

NO. 45665-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAROLD STENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 93-1-00039-1

BRIEF OF RESPONDENT

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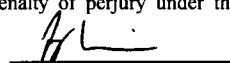
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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED December 3, 2015, Port Orchard, WA 

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant has failed to show that the trial court abused its discretion in granting the State's motion to continue the trial when the State provided numerous grounds that justified the continuance?

2. Whether the Defendant's claim that the trial court erred by declining to dismiss the case is without merit when the Defendant failed to show that a dismissal was warranted under either the due process clause or under CrR 8.3?

3. Whether the Defendant's claim that the trial court abused its discretion in failing to suppress the pants is without merit when the trial court acted well within its discretion in finding that suppression was not warranted under either a due process or CrR 8.3 analysis?

4. Whether the Defendant's claim that the trial court abused its discretion when it declined to give a "missing evidence" instruction is without merit when such an instruction can only be given when the absence of the evidence is unexplained, and when the absence of the cuttings from the Defendant's pants was explained in the present case?

5. Whether the trial court abused its discretion in denying the motion for a mistrial when the trial court was in the best position to weigh the potential prejudice caused by the irregularity and when the trial court

immediately instructed the jury to disregard the comment and juries are presumed to follow instructions from the court?

6. Whether the Defendant's claim that the trial court abused its discretion in admitting a witness's previous conviction under ER 609 is without merit when the Defendant has failed to show that the trial court abused its discretion, and when, even if this Court were to find error, any error was harmless?

7. Whether the Defendant's claim that State committed prosecutorial misconduct by misstating the burden of proof is without merit when the Defendant has failed to show the State's comments were improper?

8. Whether the Defendant's claim that WPIC 4.01 is unconstitutional is without merit when the Washington Supreme Court has found that the instruction at issue is both constitutional and a correct statement of the law?

9. Whether the Defendant's claim of cumulative error is without merit when the Defendant has failed to show that the trial court erred at all or that the existence of combined errors denied the Defendant a fair trial?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

In 1993 Stenson was charged by information filed in Clallam County Superior Court with two counts of aggravated first degree murder. *State v. Stenson*, 132 Wn.2d 668, 681, 940 P.2d 1239 (1997). The case was tried to a jury in July and August of 1994, and the jury found Stenson guilty of first degree murder of Denise Stenson and Frank Hoerner. *Id* at 682. Stenson was ultimately sentenced to death. On appeal, the Washington Supreme Court affirmed the convictions and the death sentence. *Id* at 760. The Supreme Court later rejected four personal restraint petitions filed by Stenson. *In re Stenson*, 174 Wn.2d 474, 478, 276 P.3d 286 (2012).

In 2012, however, the Court reversed Stenson's convictions and sentence, and remanded the case for a new trial. *In re Stenson*, 174 Wn.2d at 494. On remand, the State did not seek the death penalty. 1 RP (1/11/13) 18. Trial began on September 16, 2013. 3 RP 2. The jury found the Defendant guilty of the two charges. CP 242. This appeal followed.

B. FACTS

After the initial trial was reversed, the Defendant was returned to Clallam County in August of 2012 for retrial. A trial date was later set for July 15, 2013 at the Defendant's request, with the last day for trial under CrR

3.3 set for August 14, 2013. *See*, 1 RP (1/11/13) 31¹, CP 4222.

On June 5, 2013, the State filed a motion to continue the trial and the prosecutor attached a certification to the motion to continue that explained that there were numerous reasons for the request. CP 1640-47. Specifically, the prosecutor signed a certification attached to the motion to continue explaining that the defense had not yet provided discovery to the State, and the defense had only filed a witness list as of May 10, 2012. CP 1644. The defense has also not provided transcripts of recordings taken from various witness interviews, nor had the defense provided numerous pages of discovery that were no longer available to the State. CP 1644. The State also noted that the defense had indicated that it would have additional witnesses, but those witnesses had not yet been named by the defense. CP 1644.

In addition, on May 17th the defense filed several voluminous motions that the State was required to respond to, and the State further noted that some of those motions would likely require evidentiary hearings. CP 1644-45 (referencing CP 2010; 2398).

The State further explained that there were also several witnesses who had not yet been located, and that the State had enlisted the assistance of the U.S. Marshall's service in tracking down these witnesses. CP 1645-46.

¹ For simplicity's sake, the State is using the same method of citing to the record that was

In addition, the prosecutor noted that the case was extraordinarily complicated and that the documentary evidence was extensive, which, of course, had been part of the reason for the Defendant's original request to continue the trial date to July. The prosecutor further explained that she had an immediate family member who had been diagnosed with an extremely serious medical condition, and that as a result the prosecutor had been spending one week a month in Seattle while this family member received medical treatment. CP 1643. The prosecutor thus estimated that she had lost almost four months of work time due to this illness. RP 1643. Given all of these issues, the State sought a continuance of the then scheduled trial date.

The defense filed a written response which did not deny any of the factual issues raised in the State's motion or the prosecutor's certification, but asked the court to deny the motion. CP 1280-81. The defendant's response conceded that the case was "very difficult to prepare for because of the years of litigation that was involved," and the defense asked that if the Court were to grant a continuance that the Court make it as short as possible. CP 1281.

On June 12, 2013 a hearing was held on the State's motion to continue. 2RP (6/12/13) 17. At the hearing the prosecutor again explained that she had not received the defense discovery that she had requested. 2RP

used in the Appellant's brief. See, App.'s Br. at 4, n. 1.

(6/12/13) 20. The prosecutor also explained that the defense had indicated that there would be more defense witnesses, but these witnesses had not yet been named. 2RP (6/12/13) 20-21. There were also defense experts that had not yet completed their examination of the evidence, thus the State had no reports or knowledge of what the proposed testimony from these defense experts would be. 2RP (6/12/13) 22.

The State further noted that the defense had promised to provide transcripts and recordings of previous witness interviews, but the defense had not yet provided those materials for 13 witnesses. 2RP (6/12/13) 21. In addition, the State had previously requested that the defense provide as discovery several old police reports that were no longer available to the State, and the defense had acknowledged back on May 8th that the defense had those reports and would turn those over by May 15th, yet those reports had not yet been provided by the defense. 2RP (6/12/13) 22.

A written Order Compelling Discovery memorializing the trial court's May 8th ruling was entered on June 8, 2013. See, CP (TBD) - State's Supplemental Designation of Clerk's Papers (June 5 Order Compelling Discovery), filed simultaneously with this brief. The Order Compelling specifically required the defense to provide copies of any written, transcribed, or recorded statements taken from either defense or prosecution witnesses by May 17, 2013. The order also required the defense to provide copies of

numerous pages of discovery from the original trial. *Id.* As the State noted in the written motion to continue trial and the attached declaration (and again at the hearing on June 12), the defense had not complied with these rulings at the time of the motion to continue.

Finally the State noted that one of its witnesses had a double knee replacement surgery scheduled for the end of June and would thus be unavailable for 8 to 12 weeks. 2RP (6/12/13) 23.

The defense objected to any continuance. 2RP (6/12/13) 24. The defense stated that it was checking on the interview recordings and transcripts. 2RP (6/12/13) 25. The defense further stated that it would provide the old police reports by email in the near future. 2RP (6/12/13) 26. The defense conceded that this was a “very difficult case” and that it was “difficult for both sides.” 2RP (6/12/13) 25. The defense did not respond to the State’s statements about additional defense witnesses, expert witnesses, or expert witness reports.

The trial court then explained that it had reviewed CRR 3.3 and noted that a trial court was allowed to grant a motion for a continuance when it was “required in the administration of justice” and would not substantially prejudice the Defendant, and that there must be convincing and valid reasons for the continuance. 2RP (6/12/13) 29. The court then noted that the State

had been “papered to death” by the defense. 2RP (6/12/13) 30. The trial court was careful to explain that this was not a criticism of the defense, but rather was merely meant to note that the amount of material that the State, and the trial court, were required to deal with was extensive. 2RP (6/12/13)30. The trial court further noted for the records that materials generated by the defense for the then pending motion to dismiss “measured 8 inches,” and that the motions before the court included a “huge volume of material.” 2RP (6/12/13) 30-31.

The trial court further noted that the State had raised issues regarding the on-going discovery requests and the fact that the defense had not provided some of those material to the State. 2RP (6/12/13) 34.

Given these factors, the trial court found that a continuance was “required in the administration of justice.” 2RP (6/12/13) 34. The trial court then turned to the issue of a new trial date.

The State had noted that it was initially going to request a 30 day continuance (which would have been within the currently established time for trial period), but upon further consideration of all of the pending issues the State felt that a 60 day continuance was more appropriate. 2RP (6/12/13) 23. Similarly, the defense at first explained that it was initially going to ask that if a continuance be granted that it be with the 30 day period. 2RP (6/12/13) 36.

The defense, however, further explained that one member of the defense team had a pre-planned family vacation from August 18th to 24th, so the defense then asked that if the court were going to set a new trial date that it be set for as soon after August 24th as possible. 2RP (6/12/13) 36-37. The trial court then explained that late August was “just not possible” due to the court’s schedule and that the earliest date would be September 16. 2RP (6/12/13) 38. The trial date was then set for September 16. 2RP (6/12/13) 38; CP 1270.

Evidence at Trial

At trial, the evidence showed that on March 25, 1993 the Defendant and his wife, Denise Stenson, lived with their children on a piece of property that they called “Dakota Farms” where the Defendant operated a business raising ostriches and other birds. 3 RP 674, 761, 889, 1171. At approximately 4:00 am on March 25, the Defendant called 911 and stated, “this is DJ Stenson at Dakota Farms . . . Frank has just shot my wife, and himself, I think.” Exhibit 185.

Law enforcement arrived at the farm soon after, and the Defendant met the officers outside and led them to a bedroom where Frank Hoerner (a friend and business associate) lay face down on the floor dead of an apparent gunshot wound to the head. 3RP 589-90. A revolver rested near or on Mr.

Hoerner's left hand. 3RP 608. Then Defendant then led officers to an upstairs bedroom where Denise Stenson was in bed with a gunshot wound to her head. 3RP 589-90. Denise Stenson was alive, however, and medics soon arrived and began treating her. 3RP 667, 852. Mrs. Stenson was ultimately transported by helicopter to Harborview, but she died from her injuries the following day. RP 863-64, 989-90.

Law enforcement spoke with the Defendant at the scene and the Defendant explained that the night before he and his wife and Mr. and Mrs. Hoerner had gone to dinner at the Paradise restaurant with a number of other couples. 3RP 669. The Stensons had come home around 9:30 and the Defendant said he called Mr. Hoerner that night and asked him to come over to sign some insurance paperwork. 3 RP 675, 679-82. Mr. Hoerner indicated he would come over in the morning, and the next morning around 3:30 a.m. Mr. Hoerner had called and said he would come over in about 15 minutes. 3RP 669. Mr. Hoerner then arrived and the Defendant and Mr. Hoerner went to an office in one of the outbuildings. 3RP 670. The Defendant told law enforcement that he was going to go to Texas and that Mr. Hoerner became upset when he told Mr. Hoerner that he couldn't come along on the trip. 3RP 671.

The interview with the Defendant moved to another room and law enforcement asked the Defendant to go on about Mr. Hoerner being upset

about not going to Texas. 3RP 670-71. The Defendant then said that “Oh, he wasn’t going to go to Texas.” 3RP 671. The Deputy then asked what the Defendant was upset about. The Defendant said that he had told Mr. Hoerner that he would have to take his birds home and not keep them at Dakota Farms. 3RP 671. The Defendant explained that when he told Mr. Hoerner this, “Frank just became Frank,” and became “quiet and moody.” 3RP 671-72. At this point Mr. Hoerner told the Defendant that he had to use the restroom and left the office area to go use a bathroom in the residence. 3RP 672-73.

The Defendant claimed that after 10 to 15 minutes had passed he went to check on Mr. Hoerner, saw that the utility room door was ajar, went inside, and found Mr. Hoerner. 3RP 673. The Defendant also claimed that hadn’t heard any shots. 3RP 674. He then heard moaning and went upstairs where he found that his wife had also been shot, and he then called 911. 3RP 673.

During the interview with law enforcement at the scene, the Defendant also mentioned that Mr. Hoerner was having problems with his sex life and provided details. 3RP 674. Specifically, the Defendant said that the Mr. Hoerner “couldn’t get it up” and that he blamed his wife for this. 3RP 675. The Defendant also told law enforcement that Mr. and Mrs. Hoerner were not getting along and that Mr. Hoerner had hit Mrs. Horner at some time in the past. 3RP 683-84.

When the deputy asked the Defendant questions about whether he had any idea who would do something like this, the Defendant responded that he knew absolutely no reason why Frank Hoerner would shoot his wife. 3RP 686. The Defendant also stated that the Hoerners owned six birds on the farm, but beyond those six birds the Hoerners had no business interest in Dakota Farms. 3RP 686.

As law enforcement investigated the crime scene, however, it became clear that the Defendant's version of events (a murder-suicide) was inconsistent with the evidence.

The Defendant, for instance, had claimed he did not hear any gunshots, but two sisters, Allison Ainslie and Vicky Urbanczyk, who lived across the street from Dakota Farms testified that on the night of the murders they had been sleeping but woke up when they heard a loud boom or bang. 3RP 1545, 1552. Ms. Ainslie looked out the window and didn't see anything, so she went back to bed. 3RP 1545-57. The next morning, however, she saw sheriff's deputies at the scene. 3RP 1547.

Also, when Mr. Hoerner's body was rolled over, officers noticed an abrasion and dirt on his left hand that looked like he had fallen on hard gravel or a driveway. 3RP 755-56. Officers then checked outside and found blood droplets and "scuff marks" in the driveway. 3RP 756. Law enforcement also

noticed blood spatter in the utility or laundry room, in the entryway area, and outside the residence. 3RP 608-09.

When a deputy checked Mr. Hoerner for a pulse, he noticed that Mr. Hoerner's neck was hot and sweaty. 3RP 678. A longtime friend of Mr. Hoerner's, Daryl Joslin testified that he saw Mr. Hoerner nearly every day and that Mr. Hoerner's job was very physically demanding and that Mr. Hoerner was very strong. 3RP 1208-10.

A later autopsy showed that Ms. Stenson died of a single gunshot wound to the head. 3RP 994, 1002. The pathologist, however, characterized the wound as "not self inflicted." 3RP 1892. Several factors went into this characterization. First, it was found that Mr. Hoerner had an extraordinary number of abrasions or deep scrapes on his body consistent with having been dragged across a rough, gravel surface, and gravel was found in his underwear. 3RP 1833, 1848, 1855-58. The pathologist testified that these injuries were, in his opinion, dragging injuries. 3RP 1877.

Mr. Hoerner also had a deep abrasion on his face that was evidence of a "big, heavy time hit." 3RP 1861-62. He also had a more extensive wound to the back of his head that was described as large, deep laceration that went through the scalp down to the bone. 3RP 1847. The pathologist testified that this wound was also a "heavy hit to the head" and that the force of the blow

would “drop the guy” and would have either stunned him or left him unconscious. 3RP 1866. The injuries to Mr. Hoerner’s face and back of his head were also found to be consistent with injuries caused by being struck with elongated pieces of wood with sharp edges, such as the martial arts weapons that were found at the Defendant’s home. 3RP 1870-71.

At the Defendant’s home deputies had found what they referred to as a “martial arts room” where the Defendant had a collection of “nun chuckas” hanging on the wall. 3RP 640-43. One hook or wire in the collection was blank, suggesting that an item appeared to be missing from the collection. 3RP 640.

With respect to the gunshot wound to Mr. Hoerner’s head, the pathologist explained that the dark area of burning around the wound indicated that the firearm was close to, but not against, Mr. Hoerner’s head when it was fired. 3RP 1872-75. The pathologist further testified that the overwhelming number of suicidal gunshot injuries are contact wounds where the gun is held against the head and it would be “exceedingly unusual” for an intentional suicide with a gun to occur with the gun held some distance away from the head. 3RP 1876. Thus, the gunshot wound found on Mr. Hoerner was “Not the typical, I’m going to end my life, I’m putting the gun against my head” type of wound. 3RP 1874076. Rather, the gun was held “some distance away.” 3RP 1875-76.

Subsequent testing of the gravel found in Mr. Hoerner's underwear found that it was characteristic of the gravel found in the Defendant's driveway. 3RP 1959. The color texture, composition, and the presence of some tar, was consistent in both samples and the driveway was thus a "likely source in terms of the material that was removed from the buttock and back of Mr. Hoerner." 3RP 1965-66.

Subsequent testing on blood found at various locations at the crime scene were also found to be inconsistent with the Defendant's version of events and his statement that blood may have gotten on his pants when he knelt down next to Mr. Hoerner's body. 3 RP 673, Ex. 217A at 14-15.

Specifically, several blood stains found on the Defendant's pants were tested over the years with several DNA tests. Early on, for instance, PCR testing showed that the bloodstain from the knee area of the Defendant's pants were found to be consistent with the Mr. Hoerner's blood, but inconsistent with Mrs. Stenson's blood and with the Defendant's blood. 3RP 2203-21.

In another test, the genetic marker test, blood from the Defendant's pants was found to be consistent with genetic markers from Mr. Hoerner's blood, but inconsistent with samples from Mrs. Stenson and the Defendant. 3RP 2324-29. Similarly, blood stains found on the concrete near the

entryway, the dryer in the utility room, a rug, and a wall behind the door in the utility room, were found to have genetic markers consistent with samples taken from Mr. Hoerner, and inconsistent with samples taken from Mrs. Stenson and the Defendant. 3RP 2336-42.

An “RFLP” DNA analysis similarly showed that DNA found on the cutting from the Defendant’s pants matched the known sample taken from Mr. Hoerner and did not match the samples taken from Mrs. Stenson and the Defendant. 3RP 2627, 2635-36. The likelihood that an unrelated individual from the Caucasian population would have this same profile was one in 500,000. 3RP2636-37.

A more modern DNA test, known as “STR” testing, was also conducted on several stains from the Defendant’s pants in 2009. 3RP 2517. One of these stains, taken from the left leg near the cuff, was found to have enough DNA for testing purposes and the DNA found in that stain matched Mr. Hoerner’s DNA and genetic markers. 3RP 2520. The probability of selecting an unrelated individual from the US population at random that would have the same genetic markers is one in 79 billion. 3RP 2520-21.

Michael Grubb, a forensic scientist (who at the times was with the Washington State Patrol Crime Lab and is now the directory of the San Diego crime lab) with extensive training and experience in crime scene analysis and

crime scene reconstruction also examined the scene at the Defendant's residence. 3RP 2391, 2408. Mr. Grubb testified about several matters, including the firearm that was found near Mr. Hoerner. Mr. Grubb explained that the position of the gun that was found on Mr. Hoerner's hand suggested that Mr. Hoerner's hand had come to its resting place first and that the gun had either been placed, or come to rest later, on Mr. Hoerner's hand. 3RP 2417.

Mr. Grubb also examined the Defendant's pants in 1994, sometime after the stains on the right knee had been cut out during the DNA testing. 3RP 2446. A number of other stains, however, remained on the lower left pant leg and in the left cuff area. 3RP 2446-56. The stain on the lower left pant leg was caused by an "airborne droplet," and other stains from the left cuff area were also found to be classic, "medium velocity" airborne droplets, consistent with droplets that would be caused by beating a bloody object. 3RP 2455-56. Mr. Grubb further opined that the stains on the Defendant's jeans did not come about while Mr. Hoerner laid on the floor in his final resting place, and the stains were inconsistent with having been deposited when the Defendant knelt down next to Mr. Hoerner's body, as the Defendant had suggested. 3RP 2462-66.

Another crime scene reconstructionist, Rod Englert, also examined the evidence. 3RP 2868. Mr. Englert examined the Defendant's pants and

determined that the blood stain from the knee area of the pants wasn't a "kneeling down type of stain that transferred." 3RP 2939-40. He also determined that the knee stain was not consistent with having come from any of the other blood stains found inside or outside the house. 3RP 2942-46. In his opinion the evidence at the scene indicated that the events had begun outside the house and culminated on the inside, and that somewhere in between those events is when the transfer of blood to the knee of the Defendant's pants had occurred. 3RP 2946. Specifically, the evidence suggested that there were events in utility room and outside the house, and then a "moving part" or period where Mr. Hoerner was moved from the outside to the bedroom, and it was during the period when gravel was transferred to Mr. Hoerner's underwear and ultimately to the bed where other gravel was found. 3RP 2947. Mr. Englert opined that in his opinion it was during this "moving" period that the blood was transferred to the knee of the Defendant's pants. 3RP 2947.

In addition to presenting the above mentioned physical evidence, the State also produced considerable evidence regarding the financial dealings of Dakota Farms and the Defendant's financial situation at the time of the murders.

For instance, evidence showed that the Defendant was initially able to start the farm due to an investment by a person named Kit Eldridge. Mr.

Eldridge testified that in the early 1990's he was looking for some investment opportunities and was introduced to the Defendant. 3RP 382-83. The Defendant had an idea for a bird farm but was not able to purchase the farm on his own, so Mr. Eldridge agreed to buy the farm. 3RP 382-84. The Defendant moved onto the farm and agreed to pay rent equal to the mortgage payments, and the plan was that the Defendant would eventually purchase the property from Mr. Eldridge. 3RP 387-90.

In the late summer or fall of 1992 Mr. Eldridge told the Defendant that he wanted to move up the time frame and sell the property to the Defendant, as Mr. Eldridge wanted to use the money for another investment. 3RP 389-90. The Defendant said he was going to be coming into some money and that he had no problem with advancing the timeline. 3RP 390. Mr. Eldridge thus thought that the Defendant would be able to buy the farm in a month or two, but as time passed the purchase did not come about. 3RP 391-92. Mr. Eldridge then began checking in with the Defendant every month or two, and the Defendant explained that things were taking longer than he expected, but he would be able to buy the farm in the near future. *Id.*

In January or February of 1993 Mr. Eldridge again spoke with the Defendant and told him he could not continue to wait much longer. 3RP 392. The Defendant assured him that he would be able to buy the property in the near future. 3RP 392.

A few weeks later Mr. Eldridge learned that the Defendant's wife had died and Mr. Eldridge was informed for the first time that there was a life insurance policy on the Defendant's wife and that Mr. Eldridge was the beneficiary. 3RP 392-96. Mr. Eldridge eventually received \$265,000 from the insurance payout, but he didn't feel right about receiving this windfall, so he deeded the farm over to the Defendant. 3RP 393-96.

Evidence also showed that the Defendant had purchased two life insurance policies on his wife through Vern Vorenkamp, a longtime friend and neighbor. 3RP 2015-25.

Another investor, Lonny Boyd, had loaned the Defendant approximately \$30,000, and this loan by Mr. Boyd was repaid by a Prudential life insurance policy that the Defendant had taken out on Mrs. Stenson. 3RP 1463-69.

The investigation also revealed that in March of 1993 the Defendant contacted Linda Stocker, and commercial lending officer at Sea First Bank about a commercial loan. 3RP 947-49. Ms. Stocker then contacted the Defendant then next day to set up a time for her to view the farm and learn more about the operation. 3RP 952. An appointment was set for March 22. On March 22 Ms. Stocker and her supervisor went to the farm and met with the Defendant, who showed them around. 3RP 953-58. At the end of the

tour the Defendant then gave Ms. Stocker a loan packet and Ms. Stocker asked the Defendant what he was requesting. 3RP 959. The Defendant said that he did not have a request now because he had his finances figured out. 3RP 959. That response came as a bit of a shock to Ms. Stocker, and she later reviewed the loan packet and saw that it sought \$500,000 in financing. 3RP 960.

It was also found that Mr. Hoerner had invested money with the Defendant. The Defendant had initially talked to Mr. Hoerner and his wife about investing in ostriches, and he had told them that they could double their money. 3RP 1297. As a result, Mr. Hoerner eventually invested approximately \$40,000 with the Defendant, but over time Mr. and Mrs. Hoerner began to have concerns about that investment. 3RP 1302.

Several weeks before the murders, the Hoerners had dinner with the Stensons at the Hoerners's home, and at that time Mr. Hoerner had told the Defendant that he wanted his money back. 3RP 1303. The Defendant asked Mr. Hoerner to leave his money with the Defendant for a bit longer and he told him that he needed the money to stay in his bank account because he had a Chinese investor and he needed to show the investor that he had some money in the account. 3RP 1303-04. Mr. Hoerner apparently agreed to this. 3RP 1303-04.

Two additional witnesses said they had talked to Mr. Hoerner the night before the murders. Rick Knodell testified that he had been at the dinner at the Paradise restaurant and that after the dinner he had called Mr. Hoerner. 3RP 1275-76. During that call Mr. Hoerner said that he was going to talk with the Defendant about starting to make arrangements to get his money back.

Darryl Joslin similarly testified that he had spoken with Mr. Hoerner on the night of March 24 and in that conversation Mr. Hoerner had said he was upset because he had received a call asking for more money. 3RP 1281. Mr. Hoerner told Mr. Joslin that he was going to go over and discuss this with the Defendant early the next morning. 3RP 1281-82.

Finally, Dwayne Wolfe, a certified public accountant, examined the financial records relating to Dakota Farms. 3RP 2723-29. Specifically, Mr. Wolfe examined the books, book statements, tax records, financial statements, check registers, other items of evidence seized by the Clallam County Sheriff's office, and information from a bookkeeping and accounting service previously used by Dakota Farms. 3RP 2730-33. Mr. Wolfe determined that over the two years of 1990 and 1991 the business had lost about \$40,000. 3RP 2738. Mr. Wolfe's examination also showed that Mr. Hoerner had made two investments, one for \$40,000 and another for approximately \$11,000, in Dakota Farms and that, despite the purchase of

several birds, the business still had a liability to Mr. Hoerner of over \$39,000.

3RP 2757. At the time of the murders, however, Dakota Farms had only \$3,400 in its bank account. 3RP 2757-58.

III. ARGUMENT

A. **THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION TO CONTINUE THE TRIAL BECAUSE THE STATE PROVIDED NUMEROUS GROUNDS THAT JUSTIFIED THE CONTINUANCE.**

The Defendant argues that his CrR 3.3 right to a speedy trial was violated. App.'s Br. At 35. This claim is without merit because the Defendant has failed to show that the trial court abused its discretion in granting the State's motion to continue as the motion outlined numerous independent reasons for the continuance, any one of which would have justified the continuance under Washington law.

A trial court's decision to grant a motion for a continuance is reviewed for abuse of discretion. *State v. Ollivier*, 178 Wn.2d 813, 822–23, 312 P.3d 1 (2013). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Nguyen*, 131 Wn.App. 815, 819, 129 P.3d 821 (2006).

Under CrR 3.3(b)(1)(i), a defendant held in custody pending trial must be tried within 60 days of arraignment. *Ollivier*, 178 Wn.2d at 823. The trial court may grant a party's motion to continue the trial date when it "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). The court must "state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2). Washington courts have clarified that in exercising "its discretion to grant or deny a continuance, the trial court is to consider all relevant factors." *State v. Flinn*, 154 Wn.2d 193, 199-200, 119 P.3d 748 (2005), *citing State v. Heredia-Juarez*, 119 Wn.App. 150, 155, 79 P.3d 987 (2003).

Allowing counsel time to prepare for trial is a valid basis for continuance. *Flinn*, 154 Wn.2d at 200; *citing State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *State v. Williams*, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). In *Flinn*, for example, the State filed a motion to continue based upon the State's need to prepare its case in response to discovery issues and the defendant's use on expert witnesses as a part of a diminished capacity defense. *Flinn*, 154 Wn.2d at 196-97. The Washington Supreme Court affirmed, holding that the trial court did not abuse its discretion when it granted the continuance past the time for trial period in order to allow the State to prepare for the defendant's diminished capacity defense. *Id* at 201.

Scheduling conflicts may also be considered in granting continuances. *See, e.g., State v. Heredia-Juarez*, 119 Wn.App. 150, 153–55, 79 P.3d 987 (2003). Similarly, Washington courts have held that a trial court may grant a continuance to allow the State to find a witness, or when there are issues of witness unavailability or hospitalization. *See, e.g., State v. Lillard*, 122 Wn. App. 422, 436, 93 P.3d 969 (2004) (witness for the State was unavailable due to a medical condition); *State v. Lowrie*, 14 Wn.App. 408, 410-11, 542 P.2d 128 (1975) (witness unavailable due to illness); *State v. Perez*, 16 Wn.App. 154, 156, 553 P.2d 1107 (1976) (witness hospitalized); *State v. Henderson*, 26 Wn.App. 187, 191-92, 611 P.2d 1365 (1980) (continuance requested to find witness).

In addition CrR 4.7(b) outlines a criminal defendant’s discovery obligations (which include, among other things, providing the names addresses of witnesses no later than the omnibus hearing), and CrR 4.7(h)(7) specifically states that a trial court may “grant a continuance” for discovery violations.

As outlined above, the State’s motion for a continuance in the present case outlined numerous reasons that supported the requested continuance. Specifically, the State explained that the defense had not yet provided discovery to the State, and the defense had only filed a witness list as of May 10, 2012. CO 1644. The defense has also not provided transcripts of

recordings taken from various witness interviews, nor had the defense provided numerous pages of discovery that were no longer available to the State, even though the trial court had previously ordered the Defendant to turn these items over to the State. CP 1644; CP (TBD (6/5/13 Order Compelling)). The State also noted that the defense had indicated that it would have additional witnesses, but those witnesses had not yet been named by the defense. CP 1644.

The State further explained that there were also several witnesses who had not yet been located, and that the State had enlisted the assistance of the U.S. Marshall's service in tracking down these witnesses. CP 1645-46.

In addition, the defense had only recently file three voluminous motions that the State was required to respond to, and the State further noted that some of those motions would likely require evidentiary hearings. CP 1644-45. Given these facts, the prosecutor indicated that she could not be ready for trial and needed more time to adequately respond to the defense motions and to prepare her own case for trial.

The trial court carefully reviewed the State's motion and found that a continuance was "required in the administration of justice." 2RP (6/12/13) 34. The trial court specifically noted that the State had raised issues regarding the on-going discovery requests and the fact that the defense had

not provided some of those material to the State. 2RP (6/12/13) 34. The court also found that the State's claims regarding the need for adequate preparation was well taken, as the State had been "papered to death" by the defense, as the materials generated by the defense for the then pending motion to dismiss "measured 8 inches," and that the motions before the court included a "huge volume of material." 2RP (6/12/13) 30-31.

Given the record as a whole, the State clearly presented numerous issues that raised proper grounds for a continuance under Washington law, any one of which would have justified a continuance. The Defendant, therefore, has failed to show that the trial court abused its discretion in granting the continuance. It should also be noted that the Defendant failed to show (either in his written response or in the hearing on the motion) that he would suffer any prejudice if the court granted the continuance. In short, there was nothing untenable about the trial court's decision to grant the continuance, and the Defendant's time for trial claim must fail.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED BY DECLINING TO DISMISS THE CASE IS WITHOUT MERIT AS THE DEFENDANT FAILED TO SHOW THAT A DISMISSAL WAS WARRANTED UNDER EITHER THE DUE PROCESS CLAUSE OR UNDER CRR 8.3.

The Defendant next claims that the trial court erred in failing to

dismiss the case. App.'s Br. At 45. Specifically, the Defendant argues that the trial court should have dismissed the case because bloodstained portions of the pants were destroyed before a bloodstain analysis could be done on the pants and because the 911 CAD log was not preserved, and that dismissal was required under CrR 8.3 as well as under a due process analysis. The Defendant's claims are without merit, however, as the Defendant has failed to show that the trial court abused its discretion.

Due Process and a Failure to Preserve Evidence Claim

With respect to preservation of evidence claims, the Washington Supreme Court has clearly held that the Washington State due process clause "affords the same protection regarding a criminal defendant's right to discover potentially exculpatory evidence as does its federal counterpart." *State v. Wittenbarger*, 124 Wn.2d 467, 880 P.2d 517 (1994). Thus, Washington courts follow two Supreme Court cases, *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) and *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), which developed tests to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights. *Wittenbarger*, 124 Wn.2d at 475.

Under these tests, the question of whether destruction of evidence violates due process depends on the nature of the evidence and the motivation of law enforcement. *Wittenbarger*, 124 Wn.2d at 475–77, citing *Trombetta*, 467 U.S. at 489; *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed. 281 (1988). If the State has failed to preserve “material exculpatory evidence” criminal charges must be dismissed. *Wittenbarger*, 124 Wn.2d at 475. The Court went on to note that the right to due process is limited, however, and thus the courts have been unwilling to “impose on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.” *Wittenbarger*, 124 Wn.2d at 475, quoting *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337. Furthermore, a showing that the evidence might have exonerated the defendant is not enough. In order to be considered “material exculpatory evidence”, the evidence must both possess “an exculpatory value that was apparent before it was destroyed” and be of “such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Wittenbarger*, 124 Wn.2d at 475, quoting *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534.

Furthermore, under the Fourteenth Amendment, failure to preserve “potentially useful” evidence “does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the State.”

Wittenbarger, 124 Wn.2d at 475, citing *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337. With respect to “potentially useful” evidence, the Supreme Court has explained that when all that can be said of the evidence is that it could have been subjected to further testing that might have been exculpatory, the evidence is characterized as “potentially useful” and a failure to preserve potentially useful evidence does not constitute a denial of due process of law absent a showing of bad faith,

[T]he Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, *supra*, 467 U.S., at 486, 104 S.Ct., at 2532, that “whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” Part of it stems from our unwillingness to read the “fundamental fairness” requirement of the Due Process Clause, *see Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Youngblood, 488 U.S. at 57-58; *See also*, *Wittenbarger*, 124 Wn.2d at 477.

In *Youngblood*, for instance, the police negligently failed to preserve semen samples collected from the victim and the victim's clothing. *Youngblood*, 488 U.S. at 58. Notwithstanding the State's negligence, the Court held that the defendant could not demonstrate the State acted in bad faith by destroying the potentially useful evidence and, therefore, there was no due process violation. *Youngblood*, 488 U.S. at 58.

In setting forth the applicable tests under Washington law, the Washington Supreme Court specifically rejected the defense's invitation to employ a "reasonable balance" test which would not necessarily require a finding of bad faith for suppression of potentially exculpatory evidence. *Wittenbarger*, 124 Wn.2d at 479.

Federal courts have also looked to the timing of when evidence was lost or destroyed, finding that the destruction of evidence after the expiration of the direct appeal was understandable and not a violation of due process. *See, e.g., Lovitt v. True*, 403 F.3d 171, 186 (4th Cir 2005); *Ferguson v. Roper*, 400 F.3d 635, 638 (8th Cir 2005) (holding that *Youngblood* does not apply to evidence not lost or destroyed until after trial).

The Present Case

In the present appeal the Defendant raises several different arguments regarding distinct items that were addressed in the motion to dismiss. First, the Defendant claims that when the State performed DNA tests on the jeans in 1993 and 1994 the State's cut out or destroyed portions of the jeans which rendered the Defendant's expert "unable to give a comprehensive, definitive opinion" on the blood spatter and how the blood was actually deposited on the pants. App.'s Br. at 49-50.

With respect to cutting that were taken from the pants, it is important to note that the State did take some efforts to preserve the evidence of what the pants looked like before the cuttings were taken. Specifically, a photograph of the pants was taken before the DNA testing. See Ex 155 and 156. The State also noted below that despite the claim by the defense expert, the State's experts were able to give opinions about the blood spatter based on an examination of the pants as well an examination of the photograph that was taken of the pants prior to the DNA examination. See, 2 RP 74; 3RP 2462-66; 3RP 2939-46.

The existence of the photograph of the pants calls into question whether this case even qualifies as a destruction of evidence or a failure to preserve evidence case. Nevertheless, even if the photograph were somehow

deemed inadequate, it is clear that that the cuttings from the jeans in the present case do not qualify as “material exculpatory evidence.” Rather, the evidence at issue was clearly “potentially useful” evidence” at best, as it was evidence might have been useful to the defense if it could have been subjected to further testing. As outlined above, the failure to preserve potentially useful evidence does not constitute a denial of due process of law absent a showing of bad faith.

The Defendant, however, has failed to show bad faith. First, the uncontested evidence was that the cuttings were taken from the jeans as part of the DNA testing process. Furthermore, a photograph was taken of the pants in order to document their condition before the cuttings were taken. While the defense expert might have opined that he would have preferred better documentation or a more thorough examination before the cuttings were made, the facts fall far short of demonstrating “bad faith” on the part of the State. To the contrary, the facts show a good faith effort on the part of the State to preserve the evidence while still conducting the critical DNA testing. The trial court, therefore, properly found no evidence of an intentional or bad faith destruction of evidence. 2 RP 93.

With respect to the 911 CAD log, the evidence below showed that an audio recording of the call itself was preserved, but the CAD logs were inadvertently destroyed sometime in 1998-99 when the 911 agency changed

their computer system. CP 1934; 3 RP 3473-76. At trial, a stipulation was read to the jury regarding this issue and the jury was informed that the defense had requested documentation regarding the exact time of the call and the CAD log, but that information was no longer available. 3 RP 3473-76.

With respect to the CAD log, the Defendant has failed to show that this evidence qualified as “material exculpatory evidence,” as there is nothing that proves that the log had “an exculpatory value that was apparent before it was destroyed” or that it would be “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Wittenbarqer*, 124 Wn.2d at 475, citing *Trombetta*, 467 U.S. at 489.

Rather, the CAD log was again, at best, “potentially useful” evidence that might have potentially of been of some use to the defense. It is also worth noting that numerous witnesses at trial testified about the timeline of events, including the time they were dispatched to the scene and the time they arrived at the scene. See, e.g., 3RP 580-81, 587, 605, 617, 721-22, 1780. In addition, the parties stipulated that the State had lost this evidence. 3 RP 3473-76.

As the evidence was, at best, potentially useful, the failure to preserve this potentially useful evidence does not constitute a denial of due process of law absent a showing of bad faith. Here the uncontroverted evidence was

that this evidence was not lost until well after the Defendant's first trial and direct appeal had concluded. This fact is, of course, strong evidence of the lack of bad faith. The trial court, therefore, properly rejected the Defendant's motion to dismiss based upon this issue.

In short, it is clear that under Washington law, the failure to preserve potentially useful information does not constitute a denial of due process absent a showing of bad faith. *Wittenbarger*, 124 Wn.2d at 477; *Youngblood*, 488 U.S. at 57-58.² As the Defendant failed to show bad faith, the trial court properly rejected the Defendant's motion to dismiss with respect to the due process claim.

CrR 8.3

A trial court's ruling regarding a motion to dismiss charges under CrR 8.3(b) is reviewed for a manifest abuse of discretion. *State v. Warner*, 125 Wn.2d 876, 882, 889 P.2d 479 (1995). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

² The Defendant also argues that the Washington Constitution provides more protection than the federal constitution with respect to preservation of evidence claims, and goes through a *Gunwall* analysis. App.'s Br. at 67. As the Defendant concedes, however, the Washington Supreme Court has already ruled that the State constitution does not provide greater protection in this area, and that ruling is controlling in the present case. App.'s Br. at 67, citing *Wittenbarger*, 124 Wn.2d at 474, 481. This Court, therefore, need not go through a *Gunwall* analysis as the Supreme Court has already resolved this issue.

A criminal defendant bears the burden of proving both misconduct and prejudice by a preponderance of the evidence. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (citing *State v. Michielli*, 132 Wn.2d 229, 239–40, 937 P.2d 587 (1997)). With respect to the prejudice requirement, a defendant must show actual prejudice. *Rohrich*, 149 Wn.2d at 657 (concluding that dismissal under CrR 8.3(b) for government misconduct or arbitrary action “requires a showing of actual prejudice”). The “mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice.” *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993), citing *State v. Ansell*, 36 Wn.App. 492, 498–99, 675 P.2d 614).

Furthermore, dismissal is an extraordinary remedy. *Rohrich*, 149 Wn.2d at 653, citing *State v. Baker*, 78 Wn.2d 327, 332–33, 474 P.2d 254 (1970). Similarly, Washington courts have explained that the law considers dismissal of a case an extraordinary remedy of last resort, and the trial court's authority to dismiss under CrR 8.3(b) is limited to “truly egregious cases of mismanagement or misconduct.” *State v. Koerber*, 85 Wn.App. 1, 4–5, 931 P.2d 904 (1996), quoting *State v. Duggins*, 68 Wn.App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852 P.2d 294 (1993). A trial court may also abuse its discretion where it ignores reasonable intermediate remedial steps. *Koerber*, 85 Wn.App. at 4. See also, *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003) (dismissal under CrR 8.3(b) is improper absent material

prejudice to the rights of the accused).

The Present Case

To the extent that the Defendant's motion to dismiss was based on CrR 8.3, the Defendant has similarly failed to show that the trial court abused its discretion. To the contrary, the record demonstrates that the trial court acted well within its discretion in denying the motion to dismiss based on the Defendant's claim of a CrR 8.3 violation.

As a preliminary matter, it is not clear that a CrR 8.3 analysis truly applies to a failure to preserve evidence claim. For instance, an examination of Washington caselaw (at least as far as the State has been able to find) fails to reveal any cases where a Washington court has conducted a meaningful CrR 8.3 examination with respect to a failure to preserve evidence claim. At first blush one might simply conclude that this absence of cases might simply be due to the fact that this issue hasn't been raised. Upon further examination, however, the lack of cases on this issue is likely due to the fact that CrR 8.3 is largely irrelevant when it comes to preservation of the evidence claims because of the exact nature of the test under CrR 8.3 and how it overlaps with the due process clause test.

First, as outlined above, CrR. 8.3 requires "requires a showing of actual prejudice," and the "mere possibility of prejudice is not sufficient to

meet the burden of showing actual prejudice.” *Norby*, 122 Wn.2d at 264. In the context of a preservation of evidence claim, if a defendant could show “actual prejudice” then the defendant would also, almost by necessity, be able to show that the evidence was “materially exculpatory” under the due process test, and thus there would be no need to resort to an CrR 8.3 analysis.

Similarly, if the evidence at issue was only potentially useful under a due process analysis, a defendant would again, almost by necessity, be unable to show actual prejudice under the 8.3 test. Rather, all “potentially useful” evidence would be evidence that would only demonstrate a mere “possibility of prejudice,” which is of course, insufficient to prove a CrR 8.3 violation.

Thus, logic dictates that CrR 8.3 will rarely, if ever play a role in a preservation of evidence claim, and thus the dearth of caselaw on this point is easily explained.

In any event, in the present case the Defendant’s CrR 8.3 claim is without merit for several reasons. First, although CrR 8.3 authorizes a trial court to dismiss a case in certain situations, the rule does not require a dismissal even if mismanagement is found. Rather, dismissal of a case is an extraordinary remedy of last resort. In the present case the trial court carefully evaluated the Defendant’s claims and held that the extraordinary remedy of dismissal was not warranted. The Defendant has failed to show

that this was an abuse of discretion. Rather the record shows that the State photographed the pants before any cuttings were taken, and the cuttings were taken for the obviously important reason of obtaining a DNA test.

The fact that defense expert would have preferred higher quality pictures or more in depth blood spatter analysis on the pants before the cuttings were made does not demonstrate mismanagement on the part of the State. A defendant, of course, could make a similar complaint or request for more in-depth investigation and the like in nearly any criminal case. More importantly, of course, is the fact that the Defendant cannot show prejudice, as the defense can only provide speculation about what further analysis, better pictures, or an examination of the CAD log would have shown. In any event the Defendant cannot show actual prejudice, and his CrR 8.3 claim must fail. In addition, the Defendant cannot show that the trial court's decision to deny the motion to dismiss was an abuse of discretion.

The Defendant may likely argue it is often difficult (or in some cases impossible) for a defendant to show actual prejudice in a failure to preserve evidence claim, as the evidence is simply unavailable for further testing which would be needed to reveal whether the absence of the evidence caused actual prejudice. While the State doesn't dispute that this difficulty exists, it is for this very reason that the courts have developed the due process analysis for failure to preserve evidence, and it is that analysis which is the

appropriate venue for a criminal defendant to raise a failure to preserve evidence claim.³

C. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SUPPRESS THE PANTS IS WITHOUT MERIT AS THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN FINDING THAT SUPPRESSION WAS NOT WARRANTED UNDER EITHER A DUE PROCESS OR CRR 8.3 ANALYSIS.

The Defendant next claims that the trial court erred in failing to exclude the pants. App.'s Br. at 72. In support of this claim the Defendant reargues that under either the CrR 8.3 or the due process claims raised in the motion to dismiss, the trial court should have excluded the pants as a lesser sanction than an outright dismissal. This claim is without merit because the Defendant has failed to show that the trial court abused its discretion.

As outlined above, the State took efforts to document the condition of the pants by taking a picture before the pants were tested for DNA. While the defense expert was dissatisfied with this process and would have preferred

³ The Defendant also appears to argue that the trial court should have dismissed this case due to the Brady violation that the Supreme Court found in the 6th PRP that led to the order of a retrial. App.'s Br. at 60. The Supreme Court, however, already reviewed the Brady violation in detail and ordered that the proper remedy was a remand for a retrial and the exclusion of the GSR evidence. The Defendant has failed to show why relitigation of this issue was warranted. Furthermore, even if this issue was to be relitigated, the trial court aptly explained that the State had been required to retry this case 20 years after the fact and that the GSR evidence was suppressed in the second trial, and thus the State had been severely punished for the Brady violation. 2 RP 93. The Defendant has failed to show that the trial court decision in this regard was improper.

that the State had taken additional steps, the law does not require the State to do so. Under the due process analysis for a failure to preserve potentially useful evidence, the Defendant was required to show bad faith. *Wittenbarger*, 124 Wn.2d at 477; *Youngblood*, 488 U.S. at 57-58. In the present case the Defendant simply failed to make any showing of bad faith. Thus neither dismissal nor suppression was required under the due process analysis.

Similarly, the under the CrR 8.3 analysis a defendant is required to demonstrate mismanagement as well as make a “showing of actual prejudice,” and the “mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice.” *Norby*, 122 Wn.2d at 264. In the present case, as outlined in the previous section, the Defendant did not demonstrate mismanagement nor did he show “actual prejudice.” Rather, at best, the Defendant could only show the mere possibility of prejudice, which is insufficient under CrR 8.3. Thus neither dismissal nor suppression was warranted under CrR 8.3.

In short, the Defendant has failed to show that the trial court abused its discretion in declining the Defendant’s invitation to suppress the pants.

D. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO GIVE A “MISSING EVIDENCE” INSTRUCTION IS WITHOUT MERIT BECAUSE SUCH AN INSTRUCTION CAN ONLY BE GIVEN WHEN THE ABSENCE OF THE EVIDENCE IS UNEXPLAINED AND BECAUSE THE ABSENCE OF THE CUTTINGS FROM THE DEFENDANT’S PANTS WAS EXPLAINED IN THE PRESENT CASE.

The Defendant next claims that the trial court erred in failing to give the Defendant’s proposed spoliation instruction. App.’s Br. at 76. This claim is without merit because the instruction was not warranted under the facts of this case.

A trial court's refusal to issue a requested instruction (such as a missing witness instruction), when based on the evidence in the case, is reviewed for abuse of discretion. *State v. Reed*, 168 Wn.App. 553, 571, 279 P.3d 203 (2012), citing *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). A trial court abuses its discretion only where its decision is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In addition, jury instructions are sufficient if they allow the parties to argue their theories of the case and they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Furthermore, “It is not error for a trial court to refuse a specific instruction

when a more general instruction adequately explains the law and allows each party to argue its case theory.” *State v. Hathaway*, 161 Wn.App. 634, 647, 251 P.3d 253 (2011).

A missing evidence instruction, drawn from the “missing witness doctrine,” is a permissive inference instruction that informs the jury that it may draw an adverse inference from a party’s failure to produce evidence within its control. *State v. Blair*, 117 Wn.2d 479, 485–86, 816 P.2d 718 (1991), quoting *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968). The inference arises only where, under all the circumstances of the case, such unexplained failure to offer the evidence creates a suspicion that there has been a willful attempt to withhold competent testimony. *Blair*, 117 Wn.2d at 488.

Washington courts have explained that a missing witness instruction is not warranted when the absence of the evidence has been explained. See, *Blair*, 117 Wn.2d at 489; *State v. Jordan*, 17 Wn.App. 542, 544, 564 P.2d 340 (1977); *State v. LaPorte*, 58 Wn.2d 816, 824, 365 P.2d 24 (1961). And when, by way of example, a witness cannot be located due to a state patrolman's failure to get his name, a satisfactory explanation has been provided. *State v. Richards*, 3 Wn.App. 382, 385–86, 475 P.2d 313 (1970).

In the present case the Defendant's proposed instruction related solely to the portion of the Defendant's pants that were cut out. *See*, App.'s Br. at 77; CP 380. With respect to the cutouts from the pants the reason for the State's failure to produce this evidence was amply explained, as the cutouts were made as part of the DNA testing process. *See*, e.g., 3 RP 2264-65 (cutouts taken from pants as part of DNA testing); 3 RP 2363-64 (cutouts taken from pants as part of DNA testing); 3 RP 2360-61 (where it was explained that at the time of the cutouts and the DNA testing at the FBI there were no available blood stain pattern experts at the FBI lab).

The Defendant in the present appeal also argues that the trial court improperly declined to give the proposed instruction because the trial court found no bad faith. App.'s Br. at 79. As the Defendant notes, however, "culpability" and "bad faith" are factors that a trial court is to consider in determining whether to give such an instruction. App.'s Br. at 79, *citing Tavai v. Walmart Stores, Inc.*, 176 Wn.App. 122, 135, 307 P.23d 811 (2013).

Thus there was nothing improper about the trial court noting that it had not found any bad faith. The trial court noted that it was well established at trial that the missing pieces were consumed during the DNA testing, and the court thus declined to give the proposed instruction. 3 RP 3957.⁴

⁴ The trial court's ruling, viewed in its proper context, can also easily be viewed as merely stating that there was nothing in this case that created a "suspicion that there has been a

In short, as the jury was aware of the undisputed reason for the absence of certain sections from the Defendant's pants, no permissive inference instruction was warranted. The Defendant, thus has failed to show that the trial court abused its discretion in refusing to give the instruction.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL BECAUSE THE TRIAL COURT WAS IN THE BEST POSITION TO WEIGH THE POTENTIAL PREJUDICE CAUSED BY THE IRREGULARITY AND BECAUSE THE TRIAL COURT IMMEDIATELY INSTRUCTED THE JURY TO DISREGARD THE COMMENT AND JURIES ARE PRESUMED TO FOLLOW INSTRUCTIONS FROM THE COURT.

The Defendant next claims that the trial court erred in denying the Defendant's motion for a mistrial. App.'s Br. at 88. This claim is without merit because the trial court did not abuse its discretion, as the trial court was in the best position to weigh the potential prejudice from the irregularity and because the trial court instructed the jury to disregard the comment and juries are presumed to follow the court's instruction.

An appellate court reviews a denial of a motion for a mistrial for an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion if its decision is manifestly

willful attempt to withhold competent testimony" or evidence. *Blair*, 117 Wn.2d at 488.

unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *Mayer*, 156 Wn.2d at 684, quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

A trial court properly declares a mistrial only when the defendant has been so prejudiced that nothing short of a new trial will ensure that the defendant will be fairly tried. *Rodriguez*, 146 Wn.2d at 270, 45 P.3d 541. An appellate court is to overturn a denial of a motion for mistrial only when there is a "substantial likelihood" that the error prompting the request for a mistrial affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269, 45 P.3d 541 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)) (internal quotation marks omitted).

Furthermore, Washington courts have recognized that the trial court is best suited to assess the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). In addition, the trial court has broad discretion in determining whether an instruction can cure an error. *State v. Ecklund*, 30 Wn. App. 313, 316, 633 P.2d 933 (1981). Finally, courts are to presume that juries follow the trial court's instructions. *State v. Hanna*, 123

Wn.2d 704, 711, 871 P.2d 135 (1994). In addition, “the law presumes, and must presume, that the jury finds that facts from the evidence the court permits them to consider. Any other rule would render the administration of the law impractical.” *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962), *citing*, *State v. Priest*, 132 Wash. 580, 584, 232 P. 353, 354 (1925). Furthermore, the Washington Supreme Court has held that “to maintain a contrary rule is to impeach the intelligence of the jury; it is to say that they will return a verdict on evidence which the court tells them they must not consider -- a verdict they would not have returned had the inadmissible evidence been kept entirely from their knowledge.” *Johnson*, 60 Wn.2d at 29, *citing*, *Priest*, 132 Wash. at 584.

In the present case the prosecutor asked Ms. Hoerner some background questions regarding the fact she was married to Frank Hoerner, that she had a son, and that Frank Hoerner had wanted to adopt her son. 3RP 1288. The prosecutor then asked if the adoption had been finalized, and Ms. Hoerner responded,

Um, we got the name changed and everything and afterwards we saw – we saw a lawyer prior to Darold killing Frank.

3 RP 1288. The defense immediately objected and the trial court sustained the objection and instructed the jury that, “The last remark will be disregarded by the jury, ladies and gentleman.” 3 RP 1289.

Defense counsel later made a motion for a mistrial based on Ms. Hoerner's comment. 3 RP 1312. The trial court, however, denied the motion and ruled as follows:

Well, at this point I am going to deny a motion for a mistrial. The outburst was unfortunate to say the least. I did instruct the jury immediately to disregard the comment which was unsolicited. We have a very attentive jury. I have to assume they will follow my instructions I think they're well aware at 3 weeks into this trial that the comment was on the very issue that they have to decide and it's up to them, not up to Mrs. Hoerner to decide. So I don't think the prejudice has been shown to the extent there was any -- I think it willing be overcome by my instructions which I expect the jury to follow.

3 RP 1313. The trial court later explained its ruling in more detail,

There were 2 things wrong with her response. The first was it was not responsive to the question. That would have been the basis for sustaining the objection.

Secondly, and more importantly, she expressed an opinion on the ultimate issue, which no witness, even an expert, is authorized or allowed to express. That is a decision that only the jury can make.

Um, and my rulings are discretionary rulings. They will be reviewed for abuse of discretion and what my concern is, is that what would be seen on reviews as a cold, black and white, lifeless transcript that can not possibly make them understand or appreciate what was actually going on in this courtroom yesterday afternoon.

We were there. I was there. And I want to make sure the basis for my ruling is understood.

It is not unusual to find that the Appellate Court's find an abuse of discretion, and in my opinion sometimes, or perhaps where they shouldn't, the first problem that is occasionally

seen is no deference is afforded to the trial judge who was there and witnessed the activity, heard the words and knows the context, and who is making a ruling on the fly without the benefit of either briefing or any time for reflection.

Second and more commonly, is the determination by the Appellate Courts based simply on a failure of the trial judge to provide the reviewing Court with an adequate record.

I have been guilty of that myself. That is not going to happen in this case. In the first place, I think that you -- this Court is entitled to some deference on this issue with 48 years of trial experience including 6 as a trial judge, in a county where we average 40 to 60 jury trials a year spread among 3 judges.

Secondly, I have managed this case for the last 9 months. We have had dozens of pretrial hearings and rulings, including moving this case to Kitsap County at great inconvenience and expense to myself and many others, to ensure Mr. Stenson gets a jury that is untainted by any pretrial publicity. The point is, I think I know this case. I have observed literally thousands of witnesses over my 44 years of trial experience, and more importantly, I was here, I observed and listened to this extraordinary testimony for about an hour and a quarter yesterday, and a couple more hours this morning. And as you will recall, I prefaced her testimony with a colloquy which both counsel had suggested and agreed to based on what was apparently some emotional outbursts during her recent interview with Defense counsel. I wanted to make sure she understood the rules. She promised that she understood the difference between an interview and testimony in a courtroom, and promised that she would comply with those rules.

Thereafter, we watched Ms. Kelly patiently walk her through her testimony, coaching her and supporting her. Watched Defense counsel, as I said this morning, resist the temptations to object to many non-responsive answers and to allow Ms. Kelly to lead her where necessary to help get her through her testimony.

What I observed yesterday and this morning was a 46 year old woman who was 25 when her husband and best friend

were killed by gunshot wounds to the head on the same day in the same place, and she acted yesterday and this morning as if it were still March 25, 1993. She was literally hyperventilating throughout her testimony. The prosecutor had to keep reminding her to breathe. She was sobbing and shaking uncontrollably and visibly. My concern was not only what she was going to say, but whether she was going to throw up or collapse on the witness stand.

I came to the conclusion that she was either unable to comprehend the rules that I had discussed with her about her demeanor, or I think probably a little of both, but more importantly, it was my opinion she was absolutely unable to conform her behavior and emotions to any of the norms that I had discussed with her.

It is not my opinion that this was feigned or purposeful conduct, that was my observations. She got better today. I think that had something to do with getting used to being on the witness stand and getting comfortable in this environment. I do not think anybody that I have ever seen on the witness stand could fake the behavior that we saw. I think it was real, and I do not think she was able to control her emotions, and in many cases, her words. The self control that we would expect simply was not available. I'm not a psychologist, I don't know why, but when the certain buttons were pushed, she completely lost it.

I think the most important thing is, is that the jury is not going to hear anything I'm saying and it wouldn't be appropriate if they did. It would certainly be a comment on the evidence, but many of them are going to arrive at the same conclusion in their own way, and for lack of a better term, I think they will consider the source, and how it impacts her testimony.

I think also we have noticed -- I think all of us have noticed we've had much more interaction with this jury than we usually do because of the employment problem that's arose yesterday. This is a very engaged and very attentive jury. I'm grateful for that, we all should be. They are paying attention. It would be no surprise to any of them that this witness would think that the Defendant killed her husband. I don't think there's anything shocking about her having said that.

Um, having said that, I am convinced that the prejudice to the Defendant is minimal, if any. The demeanor of the witness may even provide assistance to the Defense. I have no idea how the jury will react to the content in terms of credibility. But I do think that they will follow my instruction and I am satisfied that I told them to ignore the remark. I have no reason to believe they will not follow that instruction.

So, that is my observation, that is why I ruled the way I did.

3 RP 1508-13.

Later, defense counsel brought a second motion for a mistrial based upon a claim that Ms. Hoerner may have made statements under her breath that were directed to the jury. 3 RP 1523-24. The trial court then brought in the jury and asked the jurors to indicate if they had heard any such comments from Ms. Hoerner. 3 RP 1529. Several jurors indicated that they had heard such a comment. *Id.* The trial court then questioned each of those jurors individually about what they might have heard and whether the inappropriate comments would impact their ability to be fair and impartial. 3 RP 1530-39. Each juror indicated that they could disregard the improper comments and could be fair and impartial. 3 RP 1530-39.

The trial court then denied the second motion for a mistrial, stating as follows,

Well, um, the motion for mistrial will be denied at this time. I continue to be impressed with this jury panel. I hope counsel agree with me, they are incredibly attentive and all of

them realized that what was happening was not appropriate and did their very best to ignore it. I accept their answers that it did not and will not impact their ability to be fair and impartial as jurors.

And on that basis, I will deny the motion.

3 RP 1540.

Given this record, there is no dispute that the comments by Mr. Hoerner were improper. The trial court, however, immediately instructed the jury to disregard the first improper comment. In addition, when it was found that Mr. Hoerner had made additional comments that were improper, the trial brought in each juror who had heard the improper comments and inquired whether the jurors could disregard the comments and continue to be fair and impartial. Each juror indicated they could.

The record, therefore is clear that the trial court immediately remedied the problems created by Ms. Hoerner and properly instructed the jury to disregard the improper comments. As outlined above, courts are to presume that juries follow the trial court's instructions. *Hanna*, 123 Wn.2d at 711. In addition, the record clearly supports the trial court's lengthy analysis that this jury was a careful and thoughtful jury that was able to follow the court's instructions and decide the case on the admitted evidence.

Given this record, the Defendant cannot show that the trial court abused its discretion by adopting a view "that no reasonable person would

take” of that the trial court’s ruling was “manifestly unreasonably.”

Furthermore, the actions of Ms. Hoerner, while improper, were not likely to cause the Defendant any prejudice at all. As the Defendant has explained, one of the defense theories was that Ms. Hoerner was “another suspect” and may have herself been responsible for the murders. App.’s Br. at 28. Given this defense theory, it would be of no surprise that the “other suspect” would blame the Defendant for the murders. Rather, such a belief by Ms. Hoerner could even be perceived as being consistent with this defense theory (as the trial court, itself noted). In any event, the trial court correctly noted that the prejudice to the Defendant was minimal, if any.

In short, although the actions of the witness were improper, the trial court did not abuse its discretion in determining that the Defendant had not been so prejudiced that nothing short of a new trial would ensure that the defendant would be fairly tried. *Rodriguez*, 146 Wn.2d at 270, 45 P.3d 541. Nor has the Defendant shown that there is a “substantial likelihood” that the error prompting the request for a mistrial affected the jury's verdict. The Defendant’s claim that the trial court abused its discretion in denying the Defendant’s motion for a mistrial, therefore, is without merit.

F. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A WITNESS'S PREVIOUS CONVICTION UNDER ER 609 IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION. IN ADDITION, EVEN IF THIS COURT WERE TO FIND ERROR, ANY ERROR WAS HARMLESS.

The Defendant next claims that the trial court erred in admitting evidence of a witness's prior conviction. App.'s Br. At 101. This claim is without merit because the Defendant has failed to show that the trial court abused its discretion in allowing the evidence when it was used to impeach a witness, and not the Defendant. In addition, even if this Court were to find error in this regard, any error was harmless given the strength of the State's case, as well as the fact that the impeachment was on a minor issue and the testimony of the witness in question was largely cumulative in that the main points of her testimony were introduced by other defense witnesses at trial.

A trial court's ruling under ER 609 is reviewed for abuse of discretion. *State v. Bankston*, 99 Wn.App. 266, 268, 992 P.2d 1041 (2000).

ER 609(a) provides as follows:

General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year

under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

In previous decades, Washington Appellate Courts issued conflicting decision about whether a defendant's prior drug conviction could be admitted pursuant to ER 609(a)(1). Some courts had held that prior drug convictions were probative and some court even held that all convictions had some probative value. *See, e.g., State v. Calegar*, 133 Wn.2d 718, 947 P.2d 235 (1997), *citing State v. Thompson*, 95 Wn.2d 888, 632 P.2d 50 (1981) (upholding admission of a defendant's prior VUCSA conviction as it was probative of veracity); *State v. Begin*, 59 Wn.App. 755, 760, 801 P.2d 269 (1990) (reasoning that the mere fact that the trial court has the authority to admit such convictions under ER 609(a)(1) is evidence that all felonies have some degree of probative value). *See also, State v. Lathan*, 30 Wn.App. 776, 779, 638 P.2d 592 (1981) (holding that "drug convictions may have probative value as to the credibility of the defendant and thus may be introduced for impeachment purposes.").

As the Defendant correctly points out, however, in the 1990's the Washington Supreme Court issued two opinions that held that a criminal defendant's prior drug conviction "had little to do with a defendant's

credibility as a witness.” *Calegar*, 133 Wn.2d at 724-26, quoting *State v. Jones*, 101 Wn.2d 113, 122, 677 P.2d 131 (1984). Similarly in *State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1175 (1997) the Court again cited *Jones* and held that a prior “felony conviction . . . for possession of drugs has little to do with a defendant’s credibility as a witness.” *Hardy*, 133 Wn.2d at 709, quoting *Jones*, 101 Wn.2d at 122.

The State acknowledges that *Calegar* and *Hardy* make it clear that the admission of a criminal defendant’s prior drug conviction is generally disallowed as the prejudice clearly outweighs the probative value of such evidence. It is important to note, however, that in both *Calegar* and *Hardy* the issue was whether a criminal defendant’s own drug convictions was admissible to impeach the defendant. *See, Hardy*, 133 Wn.2d at 705-06; *Calegar*, 133 Wn.2d at 721. The issue is slightly different, however, when the issue is not whether a criminal defendant’s own conviction is being offered, but rather is where a non-party witness’s prior conviction is being offered to impeach that witness. The calculus in such a case is different simply because the fact that the conviction does not belong to the defendant obviated any danger that the conviction will be used improperly against the defendant.

The issue in the present case involves the trial court’s decision to admit evidence that a witness, Ms. Wagner, had a prior drug conviction. This

was not the Defendant's conviction, and Ms. Wagner's conviction had no prejudicial effect on the Defendant's character and there was no threat that Ms. Wagner's conviction would change the jury's focus "from the merits of the charge to the defendant's general propensity for criminality." *Hardy*, 133 Wn.2d at 710, quoting *Jones*, 101 Wn.2d at 120.⁵

In short, neither *Calegar* nor *Hardy* address the exact situation of the admission of a witness's prior drug conviction. As noted above, a trial court's decision to admit evidence under ER 609 is reviewed for abuse of discretion. *Bankston*, 99 Wn.App. at 268. The exact question before this Court, therefore, is whether the trial court's decision was manifestly unreasonable, which occurs when the trial court adopts a view that "no reasonable person would take." See, *Mayer*, 156 Wn.2d at 684.

The State acknowledges that the Washington Supreme Court has rendered an opinion with respect to a defendant's prior drug conviction, but with regard to a witness's prior conviction, however, the issue is not so clear cut. Given the broad discretion given to a trial court under the abuse of discretion standard, the State suggests that the Defendant has failed to show that no reasonable person would take the position adopted by the trial court

⁵ At least one other court has noted this distinction. See, e.g., *U.S. v. Blankenship*, 870 F.2d 326, 329 (6th Cir. 1988) (noting that most cases deal with defendant's prior conviction rather than a defense witnesses prior conviction, and the potential for prejudice is greater when it is the defendant's credibility that is being attacked, thus the trial court did not abuse its

below. Thus, the Defendant cannot show an abuse of discretion.

Even if this Court were to conclude, however, that the trial court abused its discretion in admitting ER 609 evidence in the present case, any error in this regard was harmless. The Washington Supreme Court has held that the “nonconstitutional harmless error standard ... applies to ER 609(a) rulings.” *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Under this standard an erroneous 609(a) ruling is reversible if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Ray*, 116 Wn.2d at 546 (citations omitted). Applying the harmless error standard the appellate court looks to the evidence at trial, the importance of defendant's credibility, and the effect the prior convictions may have had on the jury. *See, e.g., State v. Roche*, 75 Wn.App. 500, 507, 878 P.2d 497 (1994). Under this non-constitutional harmless error standard, “an accused cannot avail himself of error as a ground for reversal unless it has been prejudicial.” *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015), *citing State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). In assessing whether the error was harmless, a court must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. *Barry*, 183 Wn.2d at 303, *citing State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

discretion in admitting evidence of witness's prior conviction).

In the present appeal there are a number of factors that demonstrate that any error regarding Ms. Wagner's prior convictions were harmless. First, the Defendant called Ms. Wagner to support its theory that Ms. Hoerner was potentially the murderer. The strength of the State's case as well as the strong physical and circumstantial evidence, however, pointed to the Defendant, and not Ms. Hoerner, as the murderer. Secondly, it is highly doubtful that the admission of Ms. Wagner's drug conviction "destroyed" her credibility as suggested by the Defendant. App.'s Br. at 107. Nor did this minor piece of information likely have any effect on the jury's ultimate decision.

This conclusion is further demonstrated by the fact that Ms. Wagner's testimony was largely cumulative. For instance, although Ms. Wagner testified that Ms. Hoerner went to Hawaii with another man not long after the murders (and posed for a photograph on this trip wearing a bikini), Ms. Hoerner herself admitted these facts in cross examination. See 3RP 1434-35. With respect to Ms. Wagner's other testimony regarding the nature of the marriage between Mr. and Mrs. Hoerner, their disagreements, and Ms. Hoerner's behavior, the Defendant called numerous other witnesses that covered these areas. *See*, App.'s Br at 28-34 (summarizing much of this testimony).

In short, given the State's strong evidence, the fact that the fact the evidence of the prior drug offense was about a prior conviction of a witness (and not the Defendant), as well as the fact that the Ms. Wagner's testimony was largely cumulative and the Defendant was able to develop his "other suspect" theory through numerous other witnesses, the record as a whole shows that any error with respect to the admission of the prior conviction evidence was harmless.

In conclusion, even if this Court were to find that the trial court erred, the error was not one that would support the conclusion, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Thus, this Court should find that any error was harmless.

G. THE DEFENDANT'S CLAIM THAT STATE COMMITTED PROSECUTORIAL MISCONDUCT BY MISSTATING THE BURDEN OF PROOF IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THE STATE'S COMMENTS WERE IMPROPER.

The Defendant next claims that prosecutorial misconduct in closing arguments violated his right to a fair trial. App.'s Br. At 107. This claim is without merit because the defendant has failed to show that the prosecutor's conduct was improper or that any improper conduct prejudiced his right to a

fair trial. Rather, the record shows that the prosecutor properly argued the beyond a reasonable doubt standard and did not otherwise denigrate or mischaracterize the reasonable doubt standard.

To establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). If the defendant failed to object to the prosecutor's misconduct at trial, a reversal is only warranted if this Court finds that the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an “enduring and resulting prejudice” incurable by a jury instruction. *State v. Sakellis*, 164 Wn.App. 170, 184, 269 P.3d 1029 (2011), *citing State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*quoting State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)); see also *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict,” and (2) no curative instruction would have obviated the prejudicial effect on the jury. *Sakellis*, 164 Wn.App. at 184, *citing State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) and *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (a defendant cannot

demonstrate “enduring and resulting prejudice” without demonstrating “a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.”).

In addition, an appellate court is to review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

As the Washington Supreme Court has recently noted, several cases from the Court of Appeals have examined whether the use of puzzle analogies are improper. *State v. Lindsay*, 189 Wn.2d 423, 434, 326 P.3d 125 (2014).

In *State v. Johnson*, 158 Wn.App. 677, 682, 243 P.3d 936 (2010), the prosecutor made an argument stating, “You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.” The Court of Appeals reversed. *Id* at 685-86.

In *State v. Curtiss*, 161 Wn.App. 673, 250 P.3d 496 (2011), this Court reached a different conclusion regarding a slightly different jigsaw puzzle

argument. There, the prosecutor stated, “There will come a time when you’re putting that puzzle together, and even with pieces missing, you’ll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.” *Curtiss*, 161 Wn.App. at 700. This Court held that the State’s comments about identifying a puzzle before it was complete were not improper. *Id.* at 700–01.

In *State v. Fuller*, 169 Wn.App. 797, 282 P.3d 126 (2012), this Court discussed *Johnson* and *Curtiss* and examined the differences between the two cases. The Washington Supreme Court in *Lindsay* cited (apparently with approval) *Fuller* and its discussion of *Curtiss* and *Johnson*, and noted that in *Fuller* this Court explained that the quantification by the prosecutor of the number of pieces and percentage of completion required for reasonable doubt in *Johnson* was entirely different from the prosecutor’s general reference to being able to discern the subject of a puzzle with some pieces missing in *Curtiss*. *Lindsay*, 180 Wn.2d at 435, citing *Fuller*, 169 Wn.App. at 825-28. The former statement introduced elements of specific quantification into the reasonable doubt analysis, while the latter did not. *Lindsay*, 180 Wn.2d at 435.

The Supreme Court in *Lindsay* went on to note that the prosecutor in *Lindsay* had stated that,

[Y]ou put a few more pieces in ... and you start to get a better idea of what that picture is.... And then you put in about 10 more pieces and see this picture of the Space Needle. Now, you can be halfway done with that puzzle and you know beyond a reasonable doubt that it's Seattle. You could have 50 percent of those puzzle pieces missing and you know it's Seattle.

Lindsay, 180 Wn.2d at 434. The Supreme Court noted that these comments were analogous to, and almost identical to, the statements made in *Johnson*. *Id* at 436. In addition the Court explained that the prosecutor's comment in *Lindsay* were,

[N]ot analogous to the comments in *Curtiss* or *Fuller*, which made no reference to any number or percentage and merely suggested that one could be certain of the picture beyond a reasonable doubt even with *some pieces* missing.

Lindsay, 180 Wn.2d at 436 (emphasis added). The Court thus concluded that prosecutor's comments in *Lindsay* were improper.

In the present case, however, the prosecutor's comments were analogous to the comments at issue in *Curtiss* and *Fuller*. In the present case the prosecutor discussed a jigsaw puzzle analogy and stated,

Here, the evidence is here. The pieces are here. At the end you may conclude that you're missing a few pieces, that you have pieces that are gone. But I submit to you, you may have questions, but I submit to you that after full, fair and careful consideration of the facts of the evidence, of the lack of evidence, you're still going to be able to see the picture of what happened to Frank Hoerner and Denise Stenson on March 25, 1993. You will be convinced, you will have an

abiding belief in the truth of the charge, that the Defendant killed them.

3 RP 4172-73. These comments from the prosecutor in the present case were similar to the statements at issue in *Curtiss* where the prosecutor said the jury could be convinced beyond a reasonable doubt “even with pieces missing.” *Curtiss*, 161 Wn.App. at 700. Similarly, the comments in the present case were different from the comments in *Johnson* and *Lindsay* where the prosecutors said, “even being able to see only *half*, you can be assured beyond a reasonable doubt” and “you can be *halfway* done with that puzzle and you know beyond a reasonable doubt.” *Johnson*, 158 Wn.App. at 685-86 (emphasis added); *Lindsay*, 180 Wn.2d at 434 (emphasis added).

The prosecutor in the present case made no argument about the “percentage” required as had been done in *Lindsay* and *Johnson*. Rather the prosecutor in the present case, like the prosecutor in *Curtiss*, merely made reference to the fact that one could “being able to discern the subject of a puzzle with some pieces missing.” *Lindsay*, 180 Wn.2d at 435.

Viewing the State’s argument in the present case as a whole, the State’s comments in closing argument did not denigrate or mischaracterize the reasonable doubt standard of proof and were clearly more analogous to the comments in *Curtiss* than the comments in *Johnson* and *Lindsay*.

Furthermore, the defense in the present case did not object to the prosecutor's arguments. Thus the Defendant bears the burden of establishing that there was misconduct that "had a substantial likelihood of affecting the jury verdict," and that no curative instruction would have obviated the prejudicial effect on the jury. *Sakellis*, 164 Wn.App. at 184; *Thorgerson*, 172 Wn.2d at 442-43; *Russell*, 125 Wn.2d at 86. Even assuming that the comments were a misstatement of the law, had defense counsel objected, the trial court could have instructed the jury to ignore these comments. In addition, the prosecutor's comments (which were clearly closer to *Curtiss* than *Johnson*) were not so "flagrant" or "ill intentioned" that a simple curative instruction would not have remedied any possible prejudice.

For all of these reasons, the Defendant's claim of prosecutorial misconduct must fail.

H. THE DEFENDANT'S CLAIM THAT WPIC 4.01 IS UNCONSTITUTIONAL IS WITHOUT MERIT AS THE WASHINGTON SUPREME COURT HAS FOUND THAT THE INSTRUCTION AT ISSUE IS BOTH CONSTITUTIONAL AND A CORRECT STATEMENT OF THE LAW.

The Defendant next claims that the reasonable doubt instruction is unconstitutional. App.'s Br. at 117. This claim is without merit because the Washington Supreme Court has previously rejected this argument and found

that the instruction given was constitutional.

In the present case the Defendant argues that WPIC 4.01, which was part of the trial court's instructions to the jury in the present case, is unconstitutional because it "tells jurors they must be able to articulate a reason for having a reasonable doubt" and is akin to a "fill-in-the-blank" argument that impermissibly shifts the burden of proof. App.'s Br. at 117-18.

The Washington Supreme Court has previously addressed WPIC 4.01 and the reasonable doubt standard. In *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), for instance, the Washington Supreme Court went through the history of WPIC 4.01 and the reasonable doubt standard in great detail. *Bennett*, 161 Wn.2d at 308-18. The Court noted that several courts had upheld WPIC 4.01 over the years. *Id* at 309, citing *State v. Pirtle*, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn.App. 286, 299-301, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn.App. 24, 25, 751 P.2d 882 (1988); *State v. Price*, 33 Wn.App. 472, 475-76, 655 P.2d 1191 (1982). The *Bennett* court then noted that it was again approving of WPIC 4.01, and also went a step farther and **required** that the instruction be given in every criminal case,

Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform

instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the *Castle* instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 317-18.

Similarly, in *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015)⁶ our Supreme Court recently reaffirmed that WPIC 4.01 is “the correct legal instruction on reasonable doubt....” In that case the trial court had correctly instructing the jury during preliminary remarks that a reasonable doubt was “a doubt for which a reason exists,” but the trial judge then went on to paraphrase the instruction and stated that a reasonable doubt was “a doubt for which a reason can be given.” *Kalebaugh*, 183 Wn.2d at 585. In concluding that the error in the trial judge's “offhand explanation of reasonable doubt” was harmless beyond a reasonable doubt, the court rejected any suggestion that WPIC 4.01 required the jury to articulate a reason for having a reasonable doubt. *Kalebaugh*, 183 Wn.2d at 585, 586. Rather, the Court held that, “We do not agree that the judge's effort to explain reasonable doubt was a directive to convict unless a reason was given or akin to the “fill

⁶ In all fairness it should be noted that the Supreme Court's decision in *Kalebaugh* was issued after the Appellant filed his brief in the present appeal.

in the blank” approach that we held improper in *State v. Emery*.” *Kalebaugh*, 183 Wn.2d at 586; *See also, State v. Thompson*, 13 Wn.App. 1, 4–5, 533 P.2d 395 (1975) (the phrase “a doubt for which a reason exists” does not direct the jury “to assign a reason for their doubt”).

Given the clear holdings in *Bennett* and *Kalebaugh*, the Defendant has failed to show that WPIC 4.01 is unconstitutional. To the contrary, the Washington Supreme Court has clearly held that WPIC 4.01 is constitutional. The Defendant’s claim, therefore, is without merit.

I. THE DEFENDANT’S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED AT ALL OR THAT THE EXISTENCE OF COMBINED ERRORS DENIED THE DEFENDANT A FAIR TRIAL.

Finally, the Defendant argues that a reversal is warranted due to cumulative error. App.’s Br. At 125. This claim is without merit, as the trial court did not err.

Cumulative error applies when several errors occurred at the trial court level but none alone is sufficient to warrant reversal. Where the combined errors effectively denied the defendant a fair trial, the cumulative error requires reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). But where there was no “prejudicial error, there can be no

cumulative error that deprived the defendant of a fair trial.” *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 1194 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by 123 Wn.2d 737, 870 P.2d 964 (1994).

In the present case the Defendant has failed to show any error or prejudice. Furthermore, even if this Court were to find that the trial court erred in admitting evidence of Ms. Wagner’s prior drug conviction, that error was clearly harmless, and a single finding of error (especially harmless error) would not warrant a finding of cumulative error. The Defendant’s cumulative error argument, therefore, should be rejected.

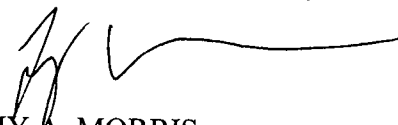
IV. CONCLUSION

For the foregoing reasons, the Defendant’s conviction and sentence should be affirmed.

DATED December 3, 2015.

Respectfully submitted,

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