NO. 94298-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAROLD RAY STENSON,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 45665-6-II
Clallam County Superior Court No. 93-1-00039-1

ANSWER TO PETITION FOR REVIEW

MARK BURNS NICHOLS
Clallam County Prosecuting Attorney
223 East 4th Street, Suite #11
Port Angeles, WA 98362
(360) 385-9180

JEREMY A. MORRIS
Special Deputy Prosecuting Attorney
519 Division Street, Suite C
Port Orchard, WA 98366
(360) 519-3500

SERVICE		
	Casey Grannis Nielsen, Broman & Koch PLLC 1908 East Madison Seattle, WA 98122 grannisc@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 26, 2017, Port Orchard, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Prosecuting Attorney MARK B. NICHOLS and Clallam County Special Deputy Prosecutor JEREMY A. MORRIS.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Darold Stenson*, No. 45665-6-II (February 22, 2017), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that there was no reversible error in the trial court, and thus affirmed Stenson's convictions. The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and,

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and,

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

The Defendant was convicted in 1994 of two counts of aggravated first degree murder and was ultimately sentenced to death. *State v. Stenson*, 132 Wn.2d 668, 682, 940 P.2d 1239 (1997). On appeal, this Court affirmed the convictions and the death sentence. *Id* at 760. This Court later rejected four personal restraint petitions. *In re Stenson*, 174 Wn.2d 474, 478, 276 P.3d 286 (2012). In 2012, however, this Court reversed the Defendant's convictions and sentence, and remanded the case for a new trial. *In re Stenson*, 174 Wn.2d at 494. In that 2012 decision this Court found that the State had wrongfully violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) when it suppressed an FBI file and photographs related to gunshot residue (GSR) testing.

On remand, the State did not seek the death penalty. 1 RP (1/11/13) 18. Trial began on September 16, 2013, and the jury ultimately found the Defendant guilty of the two charges. 3 RP 2, CP 242. The Court of Appeals affirmed, and the present Petition for Review followed. The factual history of this case is lengthy and can be found in the Court of Appeals Slip Opinion, attached to the Petition for Review, at pages 2-18.

V. ARGUMENT

A. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE COURT OF APPEALS' DECISION WAS INCONSISTENT WITH WASHINGTON LAW, AND HAS SIMILARLY FAILED TO SHOW THAT THERE IS A SIGNIFICANT CONSTITUTIONAL ISSUE OR AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT WARRANTS REVIEW.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because none of these considerations supports acceptance of review. Specifically, for the reasons outlined below, the Defendant has failed to show that the Court of Appeals' decision was inconsistent with Washington law and has similarly failed to show that there is a significant constitutional issue or an issue of substantial public interest that warrants review.

B. THE DEFENDANT FAILED TO SHOW THAT A DISMISSAL WAS WARRANTED UNDER EITHER THE DUE PROCESS CLAUSE OR UNDER CRR 8.3.

The Defendant claims that the trial court erred in failing to dismiss the case. Pet. for Rev. at 6-18. Specifically, the Defendant argues that the trial court should have dismissed the case under CrR 8.3 as well as under a due process analysis because bloodstained portions of the pants were destroyed before a bloodstain analysis could be done on the pants and because the 911 CAD log was not preserved. The Defendant's claims are without merit, however, as the Defendant has failed to show that the trial court abused its discretion.

Due Process and a Failure to Preserve Evidence Claim

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

significant to the defense violates a defendant's due process rights. *Wittenbarger*, 124 Wn.2d at 475.

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

Furthermore, under the Fourteenth Amendment, failure to preserve "potentially useful" evidence "does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the State." *Wittenbarger*, 124 Wn.2d at 475, *citing Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337. With respect to "potentially useful" evidence, the Supreme Court has explained that when all that can be said of the evidence is that it could have been subjected to further testing that might have been exculpatory, the evidence is characterized as "potentially useful" and a failure to preserve potentially useful evidence does not constitute a denial of due process of law absent a showing of bad faith. *Youngblood*, 488 U.S. at 57-58; *See also Wittenbarger*, 124 Wn.2d at 477. Federal courts have also looked to the timing of when evidence was lost or destroyed, finding that the destruction of evidence after the expiration of the direct appeal was understandable and not a violation of due process. *See, e.g., Lovitt v. True*, 403 F.3d 171, 186 (4th Cir 2005); *Ferguson v. Roper*, 400 F.3d 635, 638 (8th Cir 2005) (holding that *Youngblood* does not apply to evidence not lost or destroyed until after trial).

In the present case the Defendant claims that (when the DNA tests on the jeans were done in 1993-94) the State cut out or destroyed portions of the jeans which rendered the Defendant's expert unable to testify about certain aspects of the blood spatter. Pet. for Rev. at 10-11.

With respect to cuttings that were taken from the pants, it is important to note that the State did take some efforts to preserve the evidence of what the pants looked like before the cuttings were taken. Specifically, a photograph of the pants was taken before the DNA testing. See Ex 155 and 156. The existence of the photograph of the pants calls into question whether this case even qualifies as a destruction of evidence or a failure to preserve evidence case. Nevertheless, even if the photograph were somehow deemed inadequate, it is clear that the cuttings from the jeans in the present case do not qualify as "material exculpatory evidence." Rather, the evidence at issue was clearly "potentially useful" evidence" at best, as it was evidence that might have been useful to the defense if it could have been subjected to further testing. As outlined above, the failure to preserve potentially useful evidence does not constitute a denial of due process of law absent a showing of bad faith. The Court of Appeals, however, properly found that the Defendant had failed to show bad faith. Slip Opinion at 31.

With respect to the 911 CAD log, the evidence below showed that an audio recording of the call itself was preserved, but the CAD logs were inadvertently destroyed sometime in 1998-99 when the 911 agency changed their computer system. CP 1934; 3 RP 3473-76. At trial, a stipulation was read to the jury regarding this issue and the jury was

informed that the defense had requested documentation regarding the exact time of the call and the CAD log, but that information was no longer available. 3 RP 3473-76.

The CAD log was, at best, "potentially useful" evidence that might have potentially of been of some use to the defense. It is also worth noting that numerous witnesses at trial testified about the timeline of events, including the time they were dispatched to the scene and the time they arrived at the scene. See, e.g., 3RP 580-81, 587, 605, 617, 721-22, 1780. In addition, the parties stipulated that the State had lost this evidence. 3 RP 3473-76. As the evidence was, at best, potentially useful, the failure to preserve this potentially useful evidence does not constitute a denial of due process of law absent a showing of bad faith. Here the uncontroverted evidence was that this evidence was not lost until well after the Defendant's first trial and direct appeal had concluded. This fact is, of course, strong evidence of the lack of bad faith. The trial court, therefore, properly rejected the Defendant's motion to dismiss based upon this issue.[1]

[1] The Defendant also argues that the Washington Constitution provides more protection than the federal constitution with respect to preservation of evidence claims Pet. for Rev. at 17-18. This Court, however, has already ruled that the State constitution does not provide greater protection in this area. *Wittenbarger*, 124 Wn.2d at 474, 481. This Court, therefore, should reject the Defendant's invitation to overturn *Wittenbarger*.

CrR 8.3

A trial court's ruling regarding a motion to dismiss charges under CrR 8.3(b) is reviewed for a manifest abuse of discretion. *State v. Warner*, 125 Wn.2d 876, 882, 889 P.2d 479 (1995). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). With respect to the prejudice requirement, a defendant must show actual prejudice. *State v. Rohrich*, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). The "mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice." *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993), *citing State v. Ansell*, 36 Wn. App. 492, 498–99, 675 P.2d 614(1984).

Furthermore, dismissal is an extraordinary remedy. *Rohrich*, 149 Wn.2d at 653, *citing State v. Baker*, 78 Wn.2d 327, 332–33, 474 P.2d 254 (1970). Similarly, Washington courts have explained that the law considers dismissal of a case an extraordinary remedy of last resort, and the trial court's authority to dismiss under CrR 8.3(b) is limited to "truly egregious cases of mismanagement or misconduct." *State v. Koerber*, 85 Wn. App. 1, 4–5, 931 P.2d 904 (1996), *quoting State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, aff'd, 121 Wn.2d 524, 852 P.2d 294 (1993).

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

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

First, CrR. 8.3 requires "requires a showing of actual prejudice," and the "mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice." *Norby*, 122 Wn.2d at 264. In the context of a preservation of evidence claim, if a defendant could show "actual

prejudice" then the defendant would also, almost by necessity, be able to show that the evidence was "materially exculpatory" under the due process test, and thus there would be no need to resort to an CrR 8.3 analysis.

Similarly, if the evidence at issue was only potentially useful under a due process analysis, a defendant would again, almost by necessity, be unable to show actual prejudice under the 8.3 test. Rather, all "potentially useful" evidence would be evidence that would only demonstrate a mere "possibility of prejudice," which is, of course, insufficient to prove a CrR 8.3 violation. Thus, logic dictates that CrR 8.3 will rarely, if ever play a role in a preservation of evidence claim, and thus the dearth of caselaw on this point is easily explained.

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

The fact that defense expert would have preferred higher quality pictures or more in depth blood spatter analysis on the pants before the cuttings were made does not demonstrate mismanagement on the part of the State. A defendant, of course, could make a similar complaint or request for more in-depth investigation in nearly any criminal case. In addition, the Defendant cannot show prejudice as the defense can only provide speculation about what further analysis, better pictures, or an examination of the CAD log would have shown. In any event, the Defendant cannot show actual prejudice and his CrR 8.3 claim must fail.[2]

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

The Defendant next argues that the trial court erred in failing to exclude the pants under either the CrR 8.3 or the due process claims raised in the motion to dismiss. Pet. for Rev. at 18. This claim is without merit because the Defendant has failed to show an abuse of discretion.

---

[2] The Defendant also appears to argue that the trial court should have dismissed this case due to the *Brady* violation that this Court found in the 6th PRP that led to the order of a retrial. This Court, however, already reviewed the *Brady* violation in detail and ordered that the proper remedy was a remand for a retrial. The Defendant has failed to show why relitigation of this issue was warranted. Furthermore, even if this issue was to be relitigated, the trial court aptly explained that the State had been required to retry this case 20 years after the fact and that the GSR evidence was suppressed in the second trial,

As outlined above, the Defendant's due process claim fails because he failed to show bad faith. Similarly, the under the CrR 8.3 analysis the Defendant did not show "actual prejudice." Rather, at best, the Defendant could only show the mere possibility of prejudice, which is insufficient under CrR 8.3. The Defendant's claim, therefore, is without merit.

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

The Defendant next argues that the trial court erred in failing to give a proposed spoliation instruction. Pet. for Rev. at 19. This claim is without merit because the instruction was not warranted under the facts of this case. A missing evidence instruction, is not warranted when the absence of the evidence has been explained. *See State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991); *State v. Jordan*, 17 Wn. App. 542, 544, 564 P.2d 340 (1977). As the Court of Appeals noted, multiple witnesses at trial explained that the cutouts were made for the purpose of DNA testing. Slip Opinion at 34. Thus no instruction was warranted.[3]

---

and thus the State had been severely punished for the *Brady* violation. 2 RP 93. The Defendant has failed to show that the trial court decision in this regard was improper.

[3] The Defendant also argues that the trial court improperly declined to give the proposed

E. THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS BROAD DISCRETION IN DENYING THE MOTION FOR A MISTRIAL.

The Defendant next argues that the trial court erred in denying the Defendant's motion for a mistrial. Pet. for Rev. at 20. This claim is without merit because the trial court did not abuse its discretion, as the trial court was in the best position to weigh the potential prejudice from the irregularity and because the trial court instructed the jury to disregard the comment and juries are presumed to follow the court's instruction.

An appellate court reviews a denial of a motion for a mistrial for an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court's decision is "'manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take." *Mayer*, 156 Wn.2d at 684, *quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*quoting State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

---

instruction because the trial court found no bad faith. Pet. for Rev. at 20. As the Defendant notes, however, "culpability" and "bad faith" are factors that a trial court is to consider in determining whether to give such an instruction. Pet. for Rev. 19, citing *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 135, 307 P.23d 811 (2013). Thus there

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

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

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

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

---

was nothing improper about the trial court noting that it had not found any bad faith.

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

Defense counsel later made a motion for a mistrial based on Ms. Hoerner's comment. 3 RP 1312. The trial court, however, denied the motion after a thorough explanation and review. See 3 RP 1313, 3 RP 1508-13.

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

Given this record, there is no dispute that the comments by Mr. Hoerner were improper. The trial court, however, immediately instructed the jury to disregard the first improper comment. In addition, when it was found that Mr. Hoerner had made additional comments that were improper, the trial brought in each juror who had heard the improper

comments and inquired whether the jurors could disregard the comments and continue to be fair and impartial. Each juror indicated they could. The Defendant, therefore, cannot show that the trial court abused its discretion by adopting a view "that no reasonable person would take" or that the trial court's ruling was "manifestly unreasonably."[4]

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

The Defendant next argues that the trial court erred in admitting evidence of a witness's prior conviction. Pet. for Rev. at 23. This claim is without merit because the Defendant has failed to show that the trial court abused its discretion in allowing the evidence when it was used to impeach a witness, and not the Defendant. In addition, any error in this regard was harmless, given the strength of the State's case, as well as the fact that the impeachment was on a minor issue and the testimony of the witness in question was largely cumulative in that the main points of her testimony were introduced by other defense witnesses at trial.

---

[4] Furthermore, the actions of Ms. Hoerner, while improper, were not likely to cause the Defendant any prejudice at all. As the Defendant has explained, one of the defense theories was that Ms. Hoerner was "another suspect" and may have herself been responsible for the murders. Given this defense theory, it would be of no surprise that the

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

> General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

The State acknowledges that *State v. Calegar*, 133 Wn.2d 718, 947 P.2d 235 (1997) and *State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1175 (1997) make it clear that the admission of a criminal *defendant's* prior drug conviction is generally not admissible evidence to impeach a defendant, as the prejudice outweighs the probative value of such evidence. The admission of Ms. Wagner's prior drug conviction, however, had no prejudicial effect on the Defendant's character, thus the analysis is slightly different.[5] Given the broad discretion given to a trial court under the abuse

---

"other suspect" would blame the Defendant for the murders.

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

of discretion standard, the State suggests that the Defendant has failed to show that no reasonable person would take the position adopted by the trial court below. Thus, the Defendant cannot show an abuse of discretion.

Even if this Court were to conclude, however, that the trial court abused its discretion in admitting ER 609 evidence in the present case, any error in this regard was harmless.

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

This conclusion is further demonstrated by the fact that Ms. Wagner's testimony was largely cumulative. For instance, although Ms. Wagner testified that Ms. Hoerner went to Hawaii with another man not long after the murders (and posed for a photograph on this trip wearing a

bikini), Ms. Hoerner herself admitted these facts in cross examination. *See* 3RP 1434-35. With respect to Ms. Wagner's other testimony regarding the nature of the marriage between Mr. and Mrs. Hoerner, their disagreements, and Ms. Hoerner's behavior, the Defendant called numerous other witnesses that covered these areas. *See* App.'s Br at 28-34 (summarizing much of this testimony).

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

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

The Defendant next claims that prosecutorial misconduct in closing arguments violated his right to a fair trial. Pet. for Rev. at 24. This claim is without merit because the defendant has failed to show that the prosecutor's conduct was improper or that any improper conduct

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

To establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). If the defendant failed to object to the prosecutor's misconduct at trial, a reversal is only warranted if this Court finds that the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. See, e.g., *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011).

As this Court has recently noted, several cases from the Court of Appeals have examined whether the use of puzzle analogies are improper. *State v. Lindsay*, 189 Wn.2d 423, 434, 326 P.3d 125 (2014). The comments from the prosecutor in the present case were similar to the statements at issue in *State v. Curtiss*, 161 Wn. App. 673, 700, 250 P.3d 496 (2011) where the prosecutor said the jury could be convinced beyond a reasonable doubt "even with pieces missing." Similarly, the comments

in the present case were different from the comments in *Johnson* and *Lindsay* where the prosecutors said, "even being able to see only ***half***, you can be assured beyond a reasonable doubt" and "you can be ***halfway*** done with that puzzle and you know beyond a reasonable doubt." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) (emphasis added); *Lindsay*, 180 Wn.2d at 434 (emphasis added).

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

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

Furthermore, the defense in the present case did not object to the prosecutor's arguments. Thus the Defendant bears the burden of establishing that there was misconduct that "had a substantial likelihood of affecting the jury verdict," and that no curative instruction would have obviated the prejudicial effect on the jury. *Sakellis*, 164 Wn. App. at 184; *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011); *State v. Russell*,

125 Wn.2d 24, 882 P.2d 747 (1994). For all of these reasons, the Defendant's claim of prosecutorial misconduct must fail.

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

The Defendant next argues that the Court of Appeals erred in rejecting his claim that the trial court abused its discretion in denying his request for a jury instruction on that the reasonable doubt instruction is unconstitutional. Pet. for Rev. at 25. This claim is without merit because this Court has previously rejected this argument and found that the instruction given was constitutional.

In the present case the Defendant argues that WPIC 4.01, is unconstitutional because it "tells jurors they must be able to articulate a reason for having a reasonable doubt" and is akin to a "fill-in-the-blank" argument that impermissibly shifts the burden of proof. This Court has previously addressed WPIC 4.01 and the reasonable doubt standard. In *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), for instance, this Court went through the history of WPIC 4.01 and the reasonable doubt standard in great detail. *Bennett*, 161 Wn.2d at 308-18. This Court noted that several courts had upheld WPIC 4.01 over the years. *Id* at 309,

citing State v. Pirtle, 127 Wn.2d 628, 656–58, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn. App. 286, 299–301, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. App. 472, 475–76, 655 P.2d 1191 (1982). The *Bennett* court then noted that it was again approving of WPIC 4.01, and also went a step farther and ***required*** that the instruction be given in every criminal case,

> Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the *Castle* instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 317-18.[6] Given the clear holding in *Bennett* (and

---

[6] Similarly, in *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) this Court recently reaffirmed that WPIC 4.01 is "the correct legal instruction on reasonable doubt...." In that case the trial court had instructing the jury during preliminary remarks that a reasonable doubt was "a doubt for which a reason exists," but the trial judge then went on to paraphrase the instruction and stated that a reasonable doubt was "a doubt for which a reason can be given." *Kalebaugh*, 183 Wn.2d at 585. In concluding that the error in the "offhand explanation of reasonable doubt" was harmless beyond a reasonable doubt, the Court rejected any suggestion that WPIC 4.01 required the jury to articulate a reason for having a reasonable doubt. *Kalebaugh*, 183 Wn.2d at 585, 586. Rather, the Court held that, "We do not agree that the judge's effort to explain reasonable doubt was a directive to convict unless a reason was given or akin to the "fill in the blank" approach that we held improper in *State v. Emery*." *Kalebaugh*, 183 Wn.2d at 586; *See also, State v. Thompson*, 13 Wn. App. 1, 4–5, 533 P.2d 395 (1975) (the phrase "a doubt for which a

Kalebaugh), the Defendant has failed to show that WPIC 4.01 is unconstitutional.

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

The Defendant next argues that his CrR 3.3 right to a speedy trial was violated. Pet. for Rev at 27. This claim is without merit because the Defendant has failed to show that the trial court abused its discretion in grating the State's motion to continue, as the motion outlined numerous independent reasons for the continuance, any one of which would has justified the continuance under Washington law.

A trial court's decision to grant a motion for a continuance is reviewed for abuse of discretion. *State v. Ollivier*, 178 Wn.2d 813, 822–23, 312 P.3d 1 (2013). The trial court may grant a party's motion to continue the trial date when it "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2).

Allowing counsel time to prepare for trial is a valid basis for continuance. *State v. Flinn*, 154 Wn.2d 193, 200, 119 P.3d 748 (2005)

---

reason exists" does not direct the jury "to assign a reason for their doubt").

citing State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *State v. Williams*, 104 Wn. App. 516, 523, 17 P.3d 648 (2001). Scheduling conflicts may also be considered in granting continuances. *See, e.g., State v. Heredia–Juarez*, 119 Wn. App. 150, 153–55, 79 P.3d 987 (2003). Similarly, Washington courts have held that a trial court may grant a continuance to allow the State to find a witness, or when there are issues of witness unavailability or hospitalization. *See, e.g., State v. Lillard*, 122 Wn. App. 422, 436, 93 P.3d 969 (2004) (witness for the State was unavailable due to a medical condition);

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

The State's motion for a continuance in the present case outlined numerous reasons that supported the requested continuance. Specifically, the State explained that the defense had not yet provided discovery to the State, and the defense had only filed a witness list as of May 10, 2012. CP 1644. The defense had also not provided transcripts of recordings taken from various witness interviews, nor had the defense provided numerous pages of discovery that were no longer available to the State, even though

the trial court had previously ordered the Defendant to turn these items over to the State. CP 1644; CP 4856. The State also noted that the defense had indicated that it would have additional witnesses, but those witnesses had not yet been named by the defense. CP 1644.

The State further explained that there were also several witnesses who had not yet been located, and that the State had enlisted the assistance of the U.S. Marshall's service in tracking down these witnesses. CP 1645-46. In addition, the defense had only recently filed three voluminous motions that the State was required to respond to, and the State further noted that some of those motions would likely require evidentiary hearings. CP 1644-45. Given these facts, the prosecutor indicated that she could not be ready for trial and needed more time to adequately respond to the defense motions and to prepare her own case for trial.

The trial court carefully reviewed the State's motion and found that a continuance was "required in the administration of justice." 2RP (6/12/13) 34. The trial court specifically noted that the State had raised issues regarding the on-going discovery requests and the fact that the defense had not provided some of those materials to the State. 2RP (6/12/13) 34.

Given the record as a whole, the State clearly presented numerous issues that raised proper grounds for a continuance under Washington law,

any one of which would have justified a continuance. It should also be noted that the Defendant failed to show (either in his written response or in the hearing on the motion) that he would suffer any prejudice if the court granted the continuance. In short, there was nothing untenable about the trial court's decision to grant the continuance, and the Defendant's time for trial claim must fail.

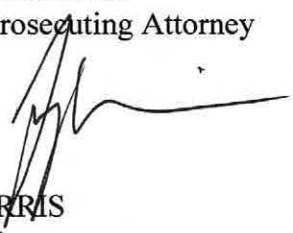
VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny the Defendant's petition for review.

DATED April 26, 2017.

Respectfully submitted,

MARK BURNS NICHOLS
Clallam County Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Special Deputy Prosecuting Attorney