SUPREME COURT NO. 93011-2

NO. 45998-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARRY TARRER,

Petitioner.

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

The Honorable Katherine M. Stolz, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Larry Tarrer, the appellant below, requests review of the Court of Appeals decision in State v. Tarrer, 2016 WL 562747, No. 45998-1-II (Feb. 9, 2016), following denial of his motion for reconsideration.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court excluded expert opinion testimony that the victim had more likely been shot in the back, which contradicted the victim's account that she faced her shooter and could therefore see and later identify her shooter as Tarrer. Did this exclusion violate (a) the constitutional right to present a defense, (b) the evidence rules governing expert testimony and related precedent, (c) the key Washington case regarding the exclusion of evidence for discovery violations, and (d) to the extent the exclusion arose from a discovery violation, the constitutional right to effective counsel?

2. The trial court admonished against jury misconduct out of a concern for the impact on the victims of crime and the State's ability to obtain convictions at trial rather than have to settle for plea deals. Were these unconstitutional comments on the evidence?

3. Does WPIC 4.01[1] undermine the presumption of innocence and shift the burden of proof to the accused?

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[1] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

4. In closing, the prosecutor diminished the reasonable doubt standard and disparaged the defense. Do these instances of misconduct, considered alone or together, require reversal?

C. STATEMENT OF THE CASE

On January 8, 1991, Lavern Simpkins and Claudia McCorvey were alone in McCorvey's Tillicum apartment, after an evening of crack using and dealing in the apartment with several others. RP 529, 536-39, 663-64, 819, 828-29, 856-57. Someone swung open the door and shot several times into the apartment. RP 549, 649. Simpkins, shot twice, was killed. RP 222, 419-20, 426, 433. McCorvey, also shot twice, survived but suffered a bullet wound to her thoracic spine, permanently paralyzing her. RP 549, 561. McCorvey's unborn child died shortly after delivery due to McCorvey's blood loss. RP 274-78.

The State charged Tarrer with first degree murder for the death of Simpkins, first degree attempted murder as to McCorvey, and first degree manslaughter for the death of McCorvey's unborn quick child. CP 1-3, 73-74, 76. Tarrer initially entered an Alford[2] plea, but in 2004 was permitted to withdraw his plea and proceeded to trial. CP 13, 22, 58, 63-66. Tarrer's first trial resulted in a mistrial; he was convicted of all

[2] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

charges in his second trial, but the Court of Appeals reversed for prosecutorial misconduct. CP 96, 98-109.

In the third trial, the trial court admonished jurors not to commit misconduct because it might result in mistrial. The trial court continued to explain that in other cases, mistrial meant that "the victim will have to testify again" and that prosecutors had to reach a plea deal because they did not want the victim to have to testify again. RP 182-83.

Tarrer wished to call Dr. Eric Kiesel, the Pierce County medical examiner, to render an expert opinion based on his review of McCorvey's medical records. Kiesel would opine that measurements of the bullet wounds in the medical records were consistent with McCorvey being shot in the back rather than the front as she claimed. RP 549, 648-53, 883-84, 888. Defense counsel conceded the medical records themselves were inadmissible under the business records exception, as the Court of Appeals had previously ruled, but that Kiesel could rely on the records to form his opinion pursuant to ER 702 and ER 703. CP 110-11; RP 888. The trial court excluded Kiesel's testimony because he was not timely disclosed and because it did not properly qualify as an expert opinion. RP 889-89, 896.

The trial court gave the pattern instruction on reasonable doubt. CP 492.

In closing, the prosecutor repeatedly misstated the reasonable doubt standard, appealed to the passions and prejudices of jurors, and disparaged defense counsel for presenting the expert testimony of Dr. Geoffrey Loftus on his eyewitness identification research. RP 1271-72, 1297-98.

The jury returned guilty verdicts. CP 521-24, 526. The trial court imposed an exceptional sentence of 896 months. CP 531; RP 1373.

Tarrer appealed. CP 546-58. The Court of Appeals rejected Tarrer's arguments that the trial court commented on the evidence and erred in excluding Dr. Kiesel's testimony, and that the reasonable doubt instruction is unconstitutional. Tarrer, slip op. at 14-18. The Court of Appeals agreed with Tarrer that the prosecutor committed misconduct, but declined to find the misconduct flagrant and ill intentioned. Id. at 18-21.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS NECESSARY BECAUSE TARRER WAS DENIED THE OPPORTUNITY TO PRESENT A DEFENSE IN VIOLATION OF THE CONSTITUTION, IN CONFLICT WITH THE EVIDENCE RULES, AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND CONTRARY TO THIS COURT'S PRECEDENT

At trial, Tarrer's defense was identity. The only evidence presented that definitively identified Tarrer as the shooter was Claudia McCorvey's testimony that she faced her shooter when she was shot. However,

McCorvey's medical records showed that McCorvey's chest wounds were exit wounds, not entrance wounds, indicating McCorvey was not facing her shooter. This powerful, exculpatory evidence was essential to Tarrer's identity defense because it undermined McCorvey's eyewitness identification and credibility.

Tarrer sought to put on the expert testimony of Pierce County medical examiner Eric Kiesel, M.D., who would have opined, based on his review of pertinent records, McCorvey was more likely shot in the back and thus did not face her shooter.[3] The trial court disallowed this testimony and the Court of Appeals affirmed. Their decisions violated Tarrer's constitutional right to present a defense and conflicted with several of this court's decisions.

a. The Court of Appeals affirmed a clear violation of Tarrer's constitutional right to present a defense

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A fair trial contemplates that a defendant will not be prejudiced by the denial of the opportunity to present

[3] In his previous trial, Tarrer attempted to admit these records as substantive evidence under the business records hearsay exception, which the trial court denied. The Court of Appeals decision affirmed this denial, holding that the business records exception did not apply. State v. Tarrer, noted at 174 Wn. App. 1029, 2013 WL 1337943, at *10. Tarrer concedes that the business records exception does not allow admission of the records themselves as substantive evidence.

witnesses. State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Tarrer was denied his right to defend himself because he was not permitted to present Kiesel's exculpatory opinion testimony that McCorvey was shot in the back and therefore was not facing her shooter when shot. This significant constitutional issue warrants review. RAP 13.4(b)(3).

b. The Court of Appeals decision conflicts with the evidence rules and case law regarding expert opinion testimony

An expert's testimony is admissible under ER 702 and ER 703 if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact. Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). "ER 703 allows an expert to base his or her opinion on evidence not admissible in evidence and to base his or her opinion on facts and data perceived by or made known to the expert at or before the hearing." Id.

Kiesel's expert testimony was admissible. As the Pierce County medical examiner, he qualified as a medical expert. He relied on generally accepted theories in the medical community as well as facts and data in the form of medical records in rendering an opinion that McCorvey was more likely shot in the back.[4] Because Kiesel's testimony went to McCorvey's

[4] The State conceded at trial that medical records constituted evidence of the type generally relied on in the medical community. RP 807.

identification of Tarrer as the shooter, it was helpful to the trier of fact. Under the evidence rules, Tarrer was entitled to present Kiesel's testimony.

The Court of Appeals decision conflicts with ER 702, ER 703, and this court's precedent applying these rules. First, the Court of Appeals held that because Kiesel had not examined McCorvey or her wounds, "his opinion on the wounds lacked foundation." Tarrer, slip op. at 16. This conflates the weight of the evidence with its admissibility. In re Marriage of Katare, 175 Wn.2d 23, 39, 283 P.3d 546 (2012) ("That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility."). The Court of Appeals' conclusion that Kiesel's testimony lacked foundation because he had not personally examined McCorvey conflicts with this court's precedent, warranting review under RAP 13.4(b)(1).[5]

Second, the Court of Appeals stated, "All Dr. Kiesel could testify to were the statements and opinions of other doctors who did examine McCorvey's wounds," and therefore agreed with the trial court that his opinion "was 'not an opinion with any certainty that we're going to bring into this courtroom.'" Tarrer, slip op. at 16-17 (quoting RP 894). This

[5] The Court of Appeals' determination that Kiesel's opinion based on bullet wound measurements lacked foundation is also contradicted by the State's presentation of the testimony of the medical examiner who performed Lavern Simpkins's autopsy and testified to the general proposition that entrance wounds were smaller in size than exit wounds. RP 417-21.

conflicts with Johnston-Forbes, ER 702, and ER 703, which establish that an expert may rely on the opinions and conclusions of others as long as those opinions and conclusions are reasonably relied on in the relevant scientific community. Kiesel planned to give his own opinion, based on statements in medical records, that McCorvey's wounds were more consistent with being shot in the back. The Court of Appeals' failure to address the admissibility of this evidence under the pertinent evidence rules and precedent warrants review under RAP 13.4(b)(1).

Third, the Court of Appeals determined "Kiesel's proposed testimony appeared to be an attempt to circumvent our previous ruling about the underlying medical records. We upheld the exclusion of expert testimony about *other* doctors' opinions of whether McCorvey's wounds were entrance or exit wounds." Tarrer, slip op. at 17 (citing State v. Tarrer, noted at 174 Wn. App. 1029, 2013 WL 1337943, at *10 (2013)). This statement is misleading because the previous decision addressed the admissibility of testimony only under the business records hearsay exception; it did not foreclose alternative theories of admissibility, such as expert opinion under ER 702 and ER 703. See Tarrer, 2013 WL 1337843, at *10 ("Under the business records exception, witnesses cannot testify to others' opinions." (emphasis added)). "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where

the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Review is appropriate because the decision below conflicts with Berschauer/Phillips and the decision in Tarrer's previous appeal. RAP 13.4(b)(1)–(2).

c. The Court of Appeals decision conflicts with precedent governing the exclusion of evidence based on discovery violations

The decision below approved of the exclusion of Dr. Kiesel because Tarrer's attorney disclosed him as a potential witness three weeks into trial. Tarrer, slip op. at 16. Although the Court of Appeals cited State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998), which addressed when evidence may be excluded based on discovery violations, its decision actually conflicts with Hutchinson.

Under Hutchinson, "[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." 135 Wn.2d at 882. The Court of Appeals acknowledged that exclusion of Kiesel was an extraordinary remedy but failed to acknowledge or apply Hutchinson's four factors governing when this extraordinary remedy might be appropriate.[6]

Exclusion of Kiesel was not warranted under Hutchinson. First, the trial court would have given a standard limiting instruction to limit the jury's

[6] These factors include (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at and outcome of trial; (3) the extent to which the witness's testimony will surprise or prejudice the prosecution; and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 883.

consideration of the medical records to assess Kiesel's opinion. The trial court could also have placed limitations on the content of Kiesel's testimony so that he did not merely parrot inadmissible evidence. The trial court could also have sanctioned counsel for late disclosure. Sanctions less severe than total exclusion would have been effective. Second, Kiesel was one of Tarrer's main avenues for challenging McCorvey's 23-year-old eyewitness identification of Tarrer as the shooter. Kiesel's testimony was powerful defense evidence that undermined McCorvey's recollection of events and her credibility—it could have changed the outcome of trial. Third, the prosecution explicitly conceded it would not be prejudiced by Kiesel's testimony. RP 892. Fourth, defense counsel's late disclosure of Kiesel was neither willful nor in bad faith but a product of his admitted lack of preparation for trial. RP 893 (defense counsel stating, "I will remind you that I told you I wasn't ready [for trial]."). The Court of Appeals decision, which contained no analysis on this issue at all, conflicts with Hutchinson, necessitating review under RAP 13.4(b)(1).

d. Tarrer received constitutionally ineffective assistance given that the exclusion of Kiesel was based in part on counsel's late disclosure

The Court of Appeals agreed with Tarrer that, under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), counsel rendered deficient performance by failing to timely disclose Kiesel

as an expert witness. Tarrer, slip op. at 22. However, the Court of Appeals erroneously concluded Tarrer could not show prejudice "because he cannot demonstrate that the trial court would have admitted Dr. Kiesel's testimony but for the missed discovery deadline." Id. As discussed, it was error not to admit Kiesel's testimony. So, to the extent that the prejudicial exclusion of Kiesel was based on defense counsel's constitutionally deficient performance, review is appropriate under RAP 13.4(b)(3).

e. The Court of Appeals' harmlessness analysis conflicts with precedent

The Court of Appeals recited the correct standards under Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002), for constitutional harmlessness: courts must be convinced beyond a reasonable doubt that, absent the error, the jury would have reached the same result. Tarrer, slip op. at 17. The Court of Appeals did not actually apply this standard, however.

The Court of Appeals recognized that "Dr. Kiesel may have called into doubt McCorvey's testimony that she was shot in the front. However, this testimony would not have impeached McCorvey's testimony that Tarrer shot her and Simpkins or countered the medical records that indicated that McCorvey was shot in the front."[7] Tarrer, slip op. at 17-18.

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[7] Medical records pertaining to McCorvey's gunshot wounds were not admitted at all. In the medical records Kiesel used to form his opinion, "there were five doctors that looked

At trial, the defense was identity and the only direct evidence Tarrer was the shooter was McCorvey's eyewitness identification of Tarrer as the person she faced when she was shot. If jurors had been provided with evidence suggesting McCorvey was shot in the back and thus did not face her shooter as she claimed, it would have undermined both McCorvey's credibility and identification. This could have changed the outcome of trial, and it is impossible to conclude otherwise beyond a reasonable doubt. Moreover, the Court of Appeals found harmlessness based on "the overwhelming amount of evidence supporting Tarrer's conviction," but did not discuss or identify the overwhelming evidence to which it referred. Tarrer, slip op. at 18. The Court of Appeals decision conflicts with constitutional precedent of this court. RAP 13.4(b)(1), (3).

2. THE TRIAL COURT'S ANTI-DEFENSE, PRO-VICTIM COMMENTS ON THE EVIDENCE WARRANT REVIEW

A trial court is constitutionally prohibited from commenting on the evidence. CONST. art. IV, § 16. "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

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at [McCorvey]. Four of them said the entrance wounds were on the back. One of them said the exit would was on the back. That person, who said the exit wounds were on the back . . . was . . . a second-year resident." RP 883-84. Thus, even if the records were admitted, Kiesel's opinion would indeed have countered the one apparent record that indicated McCorvey was shot in the front.

In the context of admonishing the jury not to commit misconduct, the trial court stated that juror misconduct would require victims to retestify and result in favorable plea deals for criminal defendants. RP 182-83. The Court of Appeals ruled this was not a comment on the evidence because the statements were not made in reference to Tarrer's case and the "attitude of the merits of Tarrer's case [we]re not reasonably inferred from the nature or the manner of the trial court's statements." Tarrer, slip op. at 14-15.

The trial court's comments sympathized with crime victims for having to retestify and lamented that juror misconduct could result in favorable plea deals for criminal defendants. The comments expressed an attitude that all criminal defendants are guilty and that all victims were credible and sympathetic. The trial court's comments to the jury betrayed its general anti-defendant, pro-victim assessment of every criminal case, including Tarrer's. This issue presents a significant constitutional question, and the Court of Appeals decision conflicts with this court's and its own precedent applying article IV, section 16. RAP 13.4(b)(1)–(3).

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

The pattern jury instruction requires the jury or the defense articulate "a reason" for having reasonable doubt. This articulation requirement distorts the reasonable doubt standard, undermines the presumption of

innocence, and shifts the burden of proof to the accused. Because it presents a significant constitutional question that has not been directly addressed by this court, and because it implicates jury instructions given in every criminal trial in Washington, this court should grant review under RAP 13.4(b)(3) and (4).

Jury instructions must be manifestly clear and not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). The error in WPIC 4.01 is readily apparent to the ordinary mind: having a "reasonable doubt" is not, as a matter of plain English, the same as having "a reason" to doubt. WPIC 4.01's use of the words "a reason" clearly indicates that reasonable doubt must be capable of explanation or justification.

Prosecutors have several times argued that juries must be able to articulate a reason for reasonable doubt, demonstrating that the reasonable doubt standard is not manifestly clear to legally trained professionals, let alone jurors. E.g., State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Indeed, the prosecutors in Johnson and Anderson recited WPIC 4.01's text before making their improper fill-in-the-blank arguments. Johnson, 158 Wn. App. at 682;

Anderson, 153 Wn. App. at 424. It makes no sense to condemn articulation arguments from prosecutors but continue giving the very jury instruction that gave rise to these improper arguments. Because the Court of Appeals decision conflicts with these cases and cases requiring jury instructions to be manifestly clear, review is appropriate under RAP 13.4(b)(1) and (2).

Review is also appropriate because this court's own precedent is in serious disarray. In State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), this court determined that the instruction "a doubt for which a reason can be given" was error, but that WPIC 4.01's "a doubt for which a reason exists" was not. This holding directly conflicts with this court's precedent that equated the "for which a reason can be given" and "for which a reason exists."

In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this court found no error in the instruction, "It should be a doubt for which a good reason exists." This court maintained the "great weight of authority" supported this instruction, citing the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note, which is attached as Appendix B, cites cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[8]

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[8] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious sensible doubt, such

In State v. Harsted, 66 Wash. 158, 162, 119 P. 24 (1911), the defendant objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." This court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This court relied on out-of-state cases, including Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." This court was "impressed" with this view and therefore felt "constrained" to uphold the instruction. Harsted, 66 Wash. at 165.

Harras and Harsted viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. This view directly conflicts with Kalebaugh and Emery, which strongly reject any requirement that jurors must be able to articulate a reason for having reasonable doubt. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 760.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01. There is no meaningful

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as you could give a good reason for."); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

difference between WPIC 4.01's doubt "for which a reason exists" and a doubt "for which a reason can be given." Both require articulation, and articulation of reasonable doubt undermines the presumption of innocence and shifts the burden of proof to the accused. Because this court's and the Court of Appeals' decisions are in disarray on the significant constitutional issue of properly defining reasonable doubt in every criminal jury trial, Tarrer's arguments merit review under all four of the RAP 13.4(b) criteria.

4. THE PROSECUTOR MISSTATED THE REASONABLE DOUBT STANDARD, INVITED JURORS TO CONVICT ON IMPROPER GROUNDS, AND DISPARAGED THE DEFENSE, NECESSITATING REVIEW

The prosecutor, John Neeb, committed misconduct during closing argument in four ways. First, the prosecutor quoted Justice Benjamin Cardozo at length to argue that justice "is due the accuser" just as much as the accused, asking jurors to "keep the balance true." RP 1271. Second, the prosecutor invited jurors to convict Tarrer because "23 years is a very long time to wait for some final justice to come in this case; but it is almost here." RP 1271. Third, the prosecutor argued, "I'm going to suggest to you that the law doesn't let you think about [a lack of evidence] when you decide if the case was proved beyond a reasonable doubt." RP 1297-98. Fourth, the prosecutor disparaged the defense for presenting the testimony of Dr. Geoffrey Loftus, claiming he was a witness whose "sole purpose is to

distract you, to confuse you, to make you worry, and to make you hesitant about reaching a verdict" and arguing his "entire testimony was designed to have you think no one can ever accurately identify somebody who committed a crime against them." RP 1272. Defense counsel only objected to the fourth instance of misconduct.

As for the fourth disparagement issue, this court should grant review pursuant to RAP 13.4(b)(1) because the Court of Appeals decision is in conflict with this court's precedent. In State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011), the prosecutor called defense counsel's arguments "sleight of hand" and "bogus." This court held these arguments were ill intentioned because they implied deception by defense counsel. Id. In State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008), this court determined the prosecutor committed misconduct when he described defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." The prosecutor's arguments that Loftus's testimony was "designed" to trick, distract, and confuse the jury constituted the same misconduct disapproved of in Warren and Thorgerson, and the Court of Appeals erred in concluding otherwise. Tarrer, slip op. at 20-21 (holding "prosecutor was merely drawing a

permissible inference from the evidence about the credibility of a witness, not disparaging the defense").

The Court of Appeals agreed with Tarrer that the prosecutor misstated the law or inappropriately appealed to the sympathy of the jury in every other respect, but concluded the errors were not so flagrant and ill intentioned that a curative instruction could not have cured it. Id. at 19-20. This conflicts with In re Personal Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012), in which this court held that where "case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct," such conduct meets the flagrant and ill intentioned standard. The prosecutor's distortions of the reasonable doubt standard and the emotional plea to jurors to do "final justice" after 23 years have been classified by the courts as misconduct before. E.g., id. at 713-14; Emery, 174 Wn.2d at 760; State v. Huson, 73 Wn.2d 660, 662-64, 440 P.2d 192 (1968); Walker, 164 Wn. App. at 731; Johnson, 158 Wn. App. at 682. The Court of Appeals decision here conflicts with these cases, necessitating review. RAP 13.4(b)(1)–(2).

Tarrer's last appeal resulted in reversal because of significant prosecutorial misconduct, yet the same prosecutor resorted to similar misconduct again. Tarrer, 2013 WL 1337943, at *5-9. The prosecutor's actions were again in plain conflict with his quasi judicial duty to ensure the

defendant a fair trial, State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), and the Court of Appeals failed to recognize this, warranting review under RAP 13.4(b)(1) and (2). This is also an issue of substantial public importance: if courts will not reverse in cases of repeated, egregious misconduct, then they actually encourage and reward prosecutors for their misconduct, thereby significantly undermining the fair, evenhanded operation of our criminal justice system. RAP 13.4(b)(4).

Finally, defense counsel rendered ineffective assistance for failing to object to the prosecutor's improper remarks, presenting an important constitutional issue under RAP 13.4(b)(3).

E. CONCLUSION

Because he satisfies every RAP 13.4(b) review criterion, Tarrer asks that this petition be granted.

DATED this 13th day of April, 2016.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LARRY TARRER, Appellant.	No. 45998-1-II UNPUBLISHED OPINION

MELNICK, J. — Larry Tarrer appeals his jury convictions of one count of murder in the first degree, one count of attempted murder in the first degree, and one count of manslaughter in the first degree for a 1991 shooting. We hold (1) the trial court did not abuse its discretion when it denied Tarrer's motions for continuance because it had tenable grounds and reasons to deny his motions, (2) Tarrer fails to show evidence of the trial court's actual or potential bias, (3) the trial court did not comment on the evidence because the trial court's attitude is not reasonably inferred from its remarks, (4) the trial court did not abuse its discretion by excluding Tarrer's expert witness because it had tenable grounds and reasons to exclude the evidence under ER 702, (5) the prosecutor's errors do not amount to such pervasive error that they could not have been cured by proper instruction, (6) Tarrer was not prejudiced by his counsel's deficient performance, (7) the trial court correctly instructed the jury on reasonable doubt, (8) there was no cumulative error, and (9) we need not determine whether this matter should be assigned to a different judge on remand because we are not remanding for a new trial. We affirm.

FACTS

I. OVERVIEW

In January 1991, Claudia McCorvey was six months pregnant. McCorvey's apartment served as a location for using and dealing crack cocaine. Bishop (Slim) Johns dealt crack cocaine out of McCorvey's apartment on January 8, 1991. Johns brought Lavern Simpkins and Larry Tarrer to McCorvey's apartment. Following an argument about Tarrer's missing cocaine, Tarrer left the apartment and went to a car. He retrieved a pistol and walked back to McCorvey's apartment.

McCorvey saw Tarrer point the pistol at her. He shot her twice. As a result, McCorvey was rendered a paraplegic. Her baby, Marquise McCorvey, was surgically delivered and lived for less than one hour. Tarrer also fatally shot Simpkins.

II. PROCEDURAL HISTORY

In 1991, Tarrer entered an *Alford/Newton*[1] plea to amended charges of murder in the second degree and assault in the first degree. In 2004, while serving his sentence, Tarrer filed a CrR 7.8 motion to vacate his conviction. The trial court denied the motion. Tarrer appealed and we reversed and remanded to the trial court consistent with *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004).[2] The State then withdrew the 1991 amended information.

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[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

[2] *State v. Tarrer*, noted at 130 Wn. App. 1010, 2005 WL 2746678.

In 2009, the State filed an amended information charging Tarrer with premeditated murder in the first degree, attempted murder in the first degree, and manslaughter in the first degree. The State added three sentencing aggravators[3] to the attempted murder in the first degree charge.

The case went to trial in 2009 and resulted in a mistrial. The State retried the case in 2010, resulting in convictions on all counts. We reversed and remanded the case for prosecutorial misconduct.[4] The Honorable Katherine Stolz presided over both trials.

III. TARRER'S THIRD TRIAL

A. Motions for Recusal and Continuance

In September 2013, before his third trial, Tarrer moved the trial judge to recuse herself because, he argued, she was not impartial. Tarrer argued that the judge's comment during sentencing following the second trial that "[t]his court is going to do its best to make sure you never get out of prison alive" demonstrated actual bias and violated the appearance of fairness doctrine. Clerk's Papers (CP) at 121. The trial court found that Tarrer failed to establish actual bias "because the court did nothing untoward in making its comments at the last sentencing hearing." CP at 125. The trial court additionally found that "[Tarrer] made this same argument during the appeal from his conviction . . . [and] [t]he court of appeals rejected that request." CP at 125. The judge accordingly denied Tarrer's motion.

On December 12, 2013, Tarrer moved for a continuance of the trial date. Although five weeks earlier Tarrer's counsel represented to the court that he would be ready for trial, he argued

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[3] They are: "[T]he victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense", "the current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant," and "the offense involved an invasion of the victim's privacy." Clerk's Papers (CP) at 76.

[4] *State v. Tarrer*, noted at 174 Wn. App. 1029, 2013 WL 1337943.

that his ongoing investigation revealed the identity of another possible shooter. In denying the motion, the trial court noted that defense counsel had been investigating the case for seven months, the issues in Tarrer's case were established, trial was to be held in one month, and Tarrer had speedy trial rights.

On January 10, 2014, three days before trial, Tarrer again moved for a continuance to seek more time to create his witness list and prepare motions in limine. The trial court denied Tarrer's motion and noted that the witness lists were past due.

B. Pretrial

Tarrer moved in limine to exclude and limit the suggestibility of the eyewitness identification. In support of his motion, Tarrer submitted briefing. On the day of trial, Tarrer requested that the trial court allow Dr. Geoffrey Loftus to testify on the unreliability of eyewitness identification.[5] Tarrer argued that the trial court should consider new case law, which Tarrer included in his brief. The trial court responded:

> Well, you're going to have to get some sort of a synopsis of what you think Dr. Loftus is going to testify to; but again, you know, I took a look through your memorandum I got this morning; and I went back and pulled up the case, you know, Section B, admission of eyewitness identification. . . . I went through all of it. I mean, that ruling was affirmed. That is the state of the law in this case. Whatever prospectively the Supreme Court might rule or the Court of Appeals might rule in the future, that's not where we are right now. Irrespective of whatever New Hampshire, New Jersey, or some other state has done, this state, our Court of Appeals, Division II, has allowed that identification, both by the photomontage and in court, to stand; so you know, I don't really intend—you know, you can argue it again; but you already know how I'm going to rule.

Report of Proceedings (RP) at 67-68.

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[5] We affirmed the admissibility of eyewitness identifications of Tarrer based on a photo montage in *State v. Tarrer*, 2013 WL 1337943 at *10-11.

Tarrer also moved in limine to limit the State's closing argument based on our opinion reversing Tarrer's convictions because of prosecutorial misconduct. Prior to argument on these motions, the State noted that it might waive closing argument. The trial court responded, "[The State] can basically cut and paste his closing argument to avoid offending the Court of Appeals." RP at 85. The State notified the trial court that it did not intend on giving "any form of the declare-the-truth argument" during closing. RP at 102. The trial court granted Tarrer's motion to preclude the State from making a declare-the-truth argument in closing, but denied his motion to preclude the State from arguing that the jury should render a true verdict. The trial court stated:

> I think there's a distinction between searching for the truth, or the truth is what you decide, and the instruction about render a true verdict. Since we do instruct them on that, I would assume that the appellate court, if they felt that was an inappropriate instruction from the Court, would have taken time to reverse it in their opinion.

RP at 103. The trial court also deferred its ruling on whether the State could use puzzle analogies during closing argument "until or when and if we actually get to some sort of argument regarding a puzzle." RP at 109.

Prior to its opening instructions to the jury, the trial court advised the parties that it was going to emphasize the seriousness of juror misconduct and that it would point out a recent mistrial resulting from juror misconduct in King County. Tarrer responded, "That's fine." RP at 180. During preliminary jury instructions, the trial court told the jury:

> We cannot emphasize strongly enough that you are not to discuss the case or conduct any research . . . by yourself on the subject of this trial. This is very important because it can lead to a mistrial. That has recently happened both in King and Snohomish Counties where . . . the jurors have committed misconduct during deliberation by researching the issues in the case. That means the county has to try the case. In the . . . King County case, it was a rape case which means the victim will have to testify again. In the Snohomish case, it was a child rape case which meant that, ultimately, the Prosecutor's Office dealt with the case because they did not want the five-year-old victim to have to testify again; so it's very important that you not conduct any research.

RP at 182-83.

C. Trial

McCorvey testified at Tarrer's trial. During redirect examination of McCorvey, the State asked if she recalled Tarrer asking her if drug dealing was dangerous and if drug dealers could have their drugs stolen. The State then asked, "[Tarrer] thought his drugs were stolen that night; right?" RP at 688. Tarrer objected. Outside the jury's presence, Tarrer argued that the State was trying to characterize him as a drug dealer.

> THE COURT: Well, considering I've heard Mr. Tarrer testify before that he was a drug dealer, I mean—
> [THE STATE]: You can't know that, Judge.
> THE COURT: I know I can't know that. I mean, not officially. Personally, yes, I know that. All right.

RP at 689. The State made an offer of proof that Johns would testify that Tarrer was a drug dealer and that the State would offer part of Tarrer's prior testimony in which he admitted he was a drug dealer. The trial court overruled Tarrer's objection.

Tarrer sought to introduce testimony from Dr. Eric Kiesel, a forensic pathologist. Tarrer made an offer of proof that Dr. Kiesel would testify regarding the size of entrance and exit wounds and what that typically meant. He would also testify that the medical records he reviewed were consistent with entrance wounds in McCorvey's back and exit wounds in her front. Dr. Kiesel had not examined McCorvey, and his testimony would be based on his review of her medical records. The trial court excluded Dr. Kiesel's testimony, finding that Dr. Kiesel had not examined McCorvey or her bullet wounds and his generalized opinion about bullet wounds was "not an opinion with any certainty." RP at 894. The court also determined that Dr. Kiesel's proposed testimony seemed to be an attempt to circumvent our previous ruling upholding exclusion of expert testimony about other doctors' opinions of McCorvey's wounds.

D. Closing Argument

During the State's closing argument, the prosecutor argued that the jury should balance Tarrer's rights with the rights of his accusers. He stated,

> There was an early United States Supreme Court [J]ustice whose name was Benjamin Cardozo who said, [j]ustice, though due to the accused, is due to the accuser, too; We are to keep the balance true; and I tell you that because—while the defendant has every right to a fair trial, that doesn't mean that while you deliberate the evidence in this case, you should not be mindful of Claudia McCorvey, Lavern Simpkins, Marquise McCorvey, and the others who have been affected by this case. It goes without saying, I think, that 23 years is a very long time to wait for some final justice to come in this case; but it is almost here.

RP at 1271. The prosecutor also argued that Dr. Loftus's testimony was presented to "distract" and "confuse" the jury, and to make it "hesitant about reaching a verdict." RP at 1272. Tarrer objected and argued the State mischaracterized the evidence. The trial court overruled the objection.

The prosecutor further stated:

> A reasonable doubt arising from the lack of evidence is the question of: Do you have enough? Again, there will always be more. . . . Do you wish you had DNA evidence . . . shoe prints . . . the gun and the ballistics . . .? I mean, all of these things are stuff that you could have that you don't have; and I'm going to suggest to you that the law doesn't let you think about those things when you decide if the case was proved beyond a reasonable doubt. What you look at is: Is the evidence that was actually presented enough?

RP at 1297-98.

E. Verdict

The jury found Tarrer guilty of murder in the first degree, attempted murder in the first degree with two aggravating factors, and manslaughter in the first degree. The trial court imposed an exceptional sentence above the standard range of 896 months' confinement. Tarrer appeals.

ANALYSIS

I. Motions for Continuance

Tarrer argues that the trial court abused its discretion when it denied his motions for continuance, infringing on his right to counsel because his lawyer did not have time to adequately prepare. We disagree.

A. Standards of Review

The trial court has broad discretion to grant or deny a motion for continuance. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *Downing*, 151 Wn.2d at 272. We will not reverse the trial court's denial of a motion for continuance unless a defendant shows that the trial court's decision was manifestly unreasonable or rested on untenable grounds or reasons. *Downing*, 151 Wn.2d at 272. The trial court weighs many factors when considering a motion for continuance, including "surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Downing*, 151 Wn.2d at 273.

We review claims of a denial of Sixth Amendment rights, including the right to counsel, de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). The constitutional right to assistance of counsel includes a reasonable time for consultation and preparation.[6] *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d

[6] Although Tarrer alleges the trial court's ruling denying a continuance violated his right to counsel, this allegation does not change the standard of review. As an example, our Supreme Court reviewed a trial court's ruling requiring a defendant attend trial in shackles for an abuse of discretion where the defendant alleged a violation of his right to a fair trial. *State v. Finch,* 137 Wn.2d 792, 852-53, 975 P.2d 967 (1999); *Hartzog*, 96 Wn.2d at 401; *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Not only do we agree with this approach, Tarrer argues that we should review this alleged error under an abuse of discretion standard.

694 (1981). As stated above, a motion for continuance will only be overturned if the trial court abused its discretion. *Downing*, 151 Wn.2d at 272. "In determining whether a trial court has abused its discretion, a reviewing court can find abuse only 'if no reasonable person would have taken the view adopted by the trial court.'" *State v. Barker*, 35 Wn. App. 388, 397, 667 P.2d 108 (1983) (quoting *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980)). "The test is the same even though the constitutional issue of effective assistance of counsel is involved. Moreover, '[t]he decision to deny the defendant a continuance will be disturbed on appeal only upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted.'" *Barker*, 35 Wn. App. at 396-97 (internal citation omitted) (quoting *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982)).

B. No Abuse of Discretion

Here, the trial court had tenable grounds and reasons to deny both motions for continuance. At a pretrial hearing, Tarrer's counsel assured the trial court that he would be prepared by the time of trial. Approximately five weeks later, defense counsel moved to continue the trial because his ongoing investigation revealed there may be another possible shooter. The State argued that this merely speculative information did not justify further delaying trial. The trial court denied Tarrer's motion. It noted that defense counsel had been investigating the case for seven months, it had been tried twice previously, and trial was scheduled to commence in one month. The trial court stated that the previous seven months provided Tarrer's counsel "more than adequate time to prepare, given the fact that his case has gone to trial twice." RP at 33.

Thus, the trial court weighed many factors, including both Tarrer's rights and trial maintenance. After so weighing, the trial court denied the motion to continue the trial. The trial court did not abuse its discretion. *See Downing*, 151 Wn.2d at 273.

Nor did the trial court abuse its discretion by denying Tarrer's second motion for continuance. Three days before trial, defense counsel again moved to continue the trial, but on a different basis than it previously relied. This time, defense counsel sought more time to create his witness list and prepare motions in limine. The State noted that defense counsel did not state with particularly what issues would require more time, especially in light of the fact that counsel could review the complete testimony of all witnesses from two previous trials. The State also informed the trial court that the witnesses already indicated they did not wish to be interviewed again, and that any such interviews would be redundant of previous interviews. The trial court denied this motion for continuance of the trial date.

The trial court did not abuse its discretion by denying this second motion for continuance because Tarrer presented no compelling reasons to grant the motion. Despite having the benefit of two previous trials to work from, and despite having had eight months to prepare, Tarrer cited his general need for more time. Tarrer failed to show that the trial court's decision to deny this late motion for continuance rested on untenable grounds or reasons.

Because the trial court did not abuse its discretion by denying either of the motions for continuance, we need not go further. Tarrer fails to establish either an abuse of discretion or a violation of his right to counsel. His claim fails.

II. JUDICIAL BIAS

A. Standard of Review

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22; *In re Pers. Restraint of Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). Impartial means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). "The law goes farther than requiring

an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

We review constitutional issues de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010). Claims of judicial bias are reviewed under the appearance of fairness doctrine that states "'a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.'" *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (quoting *State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)). But the party who argues that a judge has a bias must support the claim with evidence. *Bilal*, 77 Wn. App. at 722. A claim unsupported by such evidence is without merit. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). Thus, before we will apply the appearance of fairness doctrine, Tarrer must show such evidence of a judge's actual or potential bias. *Post*, 118 Wn.2d at 619; *State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230 (1995).

A defendant who has reason to believe that a judge should be disqualified because the judge's impartiality might reasonably be questioned "must act promptly to request recusal and 'cannot wait until he has received an adverse ruling and then move for disqualification.'" *Swenson*, 158 Wn. App. at 818 (quoting *State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1992)). A party must use due diligence in discovering possible grounds for recusal and then act upon this information by promptly seeking recusal. *Sherman v. State*, 128 Wn.2d 164, 205 n.15, 905 P.2d 355 (1995). To satisfy the threshold requirement for review, Tarrer must identify constitutional error and show how this alleged error resulted in actual prejudice to his rights that makes it "manifest." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

B. No Bias[7]

Tarrer first argues that the trial court's remarks, "'Well, considering I've heard Mr. Tarrer testify before that he was a drug dealer'" and "'I know I can't know that. I mean, not officially. Personally, yes, I know that'" show a bias against him. Br. of Appellant at 23 (quoting RP at 689). Tarrer argues that the trial court's remarks demonstrate that it was ready to overrule Tarrer's objection based on evidence from previous trials and that it did not perform its duties impartially.

The trial court's remarks do not provide evidence of actual or potential bias against Tarrer. The State's offer of proof, made immediately after the trial court's remarks, clearly shows what the trial court anticipated: that the State would offer evidence that Tarrer was a drug dealer. As Tarrer concedes, the trial court based its ruling on the State's offer of proof that evidence would establish that Tarrer was a drug dealer; Tarrer does not assign error to the trial court's ruling. Evidence at his third trial did establish that Tarrer was a drug dealer.[8] The trial court's remarks demonstrate its anticipation of the State's offer of proof and do not provide evidence of actual or potential bias against Tarrer.

Tarrer next argues that the trial court showed bias against him by refusing to consider new case law on the issue of eyewitness identification and by making a ruling before considering Tarrer's arguments. Yet, the record demonstrates that, contrary to Tarrer's argument, the trial court considered Tarrer's argument, reviewed applicable case law, and then disagreed with Tarrer on the legal issue. The trial court's decision does not provide evidence of actual or potential bias

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[7] Prior to trial, Tarrer moved the trial court to recuse itself because it lacked impartiality. The trial court denied Tarrer's motion by written order, and Tarrer does not appeal that denial. The issues he raises on appeal relating to bias and appearance of fairness are different from those he raised below.

[8] McCorvey's earlier testimony also established that she overheard Tarrer discussing losing drugs.

against Tarrer, but rather shows legal determinations against Tarrer's interest. *See In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

Tarrer next argues that the trial court showed bias when it commented that, "'[The State] can basically cut and paste his closing argument to avoid offending the Court of Appeals.'" Br. of Appellant at 25 (quoting RP at 85). Tarrer argues that this comment makes light of the prosecutorial misconduct during Tarrer's previous trial, "suggesting that the only problem with the prosecutor's previous arguments was that the Court of Appeals found them offensive." Br. of Appellant at 25. The comment acknowledges that Tarrer's previous convictions were reversed on the basis of prosecutorial misconduct and seems to express frustration with us, but it does not express favor towards the State. The trial court's comment is not evidence of bias.

Tarrer further argues that the trial court "reveal[ed] a lack of concern for Tarrer's right to a fair trial" when it denied Tarrer's motions to limit the State's closing argument. Br. of Appellant at 26. Tarrer does not assign error to the trial court's rulings, but argues that the rulings demonstrate "an absence of suitable interest in ensuring Tarrer received a fair trial." Br. of Appellant at 27. Again, the trial court's decisions do not provide evidence of actual or potential bias against Tarrer, but rather show legal determinations against Tarrer's interest. *See Davis*, 152 Wn.2d at 692-93.

Because Tarrer fails to show evidence of the trial court's actual or potential bias, we will not apply the appearance of fairness doctrine, and Tarrer's claim fails. *See Post*, 118 Wn.2d at 619; *Carter*, 77 Wn. App. at 12.

III. Comment on the Evidence

A. Standard of Review

Article IV, section 16 of the Washington Constitution prohibits judges from commenting on evidence. *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). We review constitutional questions de novo. *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). A trial judge is prohibited from making even implied comments on the evidence in order "to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). A trial court's conduct violates the constitution only if its attitude is "'reasonably inferable from the nature or manner of the court's statements.'" *Elmore*, 139 Wn.2d at 276 (quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)); *see also State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) ("An impermissible comment on the evidence is an indication to the jury of the judge's personal attitudes toward the merits of the cause.").

B. No Comment on the Evidence

Tarrer argues that the trial court's opening instructions to the jury regarding juror misconduct which, if happened, would require victims to testify again was an impermissible comment on the evidence because it "aligned the trial court on the side of victims and against defendants, implying that the jurors should share this view." Br. of Appellant at 29. The trial court remarked about victims in other cases in the context of admonishing the jury to avoid misconduct. The trial court referred to examples of juror misconduct that resulted in mistrials to emphasize the consequences of juror misconduct and the need to avoid it. The statements were not made in reference to Tarrer or the witnesses in this case. The trial court's attitude towards the

merits of Tarrer's case are not reasonably inferred from the nature or the manner of the trial court's statements. The trial court did not comment on the evidence.

IV. EXPERT WITNESS EXCLUSION

Tarrer argues that the trial court violated his right to present a defense when it excluded his expert witness. The State argues that the trial court did not err, but that even if it erred, the error was harmless. We agree with the State.

A. Standard of Review

We review the trial court's admission or exclusion of expert testimony for an abuse of discretion.[9] *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). The trial court's discretion is broad, and we reverse the trial court's decision only if it rests on unreasonable or untenable grounds. *State v. Rafay*, 168 Wn. App. 734, 783-84, 285 P.3d 83 (2012).

The federal and state constitutions' guarantee a defendant the right to present a defense. U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, § 22; *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). But, this constitutional right is not absolute and does not extend to irrelevant or inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010); *State v. Maupin*, 128 Wn.2d 918, 925, 913 P.2d 808 (1996). Thus, the right to present a defense is implicated only if the trial court excludes *admissible* evidence.

B. No Abuse of Discretion

ER 702 governs the admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified

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[9] Tarrer argues the trial court abused its discretion by excluding expert testimony and that this error violated his right to defend himself. "Alleging that a ruling violated the defendant's right to a fair trial does not change the standard of review." *Dye*, 178 Wn.2d at 548.

> as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony is admissible under ER 702 if "'(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.'" *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990) (quoting *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), *cert. denied*, 498 U.S. 1046 (1991).

Under CrR 4.7(b)(1), the defense must produce the names, addresses, and testimony of witnesses no later than the omnibus hearing. The trial court has sound discretion to manage the discovery process, and in extraordinary cases, it may exclude evidence that was presented in violation of the rules. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

Here, the trial court did not abuse its discretion in excluding Tarrer's expert because its decision rested on tenable grounds. The request to admit Dr. Kiesel's testimony first occurred during the third week of trial, it lacked foundation, and it appeared to be a tactic to introduce inadmissible evidence.

First, the trial court noted that Tarrer first sought to introduce Dr. Kiesel's testimony three weeks into trial. The exclusion of evidence that violates court discovery rules is an extraordinary remedy, but the trial court has sound discretion to manage discovery. *Hutchinson*, 135 Wn.2d at 882.

Second, the trial court also excluded Dr. Kiesel's testimony because it appeared to lack foundation. The trial court noted that Dr. Kiesel had not examined McCorvey or her bullet wounds, so his opinion on the wounds lacked foundation. All Dr. Kiesel could testify to were the statements and opinions of the other doctors who did examine McCorvey's wounds. Thus, the trial court concluded that Dr. Kiesel's highly generalized opinion about bullet wounds was "not an

opinion with any certainty that we're going to bring into this courtroom." RP at 894. The trial court properly considered this factor.

Finally, the trial court noted that Dr. Kiesel's proposed testimony appeared to be an attempt to circumvent our previous ruling about the underlying medical records. We upheld the exclusion of expert testimony about *other* doctors' opinions of whether McCorvey's wounds were entrance or exit wounds. *See Tarrer*, 2013 WL 1337943, at *10. Because the trial court relied on tenable grounds and tenable reasons to exclude Dr. Kiesel's testimony, it did not abuse its discretion and therefore, Tarrer's argument that he was denied a fair trial fails.

C. Harmless Error

Tarrer argues that the exclusion of his expert witness constituted a constitutional violation of his right to present a defense and that the error entitles him to a new trial.[10] Error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

Here, even if the trial court erred in excluding Tarrer's expert witness's testimony, we are still convinced beyond a reasonable doubt that any reasonable jury would have reached the same result even with Dr. Kiesel's testimony. His testimony would have merely shown that doctors sometimes misclassify entrance and exit wounds. Thus, Dr. Kiesel may have called into doubt McCorvey's testimony that she was shot in the front. However, this testimony would not have

[10] Although the exclusion of testimony is not constitutional, we rely on the higher harmless error standard since Tarrer alleges a constitutional violation of his right to present a defense.

impeached McCorvey's testimony that Tarrer shot her and Simpkins or countered the medical records that indicated that McCorvey was shot in the front. Because of the overwhelming amount of evidence supporting Tarrer's conviction, we are convinced beyond a reasonable doubt that, even with Dr. Kiesel's testimony, any reasonable jury would have convicted Tarrer.

V. Prosecutorial Misconduct

Tarrer argues that he did not receive a fair trial because numerous instances of prosecutorial misconduct during closing argument "eased the State's burden of proof and destroyed the presumption of innocence." Br. of Appellant at 36. Although the prosecutor did err in a few instances, the errors do not require reversal.

A. Standard of Review

A defendant who alleges prosecutorial misconduct must first establish that the prosecutor's conduct was improper. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Once a defendant meets this threshold, we must determine whether the defendant was prejudiced. *Emery*, 174 Wn.2d at 760. A defendant is prejudiced if there is a substantial likelihood that the misconduct affected the jury's verdict. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

If the defendant objected at trial, we determine if there was a substantial likelihood that the prosecutor's misconduct prejudiced the defendant by affecting the jury's verdict. *Emery*, 174 Wn.2d at 760. If the defendant did not object at trial, he "is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. When reviewing a claim that

prosecutorial misconduct requires reversal, we review the statements in the context of the entire case. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

B. Appealing to Jury's Sympathy

Tarrer claims that two of the prosecutor's arguments improperly influenced the jury. The first is when the prosecutor quoted Benjamin Cardozo and told the jury to balance Tarrer's rights with the accusers' rights. The next is when the prosecutor stated, "'It goes without saying . . . that 23 years is a very long time to wait for some final justice to come in this case.'" Br. of Appellant at 41 (quoting RP at 1271). Tarrer argues that the prosecutor's remarks diminished the jury's role, lowered the burden of proof, and suggested to the jury that it should convict on improper grounds. Tarrer did not object at trial.

The prosecutor misstated the law in both instances. The role of the jury is not to balance the rights of the accused and the accuser, rather, the "jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. And both of the prosecutor's remarks improperly appeal to the jury's sympathy. *See State v. Pierce*, 169 Wn. App. 533, 555, 280 P.3d 1158 (2012). Reference to the amount of time between the crimes and "final justice" served no purpose other than to appeal to the jury's sympathy. It was not relevant to Tarrer's guilt.

Even though the prosecutor's remarks were improper, Tarrer cannot show that the remarks were so flagrant and ill-intentioned that a curative instruction would be ineffective. Here, the prosecutor correctly argued the State's burden of proof. If the defense had objected to the two comments, curative instructions could have cured any prejudice.

C. Reasonable Doubt Standard

Tarrer next argues that the prosecutor committed misconduct when he discussed the reasonable doubt standard and stated that the law did not let the jury consider a lack of evidence, i.e. that it did not have DNA evidence, shoe prints, or the gun and the ballistics. Essentially, Tarrer claims the prosecutor suggested that the jury could not consider a lack of evidence in its deliberations. Tarrer did not object to the argument. After making this argument, the prosecutor shortly thereafter correctly told the jury that a reasonable doubt may arise from a lack of evidence.

The prosecutor erred in suggesting to the jury that it could not look at the lack of evidence. However, this error was not so flagrant and ill-intentioned that a curative instruction would not have cured any resulting prejudice.

D. Disparaging the Defense

Tarrer next argues that the prosecutor committed misconduct by disparaging the defense when he argued that "'[Dr.] Loftus's entire testimony was designed to make you think that it's impossible for any eyewitness to ever accurately identify . . . somebody who committed a crime against them.'" Br. of Appellant at 40-41 (quoting RP at 1272). On appeal, Tarrer argues that the prosecutor "implied that the defense used trickery, distraction, and confusion." Br. of Appellant at 41. Tarrer objected below, arguing that the prosecutor mischaracterized the evidence, and the trial court overruled his objection.

It is misconduct for the prosecutor to impugn the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). For example, a prosecutor commits misconduct by referring to the defense's case as "bogus" or "involving 'sleight of hand'" because such language implies "wrongful deception or even dishonesty in the context of a court proceeding." *Thorgerson*, 172 Wn.2d at 451-52. But here, the prosecutor's remarks were directed

at the weight of Loftus's testimony. The prosecutor was merely drawing a permissible inference from the evidence about the credibility of a witness, not disparaging the defense.

E. Cumulative Misconduct

Finally, Tarrer argues that these alleged instances of prosecutorial misconduct were so pervasive that they affected the outcome of the trial and could not have been cured with proper instruction. We disagree.

Although "'the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect,'" such is not the case here. *Lindsay*, 180 Wn.2d at 443 (internal quotation marks omitted) (quoting *Glasmann*, 175 Wn.2d at 707). Here, the only two instances of improper argument that Tarrer establishes are the prosecutor's appeals to the jury's sympathy. Each argument was distinct and each could have been easily cured by proper instruction to the jury. Additionally, they were two relatively minor comments in the context of the State's argument as a whole. We hold that the two errors do not amount to such pervasive error that they could not have been cured by proper instruction.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

"Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact, which we review de novo." *State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181 (2013); *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To prove ineffective assistance of counsel, Tarrer must show that (1) counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing *Strickland v.*

Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. There is a strong presumption that defense counsel's performance was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish prejudice, Tarrer must show that the deficient performance prejudiced his case. *See Fleming*, 142 Wn.2d at 865.

B. Expert Witness Deadline

Tarrer first argues that his counsel was ineffective for failing to timely disclose Dr. Kiesel as an expert witness. Defense counsel has a duty "to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. Failing to disclose an expert witness by the discovery deadline falls below an objective standard of reasonableness. Therefore, Tarrer's counsel's performance was deficient. However, Tarrer cannot demonstrate prejudice. As discussed above, the trial court properly excluded Dr. Kiesel's testimony for several reasons, including lack of foundation and that the proposed testimony appeared to be an attempt to circumvent our previous ruling about the underlying medical records. Tarrer cannot show that the deficient performance affected his case because he cannot demonstrate that the trial court would have admitted Dr. Kiesel's testimony but for the missed discovery deadline. Because no prejudice exists, his ineffective assistance of counsel claim fails. *See Strickland*, 466 U.S. at 700.

C. Failure to Object to Prosecutor's Closing Argument

Tarrer next argues that his counsel was ineffective for failing to object to the prosecutor's improper closing argument. Even if his counsel's performance was deficient, Tarrer again fails to demonstrate prejudice. As discussed above, though some of the prosecutor's comments were

improper, the errors do not amount to such pervasive error that they could not have been cured by proper instruction. Tarrer's ineffective assistance of counsel claim fails because there was no prejudice. *See Strickland*, 466 U.S. at 700.

VII. Reasonable Doubt Mandatory Jury Instruction

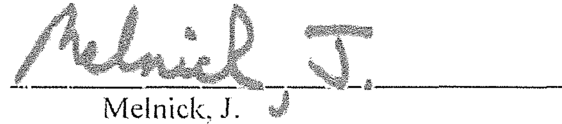
In a supplemental assignment of error, Tarrer argues that the "reasonable doubt" jury instruction was constitutionally deficient because it required the jury to articulate a reason for having a reasonable doubt. But, Tarrer concedes that the trial court followed our Supreme Court when it used WPIC 4.01, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008), to instruct the jury. The Supreme Court recently reaffirmed that WPIC 4.01 is "the correct legal instruction on reasonable doubt." *State v. Kalebaugh*, 183 Wn.2d 578, 585-86, 355 P.3d 253 (2015). The trial court did not err.

VIII. Cumulative Effect of Error

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, *cert. denied*, 513 U.S. 849 (1994). Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). If any error occurred in the trial, it was harmless; therefore, there was no cumulative error.

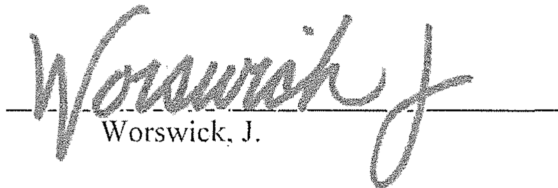
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

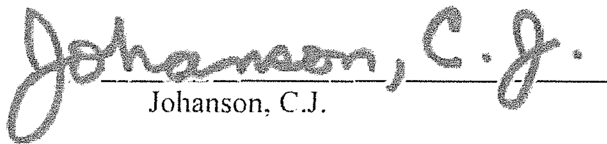


Melnick, J.

We concur:



Worswick, J.



Johanson, C.J.

APPENDIX B

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

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

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

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

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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. LARRY TARRER, Petitioner.	)))))))))	SUPREME COURT NO. ________ COA NO. 45998-1-II

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 13TH DAY OF APRIL, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY TARRER
DOC NO. 979867
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF APRIL, 2016.

X Patrick Mayovsky ____________________

NIELSEN, BROMAN & KOCH, PLLC

April 13, 2016 - 4:05 PM

Transmittal Letter

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Case Name: Larry Tarrer
Court of Appeals Case Number: 45998-1

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

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