71254-3

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NO. 71254-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICE POLLOCK,

Appellant.

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

The Honorable Mary E. Roberts, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The State argued that two of Maurice Henry Pollock's acts constituted second degree assault. However, the State failed to present sufficient evidence to prove one of these acts. The jury's verdict did not indicate on which act it relied. Pollock's conviction must accordingly be reversed and this case dismissed, as any retrial would subject, or potentially subject, Pollock to double jeopardy.

Alternatively, Pollock asks this court to reverse because Washington's mandatory reasonable doubt instruction tells jurors that having a reasonable doubt is not enough; jurors must also be able to explain or articulate a reason. The instruction strikingly resembles the fill-in-the-blank arguments that Washington courts have rejected as prosecutorial misconduct, as they impermissibly and subtly shift the burden of proof to defendants. Washington's reasonable doubt instruction is constitutionally infirm.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support one of the acts the State argued was assault in the second degree.

2. The reasonable doubt instruction given by the trial court required jurors to have more than a reasonable doubt to acquit and shifted the burden to Pollock to provide jurors with a reason for acquittal. This reasonable doubt instruction is therefore constitutionally defective.

Issues Pertaining to Assignments of Error

1a. Did the State fail to provide sufficient evidence of one of the acts it argued was second degree assault—namely Pollock charging with a shotgun?

1b. When one of the acts in a multiple acts case was not supported by sufficient evidence, and the court is unable to determine on which act the jury relied, must this court reverse the conviction and remand for dismissal to avoid violating the double jeopardy clauses of the United States and Washington constitutions?

2a. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists" tell jurors that they must have more than just a reasonable doubt to acquit?

2b. Did the reasonable doubt instruction impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

C. STATEMENT OF THE CASE

On November 19, 2010, Pollock received a call from his friend Brandon Wolfe, who lived at the Sunset Vista Apartments in Renton. 5RP[1] 11-13, 77. Wolfe told Pollock that he had just been threatened by Nigel

[1] This brief refers to the verbatim reports of proceedings as follows: 1RP—September 9, 2013; 2RP—September 10 and 11, 2013; 3RP—September 12, 2013; 4RP—September 16, 2013; 5RP—September 17, 2013; 6RP—September 18 and 19, 2013; 7RP—September 20 and November 8 and 22, 2013.

Greer and his associate, who were displeased by Wolfe's sale of marijuana at the apartment complex. 5RP 38, 67, 78-80, 82-83, 169-70. Wolfe requested protection in the form of firearms. 5RP 84, 171-72.

Pollock responded by bringing Wolfe firearms. 5RP 14, 16, 89, 130, 173. Pollock explained to Wolfe and his family how to safely use firearms. 5RP 89-90, 173.

Pollock also decided to confront Greer, who lived two apartments down the breezeway from Wolfe. 5RP 16, 90, 133-34, 173-74. Along with Wolfe, Pollock knocked on Greer's door and identified himself as "Police." 3RP 65; 5RP 17, 91, 174, 211. Pollock also yelled through the door that Greer should leave Wolfe and his family alone. 3RP 66; 5RP 17, 49-50, 52, 91. No one came to the door immediately, so Pollock and Wolfe headed back towards Wolfe's apartment. 5RP 18, 91. As they approached Wolfe's apartment, Greer came outside, upset. 5RP 18, 91-92.

The testimony conflicted as to what occurred thereafter.

Pollock testified that Greer had his hand on a gun tucked into his waist. 5RP 18. Pollock indicated he just wanted to talk and asked Greer not to pull a gun on him. 5RP 18, 53-54. At that point, Greer jumped back with a gun and Pollock pulled the blanket off a shotgun. 5RP 18. Pollock also acknowledged he had told police that he charged at Greer with a shotgun

aimed, but he described aimed simply as meaning readied. 5RP 18, 53. Pollock stated he never pointed a gun at Greer. 5RP 18, 52-53.

Pollock again asked Greer to leave Wolfe and his family alone. 5RP 19, 52-53. Pollock and Wolfe then entered Wolfe's apartment and locked the door. 5RP 19, 94.

Pollock invited Wolfe and his family to come to Pollock's house, and Wolfe, his girlfriend Misty Waggoner, and Waggoner's two children gathered their things to leave. 5RP 20-21, 174-75, 208, 215. As Pollock and Wolfe exited the apartment, Greer was still outside and was angry and aggressive. 5RP 22, 95. Pollock again told Greer to leave them alone. 5RP 23. At that point, Pollock said, "'This is why I don't deal with the N-word.'" 5RP 25, 95. As soon as Pollock said that, he was shot. 5RP 25, 95. Pollock sustained gunshot wounds to the chest, shoulder, and hand. 5RP 25-26, 28, 153-55, 161-64. Wolfe had also been shot and had fallen to the ground where he was bleeding profusely. 5RP 29-30, 95, 97, 209. Pollock shot his gun at the wall and toward the direction of bullets coming at him, but stated he "never had a human target in [his] sights." 5RP 28-30; accord 6RP 53 (defense expert noting that one of the shooters was very close to the wall and that bullets hit the wall and ricocheted).

Greer and his girlfriend, Annaka Lain, told a different story. Greer indicated that when he opened the door, Pollock came around the corner and

said, "'What's up?,'" and then stepped right in front of Greer, "[t]oe to toe, face to face." 2RP 43, 60. Greer testified he never saw Pollock with a shotgun, but that Pollock had a handgun. 2RP 44-45.

According to Greer, Pollock recounted "how he got robbed and shot by some other black guys that tried to rob him or something."[2] 2RP 45. During this conversation, Lain came outside the apartment and stood next to Greer. 2RP 46, 92-93. Greer and Lain testified that Pollock then stated, "'I hate fucking niggers,'" and then put his weapon up to Greer's head with his right hand. 2RP 46-47, 61-62, 93-94. At that point, Lain began to fire, and a gunfight ensued. 2RP 47-48, 93, 95-96.

Lain and Greer both described the confrontation occurring directly outside their apartment. 2RP 46, 53-54, 58-59, 63, 96-97, 111-12. Greer said a bullet hit walls and the microwave inside his apartment. 2RP 67. Lain also told police that her front door had been kicked open. 2RP 106.

Following the exchange of gunfire, Pollock indicated a group of men, one of whom had a gun, was by the fire door. 5RP 31. Pollock believed these men to be Greer's gang. 5RP 31.

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[2] Pollock testified about a home invasion during which the suspects attempted to rape his girlfriend and "emptied three guns into" him. 5RP 8-9. Pollock also testified he told Greer about previously being shot and not "want[ing] to be shot again." 5RP 53-54; see also 3RP 67 (neighbor testifying he heard a male voice say, "'Don't point that gun at me.'").

Pollock assisted Wolfe get back to his apartment, noting Wolfe's "leg was dang near blown in half." 5RP 35, 100, 108, 178. Pollock then walked down the stairs to his truck, and drove himself to the hospital. 5RP 35-36, 108-09, 178. He crashed through the emergency entrance gate. 3RP 21, 45-46, 75-76. The truck was smeared with blood and had a rifle in the front seat. 3RP 22, 46, 77-78. Pollock received medical assistance for his gunshot wounds. 5RP 36-37.

Police responded and began processing the scene. They recovered various evidence, including firearms, bullet fragments, bullet casings, bullet strike evidence, and blood drops along the breezeway. 4RP 65-78, 81-84. Police experienced problems with numbering and tagging the evidence at the scene. 4RP 89-90. Some of this evidence was never recorded by police officers onto their total station, including some blood drops.[3] 4RP 94-95, 106, 152-53; 6RP 37-39, 40-41, 68. Defense expert, Kim Duddy, a former employee at the Washington State Patrol crime lab, provided an extensive critique of the State's processing of the scene. CP 62-66; 6RP 29, 37-39, 45-47, 68.

Duddy also discredited Lain's and Greer's testimony. Specifically, Duddy indicated that Greer's and Lain's account that the shooting had

[3] A "total station" is what law enforcement uses "to mark specific points, whether it be items of evidence, marking the placement of a vehicle, a building . . . in a scene, and it allows you to map the scene." 4RP 56.

occurred right outside their apartment and that shots came into their apartment was not consistent with any of the evidence. CP 65-66; 6RP 49-51, 83-84. Duddy also stated there was no evidence that Greer's and Lain's door had been kicked in. CP 65; 6RP 50, 54.

After recuperating, Pollock contacted police and expressed a strong desire to tell his side of the story. 1RP 104, 108, 138, 140; 3RP 50-51; 4RP 21-23. After consulting with prosecutors, detectives conducted a recorded interview of Pollock. 1RP 105, 107, 109, 121; 3RP 52-53. Pollock acknowledged he had brought firearms, had used a ruse at Greer's apartment by knocking and announcing he was the police, and had used a racial slur against Greer. 1RP 116-18; 4RP 24-25, 27, 50. Following a CrR 3.5 hearing, the trial court ruled that Pollock's various statements were admissible as evidence against him. 1RP 155-57.

The State charged Pollock with one count of first degree assault against Greer. CP 1. The State later amended the information to two counts of first degree assault (one each against Greer and Lain). CP 11-12. Both counts alleged Pollock committed the acts while being armed with a firearm, invoking sentencing enhancements under RCW 9.94A.533(3). CP 11-12.

Following several continuances, Pollock proceeded to an eight-day jury trial, which established the foregoing recitation of facts.

Toward the end of trial, the State proposed a Petrich[4] instruction for the lesser included second degree assault against Greer. 6RP 6, 8. The State indicated, "There has been testimony and a statement from the defendant that he initially approached -- he used the word 'charged' [Greer] with his shotgun aimed, and then you heard some different testimony about what 'aimed' means." 6RP 8. The State also said, "You also heard testimony from both Annaka Lain and Nigel [Greer] that the defendant pointed his revolver at [Greer]'s head." 6RP 8-9. The State proposed the Petrich instruction because "[e]ither of those two acts . . . could be an assault in the second-degree." 6RP 9. The trial court used a Petrich instruction to instruct the jury on the lesser included second degree assault against Greer. CP 131. Pollock accepted this instruction. 6RP 10, 91.

The State also proposed and the trial court gave the standard reasonable doubt instruction, WPIC 4.01[5], which read, in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 115; 7RP 100.

During closing argument, the State asserted Pollock "told you that he is guilty of assault in the second-degree -- by charging at [Greer] and forcing

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[4] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 405-06 & n.1, 756 P.2d 105 (1988).

[5] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

him back into his apartment." 6RP 119. The State continued, "The other way he is guilty of that count of assault in the second-degree is by pointing that gun at [Greer]'s head as [Lain] said. That is also an assault in the second-degree." 6RP 119. The prosecutor also explained the unanimity requirement:

> you have to agree on what act is an assault in the second-degree; was it the pointing of the shotgun? Was it the pointing at the head? You all have to agree which one . . . it is. You don't have to agree both happened, you just have to be unanimous as to one happened.

6RP 120.

The jury returned verdicts acquitting Pollock of all but the lesser included charge of second degree assault as to Greer. CP 101-04; 7RP 11-15. The jury also returned a special verdict form stating Pollock was armed with a firearm at the time of this second degree assault. CP 105; 7RP 12.

Pollock moved to arrest judgment under CrR 7.4(a)(3), asserting that the evidence was insufficient to sustain his conviction. CP 145-53. Pollock pointed out that Greer, the alleged victim of the second degree assault, testified "he did not see a shotgun or a rifle of any kind in the hand of . . . Pollock at any time during the events of November 19[], 2010." CP 147. Pollock argued,

> If Nigel Greer was unaware that Maurice Pollock had a shotgun in his hand, and did not at any point see a shotgun in Maurice Pollock's hand, then it would be impossible for

> Maurice Pollock to have assaulted Nigel Greer by pointing a shotgun at him.

CP 147-48. At oral argument on the motion to arrest, defense counsel also raised a corpus delicti argument, asserting that the State presented no independent evidence whatsoever that corroborated Pollock's incriminating statement about a shotgun. 7RP 23-24, 28-29, 34-35.

The trial court denied Pollock's motion to arrest, stating, "We can't look at just one or two statements and determine that those are the ones that are truthful and that those are the ones that the jury believed." 7RP 36-37; CP 154. The trial court determined the jury could have appropriately reached its verdict based on the evidence presented. 7RP 36. The trial court failed to engage in analysis of the specific act that Pollock indicated was not supported by sufficient evidence—that Pollock had lunged at Greer—and instead dismissed Pollock's argument as asking "to assess the credibility of witnesses and weigh conflicting testimony and assign a different level of persuasiveness to the evidence than the jury did, and that's not my role." 7RP 36.

The trial court sentenced Pollock to 39 months of incarceration, which consisted of a lowest possible standard range sentence of three months and a 36-month firearm enhancement under RCW 9.94A.533(3). CP 156, 158; 7RP 53. Pollock timely appeals. CP 164-65.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE ONE OF THE ACTS THE STATE ARGUED WAS SECOND DEGREE ASSAULT, AND DISMISSAL IS THE ONLY REMEDY THAT AVOIDS VIOLATING THE CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY

The State argued the jury could rely on either of two acts to support the lesser included offense of second degree assault against Greer: (1) Pollock's alleged lunging at Greer with a shotgun (lunging act) or (2) Pollock's pointing a gun directly at Greer's forehead (gun-to-forehead act). The State failed, however, to support the lunging act with sufficient evidence. Because no rational trier of fact could have found Pollock guilty of the lunging act beyond a reasonable doubt, and because we do not know with certainty which act the jury relied on, any retrial for second degree assault would put Pollock twice in jeopardy for the same offense. To ensure the State does not violate Pollock's double jeopardy rights, this court must reverse Pollock's conviction and remand for dismissal of this prosecution.

a. The elements of second degree assault under the law of this case

Jury instructions to which neither party excepts or objects become the law of the case and delineate the State's proof requirements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Hames, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). Neither the State nor Pollock had

any exceptions or objections to the definitional or to-convict instructions with regard to second degree assault. 6RP 91. These instructions became the law of this case.

The trial court instructed the jury that an assault could occur in any of three ways:

> An assault is an intentional touching or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or shooting is offensive if the touching or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the act did not actually intend to inflict bodily injury.

CP 121; 6RP 102-03. The court gave only one definition of second degree assault: "A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon." CP 129; 6RP 106. The court's instructions stated, "A firearm, whether loaded or unloaded is a deadly weapon." CP 130; 6RP 106. The court also instructed the jury that to convict Pollock, it had to find "That on or about the 19th day of

November 2010, the defendant assaulted Nigel Greer with a deadly weapon . . . ." CP 133.

With regard to the second degree assault charge as to Greer, the trial court gave a Petrich unanimity instruction:

> As to Count I, the State alleges that the defendant committed acts of the lesser included crime of Assault in the Second Degree on multiple occasions. To convict the defendant on any count of the lesser included crime of Assault in the Second Degree as to Count I, one particular act of Assault in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Assault in the Second Degree.

CP 131; 6RP 106-07. The State argued during closing that two of Pollock's acts constituted second degree assault, the lunging act and the gun-to-forehead act. 6RP 119-20.

b. There was insufficient evidence to sustain a conviction for second degree assault as to the lunging act

Appellate courts review the sufficiency of the evidence by asking whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must "logically be derived from the facts proved, and should not be the

subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

The prosecutor described the alleged lunging act to the jurors in closing as: "'[Pollock] charged [Greer] with a shotgun aimed.'" 6RP 121. Pollock testified that he charged at Greer holding a shotgun but that he had never pointed the gun at Greer. 5RP 18, 52-53. Pollock said when he was on the walkway between Wolfe's and Greer's apartments, Greer had a gun and "start[ed] jumping back." 5RP 18. In response, Pollock "pulled the blanket off the shotgun with beanbags and I aimed it like this and [Greer] had jumped behind a corner." 5RP 18. Pollock also acknowledged during cross examination that he told police he "'moved toward [Greer] with the shotgun aimed, loaded with beanbags.'" 5RP 53. Pollock reiterated the shotgun was "'aimed'" at the ground, never at Greer. 5RP 53. Pollock also testified, "Aimed. Readied. It was wrapped in a blanket. It took a second for me to unwrap -- get that blanket off of it . . . ." 5RP 53. This was the full extent of evidence adduced at trial regarding the lunging act.

Indeed, Greer, the supposed victim of this second degree assault, testified he never saw a shotgun:

> Q. And was he -- did he have anything in his hands?
>
> A. He had a -- I am sure he had a handgun in his hands.

Q. Did you see him carrying anything else?

A. I didn't see nothing else.

Q. Did you ever see him with a shotgun?

A. No.

Q. Did you ever see him with anything wrapped -- wrapped up and sort --

A. I heard that -- I heard that story from different people from the apartment that he had some rifles wrapped in something. I'm not sure what it was.

[DEFENSE COUNSEL]: Objection, hearsay, Your Honor.

[COURT]: Sustained.

Q. So what you saw -- when you first came around the corner and said, 'What's up,' was he pointing a weapon at you at that time?

A. No.

2RP 44-45. Greer never described any incident during which Pollock lunged at all, let alone lunged with a weapon aimed. To the contrary, Greer said Pollock stepped right in front of Greer, "[t]oe to toe, face to face." 2RP 60. This was not lunging.

Lain, the other alleged victim in this case, did not testify to any lunging incident either. She said,

> I just saw a figure, a guy, but [Greer] was in front of me and . . . he had like a rifle or something wrapped in his shirt, and you know I had just woken up, and I have really bad vision, and it was blurry . . . and I was also on pain pills,

> so it's kind of hard to recollect exactly what I saw . . . at that moment.

2RP 87-88.

Brandon Wolfe, the only other person present during the shooting, testified that he and Pollock approached Greer's apartment, and that Pollock knocked on the door and yelled "police." 5RP 91, 133-34. At that time, Wolfe and Pollock were both armed with .357 pistols and Pollock had a shotgun wrapped in a blanket. 5RP 132. When no one came to the door, Wolfe stated he and Pollock walked back towards Wolfe's apartment, and "then all of a sudden [Greer] comes out" and Wolfe heard "cussing and la-la gangster stuff." 5RP 91-92. Pollock and Wolfe proceeded back to Wolfe's apartment; Wolfe was panicked. 5RP 93-94. Wolfe testified that Pollock again exited the apartment when Greer was on the breezeway. 5RP 93-94. Wolfe "remember[ed] [Greer] being very, very upset -- very aggressive . . . [Greer and Pollock] started walking towards each other, and they got to within about touching distance of each other, maybe, and [Pollock] turned around and he said, 'This is why I don't deal with the N-word.'" 5RP 95. Then the shooting began. 5RP 95. Like Lain and Greer, Wolfe never stated that Pollock had lunged or aimed a shotgun at Greer.

During cross examination, the State attempted to impeach Wolfe using a statement under penalty of perjury. 5RP 132-34. The statement

indicated Wolfe and Pollock intended to threaten Greer with firearms and confirmed that both Wolfe and Pollock were carrying firearms when Pollock knocked on Greer's door. 5RP 132-33. Wolfe also confirmed the statement and said, "'at one point prior to shots being f[ir]ed, I saw [Pollock] grabbing the handgun that was in his belt.'" 5RP 145. Like Wolfe's previous testimony, the statement provided no evidence that Pollock had charged Greer at all, with or without a shotgun.

Even when viewing everything in the light most favorable to the prosecution, this evidence was insufficient to prove beyond a reasonable doubt that Pollock committed the lunging act.

Applying the various definitions of assault to the lunging act, no witness testified that Pollock intentionally touched or shot at Greer with unlawful force while he was armed with a deadly weapon. Nor was there any evidence that Pollock attempted such a touching or shooting of Greer. Thus, the trial court's first two definitions of assault do not apply here. See CP 121; 6RP 102-03.

The only applicable definition of assault with regard to the alleged lunging act is whether Pollock "in fact create[d] in [Greer] a reasonable apprehension and imminent fear of bodily injury even though the act did not actually intend to inflict bodily injury." CP 121; 6RP 103. The record is

clear that Pollock created no such apprehension or imminent fear. No rational juror could conclude otherwise.

Greer testified he never saw a shotgun at all. 2RP 44-45. Unlike other witnesses, neither did Greer see Pollock holding anything resembling a shotgun wrapped in a blanket. Compare 2RP 44-45 (Greer recounting he only heard Pollock had a gun wrapped in a blanket) with 2RP 87-88 (Lain stating she saw a gun wrapped in Pollock's shirt), and 5RP 18, 53 (Pollock stating he had a shotgun wrapped in blanket), and 5RP 132 (Wolfe stating Pollock had a shotgun wrapped in blanket). Because Greer did not see a shotgun or anything like a shotgun, there is no possibility that Greer experienced reasonable apprehension and imminent fear of bodily injury by Pollock lunging at him with a shotgun. The evidence was insufficient to support a conviction of second degree assault with a deadly weapon based on the lunging act.

Nor can the State rely on Pollock's statement to police that he "moved towards [Greer] with the shotgun aimed, loaded with beanbags." 5RP 53. Not only does this not satisfy the definition of assault, even if it did, this statement fails to prove the corpus delicti of second degree assault. "A defendant's incriminating statement alone is not sufficient to establish that a crime took place." State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006) (footnote omitted) (citing State v. Aten, 130 Wn.2d 640, 655-56, 927

P.2d 210 (1996); State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)). "[T]he State must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred." Brockob, 159 Wn.2d at 328. The State's evidence "must provide prima facie corroboration *of the crime described in a defendant's incriminating statement.*" Id. "Prima facie corroboration of a defendant's statement exists if the independent evidence supports a "'logical and reasonable inference" of the facts sought to be proved.'" Id. (quoting Aten, 130 Wn.2d at 656 (quoting Vangerpen, 125 Wn.2d at 796)).

The State failed to present independent evidence that provides prima facie corroboration of Pollock's incriminating statement. As discussed, while several witnesses testified Pollock had a shotgun and that it was wrapped in a blanket or a shirt, there was no evidence at trial whatsoever that remotely corroborated Pollock's statement to police that he moved toward Greer with a shotgun aimed. Greer saw no shotgun, let alone movement toward him with a shotgun aimed. Lain said she might have seen something resembling a shotgun, but described nothing to indicate Pollock moved toward Greer with it aimed. Wolfe also testified Pollock and Greer moved toward each other, but provided no testimony that Pollock pointed a gun at Greer. During closing, the State pointed to no other evidence that corroborated Pollock's statement. See 6RP 119-20. The State failed to

substantiate Pollock's incriminating statement with any evidence whatsoever. Pollock's statement therefore does not and cannot provide sufficient evidence that Pollock committed the lunging act under the corpus delicti rule. The State's evidence of the lunging act was insufficient.

c. The insufficiency of evidence pertaining to the lunging act requires dismissal to honor Pollock's right against being put in double jeopardy

The state and federal constitutions prohibit placing a person twice in jeopardy for the same offense. U.S. CONST. amend. V; CONST. art. I, § 9. Where a conviction is not supported by sufficient evidence, a person may not be retried for that offense without violating the constitutional prohibition against double jeopardy. Hudson v. Louisiana, 450 U.S. 40, 42-44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981).

Criminal defendants in Washington also have the constitutional right to a unanimous verdict by a 12-person jury. CONST. art. I, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), abrogated in part on other grounds by In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). When the State presents evidence of more than one act that could form basis of the one charged count, the State must elect which act the jury should rely on in deliberations or the trial court must instruct the jury to be unanimous on a specific act. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984), overruled in part on other grounds by Kitchen, 110

Wn.2d at 405-06 & n.1; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911); State v. Osborne, 39 Wash. 548, 552, 81 P. 1096 (1905).

Here, the trial court instructed the jury that it had to be unanimous as to which act constituting second degree assault had been proved. CP 131; 6RP 107. Since courts presume jurors follow the trial court's instructions, State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), Pollock does not dispute the verdict was unanimous. The issue is the appropriate remedy given that the evidence of one of the distinct acts of second degree assault does not sufficiently support Pollock's conviction. The only appropriate remedy is dismissal.

The prosecutor argued that the jury could rely on the lunging act or the gun-to-forehead act to convict Pollock of second degree assault. 6RP 119-20. The jury returned a guilty verdict on the second degree assault without specifying the act on which it relied. CP 102; 7RP 11-15. This court cannot know whether the jury unanimously agreed Pollock's conviction was based on the lunging act, which was not supported by sufficient evidence, or the gun-to-forehead act, which was. Therefore, the only constitutionally appropriate remedy is to dismiss. Any lesser remedy would gamble on the possibility that Pollock would be placed twice in jeopardy for an act the State has failed to support with sufficient evidence.

Moreover, it is unfair to impose the result of the State's nonelection on Pollock. The State has the discretion to choose which act it believes supports conviction. Workman, 66 Wash. at 294-95. When the State argues at trial that multiple acts support a conviction and deliberately decides not to make an election as to which act, the State should bear the risk of its choice. When the State argues that multiple alleged acts form the basis for conviction but fails to support one or more of the acts with sufficient evidence, the State should thereby assume the risk that the conviction will be reversed and dismissed.

Our supreme court's decision in State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), provides helpful instruction. The court considered whether a second degree assault merged with a robbery elevated to the first degree based on the same conduct as the second degree assault. Id. at 803-05. The court answered yes, holding, "The merger doctrine is triggered when second degree assault with a deadly weapon elevates robbery to the first degree because being armed with or displaying a firearm or deadly weapon to take property through force or fear is essential to the elevation." Id.

The Kier court also addressed the State's arguments that the assault and robbery were committed against separate victims and therefore did not merge. Id. 808. Noting that the case before it was "somewhat analogous to a multiple acts case," the court indicated it was at best unclear whether the

jury believed Kier committed assault and robbery against the same or different victims. Id. at 811. Because "the evidence and instructions allowed the jury to consider [a single person the] victim of the robbery as well as the assault .... "the verdict . . . [wa]s ambiguous," and it would violate the prohibition against double jeopardy not to require the assault and robbery to merge. Id. at 814.

As in Kier, this court cannot say whether the jury believed Pollock committed second degree assault by the lunging act or the gun-to-forehead act. Given the ambiguity in the verdict, under Kier's careful reasoning, it would violate double jeopardy to permit even the possibility that Pollock would be retried based on an act that was not supported by sufficient evidence.

This case is also unlike other multiple acts cases in which courts presume the jury relied on the act or acts supported by sufficient evidence. In State v. Stark, 48 Wn. App. 245, 246-47, 738 P.2d 684 (1987), for example, the State presented evidence of three separate sexual contacts but only two of them constituted "sexual intercourse" under Washington's previous statutory rape statute, former RCW 9A.44.070 (1986), repealed by Laws of 1988, ch. 145, § 24(1). The trial court instructed the jury that it must unanimously agree on which act of sexual intercourse Stark engaged in. Stark, 48 Wn. App. at 251. On appeal, Stark argued that the court could not

be certain the jury did not "rely on the one act [that] would be insufficient to support a conviction for statutory rape." Id. This court disagreed, "assuming . . . the jury could not have relied on the one act of the three that would not come within the definition of 'sexual intercourse.'" Id.; see also State v. Jones, 71 Wn. App. 798, 822-23, 863 P.2d 85 (1993) ("[I]n this case we do not believe that there was sufficient evidence to go to the jury with respect to the other acts—the evidence was simply not sufficiently substantial to raise this matter to a multiple acts case.").

This case differs from Stark and Jones because the record here does not afford the assumption that the jury could not have relied on the lunging act. In Pollock's CrR 7.4 motion to arrest judgment for insufficient evidence, defense counsel recounted his conversations with six jurors after the verdict:

> [The prosecutor and defense counsel] were told by the jury that they did not believe the story as told by Nigel Greer and Annaka Lain and that they did not believe Maurice Pollock ever placed a gun to the head of Nigel Greer, based on the lack of physical evidence showing that any bullets had ever been fired into Nigel Greer's apartment, and that they had felt it was more possible that Maurice Pollock had 'charged' at Nigel Greer, as Mr. Pollock stated he did in his statement to police, with a shotgun 'aimed' at him and that was their basis for finding Maurice Pollock guilty of [a]ssault in the [s]econd [d]egree.

CP 150-51. The State conceded during argument on the CrR 7.4 that the jury "didn't believe part of [Greer's] testimony; specifically the part where

he said that the defendant put the gun to his head." 7RP 31-32. The deputy prosecutor went on,

> And Nigel Greer wasn't truthful about that because he didn't want to have a gun in his hand, and the jury, I think, pretty clearly believed that, and that is why they discounted this whole assault one with him pointing the -- with the defendant pointing the gun at [Greer]'s head, and they instead relied upon the defendant's words and the other corroborating evidence[6] to find that he did in fact commit the assault two.

7RP 32. Given that both the prosecutor and defense counsel both argued and acknowledged that the jury probably relied on the lunging act—which was not supported by sufficient evidence or corroborated in any way—this court cannot say with Stark's clarity that the jury must have relied on the gun-to-forehead act to convict Pollock of second degree assault.

Moreover, the only evidence presented to the jury of the gun-to-forehead act was the testimony of Lain and Greer. See 2RP 46-47, 61-62, 93-95. Defense expert Kim Duddy entirely discredited Lain's and Greer's version of events. She said that Pollock's gunshot wounds to the chest and shoulder would not have been forensically possible had Pollock had his arm up to Greer's head when the shooting began. 6RP 60-61. Duddy also concluded that the shooting could not have occurred right outside Lain's and Greer's apartment because there was no blood in that area. 6RP 60. And, in

[6] Though the prosecutor referred to other corroborating evidence, as discussed, there was none. And, if there were any such evidence, the prosecutor would have pointed to it during his closing argument, but he did not. See 6RP 119-20.

any event, had the jury found Greer and Lain credible, it would not have acquitted Pollock of first degree assault as to Greer or of any assault as to Lain.[7] See CP 101, 103-04; 7RP 11-12. It is not reasonable to conclude, as this court did in Stark, that the jurors must have relied on the act supported by sufficient evidence, as all signs point in the other direction.

No rational trier of fact could have found Pollock guilty of the lunging act, although it appears jurors did so. Because this court cannot say with certainty which act the jury relied on, neither can this court say with certainty that retrying Pollock would not place him twice in jeopardy for the same conduct. The only adequate remedy in these circumstances is to reverse Pollock's conviction and remand for dismissal of this prosecution with prejudice.

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

Pollock's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 115; 6RP 100; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction

[7] It is particularly unlikely the jury found Lain credible given her testimony that a "divine intervention made [her] move the way [she] did" to dodge bullets, which she had earlier likened to "do[ing] the matrix." 2RP 97, 115.

in every criminal case. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). This instruction is constitutionally defective because it requires the jury to have a reason to establish a reasonable doubt. If this court does not dismiss this prosecution, it should nonetheless reverse and remand for retrial in light of this instructional error.

WPIC 4.01 is invalid for two reasons. First, its language tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring exactly the same thing. Instructing jurors with WPIC 4.01 is constitutional error.

Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions, it must be logically derived, rational, and have no conflict with reason. Accord Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

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

capable of explanation or justification. In other words, WPIC 4.01 requires not just a reasonable doubt but an explainable, articulable, reasonable doubt.

Thus, in order for jurors to acquit under the faulty language of WPIC 4.01, it is not sufficient for them to have a reasonable doubt. Cf. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . ."). Rather, courts instruct Washington jurors that they must also be able to point to a reason that justifies their reasonable doubt. Jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. In these scenarios, despite having reasonable doubt, the jurors could not vote to acquit under WPIC 4.01. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amends. V, XIV; CONST. art. I, § 3.

Requiring jurors to articulate a reason for having reasonable doubt is also precisely what Washington courts prohibit in the context of prosecutorial misconduct. Fill-in-the-blank arguments are flatly barred

"because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012); accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you *have* to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'"); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, "'I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn't know that the cocaine was in there, and he didn't know what cocaine was'" and that "'[t]o be able to find reason to doubt, you have fill in the blank, that's your job'" (quoting reports of proceedings)); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (holding flagrant and ill intentioned the prosecutor's statement "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank'" (quoting report of proceedings)); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor's statement that "'in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank'" (quoting report of proceedings)).

Although it does not explicitly require jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt—this is, in substance, the same exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the exact same undermining to occur through a jury instruction. The Emery court approved "reasonable doubt as a 'doubt for which a reason exists'" without explanation, and certainly without considering arguments like Pollock's. Emery, 174 Wn.2d at 760. But just like fill-in-the-blank arguments, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank." Emery, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence and is therefore erroneous.

Pollock's jury was instructed pursuant to WPIC 4.01 that it must articulate a reason for having reasonable doubt. This was error because it improperly shifted the burden to Pollock to provide such a reason and required more than a mere reasonable doubt to acquit Pollock. In the event this court does not reverse and remand for dismissal, this court should

reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

E. CONCLUSION

There was insufficient evidence presented to prove one of the acts the State relied on to support a conviction for second degree assault. Because this court cannot know for certain which act the jury relied on, this court must reverse Pollock's conviction and remand for dismissal to avoid the possibility that Pollock would be doubly tried for the same conduct. Alternatively, this court should reverse and remand for a new trial based on the trial court's constitutionally deficient instruction on reasonable doubt.

DATED this 19th day of December, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71254-3-I
	)	
MAURICE POLLOCK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAURICE POLLOCK
18815 110TH CT. SE
RENTON, WA 98055

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF DECEMBER 2014.

X Patrick Mayovsky