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Court of Appeals
Division I
State of Washington

NO. 68662-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL THREADGILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL B. CAREY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The court continued the trial date three and a half weeks to allow the State time to obtain the results of relevant forensic DNA testing. The court determined that the State could not have reasonably obtained and submitted the DNA reference sample any earlier than it did. Trial commenced just five months after Threadgill was originally charged, and only two weeks after the earlier expiration date he had agreed to. Did the trial court properly exercise its discretion when it determined that a short continuance of the trial was required in the administration of justice?

2. The State may not use a defendant's exercise of a constitutional right as substantive evidence of guilt. Here, the State elicited testimony that Threadgill's phone was searched pursuant to a court order. The State also elicited testimony that a witness had consented to a search of his phone. There was no testimony that anyone ever asked Threadgill for consent to search his phone or that he refused to give it. The State did not mention the fact of the court order in argument, nor use it to infer guilt. Has Threadgill failed to establish a manifest constitutional error that allows him to raise this claim for the first time on appeal? Has he failed to establish that the testimony violated his constitutional rights?

3. On multiple occasions the Washington State Supreme Court has held that the language of WPIC 4.01 defining "reasonable

doubt" provides an accurate statement of the law. Has Threadgill demonstrated that those cases are "incorrect and harmful," the standard required to overturn precedent?

4. When the court imposes an exceptional sentence, it must set forth the reasons for its decision in written findings of fact and conclusions of law. Did the trial court properly enter written findings and conclusions in support of the exceptional sentence when it included them in Section 2.5 of the Judgment and Sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 24, 2011, Appellant Daniel Threadgill and Araya McMillon-Cooper were charged with first-degree murder with a deadly weapon enhancement. CP 1-2. McMillon-Cooper pled guilty to conspiracy to commit second-degree murder. 26RP 27.[1] The State amended the charge against Threadgill to add an aggravating factor of deliberate cruelty. CP 537-38. Following a jury trial, Threadgill was found guilty as charged. CP 661-63. When pronouncing sentence, the Honorable Judge Cheryl Carey stated, "Of my 12 years on the bench, this is the most senseless, horrific and cruel case that I have ever seen. The actions of the defendant on that night were inhumane. His unjustified rage

[1] The State adopts Appellant's designation of the Verbatim Report of Proceedings.

[manifested] itself in the brutal, brutal attack of Ms. Walstrand." 30RP 37. The court imposed an exceptional sentence of 480 months based upon the jury's finding of deliberate cruelty. CP 756, 758; 30RP 36-37. Threadgill now appeals his conviction and sentence. CP 764-74.

2. SUBSTANTIVE FACTS

In the early morning hours of August 31, 2010, 28-year-old Jennifer Walstrand was found deceased on the floor of her apartment in Des Moines, Washington. 16RP 44, 112-13; 17RP 20-21, 37. She was discovered lying in a large pool of blood, with 65 stab wounds to her head, neck, torso, and extremities. 17RP 75; 25RP 109, 117. Blood spatter in the residence, the relatively small size of each wound in relation to the large degree of blood loss, the presence of defensive wounds on her arms and hands, and blood-staining patterns on her body, all indicated that Walstrand was alive, upright, and fighting during some portion of the attack. 17RP 175-76; 25RP 109-11, 134-37. In addition to the stab wounds, Walstrand sustained blunt-force trauma to her head. 25RP 131. She had a large scalp contusion, a fractured jaw, three teeth had been knocked from her mouth, and clumps of hair had been pulled from her head. 17RP 76, 153-55; 25RP 131. Walstrand suffered greatly prior to her death. 25RP 138.

At the time she was murdered Walstrand attended college, taking business classes. 16RP 46-47. She also worked as an "escort," or prostitute. Id. Walstrand advertised on the internet and worked out of her Des Moines apartment. 16RP 48; 22RP 104-05. She had a long-term relationship with a "pimp" named Calvin Davis. 16RP 48; 22RP 103. Although Davis had multiple women who worked for him, his relationship with Walstrand was the closest. 22RP 101-03, 109-10; 24RP 81. Davis and Walstrand had been together for thirteen years. 16RP 47; 22RP 102-03. They confided in one another. 22RP 103-04.

In early 2010, a woman named Araya McMillon-Cooper began prostituting for Davis. 22RP 112-13; 24RP 79. At that time Walstrand was living in her Des Moines apartment, which was the center unit of a triplex. 16RP 46; 22RP 113. In May of 2010, Davis arranged for McMillon-Cooper to move into the triplex, directly next door to Walstrand. 22RP 113; 24RP 83. As part of her responsibilities as Davis's most trusted escort, Walstrand had a key to McMillon-Cooper's apartment. 24RP 85. McMillon-Cooper did not have a key to Walstrand's apartment. Id.

Around the same time that she moved in next door to Walstrand, McMillon-Cooper met appellant Threadgill at a nightclub where he worked as a promoter. 24RP 89-90. In addition to prostituting for Davis,

McMillon-Cooper began nightclub promotions work for Threadgill, who used the nickname "Midas." 24RP 91-92.

Threadgill lived with his aunt in Bellevue. 19RP 171; 21RP66; 26RP 98. He had moved to Bellevue from Philadelphia in 2009. 26RP 91-92. The arrangement between Threadgill and his aunt was that he was allowed to live at her apartment so long as he attended college. 26RP 91-92, 101. However, by August of 2010 Threadgill was not in school, and his aunt did not approve of his party lifestyle and the disruption that he caused to her family. 26RP 101.

Threadgill had several people who did promotions work for him, including a young woman named Marian Kerow. 21RP 61-62. Kerow, along with her friend Fardosa Mohamed, were close friends with Threadgill and would often hang out with him. 19RP 170; 21RP 65; 24RP 120-21. Although Threadgill and Kerow were not dating, their relationship was sexual; Threadgill and Mohamed were very close, "like brother and sister." 19RP 169, 182, 188; 21RP 67-68.

After Threadgill met McMillon-Cooper, he introduced her to Kerow and Mohamed. 19RP 177; 21RP 72-74; 24RP 119-20. McMillon-Cooper began to join Threadgill, Kerow, and Mohamed at the clubs and at their smoking and drinking parties. 19RP 177; 21RP 73; 24RP 120-21.

After McMillon-Cooper became close to Threadgill she grew disenchanted with prostituting for Davis, who had previously beaten her. 24RP 97-98, 101. Their relationship took a particularly sour turn in late July of 2010, when Davis refused to give McMillon-Cooper money to pay for her grandmother's upcoming funeral. Id. By the beginning of August McMillon-Cooper began ignoring Davis's texts and phone calls and stopped turning her money over to him. 22RP 116; 24RP 99. At the same time, Walstrand began to complain to Davis about the people who were hanging around McMillon-Cooper's apartment next door. 22RP 113-15. Walstrand was afraid that they would scare away her clients and negatively affect her business. 22RP 115.

One day in mid-August, McMillon-Cooper and Threadgill went to the triplex so that McMillon-Cooper could get some clothes. 24RP 103, 108-09. Davis showed up and demanded to know where McMillon-Cooper had been, and demanded "his" money. 24RP 109-10. When McMillon-Cooper told Davis that she planned to use the money for her grandmother's funeral, Davis beat McMillon-Cooper and left. 24RP 110-12. Bleeding and crying, McMillon-Cooper returned to her vehicle where Threadgill had been waiting for her. 24RP 115-16. Threadgill asked McMillon-Cooper whether "that guy" had assaulted her. 24RP 116. At the time, she did not admit to Threadgill that Davis was her pimp, but a

few days later McMillon-Cooper got drunk and confessed to Threadgill that she was a prostitute and that Davis had beaten her. 24RP 117-19. She told Threadgill that if she went back to the triplex, Walstrand would tell Davis, and she would be beaten again. 24RP 118. Threadgill assured McMillon-Cooper that she was part of his promotions "family," and that they would not let anyone hurt her. 24RP 127.

During this same time frame, Threadgill's friend Fardosa Mohamed overheard McMillon-Cooper in the restroom of a club telling someone how her pimp had taken her money and, "[t]his bitch is snitching," and "was going to get it." 19RP 185-86; 20RP 77-78; 24RP 118. Threadgill told Marian Kerow that McMillon-Cooper was having problems with her neighbor because of money. 21RP 115.

After Davis beat McMillon-Cooper at the triplex in mid-August, he told her that she needed to move out. 24RP 103-04. McMillon-Cooper began staying with her grandma[2] on some occasions, for fear of Walstrand seeing her at the triplex and telling Davis. 24RP 105-07. However, there were nights when she and Threadgill slept at the triplex. 24RP 106-07. One of those nights was August 27, 2010, the night of McMillon-Cooper's grandmother's funeral. 24RP 95-97, 107. The relationship between McMillon-Cooper and Threadgill became sexual that night. 24RP 95-97.

[2] McMillon-Cooper stayed with her other grandma, not the one who had recently passed away. 26RP 34.

The very next night, August 28, 2010, Threadgill, Kerow, and Mohamed had a birthday party for Kerow at McMillon-Cooper's apartment. 19RP 178, 187; 21RP 76-78; 24RP 121-22. At first, McMillon-Cooper thought it was going to be a small gathering, but approximately twenty people showed up, including people that McMillon-Cooper did not know. 24RP 121-23. McMillon-Cooper became upset with people going in and out of the apartment, smoking, drinking, and being loud. 24RP 122-24. She tried to keep them quiet because she did not want Walstrand to call Davis and tell him that she was there. 21RP 78-79; 24RP 107, 122-24.

Two days later, on the morning of August 30, 2010, McMillon-Cooper and Threadgill went to the triplex to get her computer. 24RP 131-32. Threadgill wore an orange hooded-sweatshirt. 24RP 133. McMillon-Cooper saw Walstrand outside of her apartment, looking through the gate. 24RP 133-34. Shortly thereafter, McMillon-Cooper received a text from Davis saying that he had seen a guy in an orange sweatshirt at the triplex, and that he hoped the guy was there to move her belongings out. 22RP 128-29; 24RP 104, 128, 133. McMillon-Cooper did not believe that Davis had actually seen Threadgill at the apartment; instead, she believed that Walstrand had provided the information about him and what he was wearing to Davis. 24RP 134-35. Indeed, McMillon-Cooper was right.

22RP 128-29. Walstrand had texted Davis, "The neighbor got some funny ass moves going on." 22RP 135-36; 25RP 27; 26RP 81-83. After Walstrand texted Davis they spoke on the phone, and Davis then texted McMillon-Cooper about seeing Threadgill in the orange sweatshirt. 22RP 136-38. Davis and McMillon-Cooper exchanged twenty texts back and forth about her need to move out. 22RP 137-38; 26RP 81-83. McMillon-Cooper shared the texts with Threadgill, explaining to him how the situation was "drama." 24RP 136-37. Threadgill's response was, "Why would you let him kick you out of your apartment. Fuck him." 24RP 128, 137. In regards to Walstrand, Threadgill told McMillon-Cooper, "Who gives a fuck about her," and "[f]uck that bitch." 24RP 128-29.

McMillon-Cooper and Threadgill spent the rest of the day together. 24RP 137-42. Later in the day, they arranged with Fardosa Mohamed to get together with her and Marian Kerow to smoke marijuana. 19RP 191-93, 21RP 82-85; 24RP 140-43. They planned to meet Mohamed and Kerow at McMillon-Cooper's apartment around eleven p.m. 19RP 193; 21RP 85. Multiple phone calls were exchanged between Threadgill and Mohamed that evening. 26RP 64.

McMillon-Cooper and Threadgill arrived at the triplex around eleven. 24RP 143. McMillon-Cooper saw Walstrand outside, and Walstrand asked McMillon-Cooper to come over to her apartment to talk.

24RP 146. McMillon-Cooper agreed, thinking that she could "calm" the situation and convince Walstrand to stop reporting her activities to Davis. 24RP 147. However, once in Walstrand's living room, the two women began arguing and their voices became raised. Id. Walstrand told McMillon-Cooper that if Davis said she had to move out, then McMillon-Cooper had to move out.[3] Id.

As McMillon-Cooper and Walstrand yelled at one another in Walstrand's apartment, Threadgill came in. 24RP 149. He immediately attacked Walstrand, stabbing her repeatedly with a small knife. 24RP 149-51. Meanwhile, Kerow and Mohamed had arrived at the triplex to smoke marijuana. 19RP 193-95; 21RP 85-86. As they were parked in front of the triplex, Kerow heard McMillon-Cooper and another woman arguing. 21RP 87-89. Both Kerow and Mohamed saw Threadgill run past their car and into the apartment next to McMillon-Cooper's. 19RP 197-98; 21RP 87-90. Shortly thereafter, they heard yelling and noises like someone getting "hit." 21RP 90. When Kerow and Mohamed heard screaming, they ran to Walstrand's door. 19RP 198-99; 21RP 90-91.

Kerow and Mohamed saw their friend Threadgill hunched over Walstrand on the floor, stabbing her repeatedly while she fought back.

[3] Shortly after eleven p.m., a neighbor heard two women yelling at one another, "You fucking bitch," "fucking whore," "get out," "I know you have it," and "fucking ho." 22RP 184-86.

19RP 200-03; 21RP 92-93. Although Walstrand pleaded with McMillon-Cooper to help her, McMillon-Cooper did nothing. 19RP 203; 21RP 93, 95; 24RP 151, 158. Mohamed asked Threadgill to stop. 24RP 152. Kerow walked toward Threadgill and tried to stop him by pushing him out of the way, and got nicked by his knife in the process. 21RP 95-96; 24RP 155. After McMillon-Cooper told Threadgill, "She's not dead," Threadgill replied, "Well, you finish her." 20RP 18; 21RP 96-97; 24RP 156. Threadgill then began stomping on Walstrand's head. 19RP 204; 20RP 19; 21RP 97-98; 24RP 155. Mohamed and Kerow ran out of the apartment. 19RP 206; 20RP 19; 21RP 99-100; 24RP 155.

The third resident of the triplex, who lived on the other side of Walstrand's apartment, heard lots of thumping noises and voices that night. 16RP 56-61. He looked out of his window and saw a small car parked by Walstrand's. 16RP 62-63. At his wife's behest, he went out to investigate and heard Walstrand's dogs barking. 16RP 61-62. The car that had been parked by Walstrand's car was gone. 16RP 64. He called the police at 11:53 p.m., about a half-hour after he had heard the thumping noises. 16RP 70. The police arrived at 12:17 a.m. on August 31, 2010. 16RP 107. There was no answer at Walstrand's door, but after retrieving a stool from the neighbor, the police were able to look through a small

window above the door, and saw Walstrand lying in a pool of blood in her living room. 16RP 73, 111-13; 17RP 26-27.

Because she lived next door to Walstrand, the police spoke with McMillon-Cooper the day after the murder and learned that both she and Walstrand worked as prostitutes for Davis. 18RP 80-81. McMillon-Cooper mentioned Threadgill's name, and told the police that he had been spending time with her at the triplex. 19RP 5.

Des Moines Police Detective Mike Thomas arranged to meet with Threadgill approximately two weeks after Walstrand's murder. 19RP 8-9. Threadgill was not a suspect at that time, and Thomas informed him in advance of their meeting that he wanted to speak to him about the murder simply because he had been staying at McMillon-Cooper's apartment next door. 19RP 8-10. Because the two women had worked together, Detective Thomas wanted to know if anyone was upset with Walstrand or McMillon-Cooper. 19RP 15-16. Detective Thomas had not ruled out the possibility that McMillon-Cooper had been the intended target of the homicide, and asked Threadgill if he knew whether McMillon-Cooper had problems with anyone. Id. Threadgill denied knowing anything about that. 19RP 15. Threadgill told Detective Thomas that he had spent August 30, 2010, the day of Walstrand's murder, with McMillon-Cooper. 19RP 18-20. He told Detective Thomas that he had been drinking and that

he thought he stayed at McMillon-Cooper's grandma's house that night. 19RP 20.

Walstrand's homicide went unsolved for approximately nine months, until in May of 2011, a "Crimestoppers" tip led police to Kerow and Mohamed. 19RP 48-49. Reluctantly, both women independently admitted to the police that they had witnessed their friend Threadgill murder Walstrand. 19RP 61; 20RP 27-29, 33; 21RP 138. Mohamed told the police she had not come forward earlier because she was scared. 20RP 25. Threadgill had told her after the murder that if she said anything, then all four of them would "go down," and that "they" would not care about her because it was "a white girl who got killed." 20RP 22.

Mohamed agreed to wear a "wire" during a conversation with McMillon-Cooper, and Kerow agreed to wear one while speaking to Threadgill. 20RP 33-34; 21RP 144-45; 26RP 85. Kerow arranged to meet Threadgill at the mall kiosk where he worked. After some initial chit-chat, Kerow asked Threadgill if he could take a break so that they could talk somewhere else. Ex. 53 at 12:50:43 to 12:51:04; Ex. 59 at pg. 3. Threadgill responded, "What is it?" to which Kerow replied, "I just want to talk to you." Id. Threadgill told her, "I have a feeling I already know what it is." Kerow said, "It's about that," and Threadgill responded, "It's that?" Id. The two immediately walked outside of the mall and began

talking about "it" in obvious reference to Walstrand's murder. Ex. 53 at 12:51:20; Ex. 59 at pg. 4.

Although on the surreptitious recording Threadgill maintained that he was not involved in the murder, his conversation with Kerow centered on what he had told the police after the murder, and what would happen if McMillon-Cooper ever told the police that he was involved. Ex. 59 at 5-6, 9-12, 17-18. Threadgill told Kerow that "the worst thing that [McMillon-Cooper] can do will ultimately be the worst thing for herself," because she would look like a liar if she changed her story. Ex. 59 at 15-17.

Additionally, Threadgill told Kerow that "where my mind's at right now is if it came down to like [McMillon-Cooper] saying this or her saying that it would be the worst decision that she ever made." When Kerow asked if he would "go after her," Threadgill stated, "I wouldn't go after her, but she'd be sorry." Kerow followed up with, "You already did this once we don't need you to do it again okay." Although Threadgill responded, "I didn't do anything I don't know what you're talking about," his body language and tone in the video are inconsistent with his words. Ex. 53 at 13:00:54 to 13:01:35; Ex. 59 at 10. <u>See also</u> Ex. 53 at 12:52:51 to 12:53:04; Ex. 53 at 13:11:00 to 13:11:22 (other denials).

Moreover, Threadgill did not deny committing the murder at other times during the conversation when it would have seemed appropriate.

For example, when Kerow asked Threadgill if his current girlfriend knew "about this," Threadgill's response was, "No, not too much." Ex. 53 at 12:53:44; Ex. 59 at pg. 5. When Kerow asked him if he would tell his unborn son about what he had done if he "went away" for it, Threadgill responded, "Not really . . . no . . . the baby's already crazy so." Ex. 53 at 12:58:13 to 12:58:31; Ex. 59 at pg. 8.

Prior to arresting McMillon-Cooper, Detective Thomas called her and mentioned Kerow's and Mohamed's names to her for the first time – to see if it would spur her to contact them. 19RP 86-87. Indeed, after the conversation, McMillon-Cooper immediately texted Kerow and Mohamed, "Gotta meet. Don't panic." 19RP 90; 26RP 25. She also texted Threadgill, "Call me ASAP." 19RP 91; 26RP 25.

C. ARGUMENT

1. THREADGILL'S RIGHT TO A SPEEDY TRIAL WAS PROTECTED BY THE COURT'S PROPER DETERMINATION THAT A SHORT CONTINUANCE WAS REQUIRED IN THE ADMINISTRATION OF JUSTICE.

Threadgill argues that his speedy trial right under CrR 3.3 was violated when the court continued the trial date from November 7, 2011 to

December 1, 2011.[4] His claim must be rejected because the court properly exercised its discretion to conclude that a short continuance was required in the administration of justice.

a. Relevant Facts.

Threadgill was charged with Walstrand's murder on June 24, 2011. CP 1-2. He was arraigned on July 6, 2011. Supp. CP __ (Sub. No. 5, Notice of Scheduling, filed July 6, 2011). On July 20, 2011, he waived his right to be tried within 60 days of arraignment, and agreed to an expiration date of October 15, 2011. Supp. CP __ (Sub. No. 9, Order Setting Status Conference, filed July 20, 2011). On August 17, 2011, he waived additional time and agreed to an expiration date of November 12, 2011. Supp. CP __ (Sub. No. 17, Order of Continuance, filed August 17, 2011). On September 14, 2011, trial was set for November 7, 2011. CP 10.

The Washington State Patrol Crime Lab analyzed evidence collected at the scene, including Walstrand's clothes and swabs from her neck. CP 777; 1RP 3-4. The lab identified several partial male DNA profiles from the evidence. CP 777; 1RP 3-4. After he was charged, the court ordered Threadgill to provide a DNA reference sample, and in

[4] Trial actually began on November 28, 2011. See 9RP. Threadgill had previously agreed to a speedy trial expiration date of November 12, 2011. Supp. CP __ (Sub. No. 17, Order of Continuance, filed August 17, 2011). Thus, he complains of a mere two-week continuance.

mid-October, the parties learned that Threadgill was excluded as a contributor of the profiles identified by the lab. CP 777; 5RP 5, 8-9.

There was no evidence connecting Walstrand's pimp Calvin Davis to her murder, and Davis had no motive to kill her. The two were close. Their text message conversation shortly before the murder indicated no animosity. See 22RP 139-40; 25RP 26-27 (Walstrand texted Davis approximately one hour before she was murdered, "On the way home, see you in the morning."). Nonetheless, prior to Walstrand's murder, the State had charged Davis with assaulting another prostitute.[5] CP 128-29. In April of 2011, before Threadgill was arrested and charged with Walstrand's murder, Davis was convicted of the pending assault and promoting prostitution charges. CP 134-42, 776. The State sought an exceptional sentence above the standard range. CP 134-42. Davis's attorney, David Gehrke, filed a motion for a new trial, which was still pending when Threadgill was arrested and charged with killing Walstrand. CP 777.

After Threadgill and McMillon-Cooper were charged, the State contacted Gehrke to see about interviewing Davis, as it believed Davis had

[5] The victim in that case was McMillon-Cooper's aunt, who also worked for Davis, and who had introduced McMillon-Cooper to Davis. CP 128-29; 22RP 154; 24RP 79.

information that was relevant to Threadgill's motive to kill Walstrand.[6] 7RP 7. Gehrke told the prosecutor that he would not allow Davis to cooperate because an interview could place Davis's assault case in jeopardy.[7] 7RP 7. Although the prosecutor did not specifically ask Gehrke if Davis would voluntarily provide a DNA reference sample, she would not have expected Gehrke to allow it, given his unwillingness for Davis to cooperate with the State while his motion for a new trial was pending. 7RP 7-8.

On October 13, 2011, the State reached an agreement with Davis whereby he would withdraw his motion for a new trial in exchange for the State's agreement to seek only a standard-range sentence. CP 777. Davis was sentenced on October 19, and Gehrke allowed Davis to be interviewed on October 28, 2011. Id. Davis agreed to provide a DNA reference sample that same day, which the State submitted to the crime lab the following business day, October 31, 2011. CP 777-78.

[6] Davis ultimately testified that at the time Walstrand was murdered, McMillon-Cooper had been avoiding Davis and refusing to turn over her earnings to him. He had "confronted" her about it and "shoved her up against the fence." 22RP 113-20. He also testified that Walstrand had been informing him of McMillon-Cooper's activities. Davis and Walstrand were not happy about McMillon-Cooper bringing Threadgill and his friends around the triplex, as it was bad for business. Davis ordered McMillon-Cooper to move out of the triplex. 22RP 113-37. Threadgill was aware of Davis's attempt to make McMillon-Cooper leave the apartment, and the morning of Walstrand's murder Threadgill told McMillon-Cooper, "Fuck [Davis]" and "fuck [Walstrand]." 24RP 128-29, 137.

[7] Although not before the court at the time of the State's motion to continue, Davis later testified that his attorney had concerns about him cooperating with the State's case against Threadgill while his motion for a new trial was pending. 22RP 148-49.

At the omnibus hearing on November 1, 2011, the State indicated that although it had submitted Davis's reference sample (as well as reference samples from McMillon-Cooper and one of Walstrand's clients), it did not know whether the analysis would be completed before the trial date of November 7. 6RP 15-17. The prosecutor informed the court that the purpose of submitting the samples was exclusionary, "to present to the jury that we have done everything we have to exclude anybody we're aware of that could potentially have their DNA there." 6RP 16. The prosecutor indicated that the State was prepared to go forward without the results if they were not received in a timely manner. 6RP 15-16.

However, two days later on November 3, 2011, Threadgill filed a lengthy brief with multiple attachments, arguing that he should be allowed to argue the theory that Davis killed Walstrand. CP 82-221. The State immediately filed a motion to continue the trial date to December 1, to allow time for the crime lab to complete its comparison analysis of Davis's DNA. CP 775-86.

The court heard argument on the continuance motion on November 7. The State noted that the case had been filed less than five months earlier and that there had been no previous continuances of the trial date. 7RP 2. The prosecutor candidly told the court that although it had previously occurred to her that Threadgill might argue Davis was a

suspect, his November 3rd brief clarified that the defense was "putting all their eggs in that basket," and she believed the need for DNA results as to Davis was greatly increased. 7RP 4-5. Moreover, the State was concerned that if the trial occurred without the DNA results and Davis was later discovered to match one of the partial profiles from the crime scene, considerable resources might be expended retrying the case. CP 779; 7RP 5-6. Finally, the State argued that the presence (or lack thereof) of Davis's DNA at the crime scene was information that the court should have when deciding whether Threadgill was entitled to argue that Davis was an "other suspect." CP 779.

Threadgill objected to the State's request for a continuance. CP 234-356. He argued that the State was dilatory for not asking Davis for a DNA reference sample until late October. He also contended that as a convicted felon, Davis's DNA sample would have already been in the CODIS system, and the State should have compared his CODIS sample to the unknown profiles found at the crime scene. Id. Threadgill provided a carefully-worded declaration from David Gehrke, indicating that the State had not asked Davis to provide a DNA sample, and that he would not have advised his client to withhold one. CP 295-96. Gehrke's declaration did not mention either the State's request to interview Davis or the advice he gave Davis not to cooperate with the State's investigation of Walstrand's

murder while Davis's case was pending. Threadgill made no effort to establish that he would be prejudiced in the presentation of his defense if the court granted the State's motion to continue.

The State responded to Threadgill's objections by confirming that the crime lab is not authorized to select an individual sample from the CODIS database to compare with profiles generated from a crime scene. 7RP 9. The State also informed the trial court that the partial profiles from the scene in this case were not suitable for uploading into the CODIS database; thus it was impossible to compare them to the offender database as a whole. Id. Further, the prosecutor argued that it was not realistic for the State to have believed that Davis would willingly provide a DNA sample while his case was pending when Gehrke had advised him to withhold his cooperation to gain a favorable outcome. CP 777; 7RP 7, 17.

After carefully reviewing the briefing and hearing argument, and after posing multiple questions to both parties, the trial court granted the continuance, finding that it was required in the administration of justice. CP 787; 7RP 20-21. The trial court concluded that the State could not have reasonably obtained Davis's DNA reference sample any earlier, and that the results of the analysis were relevant and necessary for the State to meet Threadgill's defense. Id.

b. The Trial Court Properly Exercised Its Discretion To Grant A Continuance.

CrR 3.3 governs the time for trial in Superior Court. Although the rule was enacted to protect the constitutional right to a speedy trial, it does not establish any independent constitutional standard. State v. Iniguez, 167 Wn.2d 273, 287, 217 P.3d 768 (2009). E.g., State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1994); State v. Hoffman, 116 Wn.2d 51, 77, 804 P.2d 577 (1991); State v. Fladebo, 113 Wn.2d 388, 393, 779 P.2d 707 (1989); State v. White, 94 Wn.2d 498, 501, 617 P.2d 998 (1980); State v. Miller, 72 Wash. 154, 161-62, 129 P. 1100 (1913).

Pursuant to the court rule, an in-custody defendant must be tried within 60 days of arraignment. CrR 3.3(b)(1)(i); CrR 3.3(c)(1). A defendant may waive this requirement and reset the 60-day "clock." CrR 3.3(c)(2)(i). Moreover, certain time periods are excluded, including continuances granted by the court. CrR 3.3(e)(3). Under CrR 3.3(f)(2), the court may continue the trial on its own motion or the motion of either party, "when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." If a continuance is properly granted, the time for trial will not expire until 30 days after the new trial date. CrR 3.3(b)(5). Therefore, if

the continuance was properly granted here, no rule-based speedy trial violation occurred.[8]

An alleged violation of CrR 3.3 is reviewed *de novo*. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). However, the decision to grant a continuance rests within the sound discretion of the trial court, and will not be disturbed in the absence of a clear showing that the decision of the trial court was manifestly unreasonable. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (citations omitted). When exercising its discretion to grant or deny a motion to continue, the trial court considers many factors, including whether prior continuances have been granted, due diligence, redundancy, due process, materiality, the need for orderly procedure, and the possible impact on the result of the trial. State v. Downing, 151 Wn.2d 265, 273, 87 P.2d 1169 (2004) (citing State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)); In re V.R.R., 134 Wn. App. 573, 581, 141 P.3d 85 (2006).

Here, there were no previous continuances and the case had been filed less than five months earlier. The three-and-a-half week continuance requested by the State was for the purpose of obtaining DNA results as to Calvin Davis, the individual who was the center of Threadgill's recently-filed "other suspects" motion. The trial court heard extensively from the

[8] Threadgill does not argue that his constitutional right to a speedy trial was violated; he contends that he is entitled to relief based solely on his rights under CrR 3.3.

parties on the issue and granted the continuance, necessarily concluding that the evidence was relevant and necessary for the State to rebut Threadgill's defense or to further Threadgill's argument that Davis committed the crime. The court expressly determined that the State could not have secured a reference sample from Davis any earlier than it did. 7RP 20-21.

The court's conclusion about the State's ability to obtain the reference sample from Davis is supported by the record. The State had asked Davis's lawyer to interview Davis about Walstrand's murder, and was told that Davis would not cooperate while his own case was pending. Thus, it was reasonable for the State to believe that Davis would also refuse to voluntarily provide a DNA sample. Moreover, it was not possible for the crime lab to compare Davis's CODIS sample to the crime scene profiles, as such procedure is not authorized. And finally, because there was no evidence that linked Davis to the crime, the State could not have obtained a search warrant or court order for Davis's reference sample. Simply put, the State had no access to Davis's DNA until after he agreed to provide it upon resolution of his case.

In State v. Cauthron, 120 Wn.2d 879, 910, 846 P.2d 502 (1993), overruled in part on other grounds by State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997), the Washington Supreme Court determined that the

trial court did not abuse its discretion when it granted the State's motion to continue the trial date when the continuances were "necessary to obtain the required evidence," and when the defendant was not prejudiced by the delay. In Flinn, supra, the defendant notified the State of his intent to assert a diminished capacity defense and provided it with a copy of his expert's report. That same day, he moved to continue the trial approximately three weeks. Flinn, 154 Wn.2d at 196. On the day of trial, the State requested a continuance to review the materials Flinn's expert had relied on, to interview Flinn's expert, and to hire its own expert to evaluate Flinn. Flinn objected, arguing that the State had had ample time to prepare. Id. at 196-97. The Washington Supreme Court determined that the trial court properly exercised its discretion to continue the trial past the expiration date to allow the State time to prepare for Flinn's diminished capacity defense. Id. at 200.

Likewise here, the State was entitled to pursue evidence to meet Threadgill's "other suspect" defense when a short delay had no prejudicial impact on Threadgill. Indeed, the results of the crime lab's analysis may have proved beneficial to Threadgill had Davis's DNA been discovered at the scene. It was well within the court's discretion to briefly continue the case rather than face the costly possibility of a later defense motion for a mistrial or new trial if the results were exculpatory.

Threadgill appears to argue that a continuance based on the need to obtain evidence is improper if the State has failed to exercise due diligence. Brf. of Appellant at 23. However, the cases he cites in support of this contention are not helpful to him. Both State v. Adamski, 111 Wn.2d 574, 761 P.2d 621 (1988) and State v. Gowens, 27 Wn. App. 921, 621 P.2d 198 (1980) analyzed continuances in the context of the juvenile court speedy-trial rule, which at the time required a specific finding of due diligence by the State. Adamski, 111 Wn.2d at 577; Gowens, 27 Wn. App. at 924. The current version of CrR 3.3 contains no such requirement; rather due diligence is one factor for the court to consider when exercising its discretion to grant or deny a continuance motion. See State v. Bible, 77 Wn. App. 470, 473, 892 P.2d 116 (1995) (finding of due diligence not required for a continuance; trial court need only find that a continuance is necessary for the administration of justice and will not substantially prejudice the defense). The other case Threadgill cites in support of his claim that due diligence is required, State v. Ross, 98 Wn. App. 1, 981 P.2d 888 (1999), discussed only the State's duty to act with diligence when filing charges that stem from a single criminal episode, and has no relevance here. Although the court found that the State had acted diligently in this case, such a finding was not crucial to its determination that a continuance was required in the administration of justice. The fact that the results of the DNA analysis could

have greatly impacted the trial and the resources of the court was a fair consideration for the court in its own right.

To prevail on appeal, Threadgill must prove that no reasonable judge would have granted a continuance. State v. Sutherland, 3 Wn. App. 20, 21, 472 P.2d 584 (1970). He has not met this burden. The court's grant of the State's motion for a short continuance to obtain relevant evidence had no prejudicial impact on the presentation of Threadgill's case and was a proper exercise of discretion.

2. THERE WAS NO TESTIMONY THAT THREADGILL EXERCISED A CONSTITUTIONAL RIGHT, NOR DID THE STATE USE SUCH TESTIMONY AS EVIDENCE OF GUILT.

Threadgill next contends that his rights under the Fourth Amendment and Article 1, Section 7 were violated because a State's witness testified that Threadgill's phone was searched pursuant to a court order. However, Threadgill relies on cases where the State introduced the defendant's refusal to consent to a search and then encouraged the jury to use the evidence to infer guilt. No such evidence was introduced or used in that manner here. Moreover, Threadgill did not object to the testimony and has thus waived his right to raise the claim for the first time on appeal.

a. Relevant Facts.

The State introduced evidence that its expert in computer forensics had examined the physical cell phones belonging to McMillon-Cooper, Threadgill, Walstrand, and Davis. 25RP 13, 19, 29-30. The expert testified regarding the substance of text messages between Walstrand and Davis on the day of the murder. 25RP 27-28. He also testified about text messages between McMillon-Cooper's phone and the phone numbers belonging to Kerow, Mohamed, and Threadgill, and text messages between Threadgill and Kerow. 25RP 28-42. Prior to the expert's testimony about the substance of the text messages, the prosecutor asked:

> Q: Let's turn to 93-A. Does that list the phones that you reviewed in this case?
>
> A: Yes.
>
> Q: Specifically, how many phones did you review with respect to Ms. Araya McMillon-Cooper?
>
> A: Two, an LG and a Samsung.
>
> Q: And did you review a phone that purported to belong to Daniel Threadgill?
>
> A: Yes, a Sanyo.
>
> Q: All right. And one purporting to belong to Calvin Davis?
>
> A: Yes, Blackberry.

Q: Now, in reviewing the phone records or the phones for Ms. McMillon-Cooper and Mr. Threadgill, was that pursuant to a court order?

A: Yes.

Q: What about the records or the phone for Mr. Davis?

A: It was on consent.

Q: Mr. Davis' consent?

A: Correct.

Q: Let's start with looking at Ms. McMillon-Cooper's LG phone.

A: Okay.

25RP 29-30. Threadgill did not object to the testimony. Id. There was no testimony introduced that anyone had asked Threadgill for consent to search his phone, or that he refused such a request. The prosecutor did not mention the testimony during closing argument, nor did she argue any inferences to be drawn from the fact that Threadgill's phone was searched pursuant to a court order.

b. There Was No Manifest Constitutional Error.

Appellate courts will not review a claim of error that was not raised in the trial court. RAP 2.5(a). An exception is made for manifest error affecting a constitutional right. RAP 2.5(a)(3). The exception, however, is a narrow one. State v. Kirkman, 159 Wn.2d 918, 934, 155

P.3d 125 (2007). To meet this standard and raise an error for the first time on appeal, the appellant must demonstrate that the error is truly of constitutional dimension and that it is manifest. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "Manifest" in this context requires a showing of actual prejudice. Id. at 99. Actual prejudice, in turn, requires a plausible showing that the asserted error had "practical and identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 935.

Threadgill has failed to establish that the testimony amounts to a constitutional error. He cites State v. Gauthier, 174 Wn. App. 257, 263-67, 298 P.3d 126 (2013) as support that his constitutional rights were violated. However, in that case, the State elicited testimony that the defendant had refused to voluntarily supply a sample of his DNA, and then argued to the jury that Gauthier was guilty because an innocent person would have consented. Gauthier, 174 Wn. App. at 261-62. Although Gauthier had not objected below, this Court nevertheless reached the issue on appeal, stating, "[T]he prosecutor's *use of Gauthier's invocation of his constitutional right to refuse consent to a warrantless search as substantive evidence of his guilt* was a manifest constitutional error properly raised for the first time on appeal." Id. at 267 (emphasis added). In contrast here, no evidence was introduced that Threadgill

invoked a constitutional right, nor did the prosecutor put such evidence to improper use.

Moreover, even if RAP 2.5(a)(3) requires only that the testimony "touch" upon a constitutional concern, Threadgill has not demonstrated a "manifest" error. An error is manifest if it is "so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d at 99-100. This Court "must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." State v. Kalebaugh, No. 89971-1, Slip. Op. at 6 (July 9, 2015) (quoting Kirkman, 159 Wn.2d at 100)).

Threadgill speculates, based on the testimony, that the jury drew an inference that he refused to consent to a search of his phone. But sheer speculation about possible inferences cannot create an error that is "manifest," or obvious in the record. Indeed, if the jury drew any inference from the testimony at all, it could easily have inferred that a court order was required to search Threadgill's phone simply because he had been charged with a crime.

Furthermore, even if the jury could infer from the testimony that Threadgill had refused to allow the police to search his phone, a fleeting reference to a defendant's assertion of a constitutional right does not amount to error. See State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)

(mere reference to defendant's invocation of right to remain silent "may be permissible," but reversed conviction when the State invited jury to infer guilt from that silence). "Testimony constitutes an improper 'comment' on a right only if the State invites the jury to infer guilt from the exercise of the right." State v. Gregory, 158 Wn.2d 759, 838, 147 P.3d 1201, 1242-43 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) and State v. Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000)).

Here, the prosecutor did not mention the court order in closing argument nor did she argue that the testimony was evidence of Threadgill's guilt. The State has a clear interest in presenting testimony to the jury that its evidence was obtained through lawful means. See 26RP 59 (State later inquired of Detective Thomas whether he obtained a search warrant for Threadgill's phone records). The record suggests no improper purpose on the part of the State in eliciting the fact of the court order. Simply put, there was no error at all, constitutional or otherwise.

Threadgill's argument regarding possible inferences that might be drawn from the testimony is insufficient to demonstrate that the comment had practical and identifiable consequences to the outcome of his case when the prosecutor did not use the fleeting testimony for any improper

purpose. Threadgill has failed to establish manifest error of constitutional dimensions. His claim is precluded by RAP 2.5(a).

c. Any Error Was Harmless Beyond A Reasonable Doubt.

If this Court concludes that the State impermissibly used an inference that Threadgill invoked a constitutional right as substantive evidence of his guilt, such an error is harmless when the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. Gauthier, 174 Wn. App. at 270. Under that standard the court will look at the untainted evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 421, 426, 705 P.2d 1182 (1985).

Threadgill makes much of the fact that his DNA was not discovered at the crime scene, but there was no testimony that any of the five partial male profiles discovered would necessarily have been left by the killer. And three eyewitnesses testified that they watched Threadgill commit the murder. Although Threadgill contends that "there was reason to doubt" Kerow's and Mohamed's testimony, he does not explain what that reason is apart from slight inconsistencies in their statements. Regardless of McMillon-Cooper's motive to downplay her involvement in

the crime, Kerow and Mohamed were Threadgill's friends and had no reason whatsoever to falsely implicate him. Moreover, their recitation of events was consistent with the forensic evidence of the victim's injuries.

Additionally, Threadgill's phone records were consistent with the eyewitness testimony, and inconsistent with his statement to the police that he had fallen asleep drunk that evening. And nine months after the crime, but immediately after her conversation with Detective Thomas wherein it became clear that the police knew more than she had previously thought, McMillon-Cooper frantically texted Threadgill that they needed to speak "ASAP." Finally, together with the other evidence in the case, a reasonable juror viewing Threadgill's undercover video conversation with Kerow could easily consider his demeanor and responses incriminating.

From this untainted evidence, it is clear that any reasonable juror would have reached the same result in the absence of testimony that Threadgill's phone was searched pursuant to a court order. In Gauthier, where the court found the error was not harmless beyond a reasonable doubt, the rape charge "boiled down to whether the jury believed [Gauthier's] story about prostitution gone bad or [the victim's] story that he forced her to perform a sex act." 174 Wn. App. at 270-71. And there, the prosecutor repeatedly undermined Gauthier's credibility by arguing in closing that his refusal to consent to the DNA test was evidence of his

guilt. Id. Unlike the facts of Gauthier, this case was not based on a credibility call between the defendant and a single witness, and the prosecutor did not reference the court order or argue in any manner that it proved Threadgill's guilt. If error, the testimony was harmless beyond a reasonable doubt.

d. Failing To Object To The Testimony Was Not Ineffective Assistance Of Counsel.

Threadgill also alleges that he received ineffective assistance of counsel when his attorneys failed to object to the testimony. He is not entitled to relief on that basis either.

A criminal defendant has the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of establishing such a claim falls on the defendant. Strickland, 466 U.S. at 687. To prevail, Threadgill must show that (1) his attorney's conduct fell below a professional standard of reasonableness (the performance prong), and that, (2) but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different (the prejudice prong). State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If he fails to establish either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Courts presume

that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689.

To establish deficient performance in the context of a failure to object to testimony, a defendant must show that the failure to object fell below prevailing professional norms and that the objection would likely have been sustained. State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). Gauthier had not been decided at the time of Threadgill's trial. Thus, he cites State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010) to establish that his attorneys should have objected and that the trial court would have sustained such an objection. However, as in Gauthier, a witness specifically testified that Jones refused to provide a DNA sample when asked by the police. Jones, 168 Wn.2d at 718. Here, the witness did *not* testify that Threadgill had been asked or refused consent to search; rather, the witness merely indicated that the search was premised upon a court order. His attorneys cannot be faulted for failing to object to unobjectionable testimony.

Moreover, even if his attorneys *could have* objected to the testimony based upon one inference to be drawn from it, the decision whether to object is a "classic example of trial tactics." State v. Madison,

53 Wn. App. 754, 763, 770 P.2d 662 (1998). This Court presumes that the failure to object was legitimate trial strategy, and Threadgill bears the burden of rebutting this presumption. Davis, 152 Wn.2d at 714. To be improper, the jurors would have to infer from the testimony that Threadgill was asked for consent to search and refused. As such, his attorneys could have easily concluded that it was better not to draw attention to the testimony (and thereby avoid risking such an inference) by objecting. Threadgill has not established that the failure to object was not a tactical decision.

Even if his attorneys should have objected, Threadgill fails to establish the prejudice prong of Strickland. For the same reasons that any error in the testimony was harmless beyond a reasonable doubt, Threadgill cannot show that there is a reasonable probability the outcome of the trial would have been different absent the testimony. His claim of ineffective assistance of counsel should be rejected.

3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF REASONABLE DOUBT.

Threadgill asserts that the language of WPIC 4.01 defining reasonable doubt as "one for which a reason exists," is a misstatement of the law and therefore his conviction (along with every other conviction

where WPIC 4.01 has been given) must be reversed. This argument has no merit and was never raised below. This Court is bound by precedent of the Washington Supreme Court upholding WPIC 4.01 and the language used therein.

a. Relevant Facts.

Here, the trial court instructed the jury as follows:

> The defendant, Daniel Threadgill, has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant, Daniel Threadgill, has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> ***A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.*** It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 670 (Jury Instruction 3) (emphasis added). It is the highlighted language of which Threadgill complains. This language is from WPIC 4.01. At trial, Threadgill did not object to the instruction. 26RP 116-27. Rather, he appeared to agree with it. 26RP 124-27.

b. The Alleged Error Is Not Manifest And Cannot Be Raised For The First Time On Appeal.

An instructional error not objected to below may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, Threadgill must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. O'Hara, 167 Wn.2d at 98-99. To demonstrate actual prejudice there must be a plausible showing "that the asserted error had practical and identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 935. The error must be "so obvious on the record that [it] warrants appellate review." O'Hara, 167 Wn.2d at 99-100.

Although the Washington Supreme Court recently reached an unpreserved challenge to the trial court's oral explanation of reasonable doubt, it did so because the court's erroneous statement was obvious in the record. See Kalebaugh, No. 89971-1 at 6-7 (trial court told the jury that reasonable doubt was a doubt for which a reason "can be given."). Threadgill never objected to the instruction he complains of. The trial court's use of WPIC 4.01 is not an "obvious error," and there can be nothing more than pure speculation that the inclusion of the disputed

language in the jury instructions had any identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013) (refusing to consider defendant's argument regarding the "to convict" jury instructions because he failed to object below and failed to demonstrate prejudice as required under RAP 2.5). This Court should refuse to address Threadgill's argument regarding the reasonable doubt instruction.

c. The Instructions Correctly State The Law.

Threadgill argues that WPIC 4.01 is unconstitutional. He contends that the instruction required the jury to articulate a reason to doubt, thereby undermining the presumption of innocence. However, the instruction correctly states the law. It does not lead jurors to believe that that they must be able to write out their reason for acquittal. Threadgill's arguments should be rejected.

Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). The instructions are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and

properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The instructions must define reasonable doubt and convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Over 100 years ago, the Washington Supreme Court approved a similar reasonable doubt instruction. State v. Harras, 25 Wash. 416, 420, 65 P.2d 774 (1901). There, the jury was instructed that a reasonable doubt was "a doubt for which a good reason exists." The Supreme Court said the instruction was correct "according to the great weight of authority" and was not error. Id. at 421.

Almost 60 years ago, the Supreme Court rejected a challenge to a similar reasonable doubt definition. State v. Tanzymore, 54 Wn.2d 178, 178-79, 240 P.2d 290 (1959). The challenged instruction defined reasonable doubt as:

> a doubt for which a reason exists .... A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

Id. The Supreme Court said that a challenge to that definition, which had been accepted as a fair statement of the law for "many years," was without merit. Id. at 179.

Forty years ago, Division II of this Court reaffirmed the correctness of that definition in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). Thompson argued that the phrase "a doubt for which a reason exists" required jurors to assign a reason for their doubt in order to acquit. Id. at 4-5. The court disagreed. Id. at 5. When read together with all of the instructions, the reasonable doubt instruction did not tell the jury to assign a reason for its doubts, but rather to base its doubts "on reason, not on something vague or imaginary." Id.

Within the last decade, the Supreme Court has determined that the wording of WPIC 4.01's definition of reasonable doubt is constitutional. In Bennett, supra, the defendant had asked the court to instruct the jury using WPIC 4.01. Instead, the court gave the so-called Castle[9] instruction which read, in part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. . . . There are very few things in this world we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

[9] The instruction first appeared in State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997).

161 Wn.2d at 309. The Bennett court said this instruction was constitutionally adequate but not necessarily "a good or even desirable instruction." Id. at 316. The court exercised its "inherent supervisory powers to maintain sound judicial practice" and instructed every trial court to define reasonable doubt using WPIC 4.01. Id. at 306. Even the four-person dissent, which would have overturned the conviction based on the Castle instruction, agreed that WPIC 4.01's language was clear. Id. at 320.

Most recently, in Kalebaugh, supra, the Washington Supreme Court reaffirmed that WPIC 4.01 was "the correct legal instruction on reasonable doubt." Slip Op. at 8-9. There, during its introductory remarks, the trial court orally paraphrased the term as "a doubt for which a reason *can be given*." Slip. Op. at 7 (emphasis in original). However, at the end of the case, the court provided "the complete and proper version of WPIC 4.01, the reasonable doubt instruction." Id. at 6. In concluding that error in the trial judge's "offhand" explanation was harmless beyond a reasonable doubt, the Court specifically disagreed that WPIC 4.01 requires the jury to articulate a reason for having a reasonable doubt or was akin to the improper "fill in the blank" argument made in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Id. at 8-9. Thus, Threadgill's reliance on Emery is undercut by Kalebaugh.

Threadgill's argument that the language of WPIC 4.01 contains an "articulation" requirement is wrong. In fact, it is misconduct for a prosecutor to suggest that it does. Emery, 174 Wn.2d at 759-60; State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 926 (2012); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). If WPIC 4.01 contained an articulation requirement, the prosecutors' statements in the above-cited cases would not have been misconduct because they would have been a correct statement of the law. The prosecutors' statements were erroneous precisely *because* WPIC 4.01 contains no articulation requirement.

For example, in Emery, the prosecutor argued that a reasonable doubt was "a doubt for which a reason exists." 174 Wn.2d at 760. That was a correct statement of the law. Id. The error came when the prosecutor argued that, in order to acquit, the jury had to articulate its reason to doubt, something not required under WPIC 4.01. Id. A prosecutor's statement that a reasonable doubt is one for which a reason exists is not error. Only when the prosecutor tells the jury that it must articulate a reason to doubt in order to acquit does error occur, precisely because that argument misstates what the instruction says.

Threadgill suggests that the Emery court failed to analyze why the articulation requirement is unconstitutional when voiced by the prosecutor but not when given as an instruction by the judge. Brf. of Appellant at 41-42. The answer is simple; a judge does not voice an articulation requirement when he/she reads WPIC 4.01 because that instruction contains no articulation requirement. As the line of cases cited above states, it is error for a judge or prosecutor to suggest that it does.

WPIC 4.01 simply defines a reasonable doubt as a doubt for which a reason exists, with no further requirement. Threadgill asks this court to parse WPIC 4.01 to give it subtle shades in meaning that simply would not exist in the mind of a juror. There is no reason to believe that jurors would engage in that sort of technical hairsplitting when they are given the definition.

Threadgill has provided this Court with no basis upon which to depart from the holdings of the Washington Supreme Court in Bennett and Kalebaugh. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling precedent, Threadgill bears the burden of making a "clear showing" that WPIC 4.01 is both "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

He has not done so. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). The defendant has failed to show that the Supreme Court's multiple decisions are wrong.

4. THREADGILL'S EXCEPTIONAL SENTENCE WAS PROPERLY SUPPORTED BY WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Finally, Threadgill claims that the trial court erred by failing to enter written findings of fact and conclusions of law to support the exceptional sentence. He is wrong, and remand is unnecessary because the court entered proper written findings and conclusions as part of the Judgment and Sentence.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. Although the prosecutor indicated at the end of the sentencing hearing that she would submit additional findings of fact, 30RP 39, she apparently did not.

Regardless, section 2.5 of the Judgment and Sentence contains the required written findings and conclusions. It reads: "Findings of Fact and Conclusions of Law as to sentence above the standard range." CP 756. It

goes on to iterate that the "Finding of Fact" upon which the sentence is based is the jury's finding of deliberate cruelty, as indicated on section 2.1(j) of the Judgment and Sentence. Id. Further, section 2.5 states as a "Conclusion of Law" that the jury's factual finding of deliberate cruelty is a "substantial and compelling reason[] to justify a sentence above the standard range." Id. Threadgill cites no authority requiring that written findings and conclusions be contained in a separate document, nor has he pointed to any reason why the court's findings and conclusions in section 2.5 are insufficient under RCW 9.94A.535.

The preprinted language on the Judgment and Sentence might be inadequate in a case where the aggravating factor(s) relied on require more detailed findings and conclusions. Here however, the factual basis for the exceptional sentence was simply the jury's finding of deliberate cruelty. The court's pronouncement in section 2.5 that the jury's factual finding of deliberate cruelty justified the exceptional sentence imposed was sufficient to comply with the directive for written findings and conclusions contained in RCW 9.94A.535. Remand is unnecessary.

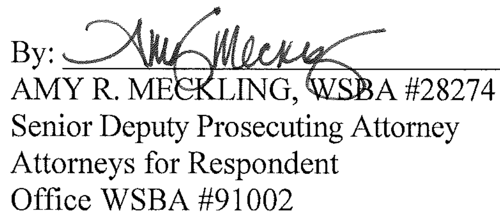
D. CONCLUSION

For all of the above reasons, the State respectfully requests that this Court affirm Threadgill's conviction and sentence.

DATED this 29th day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: ______________________
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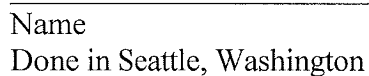
CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Today I directed electronic mail addressed to the attorney for the appellant, David Koch, at kochD@nwattorney.net, containing a copy of the Brief of Respondent, in STATE V. DANIEL THREADGILL, Cause No. 68662-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



07-29-15

Name
Done in Seattle, Washington

Date