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No. 35297-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

CHAD BENNETT,

Appellant.

---

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

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# AMENDED OPENING BRIEF OF APPELLANT

*Shortened per Court's Orders of October 10 and 31, 2018*

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## A. INTRODUCTION

The constitutional rights to a speedy trial and effective counsel are critical components of our criminal justice system. Yet Chad Bennett sat in jail for over 21 months before the State tested the decedent's shirt for DNA and disclosed over 200 hours of recordings it had purposely withheld. The trial court denied Mr. Bennett's motion to dismiss for government misconduct, ruling that a continuance would "alleviate the problem" by giving counsel time to review the late discovery dump. In so ruling, the trial court wrongly forced Mr. Bennett to waive his right to a speedy trial in order to exercise his right to prepared counsel. This Court should reverse and dismiss.

In the alternative, a new trial should be granted because the court erred in denying a motion to suppress and in excluding evidence of other suspects, and the prosecutor committed prejudicial misconduct.

At a minimum, this Court should reverse the exceptional sentence and remand for resentencing. The State presented insufficient evidence to support the aggravating factors, the aggravators are unconstitutionally vague, and the sentence is excessive.

## B. ASSIGNMENTS OF ERROR

1. The court abused its discretion and violated Mr. Bennett's rights under the Sixth and Fourteenth Amendments and article I, §§ 3 and 22 by

denying his motion to dismiss the charge for government mismanagement pursuant to CrR 8.3(b), and in denying the alternative remedy of suppression. CP 139-268, 287; RP (7/5/16) 31-85; RP (7/6/16) 86-90.

2. The court abused its discretion and violated Mr. Bennett's rights under the Sixth and Fourteenth Amendments and article I, §§ 3 and 22 by excluding "other suspect" evidence and argument. CP 866-72, 1214-20; RP (1/27/17) 374-80; RP (2/6/17) 3153-71.

3. Prosecutorial misconduct deprived Mr. Bennett of a fair trial. RP (3/21/17) 8150-8260; RP (3/23/17) 8524-92.

4. Insufficient evidence supports the "deliberate cruelty" and "particularly vulnerable victim" aggravating factors. CP 1656-57, 2138.

5. The "deliberate cruelty" and "particularly vulnerable victim" aggravating factors are unconstitutionally vague. CP 2206-22, 2241-44.

6. The trial court erred in imposing an exceptional sentence above the standard range. CP 2138-56, 2241-44.

7. The length of the exceptional sentence is arbitrary and excessive. RP (5/12/17) 8761; CP 2141-42.

C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>

1. A court should dismiss a charge pursuant to CrR 8.3(b) where the State's late provision of material discovery forces a defendant to choose between his constitutional rights to prepared counsel and a speedy

trial. Here, the State withheld over 200 hours of recordings of telephone calls and failed to perform DNA testing on the victim's shirt until 21 months after charging Mr. Bennett with murder. Did the trial court abuse its discretion and violate Mr. Bennett's constitutional rights by denying his motion to dismiss, forcing him to waive his right to a speedy trial so counsel could review the late discovery dump?

2. Because the defendant has a constitutional right to present a defense, the accused must be permitted to present evidence and argument that some "other suspect" committed the crime, so long as the defendant's evidence satisfies the low threshold of relevance. This court and our supreme court have rejected the argument that the defendant must show the other suspect "took steps" toward commission of the crime; rather, the defendant must simply show a "logical connection" between the other suspect and the crime, such as would create a reasonable doubt as to the defendant's guilt. Did the trial court err by excluding other-suspect evidence on the basis that Mr. Bennett failed to show the other suspects took "some affirmative step towards actually doing the crime?"

3. A prosecutor commits misconduct by citing facts not in evidence, offering personal opinions, issuing emotional appeals, shifting the burden of proof, undermining the presumption of innocence, or trivializing the jury's role. Here, the prosecutor:

- told the jury a witness testified there was “clear evidence of clean-up” even though the witness did not say this

- 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 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.”

Did prosecutorial misconduct deprive Mr. Bennett of a fair trial?

4. To prove the “deliberate cruelty” aggravating factor which permits an exceptional sentence, the State must show beyond a reasonable doubt the defendant engaged in gratuitous violence that inflicted pain as an end in itself and did not inhere in the crime. Here, the evidence showed the victim died quickly. Did the State present insufficient evidence of gratuitous violence beyond that which inheres in the crime of murder?

5. To prove “deliberate cruelty,” the State must also prove the crime was more egregious than typical. Here, the State presented no evidence of the violence inflicted in other murder cases. Did the State fail to prove atypicality?

6. To prove the "particularly vulnerable victim" aggravating factor that permits an exceptional sentence, the State must show beyond a reasonable doubt not only that the victim was vulnerable, but also that this vulnerability was a "substantial factor" in the commission of the offense. Here, the State presented evidence and argument that Mr. Bennett killed his elderly landlady because he could not afford to pay rent and she threatened to evict him. Did the State fail to prove the victim's alleged vulnerability was a "substantial factor" in the commission of the offense?

7. To prove the "particular vulnerability" aggravator, the State must also show the victim was more vulnerable than the typical victim of the crime. Here, the State presented no evidence of victim characteristics in other murder cases. Did the State fail to prove atypicality?

8. A law is unconstitutionally vague if it permits arbitrary application or does not give fair notice of when conduct crosses a proscribed line. Are the "deliberate cruelty" and "vulnerable victim" aggravators unconstitutionally vague?

9. The U.S. Supreme Court has held that any law which increases the available punishment may be challenged as unconstitutionally vague. The aggravating factors listed in RCW 9.94A.535 increase the permissible sentence for class A felonies from the top of the standard range to life in prison. Absent an aggravator, a court may not sentence a defendant above

the top of the range. May the aggravating factors be challenged as unconstitutionally vague?

10. Even if aggravators are valid, an exceptional sentence should be reversed as excessive if the term was selected on untenable grounds. Here, the sentencing judge used the same formula applied in a 1993 case where the defendant was convicted of first-degree murder with four aggravating factors. Mr. Bennett was convicted of second-degree murder with two aggravating factors. Also, the court in the earlier case said it was "absurd" to consider youth a mitigating factor, a holding that has been abrogated. Did the court set the sentence on untenable grounds?

D. STATEMENT OF THE CASE

Chad Bennett is a young husband and father of four children. RP (3/14/17) 7289-91. He and his family lived with his brother for a time, but when Chad's daughter revealed her uncle sexually abused her, Mr. Bennett immediately reported the crime and moved his family out of the home. CP 12, 964-66; RP (5/12/17) 8746.

The Bennetts then rented a house from Lucille Moore, who owned and rented out several homes in her Ephrata neighborhood. RP (2/28/17) 5436; RP (3/14/17) 7294-95. Ms. Moore was kind and flexible with payment plans when her tenants fell behind on rent. RP (3/14/17) 7297, 7314. For example, tenants Charles and Brandi Larr had trouble keeping

up with their rent, and Ms. Moore accommodated them. RP (3/9/17) 6872-73. Mr. Bennett obtained employment at C&C Farms, whose owners also loaned him money for rent and other essentials. RP (3/6/17) 6169-6291; RP (3/14/17) 7314, 7317, 7339-40.

On September 7, 2014, Mr. Bennett went to Ms. Moore's home to pay rent. RP (3/14/17) 7305. According to Bennett, he was at Ms. Moore's house three times that day: once to pay rent, once to pay the remainder of the deposit, and once to retrieve his wallet, which he had inadvertently left behind. RP (3/14/17) 7316; RP (3/15/17) 7406-07, 7409-10.

On September 8, 2014, Ms. Moore's neighbor found her lying on the floor with a pillow over her face and blood all over her shirt. RP (2/15/17) 4277, 4347-49. The neighbor called the police, who confirmed Moore was dead. RP (2/15/17) 4359, 4405-13. The forensic pathologist and crime scene specialist determined Ms. Moore had died quickly after being knocked to the ground, strangled, and stabbed multiple times. RP (2/22/17) 4880; RP (2/23/17) 5108.

During their investigation, detectives learned that multiple tenants were behind on rent, that Ms. Moore's daughter and her boyfriend made suspicious statements, and that Mr. Bennett was in Ms. Moore's home the day she died. CP 8, 16, 57, 64, 66, 68. Detectives sent several items to the crime laboratory for testing, and learned that Mr. Bennett's DNA was on a

cigarette butt on the floor and on the wall where some blood was smeared. CP 15. Mr. Bennett's DNA, along with the DNA of two others, was also on the pillow. CP 15. The forensic scientist determined that Mr. Bennett was a "heavy shedder," meaning he deposits more DNA than average with each touch. RP (7/5/16) 42-43. RP (3/2/17) 5791.

In November of 2014, detectives arrested Chad Bennett and the State charged him with first-degree murder. CP 1-16. Trial was continued numerous times. Finally, after Mr. Bennett had been held in jail for 21 months, trial was set to begin on July 7, 2016, with a speedy-trial expiration date of July 8. RP (5/31/16) 133-34.

At the end of June, 2016, the prosecution gave the defense: (1) over 200 hours of recordings the detective had collected for 21 months but purposely withheld, and (2) the results of DNA testing on the victim's shirt, which the State had just performed even though it had had the shirt since September of 2014. CP 144, 148, 155, 175-76, 182, 203-04; RP (7/5/16) 32-33. Mr. Bennett moved to dismiss the charge for government mismanagement pursuant to CrR 8.3(b). CP 139-268; RP (7/5/16) 31-37. The court agreed the government committed misconduct, but ruled it could "ameliorate the problem" with a continuance. RP (7/5/16) 55, 77, 81-83; CP 287. Mr. Bennett was accordingly forced to waive his right to a speedy trial. RP (7/6/16) 87-90.

Trial occurred in the fall of 2016. The State urged the jury to convict Mr. Bennett of murder, contending his statements about when he was at Ms. Moore's house and when he was in other locations did not make sense, and that he did not pay rent that day but instead killed Ms. Moore. RP (10/17/16) 2676-2769. The defense urged the jury to acquit because the State failed to prove Mr. Bennett's DNA was on the items in question because he killed Ms. Moore rather than because he was in the house paying rent, and the killer could have been Ms. Moore's daughter or another tenant. RP (10/17/16) 2775-2838; RP (10/18/16) 2858-2901.

After deliberating for a significant time, the jury indicated it was deadlocked, and the court declared a mistrial. RP (10/24/16) 3028-31.

The State planned to retry Mr. Bennett, although it admitted in its motions in limine that "[e]vidence linking the defendant to the murder is circumstantial, and much of it is inconclusive." CP 1272. Before the second trial, the State moved to prohibit Mr. Bennett from presenting evidence and argument that other suspects may have committed the crime. CP 1214-20. The court granted the motion over Mr. Bennett's objection. CP 866-70, 1220.

At the second trial, Bennett testified in his own defense, and the State introduced recordings of telephone conversations between Bennett and his wife in which Mr. Bennett said, "You know that I did it and you

were there with me." RP (3/14/17) 7288; RP (3/20/17) 7916; CP 1307. Bennett and his wife testified they were not talking about this case while the State argued they were discussing Ms. Moore's murder. RP (3/16/17) 7803; RP (3/20/17) 7916; RP (3/22/17) 8315. The State told the jury that Bennett "snapped" and killed Moore because he could not pay her the rent money that was overdue. RP (3/22/17) 8317, 8320; RP (3/23/17) 8567.

The jury acquitted Mr. Bennett of first-degree murder, but convicted him of the lesser offense of second-degree murder. CP 1652-53. The jury also found the two alleged aggravating circumstances applied: "deliberate cruelty" and "particularly vulnerable victim." 1656-57.

Bennett moved to vacate the aggravators for insufficent evidence and vagueness. CP 1904-13, 2206-22; RP (5/12/17) 8738-44. He moved for a sentence within the standard range of 134-234 months. *Id.* The court rejected the arguments and imposed an exceptional sentence of 660 months – double what Bennett could have received for first-degree murder, of which he was acquitted. CP 2141-42; RP (5/12/17) 8760-61.

## E. ARGUMENT

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

In June of 2016, 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. Because this government mismanagement prejudiced Mr. Bennett by forcing him to choose between his rights to prepared counsel and a speedy trial, this Court should reverse the conviction and remand for dismissal of the charge.

a. Relevant facts.

i. *The State failed to disclose over 200 hours of recordings of telephone calls and failed to test the victim's shirt until 21 months after charging Mr. Bennett.*

After Ms. Moore was found dead on September 8, 2014, detectives interviewed several witnesses and sent multiple items to the crime lab for testing. CP 3-16. On November 21, 2014 the lab reported that Chad Bennett's DNA was on swabs from a pillow, a wall, and a cigarette butt in Ms. Moore's home. CP 15. Detective Hufman arrested Mr. Bennett, and the State charged him with murder on November 25, 2014. CP 1-16, 142.

On December 16, 2014, the court entered the first omnibus order, directing the prosecutor to provide the defense with "all photographs, police reports, lab reports, witness statements, audio and video recordings, and the State's witness list" by December 29, 2014. CP 142, 2245.

In December of 2014, Detective Hufman began receiving audio

recordings of Mr. Bennett's telephone conversations from jail, and he began listening to them starting January 27, 2015. CP 143, 176, 267-68, 285-86. The State did not provide any of the recordings to the defense. Detective Hufman deliberately withheld the audio recordings from the defense, notwithstanding the omnibus order, because he "did not want Chad to learn that his calls were indeed being reviewed." CP 144, 175-76.

Trial was originally set for January 22, 2015, but was continued at least six times throughout 2015 and the first half of 2016. CP 144. Detective Hufman continued to receive and review audio recordings of jail calls during this 18-month period. CP 144. During this entire period, Detective Hufman purposely withheld the recordings from the defense, and did not even disclose their existence. CP 144, 176.

On May 31, 2016, trial was continued again to July 7, with an expiration date of July 8. RP (5/31/16) 133-34.

On June 17, 2016, three weeks before the scheduled trial date, the State gave the defense a CD with over 200 hours' worth of recordings of telephone calls. CP 144; RP (7/5/16) 32. In his police report dated June of 2016, Detective Hufman admitted he had been receiving and reviewing the calls for over a year and a half and intentionally concealing them. CP 176; RP (7/5/16) 32-33. He stated: "Throughout the investigation, I have reviewed a majority of the recorded calls. Due to the fact this investigation

is still ongoing, and I did not want Chad to learn his calls were indeed being reviewed, no report was completed until now, and no recording[s] were previously turned over[.]" CP 176.

That same month, 21 months after the murder, the State finally sent Ms. Moore's shirt to the crime lab for DNA testing. CP 148. Investigators had had the shirt in their possession since September of 2014, but did not ask the crime lab to test it until June 1, 2016 – the day after the court reset trial to July 7, 2016. CP 148, 182, 203-04. On June 29, 2016, eight days before the trial date, the defense received the lab report stating that Mr. Bennett's DNA and the DNA of two unknown male contributors was on the shirt. CP 148, 155. The report did not state whether the two unknown contributors matched the two unknown contributors on the pillow. *Id.*; *see also* CP 196-97; RP (7/5/16) 36.

In addition to the late dump of telephone-call recordings and late testing of the victim's shirt, the State in June of 2016 amended its witness list twice, provided two new reports regarding witness interviews, and delivered other miscellaneous materials. CP 149, 158-74, 177-81.

ii. *Mr. Bennett moved to dismiss the charge for government mismanagement because he was forced to choose between his rights to a speedy trial and prepared counsel, but the court denied the motion.*

On July 1, 2016, Mr. Bennett moved to dismiss the charge for

government mismanagement under CrR 8.3(b). CP 139-268; RP (7/5/16) 31-37.[1] The court held a hearing on the motion on July 5. RP (7/5/16) 31-85. Mr. Bennett explained dismissal was appropriate because of the "late disclosure of a large number of significant pieces of evidence in the case." RP (7/5/16) 31. He noted that the State had had the victim's shirt since September of 2014 but failed to test it until June of 2016, and that the State had deliberately withheld over 200 hours of recorded telephone calls until June of 2016. CP 139-51; RP (7/5/16) 31-34.

Mr. Bennett argued this withholding was a direct violation of the omnibus order as well as the rules of discovery, which impose an ongoing obligation. CP 150; RP (7/5/16) 33. Although defense counsel and his investigator had started listening to the recordings, they would not be able to finish listening to them by the trial date. RP (7/5/16) 33-34. And as to the recently provided lab results, the defense DNA expert would need 4-5 weeks to analyze the newly disclosed data. RP (7/5/16) 38-40, 69-70. Defense counsel explained that after listening to the calls and evaluating the data, he would need to adjust his trial strategy accordingly. The new information would affect opening statements, cross-examination of State's witnesses, and presentation of the defense case. RP (7/5/16) 75-76. Thus,

[1] He also renewed the motion following the mistrial. CP 684.

in order to respond to the late discovery, defense counsel would be forced to request a continuance beyond the speedy trial expiration date. *Id.*

Counsel noted the State's failure to act with due diligence forced Bennett into a "Hobson's Choice" between his right to a speedy trial and his right to effective assistance of counsel. *Id*; *see also* RP (7/5/16) 67-68, 76 ("Mr. Bennett would like to have his speedy trial rights honored, but he also wants to go to trial with an attorney who is adequately prepared …. [H]e is currently being forced to choose between two rights, which should not happen. He's being forced to choose."). Bennett cited cases in which courts had dismissed charges under similar circumstances, and requested the same relief for his case. CP 151-52. He asked in the alternative to suppress evidence disclosed after May 31. CP 152; RP (7/5/16) 38.

The court acknowledged it appeared "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. 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.

The court nevertheless denied the motion to dismiss and the alternative motion to suppress. CP 287; RP (7/5/16) 77. The defense was forced to request a continuance, and trial started over two months later. RP (7/6/16) 87-90 (setting trial date of September 12). The court recognized that Mr. Bennett was "on the horns of a dilemma," because he had to choose between prepared counsel and a speedy trial. RP (7/6/16) 89. Yet it ruled that a continuance could "ameliorate the problem." RP (7/5/16) 55.

As explained below, the court erred in denying the motion to dismiss and forcing Mr. Bennett to choose between his rights to prepared counsel and a speedy trial.

b. <u>A charge should be dismissed where government mismanagement prejudices the right to a fair trial</u>.

CrR 8.3(b) provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

This Court has recognized that the rule imposes two requirements. A defendant must show: "(1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial." *State v.*

*Barry*, 184 Wn. App. 790, 797, 339 P.3d 200 (2014).

i. *The government mismanages a case when it fails to comply with discovery rules and orders.*

As to the first prong, a defendant need not show intentional malfeasance; "simple mismanagement is sufficient." *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). The failure to comply with discovery orders and rules constitutes mismanagement within the meaning of the rule. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 428-29, 403 P.3d 45 (2017); *State v. Sherman*, 59 Wn. App. 763, 768, 801 P.2d 274 (1990).

ii. *The mismanagement prejudices a defendant when it forces him to choose between prepared counsel and a speedy trial.*

As to the second prong, "[i]mportantly, late disclosure of material facts can support a finding of actual prejudice." *Salgado-Mendoza*, 189 Wn.2d at 432. A defendant demonstrates prejudice warranting dismissal by showing the mismanagement adversely affected his right to a speedy trial or his "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). If delayed disclosure results in the defendant having to make a "Hobson's choice" between his rights to a speedy trial and to prepared counsel, the charge should be dismissed. *See Sherman*, 59 Wn. App. at 769. This Court does "not

believe a defendant should be asked to choose between two constitutional rights in order to accommodate the State's lack of diligence." *Id.* at 770.

c. The trial court abused its discretion in denying the motion to dismiss because government mismanagement prejudiced Mr. Bennett's right to a fair trial.

Mr. Bennett proved mismanagement and prejudice because the State provided significant discovery right before trial, forcing Mr. Bennett to waive his right to a speedy trial and request a continuance in order for counsel to prepare. This Court should remand for dismissal of the charge.

i. *The trial court properly recognized that Mr. Bennett proved mismanagement because the State dumped significant amounts of previously available discovery on defense counsel shortly before the trial date.*

On the first prong, the trial court properly recognized that Mr. Bennett proved mismanagement because the State provided significant discovery 21 months after arresting and charging him, contrary to the omnibus order and the discovery rules.

The omnibus order of December 2014 directed the State to provide the defense with "all … audio and video recordings," CP 2245, yet Detective Hufman purposely withheld over 200 hours of audio recordings from the defense. CP 142. Detective Hufman admitted he had was receiving and reviewing the calls for over a year and a half without disclosing them, and that this tactic was intentional. CP 176; RP (7/5/16)

32-33. The State dumped the recordings on the defense in late June of 2016. CP 144; RP (7/5/16) 32.

Similarly, the crime lab scientist knew early in the investigation that Mr. Bennett was a "heavy shedder." RP (7/5/16) 42-43. This meant that even though the decedent's shirt was saturated with her own blood, Mr. Bennett's DNA would also likely be found on the shirt if he touched her that day. RP (7/5/16) 41-42. Yet, the State did not even submit the shirt for testing until June of 2016, providing the results just before the speedy trial expiration date. CP 148, 155.

Courts have found mismanagement in similar circumstances. In *Sherman*, this Court found mismanagement where the State charged the defendant with stealing from her employer but did not timely produce the employer's IRS records as required in the omnibus order. 59 Wn. App. at 765, 768-69. In *Brooks*, this Court found mismanagement where the State violated CrR 4.7(a) by failing to provide witness lists, police reports, and the defendant's statement to police in a timely manner. *State v. Brooks*, 149 Wn. App. 373, 386-387, 203 P.3d 397 (2009). In *Daily*, our Supreme Court found mismanagement where the State violated court orders and discovery rules by providing lab reports and witness lists late. 93 Wn.2d at 455-56, 459. And in *Salgado-Mendoza*, the Court found mismanagement where the State failed to identify which one of nine potential toxicologists

would testify until the morning of trial. 189 Wn.2d at 433.

Here, Bennett proved mismanagement because the State delayed in testing the shirt and in disclosing hundreds of hours of recordings. Indeed, the judge recognized that Bennett proved mismanagement. The court said it appeared "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. Addressing the numerous 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.

In sum, the trial court properly recognized that Mr. Bennett proved mismanagement. But, as explained below, the court misunderstood the analysis on the prejudice prong, and provided no remedy for the violation.

ii. *The trial court's remedy of a continuance was improper; Mr. Bennett proved prejudice because he was forced to waive his right to a speedy trial in order for the defense to review the late discovery dump.*

Mr. Bennett proved prejudice warranting dismissal, and the trial

court abused its discretion by denying the motion to dismiss and forcing Mr. Bennett to waive his right to a speedy trial and request a continuance. In making its decision, the court stated, "The law seems to be that dismissal is only a remedy where there is no less severe remedy that can ameliorate the problem." RP (7/5/16) 55.

The trial court failed to recognize that a continuance can only "ameliorate the problem" if the new date is still before the speedy trial expiration date. If the continuance forces the defendant to waive his right to a speedy trial, a continuance does *not* ameliorate the problem and is not a remedy at all. *See Salgado-Mendoza*, 189 Wn.2d at 432; *Michielli*, 132 Wn.2d at 244-45; *Sherman*, 59 Wn. App. at 769-70. Because the court denied the dismissal motion on untenable grounds, it abused its discretion.

*Sherman* is instructive. There, the State failed to provide IRS records to a defendant charged with theft, claiming it attempted in good faith to do so but the records were in the control of an outside company. 59 Wn. App. at 768-69. That company did not request the records from the IRS until 10 days after the initial trial date. *Id.* at 769. The State argued the remedy for the problem was a continuance until the IRS responded to the records request, but this Court disagreed. *Id.* This Court noted that the speedy trial expiration date had already been extended seven times and that "[t]o require [the defendant] to request a continuance under these

circumstances would be to present her with a Hobson's choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense." *Id.*

Similarly, in *Michielli*, the Court held dismissal was warranted where the State's mismanagement resulted in its adding charges on October 27, just five days before trial was set to begin on November 1. *Michielli*, 132 Wn.2d at 233, 243-44. Although a month remained before the November 30 speedy trial expiration date, defense counsel apparently needed more time to prepare to meet the new charges. *See id.* at 233, 244. "Defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges[.]" *Id.* at 244. The Court stressed, "Defendant's being forced to waive his speedy trial right is not a trivial event." *Id.* 245. Thus, "Defendant has supported his CrR 8.3(b) motion to dismiss the amended charges." *Id.* at 246.

Here, the trial judge acknowledged that Mr. Bennett had to choose between two constitutional rights. RP (7/6/16) 89. The court found that "Mr. Bennett has been placed in a position where he has to choose between the effective assistance of counsel and a speedy trial." RP (7/5/16) 81. Yet it forced him to make that choice, rather than finding prejudice and dismissing the case. Because the court rested its decision on the prejudice prong on untenable grounds, it abused its discretion.

d. This Court should reverse.

i. *This Court should reverse and remand for dismissal of the charge with prejudice.*

As explained above, the trial court afforded no remedy when it forced Mr. Bennett to waive his right to a speedy trial and request a continuance in order for his counsel to review the extensive discovery the State provided late. Where a defendant establishes prejudice by showing "the interjection of new facts due to the late disclosure" forced him "to choose between his right to a speedy trial and his right to be represented by adequately prepared counsel[,]" dismissal is the only appropriate remedy. *Salgado-Mendoza,* 189 Wn.2d at 436 & n.10; *see also id.* at 432; *Michielli*, 132 Wn.2d at 246; *Sherman*, 59 Wn. App. at 769-70.

Here, as in *Sherman,* the interjection of new facts due to late disclosure forced Mr. Bennett to choose between his right to a speedy trial and his right to be represented by adequately prepared counsel. This Court should reverse and remand for dismissal of the charge with prejudice.

ii. *In the alternative, this Court should reverse and remand for suppression of the late-disclosed evidence, and for a new trial.*

If this Court disagrees that dismissal is the only appropriate remedy, it should, at a minimum, remand for suppression of all evidence provided after May 31, 2016, and for a new trial. This is the alternative

remedy Mr. Bennett requested in the trial court. CP 152; RP (7/5/16) 38.

Suppression is a suitable remedy if it "adequately addresses the prejudice." *Salgado-Mendoza*, 189 Wn.2d at 431. Mr. Bennett averred that he was ready for trial on July 5 and would not have to waive his right to a speedy trial if the court suppressed the late-provided evidence. RP (7/5/16) 38. But in addition to denying the motion to dismiss, the court denied the alternative motion to suppress. RP (7/5/16) 77.

The trial court's refusal to suppress the evidence was not harmless. Even with the late-provided evidence before it, the jury could not agree on Bennett's guilt at the 2016 trial. RP (10/24/16) 3028-31. If that evidence had been suppressed, the jury may have voted to acquit. Thus, if this Court disagrees that dismissal is required, it should reverse and remand for suppression of the evidence disclosed after 5/31/16, and for a new trial.

**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.**

Although it acknowledged a defendant has a Sixth Amendment right to present a defense, the State moved to exclude Mr. Bennett's proffered evidence that Ms. Moore's daughter and her boyfriend or Ms. Moore's tenants Charles and Brandi Larr may have committed the crime. The trial 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. But 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.

a. Relevant facts.

i. *The State moved to exclude evidence suggesting the possibility that Lucille Moore's daughter, daughter's boyfriend, or another tenant killed Ms. Moore.*

Before the second trial, the prosecutor asked Mr. Bennett to specify "whether the defense intends to proffer any other suspect evidence and who that may be." RP (1/27/17) 375. Mr. Bennett then filed a pleading suggesting he would introduce evidence implicating Lucille Moore's daughter, Wendy Swain, and Ms. Swain's boyfriend, John Rehfield. CP 866-70. He noted Detective Hufman initially believed a close family member had committed the crime because it appeared to be a "rage"

killing with a staged burglary. CP 870. RP (10/10/16) 86.

Ms. Swain and Mr. Rehfield had the opportunity and ability to commit the crime because Ms. Swain lived within a mile of Ms. Moore and was welcome in her home. RP (2/6/17) 3161, 3163. They also had a motive because Ms. Swain stood to gain a significant inheritance; it was undisputed that Ms. Moore "had substantial assets[.]" CP 866-67; RP (10/11/16) 171. According to Ms. Moore's sister-in-law, Ms. Moore's children "were just waiting for her to die." CP 64, 869.

Two days after the murder, Ms. Swain and Mr. Rehfield went to Ms. Moore's bank and asked "how someone could gain access to a safe deposit box belonging to a person who had become deceased." CP 867. Mr. Rehfield "did most of the talking for the two of them." CP 64. The bank manager described the interaction as "very cold." CP 64.

Det. Hufman had a similar experience. After he met with Swain and Rehfield, he noted in his report that his contact with the two was "cold and unsettling." CP 8, 870; RP (10/10/16) 27.

Rehfield failed a polygraph test. CP 68, 868. The examiner determined Rehfield "was not being truthful during the testing." CP 68.

The defense also proffered evidence showing that some of Ms. Moore's other tenants, and specifically Charles and Brandi Larr, may have perpetrated the crime. CP 866, 870-71. The State's theory of the case was

that Mr. Bennett killed Ms. Moore because he could not afford rent and was about to be evicted, but other tenants had been in further arrears. CP 870-71. The Larrs had had problems with timely rent payments, and another neighbor witnessed a heated argument between Brandi Larr and Ms. Moore shortly before Ms. Moore's death. CP 57, 870; RP (10/11/16) 144; RP (2/6/17) 3160. During this argument, the neighbor heard Ms. Moore say to Ms. Larr, "Do I have to show you the lease?" CP 870; RP (10/11/16) 145. Wendy Swain confirmed to Detective Hufman that, in addition to the Bennetts, the Larrs "could have had something to do with it because they were given or were about to be given eviction notices." CP 66. And on the day of the murder, neighbor Anastasia Bunakova saw a man cross the street from the vicinity of the Larrs' house and enter the back of Ms. Moore's house. CP 871; RP (2/6/17) 3155, 3162.

The State moved to exclude the evidence, arguing the Sixth Amendment right to present an other-suspect defense was only a "limited right." CP 1214-20. It characterized Mr. Bennett's proffered evidence as "speculative," and urged the court to exclude it. CP 1219.

ii. *The trial court granted the State's motion on the basis that, although the other suspects had motive and opportunity, Mr. Bennett did not show they took "some affirmative step towards actually doing the crime."*

The trial court heard oral argument on the issue as part of motions

in limine. RP (2/6/17) 3153- 71. Mr. Bennett noted that the law permitted him to present circumstantial evidence that some other suspect committed the crime, and he was not required to have direct evidence of another perpetrator. RP (2/6/17) 3156-57. This was especially so given that, in the State's own words, "[e]vidence linking the defendant to the murder is circumstantial, and much of it is inconclusive." CP 1272 (State's supplemental motions in limine). Mr. Bennett argued that the evidence of other suspects "should be heard by the jury and let them make up their own mind as to whether it should be considered or how much consideration to give it." RP (2/6/17) 3167.

The court read Mr. Bennett's offer of proof regarding Swain, Rehfield, and the Larrs, and agreed "there was a strong argument here about motive and opportunity." RP (2/6/17) 3154. But the court believed the defense also had to show "some type of step taken by any of these other individuals that the defendant has identified as potentially having committed the crime." RP (2/6/17) 3170. The court reiterated that "certainly, you know, the motive can be identified." RP 3171. "But without some affirmative step toward actually doing the crime, it comes down to basically it not being relevant enough to outweigh the burden or outweigh the – what's the rule say, 403? – outweigh the danger of potential confusion of the issues or misleading the jury or potentially

unfair prejudice." RP (2/6/17) 3171. The court therefore granted the State's motion to exclude the other-suspect evidence. CP 1220.

b. "Other suspect" evidence must be admitted if it tends to create a reasonable doubt as to the defendant's guilt; the defendant need *not* show the other suspect had "taken steps" to commit the crime.

The Sixth and Fourteenth Amendments and article I, sections 3 and 22, "guarantee a criminal defendant a meaningful opportunity to present a defense." *Ortuño-Perez*, 196 Wn. App. at 783-84; U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. As part of this right, a defendant may present evidence and argument that some "other suspect" may have committed the offense. *Franklin*, 180 Wn.2d at 378.

Because of the constitutional rights at issue, the threshold for admission of other-suspect evidence is low: such evidence is admissible so long as it "has a logical connection to the crime." *Ortuño-Perez*, 196 Wn. App. at 790. The connection must not be merely speculative, but it may be established by circumstantial evidence and may consist of "motive, ability, opportunity, and/or character evidence[.]" *Franklin*, 180 Wn.2d at 381. The defendant need *not* show that the other suspect "had taken steps to commit the crime." *Ortuño-Perez*, 196 Wn. App. at 790. Rather, if the proffered evidence "tends to create a reasonable doubt as to the *defendant's* guilt," then it must be admitted. *Franklin*, 180 Wn.2d at 381.

c. The trial court abused its discretion in excluding other-suspect evidence on the basis that Mr. Bennett failed to show the other suspects took "some affirmative step towards actually doing the crime."

The trial court committed an error of law and therefore necessarily abused its discretion by granting the State's motion to exclude other-suspect evidence on the basis that Mr. Bennett 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." *Ortuño-Perez*, 196 Wn. App. at 790. Indeed, in *Ortuño-Perez*, this Court reversed a murder conviction because the trial court had wrongly "excluded evidence pointing to [the other suspect] as the actual killer because the proffered evidence did not demonstrate 'steps taken' by [the other suspect] to commit the crime." *Id.* This Court should do the same here.

*Franklin* is also instructive. There, the defendant had a live-in girlfriend (Ms. Hibler) but also dated a colleague (Ms. Fuerte) for some time. *Franklin*, 180 Wn.2d at 373. After he and Ms. Fuerte broke up, Franklin became upset that Fuerte owed him $3,000 and that she was spending time with another man. *Id.* at 373-74.

The day after Franklin saw her with another man, Fuerte started

receiving numerous lewd calls and text, which she eventually learned were the result of a Craigslist ad urging readers to contact her for sexual favors. *Id.* at 374. A couple of nights later, Franklin confronted her at restaurant and threatened to defame her to her employers. *Id.* The harassment continued to escalate, with Fuerte receiving threatening e-mail messages the following week. *Id.* at 374-75. Franklin also called the woman, warning 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 State charged Franklin with cyberstalking, and he moved to present evidence of another suspect: his live-in girlfriend, Ms. Hibler. *Id.* at 376. She had a laptop, had accessed Franklin's e-mail account in the past, and had previously sent Fuerte threatening messages expressing displeasure about Fuerte's relationship with Franklin. *Id.* The court denied the motion based in part on its belief that the other-suspect rule "required more than showing mere motive and opportunity – it required specific facts showing that someone else committed the crime." *Id.* at 377.[2]

The Supreme Court reversed, stating, "We have never adopted a per se rule against admitting circumstantial evidence of another person's motive, ability, or opportunity." *Id.* at 373. Instead, "if there is an adequate

[2] The judge also looked at the strength of the evidence against the defendant. 180 Wn.2d at 377. The Supreme Court held both rationales were incorrect. *Id.* at 373.

nexus between the alleged other suspect and the crime, such evidence should be admitted." *Id.* This inquiry is satisfied if the evidence offered tends to create a reasonable doubt as to the defendant's guilt. *Id.* at 381.

The Court ruled the evidence proffered regarding Ms. Hibbler satisfied this low bar for admission, and that the trial court erred in excluding it. *Franklin,* 180 Wn.2d at 382. The Court explained: "The trial court in this case excluded evidence showing that another person had both the motive and opportunity to commit the crime. More than that, the excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin's guilt." *Id.*

This was so even though, as the dissent noted, Franklin "in no way connected Hibbler to the [e-mail] account actually used to perpetrate the crimes." *Franklin*, 180 Wn.2d at 386 (Owens, J., dissenting). "Franklin did not show that Hibbler even knew of the account, let alone that she created or accessed it." *Id.* Moreover, the threatening e-mails Hibbler sent out of jealousy were sent *two to three years* prior to the harassment at issue. *Id.* But as the majority noted, "other suspect" evidence need only create a reasonable doubt as to the *defendant's* guilt, and therefore the judge erred in excluding it. *Franklin*, 180 Wn.2d at 381-82.

The same is true here. Mr. Bennett presented evidence of other suspects that would create a reasonable doubt as to *his* guilt, and therefore

it should have been admitted. *Franklin*, 180 Wn.2d at 381. The court erred in excluding Mr. Bennett's proffered evidence on the basis that he failed to show another suspect took "some affirmative step towards actually doing the crime[.]" RP (2/6/17) 3171. *Ortuño-Perez*, 196 Wn. App. at 790.

d. The remedy is reversal and remand for a new trial.

Because the improper exclusion of other-suspect evidence violates a defendant's constitutional rights, a new trial is required unless the State proves, beyond a reasonable doubt, that the result of the trial would have been the same absent the error. *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Franklin*, 180 Wn.2d at 382; *Ortuño-Perez*, 196 Wn. App. at 801. In *Franklin*, the Court held the error was not harmless beyond a reasonable doubt even though the evidence against the defendant was strong and the evidence connecting the girlfriend to the crime was thin. *Franklin*, 180 Wn.2d at 383.

Here, the State similarly cannot meet its weighty burden to prove beyond a reasonable doubt that the result would have been the same absent the error. In the first trial, the State did not move to exclude "other suspect" evidence and the court did not impose any limitations on such evidence. *E.g.* RP (10/10/16) 27 (defense elicits testimony that Detective Hufman's interaction with Swain and Rehfield "was cold and unsettling"); RP (10/11/16) 156-72 (defense calls Terry Kinzel to testify about the

inheritance Wendy Swain expected to receive and how she and Rehfield reacted when they learned Ms. Moore chose to have her assets placed in a trust); RP (10/11/16) 142-46 (defense calls David Keyser to testify about the fight between Ms. Moore and the Larrs over lease issues shortly before Ms. Moore's death). The jury did not convict Mr. Bennett in the first trial. RP (10/24/16) 3028-31. Although there were other differences between the two trials, the State cannot show beyond a reasonable doubt that the exclusion of other-suspect evidence in the second trial was harmless. The remedy is a new trial. *Ortuño-Perez*, 196 Wn. App. at 802.

**3. A new trial should be granted because the prosecutor committed prejudicial misconduct.**

a. <u>A prosecutor has a duty to ensure a fair trial and may not cite facts not in evidence, offer personal opinions, issue emotional appeals, shift the burden of proof, undermine the presumption of innocence, or trivialize the jury's role</u>.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Cont. amends. VI, XIV; Const. art. I, § 22. Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Misconduct may deprive a defendant of his constitutional

right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04.

A prosecutor may not express his personal opinion, appeal to the jury's passions, or otherwise "distract the jury from its proper function as a rational decision-maker." *State v. Walker*, 182 Wn.2d 463, 479, 341 P.3d 976 (2015). Moreover, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

The State must avoid undermining the presumption of innocence or shifting the burden of proof. "Shifting the burden of proof is improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct." *Glasmann*, 175 Wn.2d at 713. A prosecutor "generally cannot comment on the lack of defense evidence because the defense has no duty to present evidence." *State v. McCreven*, 170 Wn. App. 444, 470, 284 P.3d 793 (2012). A prosecutor also may not comment on a defendant's exercise of his constitutional rights to due process and a jury trial, and may not trivialize the jury's role. *See State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014).

A new trial should be granted where a prosecutor's conduct was improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. Where a defendant objected to misconduct, prejudice is shown if there is a substantial likelihood that the misconduct affected the verdict. *Id.* Even

where a defendant does not object to improper argument, this Court will reverse if the misconduct was flagrant and incurable by an instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Multiple instances of misconduct may result in an unfair trial requiring reversal even if each improper comment in isolation would not. *See Glasmann*, 175 Wn.2d at 707 (granting new trial because "the cumulative effect of repetitive prejudicial prosecutorial misconduct" deprived the defendant of a fair trial); *Walker*, 182 Wn.2d at 479 (reversing for "flagrant, pervasive, and prejudicial" misconduct even in the absence of objections).

b. <u>The prosecutor here committed numerous instances of misconduct</u>.

The prosecutor committed multiple instances of misconduct in this case. As explained below, he cited facts not in evidence, offered personal opinions, issued emotional appeals, shifted the burden of proof, undermined the presumption of innocence, and trivialized the jury's role.

i. *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."*

The prosecutor cited facts not in evidence and violated a prior ruling by telling the jury in closing that Bill Bodziak testified there was "clear evidence of clean-up to the impression B, the blood." RP (3/21/17)

8202. In addition to making this statement, the prosecutor showed a PowerPoint slide purporting to summarize Bodziak's testimony. Ex. 528, slide 32. Most of the bullet points used plain text, but one of the few in bold stated: "**Clear evidence of clean up to Impression B (Blood)**." *Id.*

Mr. Bennett objected and moved for a mistrial. RP (3/21/17) 8202. He said, "It's stating facts not in evidence." *Id*. The court overruled the objection and 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. The prosecutor later repeated his claim that there was "Evidence of Clean up per Bodziak." Ex. 528, slide 81.

The court erred and abdicated its duty in overruling the objection and deferring to the jury. Numerous cases have held that it is misconduct for the prosecutor to argue facts not in evidence. *E.g. Pierce*, 169 Wn. App. at 537; *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). It is the court's role to sustain proper objections to prosecutorial misconduct, and when it fails to do so, it sends a message to the jury that the state's argument is legitimate. *State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015).

Mr. Bodziak did *not* testify there was clear evidence of cleanup, because a trial court ruling prohibited such testimony. *See* RP (3/6/17)

8221-22 (Mr. Bennett reiterates this point). Mr. Bennett had moved to preclude such testimony because it was inconsistent with Bodziak's report, which stated only that the characteristics of the images were "typical of attempts to clean up bloody footwear evidence." RP (3/3/17) 6027, 6028. The court and State agreed that this is all the witness could testify to:

> THE COURT: I expect he's going to say exactly what he says in this paragraph.
>
> MR. DANO: Right.
>
> MR. BUSTAMANTE: If he says that, fine. I don't have a problem with that.
>
> THE COURT: That's what I'm expecting him to say, because that's all he opined.

RP (3/3/17) 6029. The court later reiterated its ruling:

> THE COURT: So with regard to Bodziak, when he's asked the question to the effect, did you see any evidence of attempts to clean, his answer needs to be in line with what he states, which is what I saw in the images taken before enhancement are typical of attempts to clean up bloody footwear evidence.
>
> MR. DANO: Sure.

RP (3/3/17) 6037. The court confirmed these limitations with the witness:

> I want Mr. Bodziak, basically, to stick with his opinion as stated, use the language that he used in his report, which was "images taken before enhancement" is what was viewed as "typical of attempts to clean up bloody footwear evidence." Are you able to do that, Mr. Bodziak?

RP (3/6/17) 6065.

When Bodziak clarified that "it is my opinion that this impression was cleaned up," Mr. Bennett argued it would be unfair for the witness to deviate from his report at this late stage, and that if it were allowed, Mr. Bennett would need a recess to hire an expert and move for a *Frye* hearing. RP (3/6/17) 6066, 6068. The court agreed and retained its ruling:

> THE COURT: Okay. So I'm looking at this report, and the distinction is, one, it states, "typical of attempts to clean up bloody footwear," versus an opinion, there was an attempt in this case to clean up the particular scene.
>
> 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.
>
> MR. DANO: Okay.
>
> THE COURT: And so there is a slight distinction there.

RP (3/6/17) 6069.

The judge similarly limited closing argument to describing the evidence as being "typical" of an attempt to clean up. RP (3/6/17) 6069. Mr. Bennett relied on this ruling in not requesting an adjournment to hire his own expert to contest the new evidence. Yet the State violated these rulings, both in its oral presentation to the jury and in its PowerPoint.

*Gregory* is instructive. *State v. Gregory*, 158 Wn.2d 759, 864-67, 147 P.3d 1201 (2006), *overruled on other grnds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). There, the trial court in a death penalty

case granted a State's motion to exclude evidence of prison conditions for those sentenced to life. *Id.* at 864. But in closing argument, the prosecutor asked the jury to consider all of the amenities that would be afforded to the defendant in prison if he were sentenced to life instead of death. *Id.* He also argued the defendant could escape from prison. *Id.* at 864-65. The second time the State made this claim, defense objected based on "facts not in evidence," but the objection was overruled. *Id.*at 865.

The Supreme Court held the prosecutor committed misconduct and reversed the death sentence. *Id.* at 865-67. The Court noted, "It is clear that the prosecutor's argument at the very least violates the trial court's order excluding 'any reference to the conditions that exist in prison.'" *Id.* at 865-66; *see also Stith,* 71 Wn. App. at 22 (reversing for prosecutorial misconduct where prosecutor argued facts not in evidence "in spite of a direct court order on a motion in limine to exclude" the evidence at issue). Similarly here, in addition to violating the rule against arguing facts outside the evidence, the prosecutor violated the trial court's order excluding testimony and argument that this particular crime scene had been cleaned up. The trial court erred in overruling the objection.

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

The prosecutor also 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. Mr. Bennett immediately objected, explaining, "That is misstating the testimony and is arguing facts that are not in evidence." RP (3/21/17) 8207. The court overruled the objection, stating, "So I will tell the jury one more time, you are the sole determiners or the individuals who will identify what, in fact, the facts were as presented. And ultimately this is just argument by the attorneys." RP (3/21/17) 8207. This was error.

Vera Bunakova did *not* testify that she saw Chad Bennett in the alley. She testified that she saw "*a gentleman* right around here walking and he was on a cell phone approaching me." RP (3/1/17) 5575 (emphasis added). 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. She recognized only that it was a "very young" man who was taller than 5'10" and wearing certain clothing. RP (3/1/17) 5585. *Later*, she chose Mr. Bennett's picture from a photographic montage, saying she was "a little more than 50 percent" sure that he was the person she had seen. RP (3/1/17) 5653. She then identified Mr. Bennett in court. RP (3/1/17) 5598, 5653-54. Thus, the trial court erred in overruling Mr. Bennett's objection.

The court made matters worse by implying that Mr. Bennett was regularly lodging frivolous objections: "So I will tell the jury *one more*

*time*, you are the sole determiners or the individuals who will identify what, in fact, the facts were as presented. And ultimately *this is just argument* by the attorneys." RP (3/21/17) 8207. The court should not be sending such messages to the jury, and should instead sustain objections to arguments mischaracterizing the evidence. *See Allen*, 182 Wn.2d at 372, 378 (Court overruled objection to prosecutor's misstatement of the law in closing argument, stating, "It's argument." Supreme Court reversed, holding objection should have been sustained).

iii. *The prosecutor issued improper emotional appeals during rebuttal closing argument.*

In rebuttal closing, the prosecutor ingratiated himself to the jury:

> I needed to say to you that preliminarily, and I should have done that, to acknowledge Judge Estudillo for handling this case, six, seven weeks we've been together, some of you may have become friends, great friends in this process, but Judge Estudillo handling this case, did an exceptional job. Tom Bartunek, our court reporter, and Claudia Mills keeping track of everything that's being said, which is a monumental task and keeping track, and keeping the lawyers straight with the exhibits that Claudia goes through is a big job, and the state wanted to acknowledge them. Along with Garey Clements, your bailiff, who is taking you in and out of court. And all the jail staff and the people that are here listening to this case with great interest.

RP (3/23/17) 8529-30.

Such emotional appeals are improper because they have nothing to do with the jury's job of determining whether the State proved the

elements of the crime. They "distract the jury from its proper function as a rational decision-maker." *Walker*, 182 Wn.2d at 479. Although a brief recognition of the jurors' time would not necessarily be objectionable, the prosecutor could have thanked all other courtroom participants outside the presence of the jury. The only reason to do so in front of the jury was to curry favor with the jurors and subtly influence them to side with the State for reasons other than proof of guilt. The comments were improper.

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

In rebuttal closing argument, the prosecutor said, "we know that Chad Bennett was there. We know that he grabbed the center of that pillow. And the only reasonable …" RP (3/23/17) 8531. Mr. Bennett objected that the argument "what we know" constituted improper personal opinion. RP (3/23/17) 8531-32. The prosecutor apologized and implied the phrasing was inadvertent. RP (3/23/17) 8532.

But the State used the same language on a PowerPoint slide. In summarizing a recorded telephone conversation between Mr. Bennett and his wife, which they testified involved their marriage and fidelity issues, the prosecutor said, "What we do know is they are discussing this case during this call." Ex. 528, slide 79. The prosecutor narrated this slide describing the State's opinion to the jury. RP (3/22/17) 8314.

As the prosecutor implicitly acknowledged, the repeated arguments about what "we know" constituted improper personal opinions. *See Stith*, 71 Wn. App. at 21-22 (prosecutor's statement that defendant "was just coming back and he was dealing again" constituted improper opinion that defendant was selling drugs again and was thus guilty).

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

In his rebuttal closing argument, the prosecutor also stated:

> Counsel made a substantial -- spent a lot of time with you talking about DNA and cross-contamination and so forth. *The state's position is if there was any evidence that there was actual contamination of this crime scene, the defense would have been talking about it*. They talk about a lot of possibilities, possibly this, possibly that, possibly this. *But there was nothing pointed out that there was any contamination introduced into this crime scene* where Chad Bennett's DNA was planted on the cigarette butt, on the pillow area -- the pillow area.

RP (3/23/17) 8526-27 (emphases added).

This argument constitutes improper burden-shifting. Apart from the fact that it is not possible to prove whether DNA was directly deposited or placed through secondary transfer, due process requires the *State* to prove the crime beyond a reasonable doubt; the defense bears no burden to present evidence. *See, e.g., State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). In *Fleming*, the prosecutor told the jury:

> [T]here is absolutely no evidence … that [the alleged victim] has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree*.
> …
> [I]t's true that the burden is on the State. *But you would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]*. And several things, they never explained.

*Id*. at 214. The State argued the defendants had not explained various items, "implying that the defendants had a duty to explain this evidence, and that because they did not, the defendants were guilty." *Id*. at 215.

This Court reversed, noting, "[a] defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *Id*. The prosecutor here violated these rules by telling the jury that if there was any evidence adverse to the State's theory, the defense would have provided it.

vi. *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.*"

Perhaps most egregiously, the prosecutor in rebuttal 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. These comments severely undermined the presumption of innocence and trivialized the jury's role, in violation of Mr. Bennett's constitutional rights.

Specifically, the prosecutor stated:

> I did want to say one other thing, as well, that I forgot to say at the outset. And that is that the system that we're involved in, of a jury trial, you hear the words due process. And this is an example. *This is probably the biggest example of due process that this office -- or that the state has participated in*, where we've afforded the defendant every opportunity to -- the state put on its case, and for the defense to have an opportunity to put on their response, and to speak to you.
>
> 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 (emphases added).

These comments violated Mr. Bennett's constitutional rights. *Stith* is instructive. There, in addition to violating an order in limine prohibiting mention of a prior conviction, the prosecutor told the jury in rebuttal:

> And this case, ladies and gentlemen, wouldn't be ... in court here today if there was any problem about the way Officer[s] Grady and Rossen acted. Our system has incredible safeguards that would not allow a case like this to come to court if somehow the police acted improperly. So the question of probable cause is something the judge has already determined before the case came before you today.

*Stith*, 71 Wn. App. at 17. The defense objected and the judge sustained the objection and issued curative instructions, but this Court *still* reversed. *See id.* at 18, 22-23. This Court explained, "The second comment concerning 'incredible safeguards' and the court's prior determination of probable cause not only constituted 'testimony' as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court." *Id.* at 22. "This was tantamount to arguing that guilt had already been determined." *Id.*

This Court "applauded" the trial court's efforts to cure the violations, but held the misconduct was so egregious as to be incurable. *Id.* at 22-23. The 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[.]" *Id.* at 23. "Such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury." *Id.*

The same is true here. 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." Additionally, 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). In sum, as in *Stith*, the prosecutor in Mr. Bennett's case "struck at the very heart of a defendant's right to a fair trial before an impartial jury." *Stith*, 71 Wn. App. at 23.

c. The remedy is reversal and remand for a new trial.

The misconduct in this case prejudiced Mr. Bennett, constituting an independent basis for granting a new trial. As noted, prejudice is not evaluated piecemeal; rather, this Court will reverse if multiple instances of misconduct are prejudicial in the aggregate. *Walker*, 182 Wn.2d at 479; *Glasmann*, 175 Wn.2d at 707; *Pierce*, 169 Wn. App. at 556.

It is true that the State introduced evidence that Mr. Bennett's DNA was on the pillow and the shirt, as well as evidence of incriminating conversations between Bennett and his wife. But Mr. Bennett presented a defense that he and his wife were speaking about another topic and that his DNA was in the house because he was there to pay rent. In the face of conflicting evidence, the State bore the burden of proving guilt beyond a reasonable doubt. The jury may have found the State failed to meet this exacting burden if not for the prosecutor's mischaracterizations of the

evidence, personal opinions and emotional appeals, shifting of the burden of proof, undermining of the presumption of innocence, and minimization of the jury's role. Moreover, a significant amount of the misconduct occurred in rebuttal, which increases the prejudice because it is the last thing the jury hears. *Lindsay,* 180 Wn.2d at 443. Thus, this Court should hold the combined effect of the misconduct prejudiced Mr. Bennett, requiring reversal of the conviction and remand for a new trial.

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

This Court should reverse the exceptional sentence for six independent reasons: (1) insufficient evidence supports the "gratuity" prong of the deliberate cruelty aggravator; (2) insufficient evidence supports the "atypicality" prong of the deliberate cruelty aggravator; (3) insufficient evidence supports the "substantial factor" prong of the vulnerable victim aggravator; (4) insufficient evidence supports 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.

a. Relevant facts.

In addition to charging Mr. Bennett with murder, the State alleged two aggravating factors: (1) "Deliberate Cruelty" and (2) "Particularly

Vulnerable Victim." CP 1889 (Third Amended Information); *see* RCW 9.94A.535(3)(a), (b).[3] The relevant jury instructions provided:

> If you find the defendant guilty of Murder in the Second Degree as charged in Count 2, then you must determine if any of the following aggravating circumstances exists:
>
> Whether the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim.
>
> Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance.

CP 1622 (Instruction 16).

> "Deliberate cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

CP 1623 (Instruction 17).

> A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of Murder in the First Degree or Murder in the Second Degree. The victim's vulnerability must also be a substantial factor in the commission of the crime.

CP 1624 (Instruction 18).

The jury found Bennett guilty of both aggravators. CP 1656-57.

Bennett moved to vacate the aggravators and to impose a sentence

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[3] The State originally charged no aggravating factors. CP 1-2. It later charged four aggravators, but dismissed two for lack of evidence. CP 130-38; RP (10/12/16) 507. The jury was instructed only on "deliberate cruelty" and "particularly vulnerable victim." CP 1622-24.

within the standard range, arguing insufficient evidence supported the aggravators and the aggravators were unconstitutionally vague. CP 1904-13; RP (5/12/17) 8738-44; *see also* RP (3/21/17) 8115-17 (arguing against jury instruction on particular vulnerability).[4] The court rejected the arguments. RP (5/12/17) 8755-59. Although Bennett's standard range for second-degree murder was 134-234 months, the court sentenced him to an exceptional sentence of 660 months. CP 2141-42, 2241-42; RP (5/12/17) 8760-61; RP (5/22/17) 8767-77.

Before the court entered findings and conclusions regarding the exceptional sentence, Mr. Bennett again objected based on insufficiency of the evidence and vagueness. CP 2206-22. The court rejected the sufficiency challenges and ruled that the vagueness doctrine does not apply to aggravating circumstances. RP (5/22/17) 8767-77; CP 2241-44.

b. <u>The State presented insufficient evidence to support the aggravating factors.</u>

i. *The State bears the burden of proving aggravating factors beyond a reasonable doubt.*

Because aggravating factors increase the punishment that may be imposed, they are elements of a greater crime that the State must prove to

[4] Mr. Bennett had also moved to dismiss the aggravators during the first trial. RP (10/12/16) 272, 277-83, 485-90, 494, 501-24; RP (10/13/16) 557-61. The trial court denied the motions, but the jury did not reach the question because it could not agree on whether the State proved Mr. Bennett committed the murder. RP (10/13/16) 561; RP (10/24/16) 3028-31.

a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Laws of 2005, ch. 68, § 1 (amending SRA to comply with *Blakely*); RCW 9.94A.537. Thus, the appellate standard of review is the same for the base elements of a crime and the aggravating elements. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). On appellate review, evidence is sufficient to support a verdict only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970).

Before *Blakely*, judges had broad discretion to impose exceptional sentences based on their own findings of aggravating factors by only a preponderance of the evidence, and appellate courts reviewed such findings under the lenient "clearly erroneous" standard. *See State v. Tili*, 148 Wn.2d 350, 368, 60 P.3d 1192 (2003); *State v. Serrano*, 95 Wn. App. 700, 712, 977 P.2d 47 (1999). Thus, while pre-2005 cases are relevant for comparison purposes, evidence that would have satisfied the earlier lenient standards would *not* necessarily be sufficient under the current standard. Instead, the aggravators may not be upheld on appeal unless the evidence presented meets the *Jackson* standard for reviewing facts the State must prove beyond a reasonable doubt. *Stubbs*, 170 Wn.2d at 123.

ii. *The State failed to prove deliberate cruelty: it did not prove prolonged suffering or atypicality.*

"The threshold for deliberate cruelty is high." *State v. Barnett,* 104 Wn. App. 191, 205, 16 P.3d 74 (2001). The State must prove "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *Tili,* 148 Wn.2d at 369; *Serrano*, 95 Wn. App. at 712-13; CP 1623. The cruelty must go beyond that usually associated with the offense in question – it must be "significantly more serious or egregious than typical[.]" *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 grds. by State v. O'Dell*, 183 Wn.2d 680, 694-95, 358 P.3d 359 (2015) ; *Tili,* 148 Wn.2d at 369-71; *Serrano*, 95 Wn. App. at 713; CP 1623. Here, the State failed to prove either "gratuity" or "atypicality", and each failure independently requires reversal.

First, the State presented insufficient evidence of gratuitous violence that inflicted pain as an end in itself. As the trial court and State acknowledged, any of the injuries "could have caused the death of Lucille Moore." CP 2242 (court's Finding of Fact 6); RP (3/22/17) 8320 (State's closing argument). This finding was consistent with the testimony of the forensic pathologist, Dr. Kiesel. RP (2/23/17) 5101-02. Dr. Kiesel also testified that the neck wounds would have caused the victim to lose

consciousness within 10-20 seconds. RP (2/23/17) 5108. The crime scene specialist, Trevor Allen, testified that there did not appear to be a prolonged struggle. RP (2/22/17) 4880-81. In light of the evidence of a quick loss of consciousness and death, the State failed to prove beyond a reasonable doubt that Mr. Bennett inflicted pain as an end in itself.[5]

*Scott* is instructive. There, the court upheld a "deliberate cruelty" finding where the defendant subjected the victim to extensive physical and sexual assault before finally strangling her to death. *Scott*, 72 Wn. App. at 214-15. 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

[5] The trial judge even recognized that the wounds at issue in this case represented "steps taken to ensure Miss Moore's death." RP (5/12/17) 8757. Inflicting injury to ensure death is inconsistent with inflicting pain as an end in itself. Indeed, where the underlying crime is murder, ensuring a relatively quick death is the more humane approach, not a "deliberately cruel" approach.

probably alive for a long time." RP (3/22/17) 8322. There was no evidence of prolonged attack or lingering suffering. *See Scott*, 72 Wn. App. at 215.

This Court reversed a deliberate cruelty verdict in similar circumstances in *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*").[6] There, the defendant shot the victim four times in rapid succession. *Id.* at *1. The medical examiner testified that the homicide was one of the "two worst he had observed in terms of being 'gratuitously violent' and causing damage in excess of that necessary to kill someone" *Id.* at *2. The jury found the deliberate cruelty aggravator, but this Court reversed. The Court noted that although the first shot "undoubtedly" caused pain, there was insufficient evidence that the defendant sought to inflict pain as an end in itself or to prolong suffering. *Id.* Similarly in Mr. Bennett's case, the State presented insufficient evidence of gratuitous violence that inflicted pain as an end in itself. *See also Serrano*, 95 Wn. App. at 713 (reversing, even under preponderance standard, because evidence that defendant shot victim 5 times was insufficient to show he gratuitously inflicted pain as an end in itself).

The State also presented insufficient evidence on the second

[6] *Brush I* is not reported; Mr. Bennett cites it as persuasive authority. GR 14.1(a).

requirement: atypicality. *See Scott*, 72 Wn. App. at 214 (conduct must be "significantly more serious or egregious than typical"); CP 1623 (the violence must go beyond that "normally associated with the commission of the crime"). Indeed, the State presented *no* evidence whatsoever on this prong. All murders are terrible, and the State did not provide any comparative facts to the jury showing that other homicides were somehow significantly less egregious. The prosecution introduced no expert testimony and no documentary evidence setting forth the facts of other murder cases. *See* CP 1906-07, 2209, 2213 (defense memoranda highlighting this deficiency in proof).

The State may claim it is too difficult for it to present evidence of typical murders and that this requirement should be jettisoned now that juries, rather than judges, find aggravating factors. *See* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.10 Comment (4th ed.) (acknowledging that proof of "atypicality" is required but stating "[j]uries are not in a good position to make this decision"). Contrary to any such claim, proof of atypicality is both possible and necessary to avoid arbitrary and unfair impositions of exceptional sentences. In any event, the law still requires proof of atypicality, whether the State believes it is appropriate or not. *E.g. State v. Suleiman*, 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006) (stating that "a determination of whether this crime was far more egregious than

the typical" requires a "factual comparison" which must be done by a jury, not a judge); *accord State v. Faagata,* 147 Wn. App. 236, 249-51, 193 P.3d 1132 (2008), *rev'd on other grounds sub nom. State v. Turner,* 169 Wn.2d 448, 452, 238 P.3d 461 (2010). Moreover, the State proposed the jury instruction requiring proof of atypicality, but it failed to present evidence to support it. CP 2266 (Plaintiff's proposed instructions); CP 1623 (Court's instruction); *See State v. Johnson,* 188 Wn.2d 742, 746-47, 399 P.3d 507 (2017) (reaffirming Washington's law-of-the-case doctrine).

In sum, the State failed to prove gratuitous violence that inflicted pain as an end in itself, and failed to prove that this murder was significantly more egregious than the typical murder. For each of these independent reasons, the "deliberate cruelty" aggravating circumstance should be stricken and the case remanded for resentencing.

iii. *The State failed to prove particular vulnerability: it did not prove vulnerability was a substantial factor in the commission of the crime and did not prove atypicality.*

The State also presented insufficient evidence of the other aggravating circumstance, "particularly vulnerable victim." The State claimed it proved this aggravator because Ms. Moore was over 80 years old. RP (5/12/17) 8732. But that is not enough. Even assuming age alone could prove vulnerability, the State must also prove that this vulnerability was a "substantial factor" in the commission of the crime. *Suleiman,* 158

Wn.2d at 291-92; CP 1624. Moreover, the State must prove the victim is "more vulnerable to the commission of the crime than the typical victim of Murder in the First Degree or Murder in the Second Degree." CP 1624; WPIC 300.11; *State v. Bedker*, 74 Wn. App. 87, 94, 871 P.2d 673 (1994). Here, the State failed to prove either "substantial factor" or "atypicality", and each failure independently requires reversal.

First, the State did not present any evidence – let alone evidence showing beyond a reasonable doubt – that Ms. Moore's alleged vulnerability was a "substantial factor" in the commission of the offense. The State only presented evidence supporting its theory that Mr. Bennett "snapped" and killed Ms. Moore because he could not pay her the rent that was overdue. RP (3/22/17) 8317, 8320; RP (3/23/17) 8567 (State's closing argument); CP 1910-11 (Defense sentencing memorandum).

Joyce Anderson testified that Ms. Moore declined her lunch invitation for the day in question "because 106 G is supposed to come and pay me the rent." RP (2/15/17) 4313. In response to the prosecutor's follow-up question, Anderson said, "She did state that if [Bennett] doesn't pay me what he's supposed to pay me, I'm going to tell him if he can't afford it, he can go find someplace he can afford." RP (2/15/17) 4314. The State also elicited testimony from Nick Cobb that Mr. Bennett asked Cobb to loan him $700 for rent in September. RP (3/6/17) 6197.

In his rebuttal closing argument, the prosecutor summarized the State's evidence and theory as follows:

> So the state's position about this is that when Lucille Moore -- when Lucille Moore told Mr. Bennett that if you don't come up with the damage deposit, you're going to have to move. You're going to have to get out. That's when he snapped.

RP (3/23/17) 8567. Under the State's theory and the evidence it presented to support that theory, Ms. Moore's age was not a factor at all in his decision to kill her – let alone a substantial factor.

*Serrano* is instructive. There, as here, the defendant was charged with first-degree murder but convicted of second-degree murder. *Serrano*, 95 Wn. App. at 703. The court imposed an exceptional sentence of 360 months based, in part, on its finding of vulnerability. *Id.* at 703, 711. When the defendant shot the victim, the victim was thinning apples in an "orchard ape" – a caged platform suspended in the air, in which the victim was trapped. *Id.* at 710-11. But this Court reversed the vulnerable victim finding – even under the clearly erroneous / preponderance of the evidence standard – because the victim's vulnerability was not a "substantial factor" in the commission of the crime. *Id.* at 712. Instead, the apparent motive was that the defendant's wife had an affair with the victim. *Id.* at 710.

This Court also reversed an exceptional sentence with an erroneous finding of victim vulnerability in *State v. Barnett*, 104 Wn. App. 191, 16

P.3d 74 (2001). There, the defendant committed multiple crimes against his ex-girlfriend. *Id.* at 194. The court imposed an exceptional sentence based in part on victim vulnerability: the victim was 17 years old and home alone at the time of the crimes. *Id.* at 202. But this Court reversed because "that was not the reason he chose her as a victim." *Id.* at 205. The defendant chose the victim "because of their failed relationship[.]" *Id.*

Here, as in *Serrano* and *Barnett*, the State failed to prove the victim's vulnerability was a substantial factor in the commission of the offense. Instead, the State presented evidence that Mr. Bennett snapped and killed Ms. Moore because he could not afford to pay rent.

The State also failed to prove atypicality. As with the "deliberate cruelty" aggravator, the State presented no evidence about other murders or the level of vulnerability other murder victims possessed. But this is a requirement. CP 1624; WPIC 300.11; *Bedker*, 74 Wn. App. at 94.

In *Vermillion*, for example, this Court reversed a vulnerable victim aggravator where the defendant targeted female real estate agents who were working alone in vacant houses. *State v. Vermillion*, 66 Wn. App. 332, 349, 832 P.2d 95 (1992). The trial court failed to distinguish the victims "from any other victims of indecent liberties." *Id.* Thus, even under the lenient pre-*Blakely* standard, reversal was required. *Id.* Here, the State was required to prove atypicality beyond a reasonable doubt to a

jury, yet failed to present any comparison evidence at all. This constitutes an independent basis for reversal of this aggravator.

In sum, the State failed to prove Ms. Moore's alleged vulnerability was a "substantial factor" in the commission of the offense, and failed to prove that she was more vulnerable than the typical murder victim. For each of these independent reasons, the "particularly vulnerable victim" aggravator should be stricken, and the case remanded for resentencing.[7]

c. The aggravating factors are unconstitutionally vague.

Another independent basis for reversing the sentence is that the aggravating circumstances are unconstitutionally vague, both facially and as applied. *See City of Spokane v. Neff*, 152 Wn.2d 85, 88 n.1, 93 P.3d 158 (2004) (a party who is adversely affected by legislation "clearly has a right to bring a claim that the statute was facially vague"). This is an issue of law this Court reviews de novo. *Id.* at 88.

i. *The void for vagueness doctrine applies to aggravators.*

The due process clauses of the federal and state constitutions prohibit the deprivation of life, liberty, or property "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it

[7] If this Court agrees that both aggravating factors must be vacated for insufficient evidence, it need not reach the remaining sentencing arguments. Rather, the court should remand for sentencing within the standard range.

punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015); U.S. Const. amend XIV; Const. art. I, § 3.

Contrary to the trial court's conclusion, the void-for-vagueness doctrine applies to aggravating circumstances just as it applies to the other elements of a crime. And it applies to "statutes fixing sentences." *Johnson,* 135 S. Ct. at 2557 (invalidating "residual clause" of Armed Career Criminal Act as unconstitutionally vague). It is true that 15 years ago our state supreme court held that aggravating circumstances were not subject to vagueness challenges. *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). The court reasoned that the void-for-vagueness doctrine did not apply to aggravating factors because they were just "sentencing guidelines" that did not "vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature." *Id.* at 459.

But that reasoning is no longer valid. *See* RCW 9.94A.537; *Blakely*, 542 U.S. at 303. Following *Blakely,* our legislature clarified that the maximum available punishment absent a jury's finding of aggravating circumstances is the top of the standard range – here, 234 months. RCW 9.94A.537; CP 2141-42. Because aggravating circumstances increase the available punishment, they are subject to the void-for-vagueness doctrine.

The trial court misunderstood the maximum punishment available

absent the aggravators. The court said, "there's no doubt that here life imprisonment is the statutory maximum regardless of what the sentencing guidelines may indicate." RP (5/22/17) 8771-72. The judge cited *Baldwin* and said, "a defendant is put on notice of the potential maximum penalty he or she can receive upon committing the offense of murder in the second degree." RP (5/22/17) 8772.

The court was wrong. A defendant *cannot* receive a life sentence for committing second-degree murder. The maximum a defendant like Bennett, with an offender score of 1, can receive is 234 months. CP 2141; RCW 9.94A.505(1), (2)(a)(i), (x); RCW 9.94A.510 ; RCW 9.94A.515; RCW 9.94A.535; RCW 9.94A.537; CP 1913 (scoring sheet). Even a defendant with the highest offender score possible (9+) cannot be sentenced to more than 397 months for second-degree murder. *See id.*

Second-degree murder *plus one or more aggravating factors* can result in a sentence of up to life imprisonment. RCW 9.94A.535; RCW 9.94A.537; RCW 9A.32.050; RCW 9A.20.021(1)(a). Because these aggravators significantly increase the available punishment, they are subject to due process limitations, including the prohibition on vague laws.

This Court recently addressed the issue in *State v. DeVore*, 2 Wn. App. 2d 651, 660-65, 413 P.3d 58 (2018). Although the discussion was arguably dictum because Mr. DeVore pleaded guilty to an aggravator, this

Court opined that challenges to aggravating factors "do not merit review under the void for vagueness doctrine." *Id.* at 665. Like the trial court in Mr. Bennett's case, this Court believed an aggravating factor is not subject to a vagueness challenge because it "does not increase the permissible sentence of the offender." *Id.* As explained above, this is not correct.[8]

In misapprehending the maximum punishment available absent the aggravators, this Court followed a case addressing the *federal* sentencing guidelines, which operate differently from Washington's SRA. *DeVore*, 2 Wn. App. 2d at 664-65 (citing *Beckles v. United States,* ___ U.S. ___, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017)). As this Court noted, *Beckles* rejected a vagueness challenge to an enhancement under the federal guidelines, because those guidelines are merely "advisory" – they do "not fix the permissible range of sentences" but "merely guide[] the exercise of a court's discretion in choosing an appropriate sentence." *DeVore*, 2 Wn. App. 2d at 664 (citing *Beckles*, 137 S. Ct. at 892).

The same is not true in Washington: our laws specify a range of available sentences for crimes absent aggravating circumstances, and specify a greatly *increased* range of available sentences for crimes with aggravating circumstances. RCW 9.94A.505(1), (2)(a)(i), (x); RCW

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[8] Division Two recently suffered the same misunderstanding in *State v. Brush*, ___ P.3d ___ (No. 49760-3-II, filed 8/28/18) ("*Brush III*"), slip op. at 17-18.

9.94A.510; RCW 9.94A.515; RCW 9.94A.535; RCW 9.94A.537; RCW 9A.32.050; RCW 9A.20.021(1)(a). Thus, the laws permitting these increased sentences must be stated "with sufficient clarity." *DeVore*, 2 Wn. App. at 664 (citing *Beckles*, 137 S. Ct. at 892).

Indeed, the Washington Supreme Court has signaled its understanding that *Baldwin* no longer applies and aggravators are subject to the prohibition on vague laws. In two post-*Blakely* cases, the Court assumed the defendants could bring void-for-vagueness challenges, reached vagueness arguments on their merits, and noted it need not reach the question of whether *Blakely* abrogated *Baldwin. See State v. Murray*, 190 Wn.2d 727, 732 n.1, 416 P.3d 1225 (2018); *State v. Duncalf*, 177 Wn.2d 289, 298, 300 P.3d 352 (2013). Mr. Bennett properly challenges the aggravating circumstances as unconstitutionally vague.

ii. *The "deliberate cruelty" and "vulnerable victim" aggravators are unconstitutionally vague.*

The aggravators here permit arbitrary application and do not provide fair notice of what conduct crosses a proscribed line. All murders are deliberately cruel: they involve the intentional killing of a human being. A perpetrator who has only his bare hands or a small knife will necessarily need to strike multiple blows in order to ensure death. At what point do multiple strikes become "gratuitous" violence? It is unclear, and

is subject to the predilections of prosecutors and jurors. *See Tili,* 148 Wn.2d at 370 (cataloging cases addressing "deliberate cruelty" aggravator for rape, where courts had reached different decisions on its applicability to similar facts); *Barnett,* 104 Wn. App. at 205 (reversing deliberate cruelty finding in assault case even where defendant "violently and viciously" attempted to subdue victim, but noting other similar cases had come out the other way); *Serrano,* 95 Wn. App. at 713 (listing murder cases attempting to draw "deliberate cruelty" line based on number of wounds, even where different weapons were used, and reversing where defendant inflicted 5 gunshot wounds). Here, Ms. Moore was killed quickly, yet the deliberate cruelty aggravator was applied. The aggravator is impermissibly vague.

The "vulnerable victim" aggravator is also vague. The WPIC committee conceded as much in its Comment to the pattern instruction. It stated, "None of these cases have set out any definition of this term. The committee has not attempted to craft a definition." 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.11 Comment (4th ed.).

The judge in Mr. Bennett's first trial identified the same problem:

> What -- what -- by what criteria do they -- do they decide who is particularly vulnerable? Can we give an instruction about that? Is it possible that one jury (as stated) could find that -- on the same set of facts, make the same factual determination and determine that Mrs. Moore was

particularly vulnerable and another would not?

RP (10/12/16) 518.

The second judge ultimately ruled that the "vulnerable victim" aggravator was proper because Ms. Moore was over 80 and lived alone. CP 2242. But in *Barnett*, the victim was 17 and home alone and that was not sufficient to support the aggravator. *Barnett*, 104 Wn. App. at 202. Here, as in *Barnett*, the victim was strong despite her age and solitude – Ms. Moore ran a rental business, served as her church's financial secretary, volunteered with the Red Hats, and was physically fit. RP (2/15/17) 4259, 4276-77; RP (2/23/17) 5123; RP (2/28/17) 5436. The "vulnerable victim" aggravating circumstance is unconstitutionally vague.

d. <u>Even if the aggravators were sufficiently proved and not vague, the length of the sentence is arbitrary and excessive</u>.

Even if this Court finds the aggravators are supported by sufficient evidence and are not vague, it should hold that the length of the sentence is arbitrary and excessive. "A clearly excessive sentence is one that is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." *State v. Bluehorse*, 159 Wn. App. 410, 434, 248 P.3d 537 (2011). Here, the sentencing judge imposed a 660-month sentence for untenable reasons. The judge stated:

> I do believe there are similarities between the case of *State vs. Scott* and the present matter. And I have attempted to draw some conclusions about how the trial judge reached its decision in that case, considering the heinous facts of that case. And what it appears to me that the trial court did in that case was to first identify 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. And this court believes that that is a reasonable guidance or reasonable instructions to follow.
>
> So in the present case the standard range is between 134 and 234 months. And based on my analysis, again, of the method used in *State vs. Scott*, Mr. Bennett, your sentence will be 660 months.

RP (5/12/17) 8761.

The judge's decision to use the same multiplier as in *State v. Scott* was untenable. The defendant in *Scott* was convicted of *first-degree* premeditated murder, while Mr. Bennett was acquitted of first-degree murder and convicted of only second-degree murder. *Scott*, 72 Wn. App. at 209; CP 1652-53. Also, Scott was convicted of *four* aggravators, while Mr. Bennett was convicted of two. *Id.* at 210, 214-18; CP 2138. And the victim in Scott was subjected to prolonged suffering, while the victim here was killed quickly. RP (5/12/17) 8742 (counsel notes this at sentencing).

Moreover, the sentence was clearly excessive in light of Mr. Bennett's youth. CP 1911. While the court in *Scott* stated any argument citing youth as a mitigating factor "borders on the absurd," *Scott*, 72 Wn. App. at 218, that view has obviously been roundly rejected in more recent

cases. In *O'Dell* our supreme court quoted that portion of *Scott* and then noted that courts at that time "did not have the benefit of the studies … that establish a clear connection between youth and decreased moral culpability for criminal conduct." 183 Wn.2d at 695. These "psychological and neurological studies show[] that the parts of the brain involved in behavior control continue to develop well into a person's 20s." *Id.* at 691-92. "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences[.]" *Id.* at 692.

Mr. Bennett was 24 years old – an age when the parts of the brain involved in behavior control are continuing to develop and the penological justifications for imposing the harshest sentences are diminished. *Id.* at 691-92; CP 2242. For this reason, too, the court's reliance on *Scott* was untenable and the 660-month sentence is excessive.

e. Resentencing is required.

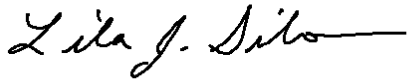
If this Court agrees that both aggravators must be vacated because of insufficiency of the evidence or vagueness, the case must be remanded for resentencing within the standard range. If this Court holds that only one of the two aggravators must be vacated, the case must be remanded for a resentencing hearing at which the court *could* impose an exceptional sentence, but would presumably impose a shorter sentence and would have the option to sentence within the standard range. *See* CP 2244 ("The

Court further concludes that either of the aggravating factors standing alone *might* establish a substantial and compelling reason justifying an exceptional sentence. However, the more substantial and compelling reason for the imposition of an exceptional sentence in this case is the deliberate cruelty…”). If this Court rejects these challenges but agrees 660 months is arbitrary and excessive, the remedy is remand for resentencing to a shorter exceptional sentence or a sentence within the standard range.

F. CONCLUSION

Because government mismanagement prejudiced his right to a fair trial, Mr. Bennett asks this Court to reverse his conviction and remand for dismissal of the charge with prejudice. In the alternative, this Court should 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 court erroneously excluded evidence and argument regarding other suspects, and the prosecutor committed misconduct. At a minimum, this Court should reverse the exceptional sentence for several independent reasons discussed above, and should remand for resentencing.

Respectfully submitted this 19th day of November, 2018.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project – 91052

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

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

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