72453-3

NO. 72453-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN CORBETT, JR.,

Appellant.

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

The Honorable Laura Inveen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The government committed egregious misconduct in attempting to bribe a material witness.

2. The court erred in admitting ER 404(b) evidence to show the complaining witness's credibility and state of mind without also requiring expert testimony on the dynamics of a domestic violence relationship.

3. The reasonable doubt instruction required more than a reasonable doubt to acquit and shifted the burden to appellant to provide the jury with a reason for acquittal.

4. Prosecutorial misconduct deprived appellant a fair trial.

5. Cumulative error deprived appellant a fair trial.

6. Jury instruction number 3 defining "prolonged period of time" constituted a judicial comment on the evidence and relieved the State of its burden of establishing every element of the aggravating factor.

7. The court erred in imposing an exceptional sentence based on RCW 9.94A.535(3)(h)(i).

8. The court erred in entering a lifetime no-contact order between appellant and his son.

Issues Pertaining to Assignments of Error

1. Does the State commit egregious misconduct when it attempts to bribe a material witness with a monetary benefit in exchange for

his cooperation, and does such misconduct require dismissal where the State cannot show the absence of prejudice beyond a reasonable doubt?

2. Did the trial court err in admitting ER 404(b) evidence of past acts of domestic violence between appellant and the complaining witness without also requiring an expert to explain the dynamics of a domestic violence relationship?

3. The trial court instructed the jury that a "reasonable doubt is one for which a reason exists." Does this instruction undermine the presumption of innocence by instructing the jury it must be able to articulate a reason before it can have a reasonable doubt?

4. Did the prosecutor improperly disparage defense counsel by calling the defense "quite frankly absurd" several times in closing?

5. Did the prosecutor unfairly align himself with the jury by using the phrase "we know" in closing argument to describe several disputed issues of fact and vouch for the credibility of several witnesses?

6. Did cumulative error deprive appellant a fair trial?

7. An exceptional sentence based on a pattern of abuse requires the State to prove multiple incidents occurring over a prolonged period of time. Where the judge instructed the jury "prolonged period of time" meant "more than a few weeks," was the State relieved of its burden to prove this element of the aggravating factor beyond a reasonable doubt?

8. Without determining whether the order was reasonably necessary to serve a compelling State interest, did the court impermissibly prohibit all contact between a father and his son for life?

B. STATEMENT OF THE CASE

The State charged Bryan Corbett, Jr., with one count of first degree burglary (Count 1), one count of second degree child assault (Count 2), and two counts of felony violation of a no-contact order (Counts 3 and 4). CP 16-19. The State alleged that on February 2, 2014, Super Bowl Sunday, Corbett chased after Charlene Harris into a neighbor's apartment and threw an empty knife block at her, striking their six-month-old son in her arms.

1. Corbett's Testimony

Corbett, who also goes by Bryan Nichols, Jr.,[1] dated Harris for several months after they met at a concert in June 2012. RP 347-48.[2] Corbett and Harris have a son named J.N. RP 111-12, 350-51. Corbett does not live with Harris, but he helps her with money, diapers, and clothes for J.N. RP 351. There was a no-contact order in place between Corbett and Harris from April 19, 2013 until April 19, 2015. Ex. 4; RP 128-29.

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[1] Corbett explained that Nichols is his father's last name and Corbett is his mother's last name, so he goes by either. RP 347.

[2] The verbatim report of proceedings is consecutively paginated, exception for voir dire and opening statements, held on July 14, July 15, and July 16, 2014. The consecutively paginated transcripts are labeled "RP" and the voir dire transcript is labeled "2RP."

On February 2, 2014, Corbett's brother, Samuel Corbett, and sister-in-law, Lorionne Dorsey, picked Corbett up from a convenience store in the Kent-Des Moines area. RP 321, 331-33, 351. The three of them went to a friend's house nearby to watch the Seahawks play in the Super Bowl. RP 351-52. They arrived before kickoff and stayed about an hour after the game ended. RP 352. After they left, Samuel and Dorsey dropped Corbett off at the Tukwila Transit Center. RP 334-35, 353. Corbett then went to his mother's house in the Central District and stayed for the night. RP 353. He did not see Harris after the Super Bowl ended. RP 353. Samuel and Dorsey both corroborated Corbett's testimony at trial. RP 320-25, 331-35.

A couple days later, Harris contacted Corbett to say she and her boyfriend, James Dixon, got into a fight when they were drinking heavily and getting high the night of the Super Bowl. RP 353-54. Harris told Corbett the argument became physical, so she asked Corbett to come over and beat up Dixon. RP 354. Corbett went over to Harris's apartment to "set things straight between her and James and to make sure that [J.N.] was okay." RP 354. Corbett believed the no-contact order between him and Harris had been lifted, because Harris told him she met with a victim's advocate and the judge, who agreed to lift the order. RP 349-50, 355.

Then, on February 25, 2014, Corbett went over to Harris's apartment again to help care for J.N. RP 357. While he was there, he heard police

scream, "Bryan Corbett come out," which made him nervous, so he hid. RP 357. The police arrested him for an alleged physical altercation with Harris on Super Bowl Sunday. RP 357-58.

2. Harris's Testimony

Harris testified that on February 2, 2014, she and Corbett were drinking and watching the Super Bowl at her apartment in South Seattle. RP 111-13. J.N. was in his playpen while they watched the game. RP 113. Harris explained she was intoxicated at the time and did not remember all the details of the day. RP 113.

Harris said she and Corbett got into an argument, but could not remember what it was about. RP 114. Harris ran out of the apartment with J.N. and began knocking on neighbors' doors until her neighbor, Suldan Mohamed, answered and let her inside. RP 114-16. A few minutes later, Corbett forced his way inside Mohamed's apartment. RP 117. J.N. cried while Harris and Corbett yelled at each other. RP 118, 168-69. Corbett then picked up an empty knife block from Mohamed's kitchen counter and threw it at Harris. RP 118, 168-69. The knife block hit J.N., who Harris was still holding in her arms. RP 118-20, 168-69. Harris and Mohamed believed J.N. was knocked unconscious because he stopped crying for about 20 seconds. RP 119-20, 170.

Mohamed pushed Corbett out of the apartment and called 911. RP 120-21, 171. The 911 call was played for the jury. RP 171-72. During the call, Harris told Mohamed the man was Bryan Nichols and he was the baby's father. RP 173.

Harris testified she then left Mohamed's apartment and Corbett dragged her down the hallway and punched her in the face. RP 121. Harris could not remember how long this altercation lasted or whether she fought back. RP 121.

Police and paramedics arrived at the apartment complex around 7:30 p.m. RP 82-84, 122. Corbett was not there when they arrived. RP 122. J.N. had red mark on his forehead, but did not lose consciousness again. RP 84-85, 90, 145. Harris and J.N. were transported to Harborview. RP 85-87, 122. Paramedic Mark Colley said Harris seemed intoxicated because she was repeating herself and slurring her speech. RP 85-87.

At the hospital, Harris denied that J.N. ever lost consciousness, inconsistent with what she said at trial. RP 161, 230-33. Harris also testified at trial that she suffered permanent hearing loss from the incident, but the doctors found no signs of hearing damage and Harris did not report any hearing problems at the hospital. RP 148-49, 234. The doctors concluded that Harris's injuries were relatively minor, consisting of small cuts and scratches on her arms and face. RP 226-28, 236; Exs. 20-24.

Social Worker Jeffrey Meyers spoke with Harris at Harborview. RP 156-58. Meyers could smell alcohol on Harris. RP 159. She told him Corbett threatened to kill her, and also grabbed her by the hair outside Mohamed's door and dragged her down the hallway. RP 157-58.

On February 25, 2014, police went to Harris's apartment to arrest Corbett. RP 251. Harris answered the door, and the police yelled for Corbett to come out. RP 252. When he did not, Harris let them inside and they found Corbett hiding under Harris's older son's bed. RP 253.

3. Police Investigation

Detective Adam Thorp investigated the case. RP 198-99. When he initially spoke with Harris, she told him Dixon committed the crime. RP 203. Harris did not know Dixon's birthday, but she provided Thorp with Dixon's phone number. RP 206. Thorp did not call the number or attain a search warrant to confirm it was Dixon's phone. RP 206-07.

Thorp also contacted Mohamed. RP 200. Mohamed was not very cooperative with the police or defense counsel, but he eventually testified at trial. RP 27-29. On cross-examination, Mohamed explained Thorp offered to buy him a set of knives if he agreed to help the State prosecute Corbett. RP 183-84, 198. Mohamed said he told Thorp, "I don't want nothing to do with this stuff, it's okay. Not interested." RP 184. Mohamed explained he

was testifying not because Thorp offered him a knife set, but because the State subpoenaed him to testify. RP 188-89.

Then, on direct, Thorp asserted he never offered Mohamed anything in exchange for his cooperation, but admitted he offered to replace Mohamed's knife block. RP 204. On cross, Thorp insisted the offered knife block "was simply a replacement." RP 208.

However, Corbett's counsel then played the following recorded conversation between Thorp and Mohamed:

> DETECTIVE THORP: Yeah. And by the way, I need[] to advise you, this line is recorded. But you[] are a huge part of this particular case as far as bringing justice to the perpetrator and making sure that he is held responsible as the only witness. Because [Harris] may not be very cooperative right now, and so it really relies heavily on your -- on your -- on what you saw on your statements and whatnot. In fact, I've been authorized by the Prosecuting Attorney's Office to buy you a new knife set, knife block and knife set, and you can keep your old ones[] as well, if that's something you're interested in.

RP 208-09. In the same conversation, Thorp then asked Mohamed whether he could describe Corbett. RP 210. Mohamed responded, "You know, I can't recall exactly how short he was or how tall he was." RP 210. Mohamed also told Thorp he was not sure whether he could identify Corbett if he saw a photo of him. RP 210-11.

After this conversation with Thorp, Mohamed explained that posters showed up all over his apartment building with Corbett's name and photo,

calling him "armed and dangerous." RP 180, 185-86, 189-90. Mohamed said he recognized Corbett from this photo. RP 190.

4. Procedural Facts

At trial, Harris admitted she originally identified Dixon, but explained she made Dixon up because she "cared and loved Mr. Corbett." RP 132, 197. Based on this evidence, the State sought to admit several prior incidents between Harris and Corbett under ER 404(b), specifically Corbett's 2012 convictions for fourth degree assault and harassment of Harris. RP 33-34, 102-03. With both of those prior incidents, Harris originally identified someone other than Corbett as the perpetrator. RP 34.

Corbett opposed admitting this evidence, arguing expert testimony was needed "to substantiate the state's psychological hypothesis that domestic violence victims are prone to lying when testifying about allegations against their assailants." CP 23; RP 35-36. Corbett argued the dynamics of a domestic violence relationship are beyond the common knowledge of a lay jury. CP 24. Thus, without the expert testimony, "the jury would see the prior bad acts only as propensity evidence, and the evidence would then be unfairly prejudicial under ER 403." CP 23.

The trial court admitted the prior incidents under ER 404(b), without requiring expert testimony. RP 107. The court found it "necessary that the fact-finder have a full understanding of the state of the mind of the alleged

victim as well as an understanding of the dynamics of the relationships between the two." RP 107. The court agreed there was "no question" the evidence was prejudicial, but "the probative value far outweighs the prejudice in this case." RP 107. Corbett renewed his objection. RP 107.

Before Harris's testimony about the prior incidents, the court gave the following limiting instruction:

> Certain evidence has been determined to be admissible in this case only for a limited purpose. This evidence consists of testimony concerning prior assaults against Charnell Harris by the defendant. These incidents may be considered by you only for the purpose of evaluating Charnell Harris' credibility and her state of mind. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP 133. Harris then testified Corbett was convicted of assaulting her in August and November 2012. RP 134. She agreed she originally told the police someone else committed the crimes. RP 134. Harris explained she began seeing Corbett again after these incidents because she "cared about him" and "was pregnant by him too." RP 135.

The State also called Harris's 10-year-old son J.H. to the stand in an attempt to impeach Corbett's alibi. RP 340-41. On direct, J.H. testified he watched the beginning of the Super Bowl with Harris and Corbett at his mom's apartment. RP 342-43. J.H. explained that his grandparents picked him up early, though, when Harris and Corbett began arguing. RP 343.

However, on cross, J.H. admitted he might have left Harris's apartment before the game started. RP 344. J.H.'s grandfather, Eugene Harris, explained that the game started around 5:30 p.m. and J.H. asked to be picked up around 2:45 p.m. RP 23. J.H. also said Eugene told him what to say on the stand, agreeing Eugene does not like Corbett. RP 344-46.

The jury acquitted Corbett of second degree child assault, instead finding him guilty of the lesser included fourth degree assault. CP 68-69. The jury found him guilty on the remaining charges. CP 66-72. The jury found that all counts were domestic violence offenses, and Counts 1 and 3 were committed within sight and sound of J.N.[3] CP 66-72. After a bifurcated proceeding, the jury also returned a special verdict finding that Counts 1, 3, and 4 were aggravated domestic violence offenses based on an ongoing pattern of abuse over a prolonged period of time.[4] CP 73-75.

The court sentenced Corbett to 152 months of confinement, 36 months above the standard range. CP 85-88. The court ordered Corbett to have no contact with Harris or J.N. for life. CP 88. Corbett appeals. CP 99.

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[3] RCW 9.94A.535(3)(h)(ii) (allowing an exceptional sentence when the jury finds "[t]he offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years").

[4] RCW 9.94A.535(3)(h)(i) (allowing an exceptional sentence when the jury finds "[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time").

C. ARGUMENT

1. THE STATE COMMITTED EGREGIOUS MISCONDUCT IN ATTEMPTING TO BRIBE A MATERIAL WITNESS, NECESSITATING DISMISSAL.

The State attempted to bribe Mohamed, a material witness, by offering him a monetary benefit—a new knife set and knife block, along with the return of his original knife block—in exchange for his cooperation and positive identification of Corbett. RP 208-09. Where the State engages in such egregious misconduct, the only adequate remedy is dismissal unless the State can affirmatively show no prejudice beyond a reasonable doubt. Because the State cannot do so here, this Court should reverse Corbett's convictions and dismiss the charges with prejudice.

a. The State engaged in egregious misconduct by attempting to bribe a material witness.

The Washington Supreme Court has held similar attempted bribery to constitute professional misconduct. In re Disciplinary Proceedings Against Bonet, 144 Wn.2d 502, 514-15, 29 P.3d 1242 (2001). Charles Bonet was assigned to prosecute Jason McCarty in a conspiracy case. Id. at 505. Prior to McCarty's trial, Ivan Yoder, a named defense witness and potential co-conspirator, made conflicting statements about whether or not he was going to testify for McCarty. Id.

After trial began, Yoder asked a detective to ask Bonet to drop a charge against him if he did not testify for McCarty. Id. Bonet told the detective to ask Yoder if he would testify for the State instead. Id. Yoder declined, but Bonet later spoke with Yoder directly and told him if he did not testify for McCarty, they could "work something out." Id. Bonet and Yoder eventually agreed Bonet would drop a pending charge against Yoder if he did not testify for McCarty. Id. at 506. Bonet formally dismissed the charge against Yoder, but Yoder nevertheless testified for McCarty. Id.

On appeal, the court framed the issue as follows: "is it misconduct for a deputy prosecuting attorney to attempt to induce a witness to not testify for a person charged with a crime, even if the offer has no affect on the witness's decision to not testify?" Id. at 513. The court held:

> We have no difficulty reaching a conclusion that a public or private attorney may not offer an inducement to a witness in order to influence that person to not testify at a trial. An attorney who does that, in our view, violates RPC 3.4(b), RPC 8.4(b), and RPC 8.4(d), regardless of whether the offer or inducement influenced the witness's decision to testify or not testify.

Id. at 514 (footnotes omitted). The court further explained, "In our view, it would contradict the interest of the public to absolve Bonet of an act of professional misconduct merely because Yoder had a prior subjective intent to not testify." Id. at 514-15.

In reaching this conclusion, the court emphasized that prosecutors possess significant power "to charge or not charge a person with a crime." Id. at 515. They are quasi-judicial officers with the duty to seek justice, not just convictions. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Therefore, the Bonet court held, a prosecutor's offer to dismiss a charge in order to influence a witness's testimony "is highly unethical and as deserving of opprobrium as would a public or private attorney's effort to bribe a witness with money to influence that person's testimony." 144 Wn.2d at 515 (emphasis added).[5]

RPC 3.4(b) prohibits lawyers from offering "an inducement to a witness that is prohibited by law." RPC 8.4 likewise specifies it is misconduct for a lawyer to "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and "(d) engage in conduct that is prejudicial to the administration of justice." RCW 9A.72.090 criminalizes bribing a witness:

> A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding . . . with intent to: (a) influence the testimony of that person.

[5] Cf. In re Disciplinary Proceedings Against Simmons, 110 Wn.2d 925, 928-29, 757 P.2d 519 (1988) (finding attorney misconduct for giving whiskey to an adverse witness known to be an alcoholic).

Thus, it is prosecutorial misconduct, as well as a crime, to offer a monetary benefit to a witness with intent to influence that person's testimony.

Mohamed was not a very cooperative witness. RP 27-29. He informed the State he "didn't want to cooperate, he didn't want anything to do with it. . . and he would only give a few terse answers to the investigator." RP 28. Mohamed told the police he could not recall what Corbett looked like and was not sure he could identify him. RP 210-11. When Detective Thorp contacted Mohamed, Thorp informed Mohamed his cooperation was essential to the State's case. RP 208-09. Then, in the same conversation, Thorp told Mohamed, "In fact, I've been authorized by the Prosecuting Attorney's Office to buy you a new knife set, knife block and knife set, and you can keep your old ones[] as well, if that's something you're interested in." RP 209. Though Mohamed said he did not accept the knife set, he thereafter identified Corbett. RP 180, 189-90.

Thus, the State offered Mohamed a monetary benefit—a new knife set and knife block—in exchange for his cooperation and positive identification of Corbett. The State does not need to resort to such bribery. Instead, lawful procedures like subpoenas and material witness warrants are sufficient to ensure a reluctant witness's testimony at trial. CrR 4.10(a); see also RP 188-89 (Mohamed subpoenaed to testify), 300-01 (material witness warrants for defense witnesses). Under Bonet, the State's attempted bribery

is "deserving of opprobrium" and constitutes misconduct. 144 Wn.2d at 514-15. This Court should so hold.

b. Because the State cannot show the absence of prejudice beyond a reasonable doubt, the proper remedy is dismissal.

There is little Washington case law addressing the appropriate remedy for the State's misconduct in offering a monetary benefit to a material witness in exchange for his cooperation. However, cases involving similarly egregious State misconduct provide useful analogies.

In State v. Cory, Cory met with his attorney in a private jail room where a sheriff's deputy had secretly installed a microphone to eavesdrop on their conversation. 62 Wn.2d 371, 372, 382 P.2d 1019 (1963). The court concluded this conduct was "shocking and unpardonable." Id. at 378. "Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.'" Id. (quoting People v. Cahan, 282 P.2d 905, 911 (Cal. 1955)). Dismissal was the only remedy to "effectively discourage the odious practice of eavesdropping on privileged communication between attorney and client." Id.

The supreme court recently clarified the scope of Cory in State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). There, a detective listened to recorded jail calls between Peña Fuentes and his attorney. Id. at 816. Because eavesdropping is reprehensible and "cannot be permitted," the

court held that the State, not the defendant, bears the burden of showing no prejudice beyond a reasonable doubt:

> The State is the party that improperly intruded on attorney-client conversations and it must prove that its wrongful actions did not result in prejudice to the defendant. Further, the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned from the eavesdropping.

Id. at 820. The proper remedy was remand to the trial court to consider whether the State proved the absence of prejudice. Id.

Similarly, the State committed egregious misconduct by injecting racial prejudice into the trial in State v. Monday, 171 Wn.2d 667, 678-79, 257 P.3d 551 (2011). For instance, the prosecutor referred to the police as "poleese" and argued "black folk don't testify against black folk." Id. at 679. Appalled, the court explained, "[t]he notion that the State's representative in a criminal trial, the prosecutor, should seek to achieve a conviction by resorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained." Id. at 680. Instead of requiring Monday to show prejudice, the court shifted the burden to the State to show "beyond a reasonable doubt that the misconduct did not affect the jury's verdict," and reversed. Id. at 680-81. The court believed this was necessary "to deter such conduct." Id.

The lesson of these cases is that when the State engages in egregious misconduct that must be deterred, the State bears the burden of proving no prejudice beyond a reasonable doubt. The State's attempt to bribe a material witness with a monetary benefit is similarly odious misconduct that must be discouraged. As the court reasoned in Peña Fuentes, it was the State, not Corbett, who improperly attempted to buy a witness's cooperation. This Court should apply the same rule here, and require the State to affirmatively show the absence of prejudice beyond a reasonable doubt.

The State cannot make such a showing here. Mohamed testified he did not accept the State's bribe. RP 184, 188-89. However, Mohamed positively identified Corbett only after the State offered him the knife set, when the "armed and dangerous" posters appeared at his apartment building. RP 180, 185-86, 189-90. Unlike Monday, who could be fairly retried, there is no way to isolate the prejudice here, unless Mohamed and Thorp are excluded as witnesses. This Court should therefore dismiss the charges with prejudice, or remand for retrial without Mohamed's and Thorp's testimony. Cory, 62 Wn.2d at 378; State v. Granacki, 90 Wn. App. 598, 604, 959 P.2d 667 (1998) (excluding detective's testimony would be an appropriate remedy for eavesdropping).

2. THE TRIAL COURT ERRED IN ADMITTING ER 404(b) EVIDENCE WITHOUT REQUIRING AN EXPERT TO EXPLAIN THE DYNAMICS OF DOMESTIC VIOLENCE RELATIONSHIPS.

Under ER 404(b), evidence of prior crimes is presumptively inadmissible to prove character and show action in conformity therewith. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). Such evidence may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Before admitting ER 404(b) evidence for one of these purposes, the court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

The Washington Supreme Court held in State v. Magers that prior acts of domestic violence are admissible under ER 404(b) "to assist the jury in judging the credibility of a recanting victim." 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (plurality opinion); id. at 194 (Madsen, J., concurring). However, the court recently declined to extend Magers to cases where the complaining witness "neither recants nor contradicts prior statements." Gunderson, 181 Wn.2d at 925.

There is no dispute that Harris originally identified Corbett, then recanted and said Dixon assaulted her. RP 132, 197. The court accordingly admitted evidence of prior acts of domestic violence between Harris and Corbett where Harris also recanted. RP 107. The court found this evidence was relevant to explain Harris's state of mind and to help the jury understand "the dynamics of the relationship between the two." RP 107.

It was error, however, for the court to admit this evidence without expert testimony explaining the dynamics of domestic violence relationships. The Gunderson court noted "it may be helpful to explain the dynamics of domestic violence when offered in conjunction with expert testimony to assist the jury in evaluating such evidence." Id. at 925 n.4 (citing Grant, 83 Wn. App. at 108). But expert testimony is not just helpful, it is necessary to explain the complicated, counterintuitive dynamics of domestic violence relationships. Without it, there is too great a risk the jury used Corbett's prior crimes as propensity evidence. This is improper and requires reversal. Id. at 927.

Expert testimony is required where the reasons for an individual's conduct are beyond the common knowledge of an average lay person. See State v. Ciskie, 110 Wn.2d 263, 265, 751 P.2d 1165 (1988); State v. Stumpf, 64 Wn. App. 522, 526-27, 827 P.2d 294 (1992). For instance, a diminished capacity defense requires expert testimony to establish the existence of the

alleged mental disorder, as well as the requisite casual connection between the disorder and the diminished capacity. Stumpf, 64 Wn. App. at 526. By contrast, a voluntary intoxication defense does not require an expert because the effects of alcohol are commonly known. State v. Kruger, 116 Wn. App. 685, 692-93, 67 P.3d 1147 (2003).

In Ciskie, the court held that expert testimony on battered woman syndrome was properly admitted to explain the victim's counterintuitive behavior in staying with an abusive partner and failing to report violent incidents to the police. 110 Wn.2d at 270-80. The court reasoned that though domestic violence is widely prevalent, the "'general public is unaware of the extent and seriousness of the problem of domestic violence.'" Id. at 272-73 (quoting United States Comm'n on Civil Rights, The Federal Response to Domestic Violence 77 (1982)). It was therefore likely the jury had "little awareness" of battered woman syndrome:

> The State noted before the trial court that for those not personally affected by a battering relationship or otherwise specially informed, it is difficult to believe that so many women are victims of their mates' physical abuse. Even more counterintuitive and difficult to understand is the ongoing nature of these relationships. The average juror's intuitive response could well be to assume that someone in such circumstances could simply leave her mate, and that failure to do so signals exaggeration of the violent nature of the incidents and consensual participation.

Id. at 273-74. In State v. Allery, the court likewise recognized this "phenomenon" was "not within the competence of an ordinary lay person." 101 Wn.2d 591, 597, 682 P.2d 312 (1984).

In Grant, the State sought to introduce prior acts of domestic violence through testimony of the complaining witness's therapist. 83 Wn. App. at 109. In concluding the evidence was admissible under ER 404(b), the court looked to scholarship on the dynamics of domestic violence relationships. Id. at 107 n.5 (quoting Anne L. Ganley, Domestic Violence: The What, Why and Who, as Relevant to Civil Court Domestic Violence Cases, in DOMESTIC VIOLENCE CASES IN THE CIVIL COURT: A NATIONAL MODEL FOR JUDICIAL EDUCATION 20 (1992)). Summarizing this research, the court explained, "victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." Id. at 107. Thus, "[e]xpert testimony would have shown that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim." Id. at 109.

The dissent in Magers also recognized expert testimony was required for prior acts of domestic violence to be admissible. 164 Wn.2d at 197-98 (C. Johnson, J., dissenting). It is not self-evident why victims in abusive relationships may often change their testimony. Id. at 197. Therefore, "expert testimony is necessary to establish why, in the context of the victim's

relationship with the defendant, these inconsistencies may exist." Id. at 197-98. Such testimony helps the jury determine whether this type of relationship actually existed and then properly consider inconsistencies in the complaining witness's testimony. Id. at 197. Without expert testimony, "the jury has a much higher likelihood of convicting an innocent defendant because of other crimes or bad acts committed in the defendant's past." Id. at 198. This is precisely what ER 404(b) is designed to prevent. Expert testimony is therefore a "necessary safeguard[]." Id.

The risk of unfair prejudice is "very high" when prior acts of domestic violence are admitted. Gunderson, 181 Wn.2d at 925. While some jurors are undoubtedly familiar with the complicated dynamics of domestic violence relationships, they are beyond the common knowledge of the average lay person. This is evidenced by courts' own reliance on scholarly work to explain why prior acts of domestic violence are relevant to a recanting victim's credibility and state of mind. Expert testimony is therefore necessary to prevent jurors from using prior acts as propensity evidence. Because no expert testified here, this Court should reverse Corbett's conviction and remand for a new trial.

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

At Corbett's trial, the court gave the standard reasonable doubt jury instruction, WPIC 4.01, which reads, in part:

> A reasonable doubt is one for 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 33; RP 369. The Washington Supreme Court requires that trial courts give this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

However, WPIC 4.01 is constitutionally defective for two reasons. First, it instructs jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt, making it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt is identical to "fill-in-the-blank" arguments, which Washington courts have invalidated in prosecutorial misconduct cases. Instructing jurors with WPIC 4.01 is constitutional error.

a. WPIC 4.01's language impermissibly adds an articulation requirement to reasonable doubt.

Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to acquit. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). Thus, for a doubt to be reasonable, it must be logically derived, rational, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).

The placement of the article "a" before "reason" improperly alters and augments the definition of reasonable doubt. In the context of WPIC 4.01, "a reason" means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to "reason," which refers to a doubt based in

reason or logic, "a reason" requires reasonable doubt to be capable of explanation or justification. In other words, WPIC 4.01 requires not just a reasonable doubt, but also an explainable, articulable doubt.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under WPIC 4.01, reasonable doubt is insufficient. For instance, a juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. 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). But, despite having reasonable doubt, the juror could not vote to acquit under WPIC 4.01. See id.

By requiring more than a reasonable doubt to acquit, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amends. V, XIV; WASH. CONST. art. I, § 3.

b. WPIC 4.01's articulation requirement undermines the presumption of innocence.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be

illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts strenuously protect the presumption of innocence by rejecting an articulation requirement in different contexts. This Court should likewise safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have prohibited arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Therefore, such arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759-60.

For instance, the court held improper a prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you have to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'" State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (quoting CPs). In State v. Venegas, the court found flagrant and ill-intentioned misconduct where the prosecutor argued in closing, "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank.'" 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (quoting RPs).

Although it does not explicitly tell jurors to fill in a blank, WPIC 4.01 implies jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt. This is, in substance, the same exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, then it makes no sense to allow the same undermining to occur through a jury instruction.

Outside the prosecutorial misconduct realm, Division Two recently acknowledged that an articulation requirement in a preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court held Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court concluded the error was not manifest under RAP 2.5(a)(3). Id. at 424.

In sidestepping the issue on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. Id. at 422-23. Similarly, in considering a challenge to fill-in-the-blank arguments, the Emery court approved of defining "reasonable doubt as a 'doubt for which a reason exists.'" 174 Wn.2d at 760. But the Emery court made this

statement without explanation or analysis. And, neither the Emery court nor the Kalebaugh court explained why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts.[6] Nor was either court considering a direct challenge to the WPIC language, so their approval of WPIC 4.01 does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

Just like fill-in-the-blank arguments, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt." Emery, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence and is unconstitutional.

c. The articulation requirement requires reversal.

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional

[6] The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." 179 Wn. App. at 423. But both errors undermine the presumption of innocence by misstating the reasonable doubt standard. As the dissenting judge surmised, "if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge." Id. at 427 (Bjorgen, J., dissenting).

error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Thus, failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error." Id. at 281-82 (internal quotation marks omitted).

Corbett's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. This required more than just a reasonable doubt to acquit; it required a reasonable, articulable doubt.[7] This undermined the presumption of innocence. It is structural error and requires reversal. This Court should reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

4. PROSECUTORIAL MISCONDUCT IN CLOSING VIOLATED CORBETT'S RIGHT TO A FAIR TRIAL.

In closing, the prosecutor repeatedly referred to the defense as "quite frankly absurd," disparaging the defense and maligning defense counsel. The prosecutor also repeatedly used the term "we know" to align himself with the jury and then vouch for witnesses and disputed facts. This flagrant and ill-intentioned misconduct prejudiced the outcome of Corbett's trial.

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[7] The State may argue this issue was already decided in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). However, Thompson was decided over 40 years ago and can no longer be squared with Emery and the fill-in-the-blank cases. WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. Because the State will avoid supplying reasons to doubt in its own case, WPIC 4.01 suggests that either the jury or the defense should supply them, "further undermining the presumption of innocence." Kalebaugh, 179 Wn. App. at 426 (Bjorgen, J., dissenting). Therefore, "[t]he logic and policy of the decision in [Emery] impels the conclusion" that the articulation requirement in WPIC 4.01 is "constitutionally flawed." Id. at 424.

Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); Monday, 171 Wn.2d at 676. When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; WASH. CONST. art. 1, §§ 3, 22; Reed, 102 Wn.2d at 145. Reversal is required, even without defense objection, when the prosecutor's misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

a. The prosecutor improperly disparaged defense counsel by calling the defense "quite frankly absurd."

Prosecutors may properly argue the evidence does not support the defense theory. State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). "However, a prosecutor must not impugn the role or integrity of defense counsel. Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." Id. at 431-32 (citations omitted).

The Lindsay court held the prosecutor improperly impugned defense counsel where he argued, "'This is a crock. What you've been pitched for the last four hours is a crock.'" Id. at 433 (quoting VRPs). The term "crock"

implied deception and dishonesty. Id. Similarly, improper disparagement occurred where the prosecutor characterized the defense as "bogus" and involving "sleight of hand." State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). A prosecutor's argument was likewise improper where he described defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.'" State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting VRPs).

The prosecutor's reference to the defense as "quite frankly absurd" is analogous to the disparagement prohibited in Lindsay, Thorgerson, and Warren. The prosecutor used the phrase three times in closing. RP 389-90, 396. The first and second instances were in reference to the defense that Harris falsely identified Corbett while at the hospital:

> But let's first stop and talk about Charnell Harris' account in the moments after all of this had happened. And we know that, in those moments afterwards, that we can rely upon Charnell to give an accurate account of what happened, because when we see in the photographs that you have in evidence from Officer Stone who had the wherewithal to document the photographs as all of this was unfolding at the hospital, the notion that in these moments, in the moments where Charnell Harris is focused on her child and the well-being of her child, that she would then try and falsely accuse somebody else, who would think to herself, you know, somebody other than, Oh my god, I want the person who did this to be blamed for it, not Mr. Corbett, if that was the case. It's quite frankly absurd.

> It is in these moments even that Charnell Harris collapses on the floor in the emergency room and needs medical care herself and she's relaying to the medical staff that it is the defendant, Mr. Nichols, that committed this offense. And it is in those moments after she has collapsed and she is on the gurney receiving care herself, while her child is being cared for in the background, that she's talking about what happened. And again, the notion that she would then try and blame anybody, then, who did this to her and her child is, quite frankly, absurd.

RP 389-90 (emphasis added). The third related to the defense that Mohamed and Thorp were biased witnesses based on the State's attempted bribery:

> Now there is also some question about whether [Mohamed identified Corbett] because he was offered new steak knives to replace. Knives that even Mr. Mohamed said were replacements for the evidence that was taken from his apartment. And he didn't even accept them. So the notion that somehow he's doing this for a free set of steak knives is also, quite frankly, absurd.

RP 396 (emphasis added). Defense counsel did not object.

The prosecutor did not simply argue the defense theory was unsupported by the evidence; he argued it was "quite frankly absurd." "Absurd" means "marked by an obvious lack of reason, common sense, proportion, or accord with accepted ideas : ridiculously unreasonable, unsound, or incongruous." WEBSTER'S, supra, at 8. By calling the defense "absurd," the prosecutor maligned defense counsel by implying he was ridiculous and unreasonable, and no rational juror should believe him. The prosecutor began each passage above by summarizing the evidence or

drawing inferences therefrom. But he then ended each with a final flourish by calling the defense "quite frankly absurd," which was plainly intended as disparagement.

There is no analytical difference between calling the defense "bogus," like in Thorgerson, and calling the defense "absurd," like here. Like Thorgerson, the "prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel." 172 Wn.2d at 452. Given clear case law prohibiting such disparagement, the prosecutor's conduct here was flagrant and ill-intentioned.

In Reed, the prosecutor's improper comments were prejudicial when they struck directly at the evidence supporting the defense theory. 102 Wn.2d at 147-48. Here, the prosecutor used "absurd" to disparage two of Corbett's primary defenses: that Harris falsely identified him at the hospital and Mohamed's identification of Corbett was questionable because of the State's bribery. These defenses were not "absurd," but rather were based on actual evidence admitted at trial. Harris recanted her initial identification of Corbett and blamed Dixon for the incident. RP 131-32, 138-39. Thorp offered Mohamed a knife set and knife block in exchange for his cooperation and positive identification of Corbett. RP 183-84, 207-11. To call them "absurd" significantly undercut these legitimate defenses, and implied defense counsel was irrational and even deceitful. No instruction could have

cured the resulting prejudice; "[t]he bell once rung cannot be unrung." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1977).

The prosecutor's flagrant and ill-intentioned disparagement of the defense caused enduring, incurable prejudice that deprived Corbett of his right to a fair trial. This Court should reverse his convictions.

b. The prosecutor improperly used the phrase "we know" to align himself with the jury and then vouch for witnesses and disputed facts.

Prosecutors are prohibited from using the power and prestige of their office to sway the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). For instance, a prosecutor may not vouch for the credibility of a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Whether a witness has testified truthfully is solely for the jury to decide. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when a prosecutor places the State's prestige behind the witness. Id.

Prosecutors must also refrain from making comments "calculated to align the jury with the prosecutor and against the [accused]." Reed, 102 Wn.2d at 147. For example, it is improper for the prosecutor to align himself with the jury by making continuous references to "we" and "us." See, e.g., State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329 & n.6, 840 A.2d 7 (Conn. Ct. App. 2004), rev'd in part

on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005). Such language implies the prosecutor and the jurors are one and the same.

The Ninth Circuit has also recognized that "use of 'we know' readily blurs the line between improper vouching and legitimate summary" of evidence. United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005). The prosecutor may properly summarize evidence admitted at trial and draw reasonable inferences from that evidence. Id. But "we know" is improper "when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility." United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009). "The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." Younger, 398 F.3d at 1191. Thus, the Ninth Circuit admonished prosecutors to refrain from using the phrase in closing. Id.

During closing, the prosecutor repeatedly used "we know" to align himself with the jury against Corbett, and then vouch for certain witnesses and disputed facts:

- "And you have the testimony that we heard today from [J.H.] as well. We know that the defendant was there." RP 389.

- "And we know that, in those moments afterwards, that we can rely upon Charnell to give an accurate account of what happened . . . ." RP 389.

- "And we know that he came into that room -- we'll fast-forward here a moment -- because we know that the butcher block was taken from the counter here . . . And we know that [Mohamed] can identify the defendant as the person that did this." RP 394.

- "And we know this happened on February 2nd, and it was the defendant that entered into Suldan's apartment by bursting through the door. We know that he intended to commit a crime against persons or property. Here it's a crime against a person. He went in there trying to assault Charnell." RP 400.

- "We know in the process of doing that he did, in fact, assault somebody." RP 400.

- "We know that the defendant committed the assault by throwing the block." RP 401.

- "So what we need to talk about is -- we know that he hit [J.N.] with the block. We need to talk about the substantial bodily harm and the reckless nature of that." RP 402.

- "Before I do that, let me just back up for a moment and say we know that when the defendant ran into the apartment, what he intended to do was assault Charnell." RP 402.

- "And here, we know that [J.N.] was knocked unconscious." RP 403.

These passages demonstrate the prosecutor did not use "we know" simply to summarize undisputed evidence. Rather, given Corbett's alibi defense, every single one of the above statements was a disputed issue of fact. Whether Harris, Mohamed, and J.H. were credible witnesses was solely for the jury to decide. The prosecutor's repeated use of "we know"

suggested to the jury it need not even weigh the evidence because "we know" what happened. See State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the accused committed the crime), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). "It is the function and province of the jury," not the prosecutor, "to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact." State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

Several of the prosecutor's "we know" statements went to ultimate issues of fact. This included Harris's credibility, Mohamed's identification of Harris, Corbett's presence at the scene, and whether J.N. sustained substantial bodily harm. As such, the prejudice is plain. This Court should reverse Corbett's convictions, because this flagrant and ill-intentioned misconduct deprived him of a fair trial.

5. CUMULATIVE ERROR DEPRIVED CORBETT OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984). Likewise, "'the cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of

instructions can erase their combined prejudicial effect.'" Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737). Each error described above was prejudicial. Together they are even more so. Because their cumulative effect deprived Corbett a fair trial, this Court should reverse.

6. THE TRIAL JUDGE IMPERMISSIBLY COMMENTED ON THE EVIDENCE BY INSTRUCTING JURORS THAT A "PROLONGED PERIOD OF TIME" MEANT MORE THAN A FEW WEEKS.

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A jury instruction constitutes improper judicial comment on the evidence if it resolves a disputed factual issue that should have been left to the jury. State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002). When a judge comments on the evidence in a jury instruction, prejudice is presumed. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State bears the burden of showing no prejudice, unless the record affirmatively shows no prejudice could have resulted. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

In State v. Becker, the court reversed because language in a special verdict form resolved a factual dispute about whether a youth program constituted a school. 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). The court held, "By effectively removing a disputed issue of fact from the jury's

consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute." Id. at 65.

Before an exceptional sentence can be imposed under RCW 9.94A.535(3)(h)(i), the State must prove beyond a reasonable doubt that the offense was part of an "ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims," consisting of multiple incidents "over a prolonged period of time."[8] What constitutes a "prolonged period of time" is not defined by statute. State v. Epefanio, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). Instead, it is an issue of fact for the jury. Id.

Here, however, the court instructed the jury, as a matter of law, that "prolonged period of time" meant "more than a few weeks." CP 80; RP 451; WPIC 300.17. Because there was evidence that the alleged pattern of abuse lasted more than a few weeks, the instruction resolved any factual dispute whether it occurred over a prolonged period of time. The instruction relieved the State of its burden to prove this element of the aggravating factor beyond a reasonable doubt.

The State may argue there is no prejudice because it introduced evidence of domestic violence spanning back to 2004. Ex. 30. However, the Becker court explained, "[w]hether the State produced sufficient evidence for a rational juror to find [Youth Education Program] was a school is

[8] See also Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); RCW 9.94A.537(3).

irrelevant to whether the jury instruction was correctly drafted." 132 Wn.2d at 65. The erroneous instruction was therefore "tantamount to a directed verdict and was error." Id. The same is true here. Whether the State produced sufficient evidence for a juror to find a pattern of abuse over a prolonged period of time does not cure the instructional error. Corbett's exceptional sentence cannot be sustained under this aggravating factor.

The trial court imposed an exceptional sentence based on two aggravators: the prolonged pattern of abuse under RCW 9.94A.535(3)(h)(i) and the offense occurred within sight or sound of the victim's or offender's minor child under RCW 9.94A.535(3)(h)(ii). CP 110-11. The first applied to Counts 1, 3, and 4. CP 73-75. The second applied only to Counts 1 and 3. CP 66-77. Because the first aggravator must be vacated, only Counts 1 and 3 still have a valid aggravating factor.

Typically courts will not remand for resentencing where it is clear the trial court would impose the same sentence based on other valid aggravating factors. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Here, in its written findings and conclusions, the court stated:

> Each one of these aggravating circumstances is a substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed. In the event that an appellate court affirms at least one of the substantial and compelling reasons, the length of the sentence should remain the same.

CP 111. However, this boilerplate language, written by the State and objected to by defense counsel, should play no role in this Court's analysis. CP 110-11; RP 477 (prosecutor stating, "I'll prepare the findings").

In State v. Smith, the supreme court invalidated two of the four reasons given for the exceptional sentence. 123 Wn.2d 51, 58, 864 P.2d 1371 (1993), overruled on other grounds, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d. 466 (2006). The trial court's written findings included boilerplate similar to that used here. Id. at 58 n.8. The court nonetheless remanded, finding it could not conclude, with requisite certainty, that the trial court would impose the same sentence on remand. Id. at 58 & n.8.

Here, at sentencing, the court emphasized it was imposing an exceptional sentence because of the prolonged pattern of abuse:

> This is not simply a situation where a relationship has gone toxic, this is a situation where there is an individual before the Court that, for some -- for whatever reason, and I don't know Mr. Corbett or his history, he has violent tendencies towards women without any explanation. And we are very fortunate that we are not looking at a death here. And I think that there's a high likelihood that if Mr. Corbett was released into the community, that if it wasn't this victim, it would be another victim, and we could be looking at a murder charge.

> I do find that there are substantial and compelling circumstances to find that a standard-range sentence is not sufficient. That it would be too lenient.

RP 474. With regard to the "sight or sound" aggravator, the court said only, "[t]he jury has made the determination of the aggravating circumstances of the presence of this very young child." RP 475.

This shows the court justified the exceptional sentence primarily, possibly exclusively, based on the pattern of abuse aggravator. The court mentioned the sight or sound aggravator only in passing. The State-drafted boilerplate findings and conclusions do not faithfully represent the court's oral ruling. Furthermore, the court indicated some unfamiliarity with the current sentencing scheme, explaining it had not imposed an exceptional sentence since before Blakely was decided in 2004. RP 470. For these reasons, it cannot be said the court would have imposed the same lengthy exceptional sentence on Counts 1 and 3 if the only remaining valid basis to do was the sight or sound aggravator.

This Court should vacate Corbett's exceptional sentence and remand for resentencing without consideration of RCW 9.94A.535(3)(h)(i). Becker, 132 Wn.2d at 65-66; Smith, 123 Wn.2d at 58. This Court should also remand for correction of the judgment and sentence where it states, "Aggravating circumstances as to count(s) I, II, IV : Domestic Violence (I, II

& IV)." CP 86; CrR 7.8(a); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

7. THE LIFETIME NO-CONTACT ORDER BETWEEN CORBETT AND HIS SON VIOLATES CORBETT'S FUNDAMENTAL RIGHT TO PARENT.

As a condition of community custody, courts may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Likewise, courts may impose crime-related prohibitions, including "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the crime committed. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Parents have a fundamental liberty interest in the "care, custody, and management" of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P .3d 686 (2010). But courts more carefully review conditions that interfere with a fundamental constitutional right. Id. A court necessarily abuses its discretion by violating an accused's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court also abuses its discretion when its decision is

based on incorrect legal analysis or an erroneous view of the law. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

State interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. "[C]onditions that interfere with fundamental rights must be sensitively imposed," with "no reasonable alternative way to achieve the State's interest." Id. at 32, 35. Thus, a court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. Rainey, 168 Wn.2d at 377-82. Instead the court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the child. Id. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

Washington courts hold that lifetime no-contact orders are not automatically appropriate simply because the child is a victim of the parent's crime. Rainey, 168 Wn.2d at 378. For instance, Ancira violated a no-contact order to see his wife and children. Ancira, 107 Wn. App. at 652. He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Id. The court imposed a five-year no-contact order with his children. Id. at 652-53. This violated Ancira's fundamental right to parent. Id. at 654. Although the State had a compelling interest in

preventing the children from witnessing domestic violence, it failed to show how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. Id. at 654-55.

Similarly, Rainey was convicted of a violent crime against his daughter (first degree kidnapping). Rainey, 168 Wn.2d at 371. The court imposed a lifetime no-contact order. Id. at 374. In addition to kidnapping, Rainey inflicted measurable emotional damage on his daughter and attempted to leverage her to inflict emotional distress on the mother. Id. at 379-80. This included letters Rainey sent his daughter from jail blaming her mother for breaking up the family. Id. These facts were sufficient to establish that a no-contact order, including indirect or supervised contact, was reasonably necessary to protect the child. Id. at 380.

Nevertheless, the Rainey court reversed because the sentencing court provided no justification for the order's lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381-82. The court explained:

> The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the

> State's interests. The restriction's length must also be reasonably necessary.

Id. at 381. The court therefore struck the no-contact order and remanded for resentencing, "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." Id. at 382.

Here, the court imposed a lifetime no-contact order between Corbett and his son, J.N.[9] CP 88. Corbett was convicted of misdemeanor fourth degree assault for throwing the empty knife block at Harris and accidentally hitting his son. CP 96. J.N. did not sustain any permanent injuries. RP 224. The assault charge was based on transferred intent: there was no evidence Corbett intended to hit or injure J.N. CP 50. In fact, Corbett's testimony demonstrated he loved J.N. and cared for his well-being. RP 351, 354. This is significantly less egregious than in Rainey, where the lifetime no-contact order was excessive even when the father kidnapped his daughter and caused her significant emotional distress.

Also like Rainey, the sentencing court here did not find the lifetime no-contact order was reasonably necessary to accomplish a compelling State interest. In fact, the court said nothing at all about the no-contact order, other than, "[h]e's to have no contact with [J.N.] and Charnell." RP 475. This

[9] Defense counsel did not object to this sentencing condition. RP 473-74. Sentencing errors, however, may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

failure to apply the appropriate legal standard constitutes an abuse of discretion. Rainey, 168 Wn.2d at 375.

Moreover, although the State has a compelling interest in protecting children from harm, it did not demonstrate how prohibiting all contact between Corbett and his son is reasonably necessary to effectuate that interest. In its presentence report, the State requested only that the Corbett be prohibited from contacting J.N. or Harris for the maximum term. CP 131-32. Likewise, at sentencing, the prosecutor said only, "the State is then asking for no contact with both [J.N.] and Charnell Harris." RP 469. This is plainly insufficient under Rainey, 168 Wn.2d at 381-82. Because the sentencing condition implicates Corbett's fundamental right to parent his child, the State must show that no less restrictive alternative would prevent harm to J.N. Id. Any limitations must be narrowly drawn. Id.

Washington courts also recognize that family and juvenile courts are "more appropriate forums than the criminal sentencing process to address the best interests of dependent children with respect to most visitation issues." State v. Letourneau, 100 Wn. App. 424, 443, 997 P.2d 436 (2000); see also Ancira, 107 Wn. App. at 655. Following the incident here, the State removed J.N. from Harris's care and placed him with her parents. RP 101, 132-33. There have been ongoing dependency proceedings since. RP 53, 62-67. The family court is therefore in the best position to regulate Corbett's

contact with his son and tailor visitation appropriately. Even when a parent is incarcerated, the Department of Social and Health Services "must provide for visitation opportunities." RCW 13.34.136(2)(b)(i)(A). Likewise, when a parent is sentenced to long-term incarceration, the Department "should consider a permanent placement that allows the parent to maintain a relationship with his or her child." RCW 13.34.180(5).

The lifetime no-contact order effectively terminated Corbett's parental rights without notice or due process.[10] This Court should strike the order barring all contact between Corbett and his son, and remand for resentencing "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." Rainey, 168 Wn.2d at 382.

About a week before filing the judgment and sentence, the court also filed a domestic violence no-contact order prohibiting all direct and indirect contact between Corbett and J.N. only until August 15, 2016. CP 114-15. While this two-year no-contact order is far preferable to the lifetime no-contact order, the court still did not consider the standard set forth in Rainey before entering this order. If this Court determines the two-year no-contact

[10] Even where a parent has been convicted of a qualifying serious offense—which did not occur here—the State may not terminate parental rights unless it first initiates dependency proceedings and provides notice, a meaningful opportunity to be heard, and establishes that "[s]uch an order is in the best interests of the child." RCW 13.34.190 (1)(b); RCW 13.34.190(1)(a)(iv); RCW 13.34.180 (3)(c).

order is valid and trumps the lifetime no-contact order, then this Court should remand for correction of the clerical error in the judgment and sentence. CrR 7.8(a); Mayer, 128 Wn. App. at 701.

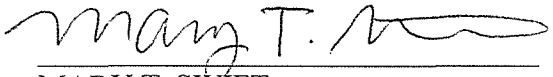
D. CONCLUSION

This Court should dismiss Corbett's convictions with prejudice because the State committed egregious misconduct by attempting to bribe a material witness. In the alternative, this Court should reverse and remand for a new trial because ER 404(b) evidence was improperly admitted without expert testimony, the reasonable doubt instruction was unconstitutional, and prosecutorial misconduct prejudiced the outcome of Corbett's trial. This court should also vacate Corbett's exceptional sentence and strike the lifetime no-contact order, and remand for resentencing.

DATED this 21st day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72453-3-I
	)	
BRYAN CORBETT, JR.,	)	
	)	
Appellant.	)	

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 21ST DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRYAN CORBETT, JR.
DOC NO. 801312
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF APRIL 2015.

X Patrick Mayovsky