

FILED

May 27, 2016  
Court of Appeals  
Division I

NO. 74255-8-1

State of Washington

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

HEYENG CHENG,

Appellant.

---

---

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

The Honorable Monica Benton, Judge

---

---

BRIEF OF APPELLANT

---

---

KEVIN A. MARCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
C. <u>ARGUMENT</u> .....	7
1. THE TRIAL COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY THAT VIOLATED CHENG’S RIGHT TO CONFRONT A WITNESS AGAINST HIM .....	7
a. <u>The statements Kira Dempsey made during the 911            call were testimonial</u> .....	7
b. <u>Admission of the testimonial statements prejudiced            Cheng</u> .....	14
2. THE JURY INSTRUCTION, “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS,” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED .....	17
a. <u>WPIC 4.01’s articulation requirement misstates the            reasonable doubt standard, shifts the burden of proof,            and undermines the presumption of innocence</u> .....	18
b. <u>No appellate court in recent times has directly grappled            with the challenged language in WPIC 4.01</u> .....	27
c. <u>WPIC 4.01 rests on an outdated view of reasonable            doubt that equated a doubt for which a reason exists            with a doubt for which a reason can be given</u> .....	28
d. <u>This structural error requires reversal</u> .....	34

TABLE OF CONTENTS (CONT'D)

	Page
3. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT WHEN SHE LIKENED THE JURY'S BEYOND-A-REASONABLE-DOUBT CONSIDERATION OF CHENG'S KNOWLEDGE OR MALICE TO EVERYDAY DRIVING DECISIONS.....	35
4. CUMULATIVE ERROR DENIED CHENG A FAIR TRIAL.....	40
5. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE DNA COLLECTION FEE AND VICTIM PENALTY ASSESSMENT .....	40
6. THIS COURT SHOULD DENY APPELLATE COSTS.....	45
D. <u>CONCLUSION</u> .....	48

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Amunrud v. Bd. of Appeals</u> 158 Wn.2d 208, 143 P.3d 571 (2006).....	41
<u>Anfinson v. FedEx Ground Package Sys., Inc.</u> 174 Wn.2d 851, 281 P.3d 289 (2012).....	19
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</u> 124 Wn.2d 816, 881 P.2d 986 (1994).....	28
<u>DeYoung v. Providence Med. Ctr.</u> 136 Wn.2d 136, 960 P.2d 919 (1998).....	41
<u>In re Electric Lightwave, Inc.</u> 123 Wn.2d 530, 869 P.2d 1045 (1994).....	28
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	38
<u>Johnson v. Dep't of Fish &amp; Wildlife</u> 175 Wn. App. 765, 305 P.3d 1130 (2013).....	20, 23, 24, 41
<u>Nielsen v. Dep't of Licensing</u> 177 Wn. App. 45, 309 P.3d 1221 (2013).....	41
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	43
<u>State v. Borsheim</u> 140 Wn. App. 357, 165 P.3d 417 (2007).....	25
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1994).....	40
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	44

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Dana</u> 73 Wn.2d 533, 439 P.2d 403 (1968).....	18, 25
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	38
<u>State v. Duncan</u> ___ Wn.2d ___, ___ P.3d ___, 2016 WL 1696698 (Apr. 28, 2016) .....	44
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1285 (1996).....	14
<u>State v. Harras</u> 25 Wash. 416, 65 P. 774 (1901) .....	30, 31, 32, 33
<u>State v. Harsted</u> 66 Wash. 158, 119 P. 24 (1911) .....	32, 33
<u>State v. Hurtado</u> 173 Wn. App. 592, 294 P.3d 838 (2013).....	7
<u>State v. Jasper</u> 174 Wn.2d 96, 271 P.3d 876 (2012).....	7
<u>State v. Koslowski</u> 166 Wn.2d 409, 209 P.3d 479 (2009).....	8, 10, 11
<u>State v. LeFaber</u> 128 Wn.2d 896, 913 P.2d 369 (1996).....	18, 25
<u>State v. Lindsay &amp; Holmes</u> 171 Wn. App. 808, 288 P.3d 641 (2013).....	36
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	36, 37, 38, 39
<u>State v. Lizarraga</u> 191 Wn. App. 530, 364 P.3d 810 (2015).....	35

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 755 (2013):.....	44
<u>State v. Mathers</u> __ Wn. App. __, __ P.3d __, 2016 WL 2865576 (May 10, 2016) .....	43, 44
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011):.....	35
<u>State v. Nabors</u> 8 Wn. App. 199, 505 P.2d 162 (1973):.....	30
<u>State v. Noel</u> 51 Wn. App. 436, 753 P.2d 1017 (1988):.....	18
<u>State v. O’Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009):.....	18
<u>State v. Paumier</u> 176 Wn.2d 29, 288 P.3d 1126 (2012):.....	34
<u>State v. Pirtle</u> 127 Wn.2d 628, 904 P.2d 245 (1995):.....	35
<u>State v. Saunders</u> 132 Wn. App. 592, 132 P.3d 743 (2006):.....	14
<u>State v. Simon</u> 64 Wn. App. 948, 831 P.2d 139 (1991) <u>rev’d on other grounds</u> , 120 Wn.2d 196, 840 P.2d 172 (1992) .....	18
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016):.....	46, 47
<u>State v. Smith</u> 174 Wn. App. 359, 298 P.3d 785 <u>review denied</u> , 178 Wn.2d 1008, 308 P.3d 643 (2013) .....	19

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Tanzymore</u> 54 Wn.2d 290, 340 P.2d 178 (1959).....	29, 30
<u>State v. Thompson</u> 13 Wn. App. 1, 533 P.2d 395 (1975).....	29, 30, 31
 <u>FEDERAL CASES</u>	
<u>Crawford v. Washington</u> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	7, 8
<u>Davis v. Washington</u> 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) 7, 8, 9, 10, 11, 12	
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	21, 23
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	20
<u>Johnson v. Louisiana</u> 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).....	20
<u>Mathews v. DeCastro</u> 429 U.S. 181, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976).....	41
<u>Michigan v. Bryant</u> 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).....	9, 10, 12, 13
<u>Sandstrom v. Montana</u> 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).....	19
<u>Sullivan v. Louisiana</u> 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).....	34
<u>United States v. Johnson</u> 343 F.2d 5 (2d Cir. 1965) .....	20

**TABLE OF AUTHORITIES (CONT'D)**

	Page
 <u>OTHER JURISDICTIONS</u>	
<u>Butler v. State</u> 78 N.W. 590 (Wis. 1899).....	32
<u>Siberry v. State</u> 33 N.E. 6815 (Ind. 1893) .....	26
<u>State v. Cohen</u> 78 N.W. 857 (Iowa 1899) .....	26
<u>State v. Jefferson</u> 43 La. Ann. 995, 10 So. 119 (La. 1891) .....	31
<u>State v. Morey</u> 25 Or. 241, 36 P. 573 (1894) .....	31
<u>Vann v. State</u> 9 S.E. 945 (Ga. 1889) .....	31
 <u>RULES, STATUTES AND OTHERA AUTHORITIES</u>	
11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008).....	17-20, 22-25, 27, 28, 31, 33, 34, 35
Steve Sheppard, <u>The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence</u> , 78 NOTRE DAME L. REV. 1165 (2003).....	22
RAP 2.5.....	34
RCW 7.68.035 .....	1, 2, 40, 42, 43, 44, 45
RCW 9.94A.535 .....	3
RCW 10.73.160 .....	46
RCW 43.43.752 .....	42

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 43.43.7541 .....	1, 2, 40, 42, 43, 44, 45
U.S. CONST. amend. VI.....	1, 7, 18, 34
U.S. CONST. amend. XIV.....	18, 40
CONST. art. I, § 3 .....	40
CONST. art. I, § 22.....	7, 18
WEBSTER'S THIRD NEW INT'L DICTIONARY (1993).....	20

A. ASSIGNMENTS OF ERROR

1. The trial court violated Heyeng Sok Cheng's right to confront a witness against him.

2. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

3. Prosecutorial misconduct during closing argument denied Cheng a fair trial.

4. Cumulative error denied Cheng a fair trial.

5a. RCW 43.43.7541's mandatory DNA collection fee violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

5b. RCW 7.68.035's mandatory victim penalty assessment fee violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

Issues Pertaining to Assignments of Error

1. Was Cheng's Sixth Amendment right to confrontation violated when the trial court admitted out-of-court statements by a nontestifying witness in which she described past events and faced no ongoing emergency?

2. Did the reasonable doubt instruction, stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof,

undermine the presumption of innocence, and shift the burden to Cheng to provide a reason for why reasonable doubt exists?

3. The prosecutor told jurors it would not be difficult to infer the mens rea element of the offenses, likening the jury's decision to everyday driving decisions. Did the prosecutor's argument constitute egregious misconduct because it trivialized and minimized the State's burden of proof beyond a reasonable doubt?

4. Does the cumulative effect of the assigned errors, if the errors do each themselves warrant reversal, require reversal?

5a. RCW 43.43.7541 requires trial courts to impose a DNA collection fee at each felony sentencing. This ostensibly serves the state's interest in funding the collection, testing, and restitution of a convicted defendant's DNA profile to facilitate criminal investigations. However, the statute mandates this DNA collection fee be imposed even when the defendant has no ability to pay the fee. Does RCW 43.43.7541 violate substantive due process when imposed on defendants who do not have the ability or likely future ability to pay?

5b. RCW 7.68.035 requires trial courts to impose a victim penalty assessment at each felony sentencing. This ostensibly serves the state's interest in funding programs to encourage and facilitate victims and witnesses to give testimony. However, the statute mandates this

assessment be imposed even when the defendant has no ability to pay it. Does RCW 7.68.035 violate substantive due process when imposed on defendants who do not have the ability or likely future ability to pay?

B. STATEMENT OF THE CASE

The State charged Cheng with felony telephone harassment and second degree malicious mischief. CP 1-2, 10-11. Both charges were alleged as domestic violence offenses. CP 1-2, 10-11. The harassment charge also alleged RCW 9.94A.535(3)(h)(iii)'s sight-and-sound-of-minor-children aggravator. CP 1, 10.

In December 2014, Cheng was in a relationship with Kira Dempsey. RP 119, 121. Kira Dempsey and her two sons lived with her mother, Leslie Dempsey, in Lake Forest Park. RP 118. Cheng stayed at the Dempsey home frequently. RP 120.

On the evening of December 29, 2014, Leslie Dempsey testified Cheng was very sick, and "seemed to be very uncomfortable or in pain." RP 121. Cheng wanted to take the car, which caused Kira concern because of how ill Cheng was. RP 122-23. Cheng allegedly threatened to "[t]ake a baseball bat to the car" if Kira would not let him drive; however, Cheng did not end up using the car.

Kira and Leslie Dempsey rose early on December 30, 2014 and left for work; Cheng was sleeping. RP 123-24. Leslie Dempsey returned home

at around 1:00 p.m. and the house was a “mess. Things overturned and broken.” RP 125. Leslie called Kira and picked her up a little later that afternoon. RP 125. Leslie decided to call police “[b]ecause of the damage done. And I knew . . . I would want to make a[n] insurance claim and to follow through and just the amount of mess amount of mess and disruption that was visible.” RP 125-26. Leslie testified the damage cost “[a]bout \$3,000” to repair. RP 126.

Leslie, Kira, and the two children spent the night at a hotel because there was not enough time to clean up broken glass and furniture before the children came home from daycare. RP 129. Leslie testified Kira was speaking with Cheng, who sounded agitated and angry. RP 129-30. Leslie testified, Cheng “made a threat to my daughter and the grandsons” that “he would hire a drug fiend and have them killed or . . . put a hit on them.” RP 131.

Kira Dempsey did not testify, despite being subpoenaed. RP 61, 104, 140-41. The State sought to admit a recording of the 911 call she made after Cheng allegedly threatened to kill her and her sons. RP 104-12, 142-44. The State asserted Kira Dempsey’s out-of-court statements were nontestimonial because she was faced with an ongoing emergency, even though Cheng had no idea where Kira was and posed no imminent physical threat to her. RP 106-09, 142-44. The defense argued the 911 call was

inadmissible under the confrontation clause because it consisted of testimonial hearsay. RP 111, 145-46. The defense asserted that, although fearful, the Dempseys faced no immediate threat, and thus the primary purpose of the 911 call was to report past criminal activity potentially relevant to a later criminal prosecution. RP 111, 145-46.

The trial court called the admission of the 911 call “a close question in some respects,” but determined that Kira Dempsey was reporting an ongoing emergency, and therefore the call contained nontestimonial statements. RP 149-50. Thus, the court allowed the 911 call to be played for the jury. RP 150, 170.

The trial court instructed the jury with Washington’s pattern instruction on reasonable doubt, which read, in part, “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 36 (Instruction No. 2) (emphasis added).

During closing argument, the State argued it could easily infer Cheng acted with the requisite mens rea of harassment and malicious mischief because jurors “make those kinds of decisions or make those kinds of judgments” “in [their] live every day. Defensive driving is actually an example of that. As you’re driving you’re constantly making judgments about what other drivers intend to do, and acting accordingly, based on circumstantial evidence.” RP 175-76. The State compared the mens rea

elements—which jurors were instructed to find beyond a reasonable doubt, CP 42, 46—with determining the state of mind of the driver of “a car that veers into your lane or is driving aggressively behind your bumper . . . .” RP 176. Defense counsel objected: “It lowers the State’s burden. It’s beyond a reasonable doubt in a courtroom, not on the road.” RP 176. The trial court overruled the objection. RP 176.

The jury convicted Cheng of malicious mischief in the second degree and acquitted Cheng of felony harassment. CP 26-27; RP 205-09. With regard to malicious mischief, the jury returned a special verdict finding that Cheng and Kira Dempsey were members of the same family or household prior to or at the time of the crime. CP 28-29; RP 206.

The trial court imposed a 29-month sentence. CP 64; RP 236. It waived all nonmandatory legal financial obligations, but imposed a \$500 victim penalty assessment and a \$100 DNA collection fee. CP 63; RP 236. The trial court ordered restitution in the amount of \$3,308 to Farmers Insurance and \$250 to Leslie Dempsey. CP 68; RP 236-37.

Cheng moved to allow for an appeal in forma pauperis. Supp. CP \_\_\_\_ (sub no. 68; motion and declaration for order allowing appeal in forma pauperis). Cheng asserted he had no assets, income, or financial interest in any real or personal property. Supp. CP \_\_\_\_ (sub no. 68). The trial court determined Cheng was “unable by reason of poverty to pay for any of the

expenses of appellate review” and that he could not “contribute anything toward the costs of appellate review.” CP 73. Cheng filed a timely notice of appeal. CP 72.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY THAT VIOLATED CHENG’S RIGHT TO CONFRONT A WITNESS AGAINST HIM

In all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. U.S. CONST. amend. VI; CONST. art. I, § 22. The confrontation clause renders inadmissible testimonial statements by a witness who does not testify at trial unless the witness is unable to testify and the defendant had a prior opportunity for cross examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This court reviews confrontation clause claims de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). The State bears the burden of proving a statement is nontestimonial. State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838 (2013).

a. The statements Kira Dempsey made during the 911 call were testimonial

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing

emergency.” Davis, 547 U.S. at 822. Statements are “testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution.” Id.

The Washington Supreme Court has identified four factors helpful in determining whether or not statements are testimonial: (1) whether the speaker was describing events as they occurred or whether the speaker was describing past events; (2) whether a reasonable listener would conclude the speaker was facing an ongoing emergency that required help; (3) the nature of the information elicited by law enforcement; and (4) the formality of the interview. State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009).

In Davis, the Court determined a frenetic 911 call, describing events as they occurred, was nontestimonial because the caller was alone, unprotected by police, and faced immediate danger from the defendant. 547 U.S. at 831-32. The caller told the 911 dispatches that Davis was “here jumpin’ on me again” and “He’s usin’ his fists.” Id. at 817-18. The Court determined that this was “plainly a call for help against a bona fide physical threat.” Id. at 827. Viewing the facts objectively, the nature of the call “was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in Crawford) what had

happened in the past.” Id. Thus, the court concluded that the purpose of the 911 call “was to enable assistance to meet an ongoing emergency” and was therefore nontestimonial. Id. at 828.

In Davis’s companion case, Hammon v. Indiana, by contrast, the Court held a wife’s statements were testimonial when police responded to a domestic disturbance between her and her husband. Id. at 819, 828. The wife appeared somewhat frightened, but she was not in immediate danger, and the interrogating policeman testified he heard no arguments or physical violence between the couple. Id. at 819, 829. The Court explained the wife’s statements were testimonial given that the office “was not seeking to determine (as in Davis) ‘what is happening,’ but rather ‘what happened.’” Id. at 830. “Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.” Id.

Five years after Davis, the Court considered whether the ongoing emergency exception “extends beyond an initial victim to a potential threat to the responding police and the public at large” in Michigan v. Bryant, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). Police discovered the declarant mortally wounded in a parking lot and the shooter had fled moments earlier with a gun. Id. at 349-50, 378. The Court determined these statements were nontestimonial because the shooter’s “motive and location after the shooting were unknown,” and thus the shooter posed an imminent

threat to officer and public safety. Id. at 374-75. The Court thus concluded that the declarant's statements were nontestimonial because they did not have the primary purpose of establishing past events. Id. at 375.

Although the Bryant Court expanded the ongoing emergency exception, its expansion was narrow. The Court pointed out, "Domestic violence cases like Davis and Hammon often have a narrower zone of potential victims than cases involving threats to public safety." Id. at 363. The Court also noted that in Hammon, the suspect was "armed only with his fists when he attacked his wife, so removing [her] to a separate room was sufficient to end the emergency." Id. at 364. However, had Hammon been armed with a gun, the responding officers might have faced an ongoing emergency. Id. The Court also acknowledged that just because a suspect has not been apprehended does not mean there is an ongoing emergency. Id. at 365; see also Koslowski, 166 Wn.2d at 426-27 ("[T]he mere fact that the suspects were at large . . . [wa]s not enough to show the questions asked and answered were necessary to resolve a present emergency situation.") There is no emergency when the suspect, "as in Davis, flees with little prospect of posing a threat to the public." Bryant, 562 U.S. at 365. Thus, "the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public." Id. at 370-71.

Viewing the facts here objectively, there was no ongoing emergency when Kira Dempsey called 911 to report Cheng's telephone harassment. Dempsey told the 911 dispatcher Cheng had called her on the phone and "threatened me and my children." Ex. 5 at 3; see also Ex. 5 at 2 ("He's making death threats on me."). Dempsey was describing events that had already occurred rather than events that were presently occurring. Cf. Davis, 547 U.S. at 822; Koslowski, 166 Wn.2d at 418. She was not currently speaking to Cheng and Cheng was not in her physical proximity. Ex. 5 at 3. Thus, her call was not "plainly a call for help against a bona fide physical threat." Davis, 547 U.S. at 827. Rather, the call was a report of Cheng's telephonic threats to the same police department that was working the malicious mischief case. Ex. 5 at 1, 4. Because the primary purpose of Dempsey's 911 call was to report past events to law enforcement potentially relevant to a later criminal prosecution, her statements were testimonial.

Neither could a reasonable listener conclude Dempsey was facing an ongoing emergency. Although Dempsey expressed fear of Cheng, she stated she did not tell Cheng where she was and acknowledged Cheng did not know where she was. Ex. 5 at 3 (in response to Dempsey's statement, "I'm like scared that he's gonna like kill me actually," the 911 dispatcher stated, "Okay. As long as he doesn't know where you're at right now"). While fearful, Dempsey's statements show she was not in any current danger. The

911 dispatcher likewise did not believe there was an ongoing emergency in which Dempsey or anyone else faced physical harm. He did not send officers to Dempsey's location to protect or aid her but instead took down Dempsey's phone number and told her he would ask the on-duty officer to return her call to see what, if anything, he could do for her. Ex. 5 at 3-4. There was no ongoing emergency because Dempsey did not face any immediate physical danger.

Nor was there a danger to the police or the public at large. At most, Cheng had a baseball bat, which he had used to damage property, not to assault any person. See RP 123 (Leslie Dempsey describing Cheng's threat to "[t]ake a baseball bat to the car"). Thus, unlike Bryant, there was no indication Cheng posed a threat to the general public or law enforcement officers. See Bryant, 562 U.S. at 363-64. And, as the Court recognized, "[d]omestic violence cases like Davis and Hammon often have a narrower zone of potential victims than cases involving threats to public safety." Id. at 363. Given that, in this case, there was no actual physical violence to any person, the circumstances here are even narrower than the "narrower zone of potential victims" identified in Davis and Hammon. There was no ongoing emergency based on potential danger to police or the public.

As for the nature of what was asked and answered, Dempsey was reporting what had occurred in the past. Her answers to the 911 dispatcher

reported Cheng's additional crime to the police officer who was already investigating the malicious mischief that had occurred earlier. Ex. 5 at 1-2. Although the 911 dispatcher initially inquired as to Dempsey's whereabouts, once Dempsey responded that Cheng did not know where she was, the 911 dispatcher quickly ended the phone call, stating he would transmit the information to the officer currently on duty to "see what he c[ould] do for" her. Ex. 5 at 3-4. The nature of the questions and answers indicated that the 911 dispatcher and Dempsey intended to relay Cheng's threats to investigating officers, not to meet an emergency but to add to the ongoing criminal investigation. This buttresses the conclusion that Dempsey's statements were testimonial.

Finally, Dempsey's 911 call was relatively formal. She wished to relay information about Cheng's threats to a specific officer: "I was working with Officer Parrish earlier on a case of . . . DV mischief in Lake Forest Park." Ex. 5 at 1. Given she identified a specific officer, Dempsey's call was meant to give a formal report of Cheng's continuing criminal activity to this particular officer who was already familiar with the case. And in any event, formality "is not the sole touchstone of our primary purpose inquiry because . . . informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." Bryant, 562 U.S. at 366.

The primary purpose of the 911 call was to report a crime and establish past events potentially relevant to a criminal prosecution. This conclusion is compelled by the nature of the questions and answers reporting past events and the fact that no one was in any imminent physical danger at the time of the call. Dempsey's out-of-court statements were used by the State as a substitute for her live testimony. Dempsey's out-of-court statements were testimonial and their admission at Cheng's trial violated the confrontation clause.

b. Admission of the testimonial statements prejudiced Cheng

Constitutional errors require reversal unless the prosecution can prove beyond a reasonable doubt that a jury would reach the same verdict absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State bears the burden of proving a constitutional error harmless. Id. The reviewing court must assume the damaging potential of the testimonial statements was fully realized. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006).

The admission of Kira Dempsey's 911 call prejudiced the outcome of Cheng's trial. First, the 911 call was powerful State evidence that Cheng committed the malicious mischief. Kira Dempsey stated it was Cheng who

did the “damage” and “vandalism” to the Dempsey house. Ex. 5 at 2. Kira Dempsey’s out-of-court statements that Cheng caused the property damage constituted extremely prejudicial evidence that Cheng was responsible for the property damage.<sup>1</sup>

Second, Kira Dempsey’s fearfulness as expressed in the 911 call assisted the State in establishing Cheng’s mens rea with respect to the malicious mischief charge. The State was required to prove that Cheng acted knowingly and maliciously. CP 45-46. Kira Dempsey’s statements in the 911 call that Cheng had threatened her and her children were prejudicial because they lent credence to the State’s theory that Cheng had acted with the requisite malice and knowledge with respect to the malicious mischief charge.

Third, although the jury acquitted Cheng of the felony harassment charge, the jury was still able to consider Kira Dempsey’s 911 call as evidence of Cheng’s propensity to commit crimes more generally. The Washington Supreme Court recognizes that evidence of other acts of violence is extremely prejudicial when admitted in domestic violence cases. State v. Gunderson, 181 Wn.2d 916, 924-26, 337 P.3d 1090 (2014). The admission of Kira Dempsey’s reports of threats against her and her children

---

<sup>1</sup> In the jail calls between Kira Dempsey and Cheng that were also admitted, Cheng asserted he did not cause the damage but that “Mary broke that shit, you understand me? You understand that bitch Mary is the one . . . .” Ex. 8 at 2.

falls into this category. Jurors, though unconvinced that Cheng committed felony harassment, nonetheless used Kira Dempsey's description of Cheng's threats as evidence of propensity.<sup>2</sup> Based on the admission of the 911 call, the jury was left to conclude that because Cheng made threatening statements to Kira Dempsey and her children, Cheng was a criminal type who must have also caused the damage to the house. Because the 911 call was damaging propensity evidence, it prejudiced the outcome of Cheng's trial.

The State cannot show that the admission of the 911 call was harmless beyond a reasonable doubt. Because admission of this prejudicial evidence violated Cheng's right to confront a witness against him, this court should reverse Cheng's conviction and remand for a new and fair trial.

---

<sup>2</sup> The jury's acquittal of Cheng in the harassment charge likely stemmed from the State's failure to present any evidence in the form of phone records that Cheng actually initiated any harassing telephone call to Kira Dempsey. See CP 42 (Instruction No. 8) (requiring State to prove "the defendant made a telephone call to another person" and "at the time the defendant initiated the phone call the defendant intended to harass, intimidate, or torment that other person"); RP 186-87 (defense counsel arguing in closing that the State failed to prove Cheng initiated the phone call to Kira Dempsey).

2. THE JURY INSTRUCTION, “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS,” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

Cheng’s jury was instructed, “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 36. This instruction, based on WPIC 4.01,<sup>3</sup> is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Not only must jurors have a reasonable doubt, they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same exact thing.

---

<sup>3</sup> 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

WPIC 4.01 violates due process and the jury-trial guarantee. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

- a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence

Jury instructions must be “readily understood and not misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). “The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.” State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must

unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing different between use of “should” and use of word indicating “must” regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

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

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of “presume” to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of “common” to ascertain the jury’s likely understanding of the word in instruction).

“Reasonable” is defined as “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . .” WEBSTER’S

THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’”) (quoting United States v. Johnson, 343 F.2d 5, 6, n.1 (2d Cir. 1965)).

Thus, an instruction defining reasonable doubt as “a doubt based on reason” would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires “a reason” for the doubt, which is different than a doubt based on reason.

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

more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington’s pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option. Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror’s doubt is merely, ‘I didn’t think the state’s witness was credible,’ the juror might be expected to then say why the witness was not credible. The requirement for reasons can all

too easily become a requirement for reasons for reasons, ad infinitum.

One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, “that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” Winship, 397 U.S. at 363. The presumption of innocence, however, “can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.” Bennett, 161 Wn.2d at 316. The “doubt for which a reason exists” language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. As discussed above, fill-in-the-blank arguments “improper impl[y] that the jury must be able to articulate its reasonable doubt” and “subtly shift[] the burden to the defense.” Emery, 174 Wn.2d at 760; accord Walker, 164 Wn. App. at 731; Johnson, 158 Wn. App. at 682; Venegas, 155 Wn. App. at 523-24 & n.16; Anderson, 153 Wn. App. at 431. These arguments are improper “because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Id. at 759. Simply put, “a jury need do nothing to find a defendant not guilty.” Emery, 174 Wn.2d at 759.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01's language. In Anderson, for instance, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions ““must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.”” State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Cheng does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01’s infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be “misleading to the ordinary mind.” Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

Recently, in Kalebaugh, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d at 585. This conclusion is sound:

Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" because it "puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case"). Yet there is little difference between a reason that "can be given" and a reason that merely exists—both definitions of

reasonable doubt require an articulable reason for why the jury has reasonable doubt.

- b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least “until a better instruction is approved.” 161 Wn.2d at 318. In Emery, the court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d at 585. The Kalebaugh court concluded the trial court’s erroneous instruction—“a doubt for which a reason can be given”—was harmless, accepting Kalebaugh’s concession at oral argument “that the judge’s remark ‘could live quite comfortably’ with the final instructions given here.” Id.

The court’s recognition that the instruction “a doubt for which a reason can be given” can “live quite comfortably” with WPIC 4.01’s language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are

undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt “for which a reason exists” language in WPIC 4.01 misstates the reasonable doubt standard. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“We do not rely on cases that fail to specifically raise or decide an issue.”). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01’s language does not control.

- c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given

Forty years ago, Division Two addressed an argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (1) infringes upon the presumption of innocence, and (2)

misleads the jury because it requires them to assign a reason for their doubt, in order to acquit.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Thompson, 13 Wn. App. at 5.

Thompson’s cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further “context” erases the taint of this articulation requirement. The Thompson court did not explain what “context” saved the language from constitutional infirmity. Its suggestion that the language “merely points out that [jurors’] doubts must be based on reason” fails to account for the obvious difference in meaning between a doubt based on “reason” and a doubt based on “a reason.” Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing “this instruction has its detractors” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and

State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the "doubt for which a reason exists" language in the instruction, so it was not at issue.

The Thompson court observed "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: "It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering." Harras, 25 Wash. at 421. Harras simply maintained the "great weight of authority" supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).<sup>4</sup> However, this

---

<sup>4</sup> The relevant portion of the note cited by Harras is appended to this brief.

note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.<sup>5</sup>

So our supreme court in Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01’s doubt “for which a reason exists” language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is “a doubt for which a reason can be given.” Kalebaugh, 183 Wn.2d at 584-85.

---

<sup>5</sup> See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) (“A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.”); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) (“But the doubt must be a reasonable doubt, not a conjured-up doubt,-such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for.”); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (1894) (“A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.”).

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, “The expression, ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. The court explained the meaning of reasonable doubt:

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, “A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” While the Harsted court noted some courts had disapproved of similar language, it was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a

doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery’s and Kalebaugh’s condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by this court’s modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01’s doubt “for which a reason exists” and the erroneous doubt “for which a reason can be given.” Both require a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See RP 159 (no defense exception to WPIC 4.01). However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use

of WPIC 4.01 was structural error and requires reversal of Cheng's conviction and a new trial.<sup>6</sup>

3. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT WHEN SHE LIKENED THE JURY'S BEYOND-A-REASONABLE-DOUBT CONSIDERATION OF CHENG'S KNOWLEDGE OR MALICE TO EVERYDAY DRIVING DECISIONS

“The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). The State's trial deputy violated this duty when she compared the jury's decision on Cheng's state of mind—a decision under the beyond-a-reasonable-doubt standard—to everyday decision making.

The prosecutor argued,

It can be difficult for anyone to make decisions about what is on the mind of another person. And, I think, there may be a tendency, as you're sitting there, to think how is it I'm supposed to determine what another person was thinking on a specific date and time. But don't think for a moment that you can't make those kinds of decisions or make those kinds of judgments. In fact, you do it in your life every day.

---

<sup>6</sup> Recently, in State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), this court upheld WPIC 4.01 against a challenge that it undermined the presumption of innocence and burden of proof. In doing so, this court merely cited Bennett and State v. Pirtle, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995). Lizarraga, 191 Wn. App. at 567. As discussed above, however, Bennett does not dispose of these arguments. Nor does Pirtle, which merely dealt with a challenge to the last sentence of WPIC 4.01, which provided that, if jurors did not have an “abiding belief” in the truth of the charge, they were not satisfied beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656-58. To date, this court has not addressed Cheng's arguments.

Defense driving is actually an example of that. As you're driving you're constantly making judgments about what other drivers intend to do, and acting accordingly, based on circumstantial evidence. For example, a car that veers into your lane or is driving aggressively behind your bumper, you think . . . .

RP 175-76. Defense counsel objected "to this line of argument. It lowers the State's burden. It's beyond a reasonable doubt in a courtroom, not on the road." RP 176. The court overruled the objection, and the State continued, "Circumstantial evidence you use every day in your life to make reasonable inferences regarding the intents and conduct of other people." RP 176.

"When the prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014) (quoting State v. Lindsay & Holmes, 171 Wn. App. 808, 828, 288 P.3d 641 (2013)). "[T]his kind of analogy to everyday experiences trivializes the State's burden of proof and is improper." Id.

Division Two has also concluded it is prosecutorial misconduct to discuss "the reasonable doubt standard in the context of everyday decision making . . . because [it] minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden." Anderson, 153 Wn. App. at 431. In Anderson, the prosecutor

compared the reasonable doubt standard to choosing to have elective or dental surgery: ““If you go ahead and do [the surgery], you were convinced beyond a reasonable doubt.”” Id. at 425 (quoting verbatim report of proceedings). The prosecutor in Anderson “gave other examples of situations in which the jurors might be convinced beyond a reasonable doubt to make a decision: when leaving their children with a babysitter or changing lanes on the freeway.” Id. The court concluded,

By comparing the certainty required to convict with the certainty people often require when they make everyday decisions—both important decisions and relatively minor ones—the prosecutor trivialized and ultimately failed to convey the gravity of the State’s burden and the jury’s role in assessing its case against Anderson. This was improper.

Id. at 431.

The same impropriety occurred here. Jurors were required to find beyond a reasonable doubt that Cheng acted with the requisite mens rea to commit malicious mischief. CP 46 (Instruction No. 12) (“[E]ach of the following . . . elements of the crime must be proved beyond a reasonable doubt . . . (2) That the defendant acted knowingly and maliciously . . .”). As in Lindsay and Anderson, the prosecutor’s comparison of the jury’s decision on Cheng’s mental state beyond a reasonable doubt to the types of things jurors do “in [their] life every day” such as “[d]efensive driving,” trivialized the reasonable doubt standard and thereby reduced the State’s

burden of proof. Jurors were required to be certain—beyond a reasonable doubt—as to Cheng’s mens rea. This decision was more substantial than gauging the mental states of other drivers on the road. The prosecutor’s comparison of the jury’s mens rea determination to everyday driving decisions was improper.

Moreover, the prosecutor’s comments were particularly egregious and ill intentioned given that “case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct . . .” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Both the Lindsay and Anderson decisions—decided in 2014 and 2009, respectively—were available to the prosecutor and both warned against the very conduct in which the prosecutor engaged here. This court should hold the prosecutor to the knowledge those cases impute to her office. Otherwise, this court will only encourage and reward prosecutors for engaging in such misconduct.

The trial court also erroneously overruled defense counsel’s proper objection, which “lent an aura of legitimacy to what was otherwise improper argument.” State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Indeed, by overruling the objection, the trial court expressed its clear agreement with the prosecution that the jury’s determination of Cheng’s mental state was akin to everyday decisions, such as operating a vehicle.

Prosecutorial misconduct requires reversal when there is a substantial likelihood that the prosecutor's statements affected the jury's verdict. Lindsay, 180 Wn.2d at 440. This substantial likelihood is met here. Leslie Dempsey's trial testimony established that Cheng was seriously ill, uncomfortable, and in pain the evening before the damage to the house occurred. RP 121-22. She testified he was severely agitated, sick, and frustrated, and was making threats to damage the car. RP 121-22. Leslie Dempsey testified her daughter was "[v]ery concerned about [Cheng's] welfare" and that Cheng was so ill he could not drive. RP 123. This testimony established that there could be at least a reasonable doubt as to whether Cheng formed the knowledge and malice required to sustain a malicious mischief conviction.

The trial court seemed to agree with this proposition at sentencing, giving its view of the evidence by telling Cheng, "you were out of it, so you don't know what you did except the tumult you left. It's a frightening circumstance." RP 236. This shows that the trial court understood Leslie Dempsey's testimony to suggest that Cheng was so ill that jurors very well might have had a reasonable doubt that Cheng acted with malice or knowledge.

In light of the evidence of Cheng's mental state presented at trial, there was a substantial likelihood that the prosecutor's repugnant

trivialization of the reasonable doubt standard affected the verdict. This court should accordingly reverse and remand for a new trial.

4. CUMULATIVE ERROR DENIED CHENG A FAIR TRIAL

Cumulative error requires reversal when there have been several errors that standing alone may not justify reversal but when combined deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1994). Each of the aforementioned errors was prejudicial. When considered together, each error was even more so. The cumulative effect of the errors requires reversal.

5. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY OR LIKELY FUTURE ABILITY TO PAY THE DNA COLLECTION FEE AND VICTIM PENALTY ASSESSMENT

When indigent defendants do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee and \$500 Victim Penalty Assessment (VPA), the statutes authorizing the collection of these fees—RCW 43.43.7541 and RCW 7.68.035, respectively—violate substantive due process because they do not rationally serve a legitimate state interest. Cheng asks this court to strike these LFOs from his sentence.

Under the state and federal constitutions, no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV; CONST. art. I, § 3. “The due process clause of the Fourteenth

Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Dep’t of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process claim depends on the nature of the right at issue. Johnson v. Dep’t of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where, as here, a fundamental right is not at issue, courts apply rational basis scrutiny. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the law or regulation in question must be rationally related to a legitimate state interest. Id. This is undoubtedly a deferential standard, but it “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). The role of the court is “to assure that even under this deferential standard of review the challenged legislation is constitutional.” DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining statute at issue unconstitutional under rational basis scrutiny); Nielsen, 177 Wn. App.

at 61 (same). When a statute does not rationally relate to a legitimate State interest, it must be struck down as unconstitutional under the due process clauses.

Here, the statutes mandate that all felony defendants pay the DNA collection and VPA fees. RCW 43.43.754(1); RCW 43.43.7541; RCW 7.68.035(1)(a). These statutes serve legitimate state interests. The DNA collection fee serves the state interest of funding the collection, analysis, and retention of offenders' DNA profiles so it might help facilitate future criminal identifications. RCW 43.43.752-.7541. The VPA fee serves the state interest of supporting "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). While these statutes serve legitimate state interests, the imposition of mandatory fees upon defendants who cannot pay the fees does not rationally serve those interests.

There is nothing reasonable or rational about requiring sentencing courts to impose these mandatory LFOs upon all felony defendants regardless of whether they have the ability or likely future ability to pay. This does not further the state's interest in funding DNA collection and preservation or in ensuring programs for victims and witnesses of crimes. This does not further the state's interest because "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827,

837, 344 P.3d 680 (2015). When imposed on defendants who cannot pay, not only the mandatory fees under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is irrational for the state to mandate the imposition of this debt upon defendants who cannot pay.

While the \$600 for the DNA and VPA fees may not seem like much, defendants against whom these LFOs are imposed will be saddled with a compounding 12 percent interest rate on the unpaid fees.<sup>7</sup> This makes the debt incurred by these LFOs even more onerous and impedes rehabilitation and reentry into society following incarceration. State v. Blazina, 182 Wn.2d at 836-37 (discussing cascading effect of LFOs with a compounding 12 percent interest and examining the detrimental impact to rehabilitation that comes with ordering LFOs that cannot be paid). Thus, the imposition of the VPA and DNA collection fees on those who cannot pay them actually undermines another legitimate interest of the State—reducing recidivism. See id.

In response, the State might cite Division Two's recent decision in State v. Mathers, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 2865576 (May 10, 2016), and assert it forecloses Cheng's substantive due process claim.

---

<sup>7</sup> Moreover, the DNA fee is "payable by the offender after payment of all other legal financial obligations included in the sentence." RCW 43.43.7541. Thus, the DNA collection fee is paid after restitution, the VPA, and all other LFOs have been satisfied. As such, the DNA fee is the least likely fee to be paid by indigent defendants.

However, Mathers did not reject all substantive due process challenges to the DNA and VPA statutes; it just rejected Mathers's challenge "because the same issues have already been addressed unfavorably to Mathers by Washington Courts" in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013). Mathers, 2016 WL 2865576, at \*7. Both Lundy and Curry were limited to the procedural question of assessing whether the VPA and DNA collection statutes contained sufficient constitutional safeguards "to prevent defendants from being sanctioned for nonwillful failure to pay." State v. Duncan, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 1696698, at \*2 n.3 (Apr. 28, 2016) (citing Curry, 118 Wn.2d at 917); see also Lundy, 176 Wn. App. at 102-03 (applying Curry to hold that there were sufficient safeguards to prevent imprisonment of indigent defendants for nonwillful failure to pay mandatory LFOs). Mathers thus did not address the type of substantive due process claim Cheng raises here, and therefore Mathers does not foreclose Cheng's substantive due process challenge to RCW 43.43.7541 and RCW 7.68.035.

The Mathers court also explicitly left the door wide open to novel substantive due process challenges like Cheng's. The court indicated that "because Mathers does not assert any new arguments, instead rearguing issues that have been clearly addressed, we follow Curry and Lundy and conclude that the imposition of DNA and VPA fees did not violate

Mathers's due process right." Mathers, 2016 WL 2865576, at \*8 (emphasis added). As discussed, Cheng's due process challenge is different than the challenges in Lundy and Curry. The Mathers court's indication that it was denying relief to Mathers because he did not assert new arguments strongly indicates that courts should be receptive to considering new or different arguments and that neither Curry nor Lundy control when such new or different arguments are raised.

Cheng raises new and different arguments that have not yet been addressed by the Washington Courts. When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA collection and VPA fees in the judgment and sentence does not rationally relate to a legitimate state interest. The state is unable to collect these fees from those who cannot pay, so without ascertaining whether Cheng can pay, it is irrational to impose these LFOs. Therefore, Cheng asks this court to hold that RCW 43.43.7541 and RCW 7.68.035 violate substantive due process as applied and to vacate these LFOs in Cheng's judgment and sentence.

6. THIS COURT SHOULD DENY APPELLATE COSTS

In the event the State substantially prevails on appeal, this court should deny any request by the State for appellate costs.

This court indisputably has discretion to deny appellate costs. RCW 10.73.160(1) (“The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs.” (emphasis added)); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016) (holding RCW 10.73.160 “vests the appellate court with discretion to deny or approve a request for an award of costs”).

There are several reasons this court should exercise discretion to deny appellate costs. The trial court determined Cheng was “unable by reason of poverty to pay for any of the expenses of appellate review” and that he could not “contribute anything toward the costs of appellate review.” CP 73 (indigency order). The trial court’s advisement of appeal rights, which Cheng signed, stated, “I have the right, if I cannot afford it, to have counsel appointed and to have portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal . . . .” CP 71. In his financial data declaration, submitted in support of the indigency order, Cheng indicated he had no income from any source and no real or personal property of any kind. Supp. CP \_\_\_\_ (sub no. 68; motion and declaration for order allowing appeal in forma pauperis). Based on the trial court’s determination of indigency, Cheng is presumed indigent throughout this review. RAP 15.2(f); Sinclair, 192 Wn. App. at 393 (“We have before us no trial court order finding that Sinclair’s financial condition has

improved or is likely to improve . . . . We therefore presume Sinclair remains indigent.”).

The trial court waived all discretionary LFOs, including court costs and fees for court-appointed counsel. CP 63; RP 236. It did so after recognizing that Cheng had a serious drug addiction. RP 235-36. And the State did not request imposition of any discretionary LFOs, expressly asking for only the “mandatory victim penalty assessment and a \$100 DNA fee.” RP 224. In addition, the trial court imposed \$3,558.14 in restitution. CP 68.

To impose thousands of dollars in appellate costs now would be incongruous with the trial court’s waiver of discretionary LFOs and the State’s request. It would also undermine Cheng’s ability to pay restitution. This court recently recognized that carrying an obligation to pay thousands of dollars in appellate cost plus accumulated interest “can be quite a millstone around the neck of an indigent offender.” Sinclair, 192 Wn. App. at 391. There is no basis in the record for this court to place this millstone around Cheng’s neck. Any request by the State for appellate costs should be denied.

D. CONCLUSION

This court should reverse Cheng's conviction and remand for a new trial.

DATED this 27<sup>th</sup> day of May, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

KEVIN A. MARCH  
WSBA No. 45397  
Office ID No. 91051

Attorneys for Appellant

# APPENDIX

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

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

**REASON FOR DOUBT.**—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann v. State*, 83 Ga. 44; *Hodge v. State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States v. Cassidy*, 67 Fed. Rep. 698; *State v. Jefferson*, 43 La. Ann. 995; *People v. Stubenvoll*, 62 Mich. 329, 332; *Welsh v. State*, 96 Ala. 93; *United States v. Butler*, 1 Hughes, 457; *United States v. Jones*, 31 Fed. Rep. 716; *People v. Guidici*, 100

N. 7  
to t  
man  
coul  
lang  
mig  
for,  
doct  
v. A  
is su  
givo  
defir  
som  
mean  
and  
burd  
guilt  
and  
reas  
Ind.  
fault  
instr  
sical  
cited  
poor  
The  
need  
lated  
The  
reaso  
"rea:  
a rea  
or w:  
v. St  
or no  
104,  
"1  
A re:  
parti:  
of lif  
befor  
v. Pe  
Boul  
Mont  
it has  
ficion  
judgr  
upon  
affair  
Keari  
victic  
deare



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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 74255-8-I
	)	
HEYENG CHENG,	)	
	)	
Appellant.	)	

---

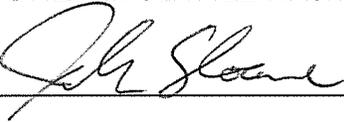
**DECLARATION OF SERVICE**

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

THAT ON THE 27<sup>TH</sup> DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HEYENG CHENG  
DOC NO. 863332  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF MAY 2016.

X   
\_\_\_\_\_