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Division I
State of Washington

SUPREME COURT NO. 93023-6

NO. 72453-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN CORBETT, JR.,

Petitioner.

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

The Honorable Laura Inveen, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Bryan Corbett, Jr., the appellant below, asks this Court to grant review of the court of appeals' unpublished decision in State v. Corbett, No. 72453-3-I, filed February 29, 2016 (attached as Appendix A).

B. ISSUES PRESENTED FOR REVIEW

1. Did the State commit egregious misconduct when it attempted to bribe a material witness with a monetary benefit in exchange for his cooperation, and does such misconduct require dismissal?

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 counterintuitive dynamics of a domestic violence relationship?

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

C. STATEMENT OF THE CASE

The State charged Corbett with one count of first degree burglary, one count of second degree child assault, and two counts of felony violation of a no-contact order. CP 16-19. The State alleged that on February 2, 2014, Corbett chased Charnell Harris into the apartment of a neighbor, Suldan

Mohamed, and threw Mohamed's empty knife block at her, accidentally striking their six-month-old son, J.N., in her arms. J.N. had a red mark on his forehead but was otherwise uninjured. On February 25, 2014, police arrested Corbett at Harris's apartment. RP 251-53. 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.[1] CP 66-72.

On appeal, Corbett raised several arguments. He asserted the State committed egregious misconduct in attempting to bribe Mohamed, a material witness, necessitating dismissal. Br. of Appellant, at 12-18. He argued the trial court erred in admitting ER 404(b) evidence of past acts of domestic violence between Corbett and Harris, without requiring an expert to explain the dynamics of domestic violence relationships. Br. of Appellant, at 19-23. He also contended the mandatory jury instruction defining reasonable doubt as "one for which a reason exists" engrafts an unconstitutional articulation requirement on the reasonable doubt standard. Br. of Appellant, 24-30; Reply Br., at 2-13. The court of appeals rejected these arguments and affirmed Corbett's convictions.[2]

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[1] For a more complete statement of the facts, including citations to the record, Corbett refers this Court to his opening brief. Br. of Appellant, 3-12.

[2] The court of appeals accepted the State's concession and struck the lifetime no-contact order between Corbett and his son because the trial court failed to consider whether it

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. DISMISSAL IS THE ONLY ADEQUATE REMEDY WHEN THE STATE ENGAGES IN EGREGIOUS MISCONDUCT BY ATTEMPTING TO BRIBE A MATERIAL WITNESS.

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. On this issue, the court of appeals held "that Corbett fails in his burden to show that the State engaged in 'criminal activity or conduct "repugnant to a sense of justice"' that requires reversal." Opinion, at 14 (quoting State v. Lively, 130 Wn.2d 1, 22, 921 P.2d 1035 (1996)).

This 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.

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was '"reasonably necessary to accomplish the essential needs of the State and public order."' Opinion, at 23-24 (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)).

After trial began, Yoder asked if Bonet would drop a charge against him if he did not testify for McCarty. Id. Bonet asked if Yoder would testify for the State instead. Id. Yoder declined, but Bonet later told Yoder if he did not testify for McCarty, they could "work something out." Id. They 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, this 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. This 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. The court 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. The Bonet court held a prosecutor's offer to dismiss a charge 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." Id. (emphasis added).

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." 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.

It is plainly 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." RP 28. Mohamed initially told the police he could not recall what Corbett looked like and was not sure he could identify him. RP 210-11. Detective Adam Thorp then contacted Mohamed and 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.

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 egregious misconduct.

There is little Washington case law addressing the appropriate remedy for such misconduct. However, this Court has recognized "the State's conduct may be so inappropriate as to violate due process." Lively, 130 Wn.2d at 19. "[T]he 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. Such is the case here.

Alternatively, this Court should adopt the standard articulated in similar egregious State misconduct cases. 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). This Court held such conduct was "shocking and unpardonable." Id. at 378. Dismissal was the only adequate remedy to "effectively discourage the odious practice of eavesdropping on privileged communication between attorney and client." Id. at 378.

This 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," this Court held the State, not the defendant, bears the burden of showing no prejudice beyond a reasonable doubt. Id. at 820. This Court remanded for consideration of whether the State proved the absence of prejudice. Id.

Similarly, in State v. Monday, the State committed egregious misconduct by injecting racial prejudice into the trial. 171 Wn.2d 667, 678-79, 257 P.3d 551 (2011). Appalled, this 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 should bear 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. 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. Mohamed testified he did not accept the State's bribe. RP 184, 188-89. But 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. The only adequate remedy is therefore to 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). This Court's review is accordingly warranted under RAP 13.4(b)(1), (b)(3), and (b)(4).

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

On appeal, Corbett argued the trial court erred in refusing his request for an expert to explain the dynamics of domestic violence relationships to prevent the jury from using prior acts as propensity evidence. Br. of Appellant, at 19-23. The court of appeals rejected Corbett's argument, holding that "[a] majority of the supreme court has declined to adopt this additional requirement," citing the dissent in State v. Magers, 164 Wn.2d 174, 197-98, 189 P.3d 126 (2008) (C. Johnson, J., dissenting). But the plurality in Magers never addressed this issue. This Court's review is therefore warranted under RAP 13.4(b)(1) and (b)(4.

The Magers court held 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 at 186 (plurality opinion); id. at 194 (Madsen, J., concurring). More recently in State v. Gunderson, this Court declined to extend Magers to cases where the complaining witness "neither recants nor contradicts prior statements." 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

There is no dispute that Harris originally identified Corbett, then recanted and said another man 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. Corbett argued, however, 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. Without it, "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. It was error for the court to refuse this request.

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. 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.

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, this Court held expert testimony on battered woman syndrome was properly admitted to explain the victim's counterintuitive behavior in staying with an abusive partner. Id. at 270-80. 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)). The jury likely 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, this 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 State v. Grant, the State sought to introduce prior acts of domestic violence through testimony of the complaining witness's therapist. 83 Wn. App. 98, 109, 920 P.2d 609 (1996). 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 believed 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. Further, Ciskie is still the law in Washington: an individual's counterintuitive behavior when subjected to domestic violence is beyond the understanding of an average lay person. 110 Wn.2d at 272-74. The court of appeals ignored Ciskie and held no expert needed to testify. Opinion, at 4-6. This Court should grant review.

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." CP 33; RP 369. Instructing jurors with WPIC 4.01 is constitutional error.

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

"The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 138 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). The error in WPIC 4.01 is readily apparent to the ordinary mind. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. WPIC 4.01 erroneously requires both for a jury to acquit.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining in the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (1993). Under these definitions, for a doubt to be reasonable it must be rational, logically derived, and not in conflict with reason. This definition comports with U.S. Supreme Court precedent defining the reasonable doubt standard.[3]

The article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason," as employed in WPIC 4.01, means "an expression or statement offered as an explanation

[3] E.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

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

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

Prosecutorial misconduct cases exemplify how WPIC 4.01 also fails to make the reasonable doubt standard manifestly apparent even to trained legal professionals. Washington courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. These fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable" and "subtly shift[] the burden to the

defense." Emery, 174 Wn.2d at 760. They are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. 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).

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The prosecutorial misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt. If trained legal

professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason for it, then how can average jurors be expected to avoid the same pitfall?

Despite the fact that the plain language of WPIC 4.01 requires articulation of doubt, the court of appeals refused to address the substance of Corbett's argument, concluding "[t]he supreme court has ordered trial courts to use WPIC 4.01 in all criminal cases." Appendix A, at 3 (citing Bennett, 161 Wn.2d at 318). But Bennett did not address a direct challenge to WPIC 4.01 and therefore does not fairly resolve Corbett's dispute.

Bennett actually undermines WPIC 4.01 by requiring the instruction be given in every criminal case only "until a better instruction is approved." 161 Wn.2d at 318. This Court clearly signaled that WPIC 4.01 has room for improvement. In Kalebaugh, this Court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with final instructions given here," which included WPIC 4.01. 183 Wn.2d at 585.

Neither of the petitioners in Bennett or Kalebaugh argued the "one for which a reason exists" language in WPIC 4.01 misstated the reasonable doubt standard. Instead, the analysis in each case flowed from the unquestioned premise that WPIC 4.01 is correct. "In cases where a legal

theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because this Court has suggested WPIC 4.01 can be improved and no appellate court has recently addressed flaws in WPIC 4.01's language, this Court should take this opportunity to closely examine WPIC 4.01.

Such examination demonstrates this Court's precedent is in disarray. In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this Court upheld the instruction, "It should be a doubt for which a good reason exists." This Court maintained the "great weight of authority" supported the instruction, citing the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[4] In other words, the Harras court viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. This conflicts with Kalebaugh and Emery, which reject any requirement that jurors must be able to give a reason for why reasonable doubt exists.

This Court's decision in State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), demonstrates further inconsistency. The Harsted court upheld the instruction, "The expression 'reasonable doubt' means in law just what the

[4] The relevant portion of the note is attached as Appendix B.

words imply—a doubt founded upon some good reason." Id. at 162. In doing so, this Court relied on out-of-state cases upholding instructions that defined reasonable doubt as a doubt for which a reason can be given. Id. at 164. One of the authorities this Court relied on was Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Though this Court noted that some courts had disapproved of similar language, it was "impressed" with the Wisconsin view and felt "constrained" to uphold the instruction. 66 Wash. at 165.

Harsted and Harras provide the origins of WPIC 4.01's infirmity. In both cases this Court equated a doubt "for which a reason exists" with a doubt "for which a reason can be given." 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. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Emery and Kalebaugh conflict with Harras and Harsted. The law has evolved. What was 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 court to seriously confront the unconstitutional articulation language in WPIC 4.01. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and the

erroneous doubt "for which a reason can be given." Both require articulation. Because this Court's and the court of appeals' decisions demonstrate the case law is in disarray on the significant constitutional issue of properly defining reasonable doubt for Washington juries, Corbett's argument merits review under RAP 13.4(b)(1) and (b)(3).

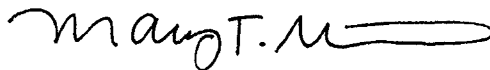
E. CONCLUSION

Because Corbett satisfies the criteria under RAP 13.4(b)(1), (b)(3), and (b)(4), he respectfully asks that this Court grant review, reverse his convictions, and remand for a new trial.

DATED this 30th day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRYAN EDWARDS CORBETT, JR., Appellant.	No. 72453-3-I DIVISION ONE UNPUBLISHED FILED: February 29, 2016

Cox, J. — Bryan Corbett appeals his judgment and sentence based on convictions of burglary, two counts of felony violation of a court order, and fourth degree assault. The jury also found by special verdict that certain of these crimes were aggravated domestic violence offenses. Here, the court properly gave WPIC 4.01 as the reasonable doubt instruction. The court did not abuse its discretion in admitting under ER 404(b) evidence of his acts of prior domestic violence. Corbett fails in his burden to show that the State committed misconduct requiring reversal. The court commented on the evidence in a jury instruction, but the record affirmatively shows that this error did not prejudice Corbett. There was no cumulative error requiring reversal. And finally, the State properly concedes that this record fails to demonstrate the trial court's reasoning in imposing a lifetime sentencing condition prohibiting Corbett from contact with

his son. We affirm the convictions, but strike the sentencing condition imposing the lifetime sentencing condition regarding contact with Corbett's son. We remand with instructions.

The State charged Bryan Corbett with several domestic violence crimes. These charges arose from the same incident on February 2, 2014, Super Bowl Sunday.

C.H. testified at trial that she was with Corbett in her apartment on that day. Corbett and C.H. have a son named J.N. After an argument, she took J.N. and fled to the apartment of her neighbor, Suldan Mohamed. Corbett followed and forced his way into Mohamed's apartment. According to testimony at trial, Corbett picked up a knife block on the kitchen counter and threw it at her. The knife block struck their son, J.N. He lost consciousness.

Mohamed called 911 to obtain medical assistance for J.N. During his call, Mohamed identified the assailant as "Bryan Nichols," based on what C.H. told him. Corbett also goes by the name "Bryan Nichols." Medical personnel and police responded to the scene.

C.H. and J.N. went to the hospital. There, C.H. told a doctor and a social worker from Child Protective Services (CPS) that Corbett was responsible for her and J.N.'s injuries. But to protect Corbett, C.H. initially told the investigating officer that a man named "James Dixon" had assaulted her.

The jury convicted Corbett. The trial court entered its judgment and sentence on the jury verdicts. The sentence included a lifetime ban on Corbett having contact with J.N.

Corbett appeals.

REASONABLE DOUBT INSTRUCTION

Corbett argues that the reasonable doubt instruction given in this case, WPIC 4.01, is unconstitutional. Because controlling case authority directs the use of this standard instruction, we reject this argument.

As a preliminary matter, the State argues that Corbett cannot raise this issue for the first time on appeal. But an instruction that misstates the reasonable doubt standard is a manifest constitutional error that may be raised for the first time on appeal.[1] Thus, we address his argument to the extent necessary.

Here, the trial court instructed the jury on reasonable doubt, using WPIC 4.01—the standard reasonable doubt instruction. In relevant part, that instruction states "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."[2]

Corbett claims this standard instruction is unconstitutional. In substance, he claims the instruction mandates that a juror must be able to articulate a reason in order to have reasonable doubt. He further argues this claimed articulation requirement undermines the presumption of innocence.

The supreme court has ordered trial courts to use WPIC 4.01 in all criminal cases.[3] This court recently noted that directive in rejecting the same

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[1] See State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015).

[2] WPIC 4.01.

[3] State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

argument that Corbett makes here.[4] We also reject this argument on the same basis.

ER 404(B)

Corbett argues that the court abused its discretion in admitting evidence of his prior acts of domestic violence against C.H. We disagree.

In this case, C.H. initially told the police that a man named "James Dixon" had assaulted her. She later testified that "James Dixon" was a name she "made up" to protect Corbett.

Under ER 404(b), the State elicited testimony showing that Corbett had twice assaulted C.H. in 2012. Both times, C.H. had initially lied to "the authorities," stating "that somebody else had committed the crime." But C.H. eventually testified, and Corbett was convicted of both assaults.

Here, the judge instructed the jury that it could consider this evidence only as it related to C.H.'s credibility. This is consistent with the requirements for admission of such evidence.[5]

ER 404(b) limits the admission of prior acts. It states:

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

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[4] State v. Lizarraga, No. 71532-1-I, 2015 WL 8112963, at *20 (Wash. Ct. App. Dec. 7, 2015).

[5] State v. Magers, 164 Wn.2d 174, 186-87, 189 P.3d 126 (2008).

The supreme court has held "that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim."[6]

If the trial court properly interprets ER 404(b), we review for abuse of discretion its decision to admit or exclude evidence.[7] "A trial court abuses its discretion if a decision is manifestly unreasonable or based on untenable grounds or untenable reasons."[8] A court also abuses its discretion if it does not follow an evidentiary rule's requirements.[9]

In this case, C.H. recanted her prior statement that "James Dixon" had assaulted her and later identified Corbett as the perpetrator. Thus, the court properly admitted the prior acts of domestic violence, and C.H.'s prior recantations, under ER 404(b).

Corbett acknowledges that C.H. recanted, and thus evidence of the prior acts of domestic violence were admissible. But he argues that there is an additional requirement—"expert testimony explaining the dynamics of domestic violence requirements."[10] This is incorrect.

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[6] Id. at 186.

[7] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

[8] Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1, 177 Wn.2d 718, 730, 305 P.3d 1079 (2013).

[9] Fisher, 165 Wn.2d at 745.

[10] Brief of Appellant at 20.

A majority of the supreme court has declined to adopt this additional requirement.[11] Corbett fails to cite any authority that requires expert testimony before admitting prior incidents of domestic violence under the circumstance of this case. Thus, we reject this argument.

GOVERNMENT MISCONDUCT

Corbett argues that the State committed "egregious misconduct" by attempting to bribe a material trial witness.[12] We conclude that he has failed in his burden to show that the alleged misconduct requires reversal.

As a preliminary matter, the State argues that Corbett may not raise this issue for the first time on appeal. We disagree.

The supreme court, with little analysis, has stated that outrageous government conduct implicates "due process under the Fifth and Fourteenth Amendments of the federal constitution."[13] Thus, we address this issue.

This doctrine "is founded on the principle that the conduct of law enforcement officers and informants may be 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'"[14] To violate due process, the government's conduct

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[11] See Magers, 164 Wn.2d at 197-98 (C. Johnson, J. dissenting).

[12] Brief of Appellant at 12.

[13] State v. Lively, 130 Wn.2d 1, 18, 921 P.2d 1035 (1996).

[14] Id. at 19 (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)).

"must shock the universal sense of fairness."[15] Government conduct is outrageous if it "amount[s] to criminal activity or conduct 'repugnant to a sense of justice.'"[16]

Corbett's argument centers on a recorded telephone conversation between Suldan Mohamed and Detective Adam Thorp of the Domestic Violence Unit. Detective Thorp was investigating the incident in Mohamed's apartment on which the charges in this case were based. The incident included the assailant throwing an empty knife block at C.H., which hit her son, J.N.

Our review of the record reveals that the State questioned Mohamed, who testified at trial, about this conversation. During cross-examination, Corbett also questioned him about the conversation:

> [Corbett:] Do you remember feeling pressured by Detective Thorp to participate in the prosecution?
>
> [Mohamed:] Yeah, in a sense. You can be subpoenaed, you can be—you know, didn't want to incriminate myself.
>
> [Corbett:] Do you remember being told that the name of the person that Detective Thorp wanted you to help prosecute was Bryan Nichols or Bryan Corbett? Do you remember him telling you that?
>
> [Mohamed:] They tell me, correct, that his first and last name. Because the first and last time that I heard his name was the night—the night that I was in the 911. And that's why I asked her what's his first and last name.
>
> [Corbett:] And do you remember Detective Thorp offering to buy you a set of steak knives as a thank you if you were to agree to help him prosecute Bryan Corbett?

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[15] Id.

[16] Id. at 22 (quoting People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714 (1978)).

> [Objection overruled]
>
> [Mohamed:] Yeah, he said he offered me, that is correct. The officer said, We'll buy you, if in the case that you don't want this, we will buy you a knife set or whatever. I said, I don't want nothing to do with this stuff, it's okay. Not interested.
>
> [Corbett:] So the conversation you had with Detective Thorp started out with you saying you don't know how tall or short the man was, him telling you it was vitally important that you helped him prosecute Bryan Corbett by name, and offered to give you a gift if you would do so; is that correct?
>
> [Mohamed:] Offered to replace.
>
> [Corbett:] He told you you could keep the old one when they were done using it as evidence too, though, right?
>
> [Mohamed:] In a sense, something like that. But what I meant to say was I didn't want him to buy me anything. But he offering. He said, We'll buy you, you know, one if you—
>
> [Corbett:] It was very clear—
>
> [Mohamed:]—if you will allow us to keep it, he allow if—We taking this for evidence, but when we done, we'll buy you, if you want, another one. That was the offer.[17]

Detective Thorp testified later in the trial. During cross-examination, Corbett questioned him regarding a portion of his testimony on direct:

> [Corbett:] You stated in response to a question from [the State] that you didn't offer Mr. Mohamed anything to cooperate in the investigation and prosecution of Mr. Corbett?
>
> [Detective Thorp:] That is correct.
>
> [Corbett:] That's actually not true, though, is it?
>
> [Detective Thorp:] That is true, sir.
>
> [Corbett:] You offered to buy him a set of steak knives that would be his to keep, didn't you?

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[17] Report of Proceedings Vol. 4 (July 16, 2014) at 183-84.

[Detective Thorp:] Not in exchange for testimony or a statement.

[Corbett:] You didn't explicitly state that it was in exchange for anything, right?

[Detective Thorp:] That is correct. It was simply a replacement for what he was—he had lost.

[Corbett:] All right. So let's make sure I understand. You told him you really needed his help to prosecute Mr. Corbett, it was very important that he cooperate, right?

[Detective Thorp:] I'm sure at some point I expressed the interest in getting a statement, yes.

[Corbett:] And then you told him, We'd be happy to buy you a set of steak knives, which would be yours to keep at the end of the case, right?

[Detective Thorp:] That is correct, but not in the same conversation.

[Corbett:] I beg your pardon, wasn't it all in the same conversation, within about a minute?

[Detective Thorp:] I don't believe so, but—

[Corbett:] I'm going to play for you a section of that recorded testimony.

[Corbett:] Okay.

[Corbett:] And bear with me. It might take a minute to get the exact spot right.

(Recording transcribed as follows:)

MR. MOHAMED: (Inaudible) Does that make sense?

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 [C.H.] 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.
>
> (End of audio recording.)
>
> [Corbett:] So not merely in the same conversation, but almost literally in the same breath; wouldn't you agree?
>
> [Detective Thorp:] Okay. That sounded pretty close, yes.[18]

At trial, Corbett denied that he was the assailant. Thus, identity was a primary issue. C.H. had given a false name—"James Dixon"—when questioned on the day of the incident. And Mohamed had initially indicated that he was uncertain whether Corbett was the assailant. Thus, Corbett sought to impeach the testimony of both Mohamed and Detective Thorp by the examinations quoted earlier in this opinion. Corbett continued this strategy at closing argument, arguing, in part, as follows:

> [The prosecutor] states that you know [C.H.] is telling the truth now because of what Mr. Mohamed said. I'd like to talk to you about Mr. Mohamed. I'm sure it was an easy argument for [the prosecutor] to make that it's ridiculous that Mr. Mohamed lied because he told them for a set of steak knives. That is ridiculous. No one is saying that that's what happened.
>
> What did happen is that Mr. Mohamed had a very startling event occur to him. Shortly after that, you heard his own voice telling the detective, I don't know, man, it was a black male. I couldn't say how short or tall he was. Looking at a picture of him probably wouldn't help me recognize him. I just don't know.
>
> Then what happened? Detective Thorp called him on the phone, and you heard Detective Thorp's voice on that tape as well. Detective Thorp told Mr. Mohamed that it was critically important that Mr. Mohamed save the day. That Mr. Mohamed be the one to make sure that Bryan got convicted. He didn't ask him anything, he told him, This is the man who did it, you need to make sure that he gets convicted, because no one else can save the day.

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[18] Id. at 207-09.

> He pulled out all the stops. Honestly, have any of you ever heard of a detective offering to buy a set of steak knives? It's absurd, to borrow [the prosecutor]'s phrase.
>
> That's not why Mr. Mohamed told you what he told you. There are more subtle reasons for what he did. How do we know he couldn't properly identify Bryan? Because he told you so in his own voice on the tape. I wouldn't be able to recognize him, I don't know how tall he was, it happened so fast.
>
> Then, under pressure, and being given an opportunity to feel important and to feel as though he had helped and as though he had saved the day, then he spent every day for the last six months walking in and out of his building, multiple times, seeing a picture of the man that he had been told was guilty by the detective. Of course he identified Mr. Corbett. Of course he did.[19]

Based on this testimony and closing argument, Corbett argues that the State attempted to bribe Mohamed by offering to replace the knife block and buy a knife set for him in exchange for favorable testimony at trial. He further claims this constitutes "egregious conduct," requiring reversal. We cannot agree.

First, we are struck by the fact that Corbett's trial counsel made what appears to this court to have been a reasonable tactical decision to elect to put these facts before a jury to impeach two important witnesses on the issue of identity. Counsel elected not to seek any remedy from the trial court, either by a mistrial motion or a request to strike the testimony of Mohamed. Thus, there is no ruling by the trial court for us to review.

Second, Corbett concedes on appeal that Mohamed was a reluctant witness at trial. The record bears this out. He testified at trial that he was there

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[19] Report of Proceedings Vol. 6 (July 21, 2014) at 412-13.

because the State subpoenaed him and told him he would go to jail if he did not testify. Mohamed also declined the detective's offer.

The jury heard this testimony and was in the best position to judge his credibility. Likewise, the jury was in the best position to judge the credibility of Detective Thorp on whether he was offering to bribe Mohamed or offering to replace property that had been taken as evidence. We do not review credibility determinations.[20]

We would be far more concerned about Mohamed's testimony if the jury had not been apprised of his recorded telephone conversation with Detective Thorp. But we simply cannot find fault with trial counsel's tactical choice to put these facts before the jury in the hope that doing so would successfully impeach Mohamed's testimony on the primary issue of identity.

Third, Corbett relies on cases that are inapposite to support his argument. Corbett uses In re Disciplinary Proceedings Against Bonet[21] to argue that a prosecutor commits professional misconduct by offering a benefit "to a witness with intent to influence that person's testimony."[22] While we agree with that proposition, the record here does not show that the prosecutor attempted to offer a benefit to Mohamed to influence his testimony.

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[20] State v. Robinson, 189 Wn. App. 877, 896, 359 P.3d 874 (2015).

[21] 144 Wn.2d 502, 29 P.3d 1242 (2001).

[22] Brief of Appellant at 15.

Corbett relies on Detective Thorp's statement to Mohamed that he "[had] been authorized by the Prosecuting Attorney's Office to buy [Mohamed] a new knife set."[23] But the fact that the prosecutor's office authorized buying a new knife set does not by itself show intent to influence Mohamed's testimony. In Bonet, the prosecutor dropped a pending charge against a witness as part of an agreement for that witness not to testify in a trial.[24] Thus, the record in this case does not resemble the record in Bonet.

The other cases on which Corbett relies are also distinguishable from the present case. State v. Cory[25] and State v. Peña Fuentes[26] involve eavesdropping on privileged conversations between clients and defense counsel—"shocking and unpardonable" conduct.[27] Similarly, in State v. Monday, the prosecutor "s[ought] to achieve a conviction by resorting to racist arguments."[28] Comparing these cases to the present case, the alleged misconduct here fails to "shock the universal sense of fairness."[29] Thus, Corbett fails to show that due process requires reversing his convictions.

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[23] Report of Proceedings Vol. 4 (July 16, 2014) at 209.

[24] Bonet, 144 Wn.2d at 514-15.

[25] 62 Wn.2d 371, 372, 382 P.2d 1019 (1963).

[26] 179 Wn.2d. 808, 811, 318 P.3d 257 (2014).

[27] Cory, 62 Wn.2d at 378.

[28] 171 Wn.2d 667, 680, 257 P.3d 551 (2011).

[29] Lively, 130 Wn.2d at 19.

In sum, we conclude that Corbett fails in his burden to show that the State engaged in "criminal activity or conduct 'repugnant to a sense of justice'" that requires reversal.[30]

COMMENT ON THE EVIDENCE

Corbett claims that the court gave an improper jury instruction, which constituted a comment on the evidence. We agree that the jury instruction did comment on the evidence. But the record shows that the comment did not prejudice Corbett.

Corbett received an exceptional sentence based on two sentence enhancements. One enhancement was that Corbett's crimes were part of an ongoing pattern of abuse for a prolonged period of time. "[W]hether a particular pattern of abuse occurred over a 'prolonged period of time'" is a question for the jury.[31]

Washington's constitution prohibits judges from commenting on the evidence.[32] In State v. Brush, the supreme court held that WPIC 300.17, a pattern jury instruction defining "'a prolonged period of time'" as "'more than a few weeks,'" was an impermissible comment on the evidence.[33]

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[30] Id. at 22 (quoting Isaacson, 378 N.E.2d at 83).

[31] State v. Brush, 183 Wn.2d 550, 558, 353 P.3d 213 (2015).

[32] CONST. art. IV, § 16.

[33] 183 Wn.2d 550, 558-59, 353 P.3d 213 (2015).

Here, the trial court provided the jury the same pattern jury instruction defining a prolonged period of time that was the subject of Brush. The State properly concedes that, under Brush, this instruction constitutes an improper comment on the evidence.

A comment on the evidence does not automatically require reversal.[34] Rather, courts apply a two-step analysis to determine whether the error requires reversal: "Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted."[35]

Thus, the question is whether the State can meet its high burden to show that giving this instruction in this case did not prejudice Corbett.

In Brush, the court determined that the State failed to show that the comment on the evidence was not prejudicial.[36] In that case, the State presented evidence showing that the "abuse occurred during a two-month period."[37] Thus, the State could not show that the jury instruction, which stated that a prolonged period of time was more than a few weeks, was not prejudicial.[38]

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[34] State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

[35] Id. at 723.

[36] 183 Wn.2d at 559-60.

[37] Id. at 555.

[38] Id. at 559-60.

In contrast, in State v. Levy, the supreme court held that a comment on the evidence was not prejudicial.[39] In that case, the court instructed the jury that the apartment in question constituted a "building" for the purposes of the burglary statute.[40] Although this was improper, Levy had never challenged that the apartment was a building.[41] Under the facts of that case, the court held "that the jury could not conclude that [the] apartment was anything other than a building."[42]

Here, unlike in Brush, the uncontested evidence showed that the domestic abuse had occurred for a period far longer than a few weeks. The admitted evidence showed that Corbett had been convicted of over 20 domestic violence crimes from 2003 to 2014, the time of trial.

This case is like Levy. In Levy, the defendant did not challenge that the apartment was a building.[43] Similarly, here Corbett did not challenge that the period from 2003 to 2014 was a prolonged period of time. If the jury believed the evidence on the prior domestic abuse, it could not have failed to find that the domestic abuse occurred over a prolonged period of time.

Accordingly, the State has met its burden to show that the comment on the evidence in this case was not prejudicial. There is no reversible error.

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[39] 156 Wn.2d 709, 726-27, 132 P.3d 1076 (2006).

[40] Id. at 716, 721.

[41] Id. at 726.

[42] Id.

[43] Id.

Corbett argues that this case resembles State v. Becker.[44] We disagree. In that case, the trial court improperly commented on the evidence by instructing the jury that an education program was a school for the purposes of a school-zone enhancement.[45] The supreme court determined that that this comment on the evidence was prejudicial.[46]

But in Becker, whether the education program was a school was a contested issue. The "Defendants presented considerable evidence at trial that [the education program] d[id] not have many of the attributes of a traditional school otherwise required by law."[47] And the defendants' theory of the case was that the education program was not a school under the statute.[48] Thus, "Although the major issue at trial was whether [the education program] itself was a school within the meaning of the statute RCW 69.50.435, the trial court's special verdict essentially withheld that determination from the jury."[49]

Accordingly, Becker is distinguishable. Here, Corbett did not challenge the length of the alleged abuse. And whether 10 years is a prolonged period of time was not an issue in this case.

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[44] 132 Wn.2d 54, 935 P.2d 1321 (1997).

[45] Id. at 65.

[46] Id.

[47] Id. at 58.

[48] Id. at 59.

[49] Id. at 63.

PROSECUTORIAL MISCONDUCT

Corbett next argues that the prosecutor committed misconduct during closing argument. He fails in his burden to show either misconduct or prejudice.

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial.[50] If a defendant fails to object at trial, we grant relief only if the remark was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[51] "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"[52] Additionally, when the defendant fails to object, it "'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'"[53]

"In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence."[54] We review alleged prosecutorial misconduct in "the context of the total argument, the issues in the

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[50] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

[51] Id. at 760-61.

[52] Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[53] State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

[54] State v. Reed, 168 Wn. App. 553, 577, 278 P.3d 203 (2012).

case, the evidence [addressed in the argument], and the instructions given to the jury."[55]

Corbett argues that the prosecutor committed misconduct during closing argument for two reasons. Neither argument is persuasive.

Impugning Defense Counsel

Corbett first argues that the prosecutor impugned defense counsel during closing argument by characterizing the defense's arguments as "absurd."

Prosecutors may argue that "the evidence does not support the [defendant's] theory of the case."[56] But they "must not impugn the role or integrity of defense counsel."[57]

A prosecutor's disparaging remarks about the defense's arguments do not necessarily disparage defense counsel—"isolated remarks calling defense arguments 'bogus' and 'desperate,' while strong and perhaps close to improper, do not directly impugn the role or integrity of counsel, and such isolated comments are unlikely to amount to prosecutorial misconduct."[58]

For example, in State v. Brown, the prosecutor described part of the defense's theory of the case as "'ludicrous.'"[59] The supreme court held that this was not misconduct, stating "[t]he use of the word 'ludicrous' was simply editorial

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[55] Emery, 174 Wn.2d at 764 n.14.

[56] Thorgerson, 172 Wn.2d at 465.

[57] Id.

[58] Id. at 466.

[59] 132 Wn.2d 529, 565-66, 940 P.2d 546 (1997).

comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense."[60]

In contrast, in State v. Thorgerson, "the prosecutor impugned defense counsel's integrity, particularly in referring to his presentation of his case as 'bogus' and involving 'sleight of hand.'"[61] "In particular, 'sleight of hand' implies wrongful deception or even dishonesty in the context of a court proceeding."[62] Similarly, in State v. Lindsay, the prosecutor impugned defense counsel by stating that counsel had "pitched . . . a crock" to the jury.[63] This impugned defense counsel because that term "implies deception and dishonesty" and is "a shortening of an explicitly vulgar phrase."[64]

Likewise, in State v. Warren, the prosecutor impugned defense counsel.[65] In that case, the prosecutor "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

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[60] Id. at 566.

[61] 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011).

[62] Id. at 452 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2141 (2003)).

[63] 180 Wn.2d 423, 433, 326 P.3d 125 (2014).

[64] Id. at 433-34.

[65] 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008).

doing.'"[66] But even in that case, these comments were "not so flagrant and ill intentioned that no instruction could have cured them."[67]

Here, the prosecutor used a variation of the phrase "quite frankly absurd" three times in closing argument. He used this phrase twice to characterize the argument that C.H. would use the assault on her child as an opportunity to frame Corbett. The third time he used it to characterize the argument that Mohamed identified Corbett as the assailant to receive a free set of knives.

Corbett did not object to any of these characterizations, suggesting that trial counsel did not consider them objectionable in the context of the trial. Instead, Corbett chose to use closing argument to respond to the prosecutor's comments. Corbett acknowledged that the idea that "Mr. Mohamed lied . . . for a set of steak knives" was "ridiculous." Corbett went on to distinguish his argument from the prosecutor's characterization. He also responded to the prosecutor's other uses of the word "absurd."

Here, the prosecutor did not directly impugn defense counsel. Thus, his comments resemble those in Brown, not those in Lindsay, Thorgerson, or Warren. In the context of this case, Corbett fails to show that the prosecutor committed misconduct during closing argument. Moreover, he fails to show that a curative instruction would not have cured the alleged misconduct.

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[66] Id. at 29.

[67] Id. at 30.

Corbett argues that using the word "absurd" is analogous to using the terms "bogus" or "a crock." But those terms, unlike "absurd," imply falsehood or deception.[68] Rather, using "absurd" is analogous to using "ludicrous," "which was a strong, but fair, response to the argument made by the defense."[69]

"We Know"

Corbett also argues that the prosecutor committed misconduct by repeatedly using the phrase "we know" during closing argument. We disagree.

In certain circumstances, using the phrase "we know" may constitute misconduct.[70] But a prosecutor does not commit misconduct by using this term only to marshal the evidence in the case.[71]

Here, the prosecutor used the phrase "we know" several times during closing argument. Corbett did not object. Accordingly, trial counsel did not believe that using these words was objectionable in the context of the case. And Corbett failed to request a curative instruction.

A fair review of this record shows that the prosecutor used this phrase only to marshal the evidence. Thus, Corbett cannot show that using "we know" was misconduct in this case.

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[68] Thorgerson, 172 Wn.2d at 451-52; Lindsay, 180 Wn.2d at 433.

[69] Brown, 132 Wn.2d at 566.

[70] State v. Robinson, 189 Wn. App. 877, 894-95, 359 P.3d 874 (2015).

[71] Id. at 895.

CUMULATIVE ERROR

Corbett also argues that cumulative error requires reversal. We disagree.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial.[72]

Here, for the reasons discussed earlier, the court's comment on the evidence was the only error at trial. And as described earlier, the record shows that this error did not prejudice Corbett.

NO-CONTACT ORDER

Corbett argues that the court improperly prohibited him from contacting his son for life as a sentencing condition. We accept the State's concession of legal error, strike this condition, and remand for resentencing.

"[The] defendant's fundamental rights limit the sentencing court's ability to impose sentencing conditions."[73] Parents have a fundamental right in the care of their children.[74]

If a sentencing condition interferes with a fundamental right, the condition must be "reasonably necessary to accomplish the essential needs of the State

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[72] State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012).

[73] In re Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010).

[74] Warren, 165 Wn.2d at 34.

and public order."[75] "[T]he interplay of sentencing conditions and fundamental rights is delicate and fact-specific."[76]

A court may not impose a no-contact order between a parent and child without "address[ing] the parameters of the no-contact order under the "'reasonably necessary' standard."[77] If a trial court fails to address the proper standard, this court strikes the no-contact order and remands for resentencing.[78]

Here, the trial court imposed a sentencing condition that prohibited Corbett from contacting his son for the duration of Corbett's lifetime. The State properly concedes that the court failed to address the "reasonably necessary" standard. Thus, we strike this condition and remand for reconsideration and resentencing.

We affirm Corbett's conviction, strike the sentencing condition imposing a no-contact order for his lifetime, and remand for reconsideration and resentencing.

Cox, J.

WE CONCUR:

Trickey, J.

Spearman, C.J.

[75] Id. at 32.

[76] Rainey, 168 Wn.2d at 377.

[77] Id. at 381-82.

[78] Id.

Appendix B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

and no other person, committed the offense:

It is, therefore, error to instruct the jury, the defendant guilty, although they may not e, and no other person, committed the alleged Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

.—In a case where the evidence as to the de- mstantial, the evidence must lead to the con- ;ly as to exclude every reasonable hypothesis n a case of that kind an instruction in these fendant is to have the benefit of any doubt. ıblished necessarily lead the mind to the con- ugh there is a bare possibility that he may d him guilty." It is not enough that the mind to a conclusion, for it must be such as . Men may feel that a conclusion is necessar- assured, beyond a reasonable doubt, that it is v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. evidence must produce "in" effect "a" rea- f defendant's guilt is probably as clear, prac- ordinary juror as if the court had charged ıce "the" effect "of" a reasonable and moral h a charge is not error: *Loggins* v. *State*, 32 v. *Shaeffer*, 89 Mo. 271, 282, the jury were ying the rule as to reasonable doubt you will o facts and circumstances proven can be rea- heory other than that the defendant is guilty; in another form, if all the facts and circum- be as reasonably reconciled with the theory nt as with the theory that he is guilty, you avorable to the defendant, and return a ver- This instruction was held to be erroneous, as le in a civil case, and not in a criminal one. fit of a reasonable doubt in criminal cases is a defendant has in a civil case, with respect ınce. The following is a full, clear, explicit, capital case turning on circumstantial evi- you in convicting the defendant in this case, st not only be consistent with his guilt, but h his innocence, and such as to exclude every at of his guilt, for, before you can infer his lence, the existence of circumstances tending compatible and inconsistent with any other at of his guilt": *Lancaster* v. *State*, 91 Tenn.

fine a reasonable doubt as one that "the jury or to tell them that it is a doubt for which a evidence, or want of evidence, can be given, ırts have approved: *Vann* v. *State*, 83 Ga. 44; Am. St. Rep. 145; *United States* v. *Cassidy*, *fferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, *State*, 96 Ala. 93; *United States* v. *Butler*, 1 *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. BRYAN CORBETT, JR., Petitioner.	)))))))))	SUPREME COURT NO. _______ COA NO. 72453-3-I

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 30TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRYAN CORBETT, JR.
DOC NO. 801312
STAFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 30, 2016 - 7:43 PM

Transmittal Letter

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