FILED
Court of Appeals
Division III
State of Washington
6/19/2019 4:25 PM

No. 35297-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHAD BENNETT,

Appellant.

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

REPLY BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. The conviction should be reversed and the charge dismissed for government mismanagement. 1

2. The conviction should be reversed and the case remanded for a new trial because the trial court erroneously excluded "other suspect" evidence and argument, and the State concedes the trial court applied the wrong test. 9

3. The conviction should be reversed and the case remanded for a new trial because the prosecutor committed prejudicial misconduct 13

   a. The prosecutor cited facts not in evidence and violated a prior ruling when he stated Bill Bodziak testified there was "clear evidence of clean-up.". 14

   b. The prosecutor cited facts not in evidence when he claimed Vera Bunakova "saw the defendant, Chad Bennett" in the alley. 16

   c. The prosecutor issued improper emotional appeals during rebuttal closing argument. 17

   d. The prosecutor presented improper personal opinions by repeatedly telling the jury "we know" certain alleged facts and conclusions. 19

   e. The prosecutor shifted the burden of proof by stating if there was any favorable evidence the defense would have presented it. 19

   f. The prosecutor undermined the presumption of innocence and trivialized the jury's role by assuring the jury that this case was "the biggest example of due process" the State had seen, that there was "no rush to judgment," and that the detectives did not make a snap decision "to arrest the wrong man.". 20

g. The misconduct prejudiced Mr. Bennett, requiring reversal and remand for a new trial. 23

4. The exceptional sentence should be reversed for several independent reasons 24

a. Insufficient evidence supports the aggravators, and the State cites the wrong standard of review. 25

b. The aggravators are unconstitutionally vague, and the State implicitly concedes this error by failing to address it 29

c. The sentence is arbitrary and excessive, and the State relies on inapposite case law. 30

B. CONCLUSION 32

TABLE OF AUTHORITIES

Washington Supreme Court Cases

In re the Personal Restraint of Glasmann, 175 Wn. 2d 696, 286 P.3d 673 (2012) 18, 19, 23

State v. Allen, 192 Wn.2d 526, 543-44, 431 P.3d 117 (2018) 30

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 16

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014) 9, 10, 11, 13

State v. Hand, 192 Wn.2d 289, 429 P.3d 502 (2018) 3

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014) 18, 23

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 26, 31

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008) 11

State v. Scherf, 192 Wn.2d 350, 429 P.3d 776 (2018) 18

State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006) 27, 28

State v. Vasquez, 178 Wn. 2d 1, 309 P.3d 318 (2013) 25

State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015) 18, 23

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993) 11

Washington Court of Appeals Cases

In re J.J., 96 Wn. App. 452, 980 P.2d 262 (1999) 29

State v. Brush, noted at 181 Wn. App. 1009, 2014 WL 1912009 (2014) . 27

State v. Duggins, 68 Wn. App. 396, 844 P.2d 441 (1993) 6

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) 20

State v. Garibay, 67 Wn. App. 773, 841 P.2d 49 (1992) 31

State v. Ortuño-Perez, 196 Wn. App. 771, 385 P.3d 218 (2016) ... 9, 10, 12

State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012)..... 19, 23

State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993), *aff'd sub nom State v. Ritchie*,126 Wn.2d 388, 894 P.2d 1308 (1995), *abrogated on other grounds by State v. O'Dell*, 183 Wn.2d 680, 694-95, 358 P.3d 359 (2015)..... 26, 27

State v. Serrano, 95 Wn. App. 700, 977 P.2d 47 (1999) 27, 28

State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990)..... 7

State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993)..... 21, 22

State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148 (1986) 20

United States Supreme Court Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 30

Cases from Other Jurisdictions

United States v. Caceres-Olla, 738 F.3d 1051, (9th Cir. 2013)..... 29

United States v. Real Property Known as 22249 Dolorosa Street, 190 F.3d 977 (9th Cir. 1999)..... 29

Constitutional Provisions

Const. art. I, § 22..... 10, 21

Const. art. I, § 3..... 10, 21

U.S. Const. amend. VI 10, 21

U.S. Const. amend. XIV 10, 21

Rules

CrR 4.7 ..... 3, 4

Other Authorities

WPIC 1.02 23

A. ARGUMENT IN REPLY

1. The conviction should be reversed and the charge dismissed for government mismanagement.

As explained in the opening brief, this Court should reverse the conviction and sentence and remand for dismissal of the charge because government mismanagement prejudiced Mr. Bennett's right to a fair trial. In the alternative, the conviction should be reversed and the case remanded for suppression of the late-disclosed evidence, and for a new trial.

After Mr. Bennett had been in jail for 21 months and trial had been continued multiple times, the State provided the defense with (1) a lab report stating Mr. Bennett's DNA was found on the victim's shirt, and (2) a CD containing over 200 hours of recordings of telephone calls, which Detective Hufman admitted he had purposely withheld until just before trial. The trial court found the State committed mismanagement, but failed to find prejudice on the basis that a continuance could "ameliorate the problem." But as the trial court recognized, the State's mismanagement prejudiced Mr. Bennett by forcing him to choose between his constitutional rights to prepared counsel and a speedy trial. Thus, the trial court erred as a matter of law by concluding a continuance beyond the

speedy trial deadline could cure the prejudice. This Court should reverse. Amended Opening Brief ("AOB") at 10-24.

In response, the State relies on the prosecutor's assertions in the trial court for the proposition that the prosecutor "expected" the case to go to trial in September of 2016 and that he "wanted to avoid dumping a mountain of evidence" on defense counsel while he was in another trial. CP 280 (cited in Brief of Respondent ("BOR") at 2). The State claims Mr. Bennett originally "agreed" to a September trial date, BOR at 3, and even implies that Mr. Bennett asked the State to delay disclosing evidence it was required to disclose. This is incorrect. The State cites no such request by the defense, and, more importantly, no waiver of the right to speedy trial signed by Mr. Bennett – nor any oral pronouncement by Mr. Bennett that he waived his right to a speedy trial past the July expiration date. *See* RP (7/5/16) 67, 76 ("Mr. Bennett would like to have his speedy trial rights honored"). He only did so *after* the trial court erroneously denied his motion to dismiss, when the court, by its own admission, forced Mr. Bennett to choose between his rights to prepared counsel and a speedy trial. RP (7/6/16) 75-76, 87-90.

The State also claims it did not test the shirt until 21 months after the killing because the shirt was saturated and forensic scientist Anna Wilson did not think male DNA would be revealed on the shirt until after

she learned that Mr. Bennett was a "heavy shedder." BOR at 4. But as the prosecutor conceded in the trial court, Ms. Wilson knew *in 2014* that Mr. Bennett was a heavy shedder. RP (7/5/16) 42-43. Thus, this fact does not excuse the late discovery.

The crime lab's "resource limitations" also cannot justify forcing Mr. Bennett to waive his right to a speedy trial. BOR at 4. Rather, "when the State is waiting for a toxicology [or other lab] report that is delayed due to backlogs, prosecutors may elect to dismiss an action without prejudice to avoid a speedy trial rights violation." *State v. Hand*, 192 Wn.2d 289, 307, 429 P.3d 502 (2018) (Madsen, J., concurring). The State did not avail itself of this solution, and therefore the trial court erred in denying Mr. Bennett's motion to dismiss or suppress, and forcing him to waive his right to a speedy trial.

As to the jail calls, the State implies that it did not commit misconduct by purposely withholding over 200 hours of recordings because "while [Mr.] Bennett's recorded conversations may have been a surprise to his lawyer, they were not a surprise to [Mr.] Bennett." BOR at 8-9. This argument is without merit. CrR 4.7(a)(1)(ii) mandates that the State disclose to the defense "any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one." If it were sufficient that the

defendant himself (rather than his lawyer) knew about his statements, then this rule would have no purpose. Indeed, the State later concedes the rule requires such disclosure. BOR at 33 ("Superior Court Criminal Rule (CrR) 4.7 imposes an ongoing duty on prosecutors to disclose evidence in its possession or control it may reasonably expect to use at trial, including a defendant's oral, written, or recorded statements.").

The State also argues it was not required to disclose any recordings until it had determined it was going to use them at trial, and that, although the State's investigator had listened to all of the recordings, Mr. Bennett was only entitled to listen to the single recording the State planned to use for impeachment. BOR at 34-35. The State is wrong. Mr. Bennett is entitled to the effective assistance of counsel, and, as his attorney stated, he needed to review all of the recordings that the State had already been reviewing for a year and a half, because some of them could have been exculpatory. RP (7/5/16) 34. Moreover, the court rule requires disclosure of "any written or recorded statements and the substance of any oral statements made by the defendant," not just the ones the State plans to use after listening to all of them. CrR 4.7.

The State also claims the continuance beyond the speedy trial deadline was "beyond anyone's control[.]" BOR at 8, 30. This is incorrect. Detective Hufman admitted he purposely withheld recordings for a year

and a half, and the State admitted Anna Wilson knew Mr. Bennett was a heavy shedder from the beginning of the investigation. RP (7/5/16) 42-43, 51, 64-65; CP 144, 175-76. Moreover, the trial court found the State had committed mismanagement. RP (7/5/16) 81-83. Its error was on the prejudice prong – or in its belief that a continuance could ameliorate the problem. RP (7/5/16) 55.

The State also characterizes the *court* as finding the late discovery was "beyond anyone's control." BOR at 30. This is incorrect. The State takes the court's quote out of context – the judge made this statement when lamenting the wasted work of the jury administrator, not when ruling on the mismanagement question. RP (7/5/16) 73. With respect to the State's mismanagement, the court stated, "Mr. Bennett has been placed in a position where he has to choose between the effective assistance of counsel and a speedy trial. And that *that delay is due to the state's failure to test this shirt a year and a half ago*." RP (7/5/16) 81 (emphasis added). Addressing the hundreds of hours of recordings, the judge said, "The court rule makes it mandatory to disclose that stuff." RP (7/5/16) 82. The judge told the prosecutor, "if you've got it in your possession, and it's potentially relevant, you're required by the court rule to turn it over …." RP (7/5/16) 83. The court noted the defense had relied on the prosecutor complying with his obligations, "and now he's finding out about all these

phone records the week before trial." RP (7/5/16) 83. Thus, the court certainly did not find that the egregiously late disclosure of discovery was "beyond anyone's control." BOR at 30.

The State also implies that *the defense* asked the State to withhold evidence and delay production of discovery while counsel was in another trial. BOR at 30. These assertions are factually inaccurate and unsupported by the record locations cited. Moreover, the other trial in question occurred in April of 2016 – well over a year after the State could have tested the shirt and started turning over the recordings.

The prosecutor avers Mr. Bennett "cannot claim either surprise or failure of due process over the tee-shirt evidence" because he learned on June 1, 2016 that the State planned to test the shirt. BOR at 31-32. But Mr. Bennett's motion was not based on "surprise" or "failure of due process." He moved for dismissal or suppression based on government mismanagement under CrR 8.3(b). CP 139-268; RP (7/5/16) 31-37. And, as the State acknowledges, Mr. Bennett noted even at the early June hearing that the very late testing constituted government mismanagement. BOR at 31-32 (citing RP (6/6/16) 25).

The State argues what occurred here does not meet the requirements for reversal under *State v. Duggins*, 68 Wn. App. 396, 844 P.2d 441 (1993). BOR at 32. But *Duggins* is inapposite. There, trial had to

be continued once, for *one to two* days, *within the speedy trial deadline*, because a witness had not received a subpoena. *Duggins*, 68 Wn. App. at 401. The defendant argued for a new application of the speedy trial rule, and urged that dismissal was appropriate whether or not the right to a speedy trial was compromised. *Id.* This Court rejected that argument. *Id.*

The facts of this case are markedly different. This was not a simple mistake in issuing a subpoena resulting in a one or two day delay. Here, the State committed egregious mismanagement by purposely withholding hundreds of hours of recordings and failing to test the victim's shirt for over a year and a half. Here, Mr. Bennett was forced into a "Hobson's choice" of exercising his right to prepared counsel or his right to a speedy trial. This is precisely the type of situation in which dismissal is mandated. *See State v. Sherman,* 59 Wn. App. 763, 769, 801 P.2d 274 (1990).

The State implies that because Mr. Bennett did not object to earlier continuances, he was not permitted to object to a continuance past the speedy trial deadline of July, 2016. BOR at 30. The State cites no legal authority for its implied argument that a defendant must object to every continuance in order to insist on his right to a speedy trial. There is no such authority.

The State also claims Mr. Bennett cannot establish prejudice because he had "over a month's notice[.]" BOR at 32. This is not correct,

either. Mr. Bennett received the lab report on June 29, 2016, eight days before the trial date of July 7 and nine days before the speedy trial expiration date of July 8. CP 148, 155. Moreover, 12 days earlier the State had dumped over 200 hours' worth of recordings on the defense – evidence the State had been collecting for a year and a half but purposely withheld. CP 144, 176; RP (7/5/16) 32. Mr. Bennett showed prejudice because his expert had to review the State's lab work and he and his investigator had to finish reviewing hundreds of hours' worth of recordings. RP (7/5/16) 33-34, 38-40, 67-70, 75-76. Indeed, the trial court implicitly recognized Mr. Bennett showed prejudice: "Mr. Bennett has been placed in a position where he has to choose between the effective assistance of counsel and a speedy trial. And that that delay is due to the state's failure to test this shirt a year and a half ago." RP (7/5/16) 81. The court's error was its failure to apply the right remedy. AOB at 22. This Court should apply a remedy, and reverse and remand for dismissal of the charge or for suppression of the late-disclosed evidence and a new trial. AOB at 10-24.

2. The conviction should be reversed and the case remanded for a new trial because the trial court erroneously excluded "other suspect" evidence and argument, and the State concedes the trial court applied the wrong test.

As explained in the opening brief, the trial court violated Mr. Bennett's constitutional right to present a defense by prohibiting him from introducing evidence and argument that Ms. Moore's daughter and her boyfriend or Ms. Moore's tenants Charles and Brandi Larr may have committed the crime. The court recognized Mr. Bennett offered strong evidence of motive and opportunity for these other suspects, but it granted the State's motion to exclude the evidence on the basis that Mr. Bennett had failed to show another suspect took "some affirmative step towards actually doing the crime[.]" RP (2/6/17) 3171.

This Court's "case law has never held that 'other suspect' evidence must be excluded when a defendant cannot prove that the identified perpetrator had taken steps to commit the crime." *State v. Ortuño-Perez*, 196 Wn. App. 771, 790, 385 P.3d 218 (2016). Rather, other suspect evidence must be *admitted* if it tends to create a reasonable doubt about the defendant's guilt. *Id.*; *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). Because the State cannot prove beyond a reasonable doubt

that the improper exclusion had no effect on the outcome, this Court should reverse and remand for a new trial. AOB at 24-34.

In response, the State concedes the trial court excluded the evidence on the basis that Mr. Bennett "failed to identify evidence showing some kind of step taken by any of the various people, named or unnamed, identified as potential suspects." BOR at 14-15. It acknowledges the trial court stated it was excluding the evidence because Mr. Bennett did not present "something that shows some affirmative step towards actually doing the crime[.]" BOR at 15. These concessions are well-taken, and this Court should hold that the trial court erred and violated Mr. Bennett's constitutional rights by excluding evidence of other suspects on this improper basis. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *Franklin*, 180 Wn.2d at 381; *Ortuño-Perez*, 196 Wn. App. at 790.

The State nevertheless urges the Court to affirm notwithstanding the above. BOR at 36-42. It notes that "evidentiary rulings are reviewed for abuse of discretion," BOR at 37, but neglects to mention that this issue is constitutional, not merely evidentiary, and that legal errors like the error the State concedes occurred necessarily constitute an abuse of discretion. "A discretionary decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record *or was reached by applying the wrong legal standard." State v. Quismundo*, 164

Wn.2d 499, 504, 192 P.3d 342 (2008) (internal citation omitted) (emphasis in original). "Indeed, a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *Id.* (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). Because the State acknowledges the trial court committed legal error in "seeking evidence of 'a step' taken by one or more of the proffered other suspects," this Court should reverse.

The State, however, claims this Court should affirm on the basis that *Franklin* is factually distinguishable. BOR at 38. The State's plea should be rejected. The State focuses on the portion of *Franklin* that is not relevant here: the discussion of the strength of the State's case. BOR at 39-40; *see* AOB 30-32 & n.2 (noting this portion of *Franklin* was not relevant to Mr. Bennett's case; instead the portion rejecting a requirement of specific steps is the relevant portion).

In *Franklin*, the evidence against the defendant was overwhelming: the day after the defendant saw his ex-girlfriend with another man, the ex-girlfriend started receiving lewd calls and texts. *Franklin*, 180 Wn.2d at 374. A couple of nights later, the defendant confronted her at a restaurant and threatened her. *Id.* The ex-girlfriend received additional threatening messages the following week, and the defendant also called her to warn her that the prior behavior "was just the tip of the iceberg," and that she

"should start looking over [her] shoulder." *Id.* at 375. The Supreme Court held the trial court should have permitted Franklin to argue that his current girlfriend committed the cyberstalking offenses of which he was eventually charged, even though the girlfriend, unlike the defendant, did not confront the victim in the restaurant, did not call the victim to threaten her, did not have any connection to the account used to perpetrate the crimes, and had not e-mailed the other woman in years even from her own account. *Id.* at 382; *see also id.* at 386 (Owens, J., dissenting). Even under these circumstances, the Supreme Court reversed for a new trial because the circumstantial evidence was sufficient to meet the low bar of simply creating a reasonable doubt as to the defendant's guilt. *Franklin*, 180 Wn.2d at 381-82. The same should occur here. AOB at 24-34.

The State complains that Mr. Bennett did not present evidence that would "place Swain, Rehfield, or Larr near Moore's house the day of the murder." BOR at 41. This is not correct; Mr. Bennett pointed out that both Swain and the Larrs lived in the vicinity. RP (2/6/17) 3155, 3161-63; CP 871. Moreover, the argument amounts to a complaint that Mr. Bennett did not present evidence of an affirmative step, which the State concedes is not the right test. *See Ortuño-Perez*, 196 Wn. App. at 790. A similar argument was already rejected in *Franklin*, where no evidence was presented that the other suspect had access to the e-mail account used to

perpetrate the crime. *Franklin*, 180 Wn.2d at 386 (Owens, J., dissenting). The defendant was not required to present evidence that the other suspect logged onto the account, and Mr. Bennett is not required to present evidence that the other suspects were in the house. As in *Franklin*, Mr. Bennett presented evidence that would create a reasonable doubt as to his guilt, and the trial court violated his constitutional rights by prohibiting him from presenting this evidence to the jury. This Court should reverse and remand for a new trial. AOB at 24-34.

3. The conviction should be reversed and the case remanded for a new trial because the prosecutor committed prejudicial misconduct.

As explained in the opening brief, this Court should also reverse because of prosecutorial misconduct. The prosecutor presented his own opinions, relied on facts not in evidence, issued emotional appeals, shifted the burden of proof, undermined the presumption of innocence, and minimized the jury's role. Specifically, he:

- told the jury a witness testified there was "clear evidence of clean-up" even though the witness did not say this and the court had prohibited such testimony
- told the jury a neighbor saw Chad Bennett in the alley even though the neighbor did not know Chad Bennett
- curried favor with the jury by separately thanking the judge, bailiff, court reporter, and clerk during closing

- told the jury "we know" various disputed facts and conclusions

- told the jury if there had been evidence of a particular type, the defense would have presented or explained it

- assured the jury this case was "the biggest example of due process" the State had ever seen, that there was "no rush to judgment," and that the detectives did not make a snap decision "to arrest the wrong man."

AOB at 34-49.

In response, the prosecution wrongly refuses to acknowledge the misconduct. As explained below, the State's arguments should be rejected.

a. <u>The prosecutor cited facts not in evidence and violated a prior ruling when he stated Bill Bodziak testified there was "clear evidence of clean-up."</u>.

The prosecutor cited facts not in evidence and violated a prior ruling by telling the jury in closing argument that State's witness Bill Bodziak testified there was "clear evidence of clean-up to the impression B, the blood." RP (3/21/17) 8202; AOB at 36-40.

In response, the State concedes the court "precluded Bodziak from testifying that evidence of wipe marks showed someone tried to clean up bloody footwear evidence because his report stated that the evidence was typical of attempts to do so, not that he concluded somebody had." BOR at 43; *see also* BOR at 16 ("The court clarified that Bodziak was prohibited from stating there was an attempt to clean up"). But it claims the

prosecutor's statement was permissible because Bodziak testified "The characteristics evident in these images, as well as images taken before enhancement, are typical of attempts to clean up bloody footwear evidence." BOR at 17 (citing RP (3/6/17) 6110); BOR at 44. In the State's estimation, because the preceding (permissible) sentence includes the phrase "attempts to clean up," it was not misconduct for the prosecutor to argue there was "clear evidence of clean-up." This makes no sense. Bodziak was not permitted to testify there was clear evidence of clean-up and did not testify there was clear evidence of clean-up. The prosecutor's statements therefore constituted misconduct.

The State also implies the prosecutor made this improper statement only once. BOR at 17-19, 43-45. But the prosecutor also showed a PowerPoint slide, not acknowledged in the response brief, which included the emphasized phrase "**Clear evidence of clean up to Impression B (Blood)**." Ex. 528, slide 32. And a later slide repeated the claim that there was "Evidence of Clean up per Bodziak." Ex. 528, slide 81. This is different from the actual, permitted testimony, which was that the wipe marks were "typical" of attempts to clean up. RP (3/3/17) 6027, 6028. And while the State complains that Mr. "Bennett makes too fine a distinction here," BOR at 44, the trial court endorsed the distinction when limiting the testimony to precisely what was in the report. RP (3/3/17)

6037; RP (3/6/17) 6065, 6069 ("There is a difference, in my opinion. It's slight. But there is a difference. Because in one, he doesn't actually express the opinion other than it appears typical.").

The State also claims the court admonished the jury to disregard the prosecutor's improper statement. BOR at 19. This is incorrect. As the State acknowledges on a different page, the court in fact stated, "I'm going to ask the jury to basically recall what they believe the evidence presented was and it's going to be ultimately up to the jury to determine what you believe the evidence was as it was presented." RP (3/21/17) 8203. *See* BOR at 18. This was improper. It is the court's role to sustain objections to prosecutorial misconduct, and the court erred and exacerbated the prejudice by abdicating this duty. *See State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's overruling of objection "lent an aura of legitimacy to what was otherwise improper argument").

b. <u>The prosecutor cited facts not in evidence when he claimed Vera Bunakova "saw the defendant, Chad Bennett" in the alley</u>.

The prosecutor also improperly argued alleged facts not in evidence when he told the jury that neighbor Vera Bunakova "saw the defendant, Chad Bennett, from approximately 15 feet away in the alley[.]" RP (3/21/17) 8207; ex. 528, slide 38. The trial court wrongly overruled Mr. Bennett's objection to this argument. Contrary to the prosecutor's

insinuation, Mr. Bunakova does not know Chad Bennett and did not recognize him that day. RP (3/1/17) 5617; AOB at 40-42.

The State acknowledges Ms. Bunakova "did not know who Bennett was" in September of 2014. BOR at 45-46. But it claims the prosecutor's argument was proper because Ms. Bunakova later chose Mr. Bennett's picture from a montage and said she was "a little more than 50 percent" sure that he was the person she had seen, and then identified him in court. *See* RP (3/1/17) 5653; BOR at 46. This is not what the prosecutor pointed out in closing. Instead, he implied that Ms. Bunakova knew *at the time* she saw a person in the alley that this person was Chad Bennett. This was improper. AOB at 40-42.

c. <u>The prosecutor issued improper emotional appeals during rebuttal closing argument</u>.

As explained in the opening brief, the prosecutor improperly ingratiated himself to the jury by thanking the judge, court staff, and jail staff during closing argument instead of outside the jury's presence. AOB at 42-43. Indeed, the prosecutor also thanked the spectators, implying that the public was on the State's side in favor of conviction and exerting subtle pressure on the jury to satisfy their expectations. RP (3/23/17) 8529-30.

The State complains that Mr. Bennett did not object to this particular instance of misconduct and avers this failure precludes review of the issue. BOR at 46-47. This complaint is ironic in light of the State's argument that Mr. Bennett should not have objected to the mischaracterization of Vera Bunakova's testimony because it "was frivolous and disruptive." BOR at 46. Mr. Bennett objected to numerous instances of misconduct, and the fact that he did not object to 100% of the improper statements does not preclude relief. Indeed, in *Walker* and *Glasmann* the Supreme Court reversed for prosecutorial misconduct even though the defendants failed to object to most of the misconduct, and in *Lindsay* the Supreme Court reversed even though the defendants objected to only a subset of the misconduct. *See State v. Walker*, 182 Wn.2d 463, 478-81, 341 P.3d 976 (2015); *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014); *In re the Personal Restraint of Glasmann*, 175 Wn. 2d 696, 707, 286 P.3d 673 (2012).

The State then appears to concede the ingratiation constituted misconduct, but argues the misconduct was harmless here because it was harmless in *State v. Scherf*, 192 Wn.2d 350, 396, 429 P.3d 776 (2018). BOR at 48. But prejudice is not evaluated piecemeal. Rather, prejudice is shown and reversal is required if the "cumulative effect" of multiple instances of misconduct renders a trial unfair. *Glasmann*, 175 Wn. 2d at

707; *accord State v. Pierce*, 169 Wn. App. 533, 556, 280 P.3d 1158 (2012) ("Taken together, there is more than a substantial likelihood that the above three improper arguments affected the verdict."). Here, the ingratiation was prejudicial when viewed in combination with the other instances of misconduct. AOB at 48-49.

d. The prosecutor presented improper personal opinions by repeatedly telling the jury "we know" certain alleged facts and conclusions.

Over Mr. Bennett's objections, the prosecutor presented improper personal opinions by telling the jury "we know" certain things that were actually disputed facts. AOB at 43-44. The State concedes the statements were "technically improper[.]" BOR at 49. It claims there was no prejudice; however, as explained above, prejudice is not evaluated in isolation but is instead evaluated cumulatively. In combination with the all of the other misconduct, the improper statements were prejudicial, and a new trial is warranted. AOB at 48-49.

e. The prosecutor shifted the burden of proof by stating if there was any favorable evidence the defense would have presented it.

The prosecutor in rebuttal closing argument improperly shifted the burden of proof to the defense by stating "if there was any evidence that there was actual contamination of this crime scene, the defense would

have been talking about it" and "there was nothing pointed out that there was any contamination introduced into this crime scene[.]" RP (3/23/17) 8526-27. The comments were like those this Court held to be improper in *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). AOB at 44-45.

The State claims the comments were not improper, "did not even hint" that Mr. Bennett had a duty to present evidence, and were a reasonable response to Mr. Bennett's argument suggesting his DNA was at the scene because he was there paying rent. BOR at 49-50. The State is wrong. Prosecutors are permitted to emphasize the evidence the State has presented in an effort to show the government has met its burden, but they are not permitted to suggest a defendant must explain the State's evidence or provide a reason for doubting the State's case. *Fleming*, 83 Wn. App. at 215; *State v. Traweek*, 43 Wn. App. 99, 106, 715 P.2d 1148 (1986).

f. <u>The prosecutor undermined the presumption of innocence and trivialized the jury's role by assuring the jury that this case was "the biggest example of due process" the State had seen, that there was "no rush to judgment," and that the detectives did not make a snap decision "to arrest the wrong man."</u>.

Even if none of the above misconduct had occurred, reversal would be required because of the shocking misconduct in rebuttal closing argument: the prosecutor assured the jury that the police had worked

thousands of hours to ensure they had the right man, that Mr. Bennett had received an extreme amount of due process, and that there was no rush to judgment. RP (3/23/17) 8536. These statements undermined the presumption of innocence and trivialized the jury's role. AOB at 45-48 (citing U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993)).

Perhaps even more shocking than the misconduct itself is the State's refusal to acknowledge the violation in its response brief. The State claims the prosecutor "did not … imply Bennett's guilt had already been determined through a finding of probable cause." BOR at 52.

The record reveals the contrary. The prosecutor argued:

> So there's been no rush to judgment in this. This has been ongoing for, as we know, since September of 2014. The investigation done by Detective Hufman and his crew, thousands of man hours have been devoted to this case. So this wasn't just a situation where a snap judgment was made, a decision to arrest the wrong man, to frame the wrong man was made. Nothing of that.

RP (3/23/17) 8536. In addition to implying guilt had already been determined, the prosecutor here perversely used the length of time that had passed since the crime as evidence that the State had taken the time to charge the right man – even though a significant portion of that time was due to the first jury's failure to agree that the State had proved its case (a fact this jury would not know). AOB at 48.

The prosecutor also assured the jury "[t]his is probably the biggest example of due process that this office – or that the state has participated in[.]" *Id.* These statements further implied Mr. Bennett's guilt has already been determined, and conveyed to the jury that it did not need to worry about anything because Mr. Bennett had already received more constitutional rights than anyone else in the history of Washington.

As explained in the opening brief, and contrary to the prosecution's claims, the comments here were like those this Court condemned in *Stith*, where the prosecutor assured the jury the system had "incredible safeguards" and there was no problem with the way the two officers investigated the case. *Stith*, 71 Wn. App. at 17, 22. Like the comments in *Stith* that "our system has incredible safeguards," the prosecutor here told the jury this case was "the biggest example of due process" the State had ever seen. Like the comments in *Stith* that the police did not act improperly and probable cause had already been determined, the prosecutor here told the jury the police had worked "thousands of hours" and did not "arrest the wrong man." These comments "clearly reflect the prosecutor's personal assurances to the jury as to the defendant's guilt" and "implied that the trial was a useless formality[.]" *Stith*, 71 Wn. App. at 23. "Such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury." *Id.*

g. The misconduct prejudiced Mr. Bennett, requiring reversal and remand for a new trial.

As explained in the opening brief, the misconduct prejudiced Mr. Bennett, requiring reversal and remand for a new trial. AOB at 48-49. In response, as noted above, the prosecution evaluates the prejudice of each instance of misconduct in isolation. BOR at 44-45, 48, 49, 51. But prejudice is not evaluated piecemeal. Rather, prejudice is shown and reversal is required if the "cumulative effect" of multiple instances of misconduct renders a trial unfair. *Glasmann*, 175 Wn. 2d at 707; *accord Pierce*, 169 Wn. App. at 556 ("Taken together, there is more than a substantial likelihood that the above three improper arguments affected the verdict.").

The State also claims there was no prejudice because the court instructed the jury that arguments of counsel are not the evidence or the law. BOR at 45. This contention is without merit. The instruction the State cites was given in *all* cases in which this Court and the Supreme Court reversed convictions for prosecutorial misconduct. *Compare* WPIC 1.02 (standard instruction given in all cases) *with, e.g., Walker*, 182 Wn.2d 478-81; *Lindsay*, 180 Wn.2d at 442-44; *Glasmann*, 175 Wn.2d at 707; *Pierce*, 169 Wn. App. at 556 (all reversing for prosecutorial misconduct notwithstanding that court presumably gave standard instruction). As these

cases demonstrate, the State cannot commit misconduct and then hide behind a single sentence roughly two-thirds of the way through a 13-paragraph introductory instruction. This Court should reverse and remand for a new trial.

4. The exceptional sentence should be reversed for several independent reasons.

As explained in the opening brief, this Court should reverse the exceptional sentence for six independent reasons: (1) the State presented insufficient evidence to support the "gratuity" prong of the deliberate cruelty aggravator; (2) the State presented insufficient evidence to support the "atypicality" prong of the deliberate cruelty aggravator; (3) the State presented insufficient evidence to support the "substantial factor" prong of the vulnerable victim aggravator; (4) the State presented insufficient evidence to support the "atypicality" prong of the vulnerable victim aggravator; (5) the aggravating factors are unconstitutionally vague; and (6) the length of the sentence is arbitrary and excessive. AOB at 49-70.

In response, the State cites the wrong standard of review for the first four issues, implicitly concedes the fifth error by failing to address it, and relies on inapposite case law in addressing the sixth issue. BOR at 53-61. This Court should reverse the exceptional sentence and remand for resentencing within the standard range.

a. Insufficient evidence supports the aggravators, and the State cites the wrong standard of review.

The State presented insufficient evidence to prove the aggravating factors, requiring reversal and remand for resentencing within the standard range. AOB at 51-61.

The State argues otherwise but cites the wrong standard. Although the response brief in some places describes the standard of review correctly, it errs in its repeated use of the phrase "substantial evidence," which is a lower standard than "sufficient evidence." BOR at 53-54, 56-57. The Supreme Court has "rejected a substantial evidence standard in determining the sufficiency of the evidence because it does not require proof beyond a reasonable doubt." *State v. Vasquez*, 178 Wn. 2d 1, 6, 309 P.3d 318 (2013). Thus, in *Vasquez*, the Court reversed a conviction that had previously been upheld under a "substantial evidence" standard. *Id.* at 6-7. Similarly here, applying the correct standard of review, reversal is required.

As to the "deliberate cruelty" aggravator, reversal is required because the State failed to prove either gratuitous violence or atypicality. With respect to alleged gratuitous violence, the State's evidence showed a quick loss of consciousness and death. AOB at 53-54 (citing record).

Thus, the State failed to prove the infliction of pain as an end in itself, which is required to support this aggravating factor.

The response brief notes that Ms. Moore was alive for part of the attack, but this fact is true of every murder, and does not demonstrate gratuitous violence as an end in itself. BOR at 54-55. And while the State discusses Ms. Moore's beating heart, the relevant consideration is her consciousness – the infliction of pain as an end in itself, rather than to kill. For this reason, the State's reliance on *Scott* is misplaced. BOR at 55; *State v. Scott,* 72 Wn. App. 207, 214, 866 P.2d 1258 (1993), *aff'd sub nom State v. Ritchie,*126 Wn.2d 388, 894 P.2d 1308 (1995), *abrogated on other grounds by State v. O'Dell*, 183 Wn.2d 680, 694-95, 358 P.3d 359 (2015). There, the defendant "took time" to break 20 bones, sexually assault the victim, and strangle her twice. *Id.* at 215. "The evidence that the assaults occurred in three different rooms also suggest[ed] a prolonged attack and lingering suffering." *Id.*

In contrast, the State's crime scene expert here testified, "It didn't seem like there was a long, drawn-out fight." RP (2/22/17) 4881. "It all seemed to be contained to a very small location." *Id.* The victim appeared to have been knocked down and then stabbed, after which she would have lost consciousness quickly. RP (2/22/17) 4880; RP (2/23/17) 5108. And the prosecutor in closing argument acknowledged Ms. Moore was "not

probably alive for a long time." RP (3/22/17) 8322. The response brief also acknowledges that nothing at the crime scene indicated Ms. Moore "put up a fight – no furniture was moved around nor was anything broken in the kitchen where her body was found." BOR at 27. It acknowledges "[t]here was no sign of struggle[.]" BOR 57. There was no evidence of a prolonged attack or lingering suffering. *Contrast Scott,* 72 Wn. App. at 215. Thus, the State failed to prove the "gratuity" prong of this aggravator.

As to the "atypicality" prong, the response brief claims, "The State did not need to put on evidence of the type or level of violence inflicted in a 'typical' homicide for the jury to conclude he went far beyond where he needed to go to end Moore's life." BOR at 55. But to begin with, if the actions were beyond those necessary to kill, that would cut against a finding of deliberate cruelty – it is far more cruel to prolong a person's suffering than to ensure a quick death. *See State v. Serrano,* 95 Wn. App. 700, 713, 977 P.2d 47 (1999); *State v. Brush,* noted at 181 Wn. App. 1009, 2014 WL 1912009 (2014) ("*Brush I*"), *aff'd* 183 Wn.2d 550, 561, 353 P.3d 213 (2015) ("*Brush II*"); AOB at 54-55. In any event, the State claim that it was not required to prove atypicality is legally erroneous. *State v. Suleiman,* 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006); *Scott,* 72 Wn. App. at 214. This Court should accept the State's implicit concession that

it failed to present any evidence, let alone sufficient evidence, of atypicality.

The State also failed to prove the "particularly vulnerable victim" aggravating factor; it did not prove vulnerability was a substantial factor in the commission of the crime and did not prove atypicality. AOB at 57-61. It is true courts have held that age alone can support a finding that the victim was vulnerable. BOR at 56-57. But courts have also made clear that this vulnerability must be a *substantial factor* in the commission of the offense. *Suleiman,* 158 Wn.2d at 291-92; *Serrano*, 95 Wn. App. at 712; *see* CP 1624. And here, the State's evidence showed the motive to be overdue rent. AOB at 58-59 (citing record). The prosecutor argued to the jury that the rent problem was the motive, but it now claims, "Nothing in the record explains why Bennett, a healthy young farmworker in his mid-20s, killed his 82-year-old landlady[.]" BOR 57. Even if this were true, it amounts to a concession that the State presented no evidence that Ms. Moore's alleged vulnerability was a substantial factor in the commission of the offense. For this reason, too, this Court should reverse the exceptional sentence.

b. The aggravators are unconstitutionally vague, and the State implicitly concedes this error by failing to address it.

Another independent reason the sentence should be reversed is that the aggravating factors are unconstitutionally vague. AOB at 61-65. The State does not appear to have addressed this issue. The failure to address an issue should be taken as a concession of error. *See United States v. Caceres-Olla*, 738 F.3d 1051, 1054 n. 1 (9th Cir. 2013) ("In his opening brief, Caceres–Olla maintains that his conviction did not constitute 'sexual abuse of a minor,' another enumerated 'crime of violence' within Guideline 2L1.2(b)(1)(A), because section 800.04(4)(a) prohibits sexual conduct with minors of 14 years and older and does not require an element of 'abuse.' The government did not respond to this argument, and so has waived reliance on that 'crime of violence' variant."); *In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999) (failure of reply brief to address findings filed following opening brief constitutes concession that there was no prejudice); *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977, 983 (9th Cir. 1999) (failure of government to defend district court's ruling in appellate brief constitutes implicit concession of error).

This Court should also note that since the filing of the opening brief, our Supreme Court has explicitly recognized that aggravating factors

are elements of a crime – not merely "sentencing factors" – subject to the constitutional protections applicable to elements. *State v. Allen*, 192 Wn.2d 526, 534-35, 543-44, 431 P.3d 117 (2018). These constitutional protections include those under the Fourteenth Amendment. *Id.* at 538 (discussing Fourteenth Amendment requirement of proof beyond a reasonable doubt and citing *Apprendi v. New Jersey*, 530 U.S. 466, 469, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). Thus, the Fourteenth Amendment protection against vague laws applies to aggravating factors, and this Court should hold the aggravators in question are unconstitutionally vague. AOB at 65-67.

c. <u>The sentence is arbitrary and excessive, and the State relies on inapposite case law</u>.

Finally, even if this Court finds the aggravators are supported by sufficient evidence and are not vague, it should hold that the length of the exceptional sentence is arbitrary and excessive.

The State argues otherwise, but in its section listing supposed "[f]actors leading to court's determination of appropriate exceptional sentence," the State sets out three sentences, one of which is "During allocution, [Mr. Bennett] maintained his innocence." BOR 28. This is an unconstitutional basis for imposing an exceptional sentence. "Trial courts may not use a defendant's silence or continued denial of guilt as a basis

for justifying an exceptional sentence." *State v. Garibay*, 67 Wn. App. 773, 782, 841 P.2d 49 (1992).

The State also claims the trial court properly relied on *Scott*. BOR at 58-59. But while the exceptional sentence in *Scott* was longer, BOR at 59, the trial court here applied the same formula as in *Scott* – it "identif[ied] a sentence within the higher end of the applicable standard range, and then applied a multiplier of three as a result of the presence of the aggravating factors." RP (5/12/17) 8761. Using the same formula as that in *Scott* was untenable given that, as the State acknowledges, "the aggravating facts in Scott are undeniably more egregious[.]" BOR 59.

Reliance on *Scott* is inappropriate for the additional reason that it has been abrogated by *O'Dell* on the question of whether young age at the time of the crime is relevant. *See O'Dell*, 183 Wn.2d at 694-95. The State complains that Mr. Bennett did not raise the issue of youth in the sentencing court and points out that *O'Dell* stated a court "may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished an adult offender's culpability." BOR at 60-61 (quoting *O'Dell*, 183 Wn.2d at 689). But Mr. Bennett is not advocating an exceptional sentence below the standard range; his point is that his young age counsels against a long exceptional sentence *above* the standard range. He also notes that *O'Dell's* abrogation of *Scott* on the age

issue is yet another reason – in addition to the undeniably more egregious facts – that the trial court's reliance on *Scott* was untenable. This Court should reverse and remand for resentencing. AOB at 69-70.

B. CONCLUSION

Mr. Bennett asks this Court to reverse his conviction and remand for dismissal of the charge with prejudice because government mismanagement prejudiced his right to a fair trial. In the alternative, the remedy for the mismanagement should be reversal and remand for suppression of all evidence disclosed after May 31, 2016, and for a new trial.

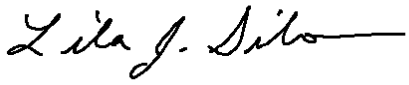
Alternatively, a new trial should be granted because the trial court erroneously excluded evidence and argument regarding other suspects, and the prosecutor committed multiple instances of misconduct.

At a minimum, this Court should reverse the exceptional sentence and remand for resentencing for several independent reasons: the State presented insufficient evidence to sustain the aggravating factors; the

aggravating factors are unconstitutionally vague; and the length of the sentence is excessive.

DATED this 17th day of June, 2019.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project – 91052
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35297-8-III
	)	
CHAD BENNETT,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JUNE, 2019, I CAUSED THE ORIGINAL **CORRECTED 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:

[X] KATHARINE MATHEWS [kwmathews@grantcountywa.gov] GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JUNE, 2019.

x_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Telephone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

June 19, 2019 - 4:25 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35297-8
Appellate Court Case Title:	State of Washington v. Chad Gerrit Bennett
Superior Court Case Number:	14-1-00778-0

The following documents have been uploaded:

- 352978_Briefs_20190619162430D3565235_2115.pdf
  This File Contains:
  Briefs - Appellants Reply - Modifier: Amended
  The Original File Name was washapp.061919-05.pdf
- 352978_Letter_20190619162430D3565235_4578.pdf
  This File Contains:
  Letter
  The Original File Name was washapp.061919-04.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov
- greg@washapp.org
- kwmathews@grantcountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190619162430D3565235