73203-0

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September 30, 2015
Court of Appeals
Division I
State of Washington

NO. 73203-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

NATHON ALLEN,

Appellant.

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

The Honorable Brian Gain, Judge

BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The information is constitutionally deficient because it omits an essential element of the charged crime.

2. Prosecutorial misconduct denied appellant a fair trial.

3. The trial court erred in giving a flawed reasonable doubt instruction, in violation of due process and the right to a jury trial.

Issues Pertaining to Assignments of Error

1. Did the State violate article I, section 22 of the Washington Constitution, the Sixth Amendment, and CrR 2.1(a)(1), by charging the appellant with second degree burglary without alleging the essential element of the ownership or occupancy of the burglarized building?

2. Did the prosecutor commit reversible misconduct during closing argument when he repeatedly invited the jury to infer appellant was guilty of an uncharged crime?

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?

B. STATEMENT OF THE CASE

The State charged Nathon Allen by amended information with second degree burglary (Count 1), theft of a motor vehicle (Count 2), and first degree theft (Count 3). CP 12-13. The State alleged that on November 27, 2013, Allen entered and remained unlawfully in a building located at 3600 East Valley Road, with intent to commit a crime against a person or property therein. CP 12. The State also alleged that on the same date, Allen wrongfully obtained a motorcycle and several items belonging to Paul LaVaque. CP 12-13. Pursuant to the State's motion, the court dismissed the two theft charges because LaVaque had an outstanding bench warrant and refused to appear for trial. RP 136; CP 39.

Burt Brienen owns storage unit 626 at Public Storage, 3600 East Valley Road, Renton, Washington. RP 252. Brienen and his stepson, LaVaque, store many household and personal items there. RP 253-54. On October 16, 2013, Brienen noticed several items missing from his storage unit, including weights, tools, painting supplies, and LaVaque's leather jackets and motorcycle riding boots. RP 256-58, 282-83. A September 25, 2013 surveillance video showed an unidentified individual pull up to the storage unit in a U-Haul van. RP 325-26. Both Brienen and LaVaque had a set of keys to the storage unit. RP 289. Brienen explained, though, that he kept both sets of keys after this incident. RP 289.

On November 25, 2013, Allen purchased storage unit 625, adjacent to Brienen's, at public auction. RP 154-57. Public Storage District Manager Zachary Siahpush explained that after 45 days of nonpayment on a storage unit, the unit can be sold at public auction. RP 151-52. After the owner of unit 625 failed to pay, Siahpush cut the lock on the unit and conducted a visual inspection of it sometime between November 2 and 6, 2013. RP 151-59. The unit appeared to have been used as a residence, containing a bed, dresser, mirror, and empty fast food bags. RP 159. Siahpush testified he did not see anything of great value inside unit 625. RP 159.

Once an individual purchases a storage unit at auction, he or she has two days to empty it. RP 153, 163. Public Storage is a secure facility, requiring an individualized gate code to enter. RP 151, 173-74. Auction buyers are not given a gate code; instead they must request access from a Public Storage employee. RP 162-63.

Around 6:00 p.m. on November 26, the day after the auction, Allen went to the Public Storage office to request access to his storage unit. RP 207-08, 218. Relief Manager Kelly Mast had Allen sign in and opened the gate for him. RP 207-08. Allen returned to the office shortly thereafter to ask if someone could cut the lock on his unit because he had forgotten his key at home. RP 208-11. Allen completed a lock cut request form and Siahpush agreed to cut the lock for him. RP 208-11. Property Manager

Susan Irving opened the gate for Allen when he exited the property around 9:00 p.m. with his truck and trailer. RP 194-97.

Allen returned the following morning, November 27, 2013, and again asked Mast for access to the property. RP 212-13. Mast testified she opened the gate for Allen and did not see anyone else inside Allen's pickup truck. RP 212-13. Then, while Mast conducted her morning lock check of the facility, another man who appeared to be an acquaintance of Allen's "popped out" of Allen's unit. RP 215. Mast testified she was suspicious, so she returned to the office and watched the security video. RP 216-17. On the video from that morning, Mast testified she saw Allen pull up to the unit and get out of his truck with two fast food bags and two cups of coffee. RP 214-17. On the security video played for the jury, though, Allen was only carrying one cup of coffee. RP 244. The video then showed Allen and the other man loading up Allen's truck. RP 217-19.

Mast also watched the security video from the previous evening, November 26. RP 218-19. She testified she saw Allen and a different man mulling around Allen's storage unit for a while, then Siahpush appeared on the video and left soon after. RP 218-19. Allen and the other man loaded up Allen's truck and trailer "with the contents of what was in that unit." RP 219. Three other cars pulled up and the passengers spoke with Allen and the

other man; "then they all left." RP 219. This surveillance video was played for the jury. RP 223-25.

Brienen called the police on November 27, 2013 to report items missing from his storage unit, including a pressure washer, portable air conditioner, leather bench, king-sized mattress, decorative wooden bench, and LaVaque's motorcycle. Ex. 12; RP 138-39, 256-58, 265-73. Records showed Brienen had not accessed the property since November 1, 2013. RP 175. Officer Robert Ylinen responded. RP 138-41. He testified the lock on Brienen's storage unit was still intact, but screws had been conspicuously removed and replaced on the interior wall shared with unit 625. RP 142-45.

Detective Renggli went to Allen's home on March 7, 2014 with two other detectives to investigate. RP 298. Allen explained to Renggli that he purchased unit 625 for $100 and was still in possession of many of the items from the unit. RP 299-300. Renggli showed Allen several photos from the November 26 and 27 surveillance videos. RP 300. Allen identified himself and his friend Paul Reed in the November 26 photos, and himself and his acquaintance John Cotton in the November 27 photos. RP 300-02. Allen explained he and Cotton made arrangements for Cotton to help him clear out the storage unit on that date. RP 302-03. Cotton was deceased by the time Renggli spoke with Allen. RP 340-41.

Allen then led the detectives around his property retrieving items from the storage unit he purchased, including a pressure washer, portable air conditioning unit, tools, and motorcycle riding boots. RP 304-08. Some but not all of the items Allen retrieved were identified by Brienen as stolen from his storage unit. RP 306-08. For instance, Allen showed Renggli a battery charger, nail gun, and several tools that were not among the allegedly stolen items. RP 306-07. Renggli testified Allen was very cooperative throughout the encounter. RP 304, 321-22.

At trial, the State played the November 27 surveillance video during Brienen's testimony. RP 268-69. As the video played, Brienen identified several of the items from his storage unit being loaded into Allen's truck, including: sand cup tires for LaVaque's motorcycle, a bicycle, sledge hammer, shop-vac, circular saw, the mattress, and air conditioning unit. RP 268-75. Brienen testified he did not know Allen and never gave him permission to enter his storage unit. RP 281.

In closing, the State argued:

> [T]his is not about that first burglary that was reported. We're not here to prove beyond a reasonable doubt that the defendant participated in that burglary on October 16th. It may be likely, it may be probable, but it will not be one of the elements that the State must prove beyond a reasonable doubt.

RP 352. Defense counsel did not object. RP 352. Later in closing, the State again argued:

> And it's important to remember when you're thinking about this case, think about that first burglary, what was reported, and think about November 27th. The first burglary we're not here to prove that the defendant was involved in. It's highly likely again because of some of that property that was found on his property, some of Burt's property --.

RP 361. Defense counsel objected, but the trial court overruled, stating, "This is argument." RP 361. The State continued, "Property from that first burglary, as Burt told you, was found on Mr. Allen's property. It's probably likely that somehow there was a connection, but that's not what the State has to prove in this case." RP 361. The State concluded its closing argument shortly thereafter. RP 361.

The State's theory was that Allen's friend Cotton stayed overnight in Allen's storage unit on November 26 in order to access Brienen's unit. RP 369-70. The defense theory was that Allen unwittingly purchased a storage unit that contained Brienen's property. RP 363. Defense counsel also pointed out that the surveillance video from November 26 never showed Cotton, only Allen's friend, Reed. RP 369-70.

The jury found Allen guilty of second degree burglary. CP 40. The court sentenced Allen to 12 months of electronic home detention. CP 63. Allen timely appeals. CP 73-74.

C. ARGUMENT

1. THE BURGLARY CHARGE MUST BE DISMISSED BECAUSE THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF OWNERSHIP OR OCCUPANCY.

An information charging burglary must allege the ownership or occupancy of the burglarized premises so as to negate the accused's right to enter. The information charging Allen with burglary stated:

> That the defendant Nathon George Allen in King County, Washington, on or about November 27, 2013, did enter and remain unlawfully in a building, located at 3600 East Valley Road, in said county and state, with intent to commit a crime again a person or property therein . . . .

CP 12. This failed to negate Allen's right to enter because Allen had lawful access to the storage unit he purchased at 3600 East Valley Road. Allen's burglary conviction should be reversed because even under a liberal reading of the information, the essential element of ownership or occupancy is missing. This renders the information constitutionally infirm.

An information is constitutional under article I, section 22 of the Washington Constitution and the Sixth Amendment only if it includes all statutory and nonstatutory essential elements of the charged offense.[1] State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). The purpose of this rule is to properly notify the accused of the charges against him and allow

[1] CrR 2.1(a)(1) likewise requires the information to "be a plain, concise and definite written statement of the essential facts constituting the offense charged."

him to prepare and present a defense. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). A challenge to the constitutional sufficiency of an information may be raised for the first time on appeal. Id. at 102-03.

In charging burglary, "the ownership or occupancy of the premises alleged to have been broken into must be alleged in some manner sufficient to negative the right of the person charged with the crime to enter the building." State v. Klein, 195 Wash. 338, 341, 80 P.2d 825 (1938). The State charged Klein and his codefendant with second degree burglary. Id. at 339. At the time, second degree burglary was defined as:

> Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years.

Id. at 340 (quoting Rem. Rev. Stat., § 2579). RCW 9A.52.030 now defines it as: "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling."

The information in Klein alleged:

> They, the said Harry Klein and James Cole, in the county of Snohomish, state of Washington, on or about the 29th day of August, 1937, did wil[l]fully, unlawfully and

> feloniously, and with the intent to commit some crime therein, to-wit: larceny, break and enter a building, to wit: The Tradewell Store building, located at 2813 Colby avenue, in the city of Everett, Washington, being managed by one John Bird of the city of Everett, Washington, said building being a building in which property was then and there kept for use, sale or deposit.

195 Wash. at 339. The Klein court found this sufficient to charge burglary. Id. at 342. In reaching this conclusion, the court relied on cases holding occupancy, not ownership, of a building was an essential element, and a person in direct management of a building is the occupant, as a matter of law. Id. at 341-42. The information identified John Bird as the manager of the burglarized building, thereby establishing the building's occupancy and negating Klein's right to enter. Id. at 344.

What the Klein court essentially held was the information must provide notice that a person or entity has a possessory interest in the burglarized premises superior to that of the accused. See id. at 343-44. Alleging someone other than the accused owned or occupied the burglarized building is a common way of articulating this superior interest. Thus, allegation of ownership or occupancy is material for two purposes: "(1) To show on the record that the building burglarized is not the property of the accused, and (2) to identify the offense to such an extent as to protect the accused from a second prosecution for the same offense." Id. at 343-44.

Other cases demonstrate this rule as well. See, e.g., State v. Knizek, 192 Wash. 351, 352, 73 P.2d 731 (1937) (information alleging Knizek broke and entered warehouse "belonging to the Union Oil Company of California" was sufficient to show the warehouse belonged to someone other than Knizek); State v. Burke, 124 Wash. 632, 633, 215 P. 31 (1923) (information alleging burglary committed by breaking and entering in the nighttime "the First Bank of White Bluffs, in Benton county, Wash.," sufficient to charge burglary although owner of bank not named); State v. Franklin, 124 Wash. 620, 623, 215 P. 29 (1923) (information charging Franklin with breaking and entering a bank, post office, railway express or mail car, provided sufficient notice despite failing to specify owner).

These cases establish that an information charging burglary must include language that indicates someone or something held a possessory interest in the burglarized property superior to that of the accused. The information charging Allen fails to do so. Instead, the information provides only the general address for the Public Storage site in Renton. CP 12. On November 27, 2013, the date of the alleged offense, Allen owned storage unit 625 on that property and had lawful access to it. Nowhere does the information allege Allen entered a storage unit owned by someone with a superior interest to him. The information is therefore constitutionally infirm

because it failed to provide sufficient notice to Allen that he did not have the right or privilege to enter the building at 3600 East Valley Road.

Klein compels this result despite a change in the burglary statutes. See, e.g., State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007) (recognizing modern statutes treat burglary as an offense against habitation and occupancy rather than ownership of property, just as courts did at common law). An information must still charge ownership or occupancy of the burglarized premises. Unlike Klein, where the State alleged John Bird managed (i.e., occupied) the building at issue, the information here alleges only that Allen "did enter and remain unlawfully in a building, located at 3600 East Valley Road." CP 12. No owner, occupant, or manager is mentioned. This fails to negate Allen's right to enter, where Allen actually had a right to enter the Public Storage property at 3600 East Valley Road.

The State may claim the "did enter and remain unlawfully" language sufficiently apprised Allen he had no right to enter the premises. This argument would likely be based on RCW 9A.52.010(5), which provides, "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."

When the Court decided Klein, there was no statutory counterpart to RCW 9A.52.010(5). Nevertheless, Rem. Rev. Stat. § 2063 provided that terms not defined by law were to be construed according their common

usage. Klein's information stated he and a cohort "unlawfully . . . enter[ed] a building." Klein, 195 Wash. at 339. "Unlawful entry" is defined as "[t]he crime of entering another's real property, by fraud or other illegal means, without the owner's consent." BLACK'S LAW DICTIONARY 574 (8th ed. 2004). Therefore, Rem. Rev. Stat. § 2063, combined with the definition of "unlawful entry," is essentially the same as RCW 9A.52.010(5).

The Klein court nevertheless found the words "unlawfully . . . ent[ered]" did not obviate the need to allege an ownership or occupancy interest in the building entered. 195 Wash. at 339-41. This reasoning has not changed. Allen's information failed to allege ownership or occupancy in the "building, located at 3600 East Valley Road," when Allen had ownership of a building at that location.

Allen did not challenge the information before the verdict. When such is the case, courts liberally construe the information's sufficiency. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). But the information may be found sufficient only "if the necessary elements appear in any form, or by fair construction may be found, on the face of the document." Id. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Therefore, if the missing elements are not found or fairly implied, prejudice

is presumed and dismissal without prejudice is the proper remedy. McCarty, 140 Wn.2d at 425-26, 428.

A liberal reading of Allen's information fails to reveal, by implication or otherwise, the essential element or ownership or occupancy of the building at 3600 East Valley Road. This Court should therefore dismiss Allen's conviction without prejudice. Id. at 428.

2. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY REPEATEDLY INVITING THE JURY TO INFER ALLEN WAS GUILTY OF AN UNCHARGED CRIME.

Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; WASH. CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Reversal is required, even without defense objection, when the prosecutor's misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

a. The prosecutor improperly invited the jury to infer Allen was guilty of an uncharged crime.

A prosecutor is forbidden from appealing to the jurors' passions and encouraging them to render a verdict based on emotion rather than properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge, and that otherwise prevent calm and dispassionate evaluation of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001). This includes comments encouraging jurors to convict based on propensity to commit the crime charged. Fisher, 165 Wn.2d at 748-49. It is particularly offensive to suggest that the accused committed an uncharged crime. State v. Henderson, 100 Wn. App. 794, 802-03, 998 P.2d 907 (2000); State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976).

Reference to uncharged incidents and dismissed charges constituted reversible error in Torres and State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). In Torres, this Court held it improper when the prosecutor suggested in opening that one of the defendants, who was charged with rape, could also have been charged with burglary. 16 Wn. App. at 256. "This suggestion was uncalled for and asked the jury to infer that the defendant Castillo was guilty of other crimes not charged in the information." Id.

In Boehning, the prosecutor twice referred to dismissed rape charges in closing argument and suggested the complainant's previous disclosures would have supported these charges. 127 Wn. App. at 519-21. Defense counsel did not object. Id. at 518. The court nevertheless concluded these references were improper and required reversal for several reasons. Id. at 522. First, the dismissed charges were not "'evidence' from which reasonable inferences and arguments about the [remaining] molestation charges could be made." Id. Second, the dismissed charges were "wholly irrelevant to the State's case." Id. Third, the argument "improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds." Id.

Under ER 404(b), evidence of prior bad acts is presumptively inadmissible to prove character and show action in conformity therewith. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). In Allen's case, the State never sought to admit evidence of the September 2013 burglary under one of the proper exceptions to ER 404(b), such as motive, opportunity, intent, or identity. See Supp. CP__ (Sub. No. 44, State's Trial Memorandum). Defense counsel accordingly had no opportunity to object to its admission or request a relevant limiting instruction.

There was no evidence Allen had access to the Public Storage property prior to November 25, 2013 when he purchased unit 625 at auction.

On the September 15 surveillance video, neither Allen nor his friends can be seen when the U-Haul van pulled up to Brienen's storage unit. RP 325-26. The identity of the individual in that video was never established. RP 325-26. Detective Renggli testified nothing linked Allen to the September burglary. RP 325-27.

The only conceivable link between Allen and the September burglary was Allen's possession of motorcycle riding boots, which Brienen believed were stolen in the first burglary. RP 256-58, 304-08. But "proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary." State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Allen's possession of possibly stolen riding boots is therefore insufficient to establish his involvement in the September burglary.

Nevertheless, the prosecutor repeatedly argued in closing that it was highly likely Allen was responsible for or involved in the uncharged burglary. At the beginning of argument, the prosecutor claimed "[i]t may be likely, it may be probable" that Allen "participated in that burglary on October 16th." RP 352. Defense counsel did not object. But defense counsel in Boehning did not object, either. 127 Wn. App. at 518. Regardless, the court concluded reference to Boehning's dismissed rape charges required reversal. Id. at 518-19, 522. This establishes that inviting

the jury to infer Allen was guilty of the uncharged burglary was flagrant and ill-intentioned misconduct. See id. at 525.

Later in closing, the prosecutor again argued "[i]t's highly likely" Allen was involved in the first burglary, "because of some of that property that was found on his property, some of Burt's property --." RP 361. Defense counsel objected, but the trial court overruled, stating, "This is argument." RP 361. The prosecutor immediately continued with the same argument, "Property from that first burglary, as Burt told you, was found on Mr. Allen's property. It's probably likely that somehow there was a connection." RP 362. This invited the jury to infer Allen was guilty of the September burglary, even though he was never charged for that crime and there would be insufficient evidence to support any such conviction.

Washington law is clear: it is flagrant and ill-intentioned misconduct for the prosecutor to argue the accused is guilty of uncharged crimes. Boehning, 127 Wn. App. at 518-19; Torres, 16 Wn. App. at 256-57. Just as in Torres and Boehning, the prosecutor's repeated argument that it was "highly likely" and "probable" Allen was involved in the September burglary was "uncalled for" and impermissibly asked the jury to infer Allen was guilty of that uncharged crime. Boehning, 127 Wn. App. at 522; Torres, 16 Wn. App. at 256.

Even if this Court concludes the first reference to Allen's purported involvement in the September burglary was not flagrant and ill-intentioned misconduct, defense counsel objected to the second reference, and the third reference followed immediately after the trial court overruled the objection. Where defense counsel objects, the appellant need only show the prosecutor's conduct was improper and prejudicial. Monday, 171 Wn.2d at 675. Based on the well-established case law discussed above, there can be no reasonable dispute the prosecutor's second and third comments on the uncharged burglary were improper.

The State may argue the prosecutor was merely electing the November 2013 burglary to avoid a jury unanimity problem, as required by State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). For instance, the prosecutor informed the jury "this is not about the first burglary that was reported" and "we're not here to prove that the defendant was involved in [the first burglary]." RP 352, 361.

But the prosecutor did not stop there. Instead he proceeded to argue it was "likely," "probable," "highly likely," and "probably likely" Allen was involved in the first burglary. RP 352, 361-62. This went far beyond a simple election and landed squarely within the conduct prohibited in Torres and Boehning. The to-convict instruction also required the jury to find

"[t]hat on or about November 27, 2013, the defendant unlawfully entered a building other than a dwelling." CP 55. There would have been no confusion the State was seeking a conviction for the November burglary.

The State may also argue the prosecutor was simply drawing reasonable inferences from the evidence. See State v. Anderson, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009) ("The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence."). However, the Boehning court already rejected this argument, holding that referencing dismissed charges was not a reasonable inference from the evidence. 127 Wn. App. at 522. The court further emphasized the dismissed charges "were wholly irrelevant to the State's case." Id.

The same is true here. Whether Allen was involved in the September burglary was irrelevant to whether he committed the November burglary. Such an argument served only to encourage the jury to convict based on Allen's purported propensity to commit burglary. The prosecutor's argument also did not constitute a reasonable inference from the evidence because mere possession of stolen property cannot, as a matter of law, establish burglary. Any such argument from the State should be rejected.

This Court should hold the prosecutor's argument that Allen was guilty of an uncharged crime was improper, as well as flagrant and ill-intentioned misconduct.

b. The misconduct prejudiced the outcome of Allen's trial, necessitating reversal.

Misconduct warrants reversal when it "was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Prejudice is established if there is a substantial likelihood the misconduct affected the jury's verdict. Belgarde, 110 Wn.2d at, 508; Reed, 102 Wn.2d at 145. Misconduct that is not objected to warrants reversal when no jury instruction could have cured the resulting prejudice. Boehning, 127 Wn. App. at 522.

Like in Boehning, the prosecutor's argument that Allen was involved in the uncharged burglary "alone compels reversal," because it "improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds." 127 Wn. App. at 522. Prosecutors, in their quasi-judicial capacity, exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Statements made during closing argument are intended to influence the jury. Reed, 102 Wn.2d at 146. Such was the case here. The prosecutor's

argument invited the jury to improperly convict Allen based on an alleged but unproved propensity to commit burglary.

Allegations of prior crimes are "highly prejudicial." State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Even more prejudicial is "admission of evidence concerning a crime similar to the charged offenses." State v. Babcock, 145 Wn. App. 157, 164-65, 185 P.3d 1213 (2008). Such evidence is "inherently difficult to disregard." Id. The prosecutor alleged Allen's involvement in an uncharged burglary almost identical to the charged burglary. This would be incredibly difficult for the jury to disregard, even if the court had given a proper curative instruction.

State v. Escalona is instructive in this regard. 49 Wn. App. 251, 742 P.2d 190 (1987). There, in a trial for second degree assault with a deadly weapon, a witness testified Escalona "already has a record and had stabbed someone." Id. at 253. The trial court orally instructed the jury to disregard the statement. Id. This Court held, "despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact." Id. at 256. The jury "undoubtedly" used this evidence "for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past." Id. A new trial was necessary. Id.

The trial court also overruled defense counsel's objection to the prosecutor's second reference to the uncharged burglary. RP 361. "This ruling lent an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). The trial court augmented the prosecutor's prejudicial conduct by putting its imprimatur on the improper remarks. State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). "This increases the likelihood that the misconduct affected the jury's verdict." Id.

Overruling counsel's objection also demonstrates the court would have overruled an objection to the prosecutor's first improper reference to the uncharged burglary. An instruction could not have cured the resulting prejudice, because the trial court would not have given one. Even if it had, "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Babcock, 145 Wn. App. at 164-65 (alteration in original) (quoting Escalona, 49 Wn. App. at 255).

Fisher is analogous. Fisher was convicted of four counts of molesting his stepdaughter. Fisher, 165 Wn.2d at 742. Before trial, the court excluded ER 404(b) evidence that he physically abused his biological child and his stepchildren unless the defense made delayed reporting an issue. Id. at 734. Defense counsel did not request a limiting instruction. Id.

Despite this ruling, the prosecutor repeatedly emphasized the past abuse during trial and argued Fisher's molestation of his stepdaughter was consistent with this history. Id. at 734-38.

Defense counsel noted a standing objection to the prosecutor's argument during closing that the prior physical abuse proved Fisher's propensity to sexually abuse his stepdaughter. Id. at 737. The prosecutor claimed:

> There can be no doubt that the defendant is abusive. It shows in the way the defendant deals with and has dealt with children in his life. Children are objects to be abused. Had there been one instance of the defendant being abusive, that would be a very good argument. Had he been abusive once to Tyler, once to Brett, no. It's not once, it's thirteen separate instances, ladies and gentlemen. Thirteen separate instances, including [the stepdaughter] and including the sexual abuse.
>
> . . . And the defendant engaged in a repeated pattern of abuse that didn't stop with physical abuse. It spilled right over into sexual abuse.

Id. at 738.

On appeal, Fisher argued the prosecutor committed misconduct in discussing the ER 404(b) evidence. Id. at 746. The supreme court agreed, reasoning the evidence was admitted solely to explain the complainant's delay in reporting, and that contrary to that limitation, the prosecutor used it as propensity evidence in closing. Id. at 747-49. "Using the evidence in such a manner after receiving a specific pretrial ruling regarding the

evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct." Id. at 749. The court concluded the misconduct denied Fisher a fair trial despite defense counsel's failure to request a curative or limiting instruction. Id.

The prosecutor began and ended his closing argument by claiming it was likely Allen was involved with the uncharged September burglary. RP 352, 361-62. This invited the jury to infer Allen's guilt based on his propensity to commit burglary. Given that the September burglary was almost identical to the November burglary, the prosecutor's argument could have easily swayed the jury's decision, denying Allen a fair trial. The prosecutor's improper argument may have also encouraged the jury to seek retribution for the uncharged burglary. This Court should reverse and remand for a new trial. Boehning, 127 Wn. App. at 525.

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

At Allen's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01,[2] 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 46; RP 345. The Washington Supreme Court requires trial

[2] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

courts to give this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). This instruction is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing.

For these reasons, WPIC 4.01 violates due process and the right to a jury trial. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, §§ 3, 22. Use of this instruction in Allen's case is structural error requiring reversal.

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

In order for jury instructions to be sufficient, they 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 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar.[3]

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a "not guilty" verdict. Examination of the meaning of the words "reasonable" and "a reason" shows this to be true.

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[3] See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, resulting in court's conclusion that jury could have applied the erroneous standard), overruled on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying upon grammatical structure of unanimity instruction to determine reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (2013) (discussing difference between use of "should" rather than use of a word indicating "must" regarding when acquittal is appropriate).

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of "common" to ascertain the jury's likely understanding of the word used in jury instruction); Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of the word "presume" to determine how jury may have interpreted the instruction).

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

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. But WPIC 4.01 does not do that. Instead, WPIC 4.01 requires "a reason" for the doubt, which is different from a doubt based on reason.

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "A reason" in the context of WPIC 4.01 means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that 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.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington's pattern instruction on reasonable doubt instruction is unconstitutional because its language requires more than just a reasonable doubt to acquit. It also requires a justification or explanation for why reasonable doubt exists.

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

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, "I didn't think the state's witness was credible," the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to "give a reason," an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these

scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The standard of beyond a reasonable doubt enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316. The doubt "for which a reason exists" language in WPIC 4.01 does that in directing jurors the must have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Such arguments "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 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 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).

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 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 for their 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?

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)). An ambiguous instruction that permits 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." Dana, 73 Wn.2d at 537. 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 Washington 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." 183 Wn.2d 578, 355 P.3d 253, 256 (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 the 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." 161 Wn.2d at 318. 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 similarly 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.'" 355 P.3d at 256. The Kalebaugh 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 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 are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation.

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 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); accord In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). 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.

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

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, 13 Wn. App. at 5, court began its discussion by recognizing the "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). 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 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, 13 Wn. App. at 5, further observed, "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Harras found no error in the following instructional language: "It should be a doubt for which a good reason exists." 25 Wash. at 421. Harras, 25 Wash. at 421, 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).[4] However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[5]

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[4] For the Court's convenience, the relevant portion of the note cited by Harras (48 Am. St. Rep. at 574-75) is attached as an appendix to this brief.

[5] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99 (1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or

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, 355 P.3d at 256. The Kalebaugh court explicitly held it was manifest constitution error to instruct the jury that reasonable doubt is "a doubt for which a reason can be given." Id.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), further illuminates this dilemma. Harsted took exception to the following instruction: "The expression 'reasonable doubt' means in law just what the words imply—a

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substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for." (Emphasis added.)); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for." (Emphasis added.)); State v. Morey, 36 P. 573, 577 (Or. 1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for." (Emphasis added.)).

doubt founded upon some good reason." Id. at 162. The supreme court explained "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 defining 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, 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 Wash. 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.

d. This structural error requires reversal.

Defense counsel did not object to the instruction at issue here. RP 336-38. However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3).

Structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Allen's conviction.

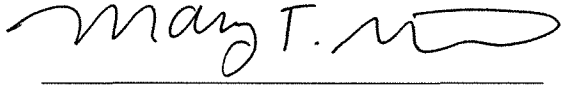
D. CONCLUSION

For the above stated reasons, this Court should reverse the conviction and remand for a new trial.

DATED this 30th day of September, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Appellant

Appendix

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

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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 COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73203-0-I
	)	
NATHON ALLEN,	)	
	)	
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 30TH DAY OF SEPTEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NATHON ALLEN
NO. 2015077023
PIERCE COUNTY JAIL
910 TACOMA AVENUE S
TACOMA, WA 98402

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2015.

X Patrick Mayovsky