72453-3

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Court of Appeals
Division I
State of Washington

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. OUTRAGEOUS STATE MISCONDUCT VIOLATED CORBETT'S DUE PROCESS RIGHTS AND REQUIRES REVERSAL.

In response to Corbett's claim of egregious governmental misconduct for attempting to bribe a material witness with a knife block, the State argues Corbett failed to preserve the issue at trial and is now barred from asserting it under RAP 2.5(a). Br. of Appellant, 12-18; Br. of Resp't, 7-10. However, "constitutional error may be raised for the first time on appeal, particularly where the error affects 'fundamental aspects of due process.'" State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting State v. Johnson, 100 Wn.2d 607, 614, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985)).

Washington courts have recognized "the State's conduct may be so inappropriate as to violate due process." Id. Courts have also recognized "the rights of defendants to claim a due process violation based on outrageous government conduct without requiring a separate constitutional violation." Id. at 20. Therefore, a prosecution may be dismissed when the government engages in outrageous conduct. Id. For police conduct to violate due process, it "must be so shocking that it violates fundamental fairness." Id. In Lively, the State's outrageous conduct violated due process and dismissal was warranted. Id. at 27.

Such is the case here. The State attempted to bribe a material witness to testify against Corbett. RP 208-09. Corbett established in his opening brief that such action is plainly misconduct, "deserving of opprobrium." In re Disciplinary Proceedings Against Bonet, 144 Wn.2d 502, 515, 29 P.3d 1242 (2001). Lively further establishes that such a challenge to such outrageous State misconduct may be raised for the first time on appeal because it violates due process. This Court should accordingly reverse and dismiss the charges or, alternatively, reverse and remand for retrial without Suldan Mohamed's and Detective Adam Thorp's testimony.

2. ER 404(b) EVIDENCE SHOULD NOT HAVE BEEN ADMITTED WITHOUT EXPERT TESTIMONY.

In his opening brief, Corbett established why expert testimony on the dynamics of domestic violence relationships was necessary to prevent the jury from using prior acts as propensity evidence. Br. of Appellant, 19-23. In response, the State claims Corbett's position is "unsupported by authority" and "is based on a too-narrow interpretation of this Court's decision in State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996)." Br. of Resp't, 10.

Expert testimony is required where the reasons for an individual's conduct are beyond the common knowledge of an average lay person. State v. Ciskie, 110 Wn.2d 263, 265, 751 P.2d 1165 (1988). In Ciskie, the Washington Supreme Court held that an individual's counterintuitive

behavior when subjected to domestic violence is beyond the understanding of an average lay person. Id. at 272-74. Charnell Harris first identifying Corbett as the perpetrator, then identifying James Dixon, and then identifying Corbett again is counterintuitive behavior that is "not within the competence of an ordinary lay person." State v. Allery, 101 Wn.2d 591, 597, 682 P.2d 312 (1984).

Significantly, the State does not respond to or acknowledge the court's holding in Ciskie. Br. of Resp't, 10-12; In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). Instead the State only speculates that jurors are more likely to understand domestic violence relationships in 2015. Br. of Resp't, 12. This conflicts with Ciskie and cannot be sustained. This Court should accordingly reverse.

3. WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.

In his opening brief, Corbett argued WPIC 4.01, which defines reasonable doubt as "one for which a reason exists," is unconstitutional because it requires jurors to articulate a reason for their doubt. Br. of Appellant, 24-30. In response, the State argues the Washington Supreme Court has previously upheld this instruction and further asserts the "fill-in-

the-blank" cases are inapposite here. Br. of Resp't, 15-17. The State is incorrect for several reasons.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. This fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

But the improper fill-in-the-blank arguments were not the mere product of invented malfeasance. The offensive arguments did not originate in a vacuum—they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor explicitly recited WPIC 4.01 before making the fill-in-the-blank argument: "A reasonable doubt is one for which a reason exists. That means, 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. 417, 424, 220 P.3d 1273 (2009).

The same occurred in State v. Johnson, where 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. 677, 682, 243 P.3d 936 (2010).

These misconduct cases make clear that WPIC 4.01 is the true culprit for the impermissible fill-in-the-black arguments. 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 doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same pitfall?

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)). Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Even if it is possible for an appellate court to interpret the instruction in a manner that avoids

constitutional infirmity, that is not the correct standard for measuring the adequacy of jury instructions. Courts have an arsenal of interpretive tools at their disposal; jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, supports this conclusion.

In State v. Kalebaugh, the supreme court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." __Wn.2d__, __P.3d__, 2015 WL 4136540 at *3 (July 9, 2015). That conclusion is sound:

> Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant

> guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction, "a reasonable doubt is such a doubt as the jury are able to give a reason for").

b. No appellate court in recent times has directly grappled with the challenged language.

In Bennett, the supreme court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In Emery, the court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759. In Kalebaugh, the court contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" 2015 WL 4136540 at *3. The 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 the final instructions given here." Id.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their reasonable doubt. WPIC 4.01 requires jurors to articulate to themselves or others a reason for having a reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh did not provide an answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case.

None of the appellants in Kalebaugh, Emery, or Bennett argued that the language requiring "a reason" in WPIC 4.01 misstates 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. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control. Cases that fail to specifically raise

or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

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

Forty years ago, the Court of Appeals addressed an argument that "'[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from

constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors," but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. 54 Wn.2d at 291. Nabors cites Tanzymore as its support. 8 Wn. App. at 202. Neither case specifically addresses the doubt "for which a reason exists" language in the instruction. There was no challenge to that language in either case, so it was not an issue.

Thompson observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following instructional language: "It should be a doubt for which

a good reason exists." 25 Wn. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342). Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.

So Harras viewed its "a doubt for which a good reason exists" instruction as equivalent to those instructions requiring a reason be given for the doubt. And then Thompson upheld the doubt "for which a reason exists" instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. That is a problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 2015 WL 4136540 at *3.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. Harsted took exception to the following instruction: "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. The supreme court explained the phrase "reasonable doubt" means:

> [I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. 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. In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in one of these decisions, "[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899). Harsted noted some courts disapproved of the same kind of language, but was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. 66 Wn. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation demolishes the argument that there is a real difference between a doubt "for which a reason exists" in WPIC 4.01 and being able to give a reason for why doubt exists. The supreme court found no such distinction in Harsted and Harras.

The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. This is apparent because the supreme court in Emery and Kalebaugh, and numerous Court of Appeals decisions in recent years, condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law has evolved. What seemed acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable 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 a reason for why reasonable doubt exists. That requirement distorts the reasonable doubt standard to the accused's detriment.

4. THIS COURT SHOULD VACATE THE EXCEPTIONAL SENTENCE BECAUSE JUDICIAL COMMENT ON THE EVIDENCE WAS PREJUDICIAL.

In State v. Brush, the Washington Supreme Court held, unambiguously, that the jury instruction defining "prolonged period of time" "constituted an improper comment on the evidence because it resolved a contested factual issue for the jury." __Wn.2d__, 353 P.3d 213, 218 (2015).

"The instruction essentially stated that if the abuse occurred over a time period that was longer than a few weeks, it met the definition of a 'prolonged period of time.'" Id. This is the same instruction given in Corbett's case. CP 80; RP 451. Brush therefore controls.

Judicial comments are presumed prejudicial. Brush, 353 P.3d 218. The State bears the burden of showing the accused was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. Id. In Brush, the judicial comment was prejudicial where the alleged abuse occurred over a two-month period, so "a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a 'prolonged period of time.'" Id. at 218. The State accordingly did not meet the "high burden" of showing no prejudice. Id.

The State relies on State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006), to argue the judicial comment was not prejudicial. Br. of Resp't, 27. But Levy is readily distinguishable. There, the jury was instructed, "That on or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building, *to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA*." Levy, 156 Wn.2d at 716 (quoting the clerk's papers). The court held this was an impermissible judicial comment on the evidence. Id. at 721-22.

However, the court held the judicial comment was not prejudicial. Id. at 726. The court emphasized that the critical issue at Levy's trial was whether he *entered* the building. Id. The question of whether the apartment was a building was never challenged in any way at trial. Id. "[T]he proper conclusion in this case regarding the reference to the apartment as a building is that the jury could not conclude that White's apartment was anything *other than* a building." Id.

The Levy court contrasted this to State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997), in which the special verdict form expressly stated a young program was a school, a fact that was highly contested and critical to the case. This erroneous jury instruction was "tantamount to a directed verdict and was error," even though there was sufficient evidence, as a matter of law, that the youth program constituted a school. Id. at 65. In his opening brief, Corbett relied on Becker to establish that the judicial comment was prejudicial. Br. of Appellant, 40-41. The State does not acknowledge or distinguish Becker, presumably because it cannot.

In sum, Brush provides only one example of when defining prolonged pattern of abuse is prejudicial. Becker is therefore useful by analogy. Rational jurors could easily have doubted whether the time period here constituted a *prolonged* period time, except for the fact they were instructed it did. And, as in Becker, even if there is sufficient evidence, as a

matter of law, the instruction still erroneously prevented the jury from making an ultimate factual determination on whether the alleged abuse occurred over a prolonged period of time. Corbett's exceptional sentence therefore cannot be sustained under this aggravating factor.

The remaining question is the proper remedy. Appellate courts may decline to remand for resentencing only when the record 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). The State concedes the "record is silent as to whether the trial court would have imposed the same sentence if only one of the two aggravators had been found proven by the jury." Br. of Resp't, 28-29. This Court should accordingly vacate the exceptional sentence and remand for resentencing. Becker, 132 Wn.2d at 65-66.

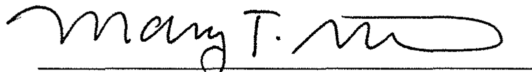
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Corbett's convictions because the State committed outrageous misconduct by attempting to bribe a material witness. In the alternative, this Court should reverse and remand for a new trial. This Court should also vacate Corbett's exceptional sentence and remand for resentencing. Finally, this Court should accept the State's concession that remand is required for the sentencing court to consider lesser alternatives to the lifetime no-contact order between Corbett and his son.

DATED this 27th day of August, 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 27TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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 27TH DAY OF AUGUST 2015.

x Patrick Mayovsky