

No. 31642-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID E. NICKELS,

Appellant.

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

The Honorable Evan E. Sperline

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT IN REPLY

David Nickels was unfairly convicted of first-degree murder in proceedings so flawed that constitutional error occurred at every meaningful stage. On appeal, the State defends the unjust conviction only by contorting the law and actively misrepresenting the facts.

Recognizing that, under this Court's decision in *State v. Smith*, 174 Wn. App. 359, 298 P.3d 785 (2013), reversal of Mr. Nickels's conviction is required, the State urges the Court to overrule that decision. With respect to the extraordinary misconduct by juror Arlene Bundy, the State claims that (a) her statement during trial, "[Ephrata] is a small town, [Mr. Nickels] will get what he deserves," did not indicate bias or unfitness, (b) she did not perjure herself in post-trial evidentiary proceedings even though she testified falsely under oath, (c) the court had no obligation to notify the parties of Bundy's misconduct, and (d) neither Mr. Nickels nor the public had the right to be present at the secret proceeding in which the court disposed of the issue.

The State attempts to whitewash its egregious *Brady* violations and misconduct during closing argument, and defends the trial court's legally unsound rulings limiting the presentation of other suspect evidence. Last, the State wrongly claims newly-discovered evidence of Libby's guilt based on a *confession* by Julian Latimer did not merit a new trial. All of

these errors must be viewed through the lens of the trial court's improper relationship with the decedent, which it did not disclose to Mr. Nickels.

Each of these errors on its own requires reversal. Viewed cumulatively, they permeated the trial with unfairness. Mr. Nickels's conviction should be reversed.

B. ARGUMENT IN REPLY

1. *Smith* requires reversal of Mr. Nickels's conviction.

Due process imposes upon the State the duty to prove an accused person's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); U.S. Const. amend. XIV; Const. art. I, § 3. The reasonable doubt standard augments the "moral force of our criminal law" and "provides concrete substance for 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 364 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)). "The failure of the court to state clearly to the jury the definition of reasonable doubt and the concomitant necessity for the state to prove each element of the crime by that standard is far more than a simple procedural error, it is a grievous constitutional failure." *McHenry*, 88 Wn.2d at 214.

- a. The “to-convict” instruction diluted the State’s burden to prove guilt beyond a reasonable doubt, a structural error.

In *Smith*, the “to convict” instruction substituted the mandatory “must” for “should” with respect to the jury’s duty to return a not-guilty verdict if the State failed to prove guilt beyond a reasonable doubt. *Smith*, 174 Wn. App. at 367-68. This Court held the instruction impermissibly relieved the State of its burden of proof, violated due process, and was a structural error. *Id.* at 368-69.

Smith was decided after Mr. Nickels’s trial was completed—a trial in which the same judge as in *Smith* gave an identical constitutionally defective “to convict” instruction. Based on that decision, Mr. Nickels moved prior to sentencing for a new trial. The court denied the motion, primarily because the *Smith* decision was not final. 4/12/13 RP 21.

On appeal, the State advances two arguments, both of which lack merit. First, evidencing its misunderstanding of structural error, the State claims Nickels did not suffer prejudice from the unconstitutional instruction because Instruction No. 3 defined reasonable doubt for the jury. Br. Resp. at 13. But in *Smith*, the jurors were similarly instructed, and this did not cure the constitutional error.¹

¹ By notation ruling on November 18, 2014, this Court granted Mr. Nickels’s motion to supplement the appellate record with the jury instructions given in *Smith*. The instructions were attached to Mr. Nickels’s motion and contain clerk’s papers numeration from *Smith*’s appeal (Court of Appeals No. 29382-9-III). Citations are to the clerk’s

Instruction 3 given in this case included the following language:

The defendant is presumed innocent. This presumption requires a verdict of not guilty unless you find, during your deliberations, that the presumption has been overcome by the evidence beyond a reasonable doubt.

CP 3908.

Instruction 3 in *Smith* provided:

The defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

Smith CP 50.

In *Smith*, as in this case, Instruction 3 explained that the State bore the burden of proof beyond a reasonable doubt, the defendant was presumed innocent, and that the presumption continued throughout the trial unless overcome by the evidence beyond a reasonable doubt. *Smith* CP 50. The *Smith* Court nevertheless found that because the “to convict” instruction authorized the jury to convict even if the State did not meet its burden of proof, the instructions read as a whole did not “make the relevant legal standard manifestly apparent to the average juror.” *Smith*, 174 Wn. App. at 369 (quoting *State v. Kylo*, 166 Wn. App. 856, 864, 215 P.3d 177 (2009)).

The United States Supreme Court has held that

papers in that appeal, and are referenced in this brief as “*Smith* CP” followed by page number.

[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Francis v. Franklin, 471 U.S. 307, 322 (1985).

Here, only one instruction addressed the jury's *duty* to acquit if the State did not meet its burden, and that was the "to-convict" instruction. The "to-convict" instruction stated, "if after weighing all of the evidence you have a reasonable doubt as to any of these elements, then you **should** return a verdict of not guilty." CP 3909 (emphasis added). The explanation of the presumption of innocence included in the "Charge and Burden of Proof" instruction at best contradicted the constitutionally infirm elements instruction, and did not explain it. *Francis v. Franklin*, 471 U.S. at 322. The State's claim that the error was somehow "harmless beyond a reasonable doubt" is specious.²

b. The State's contention that this Court should abandon *Smith* is unpersuasive and misleading.

Smith requires this Court reverse Mr. Nickels's conviction. This is probably why the State's principal argument focuses on why the State believes *Smith* was wrongly decided. Br. Resp. at 14-17. This Court

² Further demonstrating its flawed understanding of constitutional error, the State notes that a non-structural error is subject to "the rigorous constitutional harmless error standard." The State seems to misapprehend that it is the *State*, not Mr. Nickels, that bears the "rigorous" burden of proving beyond a reasonable doubt that a constitutional error was not prejudicial. *Chapman v. California*, 386 U.S. 18, 25 (1967).

considered and rejected similar arguments in *Smith*. In any event, the State's contentions are unconvincing.

The State cites authorities that predate the key Supreme Court decisions discussed in *Smith* instead of addressing these decisions. Compare Br. Resp. at 14 with *Smith*, 174 Wn. App. at 366 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993)) and at 368 (discussing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006)). The State relies on a federal habeas case from the Tenth Circuit, Br. Resp. at 14, apparently without understanding the deference federal courts must accord state adjudications on review of a claim that a state decision was contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254.

The State's recitation of state cases is likewise misleading. In *People v. Munoz*, 240 P.3d 311, 315 (Colo. 2009), and *State v. Sanders*, 912 N.E.2d 1231, 1234 (Ill. 2009), two of the cases cited by the State, the Courts reviewed the defendants' claims under a plain error standard.

It is true that some state courts have concluded that the word "should" does convey the adequate level of certainty for a juror to understand her constitutional obligations. These cases do not help the State, given the significance our Supreme Court has accorded the "to convict" instruction in a criminal trial. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (the "to convict" instruction "carries with it a special

weight because the jury treats the instruction as a ‘yardstick’ by which to measure a defendant’s guilt or innocence”). Thus, jury instructions—and in particular the “to convict” or elements instruction—must make it manifestly apparent to the jury that the State bears the burden of proof, and that, where the State fails to carry its burden, the jury must acquit. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The decisions upon which this Court relied in *Smith* are more apposite. The State tries to distinguish these decisions, but fails to correctly analyze them. In *Com. v. Caramanica*, 729 N.E.2d 656, 659 (Mass. 2000), the Court found the use of the permissive “should” in the reasonable doubt definitional instruction was a grave constitutional error that went “to the heart of the message” that “where reasonable doubt remains, acquittal is mandatory.” The Court noted, however, that the use of the word was “limited to a single instance in a lengthy charge,” and speculated that, if it were the only error, reversal might not be required. *Id.* In *Smith* and this case, by contrast, the error appeared in the “to convict” instruction—the yardstick by which guilt or innocence is measured.

Likewise, the State fails to mention that in *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004), the use of the permissive “should” was

immediately followed up by the admonition, “if ‘you entertain a reasonable doubt of the truth of any one of these material

allegations, then it is *your duty* to give the Defendant the benefit of such doubt and acquit him,’ and by summing up with the unequivocal statement: ‘There *must* be proof beyond a reasonable doubt.’”

Id. at 822 (emphasis in *Leavitt*).

At oral argument in *Smith*, “[e]ven the State did not disagree” that “you *should* get more exercise doesn’t mean you *shall* get more exercise.” *Smith*, 174 Wn. App. at 868 (emphasis added). This Court concluded that it could not be certain the jury understood the court’s use of “should” in the elements instruction as mandatory and that, for this reason, the “to convict” instruction failed to make the relevant legal standard manifestly apparent to the jury. *Id.* at 369.

The use of the permissive “should” in the “to convict” instruction in Mr. Nickels’s trial impermissibly diluted the State’s burden of proof, and was a structural error. The State has failed to show that *Smith* was decided incorrectly. Mr. Nickels’s conviction must be reversed for a new trial.

2. The trial court violated Mr. Nickels’s Sixth and Fourteenth Amendment rights by permitting a biased and unfit juror to deliberate to verdict.

Three jurors—Brian Reese, Gail Taylor, and Nancy Tracy—heard juror Arlene Bundy make comments that Mr. Nickels “wasn’t going to last long,” he is going to “get what he deserved,” and “[Ephrata] is a small town, he’ll be taken care of.” Mr. Reese was so troubled by these

comments that he alerted the bailiff, because he believed Bundy had prejudged Mr. Nickels's guilt.

In post-trial proceedings, Judge Sperline stated that the bailiff had reported Bundy's comments to him, and that this happened two or three times. RP (12/20/12) 39-40, 43. At a post-trial evidentiary hearing, however, when Bundy was asked whether "any juror" had made such comments, she falsely testified, "no." RP (1/16/12) 907-08.

a. The State misrepresents the record and the facts in claiming Bundy was unbiased and did not perjure herself.

Remarkably, the State claims that Bundy's untruthful response was not perjury because she was not asked "if *she* made such comments." Br. Resp. at 19 (State's emphasis). The State also accuses Mr. Nickels of "grossly overstat[ing]" the evidence of Bundy's bias. But it is the State that contorts and understates the record. Mr. Nickels's recitation of the facts is accurate and borne out by Judge Sperline's summary of events.

Any is "used to indicate a person or thing that is not particular or specific." The question was not whether "any other juror" had made the statement.

The Court's question was not confusing. Any reasonable juror asked whether "any juror" had done or said something would know that the phrase included herself. The truthful response to the court's question

whether “any juror” had made the comments, therefore, was “yes.” Bundy lied to the court when she testified in the post-trial hearing.

The State claims that “[t]he record ... fails to establish that there was not a single comment heard by two jurors.” Br. Resp. at 21. But the judge himself heard complaints about Bundy’s comments on two or three occasions. RP (12/20/12) 39-40. And the State concedes that it took “a few reminders” before Bundy was persuaded to desist from making improper comments. Br. Resp. at 20.

The State relies on *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009), for the proposition that Bundy’s comments constituted “mere infractions of jury rules.” Br. Resp. at 20. The State’s reliance is misplaced. *Depaz* involved jury misconduct, not a juror’s unfitness to serve because of bias. 165 Wn.2d at 856.

It is true, as the State observes, that Bundy was a “chatty woman,” but she did not confine her remarks to observations about “the process” and “the attractiveness of the defense paralegal.” *Id.* And even such behavior, if repeated despite admonitions from the bailiff, would be troubling, because it would show that Bundy was incapable of following the court’s instructions.

The State offers a strained interpretation of Bundy’s pronouncements, contending she “could have meant any number of

things” by her comments. Br. Resp. at 21. However Reese, to whom Bundy spoke directly and who observed her demeanor, unequivocally believed that Bundy “had decided that the defendant was guilty before hearing all the evidence.” CP 4086. Thus, the State’s contention that “nothing in the record” demonstrates Bundy’s bias and the prejudice to Mr. Nickels’s right to a jury trial, Br. Resp. at 21-22, is patently absurd.³

The State avers that “Nickels never sought to clarify the statement she was alleged to have made during the trial.” Br. Resp. at 24. This claim is false. Nickels proved that Bundy made several highly improper comments through the sworn statements of three jurors, Reese, Tracy, and Taylor.

The State likewise claims that the trial court acted “within its discretion” in “not finding that she had actual bias.” *Id.* But the State does not know what the trial court found, because the trial court held a secret ex parte proceeding and did not alert the parties of the comments during the trial, when the issue could have been explored.

Last, the State repeats that “there is no evidence here that Bundy concealed any facts.” *Id.* As established, any reasonable juror would understand that a question about “any juror” refers to herself and others.

³ The State believes it is “notable” that Mr. Nickels did not question Bundy during voir dire. Br. Resp. at 22 n. 11. This assertion is baffling. Mr. Nickels cannot be faulted because he did not anticipate that Bundy would engage in reversible misconduct.

Bundy answered it falsely, twice. RP (1/16/12) 907-08. Thus, it is the State's factual recitation that is inaccurate and misleading.

b. The inclusion of a biased juror in the jury violated due process and requires reversal of Mr. Nickels's conviction.

That the State goes to such lengths to distort the record demonstrates the seriousness of the misconduct and supports a finding that Bundy was actually or impliedly biased, and unfit to serve. The State admits that the inclusion in a jury of a biased juror violates the Fourteenth Amendment right to due process and is a structural error. Br. Resp. at 22 (citing, *inter alia*, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) and *Smith v. Phillips*, 455 U.S. 209, 221-24 (1982) (O'Connor, J., concurring)).

The State avers that a finding of implied bias is reserved for "exceptional cases." Br. Resp. at 25 (citing *Dyer v. Calderon*, 151 F.3d 970, 981 (9th Cir. 1998) and *State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2007)). This case is exceptional. The record establishes Bundy's actual or implied bias. She was an unfit juror, and her inclusion on the panel that deliberated to verdict violated Mr. Nickels's right to due process and trial by an impartial jury. His conviction must be reversed.

3. **The trial court's failure to notify the parties and instead resolve the issue of juror bias in a secret 'proceeding' violated Mr. Nickels's rights to be present and to the assistance of counsel.**

The State claims that, even if Bundy's conduct was improper, the post-trial hearing cured any impropriety. Br. Resp. at 26-28. But the error was not limited to the bailiff's ex parte contacts with the juror.

The State avoids discussion of the trial court's decision to resolve the matter in a secret 'proceeding,'⁴ without notice to the parties or affording Mr. Nickels an opportunity to be present. As noted in Mr. Nickels's opening brief, the trial court's conduct was similar to an error that required reversal in *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). In *Irby*, the court and parties agreed to excuse seven jurors over email. *Id.* at 878. No hearing was held on the record, and Mr. Irby was not consulted or afforded an opportunity to be present. The Supreme Court held that this "proceeding" tested the jurors' fitness to serve, and thus was one for which Mr. Irby had the due process right to be present. *Id.* at 881-82. His exclusion was held to be a structural error that necessitated reversal. *Id.*

Likewise, the State fails to explain why the court's failure to notify counsel and instead resolve the issue in a secret proceeding did not result in a complete denial of counsel at a critical stage of the trial. *United States v. Cronin*, 466 U.S. 658, 659 (1984). This too is a structural error. *Id.*

⁴ The court decided, on its own and without notifying the parties of Bundy's comments, to resolve the issue by admonishing the whole jury not to discuss the case until the presentation of evidence was concluded. This admonition did not resolve the problem of Bundy's evident bias.

4. The secret proceeding violated the right to a public trial.

The State offers a shallow and unconvincing response to Mr. Nickels’s argument that the secret proceeding at which the judge resolved the issue of juror bias violated the right to a public trial. Br. Resp. at 28-30. The State relies upon a single case, *State v. Halverson*, 176 Wn. App. 972, 977, 309 P.3d 795 (2013). However, in his opening brief, Mr. Nickels addressed *Halverson* at length and explained why its analysis is incompatible with historical precedent and Washington’s “‘separate, clear and specific [constitutional] provision [that] entitles the public ... to openly administered justice.’” *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 209-10, 848 P.2d 1258 (1993) (quoting *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975)).

The State also fails to consider the chief distinction between *Halverson* and this case. In *Halverson*, “[o]n the record the next morning with Halverson and trial counsel present, the trial court recounted the prior afternoon’s events.” 176 Wn. App. at 975. Here, but for Reese’s disclosure to counsel post-trial, the secret proceeding may never have come to light at all.

Mr. Nickels cited many cases to support the proposition that proceedings to examine juror bias were historically open to the public. The State addresses none of these. Indeed, the State does not even

acknowledge that the public trial right embodied in article I, §§ 10 and 22 is more expansive and unbounded than the qualified right expressed in the First and Sixth Amendments.

As the State notes in another context, “the Court of Appeals is not bound by even the same division of the Court and may decline to follow another opinion of the Court.” Br. Resp. at 14 (citing *Grisby v. Herzog*, 190 Wn. App. 786, 810, 362 P.3d 763 (2015)). This Court should depart from and decline to follow *Halverson*.

A violation of the right to a public trial is a structural error. *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012). The secret proceeding implicated the core concerns at the heart of the public-trial right: “the corrupt or overzealous prosecutor and ... the compliant, biased, or eccentric judge.” *Press-Enterprise v. Superior Court*, 478 U.S. 1, 12-13 (1986) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 572 (1980). The secret proceeding in which the trial court adjudicated the matter of juror bias was a structural error that requires reversal of Mr. Nickels’s conviction.

5. The State’s *Brady* violations and withholding of evidence violated due process.

The State commences its response to Mr. Nickels's *Brady* claim with an *ad hominem* attack on appellate counsel. Br. Resp. at 30-31. Even though Mr. Nickels's argument is replete with quotes directly from the trial judge himself, the State claims that the record does not support Mr. Nickels's arguments.⁵ The quotes themselves the State labels "sensationalist." If this is true, they are sensational only because the State's gross mismanagement of its discovery obligations was shockingly outside the bounds of what is required by the constitution and court rule.

The record is replete with examples of the State's pretrial discovery violations. CP 39-81; RP (12/13/10) 107; RP (4/25/11) 129-31; RP (8/19/11) 2-16RP (9/6/11) 188-90, 203, 296; RP (2/28/12) 427-29, 433-34, 437; RP (5/8/12) 449; RP (Jackson Vol. 4) 461, 524; RP (Jackson Vol. 5) 662, 664; RP (Jackson Vol. 6) 841-42, 853-55. Further, the trial court explicitly and repeatedly found that the police agencies involved were not complying with their duties to timely provide and turn over evidence. At a hearing on August 19, 2011, the court noted a pattern in the court and county of "terrible discovery problems," stating,

We find out that some police officer is holding onto something that might or might not be crucial to everyone, with just apparently no compunction to say, do you know what, I ought to—there's a guy

⁵ This contention is particularly ironic given the State's vigorous opposition to Mr. Nickels being permitted to file a brief longer than 100 pages.

charged with murder, I ought to get that up there. That's the part that just baffles me.

RP (8/19/11) at 21.

At a hearing in July 2012, after the State failed to notify the defense that it was having a gun suspected of being the murder weapon tested, the court admonished the prosecution:

I find myself once again in the position of being bewildered by the approach of law enforcement agencies with which this court commonly deals, that just seems to put its hands over its eyes and ears in regard to the obligation to involve the defense in any testing of this kind ... but there seems to be this attitude that we can just engage in these sorts of investigations without letting anybody know. And what does it take a person in the position of Detective Rodriguez to do a ten second e-mail to the prosecutor saying, we're going to send this gun over, please let [defense counsel] know.

RP (7/6/12) 31-32.

At that same hearing, the court agreed with the defense that permitting the police to make the relevance determination was "not conducive to notions of a fair trial and an appropriate administration of justice, and it's not consistent with the State's discovery obligations." *Id.* at 33.

Four days later, after the defense renewed its motion to dismiss for the third time, the court reiterated its "surprise and frustration" that the State was not notifying the defense about ongoing police work, stating, "that level of disclosure of information continues to frustrate the court and continues, frankly, to baffle me." RP (7/10/12) 37-38.

Ultimately, after the misconduct continued unabated, the court concluded that Mr. Nickels had “clearly established ... mismanagement necessary to support dismissal,” but held that the “official bungling” did not prejudice Mr. Nickels. CP 5750-51. The State cannot, and does not, point to any part of Mr. Nickels’s factual recitation that is inaccurate.

With regard to the State’s most significant *Brady* violation during the trial, the State does not dispute that the prosecution deliberately withheld the transcript of Matthew Cox’s recorded interview by police. Br. Resp. at 31. Nor does the State disagree that the prosecution had a duty to turn over the evidence, which it violated. The State claims, however, that the State’s withholding of the material did not prejudice Mr. Nickels because “the inferences he posits [are not] warranted.” Br. Resp. at 32.

In so claiming, the State again misstates the record, and fails to understand the scope of its duties under *Brady v. Maryland*, 373 U.S. 83, 86 (1963), and its progeny. Ephrata police conducted a recorded interview of Cox on August 11, 2012, regarding a July 27, 2012 home invasion robbery committed by Libby against Cox. CP 3951. The defense commenced its case on August 13, 2012.

In the recorded interview, Cox (1) stated that he had been warned by Libby’s girlfriend to watch his back, and (2) intimated that he believed

Libby committed the burglary/robbery in retaliation for Cox testifying at trial, stating, “I know Ian’s pissed off about this whole thing.” *Id.* The trial court, however, granted the State’s motion to preclude the defense from presenting evidence of the robbery because it believed that the defense did not show a link between that event and the trial. RP (8/22/12) 176-77.

The Cox interview supplied this missing link. The fact that the State can “posit” an alternative inference about the statements does not lessen their import under *Brady*. There can be no claim that suppression of the evidence was inadvertent. To the contrary, it is plain that the State thought the interview was relevant or believed it might have led the court to reverse its ruling excluding evidence of the robbery, or it would not have withheld the transcript. But this does not matter under *Brady*; suppression of evidence by the prosecution violates due process “irrespective of the good or bad faith of the prosecution.” *Brady*, 373 U.S. at 87.

The State concedes that the police engaged in “sloppy practices,” but claims that the police “did not act in bad faith in excluding Libby as a suspect” because, when he was interviewed by the police, Libby protested his innocence. Br. Resp. at 34. Guilty people lie to the police all the time. Libby was a known thief and hoodlum, hardly someone whose word could

be trusted. And the police did not preserve Libby's phone or try to get a warrant to search the text messages it contained to see whether the messages reported by Tycksen were there.

The State last claims that Mr. Nickels failed to "even attempt to support his claim that he was prejudiced." Br. Resp. at 37. Again, this is simply false. *See* Br. App. at 43-44 (discussing prejudice). The State vigorously and energetically fought to exclude Mr. Nickels's other suspect evidence and engaged in a concerted campaign to attack the character of the principal defense witness, Crystal Tycksen. Had the State turned over the transcript or alerted the defense of Cox's statements when they were made, at a minimum, they would have provided crucial support for Nickels's other suspect defense by showing that Libby had threatened another witness in connection with his testimony. Additionally, the trial court may have been persuaded that the robbery indeed was linked to the case, and authorized admission of this evidence. There thus is a reasonable probability that the outcome of the proceedings would have been different.

This Court should conclude that the State violated its *Brady* obligations and that Mr. Nickels was prejudiced. The conviction should be vacated and dismissed.

6. The trial court's exclusion of other suspect evidence was founded on a misapplication of the law and violated Mr. Nickels's right to a defense.

“Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true.” *State v. Chenoweth*, 160 Wn.2d 454, 483, 158 P.3d 595 (2007). Libby confessed that he murdered Munro to Tycksen while trying to steal guns from Munro's car. The trial court misapplied ER 804(b)(3) by requiring specific *factual* corroboration of each of Libby's inculpatory statements to Tycksen. RP (Beck Vol. 5) 1222-37. The result was that the jury was prevented from hearing that (a) Libby had a gun on the day of the shooting, (b) Libby and Latimer acted suspicious and secretive in the days following the murder and Latimer silenced Libby when he would bring up the topic, (c) Libby told Tycksen he was high and drunk when he murdered Munro, and (d) Libby told Tycksen he intended to steal Munro's guns. *Id.*

The Washington Supreme Court has held that, in evaluating the admissibility of statements proffered under ER 804(b)(3), “adequate indicia of reliability must be found in reference to *circumstances surrounding the making of the out-of-court statement*, and not from *subsequent corroboration of the criminal act.*” *State v. Anderson*, 107 Wn.2d 745, 751, 733 P.2d 517 (1987) (emphasis added). The Court also

has held that, where a defendant seeks to introduce another person's inculpatory hearsay statements in his defense, "the presumption is admissibility, not exclusion." *State v. Roberts*, 142 Wn.2d 471, 496, 14 P.3d 17 (2000).

The trial court demanded factual corroboration of Libby's confession to Tycksen, and failed to apply a presumption of admissibility to Mr. Nickels's other suspect evidence. In defending the trial court's ruling, the State repeats these errors.

The court's rulings prevented Mr. Nickels from presenting a defense. Each statement was admissible because it was (a) against interest and (b) made under circumstances that corroborated the statement's trustworthiness. Libby, a convicted felon, told Tycksen he had been shooting guns close in time to the homicide. Libby told Tycksen he had consumed illegal substances before he attempted to steal guns from Munro's truck. Tycksen personally witnessed Libby and Latimer acting suspicious and secretive. That Latimer told Libby to "shut up" when Libby brought up the shooting was not hearsay, and was admissible because it was relevant. And Libby's intent to steal guns explained why he was prowling Munro's truck. The State's arguments to the contrary are unconvincing. The unfair and improper limitations imposed by the trial

court prevented Mr. Nickels from presenting his defense. The constitutional error requires reversal of Mr. Nickels's conviction.

7. The prosecutor and DNA technician engaged in prejudicial misconduct; the State's claims to the contrary are based on a misstatement of the standards governing testimony about DNA testing results.

The State asserts that it was not improper for the DNA technician to state that Mr. Nickels's DNA was "included" within the mixed sample with multiple contributors obtained from the handcuffs. Br. Resp. at 78-79. Based on this premise, the State avers that neither the lab technician nor the prosecution committed misconduct.

However the authority that the State cites for this proposition *contradicts* its claim. The State avers that Wilson followed the guidelines for testimony contained in the Washington State Patrol's STR procedures manual. Br. Resp. at 79. According to the manual, however, it is only proper to characterize a contributor to a mixed sample as "included" within the mixture if he is a major contributor.⁶ If the person is a minor contributor to a mixed sample, the correct terminology is "cannot be excluded as one of the possible contributors" or "consistent with having

⁶ *Washington State Patrol Casework STR Analysis Procedures* (May 2016) at 77, available at http://www.wsp.wa.gov/forensics/docs/crimelab/manuals/technical/dna/DNA_STR_CW_Procedures_Rev_25.pdf (last visited July 16, 2016) (hereafter "WSPCL STR Procedures Manual").

originated from.” *Id.* The same is true for mixtures without a differential extraction. *Id.* at 78.

Wilson analyzed 13 strands from the handcuff swab. From that analysis, she identified a mixture of “*at least three*” individual contributors. RP (8/1/12) 76 (emphasis added). She did not identify a major contributor. She initially allowed that Mr. Nickels was at best a potential contributor, but then averred that he was “included as a contributor to that mixture.” *Id.* at 76. According to the WSPCL STR Procedures Manual, this testimony was improper and contrary to procedure. WSPCL STR Procedures Manual at 77-78 (providing that, in a mixed sample with a minor contributor or in which differential extraction has not been performed, the allowable conclusion is “cannot be excluded” or “is consistent with having originated from”). Because Mr. Nickels had not been identified as a major contributor, she was not authorized to characterize his DNA as “included” within the sample. In claiming that Wilson’s testimony was proper, the State mischaracterizes the procedures manual.

As a government actor, Wilson must refrain from engaging in misconduct just like the prosecutor. The State asserts that the prosecutor did not engage in misconduct, however this claim rests on the same flimsy house of cards as the State’s inaccurate contentions regarding the propriety

of Wilson's testimony. Wilson violated protocol, and the State capitalized on her inaccurate testimony by misstating the evidence about DNA.

The State compares this case to *State v. Starbuck*, 189 Wn. App. 740, 355 P.3d 1167 (2015), but the comparison is inapt. In *Starbuck*, DNA recovered from the victim's fingernails, face, and neck matched that of Starbuck and his sons, "none of whom lived in the house and none of whose DNA would be expected to be found all over the body." *Id.* at 757-58. Starbuck was therefore a known contributor to the DNA sample, so it was proper for the expert to testify that Starbuck's DNA "matched" that found on the victim, WSPCL STR Procedures Manual at 76, and appropriate for the prosecutor to use the same terminology in his rebuttal argument. *Starbuck*, 180 Wn. App. at 760-61.

As the lengthy block quotes from the prosecutor's closing argument in the State's brief illustrate, in this case, the claim that Mr. Nickels's DNA was "on those handcuffs" was a central theme of its closing argument. Br. Resp. at 81-84. But the assertion was false and predicated on misconduct by Wilson.

The prosecutor certainly knew that Nickels was not a major contributor to the sample. The prosecutor understood that, at most, he was a "potential contributor" to the mixture, someone who "could not be excluded." *See* WSPCL STR Procedures Manual at 77-78. The jury could

not have been expected to know or understand this, however. Given the weight that jurors accord DNA evidence, the prosecutor's misconduct would have had a devastating impact on the jury's assessment of the State's case.

In *State v. Allen*, 182 Wn.2d 364, 376-77, 341 P.3d 268 (2015), the Washington Supreme Court found that the State committed reversible misconduct where the prosecuting attorney (1) misstated a key issue in the case and (2) repeated the misstatement multiple times. The State's misconduct in this case was similarly prejudicial, and no instruction from the court would have been sufficient to cure the error. *Compare State v. Whack*, 73 A.3d 186, 200-01 (Md. 2013) (reversing based on like misconduct even though "the trial court instructed jurors several times during trial that closing arguments were not evidence and that their recollection of the testimony and evidence controlled"). Based on the prosecutor's and lab technician's egregious misconduct, the Court should reverse Mr. Nickels's conviction.

8. The State's defense of the trial court's ruling denying a new trial rests on faulty and incomplete legal and factual claims.

a. The Powells' compelling account of Latimer's confession to Travis Powell merited a new trial.

Sharon and Travis Powell swore under penalty of perjury that, on the morning of the shooting, Julian Latimer appeared at their house,

frightened and pale. As soon as he was in Travis's room, he exclaimed that earlier that day he was with Libby robbing a man's truck, the man surprised them, and Libby shot the man. CP 3931-32, 5491.

Richard and Sharon Powell did not follow the news and had believed Libby was being tried for murdering Munro. CP 3930, 3934. When Richard Powell learned that Nickels had been convicted, he had a "sick feeling," and contacted attorney Garth Dano⁷ for assistance. Mr. Dano helped the Powells execute declarations about what they knew.

Sharon Powell stated that she was "scared to death" that Libby would retaliate against her and her family for coming forward. CP 3932. She overcame her fears, however, because she did not "want an innocent person to be convicted." *Id.*

The State believes it "implausible" that the Powells would not have contacted the police to tell them what they knew when the shooting happened. *Id.* But it is not hard to believe that a woman in poor health who feared Libby's capability for retaliation (a reasonable fear given that she knew Libby to be a murderer and believed him to be in a gang) would be too frightened to contact law enforcement. What is implausible is the State's theory that the Powells' "antipathy"⁸ toward Libby would be so strong that they would concoct an elaborate story accusing him of murder,

⁷ Mr. Dano is now the elected prosecutor for Grant County.

⁸ Br. Resp. at 91.

enlist the services of a reputable local attorney, and thrust themselves in the middle of acrimonious legal proceedings, all to get Libby in trouble.⁹

b. Latimer's confession was substantively admissible as an excited utterance.

The State conclusorily defends the trial court's ruling that Latimer's statement was not an excited utterance. The State chiefly rests its arguments on the "fact" that other persons who saw Latimer that same morning believed he looked "normal." Br. Resp. at 88. The Washington Supreme Court does not consider such differences significant. For example, in *State v. Young*, 160 Wn.2d 799, 810, 161 P.3d 967 (2007), the Court cited with approval the Ninth Circuit's decision in *United States v. Napier*, 518 F.2d 316, 316-18 (9th Cir. 1975), in which a victim's spontaneous outburst was provoked two weeks after the startling event by seeing the defendant's photograph in the newspaper. That some witnesses who saw Latimer on the morning of the shooting may have believed that he seemed "normal" would not, on its own, disqualify his statements to Travis Powell from being excited utterances, absent a basis to conclude that intervening circumstances may have rendered the statement unreliable. Compare *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004) (accomplice's statements inculcating the defendant were excited utterances even though, after the homicide, accomplice helped dispose of

⁹ The State cannot muster any theory to explain why Travis Powell would have participated in his parents' alleged scheme.

victim's body and burglarize his house, and drove to Gig Harbor where van used in crime was burned). The State does not identify any intervening circumstances that would make Latimer's statements unreliable, and there were none.

Most significantly, the State fails to address the trial court's legal errors in reaching this conclusion, even though these are outlined at length in Mr. Nickels's opening brief.¹⁰ See Br. App. at 83-87.

Even a sworn recantation does not undercut the reliability of an excited utterance. *Young*, 160 Wn.2d at 808; accord *State v. Magers*, 164 Wn.2d 174, 188, 189 P.3d 126 (2008); compare *State v. Nava*, 177 Wn. App. 272, 291-94, 311 P.3d 83 (2013) (statement admissible as recorded recollection despite witness's sworn testimony disavowing it), *rev. denied*, 179 Wn.2d 1019 (2014). The State's arguments are deficient and unconvincing.

Latimer spontaneously blurted to Travis Powell that he assisted Libby in the commission of a robbery and saw Libby shoot a man who tried to intervene. The statement was made close in time to when the murder occurred and two people attested to its spontaneity and Latimer's excited, agitated state. The statement's inculpatory nature lends weight to a finding that it is reliable. The trial court's ruling was contrary to the

¹⁰ The State's arguments must be viewed with skepticism, given that, if Libby were on trial, the State would aggressively argue that Latimer's statements were excited utterances.

great weight of precedential authority and was an abuse of discretion. The statement was plainly an excited utterance and, as such, was substantively admissible. *Young*, 160 Wn.2d at 817.

- c. The statement was admissible as a statement against penal interest; the State's claim that Mr. Nickels bore some burden to prove Latimer's unavailability at a future trial misstates the law.

The statement was also admissible as a statement against penal interest. The State claims that Nickels bore the burden of proving Latimer would be unavailable at the motion for new trial, but the State misunderstands the law and consequently its citations are inaccurate.

ER 804 does not allocate a burden to the proponent of a statement. Rather, *the Confrontation Clause* requires the *State* to prove that a witness is unavailable before it may introduce a statement against penal interest at trial against a *defendant*. *State v. Smith*, 148 Wn.2d 122, 132, 59 P.3d 74 (2002); *State v. Beadle*, 173 Wn.2d 97, 112, 265 P.3d 863 (2011) (“the burden of proving unavailability *for constitutional purposes* lies with the proponent ... of the statement”) (emphasis added); *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984) (“The Sixth Amendment requires a demonstration of unavailability when the declarant witness is not produced”). The State has no Sixth Amendment right to confront witnesses. Therefore, its claim that Mr. Nickels had to prove Latimer's unavailability at the new-trial motion is completely misplaced.

ER 804 supplies six examples of unavailability, one of which is unavailability due to privilege. ER 804(a)(1). Latimer confessed that he was an accomplice to felony murder. Latimer testified under oath that he only left the house on the day of the shooting to go to the crime scene. When confronted with the Powells' evidence, however, he stated, again under oath, that he also went to see Travis Powell to buy drugs. Latimer therefore also committed perjury.¹¹

The State does not address Latimer's Fifth Amendment privilege given these potential charges. Nor does the State appear to understand that the trial court's ruling concerning Latimer's future unavailability was premature and constitutionally unsound. The State's remaining claims regarding Mr. Nickels's new evidence are equally unpersuasive. Mr. Nickels is entitled to a new trial.

9. Judge Sperline's relationship and his stepson's close friendship with Munro, which Judge Sperline failed to disclose to the defense or the public, violated the appearance of fairness doctrine and merits a new trial.

¹¹ In a footnote, the State briefly attempts to defend Latimer's credibility by stating that Mr. Nickels's citations to his testimony in his opening brief do not support the inference that the only place Latimer went on the morning of the crime was to see the crime scene. Br. Resp. at 88 n. 41. This is nonsense. Latimer was evasive and deceptive in his testimony. Initially, he claimed he was at home all day when the crime occurred with his fiancée. RP (Beck Vol. 6) 1440. Then he said he did not remember where he was the morning of the crime but that his fiancée, Rhiannon Crump, told him he was in bed. RP (Beck Vol. 6) 1440-41. Then, in response to the question whether he left the apartment to view crime scene, he said he "walked out onto the road" and "seen all the cops and the news crews down there, and *that was it.*" *Id.* at 1442 (emphasis added). He repeated that he walked a block and a half down the road and then walked back. *Id.* at 1448. He denied using drugs, *Id.* at 1448, although in his statement to Rectenwald, he said he went to see Powell to buy drugs. CP 4236.

Judge Sperline's stepson, Eric Newstrand, had a close relationship with Sage Munro and was a member of a public Facebook page dedicated to his memory. CP 6049, 6052. Newstrand had attended high school with Munro and frequently posted comments on the page. CP 6053, 6057. Judge Sperline had officiated Newstrand's wedding, bought a house with him, and listed Newstrand as one of his "friends" on Facebook. CP 6032.

On September 6, 2012, at 3:48 p.m., Newstrand posted on the public Facebook page, "Jury has come to a verdict. The verdict will be read at approximately 4:20 p.m." CP 6054. It is not clear how Newstrand learned this information, since there was no discussion of the timing of the verdict being read on the court record. At 4:39 p.m., Newstrand posted on the public Facebook page, "G-U-I-L-T-Y!!! Justice has been served!!" *Id.* On his personal Facebook page, Newstrand wrote, "The best birthday present ever! Jury came back with a guilty verdict in my good friend's murder trial! Justice has been served!" CP 6060.

Andrew Phipps, who was friends with Newstrand and Munro, opined that Judge Sperline "had to have known that his stepson, Eric Newstrand, had a friendship with Sage Munro because of our friendship while in high school." CP 6269. He also believed it was "highly unlikely" that Sperline did not know Munro personally. *Id.* Another

friend, Joey Molitor, agreed that Judge Sperline would have known that Newstrand and Munro were friends. CP 6210.

Judge Sperline never disclosed either association to the parties.

Principles of due process prohibit a trial before a biased tribunal.

Williams v. Pennsylvania, -- U.S. --, 136 S. Ct. 1899, 1905 (June 9, 2016);

In re Murchison, 349 U.S. 133, 136 (1955); U.S. Const. amend. XIV.

Because it is difficult for a judge to discern subjective bias within himself,

The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, “the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’

Williams, 136 S.Ct. at 1905 (citations omitted).

In *Williams*, a state Supreme Court justice, as a district attorney years earlier, had prosecuted the defendant and given approval to seek a death sentence. *Id.* at 1903. The justice was on the tribunal that reinstated the sentence after a postconviction court granted the defendant relief. *Id.* The Supreme Court concluded that, because of the justice’s “significant, personal involvement” in the case, his failure to recuse himself presented “an unconstitutional risk of bias.” *Id.* at 1907. The Court explained,

Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.

Id. The Court concluded that an unconstitutional failure to recuse is a structural error even where the biased judge is a part of a multimember tribunal, and even if the judge did not cast the deciding vote. *Id.* at 1909.

In Mr. Nickels's case, other friends of Munro, who would have had no reason to slant their opinions in the defense's favor, believed that Judge Sperline personally knew Munro, and were certain that he was aware of Newstrand's close friendship with him. In addition, there is the troubling and unaccounted-for fact that Newstrand knew that the jury had reached a verdict before the public was informed. As in *Williams*, this Court should conclude that the appearance of bias violated due process and was a structural error.

The State relies on a single case, *Kok v. Tacoma School Dist. No. 10*, 179 Wn. App. 10, 317 P.3d 481 (2013), to support its claim that the appearance of fairness doctrine was not violated. That case helps Mr. Nickels, not the State. *Kok* was a civil, not a criminal case. In *Kok*, the allegation of bias was based on the judge's spouse's prior representation of the respondent on unrelated matters. *Id.* at 26. Additionally, because the case involved a summary judgment order, which would be reviewed de novo, the appellate court decided that "the increased risk of prejudice present in [*Tatham v. Rogers*, 170 Wn. App. 176, 283 P.3d 583 (2012)] is not an issue here." *Id.*

In an effort to stretch the facts of *Kok* to this case, State contends that Sperline's relationship to Munro was "tenuous at best." Br. Resp. at 99. This is false. Sperline was, at best, one remove from Munro. Even if, despite the evidence to the contrary, Sperline did not personally know Munro, his stepson not only was Munro's close personal friend, he had a distinct and substantial interest in Mr. Nickels being convicted. Second, in contrast to *Kok*, the judge's failure to disclose the relationship may have violated CJC 1.2, 2.2, and 2.3(A).

The State's third claim is that "because the judge did not have discretion over the ultimate decision: that was in the hands of the jury," *Kok* should control. Br. Resp. at 99. This claim is hard to countenance. The judge bore sole responsibility for deciding what evidence would be heard at trial. The limitations that were imposed on Mr. Nickels's defense and the rulings on motions to suppress evidence were solely in the judge's hands. The judge decided whether *Brady* violations or governmental misconduct merited dismissal.

As the State concedes, the jury's decision "could only be modified by the judge in Nickels's favor." *Id.* But Judge Sperline did not modify the jury's decision in Nickels's favor. He did not grant a new trial based on serious juror misconduct, concealed the misconduct from the parties, and conducted a secret proceeding during the trial to resolve the issue. He

did not grant a new trial despite the discovery of compelling exculpatory evidence exonerating Mr. Nickels and confirming Libby's guilt. He did not grant a new trial even when his own "to-convict" instruction was held to be unconstitutional by this Court.

Mr. Nickels does not need to prove that Judge Sperline was actually biased. If, by virtue of Judge Sperline's personal associations with Newstrand and Munro, there was a "serious risk" of bias, then a structural error occurred. *Williams*, 136 U.S. at 1907.

Although Judge Sperline himself may have subjectively believed his associations did not undermine his impartiality, all of his rulings must be viewed through the lens of his potential bias. This Court should conclude that the relationship with Newstrand and Munro created a "serious risk" that Mr. Nickels was tried by a biased tribunal, in violation of due process. The structural error requires reversal of Mr. Nickels's conviction.

B. CONCLUSION

Mr. Nickels's trial was rife with unfairness. All of the errors discussed above and in Mr. Nickels's opening brief require reversal of his conviction. The *Brady* violations separately require dismissal. Accordingly, this Court should reverse and dismiss Mr. Nickels's conviction.

DATED this 25th day of July, 2016.

Respectfully submitted:

s/ Susan F. Wilk

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 31642-4-III
v.)	
)	
DAVID NICKELS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA-RILEY, STATE THAT ON THE 25TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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