SUPREME COURT NO. 92917-3

NO. 46523-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN FESSEL,

Petitioner.

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

The Honorable Susan L. Clark, Judge

PETITION FOR REVIEW

JARED B. STEED
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Justin Fessel, the appellant below, asks this Court to grant review of the Court of Appeals' unpublished decision in State v. Fessel, No. 46523-0-II, filed February 9, 2016 (attached as Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Does the jury instruction defining reasonable doubt as "one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the accused to provide a reason for why reasonable doubt exists?

2. Is review appropriate under RAP 13.4(b)(1) and (b)(3) because the Court of Appeals decision conflicts with decisions of this Court and because this case involves a significant constitutional question?

C. STATEMENT OF THE CASE

The Clark County prosecutor charged appellant Justin Fessel with three counts of second degree assault and one count each of vehicular assault and hit and run for an incident that occurred on July 26, 2013. CP 4-7.

At Fessel's trial, the court gave the standard reasonable doubt jury instruction, WPIC 4.01,[1] which reads, in part: "A reasonable doubt is one for

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." CP 21; 3RP 92.

A jury found Fessel guilty of vehicular assault and hit and run. CP 73-74; 6RP 736. The jury also returned special verdicts finding that Fessel and the complaining witnesses were members of the same family. CP 75-77; 6RP 736-37. The jury found Fessel not guilty on each of the three charged second degree assaults. CP 70-72; 6RP 736.

Fessel was sentenced jointly on the vehicular assault, hit and run, and two separate bail jumping charges. 7RP 755-57. Fessel was sentenced to 72 months on the vehicular assault conviction and 60 months on the hit and run conviction, to be served consecutively to the bail jumping convictions, for a total of 144 months imprisonment. 7RP 784; CP 86-102.

On appeal, Fessel raised several arguments, including that the reasonable doubt instruction contained an unconstitutional articulation requirement. Brief of Appellant (BOA) at 3-12. He also challenged the trial court's imposition of the consecutive exceptional sentence. Supplemental Brief of Appellant (SBOA) at 3-10.

The Court of Appeals agreed with Fessel that the trial court's imposition of consecutive exceptional sentences required remand for resentencing. Appendix at 11-12.

However, the Court of Appeals rejected Fessel's challenge to WPIC 4.01, concluding he failed to challenge the instruction during trial and could not otherwise show obvious error warranting review of the issue as a manifest error affecting a constitutional right. Appendix at 5. The Court of Appeals nevertheless believed that Fessel's argument was precluded by this Court's decisions in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), and State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015), which "reaffirmed that WPIC 4.01 was the 'proper' instruction and 'the correct legal instruction on reasonable doubt.'" Appendix at 5.

Fessel now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

1. WPIC 4.01's articulation requirement misstates the reasonable doubt standard.

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning

of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 138 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). The error in WPIC 4.01 is readily apparent to the ordinary mind. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. WPIC 4.01 erroneously requires both for a jury to acquit.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining in the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (1993). Under these definitions, for a doubt to be reasonable it must be rational, logically derived, and not in conflict with reason. This definition best comports with U.S. Supreme Court precedent defining the reasonable doubt standard. E.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The placement of the indefinite article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt.

"[A] reason," as employed in WPIC 4.01, means "an expression or statement offered as an explanation or a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. WPIC 4.01's use of the words "a reason" indicates reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable.

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Ambiguous instructions that permit an erroneous interpretation of the law are improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Even if it is possible for judges and lawyers to interpret the instruction to avoid constitutional infirmity, this is not the correct standard for measuring the adequacy of jury instructions. Judges and lawyers have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

Recent prosecutorial misconduct cases exemplify how WPIC 4.01 fails to make the reasonable doubt standard manifestly apparent even to trained legal professionals. The appellate courts of this state have consistently condemned arguments that jurors must articulate a reason for

having reasonable doubt. These fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable" and "subtly shift[] the burden to the defense." Emery, 174 Wn.2d at 760; accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Emery, 174 Wn.2d at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

These prosecutorial misconduct cases are telling given that the improper burden shifting arguments are not merely the product of prosecutorial malfeasance but the consequence of WPIC 4.01's plain text. The offensive arguments did not materialize out of thin air but sprang directly from the language "[a] reasonable doubt is one for which a reason exists." In Anderson, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors, "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my

reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The prosecutorial misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable. Lawyers mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist. Average jurors certainly believe they must give a reason for having reasonable doubt.

Under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating why their doubt is reasonable to themselves or others. Scholarship explains this problem:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, "I didn't think the state's witness was credible," the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to "give a reason," an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The standard of beyond a reasonable doubt enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our

criminal law." In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. The doubt "for which a reason exists" language in WPIC 4.01 does that in directing jurors the must have a reason to acquit rather than a doubt based on reason.

This Court should accept review under RAP 13.4(b)(3) to evaluate WPIC 4.01's articulation requirement.

2. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given.

The Court of Appeals refused to address Fessel's argument, concluding it was precluded by this Court's decisions in Kalebaugh, Bennett, and Emery. Appendix at 5-6. But these cases did not address a direct challenge to WPIC 4.01 and therefore do not fairly resolve Fessel's dispute.

Bennett actually undermines WPIC 4.01 by requiring the instruction be given in every criminal case only "until a better instruction is approved." 161 Wn.2d at 318. The Bennett court clearly signaled that WPIC 4.01 has room for improvement. This is undoubtedly true given WPIC 4.01's repugnant articulation requirement.

More recently in Kalebaugh, this Court concluded that the trial court's erroneous instruction—"a doubt for which a reason can be given"—

was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with final instructions given here," which included WPIC 4.01. 183 Wn.2d at 585. While Kalebaugh and Bennett might be read to tacitly approve WPIC 4.01, neither of the petitioners in those cases argued the "one for which a reason exists" language in WPIC 4.01 misstated the reasonable doubt standard.

"In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged in Kalebaugh or Bennett, the analysis in each case flows from the unquestioned premise that WPIC 4.01 is correct. Because this Court has suggested WPIC 4.01 can be improved and because no appellate court has recently addressed flaws in WPIC 4.01's language, this Court should take this opportunity to closely examine WPIC 4.01 pursuant to RAP 13.4(b)(3).

Furthermore, this Court's own precedent is in disarray. Kalebaugh's observation that it is error to require articulation of reasonable doubt overlooks this Court's precedent that approved WPIC 4.01's "for which a reason exists" by relying on cases approving of the "for which a reason can be given" language.

In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this Court found no error in the instruction, "It should be a doubt for which a good reason exists." This Court maintained the "great weight of authority" supported this instruction, citing as authority the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[2]

In Harras, this Court viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. Harras directly conflicts with both Kalebaugh and Emery, which strongly reject any requirement that jurors must be able to give a reason for why reasonable doubt exists. Kalebaugh, 183 Wn.2d at 585 ("[T]he law does not require that a reason be given for a juror's doubt."); Emery, 174 Wn.2d at 760 ("Th[e] suggestion [that the jury must be able to articulate its reasonable

---

[2] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious sensible doubt, such as you could give a good reason for"); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

doubt] is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.").

This Court's decision in State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), demonstrates further inconsistency in this Court's decisional law regarding the reasonable doubt instruction. Harsted objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. This Court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This Court proceeded to cite out-of-state cases upholding instructions that defined reasonable doubt as a doubt for which a reason can be given. Id. at 164. One of the authorities this Court relied on was Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Though this Court noted that some courts had disapproved of similar language, it was "impressed" with the Wisconsin view and felt "constrained" to uphold the instruction. 66 Wash. at 165.

Harsted and Harras provide the origins of WPIC 4.01's infirmity. In both cases this Court equated a doubt "for which a reason exists" with a doubt "for which a reason can be given." These cases held that if a reason

exists, it defies logic to suggest that the reason cannot also be given. Harsted and Harras conflict with Kalebaugh and Emery. There is no real difference between the supposedly acceptable doubt "for which a reason exists" in WPIC 4.01 and the plainly erroneous doubt "for which a reason can be given." Kalebaugh, 183 Wn.2d at 585.

The articulation problem in WPIC 4.01 has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Emery and Kalebaugh explicitly contradict Harras and Harsted. The law has evolved. What was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains a relic of the misbegotten past, outpaced by this Court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require articulation. Articulation of reasonable doubt is repugnant to the presumption of innocence. Because this Court's and the Court of Appeals' decisions demonstrate the case law is in disarray on the significant

constitutional issue of properly defining reasonable doubt for Washington juries, Fessel's arguments merit review under RAP 13.4(b)(1) and (3).

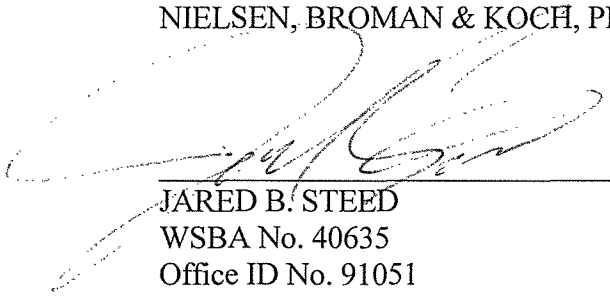
E. CONCLUSION

Because Fessel satisfies review criteria under RAP 13.4(b)(1) and (b)(3), he asks that this Court grant review.

DATED this 7th day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JARED B. STEED
WSBA No. 40635
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

February 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN SCOTT FESSEL, Appellant.	No. 46523-0-II UNPUBLISHED OPINION

MAXA, J. — Justin Fessel appeals his convictions and sentence for vehicular assault and hit and run. We hold that (1) the trial court erred by failing to enter written findings of fact and conclusions of law after a CrR 3.5 hearing, but that error was harmless because the trial court's oral findings were sufficient to enable appellate review; (2) Fessel failed to preserve for appeal his argument that the trial court's reasonable doubt jury instruction was constitutionally deficient because he did not object to this instruction in the trial court; and (3) Fessel's claims in his statement of additional grounds (SAG) have no merit. However, we accept the State's concession and hold that the trial court erred in imposing consecutive sentences for these convictions and bail jumping convictions sentenced on the same day. Accordingly, we affirm Fessel's convictions, but we reverse his sentence and remand for resentencing.

FACTS

On July 26, 2013, Fessel was involved in an automobile collision in which his vehicle struck a vehicle occupied by his parents and his brother. Fessel's brother James stated that Fessel intentionally hit their vehicle. The State charged Fessel with one count of vehicular assault, one count of hit and run, and three counts of second degree assault.

While in jail, Fessel made statements to Detective James Payne of the Clark County Sheriff's Office. The trial court held a pretrial CrR 3.5 hearing to determine whether the statements were admissible. The trial court made an oral ruling that the statements were admissible and explained the basis for the ruling, but failed to enter written findings of fact and conclusions of law.

Before trial, Fessel objected based on chain of custody to the admission of records from a cell phone that was found in the victims' vehicle. The vehicle was in a locked and secured evidence storage building. Officers placed the cell phone in a marked bag and placed it on a table. However, officers apparently forgot to collect the phone, and it was left unattended for 28 days on the table in the secure building. The investigating detective testified that when he retrieved the cell phone, it was in the same paper bag and located on the same table where he had left it after conducting the search of the vehicle. The trial court admitted the cell phone evidence.

The trial court gave a standard reasonable doubt jury instruction that included the phrase "[a] reasonable doubt is one for which a reason exists." Clerk's Papers at 41. This instruction was identical to WPIC 4.01. 11 *WASHINGTON PRACTICE: WASHINGTON PATTERN JURY*

INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). Fessel did not object to this instruction.

The jury found Fessel guilty of the vehicular assault and hit and run charges, but not guilty on the three second degree assault charges. Fessel also was convicted for two counts of bail jumping in a separate trial and the sentencing for all of his convictions occurred on the same day. The trial court imposed Fessel's vehicular assault and hit and run sentences consecutively to the bail jumping sentences rather than concurrently. The trial court did not enter findings of fact and conclusions of law supporting the consecutive sentences.

Fessel appeals his convictions and sentence.

ANALYSIS

A. FAILURE TO ENTER WRITTEN CRR 3.5 FINDINGS AND CONCLUSIONS

Fessel argues that the trial court erred by failing to enter written findings of fact and conclusions of law following its CrR 3.5 hearing, and therefore that we must remand for the entry of such findings and conclusions.[1] The State concedes that the trial court erred, but argues that the error was harmless. We agree with the State.

Under CrR 3.5, the trial court must conduct an admissibility hearing before admitting a defendant's statement into evidence. CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law after a CrR 3.5 hearing. Failure to enter written findings and conclusions after a CrR 3.5 hearing is error. *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648, *review denied*, 184 Wn.2d 1025 (2015). However, the failure to enter written findings and

[1] Fessel does not contest the trial court's oral findings or its determination in his CrR 3.5 hearing. He argues only that the court's failure to enter findings and conclusions as required by CrR 3.5(c) requires mandatory remand.

conclusions following a CrR 3.5 hearing is harmless error if the oral findings are sufficient to enable appellate review. *Id.*

Here, the trial court made clear and detailed oral findings of fact. The court stated,

> The Court's ruling is that on August 15th 2013, Mr. Fessel was contacted in the Clark County Jail in a public interview room, and that at that time Mr. Fessel was in custody. Detective Payne did advise Mr. Fessel of his *Miranda*[2] rights. There is no indication from the testimony given that Mr. Fessel was under the influence of any type of substance or that he did not understand his rights. His answers were responsive to the questions asked. It's the Court's finding, based on all of the facts, that the statements were knowingly, intelligently and voluntarily given without any request for Counsel, and that *Miranda* rights were properly given before the statements. So the statements are admissible.

Report of Proceedings (RP) (Feb. 19, 2014) at 64. In this ruling, the trial court expressly found that (1) Fessel was advised of his *Miranda* rights, (2) there was no indication that he did not understand his rights, and (3) his statements were knowingly, intelligently, and voluntarily given without any request for counsel. We hold that these findings and the trial court's conclusion that the statements were admissible are sufficient to enable appellate review.

Because Fessel did not assign error to the trial court's admission of his statements, we need not address whether that admission was error. Accordingly, we hold that the trial court's error in failing to enter written findings of fact and conclusions of law following its CrR 3.5 hearing was harmless.

B. PROPRIETY OF WPIC 4.01

Fessel argues that the trial court's jury instruction defining reasonable doubt as "one for which a reason exists" is constitutionally deficient and requires reversal because (1) it requires

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the jury to articulate a reason for having a reasonable doubt and (2) it impermissibly undermines the presumption of innocence. We decline to address this issue because Fessel did not object to this instruction in the trial court.

A party generally waives the right to appeal an error unless there is an objection in the trial court. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception is for "manifest error affecting a constitutional right." RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. To determine whether we should consider an unpreserved error under RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude and (2) the error is manifest. *Kalebaugh*, 183 Wn.2d at 583. An error is manifest when the appellant shows actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). The asserted error must have practical and identifiable consequences in the trial court. *Id.* The focus of the actual prejudice inquiry is whether it is obvious from the record that the error warrants appellate review. *Id.* at 99-100.

Here, Fessel makes a claim of constitutional magnitude – an instruction that misstates the reasonable doubt standard is a constitutional error. *Kalebaugh*, 183 Wn.2d at 584. However, Fessel cannot show an obvious error.

The trial court's reasonable doubt jury instruction was identical to WPIC 4.01. In *State v. Bennett*, the Supreme Court directed trial courts to exclusively use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt. 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In *Kalebaugh*, the Supreme Court recently reaffirmed that WPIC 4.01 was the "proper" instruction and "the correct legal instruction on reasonable doubt." 183 Wn.2d at 586. The court distinguished between the proper language of WPIC 4.01 ("a doubt for which a reason *exists*") and the trial court's improper additional instruction in that case ("a doubt for which a

reason *can be given*"). *Id.* at 581-82. Similarly, the Supreme Court in *State v. Emery* stated that the prosecutor in closing argument "properly" described reasonable doubt as a doubt for which a reason exists. 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Fessel cannot show that the trial court's reasonable doubt instruction constituted a manifest error. Accordingly, we will not consider Fessel's unpreserved challenge to this instruction.

C. SAG CLAIMS

1. Evidence Claims

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Garcia*, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). A trial court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

a. Cell Phone Chain of Custody

Fessel claims that the trial court erred by admitting into evidence records from a cell phone that was secured by an investigating officer, but was left unattended on an evidence table for 28 days. Fessel argues that because the cell phone was left unattended for such a long period, the State could not establish chain of custody. We disagree.

Before a trial court admits evidence, the proponent must authenticate or identify it "to support a finding that the matter in question is what its proponent claims." ER 901(a). The chain of custody should show that it is improbable that the evidence has either been contaminated or tampered with. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The nature of the object, the circumstances of its preservation, including custody, and the likelihood of tampering are factors to be considered in determining admissibility. *State v.*

Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Minor discrepancies regarding the chain of custody affect the weight of the evidence, not its admissibility. *Id.*

Here, the testimony at trial was that the cell phone remained in a locked and secured area from the time that the officers seized the phone until it was retrieved four weeks later. The chain of custody is not broken when evidence is stored in a locked and secured area. *State v. Wilson*, 83 Wn. App. 546, 555, 922 P.2d 188 (1996). Further, the investigating officer testified that when he retrieved the cell phone, it was in the same paper bag and located on the same table where he left it after conducting the search of the vehicle. Although the fact that the cell phone was left unattended may have raised some questions about chain of custody, those questions related to the weight of the evidence, not the admissibility.

Accordingly, we hold that the trial court did not abuse its discretion by admitting the cell phone into evidence.

b. Exclusion of Drug Use Evidence

Fessel asserts that the trial court erred in excluding evidence regarding drug use by victims and witnesses. We disagree.

Fessel claims to have witnessed, or to have knowledge of evidence of, drug use by some of the victims and witnesses testifying for the State. Fessel argues that this drug use raises questions about the credibility of their testimony. The trial court excluded this evidence because Fessel did not offer expert testimony on the potential effects that drug use could have on the witnesses' credibility. The trial court ruled that without expert testimony, drug use evidence was irrelevant.

The only person that Fessel claimed was using drugs who testified at trial was his father, James Fessel. During argument of motions in limine, Fessel represented that James told a physician that he had used methamphetamine on the morning of the incident and that a urinalysis exam from the hospital showed the presence of methamphetamines in his system. However, Fessel made no offer of proof regarding how much methamphetamine James consumed or the level of the drug in James's system. In addition, Fessel offered no evidence that the use of some unknown amount of methamphetamine necessarily would affect James's perception of the incident. Finally, Fessel offered no evidence that James showed signs of impairment at the time of the incident.

As noted above, the trial court has discretion regarding the introduction of evidence. *Garcia*, 179 Wn.2d at 846. In the absence of more specific evidence of a connection between James's actual drug use and his credibility, we hold that the trial court's exclusion of drug use evidence was not an abuse of discretion.

2. Disclosure of Cell Phone Data

Fessel asserts that the State violated CrR 4.7 by failing to provide him with a copy of a compact disc (CD) containing data obtained from several confiscated cell phones. He claims that the State's failure to provide him with a copy of the data forced him to surrender his right to a speedy trial and give up proceeding pro se, arguing that since he could not access the CD evidence in jail he had no real choice but to rely on counsel to obtain the CD. We disagree that the State violated CrR 4.7.

CrR 4.7(a)(1)(v) provides that a prosecutor must disclose to the defendant any tangible object(s) the prosecutor intends to use at trial that were obtained from the defendant.[3] The State initially stated that it had not reviewed the CD and did not plan to use the cell phone data at trial. The State later decided to use some cell phone records at trial, but by then the State had agreed to provide copies of the CDs to counsel.

Under CrR 4.7(c)(1), a prosecutor also must produce relevant material and information regarding specified searches and seizures as requested by the defendant. Here, the record suggests that Fessel requested copies of the CDs shortly before the first scheduled trial date. The prosecutor had the CDs but was prevented by jail rules from providing copies to Fessel, who at that time was representing himself. The trial court pointed out that he could have had his investigator review the CDs, but Fessel did not. In addition, once counsel was reappointed to represent Fessel, the State agreed to provide copies of the CDs to counsel.

Under the circumstances here, we hold that the State did not violate CrR 4.7.

3. Time for Trial

Fessel asserts that the trial court violated his "speedy trial rights" by granting a continuance beyond the time for trial deadline because of the unexpected unavailability of Detective Payne, one of the State's key witnesses.[4] SAG at 4A. We disagree.

---

[3] The State also has a duty to produce any exculpatory evidence. However, while Fessel claimed that there may have been exculpatory evidence on the CDs, he does not present any argument or evidence that the information on the CDs was exculpatory.

[4] Fessel does not state whether he is asserting a violation of his time for trial right under the court rules or his constitutional speedy trial right. Because the trial court analyzed the issue under CrR 3.3, and Fessel does not identify a constitutional violation in his SAG, we address this claim under the time for trial rule.

CrR 3.3(b) and (c) provide that a defendant who is detained in jail must be brought to trial within 60 days of arraignment. The purpose of this rule is to protect the defendant's constitutional right to a speedy trial and to prevent undue and oppressive incarceration before trial. *State v. Kingen*, 39 Wn. App. 124, 127, 692 P.2d 215 (1984). A criminal charge not brought to trial within the time limits of CrR 3.3 must be dismissed with prejudice. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009).

Certain time periods are excluded from the computation of time, including continuances granted by the trial court. CrR 3.3(e). CrR 3.3(f)(2) states,

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance.

A trial court may grant the State's motion for a continuance when "'required in the administration of justice'" as long as the continuance does not substantially prejudice the defendant in his defense. *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009) (quoting CrR 3.3(f)(1), (2)). The decision to grant a continuance under CrR 3.3 rests in the sound discretion of the trial court and will not be disturbed unless the trial court grants the continuance for untenable reasons. *State v. Ollivier*, 178 Wn.2d 813, 822-23, 312 P.3d 1 (2013), *cert. denied*, 135 S. Ct. 72 (2014).

Here, Fessel's trial was scheduled for April 21, 2014, and the time for trial deadline was April 30. On the first day of trial the State learned that Detective Payne was unavailable because his pregnant wife and children had been in a car accident. The State moved for a continuance under CrR 3.3(f). The trial court granted the motion and set a new trial date of May 12.

The trial court's grant of a continuance was appropriate here. The unavailability of a witness constitutes valid grounds to continue a trial date under CrR 3.3(f)(2). *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993). Moreover, Fessel did not articulate any prejudice resulting from the continuance and there is no evidence that the delay prejudiced the presentation of his defense. We hold that the trial court did not violate Fessel's time for trial right.

4. Prosecutorial Misconduct

Fessel asserts that the prosecutor improperly moved the trial court to declare that Detective Payne was an expert. He argues that this motion encouraged the jury to assume that the trial court, and not the jury, determines whether a witness has sufficient expertise. However, the trial court refused to declare that Detective Payne was an expert and instead stated that whether a witness is an expert is the "ultimate decision for the jury." 2 RP at 467. Therefore, even if the prosecutor's motion constituted misconduct, Fessel clearly was not prejudiced.

We hold that Fessel's prosecutorial misconduct claim fails.

D. EXCEPTIONAL SENTENCE

Fessel argues, and the State concedes, that the trial court's imposition of consecutive sentences for two or more current, nonviolent sentences was an exceptional sentence and that the trial court erred in not entering findings of fact and conclusions of law to support that exceptional sentence. We accept the State's concession and remand for resentencing.

Under former RCW 9.94A.589 (2002), convictions sentenced on the same day are treated as "current offenses." Former RCW 9.94A.589(1)(a) states that sentences for current offenses shall be served concurrently and that "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.535 provides that whenever

the trial court imposes an exceptional sentence, it must "set forth the reasons for its decision in written findings of fact and conclusions of law."

Here, the trial court sentenced Fessel for the vehicular assault, hit and run, and bail jumping convictions on the same day, and therefore they were current offenses. In order to impose these sentences consecutively, the trial court was required to identify the basis for an exceptional sentence and enter findings of fact and conclusions of law to support an exceptional sentence. The trial court failed to enter such findings and conclusions. Accordingly, we hold that the trial court erred in imposing Fessel's sentences for vehicular assault, hit and run, and bail jumping consecutively. We remand for resentencing.

We affirm Fessel's convictions, but we reverse his sentence and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Worswick, J.
WORSWICK, J.

Johanson, C.J.
JOHANSON, C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 46523-0-II
JUSTIN FESSEL,	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] JUSTIN FESSEL
DOC NO. 769462
STAFFORD CREEK CORRECTIONS CERNTER
191 CONSTANTINE WAY
ABERDEEN, WA 9852

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF MARCH 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 08, 2016 - 2:33 PM

Transmittal Letter

Document Uploaded: 4-465230-Petition for Review.pdf

Case Name: Justin Fessel
Court of Appeals Case Number: 46523-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

CntyPA.GeneralDelivery@clark.wa.gov