is misplaced. ER 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." There was never a question as to the content of the tape. There was never a challenge to the accuracy of the transcript of the tape. This rule is inapplicable to the circumstances to this case.

Even if the rule were applicable, however, defense counsel did not make his objection on this basis until the State was cross-examining the defense expert. RP 5661. This objection was not made in a timely manner relative to defendant's current claim of error, that the video tapes were admissible to impeach the State's witnesses. ER 103 requires all evidentiary objections to be timely and specific. Failure to raise an objection at the trial court precludes a party from raising it on appeal. DeHaven v. Gant, 42 Wn. App. 666, 669, 713 P.2d 149 (1986). Even if an objection is made at trial, a party may assign error in the appellate court only on the specific ground made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Defendant did not make a timely Best Evidence Rule objection and it is therefore waived.

Defendant's reliance on ER 106, the Rule of Completeness, is equally misplaced. Defendant never raised this ground for admission below and it is therefore waived. Even if it were raised below, defendant's failure to cite to the record as to where that objection was made and preserved waives it on appeal. RAP 10.3(a)(5); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Hurlbert v. Gordon, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992).

Even if preserved defendant has failed to explain how the admission of Deputy Dogeagle's statement required the admission of other

statements. Defendant has not even bothered to explain which statements should have been included and what the would have done to alleviate any unfairness created by Deputy Dogeagle's statement. Finally, defendant has not explained how the trial court abused its discretion when it did not apply the Rule of Completeness.

The trial court did not err when it determined that the video tapes would confuse the jury, and certainly did not abuse its discretion when it ruled in the same manner as two previous judges. Three judges looked at the video tapes and determined that it would be improper to play them before the jury. Defendant has failed to prove that his right to confront the witness was violated because he has failed to show how the use of the transcripts was insufficient to properly impeach the witness.

- b. The trial court did not err when it did not permit defense counsel to attempt to impeach State's witness McQueen with information that a prosecuting attorney appeared at McQueen's sentencing six years earlier to inform the court that McQueen needed to be sentenced in a manner which would protect his safety because he had testified in defendant's first trial.

"Trial courts have discretion to determine the scope of cross-examination and to prohibit further questioning where the claimed bias is speculative or remote." State v. Benn, 120 Wn.2d 631, 651, 845 P.2d 289 (1993)(citing State v. Young, 89 Wn.2d 613, 628, 574 P.2d 1171, cert.

denied, 439 U.S. 870 (1978); State v. Guizzotti, 60 Wn. App. 289, 293, 803 P.2d 808, review denied, 116 Wn.2d 1026 (1991); see also Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974)).

Defendant appears to attempt to assign error to two distinct decisions by the court with respect to Mr. McQueen's cross-examination. First, he spends two and a half pages discussing the State's attempt 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." Brief of Appellant, at 50-51. Defendant does not cite any testimony, nor offer proof, in the record that shows McQueen received any consideration for his testimony, nor does he really even allege this to be the case. Defendant simply says that bias evidence is properly elicited under cross-examination.

The State asked the court to limit defense counsel's cross-examination to relevant information. Defense counsel began to allege that McQueen made a deal with the prosecutor for testimony in this case, but got sidetracked by the judge and the issue was never raised again. RP 2798-99. McQueen did not receive a reduction in his 1996 case in exchange for his testimony, and defense counsel never provided the court with any proof to the contrary. RP 2849. Counsel never asked the questions on cross-examination, even though the court never excluded any evidence on the topic of a deal for testimony. Nor did counsel ever make

an offer of proof. Defendant cannot assign error to a decision the court never made.

The second instance defendant raises with respect to cross-examination of Steve McQueen, is that the court sustained the State's objection when defense counsel attempted to inquire about a prosecutor appearing at Mr. McQueen's 1996 sentencing on several robbery convictions. Brief of Appellant, at 51, fn. 44; RP 2817, 2848-49. Defendant does not bother developing this argument during the body of brief, but makes an important error in the footnote. Defendant asserts that defense counsel was attempting "to show McQueen's knowledge of how the system works with deals." Id. There is no evidence in the record that this is what defense counsel was attempting to elicit. The following day defense counsel made a record of the reason for his question. "[M]y next question was going to be 'did he [DPA Horne] appear at your sentencing' which occurred in, I think it was, '96, and make statements on your behalf that related to your cooperation in this case, and was that case pending at the time that you testified in this matter on behalf of the State." RP 2848-49.

What the State pointed out to the court was that DPA Horne appeared at the sentencing to inform the sentencing court that Mr. McQueen would be testifying against a person who had killed a police

officer, so his safety in prison would need to be addressed. RP 2849.

Defendant failed to convince the court that this was relevant six years later, after defendant had been released from prison. That six years earlier a deputy prosecutor informed a sentencing court that McQueen was at risk in prison was hardly relevant to his testimony in this case. Even if the trial court erred, it cannot be said that the trial court abused its discretion when it attempted to limit cross-examination to relevant impeachment, and prohibited speculative or remote testimony.

Finally, even if the court abused its discretion and improperly limited the impeachment evidence, defendant has failed to explain how he was prejudiced. Defendant has failed to articulate what testimony McQueen gave which was particularly damaging to his case. Mr. McQueen's testimony was largely *res gestae* evidence, explaining defendant's drug dealing, that he had guns and that he knew how to use them. Much of this testimony was admitted through other witnesses as well. Even if the court abused its discretion, the low level of import to Mr. McQueen's testimony relative to the other witnesses makes any error harmless. "The denial of a criminal defendant's right to adequately cross-examine an essential State witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation, made applicable to the states by the Fourteenth

Amendment.” State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)(citing Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974))(emphasis added). Mr. McQueen was far from an essential State witness. While the State maintains that the court did not err, and that defense counsel failed to explain why Mr. Horne’s presence at a sentencing six years earlier was relevant, any error was harmless given the limited value this ‘bias’ testimony would have had and the minor role this witness played in the State’s case.

- c. The trial court did not err when it limited defense expert Kay Sweeney’s impeachment testimony to relevant evidence, and excluded testimony which was contrary to the parties stipulation, contrary to defendant’s offer of proof, and merely speculative.

Defendant contends that the trial court erred when it limited Mr. Sweeney’s testimony about contamination of the crime scene. Defendant asserts this testimony would have shown that Mr. Englert ’s reconstruction of the “crime scene was based on a house of cards.” Brief of Appellant, at 53. Defendant alleges the court prohibited his expert from testifying about two specific points: (1) that “people moving around the house, performing aid, searching, taking things like chunks of the walls” contaminated the crime scene, and (2) sheetrock that was strewn over the house prevented

Mr. Englert from testifying with any reliability. Brief of Appellant, at 53-54.

The court's ruling on this was very specific and addressed the issues defendant raises. First, the trial court did permit questioning with respect to the first point. Second, the court did exclude testimony about contamination that was not supported by the offer of proof. The court even invited defense counsel to put Mr. Sweeney back on the stand to further develop the offer of proof.

Okay. Okay. With respect to his comments on the DNA, it seems to me, number one, he's not qualified to speak to this issue, but it also flies in the face of the stipulation, because even if he's talking about a sample that wasn't covered by the stipulation, not all of those samples were tested; a DNA test was done on them. 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.

With respect to the rest of his testimony, as I previously indicated, you can testify - - elicit from him testimony with respect to the chair, with respect to the I think he called it Area 24, which I understand to be the south facing portion of the north section of the archway, and he can talk about that. He can talk about any mixtures of blood that were not stipulated to as to how they could have come to be there by activities that may have occurred after the actual shooting took place, which is what I understand is part of the defense's argument here, but I don't want general, broad testimony of it affecting all of the reliability of all the conclusions, because that 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 indicated or 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 there's some potential there of saying well, somebody else's blood was on the wall, the wall was knocked out, that blood then was 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 did not 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 ask you to invite me to 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, and so on balance and weighing the issue of the Court of Appeals having excluded the bullets that were in the wall, misleading the jury by getting into the whole issue of the sheetrock, compared to a lack of any evidence, it's mere speculation at this point because nobody has testified to it 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, so in - - I haven't looked at all those pictures that you showed him, but the pictures that have those piles of sheetrock, we're not going to go there, whichever numbers those were.

RP 5389-92.

The court observed that Mr. Sweeney did not say that the conclusions or opinions of Mr. Englert were impacted by the sheetrock. Therefore, Mr. Sweeney was not going to testify as defendant now claims he should have been permitted to testify. The court did a simply balancing

of prejudice versus probabiveness of the offered testimony and concluded that because the testimony was not supported by the witness's own opinion, it would have been more prejudicial than probative to permit defense counsel to proceed with this line of questioning. The court properly weighed the issue and made the proper conclusion. The court even invited counsel to expand on the offer of proof and counsel did not do so. Counsel probably did not do so because he had no reason to believe Mr. Sweeney would ever testify that the existence of the sheetrock actually impacted any of Mr. Englert's conclusions.

Defendant has failed to cite any portion of the offer of proof which would lead this court to conclude that the trial court abused its discretion when it determined that the offer of proof was insufficient for Mr. Sweeney to testify that the sheetrock debris contaminated the scene. The failure to develop this argument precludes review of this issue.

- d. The trial court did not err when it did not permit the introduction of testimony which was not admissible.

Defendant asserts the trial court erred when it did not permit (1) impeachment of Deputy Benson by use of a statement in his affidavit for the search warrant, (2) testimony that defendant regularly went back to sleep after his girlfriend gave him his medicine, and (3) the defense to

introduce a prior statement made by Deputy Reigle which did not mention the knock and announce procedure used the morning in question. Brief of Appellant, at 54-56.

With respect to his attempt to impeach Deputy Benson, defendant's premise is false. Defendant fails to articulate how Deputy Benson lied in the affidavit for the search warrant. There is no evidence Deputy Benson made a false statement in the affidavit. The crux of defendant's argument is that Deputy Benson referenced a 'controlled buy' in the affidavit for a search warrant, but that it was not really a controlled buy.

The term 'controlled buy' is clearly a term of art and has meanings which are dependent upon the circumstance. The 'controlled buy' in question was the first one Deputy Benson observed between Mr. McQueen and defendant. The deputy explained on cross-examination that he did consider the exchange a controlled buy for the purposes of what he was attempting to use it for, the application for a search warrant. RP 1528. The deputy further explained that his reference to it in a prior proceeding as not a 'controlled buy' was that it would not have been sufficient to charge defendant with delivery of a controlled substance because Mr. McQueen was being used as a confidential informant and would not testify at a trial. RP 1258. Without the belief Mr. McQueen

would testify at trial, the State could not charge defendant. Because defense counsel did not prove Deputy Benson lied when he completed the affidavit, the court did not err in preventing this line of impeachment.

Further, it is clear from Deputy Benson's testimony that he did not believe the statement in the affidavit to have been a false statement, therefore, counsel would have been left with the answer and no means by which he could impeach the deputy's conclusion that it was a false statement. RP 1514-17, 1525-28. The long standing rule is that if the witness denies the specific instance of conduct being alleged, the inquiry is at an end. Extrinsic evidence is not permitted to be introduced to contradict the witness. See State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). The cross-examiner must "take the answer" of the witness and may not call a second witness to contradict the first witness. State v. Barnes, 54 Wn. App. 536, 540, 774 P.2d 547 (1989). Given this rule, there was no means by which defendant could impeach Deputy Benson's conclusion that he was not dishonest in the affidavit, therefore, the court's ruling had no impact on the veracity of the witness.

With respect to Ms. Patterson's testimony, the trial court properly concluded that absent personal knowledge as to whether defendant went to sleep after she gave him his medicine, the witness should not be permitted to testify that defendant did go to sleep. Defendant appears to assert that

Ms. Patterson should have been permitted to testify that defendant was in the habit of going back to sleep after she gave him the medicine.

However, there was insufficient evidence before the court to establish a habit.

Evidence Rule 406 states, "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

"Although the rule does not define habit, 'habitual behavior' has been described as 'consisting of semi-automatic, almost involuntary and invariabl[y] specific responses to fairly specific stimuli.' 'As with most evidentiary questions, determination of admissibility of habit evidence is within the trial court's discretion.'" Degel v. Buty, 108 Wn. App. 126, 132 29 P.3d 768 (2001)(quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 325, 326, 858 P.2d 1054 (1993)(other citations omitted).

Counsel's offer fell short of establishing a habit sufficient to be admissible under ER 406. Defense counsel told the court that Ms. Patterson regularly gave defendant his medicine and it makes him sleepily and he likes to sleep through the bad effects of the medication. RP 3269,

3273. This is not an offer of proof that establishes a habit that everytime defendant takes the medication he goes back to sleep. The offer only demonstrated what defendant likes to do, not what he does with such regularity that it is a habit. This is particularly true when the lack of information as to how long and how often defendant has taken the medication is added to the equation. There was no testimony as to how many times Ms. Patterson had given the medicine to defendant, therefore, there was no way for the court to conclude that the witness had sufficient information to conclude that he was in the habit of falling asleep after he got the medicine.

In fact, the witness had already testified that she did not know whether or not defendant went back to sleep after she gave him his medicine. RP 3247. Finally, any error on this point was made harmless by what the witness did testify to on cross-examination. The following exchange occurred on cross-examination of Ms. Patterson:

Q : Were you asked the question, "Do you recall what he did after he took the medication on October 16th?" And your answer was, "To my knowledge, he laid back down and went to sleep." And the question was, "Did you observe that?" and your answer was, "Yes, I observed him lay back down." Do you recall giving - - being asked those questions and giving those answers?

A : Yes.

Q : And is that - - does that assist you in refreshing your recollection of what you did observe on October 16th?

A : Yes, it refreshes my memory. Is that what you mean?

Q : Refreshes you memory. That's probably a better way to put it.

A : Okay.

Q : Does it do so?

A : Yes.

Q : Is that an accurate statement of what you did observe on October 16th, 1995?

A : Yes, he laid back down.

RP 3274-75.

The trial court did not err when it determined that defendant had not established a habit pursuant to ER 406, and it cannot be said that it abused its discretion when it made this ruling. Defendant does not even assert that the trial court abused its discretion. Even if the court abused its discretion, defendant has failed to show that any error was prejudicial in light of the testimony elicited on cross-examination.

Defendant's assertion that the court erred when it excluded impeachment of Deputy Reigle by a prior inconsistent statement is erroneous. Defense counsel used an interview of Deputy Reigle soon after the event to impeach him. RP 3360-63. The interview soon after the murder was conducted by Tacoma Police Department and Pierce County Sheriff's Department detectives. They asked Deputy Reigle very specific questions: "Do you recall who was first up to the door?" and "Do you

recall how the door was opened or did you see who was opening?" RP 3366.

Inconsistency between the prior statement and the witness's testimony at trial is determined "not by individual words or phrases alone, but the whole impression or effect of what has been said or done." State v. Newbern, 95 Wn. App. 277, 294, 975 P.2d 1041, review denied, 138 Wn.2d 1018, 989 P.2d 1142 (1999)(citations omitted). In the earlier interview, the deputy was not asked if there was a knock and announce, nor was he asked what happened before the door was opened. At trial, the deputy detailed how he entered the residence. Defense counsel was alleging that the answers the deputy gave to the detectives was inconsistent with the testimony. There was no inconsistency; the questions were different. The court did not err when it concluded that there was not an inconsistency by which defendant could properly impeach the witness. RP 3369. Even if it the trial court erred, it did not abuse its discretion when it concluded that there was not an inconsistency.

Finally, because "[i]mpeaching evidence is not substantive evidence," defendant cannot establish he was prejudiced by the exclusion of the evidence. State v. Stewart, 2 Wn. App. 637, 639, 468 P.2d 1006 (1970). Every deputy called to the stand indicated that the deputies knocked and announced and entered the residence after hearing no

response. There was nothing in the statement Deputy Reigle gave to the detectives that the court excluded, which would impeach his testimony at trial. The trial court did not err, and certainly did not abuse its discretion, but even if it did, defendant cannot prove he was prejudiced.

- e. The trial court properly permitted the parties' experts to give their opinions about what happened in the house after the first exchange of gunfire, because the opinions were supported by scientific evidence generally accepted in the relevant community, and the experts did not speculate as to who fired the first shot.

Defendant contends that “[o]n the prior appeal, this Court ruled that it was error to admit expert testimony on the sequence of the firing of the bullets, because it was totally speculative.” Brief of Appellant, at 57. This is not an accurate reflection of the court’s ruling on the prior appeal. This Court only prohibited the experts from testifying as to who fired first:

Opinion testimony is not excluded merely because it embraces an ultimate issue to be decided by the trier of fact. ER 704. Furthermore, an expert may express an opinion even though it may be qualified or indefinite. 5B Tegland, *supra*, sec.702.22 at 82. As long as the scientific methods used to form the opinion are generally accepted within the relevant community, an expert's lack of certainty does not render the evidence inadmissible. *State v. Warness*, 77 Wn. App. 636, 643, 893 P.2d 665 (1995).

An opinion based on the opinion of another expert also is admissible, so long as the testifying expert 'reasonably relied' on that opinion, as required by ER 703.

5B Tegland, supra, at sec.703.6 at 220. ER 703 does not confer any value, however, on an opinion that is wholly lacking some factual basis. 5B Tegland, supra, at sec.703.8 at 223; see also Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d 50, 102-03, 882 P.2d 703 (1994). Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded. Queen City Farms, Inc., 126 Wn.2d at 103.

The trial court did not err in admitting most of the crime-scene-reconstruction testimony on the grounds that it would be helpful to the jury. Englert was able to 'read' the physical evidence and draw his conclusions only as a result of his experience and training, with those conclusions being beyond common knowledge. See Coleman, 348 S.E.2d at 72.

Here, as in Coleman, 'absent an explanation of the physical evidence found at the crime scene, the jury would have been faced with translating seemingly meaningless facts into possibly erroneous conclusions, or ignoring the physical evidence altogether.' Coleman, 348 S.E.2d at 72.

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. Englert's testimony that Eggleston fired first and hit Bananola in the foot is supported primarily by his testimony that Bananola was backing up when he was hit in the foot and that he would not have fired while backing up. Sweeney's testimony that Bananola fired first is supported by the testimony that when Eggleston was hit in the groin, he doubled up, leaving his weapon close to the floor. According to Sweeney, Eggleston then fired and the shot ricocheted off the floor into Bananola's foot.

Both of these conclusions are completely speculative. Although both experts cite evidence, none of it even tends to prove which shot was fired when. Although bloodspatter and trajectory analysis can help establish the location from which a shot was fired as well as a victim's location when wounded, such evidence

provides no support for the temporal sequence of gunfire. The expert testimony as to who fired first is mere conjecture and should have been excluded. See Walker v. State, 67 Wn. App. 611, 620, 837 P.2d 1023 (1992), rev'd on other grounds, 121 Wn.2d 214, 848 P.2d 721 (1993) (court properly excluded expert testimony stating that accident occurred when decedent drove to the right to let a car pass because there was no evidence regarding decedent's thought processes); see also Riccobono v. Pierce County, 92 Wn. App. 254, 268, 966 P.2d 327 (1998)(expert opinion was based on assumption for which there was no factual basis and should have been excluded).

Eggleston, No. 22085-7-II, at 46-49.

It is clear that this Court concluded that the testimony of both experts was admissible, and that the problem the Court had was with the speculative nature of the conclusions each had with respect to who fired the first shot, Deputy Bananola or defendant. As noted above, this Court concluded that the first and second trial courts did not err in admitting most of the crime-scene-reconstruction testimony on the grounds that it would be helpful to the jury. The only testimony the court held inadmissible was the expert testimony as to who fired first because it was mere conjecture.

If this Court believed all of the sequencing of shots testimony should have been excluded it could certainly have said so, but it is obvious that this was not necessary because the balance of the testimony was based on proper expert opinions. Each time Mr. Englert testified as to where the

participants were he explained upon what evidence he was relying. RP 4654-87, 4693-4761.

The trial court and counsel spent a significant amount of time discussing what this Court meant in the earlier opinion. RP 4630-39. It was clear to the trial court that this Court was prohibiting the witnesses from testifying as to who shot first, but forensic evidence and witness statements could be used to determine what happened after the initial exchange of fire in the hallway. The trial court noted:

[The Court of Appeals opinion] doesn't say that no one can testify that after there was a gunfight in the hallway that Mr. Eggleston is believed to have moved in this direction and Mr. Bananola is believed to have moved in this direction, based upon blood spatter, based upon the testimony of the people who are able to testify or any other evidence that they have, the shell casings, the bullets that are allowed to be admitted.

RP 4638. The trial court did not err when it came to this conclusion because it is consistent with the holding of this Court's ruling. Further, the trial court did not abuse its discretion when it admitted the evidence because it was based on the experts' opinions that were founded on methods generally accepted within the relevant community.

- f. The trial court properly concluded that evidence of defendant's drug dealing and drug possession was admissible to prove motive, intent, absence of mistake, res gestae, and to disprove self-defense.

In the first trial defendant was convicted of unlawful possession of a controlled substance with intent to deliver (marijuana), unlawful delivery of a controlled substance (marijuana), and unlawful possession of a controlled substance (mescaline). CP 1204-05. The trial court concluded that evidence of defendant's drug dealing and possession of controlled substances was relevant to prove defendant's motive for killing Deputy Bananola, absence of mistake, the res gestae of the crime and why the deputies were serving the search warrant, and his intent in that the State needed to disprove self-defense. RP 95-96.

Evidence Rule 404(b) states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

We have held that when the State seeks admission of evidence under ER 404(b), that the defendant has committed bad acts that constitute crimes other than the acts charged, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be

admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. State v. Pirtle, 127 Wn.2d 628, 649, 904 P.2d 245 (1995).

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Defendant does not assert that the trial court did not follow the proper procedure, only that the court came to the incorrect conclusion. Defendant does not challenge the fact that the State proved, by a preponderance of the evidence, that defendant committed the acts, which is logical in that he was convicted beyond a reasonable doubt of having done so.

The trial court held that the evidence was properly admitted to prove defendant's intent and preparation. RP 95. The court further ruled that the evidence was admissible to provide the res gestae of the crime, and that it was part of the same transaction as the crime. Id. The court also ruled that it was relevant and admissible to demonstrate the absence of mistake and to disprove defendant's claim of self-defense. The court concluded that "there's no other way of telling the jury this story without providing the evidence of the drug dealing, so I think the prejudice, if any, to the defendant is very slight, and I'm going to allow its admission." RP 96.

Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. Relevant evidence is admissible unless its probative value is outweighed by prejudice or has a tendency to confuse the issues, mislead the jury, cause undue delay, or is an unnecessary presentation of cumulative evidence. ER 403; Thomas v. State, 150 Wn.2d 821, 858, 83 P.3d 970 (2004). The threshold for relevancy is low, and "[e]ven minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The evidence of defendant's drug dealing and drug possession was relevant for all of the reasons the court admitted the evidence. It was relevant to show why the deputies were executing a search warrant at the Eggleston residence. It was relevant to show how the deputies prepared for the execution of the warrant. It was relevant to explain why the narcotics team executed the warrant rather than the S.W.A.T. team. In other words, the evidence was admissible to complete the res gestae of the incident. Where the defendant's acts are part of the "same transaction" and show a "continuing course of provocative conduct," evidence is admissible "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Lane, 125 Wn.2d 825, 831-33, 889 P.2d 929 (1995)(quoting State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591, 637 P.2d 961

(1981), and State v. Thompson, 47 Wn. App. 1, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987)).

The evidence was probative of the State's contention that defendant was responding as a drug dealer would to police entering his house, as opposed to how an ordinary person would respond. Alternatively, it was relevant to demonstrate that defendant was acting with the intent to kill whoever was there to steal his drugs. This made the evidence relevant to defendant's intent and relevant to disprove defendant's claim of self-defense. Absent the evidence of drug dealing the State would have been precluded from explaining why defendant acted as he did. The State would not have been able to explain why defendant's house was the subject of a search warrant, nor why he had guns to protect his criminal enterprise. The trial court certainly did not err when it concluded that the evidence was relevant.

In State v. Campbell, this Court held that evidence of the defendant's gang membership was admissible under ER 404(b) where the State's theory of the case was that the alleged murder was in response to invasions of drug sales territory. 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995). The Campbell court concluded that the evidence was relevant and because it 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,” the trial court did not err by admitting the evidence. Id. at 822.

The legal issue presented in the case at bar is very similar to Campbell. The State’s theory of why defendant reacted to the entry of the deputies as he did was directly related to his drug dealing. Defendant’s own argument as to why the evidence was prejudicial demonstrates why it was particularly probative. Defendant concludes that the evidence was too prejudicial because without it the State could not prove the absence of self-defense. Brief of Appellant, at 65-66. This is one very important reason it was probative. Without the evidence, the State’s ability to disprove self-defense would have been much more difficult to prove.

It is questionable whether the ER 404(b) analysis was even necessary in this case. The State is unaware of any case that prohibits the introduction of relevant information in a subsequent trial proven at the prior trial. Defendant’s theory of admissible evidence would mean the State would be precluded from offering evidence of criminal activity the State proved during the first trial. The State, in other words, would be in a worse position at the outset of the second trial because it succeeded on some counts in the first trial. It would be illogical to make the State’s case less strong in a second trial as a result of convictions obtained in the first trial.

A review of this Court's decision in State v. Eggleston, No. 22085-7-II, is helpful. In that decision, this Court noted that the trial court in the first trial did not err in denying defendant's motion to sever. Id. at 82-86. Part of the analysis included the fact that the trial court did not err when it concluded that the evidence of drug dealing would be admissible in the murder trial even if the cases had been severed. "The trial court also observed that the evidence would be cross-admissible, as the earlier drug sales and subsequent search warrant were connected to the entry and shooting. Again, we find no abuse of discretion." Id. at 84. If the evidence would have been cross-admissible in severed trials, defendant cannot now claim the trial court abused its discretion when it concluded that it was admissible in the subsequent trial.

Defendant's constitutional claim, that the trial court's error in admitting the evidence was so egregious as to render the trial fundamentally unfair, is baseless. A constitutional challenge to the admission of the evidence presumes the admission of the evidence was improper. This is clearly not the case. The trial court followed the prescribed method by which it should determine admissibility and properly concluded that the evidence was admissible.

- g. The trial court did not err when it determined Mr. Garn was unavailable to testify and his prior testimony would be admissible.

Tacoma Police Department forensic officer Ted Garn testified in the first two trials, but was unable to testify at the third trial because he lacked memory of the subject matter and his post traumatic stress disorder prevented him from reviewing the documents that might refresh his recollection. RP 1369-71. The trial court concluded that Mr. Garn's prior testimony could be used in his absence. RP 1371-72.

Evidence Rule 804(b)(1) states:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Evidence Rule 804(a) defines unavailable as follows:

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;

These evidence rules present a two prong test. First, is the witness unavailable? Second, is the offered substitute testimony "former

testimony”)? Both prongs of the test were met and the trial court properly admitted the evidence.

Defendant only challenges the admissibility of Mr. Garn’s prior testimony on the basis of the first prong of the test. It is clear that the substitute testimony offered was “former testimony” under the rule, in that it was Mr. Garn’s testimony at a previous trial involving the same parties, the same incident, and the same crimes.

Mr. Garn was unavailable for two reasons. He was unable to remember the events about which he would have been asked to testify. RP 1229, 1231-32. While Mr. Garn remembered going to the scene of this crime, and believed he collected evidence, he had “lost a lot of memory from the past,” due to an accident he had been in while on duty, and post traumatic stress syndrome related to his service in Vietnam. RP 1228-31. Mr. Garn testified that he did not recall what he did on October 16, 1995. RP 1231. Mr. Garn indicated that he could not recall the scene of the crime, even when shown a photograph. RP 1231; Exhibit 78. Mr. Garn could not recall if he had ever seen the property sheet used to document what was collected at the scene of the crime. RP 1232; Exhibit 628. He could not even remember the documents he helped prepare, nor could he remember preparing those documents. RP 1234-36, 1240; Exhibit 629. Mr. Garn did not even remember the deputy prosecutors offering him the

reports to read when they went to his house a few weeks before trial. RP 1241, 1246. On cross-examination Mr. Garn indicated that records of his work would not help him remember what particular work he did on this case. RP 1240.

Mr. Garn was also unavailable because he was suffering from “a then existing physical or mental illness or infirmity.” Mr. Garn testified that he could not read his reports of the work he did at the Eggleston residence. RP 1241-42.

Q (by DPA): I would like you to read the paragraph at the bottom - - toward the bottom of the page of Exhibit 629 to yourself, please.

A: I’m sorry. I can’t do it. I just can’t do it. I just can’t do it.

Q: Why not Mr. Garn?

A: I just - - I just can’t do it. Not that I don’t want to, I just can’t do it.

Q: Why not Mr. Garn?

A: I don’t - - it just - - I just can’t do it. It’s - - huh-uh.

RP 1241-42.

Mr. Garn explained that he was about to enter the VA hospital that day, or as soon as a bed was available for treatment of his PTSD, and that he has been receiving counseling and taking medication for the disorder.

RP 1232-34.

Mr. Garn’s wife testified that when he watches things on television that contain some violence, “[h]e becomes violent. He becomes extremely

depressed. He hallucinates. He has paranoia that people are coming to kill him or that he needs to go kill someone.” RP 1243. After episodes, Mr. Garn has no memory of what has just happened. RP 1244. Mr. Garn had been told by his doctors to avoid newspapers, the news, war movies, and crime drama television shows. If he does expose himself to these things he has episodes during which he experiences depression, paranoia and violent outbursts. RP 1243-45. These episodes can last from a few minutes, to a few days, to weeks. RP 1244. Mrs. Garn reported that Mr. Garn’s condition worsened since his second surgery which he had about four months before this court appearance. RP 1245. Mrs. Garn was a registered nurse for 20 years. RP 1248.

Mrs. Garn recalled the deputy prosecutors coming to the Garn house a few weeks before their court appearance. She recalled that the prosecutors showed Mr. Garn reports he had prepared. “He just - - he actually had no idea what those (the reports he had prepared) were, and I recall you specifically asking him what one specific thing was, and he had no idea.” RP 1246.

“A trial court's finding of unavailability is a matter within the sound discretion of the trial court and will not be reversed absent abuse of discretion.” State v. Whisler, 61 Wn. App. 126, 137, 810 P.2d 540 (1991)

(citing In re Estate of Foster, 55 Wn. App. 545, 554, 779 P.2d 272 (1989), review denied, 114 Wn.2d 1004 (1990)).

In the context of Evidence Rule 804(a), the confrontation clauses of the both federal constitution and the state constitution are satisfied if the State has made “a good faith effort to obtain” the presence of the witness. Whisler, 61 Wn. App. at 138. This is consistent with the Supreme Court’s interpretation of the federal constitution’s confrontation clause. The basic litmus of Sixth Amendment unavailability is established if “the prosecutorial authorities have made a good-faith effort to obtain” the witness’s presence at trial. Ohio v. Roberts, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) *overruled on other grounds by* Crawford v. Washington, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).

The trial court in the present case properly determined that Mr. Garn was unavailable because he could not remember the subject of his testimony and his mental illness prevented him from testifying. It would have been improper of the court to require Mr. Garn to testify when it obviously would have grave consequences on his mental well-being, and possibly on the proceedings. The court certainly did not abuse its discretion when it made these determinations. Because the witness was procured, the defendant’s right to confront the witness was not abridged.

3. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY PROPERLY ARTICULATED THE LAW OF SELF-DEFENSE AND ALLOWED DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

Defendant assigns error to the court's jury instructions. Defendant appears to make three arguments with respect to the jury instructions. Defendant's first argument is that Instructions 14, 15, 16, 17 and 19 deprived defendant of his claim of self-defense. His second argument is that the prior jury verdicts prohibited the State from asserting defendant knew or should have known that Deputy Bananola was a law enforcement officer. His third argument is that the trial court's pretrial ruling which prohibited him from challenging the legality of the search impermissibly removed a material element from the jury's consideration: whether Deputy Bananola was carrying out a legal duty at the time of his murder.

- a. The jury instructions were a proper statement of the law of self-defense when a law enforcement officer is the victim of the murder.

Appellate courts review a trial court's jury instructions under the abuse of discretion standard. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court does not abuse its discretion in instructing the jury if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and (3) when read as a whole,

properly inform the trier of fact of the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Reversal is not required unless prejudice can be shown. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). An error is not prejudicial unless it affects or presumably affects the trial outcome. Thomas, 99 Wn.2d at 104. A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense. i.e., the statutory elements of reasonable apprehension of great bodily harm and imminent danger. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

“[T]he established rule for use of force in self-defense cases involving arrests requires the person face a situation of actual, imminent danger, not just apparent, imminent danger.” State v. Bradley, 141 Wn.2d 731, 738, 10 P.3d 358 (2000)(citing State v. Valentine, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997)).

Defendant cites to the jury instructions he finds offensive, but fails to make any citation to authority as to why the given self-defense instructions were improper.¹

“This court will not review a claimed error unless it is (1) included in an assignment of error or clearly disclosed in the associated issue pertaining thereto, and (2) supported by argument and citation to legal authority. Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675, 683, 713 P.2d 736 (1986); RAP 10.3(a)(5); B.C. Tire Corp. v. GTE Directories Corp., 46 Wn. App. 351, 355, 730 P.2d 726 (1986); State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002); RAP 10.3(a)(5).

Even if this court were to ignore defendant’s failure to cite to legal authority, and review the instructions, it would conclude that they were proper. The trial court had to address two possibilities. Did defendant kill Deputy Bananola, knowing he was a law enforcement officer, or did he do so not knowing he was a law enforcement officer?

First, defendant claims that Instruction 15 deprived him of his right to claim self-defense if he was aware Deputy Bananola was a law enforcement officer when he shot him three times in the head. Brief of

¹ Defendant does provide citation to legal authority with respect to his claim that he should have been permitted to argue the legality of the search warrant to the jury (addressed below), but none for his argument that the self-defense instructions given were improper.

Appellant, at 88.

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 779; Instruction 15.

This instruction did not prevent defendant from arguing his theory of the case. Defendant argued the State did not prove he did not act in self-defense. If the jury had concluded that defendant knew Deputy Bananola was a law enforcement officer, but that the State failed to prove that Deputy Bananola's decision to fire was not necessary to overcome resistance, defendant would have been acquitted. This actually provided defendant a broader theory than the one he was employing.

At trial defendant was claiming that he did not know the John Bananola was a law enforcement officer. The court's instructions permitted the jury to conclude that even if defendant knew John Bananola was a law enforcement officer, he could still use deadly force in self-defense if Deputy Bananola was using excessive force, i.e. an amount of force in excess of that necessary to overcome actual resistance. This instruction was an accurate statement of the law and permitted defendant to argue his theory of the case.

Defendant next contends that the “knowledge” instruction permitted the jury to presume defendant knew Deputy Bananola was a law enforcement officer. The following is Instruction 17:

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.

CP 781. Both of the trial court’s justifiable homicide jury instructions (numbers 13 and 14) included an element of knowledge. It was proper for the court to instruct the jury as to what knowledge meant. The court’s instruction used the standard definition of knowledge as set forth in RCW 9A.08.010(1)(b):

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.

The Washington Supreme Court has already determined that the section of this definition to which defendant objects, the second part which permits a jury to infer knowledge from the circumstances, is constitutionally permissible because it still requires the jury to make a

specific finding with respect to the particular defendant. State v. J.M., 144 Wn.2d 472, 481, 28 P.3d 720 (2001) (See also State v. Johnson, 119 Wn.2d 167, 174-175, 829 P.2d 1082 (1992)).

This makes sense. If the jury could not infer knowledge from the circumstances, the State could not prevail, absent a confession by the defendant that he did in fact know of the circumstance the State had to prove. This is not the law, and for good reason; the State would never be able to satisfy the element of knowledge. It is only through the application of common sense that the State can prove knowledge. The State must prove circumstances that show that a reasonable person in the defendant's situation would know of the relevant facts in existence. The instruction was a proper statement of the law and permitted defendant to argue his theory of the case to the jury. There was no error in giving the knowledge instruction to the jury.

Defendant next complains that Jury Instructions 19 and 20 eliminated his self-defense claim if the jury concluded that he knew Deputy Bananola was a law enforcement officer. This is not true. The instructions stated correctly that when a person is claiming self defense against one whom he knows is a law enforcement officer, he must be in actual and imminent danger of death or great bodily injury. A reasonable but mistaken fear of such is insufficient.

Homicide or the use of deadly force involving the killing of a person whom the slayer knew was a law enforcement officer is not justified 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 783; Jury Instruction 19.

It is well settled that this is an accurate statement of the law. A citizen may defend against official force only when in actual danger of death or great harm. State v. Valentine, 132 Wn.2d 1, 20, 935 P.2d 1294 (1997)(quoting State v. Westlund, 13 Wn. App. 460, 467, 536 P.2d 20 (1975)). "Official force" means force wielded by someone whom the citizen perceives to be a police officer. State v. Bradley, 96 Wn. App. 678, 683, 980 P.2d 235 (1999), aff'd, 141 Wn.2d 731, 10 P.3d 358 (2000).

A reasonable but mistaken belief of imminent danger is an insufficient justification for use of force against a law enforcement officer engaged in the performance of official duties. Valentine, 132 Wn.2d at 20-21; Bradley, 96 Wn. App. at 683. Thus, to justify the use of force against a law enforcement officer engaged in the performance of official duties, a finding of actual danger of serious injury under an objective standard is required. Bradley, 96 Wn. App. at 685; Valentine, 132 Wn.2d

at 20-21; State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985);
State v. Ross, 71 Wn. App. 837, 843, 863 P.2d 102 (1993).

The stricter self-defense standard is in place to protect law enforcement officers and third parties from the dangers of physical violence related to arrests. Bradley, 96 Wn. App. at 683; Ross, 71 Wn. App. at 840-43; Valentine, 132 Wn. 2d at 20.

Defendant had two very real self-defense theories available to him, the absence of both of which the State had to prove beyond a reasonable doubt. First, if the defendant reasonably did not know Deputy Bananola was a law enforcement officer, and defendant reasonably believed he was in imminent danger of serious bodily harm, he would have been justified in his use of deadly force. Secondly, even if defendant knew Deputy Bananola was a law enforcement officer, and defendant was in actual imminent danger of serious bodily harm because the deputy was using excessive force, he would have been justified in his use of deadly force. The State had to disprove beyond a reasonable doubt both of these theories. The instructions given were an accurate statement of the law and permitted defendant to argue his theory of the case. The court did not err when it instructed the jury.

- b. The trial court properly instructed the jury because the prior verdicts did not implicate the doctrine of collateral estoppel.

Defendant asserts the prior verdicts in this case prohibited the court from instructing the jury on whether defendant knew or should have known Deputy Bananola was a law enforcement officer. The State has responded to this argument above. In short, defendant failed to raise this issue in the trial court, and has failed to argue the elements of collateral estoppel, much less satisfy them. Therefore, he cannot prevail on this claim of error on appeal.

- c. The trial court properly prohibited defendant from arguing the validity of the search warrant to the jury.

Defendant claims that the trial court's ruling which prohibited him from challenging the legality of the search in front of the jury impermissibly removed an element of his self-defense claim from jury consideration. This claim is erroneous because the court correctly concluded that the question of whether the search warrant was properly issued was a legal question for the court, not a factual question for the jury. If defendant wanted to challenge whether Deputy Bananola used force "in the discharge of a legal duty" by his entry into the Eggleston residence, he could have challenged whether the deputies were executing a

search warrant. In other words, he could have claimed a search warrant was never issued. However, a deputy acts within the legal duties of his job when he carries out the orders of the court. The legality of the order is a question of law properly answered by the court.

Questions of law are the province of the court and questions of fact are for the jury. State v. Chambers, 81 Wn.2d 929, 931-32, 506 P.2d 311 (1973)(See also Sparf v. United States, 156 U.S. 51, 82-87, 39 L. Ed. 343, 15 S. Ct. 273 (1895)). “What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.” Sullivan v. Louisiana, 508 U.S. 275, 277-278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (citations omitted).

Defendant asserts that “the lawfulness and officialness of a slain officer’s use of force is necessarily a jury determination under Gaudin.” Brief of Appellant, at 91. (Citing United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed.2d 444 (1995)). In Gaudin the defendant had been convicted of making material false statements on loan documents. 515 U.S. 507-08. The trial judge refused to submit the question of “materiality” to the jury. Id. It was uncontested that conviction required that the statements be “material”, and that “materiality” is an element of the offense that the Government had to prove. Id. at 509. The Supreme

Court held:

Thus far, the resolution of the question before us seems simple. 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; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

Gaudin, 515 U.S. at 511.

The issue of Deputy Bananola's use of force is entirely different. The State had to disprove defendant's self-defense claim. Part of the State's case in doing so rested on the premise that Deputy Bananola was using deadly force, and permitted to do so when overcoming "actual resistance to the execution of the legal process, mandate, or order of a court or officer, or the discharge of a legal duty. The service of a search warrant is a legal duty of a law enforcement officer." CP 779; Jury Instruction 15. The deputy did not have to be serving a search warrant that would sustain a suppression motion in order for the defendant to be required to submit to the legal process. The issuance of the search warrant satisfies the requirement that the deputy be acting pursuant to the discharge of his legal duty.

Even if the search warrant had later been determined to be lacking probable cause or in some other way defective, that does not give the defendant the right to use force in resisting its execution. A person being

arrested does not have the right to resist, even if the arrest is unlawful. State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997). An occupant, confronted with a valid search warrant, has no right to refuse admission to police officers. State v. Richards, 136 Wn.2d 361, 374, 962 P.2d 118 (1998).

The legality of the search warrant is not an element of the self-defense claim. The element is whether the deputy was engaged in the discharge of his legal duty: the service of a search warrant. If the deputy had not been serving a search warrant, defendant might have been able to avail himself of a claim that the deputy was not acting in the discharge of his legal duty. But under the facts of this case, there is no claim that he was acting outside the scope of the search warrant. That the State proved this element, the existence of the search warrant, and defendant chose not to challenge it, does not mean that defendant had a right to challenge the legality of the warrant.

Finally, whether the search warrant was lawfully issued is a question of law, and one that this court has already answered. This court concluded that the search warrant was valid. Eggleston, No. 22085-7-II, at 66-82. The idea that a jury should determine the validity of a search warrant has no support in case law. The question for the jury, the element of the self-defense claim, was whether the deputy was carrying out a legal

duty. Once the court signs the search warrant, the deputy has a legal duty to serve it.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JURORS 4 AND 7, AS WELL AS JUROR BURROWS.

- a. The removal of Jurors Number Four and Seven was appropriate and the court did not abuse its discretion by dismissing jurors who could not be present for testimony.

On the sixteenth day of trial Juror Number Seven fell and hurt her right knee, her back, arms and hand. RP 2610-15; 2688. The court had scheduled a visit to the scene of the crime for that afternoon and had to reschedule it due to the injury. RP 2608. Juror Number Seven indicated that she was having trouble walking and was icing her knee. The State's attorney made a record that Juror Number Seven was in obvious discomfort and appeared to believe she had suffered more than just a scraped knee. RP 2621. The court reviewed RCW 2.36.110 and CrR 6.57, and after discussion with counsel determined that even though the site visit would have to be rescheduled, Juror Seven would remain on the panel. RP 2617-21. The court indicated that if it thought Juror Seven's ability to give her attention to the testimony was impacted Juror Seven would be excused. RP 2620.

Rescheduling the site visit required canceling and rescheduling a bus, getting a second judicial assistant, rescheduling other personnel, and juggling the witnesses. RP 2680. The State reported that the site visit could not be put off indefinitely because there were concerns that transients would break back into the house. RP 2680. The trial court recognized the concern and reset the site visit for four days later, Monday afternoon.

On Monday morning Juror Number Seven informed the court that she had seen the doctor on Friday and had another appointment that afternoon. RP 2685. The court was very concerned that Juror Number Seven had scheduled an appointment that would conflict with the taking of testimony and the rescheduled site visit. RP 2685. The court decided that it was going to excuse Juror Number Seven, observing that the medical appointments could be an ongoing problem. RP 2690.

The same morning, Juror Number Four called the court to report that she had been vomiting all night and was still vomiting that morning. RP 2684. The court indicated that the juror had said that she would try to make it to court that afternoon, but the court told her to stay home and try to get better. The court concluded that it would not be sensible to have a juror who has been vomiting in the morning to come to court that afternoon. RP 2692. The court expressed concern that the juror could end up getting all of the people in the courtroom sick, and there was no assurance the juror would be ready to proceed that afternoon. The court

was aware of the expense another site visit delay would cost, as well as the extensive scheduling problems inherent in delaying the proceedings any further.

An appellate court reviews a trial court's decision to remove a juror for an abuse of discretion. State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993); State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). CrR 6.5 allows the court to replace a juror with an alternate juror, before the submission of the case to the jury, if the juror becomes unable to serve. In the case of a deliberating jury, although CrR 6.5 does not specifically require a hearing, some sort of formal proceeding is contemplated by the rule. Ashcraft, 71 Wn. App. at 462. But such a proceeding is only required when the case has already gone to the jury and the alternates have been temporarily excused. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981 (1998). The purpose of a formal proceeding is to verify that the juror is unable to serve and to demonstrate that the alternate is still impartial. State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001). There is no language in the rule which implies the court should hold a hearing before dismissing a juror prior to the case being given to the jury.

RCW 2.36.110 requires the court to excuse from service any juror who, in the opinion of the judge, is unfit or unable to serve for a number of listed reasons, including ill health. The court has a statutory duty to

excuse a juror who is too ill to serve. RCW 2.36.110. In Jorden, the court did take testimony because the parties disputed whether a juror was falling asleep. Jorden, 103 Wn. App. at 224-26.

Defendant has cited no case where the court was found to have abused its discretion in a case such as the one at bar. Both jurors were excused well before the parties rested, and both presented possible continuing delays. The Jorden court concluded that it was not an abuse of discretion to dismiss a juror who had been inattentive and appeared to be very tired. 103 Wn. App. at 226. The Johnson court found no abuse of discretion when the trial court replaced a juror after deliberations began with an alternate because the dismissed juror called to tell the court that she could no longer continue deliberating. 90 Wn. App. at 73.

In a footnote defendant cites United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991), for the proposition that a juror's one day absence is insufficient to dismiss the juror. This case is not at all like the one at bar. In Tabacca, the juror informed the court that he would be absent that day because his wife took the car keys and he would not be able to get to the courthouse. Id. at 913. The Tabacca court concluded that given the jury had already started deliberations, the shortness of the trial (only two and a half days), and the determinate length of the absences (only one day), the court did not have "just cause" to dismiss the juror. The Tabacca court noted that other cases where the continuances would have been for

unspecified periods of time, the jury had not been given the case, and the trial was longer, the rule was not violated by the trial courts dismissal of jurors. Id. at 914-15.

In the present case, the court did not need to find “just cause” to dismiss the juror. The statute and court rule instruct the court “[i]f 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.” CrR 6.5.

Because the court dismissed the juror before the case was given to the jury, and each dismissed juror was replaced with an alternate, defendant’s right to an impartial jury was not violated. The court had a duty to dismiss jurors who could not continue to carryout their duty. The court concluded that the Juror Number Seven’s absence was going to be expensive and delay the proceedings for the second time in a matter of days. The court was also concerned that there may very well be further delays caused by treatment for this juror’s injuries. It was clear that the juror was not going to be able to carry out her duties as a juror, therefore the court had a duty to dismiss the juror. Even if the court was incorrect in its assessment, it cannot be said that the court abused its discretion when it concluded that the juror had to be dismissed because her inability to attend the proceedings would have resulted in a second expensive and troublesome delay.

Dismissal of Juror Number Four was also appropriate. The court concluded that the juror should not come to court and possibly infect everyone in the courtroom. It was not an abuse of discretion to dismiss the sick juror, particularly when the court rule requires the court to do so: “If at anytime before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” CrR 6.5. The juror was sick and unable to attend. How soon the juror was going to be able to participate was unknowable. The possible infection of the other jurors and participants made discharge of Juror Number Four proper, and certainly not an abuse of discretion.

- b. The trial court did not err when it dismissed Juror Burrows with the consent of both parties.

Defendant states that “Juror Thomas Burrows was dismissed by the court towards the end of the trial, following information given by the state to the court in chambers, that Burrows was actually a customer of Magoo’s, the tavern at which Mr. Eggleston worked.” Brief of Appellant, at 71. Defendant admits that he stipulated to the dismissal of Juror Burrows. Id. Juror Burrows was dismissed from the case because he had contact and conversations with a witness who had been a witness in the case, but not called in this particular trial. RP 6132. Juror Burrows was

also observed to be sleeping during some of the proceedings. RP 6134. Juror Burrows was working at night and hearing testimony during the day, and therefore may have been sleep deprived and unable to pay attention to trial testimony. RP 6135. Defense counsel stipulated to Juror Burrows' dismissal. RP 6135. Juror Burrows was dismissed before the court read the jury instructions and before the case was given to the jury.

Defendant fails to explain why this decision was erroneous, or how the court abused its discretion by doing what both parties agreed should be done.

Defendant alleges that the information given to the court was erroneous and that Juror Burrows had informed the court that he had come into contact with people whom he recognized from his patronage of Magoo's Tavern. The only evidence defendant presents on appeal is an affidavit of Juror Burrows which states that he informed the court of such, and this affidavit was obtained after the jury returned its verdict. CP 818-20.

Defendant has failed to present any record that this contact between the juror and the court existed other than the juror's affidavit. The defense did not provide testimony or statements from the judicial assistant, nor the court. The defense has failed to cite to the record where

this issue was raised below before the court and failed to demonstrate how the court erred when it dismissed Juror Burrows.

Even if the court had communicated with Juror Burrows about his prior dealings with persons at Magoo's Tavern, it has not been demonstrated that the court abused its discretion by dismissing the juror prior to the beginning of deliberations. Given that Juror Burrows appeared to have friends who were familiar with the case, and with whom he had contact during the trial, the judge would have been well within her discretion to dismiss Juror Burrows. Even if this were not the case, however, the fact that Juror Burrows was sleeping during some of the testimony also warranted his dismissal from the case.

Defendant observes that the trial court's findings regarding juror misconduct "fail to address Burrows' now uncontradicted assertion, supported by another juror's declaration, that he had contacted the judge through her Judicial Assistant during the trial." Brief of Appellant, at 76. Defendant fails to note that there is no record that defense counsel raised this issue before the court at the hearing involving the juror misconduct. The findings of fact and conclusions of law prepared after the juror misconduct hearing were tailored for the issues raised at the hearing: whether jurors discussed the evidence before deliberation began, whether jurors discussed a witness's veracity before deliberations began, and

whether jurors discussed the prior trials. Defendant has failed to provide a record sufficient for review of this issue.²

Defendant also complains that the trial court erred when it failed to recuse itself. Defendant fails to cite to the record where the court made this decision, and he has, therefore, failed to provide a record sufficient for review of this claim of error. State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002).

Defendant complains that the trial court's failure to hold a hearing before dismissing Juror Burrows violated CrR 6.5 and RCW 2.36. Brief of Appellant, at 78. As noted above, a hearing is only contemplated if the juror is being dismissed after the jury has begun deliberations. But this ignores the point, if the parties are stipulating that the juror should be removed, a hearing is a waste of time. Defendant cannot agree to a juror being dismissed, and then claim such was error on appeal. The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003) (See, e.g., State v. Henderson, 114

² Defendant asserts that the trial court did not permit inquiry regarding Burrow's allegation that he was threatened, that he told the judicial assistant about it, and that she assured him that the judge was told. Brief of Appellant, at 75. Defense counsel never made a request at this hearing to inquire of the jurors about this allegation. Therefore, defendant's assertion that the trial court did not permit this line of inquiry cannot be a legitimate claim of error.

Wn.2d 867, 870, 792 P.2d 514 (1990); State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989)).

Finally, defendant asserts that the trial court's failure to inform defense counsel of Juror Burrows comments to the judicial assistant violated his right to be present at every stage of the proceeding. This presupposes that the contact occurred. While defendant provided an affidavit of Juror Burrows, he has failed to present any citation to the record where the court addressed his contention. Further, defendant has failed to explain which alleged contacts with the court would warrant a finding of prejudice. If defendant did raise this below, the trial court would have addressed it and made a ruling as to whether a new trial was warranted, something the trial court was in the best position to determine. Defendant's failure to cite to the record, and failure to provide a record sufficient for review of this issue, constitutes a waiver of this claim of error. Given that Juror Burrows was dismissed before deliberations began, it is difficult to speculate as to how defendant was prejudiced.

Defendant cites State v. Wroth, 15 Wn. 621, 47 P. 106 (1896), for the proposition that the contact alleged in this case is error requiring reversal. The law in Washington, however, requires the defendant to at least allege prejudice before reversal is even considered. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Defendant has not even alleged

prejudice, much less detailed how he was prejudiced by the court's alleged contact with the juror. It is nearly impossible for defendant to allege prejudice in this case because Juror Burrows was removed before the case went to the jury.

Because defendant stipulated to the removal of Juror Burrows, he cannot claim the trial court erred in dismissing Juror Burrows. Even if his removal was not necessary because of his contacts with the witness, his falling asleep was a legitimate reason for his removal and the court did not abuse its discretion by dismissing him. Additionally, defendant's failure to present a record sufficient for review precludes appellate review of defendant's motion for the trial court to recuse itself. Finally, defendant has failed to even allege prejudice, therefore, he cannot prevail on his claim that any judge-juror contact warrants a new trial.

5. THE TRIAL COURT DID NOT ERR WHEN IT CONCLUDED THAT THERE WAS NO REASONABLE POSSIBILITY THAT ALLEGED JUROR MISCONDUCT IMPACTED THE VERDICT.

Defendant alleges two bases for reversal based on juror misconduct: that a juror failed to reveal knowledge of Eggleston's prior trials, and other jurors discussed those prior trials and their outcome. The trial court held a hearing on these claims of jury misconduct and had each

of the jurors testify as witnesses. RP 6527-6599. The court detailed its findings and conclusions on the record, and then memorialized these in written findings of fact and conclusions of law. RP 6600-12; CP 921-31.

With respect to defendant's first claim of error, the trial court concluded that knowledge of the existence of prior trials was not extrinsic evidence, because the fact that there were prior trials was expressed by counsel during questioning of witnesses, and witnesses testified to such. CP 927. The trial court concluded that in voir dire some jurors admitted knowledge of the results of the prior trials but they were not disqualified for such "so long as the juror could put aside that prior knowledge and judge the case fairly and impartially." CP 927. There was no evidence the juror who shared the information about the results of the prior trials intentionally mislead counsel or the court during voir dire. CP 926.

With respect to defendant's second claim, the trial court concluded that the extrinsic evidence of knowledge of the prior verdict did constitute juror misconduct. The court found "that extrinsic evidence regarding some results of prior trials was received by a few members of the jury." CP 927. The court also found that there was no indication that the extrinsic evidence identified which charge in the prior trials resulted in a hung jury, mistrial or conviction. CP 927. The court concluded that "[t]he communication of the results of prior trials by one juror to a few other

members of the jury during deliberations constituted misconduct.” CP 928.

After hearing from the jury, the court began its analysis by looking at relevant case law. After looking at the other claimed areas of juror misconduct, the court addressed the one challenged on appeal, the interjection of extrinsic evidence. RP 6600-01. The trial court observed that when this Court was faced with a similar issue after defendant’s second trial, it looked to United States v. Keating, 147 F.3d 895 (9th Cir. 1998). RP 6602; Eggleston, at 23.

This court held: “Given the court's failure to conduct any inquiry and the difficulty of concluding that the misconduct could not have affected the verdict, we are compelled to hold that the trial court erred in failing to grant a new trial because of juror misconduct.” Eggleston at 24-25.

The trial court took this ruling to heart and after a hearing, during which each juror was examined, it applied the facts of this case to the holding in Keating. RP 6602. The court looked at Keating and applied the “reasonable possibility” standard Keating enunciated, as set forth in Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988). Keating, 147 F.3d at 900-02.

The Dickson factors are:

1. whether the material was actually received, and if so, how;
2. the length of time it was available to the jury;
3. the extent to which the juror discussed and considered it;
4. whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and
5. any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.

Keating, 147 F.3d at 902 (citing Dickson, 849 F.2d at 406; Marino v. Vasquez, 812 F.2d 499, 506 (9th Cir. 1987)).

The trial court applied these factors and concluded: “Under an objective standard, there is no reasonable possibility that any reference to or disclosure of the results of the prior trials affected the verdict.” CP 930. The court further concluded, “there is no reasonable possibility that juror misconduct prejudiced the defendant or affected the jury’s verdict. There is no reasonable doubt about the lack of effect of juror misconduct on the verdict.” CP 931.

A trial court's ruling on a motion for a new trial will not be reversed on appeal absent a showing of abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). “[U]ltimately the

determination of whether juror misconduct in interjecting evidence outside of the record affected the verdict is within the discretion of the trial court.” Richards v. Overlake Hosp. Medical Center, 59 Wn. App. 266, 272, 796 P.2d 737 (1990).

It is firmly established that a jury’s consideration of extrinsic evidence may warrant a new trial. Balisok, 123 Wn.2d at 118; State v. Rinke, 70 Wn.2d 854, 862, 425 P.2d 658 (1967). Extrinsic evidence “is defined as information that is outside all the evidence admitted at trial, either orally or by document.” Richards, 59 Wn. App. at 270. “Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal.” Balisok, 123 Wn.2d at 118 (citing Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)). Thus, when extrinsic evidence has been introduced, the question is not whether error has occurred, but whether the defendant has been prejudiced by the error. See Rinke, 70 Wn.2d at 862.

A new trial should be granted when there are reasonable grounds to believe that the defendant may have been prejudiced by the extrinsic evidence in question. State v. Cummings, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). In making this determination, courts employ an objective standard:

The court must make an objective inquiry into whether the extraneous evidence could have affected the jury's verdict, not a subjective inquiry into the actual effect.

Allyn v. Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020 (1998)(emphasis in original). Each case must be decided on its own facts. Cummings, 31 Wn. App. at 429. Moreover, "something more than a possibility of prejudice must be shown." Id. at 430 (citing State v. Lemieux, 75 Wn.2d 89, 448 P.2d 943 (1968)). On the other hand, any reasonable doubt as to the effect of the evidence must be resolved against the verdict. Allyn, 87 Wn. App. at 730; Cummings, 31 Wn. App. at 430. "Not all instances of juror misconduct merit a new trial; there must be prejudice." State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669, review denied, 133 Wn.2d 1021, 948 P.2d 389 (1997), citing State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021, 827 P.2d 1392 (1992)).

The question of whether a defendant has been prejudiced by extrinsic evidence is addressed to "the sound discretion of the trial court, who saw both the witnesses and the trial proceedings, and had in mind the evidence." Allyn, 87 Wn. App. at 730. Although the trial court's decision is always reviewed for abuse of discretion, a decision to grant a new trial is afforded greater deference from the appellate courts:

If misconduct is found, great deference is due the trial court's determination that no prejudice occurred. However, greater weight is owed a decision to grant a new trial than a decision not to grant a new trial.

Richards, 59 Wn. App. at 271. In State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953), the court concluded that the burden is upon the State to show that no prejudice actually resulted. Rose, however, was addressing a circumstance where the jury violated a statute which prohibited them from separating. The court observed that prejudice was presume because of the statutory violation, and in the absence of the statute, prejudice would not have been presumed. 43 Wn.2d at 557 (citing State v. Pepoon, 62 Wash. 635, 114 Pac. 449 (1911)). In State v. Murphy, 44 Wn. App. 290, 721 P.2d 30 (1986) the court clarified the standard.

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. However, this presumption is not conclusive and may be overcome if the trial court determines such misconduct was harmless to the defendant.

State v. Murphy, 44 Wn. App. at 296 (citing Remmer v. United States, 347 U.S. 227, 229, 98 L. Ed. 654, 74 S. Ct. 450 (1954); State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953); State v. Saraceno, 23 Wn. App. 473, 475, 596 P.2d 297, review denied, 92 Wn.2d 1030 (1979); State v. Forsyth, 13 Wn. App. 133, 136-37, 533 P.2d 847 (1975).

The trial court in this case, unlike defendant's second trial court, conducted a hearing and questioned each juror. The court made findings of fact and conclusions of law. The only finding of fact to which defendant assigned error is Findings of Fact XX. Importantly, defendant did not assign error to the court's Finding of Fact XXI, which states: "During voir dire, jurors disclosed some knowledge of the results of prior trials. This knowledge was not a disqualification of that juror so long as the juror could put aside that prior knowledge and judge the case fairly and impartially." This finding makes clear that the parties were aware before the jury was empanelled that a juror might know of the results of the prior trials.

Defendant has failed to explain how the court abused its discretion when it concluded there was no reasonable possibility that the extrinsic evidence of defendant's prior conviction overturned on appeal, which was heard by only one or two jurors, affected the verdict. The court's inquiry of each juror revealed that even though one of the jurors mentioned the overturned conviction, only one juror recalled hearing the statement and there was no discussion of the subject. CP 925-27; Findings of Fact XII-XXI.

The court instructed the jury that "[t]he only evidence you are to consider consists of the testimony of the witnesses and the exhibits

admitted into evidence.” CP 764; Jury Instruction Number One. “Courts generally presume jurors follow instructions to disregard improper evidence.” State v. Russell, 125 Wn.2d 24, 84-85, 882 P.2d 747 (1994) (citing State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991)).

Defendant does not even claim that the verdict was impacted by the knowledge of these two jurors, he simply says prejudice is presumed, and the trial court erred in not applying an objective standard. Brief of Appellant, at 82. While the State is required to disprove prejudice, it can do so by a showing to the trial court that the extrinsic evidence had no impact on the verdict. The trial court heard all of the trial testimony, reviewed the testimony of the jurors and the affidavits submitted by defendant, and came to the following conclusion: “There is no reasonable possibility that juror misconduct prejudiced the defendant or affected the jury’s verdict. There is no reasonable doubt about the lack of effect of misconduct on the verdict.” CP 931. The court clearly did conclude that there was no prejudice beyond a reasonable doubt that the jury misconduct had no impact on the verdict, and defendant does not explain how this finding was an abuse of discretion.

Defendant’s claim that the trial court erred by not applying an objective standard to its findings is also erroneous. The trial court

concluded: “Under an objective standard, there is no reasonable possibility that any reference to or disclosure of the results of the prior trials affected the verdict.” CP 930.

While the court did conclude that there was extrinsic evidence before some of the jurors, it was obvious this extrinsic evidence was not prejudicial to defendant receiving a verdict from an impartial jury. Only one juror reported that he heard about the prior conviction, and said that another juror informed him of such. There was no discussion of the prior verdict during deliberations. The other jurors did not even hear the statement and never discussed it.

The court’s diligent application of the Dickson factors is detailed in its Conclusions of Law IV. CP 928-30. The trial court found that the information was known by two jurors, and communicated by another juror. This factor, the court concluded, weighed in favor of a new trial. CP 928. The information appeared to have been communicated on the second and final day of deliberations, and this weighed against a new trial. CP 928. “There was no discussion or consideration of the result of the prior trials by any members of the jury. Only two jurors heard the extrinsic information.” CP 929. The trial court concluded this weighed against a new trial. CP 929. The information was related in the middle of deliberations, as opposed to prior to deliberations beginning and the court

considered this to weigh in neither the favor of, nor against, a new trial. CP 929. The court concluded that the juror who related the information did not mislead the court during voir dire, and may have recalled something during the trial, or learned of the information during the trial. This did not weigh in favor of a new trial. CP 929. “Other jurors reported knowledge of the result of the prior trials during voir dire, and one juror was told of a portion of the result between voir dire and the commencement of testimony. Those jurors were not challenged for cause by the defendant and were allowed to remain on the jury. This factor weighs against the granting of a new trial.” CP 929. The court also found that given the questions by defense counsel and answers of witnesses that were not the subject of a motion to strike, it was reasonable for a juror to conclude that a prior trial had been held and some result had been achieved. This factor weighed against a new trial. CP 929-30. The court found that some of the reported extrinsic evidence was prejudicial to the State, and this weighed against a new trial. CP 930. The court also held that because the jury was never aware of what charges defendant had previously been convicted, this weighed against a new trial. CP 930. And the court found that the information the jurors related about the prior trials results (conviction, mistrial and hung jury), demonstrated the extraneous

information was ambiguous and inconsistent, and this weighed against a new trial. CP 930.

Defendant has not explained which of these findings was incorrect, or which was an abuse of discretion.

If this court were to conclude that the trial court abused its discretion in finding there was no reasonable possibility that the extrinsic evidence impacted the verdict, it would be concluding that no conviction could be sustained when a couple of jurors knew of a prior conviction. It would be a grave mistake to come to this conclusion. The result would be that the State could never retry a high profile case. There are a number of cases each year which have so much publicity that it would be impossible for a court to empanel a jury on retrial without a juror or two having not heard about the prior conviction. For example, if Robert Yates' conviction was overturned, and the case retried, it would be preposterous to believe that a jury could be seated in which at least a couple of jurors never heard of his earlier conviction. If Gary Ridgeway successfully withdrew his guilty pleas to the Green River murders, it would be equally ridiculous to believe a jury could be empanelled without a juror or two knowing he had pleaded guilty to those murders.

The trial court observed as much when it made Conclusion of Law IV(c):

During testimony before the jury, witnesses and defense counsel indicated on numerous occasions that there had been prior trials. Defense counsel did not request a mistrial, a curative instruction, or that the information be stricken. This information was properly before the jury for consideration, and a reasonable inference from that information is that there had been some previous result, given the seven-year period between the incident and this trial and the period of five years since the first trial and four years since the second trial. This factor weighs against the granting of a new trial.

CP 929-30.

This court should not ignore the obvious. If a person is on trial for the murder of a police officer which was committed seven years ago, and the jury is aware of prior trials, a juror or two will presume a prior conviction was overturned. Jurors are members of the community who understand the legal process well enough to know such. The legal system should not presume jurors live in a vacuum, or are so unintelligent as to not come to such conclusions on their own. Jurors may truthfully tell the court during voir dire that they have no memory of the prior verdict. That does not mean that after two months of testimony they will not figure out that a prior trial resulted in a conviction that was later overturned. When trying a case as old as this one, the law should not require a trial court to seat only jurors so far removed from reality that they are unable to deduce the obvious. In this case, the question is whether that knowledge impacted the verdict. After hearing all of the jurors testify, the trial court concluded

beyond a reasonable doubt this jury's verdict was not affected by a couple of jurors knowing about a prior conviction, particularly when this information was not part of the deliberations. This finding was not an abuse of discretion, and is supported by the findings of fact.

The law does not require reversal when a jury has information that a prior conviction resulted from a prior trial on the same charges. Reversal is only required if the trial court concludes that the State has not demonstrated that there is no reasonable possibility that such had an impact on the jury's verdict. This Court does not review the question de novo. It must conclude that no reasonable trial court would have found as this trial court ruled. Given these circumstances, that high threshold cannot be met by defendant. Defendant has not demonstrated that the trial court abused its discretion in its conclusion that the jury's verdict was not impacted by two jurors' knowledge of defendant's prior conviction. The fact that the knowledge was not related to the entire jury, and was not discussed at all in deliberations, weighs heavily in favor of the court's determination. The trial court properly applied the Dickson factors and determined there was no reasonable possibility that the verdict was impacted by the extrinsic evidence. The trial court did not abuse its discretion when it came to this conclusion.

6. THE TRIAL COURT DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE WHEN IT SENTENCED DEFENDANT ON DRUG CHARGES THAT WERE NOT SUBJECT OF THE APPEAL.

Defendant contends that the trial court violated his double jeopardy rights by sentencing him on the drug convictions. Defendant fails to note however, that the judgments and sentences imposed after the first and second trials were vacated by the Court of Appeals opinion. There was no valid judgment and sentence, therefore the court had to resentence defendant on the drug charges. In fact, in defendant's first appeal the State has conceded that the original judgment and sentence contained an error when it mandated that the drug conviction sentence enhancements ran consecutive to each other rather than concurrent with each other. Defendant had to be resentence on the drug counts, regardless of the outcome in the third trial.

Where a sentence is not in accordance with the law, the sentencing court has both the authority and the duty to correct the sentence. State v. Pringle, 83 Wn.2d 188, 193, 517 P.2d 192 (1973). Further, where the defendant's confinement is not in accordance with a valid judgment and sentence, the resentencing does not impact the defendant's double jeopardy rights. Pringle, 83 Wn.2d at 193-94. There is no expectation in

finality of a sentence, for double jeopardy purposes, that is pending an appeal. State v. Hardesty, 129 Wn.2d 303, 312, 915 P.2d 1080 (1996).

In the present case, defendant did not have an expectation in the finality of his sentence on the drug charges because he filed an appeal of his conviction on those charges as well as all of the other counts. The trial court could not let his original judgment and sentence stand because it included counts that had been reversed, and enhancements that were erroneously run consecutively rather than concurrently. That judgment and sentence was therefore, voided by this court's opinion in Eggleston, No. 22085-7-II.

When the trial court sentenced defendant it was required to include all of defendant's convictions in its determination of his offender score. RCW 9.94A.360(1) provides the basis for determining what convictions properly may be included as a prior offense in calculating an offender score:

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. 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.

The trial court properly included the convictions from the first trial when it sentenced defendant on the drug charges. See State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992).

Defendant does not raise the issue directly but the real question may be which judge had the authority to impose the sentence on the drug charges. It may very well be that the judge who presided over the first trial, Judge McPhee, should have imposed the sentence on the drug convictions. Because this case will need to be remanded for resentencing (see Argument Section 8 below), the State invites defendant to express to this Court whether he wants Judge McPhee to enter the sentence on the drug convictions, or whether he acquiesces to Judge Arend imposing sentence on all counts.

7. THE TRIAL COURT DID NOT ERR WHEN IT CALCULATED DEFENDANT'S OFFENDER SCORE AND DID NOT FIND TWO OF THE DRUG CONVICTIONS TO BE THE SAME CRIMINAL CONDUCT.

Defendant has waived this claim of error. Defendant stipulated to his offender score at sentencing and cannot now complain that some of the prior criminal history amounted to the same criminal conduct. RP 6636. The Washington Supreme Court observed that a defendant generally cannot waive a challenge to an incorrect offender score. In re Personal

Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Exceptions to this rule exist, however, where the alleged error involves a stipulation to incorrect facts or a matter of trial court discretion. Goodwin, 146 Wn.2d at 874. The same criminal conduct doctrine involves both factual determinations and matters of trial court discretion. Goodwin, 146 Wn.2d at 875. Thus, a defendant may waive an alleged error regarding same criminal conduct if he fails to assert this argument at sentencing. Goodwin, 146 Wn.2d at 875 (favorably citing State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000)). By stipulating to his criminal history, and by agreeing with the State's calculation of his offender score defendant waived his right to challenge the offender score and to argue that reduced standard ranges should apply based on the same criminal conduct rule. See Nitsch, 100 Wn. App. at 521-22; see also In re Personal Restraint of Connick, 144 Wn.2d 442, 464, 28 P.3d 729 (2001)(once a defendant agrees to an offender score that counts his prior offenses separately, he cannot subsequently challenge the sentencing court's failure to consider some of those prior offenses as the same criminal conduct).

In this case, the waiver is even more apparent. Defendant was convicted of these crimes in the first of his three trials. Defendant has failed to cite when, after any of these trials, he raised the same criminal

conduct challenge. The proper place to raise it would have been after the first trial. If defendant had done so, Judge McPhee could have addressed the challenge and made a decision. Defendant's failure to do so then, precludes him from raising it later. Defendant's failure to raise this issue in his first appeal further waived review of this issue.

Finally, the appeal in this case comes from a trial that does not include the drug convictions. The drug convictions had already been scored as separate criminal conduct by the two preceding judges. CP 1204-15, 1520-30. This appeal relates to the decisions of the court after the third trial. This appeal is the wrong place and time to challenge the earlier findings that the convictions did not amount to the same criminal conduct.

Defendant cannot be heard to complain that this court erred when it followed his recommendation with respect to his offender score, and he failed to challenge the separate criminal conduct findings of the court which heard the evidence of the criminal conduct at issue.

8. BLAKELY v. WASHINGTON REQUIRES THIS COURT TO VACATE DEFENDANT'S EXCEPTIONAL SENTENCE.

On June 25, 2004 defendant filed a Statement of Supplemental Authority citing Blakely v. Washington, No. 02-1632, 2004 U.S. LEXIS

4573 (2004). The United States Supreme Court decided this case on June 24, 2004, and the State concedes this decision requires defendant's sentence be vacated, and this case remanded for resentencing.

State contests defendant's assertion that the doctrine of collateral estoppel prevented the trial court from imposing an exceptional sentence on the basis of the defendant's knowledge that the victim was a law enforcement officer at the time of the murder. In light of the Blakely decision, however, this issue is moot and the State will not present further argument unless instructed to do so by this court.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this court affirm the defendant's convictions, and remand for resentencing.

DATED: JULY 9, 2004

GERALD A. HORNE
Pierce County
Prosecuting Attorney



JOHN M. SHEERAN
Deputy Prosecuting Attorney
WSB # 26050

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/9/01 Johnson
Date Signature

FILED
COURT OF APPEALS
BY DEPUTY
STATE OF WASHINGTON
04 JUL -9 PM 4:05

APPENDIX "A"

*Verbatim Report of Proceedings,
May 20, 1998*

1 May 20, 1998

2 THE COURT: I'd ask everyone in the
3 courtroom to remain seated at all times during these
4 proceedings this afternoon, do not stand for the jury.

5 Ms. Ross has the jury, presiding juror advised you
6 that the jury has reach a verdict?

7 THE JUDICIAL ASSISTANT: Yes, they have,
8 Your Honor.

9 THE COURT: If you'll escort the jury into
10 the courtroom, please.

11 (The following occurred in the
12 presence of the jury.)

13 THE COURT: Mr. Greer, are you the presiding
14 juror?

15 JUROR GREER: Yes, I am.

16 THE COURT: And has the jury reached a
17 verdict?

18 JUROR GREER: Yes, we have.

19 THE COURT: If you'd hand the verdict forms
20 to Mrs. Ross, the judicial assistant.

21 I'll read the verdicts. Verdict form A, murder in
22 the first degree. We the jury find the defendant not
23 guilty of murder in the first degree, of the crime of
24 murder in the first degree as charged. Verdict form B,
25 murder in the second degree. We the jury, having found

1 the defendant not guilty of the crime of murder in the
2 first degree as charged, or being unable to unanimously
3 agree as to that charge, find the defendant guilty of
4 the lesser included crime of murder in the second
5 degree. Special verdict form, deadly weapon. We the
6 jury return a special verdict by answer as follows:
7 Was the defendant armed with a deadly weapon, pistol,
8 revolver, or any other firearm, at the time of the
9 commission of the crime of murder in the first degree
10 or murder in the second degree? Answer, yes. Both
11 verdict forms were -- all three verdict forms that I
12 referred to have been signed by the presiding juror.

13 Ladies and gentlemen of the jury, I'm going to ask
14 each of you two questions. One, whether these are the
15 verdicts of the jury, and whether these verdicts are
16 your personal verdict, that is you voted in the way
17 that I have read the verdicts, personally. The purpose
18 of that is to make sure the record discloses that the
19 verdict is unanimous.

20 Miss Brokaw, are these the verdicts of the jury?

21 JUROR BROKAW: Yes.

22 THE COURT: Are these your personal
23 verdicts?

24 JUROR BROKAW: Yes.

25 THE COURT: Mr. Peterson, are these the

1 verdicts of the jury?

2 JUROR PETERSON: Yes.

3 THE COURT: Are these your personal
4 verdicts?

5 JUROR PETERSON: Yes, sir.

6 THE COURT: Mrs. DeWitt, are these the
7 verdicts of the jury?

8 JUROR DEWITT: Yes.

9 THE COURT: Are these your personal
10 verdicts?

11 JUROR DEWITT: Yes.

12 THE COURT: Mr. Greer, are these the
13 verdicts of the jury?

14 JUROR GREER: Yes.

15 THE COURT: Are these your personal
16 verdicts?

17 JUROR GREER: Yes.

18 THE COURT: Mr. Ryan, are these the verdicts
19 of the jury?

20 JUROR RYAN: Yes.

21 THE COURT: Are these your personal
22 verdicts?

23 JUROR RYAN: Yes.

24 THE COURT: Mrs. Reynolds, are these the
25 verdicts of the jury?

1 JUROR REYNOLDS: Yes.

2 THE COURT: Are these your personal
3 verdicts?

4 JUROR REYNOLDS: Yes.

5 THE COURT: Mr. Imhof, are these the
6 verdicts of the jury?

7 JUROR IMHOF: Yes.

8 THE COURT: Are these your personal
9 verdicts?

10 JUROR IMHOF: Yes.

11 THE COURT: Mr. Sabol, are these the
12 verdicts of the jury?

13 JUROR SABOL: Yes.

14 THE COURT: Are these your personal
15 verdicts?

16 JUROR SABOL: Yes.

17 THE COURT: Mr. Pena, are these the verdicts
18 of the jury?

19 JUROR PENA: Yes.

20 THE COURT: Are these your personal
21 verdicts?

22 JUROR PENA: Yes, sir.

23 THE COURT: Mr. Griffin, are these the
24 verdicts of the jury?

25 JUROR GRIFFIN: Yes.

1 THE COURT: Are these your personal
2 verdicts?

3 JUROR GRIFFIN: Yes.

4 THE COURT: Mrs. Hurt, are these the
5 verdicts of the jury?

6 JUROR HURT: Yes, sir.

7 THE COURT: Are these your personal
8 verdicts?

9 JUROR HURT: Yes.

10 THE COURT: And Mr. Walker, are these the
11 verdicts of the jury?

12 JUROR WALKER: Yes.

13 THE COURT: Are these your personal
14 verdicts?

15 JUROR WALKER: Yes.

16 THE COURT: The verdicts will be accepted by
17 the court. I do want to indicate that special verdict
18 form, aggravating circumstances, was also filled out by
19 the jury, but it really has no significance to the
20 verdict that the jury has rendered.

21 Ladies and gentlemen of the jury, you're discharged
22 from your duties as jurors in this cause. I will be
23 the sentencing judge in this matter, so I'm not going
24 to say a heck of a lot this afternoon, except to thank
25 you for your unusual and lengthy service as jurors in

1 the last trial, a presentence report was prepared. Do
2 you wish that report updated or --

3 MR. HESTER: I think we can update you. I
4 don't think we need a new one, unless the court feels
5 compelled to do one because of the case.

6 THE COURT: I'm not compelled. The
7 defendant has a right to have a presentence report
8 prepared.

9 MR. HESTER: We can supplement.

10 THE COURT: If that's the case, we should be
11 able to have sentencing prior to July 13th.

12 MR. HESTER: That's certainly an option,
13 yeah.

14 THE COURT: I'm available any time in the
15 month of July. And I would be available any time you
16 determine you wish this done. If I'm gone, I'm not
17 very far away. Would you like it earlier than that
18 date?

19 MR. HESTER: I was -- if we could set it
20 like -- what day do we want to do it on?

21 THE COURT: Doesn't make any difference to
22 me. Early July would be fine.

23 MR. HESTER: How about --

24 THE COURT: Or any time.

25 MR. HESTER: How about the second of July,

1 9:00 o'clock?

2 THE COURT: The second of July, is that
3 acceptable Miss Amos?

4 MS. AMOS: Yes, Your Honor.

5 THE COURT: Now, I think we should have a
6 waiver of Mr. Eggleston's right to a presentence report
7 on the record.

8 MR. HESTER: We can do that.

9 THE COURT: Do you want to inquire of your
10 client, Mr. Hester?

11 MR. HESTER: I can do that. We have a right
12 to a full presentence report. You have a right to
13 supplement the presentence report that's been made
14 previously. Will you waive both of those
15 opportunities?

16 THE DEFENDANT: I understand.

17 THE COURT: You're doing this freely and
18 voluntarily?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you have any question about
21 that process, Mr. Eggleston?

22 THE DEFENDANT: No, sir.

23 THE COURT: The court will approve a waiver
24 of a written presentence report. Obviously if the
25 defense wishes to submit sentencing information to me,

1 or the state, please feel free to do so. I'd like it
2 at least a week before the date of sentencing. So
3 sentencing will be set for July the second at 9:00 a.m.
4 I cannot tell you it will be in this courtroom. I kind
5 of go where I'm told.

6 MR. HESTER: Most of us do.

7 MS. AMOS: You said 9:00 o'clock, is that
8 correct?

9 THE COURT: Yes. I think that would fit the
10 schedule in Pierce County Superior Court.

11 MS. AMOS: That's customary, yes.

12 MR. HESTER: Everybody is here. Could I ask
13 that he have the opportunity to be dressed in clothes
14 like he's wearing today at that time?

15 THE COURT: That's fine with me. I've
16 signed an order setting the matter for sentencing July
17 2nd, 1998 at 9:00 a.m., in such courtroom as may be
18 directed. Court will be at recess.

19 (Court recessed.)
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