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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JULIO JOSEF DAVILA, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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# BRIEF OF RESPONDENT

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## INTRODUCTION

On appeal, defendant claims that the jury only heard "part of the story" of the State's actions in pursuing this case. A careful review of the record leads to a different conclusion.

The jury was presented with evidence that the murder weapon, a baseball bat, had DNA of the victim, Mr. Allen, on the barrel, and the DNA of the defendant on the handle of the bat. The jury was not advised that the Washington State Patrol Crime Lab ("WSPCL") forensic scientist, Ms. Olson, who had conducted the 2007 DNA testing of the evidence collected from the murder scene, had resigned after a poor performance report because the report was not discovered until after defendant's trial. The jury was not advised that the trial court found that the WSPCL's report provided no exculpatory or material evidence because the report had found no evidence that Olson's work on this case had been poorly performed for the same reason.

The jury was advised that the WSPCL conducted DNA testing in 2012 when there was a match with the defendant's DNA profile in a national database. The jury was advised that the WSPCL's forensic scientist, Lorraine Heath, obtained and developed a 2012 DNA profile of Mr. Davila to compare to the profile in the database. Heath compared the 2012 DNA profile of Mr. Davila to the 2007 DNA profile developed by Ms. Olson, identified as "unidentified

individual A", and found the 2012 DNA of Mr. Davila matched the 2007 DNA previously unidentified profile.

The jury was presented with evidence that Jeramie Davis had been convicted of the murder of Mr. Allen three years earlier and that Mr. Davila was on trial in this case for that murder based upon newly discovered evidence. Specifically, the identification of Mr. Davila's fingerprints at the murder scene and his DNA on the handle of the baseball bat found at the scene with Mr. Allen's DNA on the barrel thereof.

## I.

## ASSIGNMENTS OF ERROR

1. The State violated Mr. Davila's due process right to a fair trial when the State failed to disclose evidence.
2. The trial court erred in denying Mr. Davila's post-trial motion for a new trial based upon prosecutorial misconduct.
3. Defendant was denied due process by State's reliance on inconsistent theories and its deliberate deception of facts not in evidence.
4. Defendant was denied a fair trial by the cumulative effect of the State's misconduct.

## II.

## ISSUES

1. Did Mr. Davila receive a fair trial despite lately disclosed immaterial evidence that was unknown to the prosecutor?
2. Did the trial court abuse its discretion when it denied defendant's post-trial motion for a new trial?
3. Was Mr. Davila denied a fair trial by the State's theory of the case?
4. Was Mr. Davila denied a fair trial by the cumulative effect of the State's misconduct?

## III.

## STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal only.

## IV.

## ARGUMENT

### A. THERE WAS NO VIOLATION OF *BRADY v. MARYLAND* BECAUSE THE EVIDENCE THAT DEFENDANT CLAIMED WAS IMPROPERLY WITHHELD WAS NOT KNOW TO THE PROSECUTOR AND WAS NEITHER EXCULPATORY NOR MATERIAL.

Due process violations are reviewed *de novo*. *State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158 (2011). Alleged violations by the prosecution of

the duty to disclose are alleged due process violations and are therefore reviewed *de novo*. *Id.*

The suppression of evidence favorable to the defense by the prosecution, either intentionally or inadvertently, which is impeaching or exculpatory, violates the constitutional rights of the accused to due process if the accused is prejudiced by such suppression. U.S. Const. Amends. VI, XIV; *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

While it is true that "the prosecution cannot avoid its obligations under *Brady* by keeping itself ignorant of matters known to other state agents, it has no duty to independently search for exculpatory evidence." *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 72 P.3d 182 (2003). Nor has the prosecutor the resources to independently investigate whether other state agents have forwarded every item of information in their possession to the prosecution. Nevertheless, the prosecutor has a duty to disclose evidence under the control of staff immediately even when newly discovered evidence is found during trial. *See State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980).

Importantly, the withheld evidence must be material to guilt or innocence for a constitutional violation to have occurred. *See State v. Renfro*, 28 Wn. App. 248, 622 P.2d 1295 (1981), *cert. denied*, 459 U.S. 842, 103 S. Ct.

94, 74 L. Ed. 2d 86 (1982). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280 (*quoting Bagley*, 473 U.S. at 682). The "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (*quoting Bagley,* 473 U.S. at 678); *See In re Pers. Restraint of Woods*, 154 Wn.2d 400, 428-29, 114 P.3d 607 (2005); *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (where Court emphasizes due process right to fair trial as baseline issue of evidence disclosure).

However, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *See State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). The court "evaluate[s] its effect cumulatively, not item-by-item" when considering the materiality of withheld evidence. *Carriger*, 132 F.3d at 480 (*citing Kyles*, 514 U.S. at 434-34).

Here, the record reflects that the prosecutor had no foreknowledge of the WSPCL's report regarding Ms. Olson's work. Instead, the prosecutor found out about the existence of the report when so advised by the defense counsel.

CP 283-284. The referral from law enforcement seeking the State to charge Mr. Davila with Mr. Allen's murder made no mention of Ms. Olson as a witness; rather, it listed Lorraine Heath as the DNA forensic scientist who would testify about DNA in this case. Accordingly, the State's witness list filed on January 12, 2012, does not reference Ms. Olson. CP 366-367. Nor does the State's amended witness list filed June 15, 2012 list Ms. Olson. CP 368-369. The trial court found no evidence to support the claim that the prosecutor knew about the WSPCL report regarding Ms. Olson until after defense counsel discovered the report through a public records act request. RP 583-584, 596-597; CP 283-284. Appellant has provided no evidence from the record or otherwise that supports the claim that the prosecutor knew about the WSPCL report, so there was no failure to disclose evidence in violation of *Brady*.

The condition precedent for the finding of a *Brady* violation is a finding that the State must have "intentionally or inadvertently" suppressed evidence. *Brady v. Maryland*, 373 U.S. 83, 87. Here, the defense accessed the WSPCL report before the prosecution, so there is no evidence that the prosecution suppressed the evidence.

Assuming, *arguendo,* that it is determined that there was a suppression of evidence by the State, the evidence withheld "must be material to guilt or innocence." *See Renfro*, 28 Wn. App. 248. Materiality is shown when there is a reasonable probability that the withheld evidence, having risen above the

threshold of merely "possibly" helping the defense, brings into question the confidence in the outcome of the trial. *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97).

Appellant's argument focuses on a failure to disclose evidence that he characterizes as of impeachment value, yet no such finding was made by the trial court. Appellant's only argument supporting the claim of a *Brady* violation is that the WSPCL report provided impeachment evidence of the DNA results that placed Mr. Davila at the murder scene. Notably, this argument runs contrary to what the defense offered to the jury that Mr. Davila was never at the scene and did not commit the murder. The fact that Ms. Olson's work did not identify Mr. Davila as being at the scene of the murder worked to Mr. Davila's advantage, so he would have no reason to impeach her work. Mr. Davila's defense focused on the fact that the murderer, Mr. Davis, had already been convicted.

A defendant's argument in support of finding a *Brady* violation must demonstrate the alleged withheld evidence rises above "merely possibly helping the defense." *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. at 110, n.17. Here, appellant does not meet this criterion. Instead, the appellant focuses on the impeachment value of the WSPCL report regarding Ms. Olson, a witness not called to testify by either party. Appellant contends that the trial court deprived him of the use of WSPCL report as impeachment evidence of the DNA results, yet defendant strategically elected not to call Ms. Olson to testify at trial.

Evidence Rule ("ER") 607 provides that: the credibility of a witness may be attacked by any party, including the party calling the witness.

Defendant decided not to call Ms. Olson to testify as a DNA expert regarding her development of the DNA profile of "unidentified individual A" from the DNA sample off the baseball bat. Defense counsel faced the logistical problem that the WSPCL's DNA Forensic Scientist who testified at trial was Ms. Lorraine Heath. The record reflects that Ms. Heath went through a completely independent process of developing a profile from a new sample of Mr. Davila's DNA. RP 434-437, 464; CP 261- 282; 312-322. Ms. Heath then compared Mr. Davila's DNA profile to that of the unidentified individual A and found a match. RP 434-437, 464; CP 261-282; 312-322. Further examination of the procedures and policies in the WSPCL revealed that Ms. Olson's development of the DNA profile for "unidentified individual A" could not have been the result of poor procedures since she developed the profile from the baseball bat on November 5, 2007, and then developed the other DNA results on December 4, 2007. CP 261-282. The DNA profile from the bat was developed before any other possible source of Mr. Davila's DNA was present in the WSPCL, so there could not have been any contamination of the DNA profile developed from the bat. CP 261-282. Accordingly, the impeachment value of the WSPCL report regarding Ms. Olson was of immaterial relevance or value. Additionally, Ms. Heath's review of Ms.

Olson's work found no violations of procedures or protocols in her DNA results developed in this case. RP 442, 444, 448, 453-456.

Appellant's argument cannot overcome the fact that the trial court provided his trial counsel with more than ample opportunity to prove the materiality of the WSPCL report without success. The trial court granted defense counsel continuances of the motion for new trial from August 1 through October 25, 2012. RP 572-635. Appellant could not establish that there existed even a possibility that Ms. Olson's work in this case was faulty or material to the reliability or admission of the DNA evidence in this case. RP 622-624. Appellant fails to show there is a reasonable probability that the alleged withheld evidence brings into question the confidence in the outcome of the trial.

The prosecution must learn of evidence in the possession of staff and immediately disclose the information at the moment of discovery. *See Oughton*, 26 Wn. App. 74. Here, the trial court found that the prosecutor did not learn of the WSPCL report regarding Ms. Olson until after Mr. Davila's trial. RP 583-584; CP 283-284.

Even if the prosecution had known of the WSPCL report regarding Ms. Olson, the evidence must be material to guilt or innocence to violate appellant's due process. *See Renfro*, 28 Wn. App. 248. Materiality is shown when there is a reasonable probability that the withheld evidence, having risen above the threshold of merely "possibly" helping the defense, brings into question the

confidence in the outcome of the trial. *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97). Here, the WSPCL report regarding Ms. Olson was entirely immaterial to Ms. Heath's testimony regarding the DNA results obtained in this case. The WSPCL report, in fact, found no procedural or protocol violations in Ms. Olson's work in this case, so the impeachment value vis-à-vis Ms. Heath's work herein was negligible. CP 162-260. There is no evidence to suggest that the WSPCL report could have even "possibly" helped the defense let alone brought into question the confidence in the outcome of the trial. *See Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97.

The appellant has failed to show any relevant, material, and admissible evidence was withheld from the defense at trial. Appellant obtained the WSPCL report before the prosecution even knew that it existed, hence appellant received due process and a fair trial.

### B. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S POST-ADJUDICATION MOTION FOR A NEW TRIAL FOR A FAILURE OF PROOF.

Defendant moved the trial court for a new trial based upon claims that: (1) the prosecutor committed misconduct by arguing inconsistent theories of the case, and (2) the prosecutor failed to disclose that a forensic expert linked to the case resigned due to a poor performance report in violation of *Brady v. Maryland.* On appeal, defendant claims the trial court improperly denied his motion for a new trial based upon the above-noted claims. The State's response to the claim of a

*Brady* violation is set forth in section A of the Argument portion of this brief. Appellant proffers the prosecutorial misconduct argument on appeal despite his already having conceded that he failed to object to the prosecutor's remarks at the time such were made. CP 162-260 (Motion for New Trial, p. 1).

Generally, a trial court's decision whether to grant or deny a motion for a new trial is reviewed for a clear abuse of discretion. *State v. Wilson,* 71 Wn.2d 895, 899, 431 P.2d 221 (1967). Specifically, a trial court's decision regarding improper prosecutorial argument is also reviewed for the abuse of discretion. *State v. Cheatam,* 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

As a quasi-judicial officer, a prosecutor has a duty to ensure that the defendant is afforded a fair trial. *State v. Boehning,* 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Here, assuming, *arguendo,* that defendant had preserved this issue by objection; defendant still has the burden of proving the impropriety of the prosecutor's actions *and* their prejudicial effect. *State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.2d 221 (2006) (*citing State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The defendant establishes prejudice when there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Pirtle,* 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Absent an objection, defendant could still qualify for a new trial if he proved that the prosecutor's remarks to the jury were so flagrant and ill-

intentioned as to create a level of prejudice that could not be cured by instruction. *State v. Boehning,* 127 Wn. App. at 518. For example, it is misconduct for a prosecutor to openly violate a court order regarding the admissibility of evidence. *State v. Smith,* 188 Wash. 422, 428-429, 65 P.2d 1075 (1937).

As noted, appellant contends there was prosecutorial misconduct here because the prosecutor offered inconsistent theories of culpability in the separate trials, four years apart, of two individuals for a murder. Appellant's position is complicated by the fact his counsel specifically subpoenaed the prosecutor from the *Davis* case to be available for examination regarding the State's theory of guilt proffered therein in this trial. RP 3-14. Then the defense moved for and welcomed the admission of the body of evidence upon which Mr. Davis was convicted of committing the subject murder four years earlier before the jury herein. RP 3-14, 87-94. The admission of the evidence of the murder conviction of Mr. Davis permitted Mr. Davila to claim that Mr. Davis murdered Mr. Allen. RP 648-659 (defense opening statement), 544-553 (defense closing statement). Appellant benefitted from his own actions to admit evidence from the trial of *State v. Davis*.

The appellant's position fails to take into consideration that the State's theories in the cases against Mr. Davis and Mr. Davila were separated by four years and newly discovered evidence. During the *State v. Davis* trial, it was impossible for the State to have known that the DNA discovered on the murder

weapon or that the fingerprints lifted from the crime scene belonged to Mr. Davila. That evidence was not discovered until three years had passed after the trial and conviction of Mr. Davis. In fact, new evidence was not discovered until after Mr. Davis had his murder conviction upheld by this Court in his direct appeal (in 2009 in Cause #27077-7-III ) and subsequently in his Personal Restraint Petition (in 2011 in Cause #29735-7-III). The State did not have any evidence of any co-defendants until three years later. The newly discovered evidence did not suggest that Mr. Davis was not responsible because the State's theory with regard to Mr. Davis was that the crime scene lacked any of his DNA because he wore gloves. It was a crime scene that Mr. Davis freely admitted visiting numerous times, yet neither his fingerprints nor DNA was found there.

Three years later, the State receives a referral from law enforcement for the prosecution of Mr. Davila for the murder of Mr. Allen based upon the development of his fingerprints and DNA at the murder scene despite his claim that he had never been inside the scene. RP 290 -300.

It is established that a prosecutor's pursuit of fundamentally different theories in separate trials of defendants charged with the same murder can violate due process "when no new significant evidence comes to light." *Thompson v. Calderon,* 120 F.3d 1045, 1058-1059 (1997). The Ninth Circuit ruled that in the second trial of a codefendant that the prosecutor's manipulation of evidence and witnesses called into question the theory of guilt the State proffered in the trial of

the first codefendant. *Id.,* at 1054. However, such is not the circumstance between the trials of Mr. Davis and Mr. Davila. Quite the contrary, here the evidence reasonably supported the convictions of both defendants. There was no argument offered to the jury that the evidence to support the convictions of Mr. Davis and Mr. Davila was mutually exclusive.

The State's theory in the Davis trial was that the evidence indicated that Mr. Davis acted alone in hitting Mr. Allen in the head with the baseball bat during the robbery. The State's theory in Mr. Davila's trial included evidence that was unknown to the State at the time of the trial of Mr. Davis. The newly developed evidence indicated that Mr. Davila was also present at the crime scene and swung the baseball bat that killed Mr. Allen.

The State's theories in the respective trials were consistent in that the evidence was sufficient to support the jury finding either participant guilty of murder regardless of who swung the bat. Prosecutors violate a defendant's right to due process when they knowingly use false evidence. *Mooney v. Holohan,* 294 U.S. 103, 112-113, 55 S. Ct. 340, 79 L. Ed. 791 (1935); *Berger v. United States,* 295 U.S. 78. 84-89, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Hence, due process can be violated when a prosecutor knowingly uses false evidence or acts in bad faith to pursue fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder. *Nguyen v. Lindsey,* 232 F.3d 1236, 1240 (2000). Here, defendant has failed to establish his claim of prosecutorial

misconduct because the State adjusted its theory of the case with respect to a previously unknown defendant based upon the discovery of new additional evidence. The defendant has wrongfully and unjustifiably accused the prosecutor herein with being deceitful and intentionally misleading the jury yet has failed to prove that the prosecutor knowingly used false evidence to obtain the conviction. No due process violation occurred or has been proved.

### C. DEFENDANT SHOULD BE FORECLOSED FROM RAISING THE CLAIM OF PROSECUTORIAL MISCONDUCT BY RAP 2.5(a)(3) DUE TO HIS CONCESSION THAT HE FAILED TO OBJECT TO THE STATE'S CLOSING REMARKS AT TRIAL.

Neither the defendant nor his counsel objected to the prosecutor's closing remarks that he now contends constituted prejudicial misconduct. Quite the contrary was the case as Mr. Davila's defense depended upon having the jury in his case focus upon the fact that the evidence produced in the *State v. Davis* trial supported the verdict therein that Mr. Davis murdered Mr. Allen and that Mr. Davila was not at the store that night.

Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by whether: (1) the alleged error is truly constitutional, and (2) is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable

consequences in the trial of the case. *State v. Stein,* 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

Defendant claims the court committed a constitutional error by failing to grant his motion for a new trial based upon prosecutorial misconduct. Defendant argued to the trial court that the prosecutor offered inconsistent theories of guilt in the separate trials. A careful examination of the totality of circumstances in which the prosecutor's remarks were made supports the trial court's denial of the motion.

Before one item of evidence was presented to the jury in Mr. Davila's trial, defense counsel was agreeing that the jury needed to know how Mr. Davis was involved in the crime. RP 3-14, 87-94. Mr. Davila's defense depended upon the jury in his trial knowing that the jury in *State v. Davis* had found Davis guilty of the murder of Mr. Allen. Mr. Davila's defense was that it was solely Mr. Davis who murdered Mr. Allen. RP 90. The trial court observed that: "you each have different reasons why you want the same information in front of this jury." RP 94. The defense opening remarks to the jury advised the jury that there was no evidence that he was at the scene because no one saw him there despite the numerous witnesses. RP 649. The defense then went into a detailed analysis of all the evidence that was produced in the *State v. Davis* trial that supported the verdict that Mr. Davis had committed the murder. RP 650-659. Finally, the

defense advised the jury that there was no evidence that Mr. Davila was inside the store the night when Mr. Allen was murdered. RP 659.

During the course of the trial, Mr. Davila's counsel brought the jury's focus back to the evidence produced in the *Davis* trial. Then in its summation, defense counsel compared and contrasted the evidence produced during the *Davis* case with that produced during Mr. Davila's trial. RP 544-553. Defense counsel argued that there was insufficient evidence to find that the baseball bat was the cause of the blunt force that resulted in Mr. Allen's death. RP 551. Finally, defense counsel asks the jury, "Did science convict Davis? No. No DNA, no prints...What convicted Davis? The facts. Common sense...The evidence pointed directly to him...he was a pro." RP 544-545. Defense counsel proffered Mr. Davila's defense from the beginning as that someone else was guilty of the murder of Mr. Allen. In fact, this version of the other person defense was almost perfectly set up because counsel could focus all the jury's attention on the evidence and rightful conviction of Mr. Davis to the exclusion of Mr. Davila's fingerprints and DNA on the murder weapon. Ultimately, Mr. Davila's counsel did not simply fail to object, they embraced the State's evidence, argument and conviction of Mr. Davis three years earlier.

The trial court herein could hardly ignore the tactical and strategic decisions executed by Mr. Davila's defense in assessing the validity of the motion for a new trial based upon allegedly inconsistent case theories between the two

trials. At the motion hearing, defense counsel argued that the State changed its theory of guilt based upon the allegation that Mr. Davila was a participant in the robbery. This perspective of the State's case theories in the separate trials is too narrow because it ignores the fact that the defense in the *Davis* trial was that the crime was committed by "unidentified individual A" whose DNA had been discovered on the presumed murder weapon.

The presence of the DNA from "unidentified individual A" did not contradict the admission by Mr. Davis that he was at the murder scene when Mr. Allen was apparently still alive. The State presented the evidence available at the *Davis* trial which did not include the identity of the DNA on the murder weapon. It was three years later that sufficient additional evidence in the form of identified finger and palm prints plus the identification of the unidentified DNA profile made it even possible to contact Mr. Davila regarding the incident.

In the trial court's ruling denying the motion for a new trial, it observed that:

> [it] was clear from day one of this trial that the jury was going to hear information about Davis & that Davis had been convicted of the murder. That issue came up specifically via motion that defense counsel made early on to call Mr. Nagy [the prosecutor therein] as a witness...I said...that the jury was going to be hearing about Davis. They certainly did hear about Davis form *both* sides. The fact that Davis was convicted is a fact in this case...given to the jury. Not discussing it would have...appeared odd to the jurors since it was the subject of closing on both sides...because there was no objection at trial...there is a much higher standard of review...were the prosecutor's remarks so prejudicial that no

instruction...would have corrected the problem... this situation simply does not meet that standard...

...whether there has been prosecutorial misconduct with regard to the theory of the case...again...harken back to the motion we had about whether Mr. Nagy could be called as a witness primarily because of the argument he made in the *Davis* case. At the time Davis was tried – there was an identification of another individual referred to as unidentified individual A, who had DNA on the bat...there was no match to [Mr. Davila] at the time...the jury in the *Davis* case was aware of that fact and it was mentioned in the closing...

When we come to this case...the theory is no different than the theory in the Davis case...Mr. Allen was killed by a baseball bat...there was unidentified individual A's DNA on the bat, and Davis's DNA was not on the bat. Those issues did not change. If counsel means the theory of the case that Davis and Mr. Davila were acting in concert or as accomplices...that is not an inconsistent view with Davis...the fact that the State was not able to present evidence to this jury to avoid a dismissal of the first degree murder, predicated on the robbery, *does not mean the State had the State had the opportunity to use that theory.*

The issue for the State because they did not have any evidence they could put before the jury that linked Davis and Davila...there was testimony that Davila said he did not know Davis, and Davis did not know Davila...there may have been other testimony, but there was a marital privilege involved that I made rulings on...

...in the end...You [defense counsel] got the evidence you got...this is not a situation where the theory in this case has been changed...there is additional information that was available Davila's case that was not available in the Davis case – i.e. now the unidentified individual A is Davila.

All in all, when you look at the totality of argument...I received *no objection during argument...did not hear anything objectionable myself during closing...so had no expectation would receive an objection...what counsel told the jury is something they had already heard through the course of this case through testimony of various witnesses...the motion for a new trial is denied with respect to prosecutorial misconduct.*

RP 589-592 (Emphasis added).

Appellant has identified no practical and identifiable consequences in the *trial of this case* directly attributable to the alleged error by the trial court. Defendant has not established that the court committed a manifest error, hence, defendant is not entitled to appellate review thereof.

### D. THE STATE'S THEORY OF THE CASE ENSURED THAT DEFENDANT RECEIVED A FAIR TRIAL.

Any discussion of alleged inconsistent theories of guilt between this case and that of Mr. Davis should begin with acknowledging what the respective juries found them guilty of separately. Mr. Davis was found guilty of felony murder while Mr. Davila was found guilty of intentional murder.

Appellant contends that the State's theory of the case herein was inconsistent and unreasonable in violation of his right to due process because it required the jury to consider two people independently and personally responsible for the murder of Mr. Allen. Appellant cites to authorities that provide that it is a violation of due process where: (1) prosecutors solicit false evidence; (2) prosecutors fail their duty to correct known false evidence; (3) prosecutors fail their duty of candor by making false statements of material fact to deceive the trier of fact; and (4) prosecutor presents contradictory theories in trials for different defendants.

Applying the cited principles, appellant contends that in the Davis trial, the prosecutor argued that Davis was responsible, yet three years later contended that Mr. Davila was responsible for the same murder. Appellant contends that these constitute inconsistent theories of guilt and a violation of Mr. Davila's due process right to a fair trial.

The trial court heard this argument and found it unpersuasive in light of the body of evidence that existed at the time of the Davis trial when compared to that presented in the Davila trial four years later. Second, appellant's claim is not supported by the record or the law. The lack of DNA or prints of Davis at the scene was consistent with the theory that he wore gloves while at the crime scene on numerous occasions that night. The discovery of Mr. Davila's prints and DNA evidence at the crime scene despite his claim that he had never been inside the store is consistent with the theory proffered in *Davis*. The discovery of Mr. Davila's presence at the murder scene contradicts his claim and supports the theory that either one, or both, Mr. Davis or Mr. Davila swung the baseball bat that killed Mr. Allen. The evidence of Mr. Davila's presence at the murder scene was uncontroverted by the defense because that evidence was deposited at the scene that night, just not identified until three years later.

Finally, it is important to keep in mind that the jury is presumed to follow the trial court's instructions on the law to be applied to the case before them. Included in those instructions is the trial court's advisement that the lawyer's

remarks are not evidence and are only intended to assist the jury with its organizing of the evidence during deliberations. Those remarks are neither evidence nor the law and should not be accorded any value outside of their intended function. *State v. Lord,* 117 Wn.2d 829, 861, 822 P.2d 177 (1991); CP 136-155; RP 524. Here, the jury was provided with argument from defense counsel that Mr. Davis was solely responsible for Mr. Allen's murder, yet provided no explanation why Mr. Davila's prints and DNA were at the scene and on the murder weapon.

The State's theories actually complimented one another in the two trials because its theory in *State v. Davis* was that he used gloves during his participation in the murder while its theory herein was that Davila's prints and DNA were deposited at the murder scene due to his participation in the murder. The fact that there was evidence produced in the *Davis* trial made it possible for the jury to find there was collaboration between Mr. Davis and "unidentified individual A" which distinguishes that trial from this case. However, it does not make the theories inconsistent, false, or deceitful as characterized by the appellant. Instead, the theories are very consistent because the body of evidence in Mr. Davila's trial is significantly different and augmented by the additional evidence that the unidentified prints and DNA belonged to Mr. Davila.

Additionally, appellant claims that the prosecutor herein deceived and misled the jury when arguing that Mr. Davis's case was "done."[1] In fact, the record of *State v. Davis,* as reflected in this Court's decisions in both his direct appeal and subsequent personal restraint petition, reveal that his case was completed before this case was even filed by the State. The mandate for the direct appeal was issued on February 22, 2010, and the personal restraint petition was dismissed and final by February 15, 2012. Clearly, the prosecutor did deceive, mislead, or present false argument to the jury given the public history of *State v. Davis.*

As noted, the State's theories of guilt in each of the trials were consistent based upon the body of evidence that existed before each jury. Appellant has not established that the State's theory of guilt in this trial deprived Mr. Davila of a due process and a fair trial.

### E. DEFENDANT HAS NOT SHOWN THAT THE ALLEGED CUMULATIVE EFFECT OF HIS ASSIGNED ERRORS DEPRIVED HIM OF DUE PROCESS.

Appellant contends that cumulative errors by the trial court resulted in a fundamentally unfair trial which require the reversal of his conviction. The cumulative error doctrine provides for reversal of a conviction if the combined

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[1] The *Davis* direct appeal in cause #27077-7-III was mandated in 2010 and his subsequent Personal Restraint Petition in cause #29735-7-III was dismissed on December 6, 2011, then finalized on February 15, 2012. Mr. Davis' case was "done" about five months before the State even filed the Information charging Mr. Davila.

effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered harmless. *State v. Weber,* 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied,* 551 U.S. 1137 (2007). The doctrine does not apply where the errors are few and have little or no effect on the trial outcome. *Id.* The State maintains that the appellant has failed to prove that the trial court committed any errors, hence the cumulative error doctrine does not apply.

Assuming, *arguendo,* that this Court identifies that the trial court committed more than one error, then the analysis turns upon whether those errors worked to deprive Mr. Davila of a fair trial. The appellant's brief has focused its arguments on the assigned errors that: (1) the State failed to disclose evidence; (2) the trial court had no sound basis to deny defendant's new trial motion; and (3) the State argued inconsistent theories of guilt to thereby deceive the jury.

As noted, the trial court properly concluded that the defendant possessed the WSPCL report regarding Ms. Olson before the prosecutor was even aware of its existence. Appellant has not provided any evidence that the prosecutor even knew about the WSPCL report until the issue was raised by defense counsel. Appellant did not show how the WSPCL report was material or relevant to the issue before this jury – *i.e.* whether Ms. Heath's independent DNA results identifying Mr. Davila's DNA as present on the murder weapon was faulty. There can be no error absent the appellant showing that the trial court abused its discretion in finding that the prosecutor neither possessed nor knew of the

WSPCL report regarding Ms. Olson until after defense counsel notified the prosecutor. Appellant has not successfully established that no other jurist would reach the same conclusion as did the trial court herein. If not, there is no error.

As noted, the trial court had ample basis to deny defendant's motion for a new trial. The appellant has not established that no other reasonable jurist would deny the defendant's motion for a new trial based upon the reasons articulated by the trial court herein. If not, there is no error.

Finally, as noted, the defendant has not established that the State presented inconsistent case theories in the separate trials of Mr. Davis and Mr. Davila. The trials were three years apart in their presentation. The trials presented different bodies of evidence to the respective juries. The body of evidence developed herein was augmented by the identity of the individual whose prints and DNA were discovered at the murder scene yet unidentified. The State's theory in *State v. Davis* was based upon a homicide occurring in the context of a felony murder. The State's theory herein was that the homicide was intentional. Had Mr. Davis and Mr. Davila both been charged with either felony murder or intentional murder only, appellant's perspective might have a little more acceptance, alas, such is not the case. Assuming, *arguendo,* that this Court finds the State's theories in the separate trials inconsistent, appellant would not be entitled to relief under the cumulative error doctrine since the condition precedent to its application is more than one error.

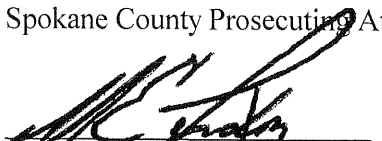
V.

CONCLUSION

For the reasons stated, the conviction, judgment, and sentence should be affirmed.

Respectfully submitted this 26th day of November, 2013.

STEVEN J. TUCKER
Spokane County Prosecuting Attorney



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