

COA NO. 45665-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAROLD STENSON,

Appellant.

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

The Honorable S. Brooke Taylor, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

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

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ARGUMENT IN REPLY</u> | 1 |
| 1. THE TRIAL COURT VIOLATED STENSON'S CrR 3.3 RIGHT TO A SPEEDY TRIAL IN GRANTING THE STATE'S MOTION FOR CONTINUANCE PAST THE SPEEDY TRIAL DEADLINE ON AN UNTENABLE GROUND | 1 |
| 2. THE TRIAL COURT ERRED IN FAILING TO GRANT STENSON'S MOTION TO DISMISS THE CASE IN LIGHT OF THE STATE'S MISMANAGEMENT OF THE CASE AND DUE PROCESS VIOLATIONS..... | 4 |
| a. The court erred in failing to dismiss under CrR 8.3(b)..... | 4 |
| b. Dismissal is warranted due to the <u>Brady</u> violation | 11 |
| c. Dismissal is warranted under the federal test for destruction of evidence | 13 |
| d. Dismissal is warranted under an independent due process test based on the Washington Constitution..... | 14 |
| 3. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE PANTS EVIDENCE..... | 14 |
| 4. THE TRIAL COURT ERRED IN REFUSING TO GIVE THE SPOILIATION INSTRUCTION PERTAINING TO THE PANTS..... | 15 |
| 5. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE STATE'S WITNESS — THE OTHER SUSPECT IN THIS CASE — EXPRESSED HER OPINION THAT STENSON WAS GUILTY OF KILLING HER HUSBAND | 18 |
| 6. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A DEFENSE WITNESS'S PRIOR DRUG CONVICTIONS UNDER ER 609 | 21 |

TABLE OF CONTENTS (CONT'D)

| | Page |
|---|------|
| 7. PROSECUTORIAL MISCONDUCT VIOLATED STENSON'S DUE PROCESS RIGHT TO A FAIR TRIAL | 25 |
| 8. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL..... | 26 |
| a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof and undermines the presumption of innocence | 27 |
| b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01..... | 28 |
| c. The pattern instruction rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given..... | 30 |
| B. <u>CONCLUSION</u> | 37 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--|----------|
| <u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1,</u> 124 Wn.2d 816, 881 P.2d 986 (1994)..... | 29 |
| <u>City of Kent v. Sandhu,</u> 159 Wn. App. 836, 247 P.3d 454 (2011)..... | 7 |
| <u>Coggle v. Snow,</u> 56 Wn. App. 499, 784 P.2d 554 (1990)..... | 18 |
| <u>DeHeer v. Seattle Post-Intelligencer,</u> 60 Wn.2d 122, 372 P.2d 193 (1962)..... | 15 |
| <u>Homeworks Const., Inc. v. Wells,</u> 133 Wn. App. 892, 138 P.3d 654 (2006)..... | 17 |
| <u>In re Detention of Cross,</u> 99 Wn.2d 373, 662 P.2d 828 (1983)..... | 18 |
| <u>In re Electric Lightwave, Inc.,</u> 123 Wn.2d 530, 869 P.2d 1045 (1994)..... | 30 |
| <u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 940 P.2d 1362 (1997)..... | 4, 5, 19 |
| <u>In re Pers. Restraint of Stenson,</u> 174 Wn.2d 474, 276 P.3d 286 (2012)..... | 12 |
| <u>Kucera v. State,</u> 140 Wn.2d 200, 995 P.2d 63 (2000)..... | 30 |
| <u>Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.,</u> 123 Wn.2d 678, 871 P.2d 146 (1994)..... | 16 |
| <u>Pier 67, Inc. v. King County,</u> 89 Wn.2d 379, 573 P.2d 2 (1977)..... | 16 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--|----------------|
| <u>State v. Ansell</u> , 36 Wn. App. 492, 675 P.2d 614, <u>review denied</u> , 101 Wn.2d 1006 (1984) | 7 |
| <u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007)..... | 28, 29 |
| <u>State v. Calegar</u> , 133 Wn.2d 718, 947 P.2d 235 (1997)..... | 22 |
| <u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012)..... | 28, 29, 34, 36 |
| <u>State v. Flinn</u> , 154 Wn.2d 193, 110 P.3d 748 (2005)..... | 1 |
| <u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007)..... | 22 |
| <u>State v. Hardy</u> , 133 Wn.2d 701, 946 P.2d 1175 (1997)..... | 21, 22 |
| <u>State v. Harras</u> , 25 Wn. 416, 65 P. 774 (1901) | 32, 33, 35, 36 |
| <u>State v. Harsted</u> , 66 Wn. 158, 119 P. 24 (1911)..... | 34-36 |
| <u>State v. Harvill</u> , 169 Wn.2d 254, 234 P.3d 1166 (2010)..... | 17 |
| <u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936 (2010), <u>review denied</u> , 171 Wn.2d 1013, 249 P.3d 1029 (2011) | 26 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--|---------------|
| <u>State v. Johnson,</u> 152 Wn. App. 924, 219 P.3d 958 (2009)..... | 21 |
| <u>State v. Kalebaugh,</u> 183 Wn.2d 578, 355 P.3d 253 (2015)..... | 26-29, 34, 36 |
| <u>State v. Lindsay,</u> 180 Wn.2d 423, 326 P.3d 125 (2014)..... | 25 |
| <u>State v. Lizarraga,</u> __ Wn. App. __, __ P.3d __, 2015 WL 8112963 (slip op. filed Dec. 7, 2015) | 36 |
| <u>State v. Marks,</u> 114 Wn.2d 724, 790 P.2d 138 (1990)..... | 15 |
| <u>State v. Martinez,</u> 121 Wn. App. 21, 86 P.3d 1210 (2004)..... | 12 |
| <u>State v. Nabors,</u> 8 Wn. App. 199, 505 P.2d 162 (1973)..... | 31, 32 |
| <u>State v. N.E.,</u> 70 Wn. App. 602, 854 P.2d 672 (1993)..... | 11 |
| <u>State v. Norby,</u> 122 Wn.2d 258, 858 P.2d 210 (1993)..... | 7, 14 |
| <u>State v. Oppelt,</u> 172 Wn.2d 285, 257 P.3d 653 (2011)..... | 5 |
| <u>State v. Quismundo,</u> 164 Wn.2d 499, 192 P.3d 342 (2008)..... | 22 |
| <u>State v. Rafay,</u> 167 Wn.2d 644, 222 P.3d 86 (2009)..... | 20 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Raschka,
124 Wn. App. 103, 100 P.3d 339 (2004)..... 3

State v. Rohrich,
149 Wn.2d 647, 71 P.3d 638 (2003)..... 4, 7, 14

State v. Tanzymore,
54 Wn.2d 290, 340 P.2d 178 (1959)..... 31, 32

State v. Thompson,
13 Wn. App. 1, 533 P.2d 395 (1975)..... 30, 31, 33

State v. Wake,
56 Wn. App. 472, 783 P.2d 1131 (1989)..... 1, 3

State v. Weber,
99 Wn.2d 158, 659 P.2d 1102 (1983)..... 20

State v. Williamson,
100 Wn. App. 248, 996 P.2d 1097 (2000)..... 18

Thomas v. French,
99 Wn.2d 95, 659 P.2d 1097 (1983)..... 24

FEDERAL CASES

Brady v. Maryland,
373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).4-6, 11,
12

Ferguson v. Roper,
400 F.3d 635 (8th Cir. 2005) 13

Lovitt v. True,
403 F.3d 171 (4th Cir. 2005) 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Chapman,
524 F.3d 1073 (9th Cir. 2008) 12

OTHER STATE CASES

Bennett v. State,
128 S. W. 851 (Ark. 1910)..... 35

Blue v. State,
86 Neb. 189, 125 N. W. 136 (Neb. 1910)..... 35

Butler v. State,
102 Wis. 364, 78 N.W. 590 (Wis. 1899) 34

Gragg v. State,
3 Okl. Cr. 409, 106 Pac. 350 (Okla. Crim. App. 1910) 35

Hodge v. State,
97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145 (Ala. 1893) 35

People v. Guidici,
100 N. Y. 503, 3 N. E. 493 (N.Y. 1885) 35

People v. Jackson,
167 Mich. App. 388, 421 N.W.2d 697 (Mich. Ct. App. 1988)..... 36

Siberry v. State,
33 N.E. 681 (Ind. 1893) 27, 35

State v. Cohen,
78 N.W. 857 (Iowa 1899) 28

State v. Jefferson,
43 La. Ann. 995, 10 So. 199 (La. 1891) 33, 35

TABLE OF AUTHORITIES

Page

OTHER STATE CASES

State v. Morey,
25 Or. 241, 36 P. 573 (Or. 1894) 33

State v. Patton,
66 Kan. 486, 71 Pac. 840 (Kan. 1903)..... 35

State v. Serenson,
7 S. D. 277, 64 N. W. 130 (S.D. 1895)..... 35

Vann v. State,
9 S.E. 945 (Ga. 1889) 33, 35

OTHER AUTHORITIES

11 Washington Practice: Washington Pattern Jury Instructions: Criminal
4.01 (3d ed. 2008)..... 26, 28-30, 33, 36, 37

CrR 3.3..... 1

CrR 4.7(b), (g) 2

CrR 8.3(b) 4, 6, 7, 11, 14

ER 609 21

ER 609(a)..... 21, 22

Note - Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342).... 33

A. **ARGUMENT IN REPLY**

1. **THE TRIAL COURT VIOLATED STENSON'S CrR 3.3 RIGHT TO A SPEEDY TRIAL IN GRANTING THE STATE'S MOTION FOR CONTINUANCE PAST THE SPEEDY TRIAL DEADLINE ON AN UNTENABLE GROUND.**

In finding the administration of justice justified the continuance, the trial court emphasized the State's need for more time to prepare due to inadequate staffing resources. 2RP 29-34. The State, in defending that decision, does not even attempt to engage State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989). Inadequate staff is not a tenable reason for granting the State's request for a continuance. Wake, 56 Wn. App. at 475. Instead, the State cites State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005). Brief of Respondent (BOR) at 24. As set forth in the opening brief, Flinn is easily distinguishable because the need for more time in that case was not the result of self-created hardship. Brief of Appellant (BOA) at 43-44.

On appeal, the State seizes upon the discovery issue as a tenable basis to grant the continuance. BOR at 25-27. The State's motion to continue the trial was of the kitchen sink variety. CP 1640-47. In the eight-page written motion, reference is made to discovery in only a single paragraph. CP 1644. The bulk of the motion focused on the State's inability to deal with the case due to staffing problems. CP 1640-47.

In granting the motion to continue, the trial court dwelt at length on the State's need for more time to prepare for trial. 2RP 29-34. The trial court briefly mentioned discovery at the end of its ruling, almost as an afterthought: "There's also the matter of on-going discovery in both directions, but still more requests for the production of things the Defense has in its exclusive domain that have not been provided to the State. I don't know all the details of that, but I do know that there are requests still outstanding." 2RP 34.

The State acknowledged the defense had provided a list of witnesses on May 10, 2012. CP 1644. This complied with the discovery order, which called for that list to be made available by May 17. CP 4856. The State complained the defense had not named any other witnesses. CP 1644; 2RP 21. At the continuance hearing, however, the defense did not suggest there would be any other witnesses not already on the witness list.

The State also complained that the defense had not provided notice of any motions in limine. CP 1644. The discovery order contains no such requirement. CP 4856. And there is no such requirement in the discovery rules. CrR 4.7(b), (g).

The State claimed the defense had not provided all copies of transcripts of recordings for State's witnesses and pages from discovery "that went missing over the years from the State's files which it has acknowledged

it possesses." CP 1644; 2RP 21-22. At the hearing, defense counsel told the court that it thought the State already had the entire discovery since the police reports at issue were obtained from the State's files in the first place, but those reports possessed by the defense could be e-mailed to the State that very day. 2RP 26. The trial court did not find the discovery issue, standing alone, justified a continuance. It relied heavily on the State's need to prepare due to inadequate resources, and that reason is untenable in light of Wake.

The State points out scheduling conflicts and witness unavailability may be considered in granting continuances. BOR at 25. But the trial court did not rely on either of those grounds in granting the request.

Finally, the State says Stenson failed to show any prejudice from the continuance. BOR at 27. That is irrelevant. "Failure to strictly comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice." State v. Raschka, 124 Wn. App. 103, 112, 100 P.3d 339 (2004).

2. THE TRIAL COURT ERRED IN FAILING TO GRANT STENSON'S MOTION TO DISMISS THE CASE IN LIGHT OF THE STATE'S MISMANAGEMENT OF THE CASE AND DUE PROCESS VIOLATIONS.

a. The court erred in failing to dismiss under CrR 8.3(b).

The State says the trial court did not abuse its discretion in denying the motion to dismiss. BOR at 37. The trial court, however, applied the wrong legal standard in ruling on the motion to dismiss. A trial court's decision is based on an untenable reason if it relies on an incorrect legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The trial court opined the loss of information and witnesses after a 20-year hiatus impacted the State and the defense equally and the State had already been severely sanctioned by having to endure a retrial. 2RP 92-93. Citing to the trial court's remarks, the State complains the State was already "punished" for its Brady¹ violation. BOR at 40 n.3. But prejudice to the State plays no role in the CrR 8.3(b) analysis. Any prejudice to the State is irrelevant under that standard. The correct standard is whether the defendant suffered prejudice. State v. Rohrich, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). The trial court's consideration of harm to the State amounts to application of an incorrect legal standard and constitutes abuse of discretion in deciding the CrR 8.3(b) motion.

¹ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The trial court also relied on a distinction between good faith mismanagement and "actual misconduct" in ruling dismissal was not warranted here, opining only "actual misconduct" justified the extreme remedy of dismissal. 2RP 91-92. That is not the correct legal standard. To support dismissal, it is enough that simple mismanagement occurred. State v. Oppelt, 172 Wn.2d 285, 297, 257 P.3d 653 (2011). So again, the trial court's ruling relied on an incorrect legal standard, which constitutes an abuse of discretion. Littlefield, 133 Wn.2d at 46-47. The trial court's comment suggests that it gave special consideration to the absence intentional misconduct. But the correct focus must always be on the prejudice to the defendant. Simple mismanagement is capable of causing as much prejudice as intentional misconduct. The state of mind of the government actor has no bearing on the prejudice that results from the impropriety.

The State attempts to narrow Stenson's argument for dismissal to the pants and 911 call record. BOR at 39. Stenson's argument is broader than that. The combination of losses — loss of evidence, lost witnesses, lost leads — materially prejudiced Stenson's presentation of his defense and right to a fair trial. The State is responsible for the fact that Stenson did not get a fair trial the first time around. It withheld exculpatory evidence. The State understandably makes no effort to defend the Brady

violation. Its Brady violation constitutes mismanagement of the case under CrR 8.3(b). That mismanagement has consequences. It is because of that mismanagement that a second trial occurred 20 years later. The State is responsible for the passage of time and the resulting detriment to Stenson's ability to present a defense at the second trial.

The State denies the handling of the pants was mismanagement. BOR at 39. The trial court indicated mismanagement took place without specifying what it consisted of. 2RP 90-92. In any event, the mismanagement of the pants, resulting in the compromise of their evidentiary integrity for blood analysis purposes, goes far beyond a defense expert's complaint that better photos should have been taken of the pants before they were cut up and discarded. BOR at 39. The defense expert detailed the myriad ways in which the State's handling of the pants resulted in loss of key evidence needed to accurately analyze and assess the significance of the bloodstains. BOA at 52-54.

The State emphasizes actual prejudice, and not the possibility of prejudice, is necessary to dismiss a case under CrR 8.3(b). BOR at 36-39. Stenson showed more than a possibility of prejudice to his defense. The requirement for showing prejudice under the CrR 8.3 standard is satisfied where the misconduct interfered with the defendant's ability to present his

case. City of Kent v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011). Stenson satisfies that standard.

Rohrich, a preaccusatorial delay case, provides illustration through contrast. The Supreme Court in that case held the State's delay in bringing the case to trial did not cause actual prejudice to the defendant's ability to prepare his defense. Rohrich, 149 Wn.2d 656-57. Assertions that witness memories "could have faded" or that defendant's memory "could have been compromised" demonstrates only a "possibility of prejudice," which is insufficient to justify dismissal under CrR 8.3(b). Id. at 657 (citing State v. Ansell, 36 Wn. App. 492, 498-99, 675 P.2d 614) ("[t]he possibility that memories will dim is not in itself enough to demonstrate [the defendant] could not receive a fair trial"), review denied, 101 Wn.2d 1006 (1984)). The "mere allegation that witnesses are unavailable or that memories have dimmed is insufficient." Rohrich, 149 Wn.2d 657 (quoting State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993)).

Stenson, in contrast, does not rely on the speculative possibility that witnesses are unavailable or that their memories have faded. We know for certain that this occurred. Two of the more glaring examples involve Jack Mendorf (deceased) and Deanne Chapman (lost memory).

Mendorf, had he still been alive, could have provided very helpful testimony for the defense: Mrs. Hoerner showed up at his doorstep asking

about Frank before she could have known about the murders. 2RP 59; CP 2474. That testimony, which strongly supported the other suspect theory of the defense case, was unavailable for the second trial.

Chapman, had she not lost her memory by the time of the second trial, could have testified that David Oberman privately met with Mrs. Hoerner in the weeks leading up to the murder, admitted owning the gun used in the murders, and asked her to hide the bar that was used to hit Frank on the head. CP 2521, 2529, 3143; 2RP 63-64.² Chapman's testimony would have allowed the defense to argue Mr. Oberman was involved in the murders.³ This testimony, now lost, would have effectively rebutted the argument the State was able to make: that Mrs. Hoerner could not have been the killer because she was too small and weak to overpower Frank by herself and drag him from the driveway to the bedroom. 3RP 4081-82.

Other witnesses, unavailable for the second trial, would have supported the defense case. For example, Cheryl Fabel, Mrs. Hoerner's friend, gave an interview to police in which she said Mrs. Hoerner talked about divorce daily, complained about not getting enough sex, had affairs with other men before Frank died, and knew how to use a gun. CP 2415.

² According to Chapman, Oberman's ex-girlfriend told her that Oberman told someone in a bar that "he had to kill his sister." CP 2453.

³ Police did not investigate Mr. Oberman as a suspect in 1994. CP 2453.

Defense counsel did not call Fabel as a witness to testify to these matters at the second trial because of memory problems, to which the trial court commented "it's not surprising we have some witnesses with memory issues in 20 year's time." 3RP 3086. Fabel's testimony would have supported the defense theory that Mrs. Hoerner was the murderer. The fact that Mrs. Hoerner knew how to use a gun would have been particularly helpful, as no other witness testified to this fact at trial.

David Oberman told a defense investigator in 1993 that Alison, who lived across the street from the Stenson residence, had seen a woman running from the property on the morning of the murders. CP 2423, 2489, 2609. Alison could not be located for the second trial. CP 2423. Again, that lost testimony would have supported the other suspect theory of the defense case.

David Oberman (deceased) could have testified that Frank beat Mrs. Hoerner and that she planned to leave Frank. CP 2429, 2439, 2473. Such testimony would have bolstered the defense theory that Mrs. Hoerner was the killer.

Tracy Reed told police that she saw bruises on Mrs. Hoerner's body before the murders and that Mrs. Hoerner was not getting along with Frank. CP 2431-32. A few days before the shootings, Hoerner walked from her house to the Stenson house in the rain with a suitcase, crying.

CP 2431-32. According to Chapman, Reed knew that David Oberman had been out all night before the murders and then returned "before everything happened." CP 2453. Reed could not be located to testify for the second trial. CP 2478. Reed's prior testimony from the first trial was read into the record, but it did not include the above-referenced information. 3RP 3134-3143.

With regard to blood analysis of the pants, the State contends the State's experts were able to give complete opinions on the matter and so Stenson has no room to complain. BOR at 39. The State shrugs off the defense expert's inability to offer a comprehensive opinion due to the compromised state of the pants as speculative prejudice. Id. What the State misses, though, is that the State's mismanagement of the pants interfered with the defense ability to put on their defense in this regard. What Stenson was left with was an expert who was unable to testify about aspects of the blood spatter, which left him in an inferior position to the State's experts.

The State is solely to blame for the reversal of the original convictions and the need for a second trial. It is the State's fault that this case was tried 20 years later. Stenson's ability to prepare a defense to the charges was compromised as a result of the cumulative loss of evidence.

He shows government mismanagement and actual prejudice. The trial court abused its discretion in refusing to dismiss the case under CrR 8.3(b).

b. Dismissal is warranted due to the Brady violation.

In a footnote, the State asserts dismissal due to the Brady violation is not an available remedy. BOR at 40 n.3. Argument contained in a footnote should not be addressed. State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993). But in an exercise of caution, Stenson addresses it here.

The State claims the Supreme Court has already reviewed the Brady violation and ordered remand for retrial as the remedy. BOR at 40 n.2. According to the State, Stenson has not shown "why relitigation of this issue was warranted." Id.

Stenson asked for a new trial as the remedy for the Brady violation and the Supreme Court agreed. At that time, based on the information available, that limited remedy seemed appropriate. There was no discussion of whether the case should be dismissed. That issue was not raised.

The reason why dismissal is appropriate to consider at this juncture is because the extent of prejudice stemming from the Brady violation did not become manifest until new counsel was appointed and attempted to prepare a defense for the second trial. Trial counsel's ability to prepare

Stenson's defense was stymied by the passage of time and the resulting loss of evidence and investigative leads. The length of time between the first trial and the second must be laid at the State's feet. It was not until 2009 — 15 years after the first trial — that the State revealed the existence of the Brady evidence, and only then in response to counsel's broad request for all records relating to bullet lead analysis, GSR, and blood spatter testing. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 479, 276 P.3d 286 (2012).

Dismissal is a proper remedy for a Brady violation where the delay in revealing evidence compromises defense counsel's ability to adequately prepare for trial. State v. Martinez, 121 Wn. App. 21, 35-36, 86 P.3d 1210 (2004). The State's Brady violation caused a new trial, defense preparation for which was irremediably compromised due to lost witnesses and evidence. Stenson's defense suffered. The State, meanwhile, reaped the benefit of its wrongdoing by being able to strengthen its prosecution after the failed first trial, which is "an advantage the government should not be permitted to enjoy." United States v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008).

c. Dismissal is warranted under the federal test for destruction of evidence.

The State argues Stenson cannot show bad faith from the destruction of the evidence. Stenson relies on his argument in the opening brief that bad faith has been shown. BOA at 33.

The State cites Lovitt v. True, 403 F.3d 171, 186 (4th Cir. 2005) and Ferguson v. Roper, 400 F.3d 635, 638 (8th Cir. 2005) for the proposition that destruction of evidence after the trial does not violate due process. BOR at 31. The destruction of the pants occurred before Stenson's first trial and so the proposition, even assuming its validity, is inapplicable to that claim.

The State includes the 911 call under the due process destruction of evidence theory. BOR at 34-35. The destruction of the 911 call record occurred after the direct appeal in Stenson's first case, but before the second trial. Importantly, both Lovitt and Ferguson are federal habeas cases involving review of a state court decision. Lovitt was concerned that "[e]xtending the destruction of evidence rule today might impermissibly create a 'new rule' on federal habeas review." Lovitt, 403 F.3d at 187. The concern of whether a rule should apply retroactively to a case that is already final is not present in a case like Stenson's, which is now on direct appeal in the state court. There is no retroactivity problem.

Ferguson, meanwhile, involved a prisoner who had his one trial, lost his appeal in the state court, and was seeking relief in a collateral attack setting. Ferguson, 400 F.3d at 636. Stenson's case is on appeal right now. That appeal stems from his second trial. To accept the State's argument would mean defendants who obtain a new trial have no due process protection against destruction of evidence in relation to the new trial. No court has ever held that or even suggested that would be a fair standard. Destruction of evidence occurred before Stenson's trial, he is now on appeal from that trial, and the due process standard applies to the destruction at issue.

d. Dismissal is warranted under an independent due process test based on the Washington Constitution.

Stenson relies on the argument made in the opening brief that bad faith in destroying evidence need not be shown under the Washington Constitution. See BOA at 67-71.

3. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE PANTS EVIDENCE.

The State contends suppression of the pants is not an appropriate remedy under CrR 8.3(b) because Stenson can only show the possibility of prejudice rather than actual prejudice. BOR at 41. The general rule is that actual prejudice is required to justify *dismissal* of a prosecution under CrR 8.3(b). Rohrich, 149 Wn.2d at 657-58 (citing Norby, 122 Wn.2d at 264).

But the State does not cite a single case that requires a showing of actual prejudice to justify the lesser remedy of *suppression* of evidence. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

The salient question is whether suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct. State v. Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). The opening brief sets forth the prejudice to the defense caused by the failure to suppress the pants evidence. See BOA at 73-75.

The State further claims suppression of the pants is not an appropriate remedy under a due process destruction of evidence theory because Stenson cannot show bad faith in failing to preserve them. BOR at 40-41. Stenson relies on the argument made in the opening brief that bad faith was shown or, in the alternative, that bad faith need not be shown under the Washington Constitution. See BOA at 67-71, 76.

4. THE TRIAL COURT ERRED IN REFUSING TO GIVE THE SPOILIATION INSTRUCTION PERTAINING TO THE PANTS.

"When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would

be unfavorable to the nonproducing party." Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 689, 871 P.2d 146 (1994) (citing Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)). The State argues the trial court properly refused to give a spoliation instruction because the State provided a satisfactory explanation for why the pants cutouts were not preserved. BOR at 44. According to the State, the fact that the cutouts were made as part of the DNA testing process explains their loss. Id.

That is not a satisfactory explanation. The State understood the importance of the pants. The bloodstain evidence and associated analysis constituted the cornerstone of the State's theory of guilt. But Grubb, the State's bloodstain analyst, either did not tell Detective Martin that the pants should be examined for bloodstains before being cut up or Martin did not tell the FBI that the pants should be examined for bloodstains before being cut up. 3RP 2506; CP 456, 489-90. No explanation, let alone a satisfactory one, is offered for this failure.

Further, the State offered no explanation for why the FBI did not notify the Sheriff's Office or the prosecutor's office that a blood analyst was unavailable and that it would go ahead with the destruction of the bloodstained portion of the pants through DNA testing unless other

arrangements were made. 3RP 2364 (FBI analyst Errera did not call Detective Martin or anyone else).

Additionally, the FBI could have just taken the centers of the bloodstains, leaving the perimeter or "halo" intact, which would have enabled defense expert Sweeney to render an opinion regarding the origination of the blood spatter on the right knee. CP 1543. No explanation was given for why the FBI did not leave the halo intact. The spoliation instruction was warranted because the State failed to offer a satisfactory explanation for cutting up the pants before a bloodstain analysis could be done and for not leaving the halo intact.

The State points out the presence of bad faith is a factor a trial court can consider in determining whether to give a spoliation instruction. BOR at 44. But bad faith is not a prerequisite. Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654 (2006). The State minimizes the trial court's reliance on the absence of bad faith in its ruling, describing the court as merely "noting that it had not found any bad faith." BOR at 44. The trial court did not simply make a passing reference to bad faith. Rather, the court relied on the absence of bad faith as justification for its ruling. 3RP 3956-57. The court necessarily abused its discretion by basing its ruling on an erroneous view of the law. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

The State does not attempt to defend the trial court's ruling that the proposed spoliation instruction was a comment on the evidence. The State thereby concedes the instruction was not a comment on the evidence and the court erred in ruling otherwise. See In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it.").

5. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE STATE'S WITNESS — THE OTHER SUSPECT IN THIS CASE — EXPRESSED HER OPINION THAT STENSON WAS GUILTY OF KILLING HER HUSBAND.

The State contends the trial court properly refused to grant a mistrial after Mrs. Hoerner improperly opined Stenson killed her husband. BOR at 42. It emphasizes the abuse of discretion standard. "Simply reciting 'abuse of discretion' as a standard of review is not helpful. At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses his or her discretion. The range of those discretionary choices is, therefore, a question of law." State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

The State claims an abuse of discretion occurs when the court adopts a view that no reasonable judge would take. BOR at 52-53. That formulation of the standard has been criticized as inaccurate, and "[s]trict application of such a standard would mean that an appellate court would

never reverse without a hearing to determine the general reasonableness of the judge." Cogle v. Snow, 56 Wn. App. 499, 506, 784 P.2d 554 (1990).

At best, the "no reasonable judge" standard is the most extreme form of abuse of discretion. It is not the only one. "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Littlefield, 133 Wn.2d at 47.

In addressing whether the trial court abused its discretion in refusing to grant a mistrial, this Court need not close its eyes to the trial court's statements showing its investment in avoiding another trial. 1RP 224, 462. The trial court addressed the mistrial motion with an eye toward this appeal. 3RP 1507-08. And in this regard, the trial court spent a good deal of effort in defending its position that Mrs. Hoerner did not intentionally violate the court order. 3RP 1509-11. That perception is attacked in the opening brief because it does not jibe with the sequence of events. BOA at 94-95. Further, the trial court, in ruling on the motion, did not have the benefit of her brother Hedrick's testimony that Mrs. Hoerner could hyperventilate and tear up at will. 3RP 3299-3300.

But regardless of whether Mrs. Hoerner intentionally violated the order not to give opinion testimony, reliance on her state of mind is misplaced. In considering the prejudicial effect of a trial irregularity, "the judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). To the extent the trial court based its mistrial ruling on its belief that Mrs. Hoerner did not intentionally violate the court's order, the court abused its discretion by placing weight on the supposed lack of intentionality when the question of intention properly carries no weight. Weber, 99 Wn.2d at 164-65. A court abuses its discretion when it applies the wrong legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

The State claims the prejudice to Stenson was minimal because it would come as no surprise that the other suspect in the case would blame Stenson for the murders. BOR at 53. That is one way to spin the matter. But that is not the only way the jury could have assessed the improper opinion testimony. It may have given Mrs. Hoerner's opinion particular credence because, of all the witnesses who testified, she was in a position of having the most intimate knowledge of what really happened the night

of the murders. The jury may therefore have given her opinion particular weight when it should have carried none. Opinion testimony is unfairly prejudicial to the defendant because it invades the exclusive fact-finding province of the jury. State v. Johnson, 152 Wn. App. 924, 930, 219 P.3d 958 (2009).

The State emphasizes jurors are presumed to follow the court's instructions and the trial court instructed the jury to disregard Mrs. Hoerner's improper comment. Stenson relies on the opening brief to argue not all comments are curable and some require a mistrial notwithstanding instruction to disregard. BOA at 97-100. Such is the case here.

6. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A DEFENSE WITNESS'S PRIOR DRUG CONVICTIONS UNDER ER 609.

The State contends the trial court properly admitted prior drug conviction evidence because it was used to impeach Stenson's witness (Ms. Wagner) rather than Stenson himself. BOR at 54. That contention fails.

The rule is that "[p]rior drug convictions are generally not probative of a witness's veracity and thus are usually inadmissible for impeachment purposes under ER 609(a)(1)." State v. Hardy, 133 Wn.2d 701, 715, 946 P.2d 1175 (1997). There is "nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful." Hardy, 133 Wn.2d at 709-10. That proposition applies equally to all witnesses,

not just defendants who choose to testify. The State does not and cannot explain why a drug conviction that has no probative value for a defendant's veracity suddenly takes on probative value for another witness's veracity. The State makes no argument that Wagner's ordinary drug convictions are probative of her truthfulness and nothing in the record would support such an argument. For that reason, the evidence was improperly admitted for impeachment purposes under ER 609(a), regardless of the extent of its prejudicial effect.

A trial court abuses its discretion when it applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). The trial court's failure to balance the requisite factors and conduct an analysis of probative value versus prejudicial effect on the record means the court necessarily abused its discretion in admitting the drug conviction evidence to impeach Wagner. State v. Calegar, 133 Wn.2d 718, 722, 947 P.2d 235 (1997); Hardy, 133 Wn.2d at 712.

The State also claims Wagner's conviction had no prejudicial effect on Stenson's character. That may be so, but prejudice remains. The prejudice is that the jury used the drug conviction evidence against

Wagner to discount her testimony. Wagner was Stenson's witness. She testified in support of the defense theory that Mrs. Hoerner was the real killer. By improperly undermining Wagner's testimony through the drug conviction evidence, the State was able to weaken the defense.

The State says the error is harmless because Wagner's testimony is cumulative. BOR at 59. That assessment is incorrect. First, it is important to consider not only the content of what was testified to, but also the status of the person who gave the testimony. Wagner was Mrs. Hoerner's friend and neighbor during the 1990's, so she had a unique opportunity to observe Mrs. Hoerner's behavior first hand over a long period of time and to be the recipient of her confidences. 3RP 3011-13, 3017-18. Further, Wagner had no personal relationship with Stenson or his family, whereas Denise Oberman was a sister-in-law who described Stenson and his marriage in positive terms. 3RP 3033, 3037-39. Oberman could be viewed as harboring bias and her testimony about Mrs. Hoerner discounted accordingly. But Wagner was not exposed to a charge of being biased toward Stenson. Her testimony, minus the improper drug conviction evidence, naturally would have carried more persuasive force.

As for the content of what was testified to, Wagner's testimony was not simply a mirror image of what others said. She provided facts that others had not alluded to, such as (1) Mrs. Hoerner's admission that

she would be better off financially if Frank died and (2) Mrs. Hoerner got rid of most of Frank's things a couple weeks after his death, went on a lavish shopping spree, and did not portray herself as missing or mourning her husband. 3RP 3021-24.

The details are important and it is important who was doing the telling. The jury may have found one or more of facts provided by Wagner compelling if Wagner's testimony had not been discredited through improper admission of the drug conviction evidence. See Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983) ("Because there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.").

As part of its cumulative argument, the State points to Mrs. Hoerner's testimony in which she admitted going to Hawaii with another man and posing for the bikini photograph. BOR at 59; 3RP 1434-35. But her refusal to admit dissatisfaction with her husband meant that the bare facts she did admit to were not placed in the wider context of an unhappy marriage. Wagner's role as a defense witness was to provide that context while offering specific, damaging facts related to Mrs. Hoerner's motive for doing away with her husband.

The State also claims the error is harmless because other evidence pointed to Stenson, not Mrs. Hoerner, as the murderer. BOR at 59. The

evidence, however, allowed for either conclusion. The defense put on a good deal of evidence that pointed to Mrs. Hoerner as the other suspect, and true killer, in this case. See BOA at 28-34. For the reasons stated above and in the opening brief, there is a reasonable probability affected the outcome. The error also contributes to the cumulative error analysis.

7. PROSECUTORIAL MISCONDUCT VIOLATED STENSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The State claims the trial prosecutor did nothing wrong in using a puzzle analogy in closing argument because there was no argument about the "percentage" required to find guilt beyond a reasonable doubt. BOR at 65. The sin, however, is the quantification of the standard of proof by means of a jigsaw puzzle analogy. State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). Referring to a percentage is one way to quantify. Referring to a specific number of pieces is another. The prosecutor, in discussing how guilt could be found beyond a reasonable doubt, referred to a specific number of missing puzzle pieces. 3RP 4172-73. That quantified the reasonable doubt standard and was misconduct.

Further, the State does not address Stenson's argument that the prosecutor compounded the misconduct by referring to jurors working quite a few actual jigsaw puzzles during the trial in the midst of explaining why the jumbled evidence, once pieced together in some fashion, added

up to guilt beyond a reasonable doubt.⁴ 3RP 4170. The link drawn between the juror's task and the mundane task of working a jigsaw puzzle trivialized the State's burden. State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011). It is improper to discuss the reasonable doubt standard in the context of everyday decision making. Johnson, 158 Wn. App. at 684-85. Stenson otherwise relies on the argument made in the opening brief.

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

The State contends the Supreme Court has approved of WPIC 4.01 and therefore Stenson cannot show the reasonable doubt instruction is unconstitutional. BOR at 66-69. The Supreme Court will ultimately need to resolve the matter, but nothing prevents the Court of Appeals from assessing Stensons's attack on this instruction in light of argument that no appellate court has yet to grapple with.

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

In State v. Kalebaugh, the Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason

⁴ The court earlier mentioned "I do understand they've run out of jigsaw puzzles." 3RP 3924-25.

can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015).⁵ That conclusion is sound. Instructing a jury that "a reasonable doubt is such a doubt as the jury are able to give a reason for" can "only lead to confusion, and to the detriment of the defendant. A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that you have a reasonable doubt of the defendant's guilt; give a reason for your doubt; and under the instruction given in this cause the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. 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 which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case." Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893).

Further, who shall determine whether a juror is "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.

⁵ The Supreme Court issued its decision in Kalebaugh after Stenson filed his opening brief.

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) (criticizing "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 WPIC 4.01.

In Bennett, the Supreme Court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In Emery, the Court contrasted "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. State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012).

In Kalebaugh, the Court contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt for which a reason can be given.'" Kalebaugh, 183 Wn.2d at 584. The 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. at 585.

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

The appellant did not advance the legal theory that the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard in Kalebaugh, Emery or Bennett. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each

flows from the unquestioned premise that WPIC 4.01 is correct. Those cases did not involve a direct challenge to WPIC 4.01, so their approval of WPIC 4.01's language does not control. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

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

40 years ago, in State v. Thompson, the Court of Appeals addressed an argument that "'The 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." Thompson, 13 Wn. App. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959) and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without

merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959).⁶ Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addresses the doubt "for which a reason exists" language in the instruction. There was no challenge to that language in either case, so it was not an issue.

Thompson observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following instructional language: "It should be a doubt for which a good reason exists, — a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." Harras, 25 Wn. at 421. Harras simply

⁶ The "standard" instruction at issue in Tanzymore read: "You are instructed that the law presumes a defendant to be innocent until proven guilty beyond a reasonable doubt. This presumption is not a mere matter of form, but it is a substantial part of the law of the land, and it continues throughout the entire trial and until you have found that this presumption has been overcome by the evidence beyond a reasonable doubt.

"The jury is further instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists. You are not to go beyond the evidence to hunt up doubts, nor must you entertain such doubts as are merely vague, imaginary, or conjectural. A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." Tanzymore, 54 Wn.2d at 291 n.1.

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).⁷ Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.⁸

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, 13 Wn. App. at 5. 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

⁷ For the Court's convenience, the relevant portion of the note cited by Harras (48 Am. St. Rep. at 574-75) is attached as appendix A to the brief.

⁸ See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 199 (La. 1891) ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or 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."); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (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.").

must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 183 Wn.2d at 585.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. In Harsted, the defendant took exception to the following instruction: "The expression 'reasonable doubt' means in law just what the words imply-a doubt founded upon some good reason." Harsted, 66 Wn. at 162. The Supreme Court explained the phrase "reasonable doubt" means that, "if it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63.

In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated by one of these decisions, "[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-

92 (Wis. 1899).⁹ Harsted noted some courts disapproved of the same kind of language,¹⁰ but was "impressed" with the view adopted by the other cases it cited and felt "constrained" to uphold the instruction. Id. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the 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

⁹ Additional citations include the following: State v. Patton, 66 Kan. 486, 71 Pac. 840, 840-42 (Kan. 1903) (instruction defining a reasonable doubt as such a doubt "as a jury are able to give a reason for"); Hodge v. State, 97 Ala. 37, 41, 12 South. 164, 38 Am. St. Rep. 145 (Ala. 1893) ("a reasonable doubt is defined to be a doubt for which a reason could be given."); State v. Serenson, 7 S. D. 277, 64 N. W. 130, 132 (S.D. 1895) ("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 the jury are able to give a reason for."); Vann, 9 S.E. at 947-48 ("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."); People v. Guidici, 100 N. Y. 503, 510, 3 N. E. 493 (N.Y. 1885) ("You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence-a doubt for which some good reason arising from the evidence can be given."); Jefferson, 43 La. Ann. at 998-99 ("A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or 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.").

¹⁰ Citing Siberry, 133 Ind. at 684-85; Bennett v. State, 128 S. W. 851, 854 (Ark. 1910); Blue v. State, 86 Neb. 189, 125 N. W. 136, 138 (Neb. 1910); Gragg v. State, 3 Okl. Cr. 409, 106 Pac. 350 (Okla. Crim. App. 1910).

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. We know it's rotten because the Supreme Court in Emery and Kalabaugh, 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 okay 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 4.01.¹¹ Cf. People v. Jackson, 167 Mich. App. 388, 391, 421 N.W.2d 697 (Mich. Ct. App. 1988) ("An instruction defining reasonable doubt may not shift the burden of proof by requiring the jurors to have a reason to doubt the defendant's guilt. Rather, the

¹¹ Division One of the Court of Appeals has not. See State v. Lizarraga, __ Wn. App. __, __ P.3d __, 2015 WL 8112963, at *20 (slip op. filed Dec. 7, 2015) (upholding WPIC 4.01 as correct statement of law, citing Bennett).

instruction must convey to the jurors that a reasonable doubt is an honest doubt based upon reason.").

As argued, 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.

B. CONCLUSION

For the reasons stated, Stenson requests that this Court reverse the convictions and dismiss the charges, or in the alternative, remand for a new trial.

DATED this 26th day of January 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

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*, 123 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: *Yann 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

N.
to t
ma
cou
lan
mig
for,
doc
v. A
is si
give
defi
som
mea
and
burd
guilt
and
reasc
Ind.
fault
instr
sical
cited
poor
The
neede
lated
The
reaso
"reas
a rea
or wa
v. St
or no
104, 1
"I
A rea
partic
of lif
befor
v. Pe
Boulé
Mont
it has
ficien
judgr
upon
affair
Keari
victic
deare

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

| | | |
|--------------------------|---|--------------------|
| STATE OF WASHINGTON/DSHS |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 45665-6-II |
| |) | |
| DAROLD STENSON, |) | |
| |) | |
| 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 28TH DAY OF JANUARY, 2016 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAROLD STENSON
 DOC NO. 232018
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JANUARY, 2016.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

January 28, 2016 - 4:13 PM

Transmittal Letter

Document Uploaded: 3-456656-Reply Brief.pdf

Case Name: Darold Stenson

Court of Appeals Case Number: 45665-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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

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

jeremy@glissonmorris.com