FILED
Court of Appeals
Division III
State of Washington
4/16/2019 3:50 PM

NO. 35297-8-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

CHAD GERRIT BENNETT, APPELLANT

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

Superior Court Cause No. 14-1-00778-0

The Honorable John D. Knodell
The Honorable David Estudillo

BRIEF OF RESPONDENT

GARTH DANO
GRANT COUNTY PROSECUTING ATTORNEY

Katharine W. Mathews, WSBA# 20805
Deputy Prosecuting Attorney
Attorneys for Respondent

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011

Table of Contents

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

A. AN AGREEMENT BETWEEN THE DEFENSE AND THE STATE TO DELAY PRODUCTION OF DISCOVERY AND TRY THE CASE IN SEPTEMBER 2016 UPENDED ON APRIL 25, 2016 WHEN BENNETT DEMANDED IMMEDIATE TRIAL. DURING THE ENSUING ACCELERATED DISCOVERY PRODUCTION AND TRIAL PREPARATION, THE STATE DETERMINED AN ITEM PREVIOUSLY THOUGHT UNLIKELY TO YIELD DNA EVIDENCE MIGHT PROVE USEFUL. BENNETT AGREED TO THE 11TH HOUR TEST AND TO A FUTURE TRIAL CONTINUANCE, BUT OBJECTED TO THAT SAME CONTINUANCE A MONTH LATER WHEN THE DNA RESULTS INCRIMINATED HIM. BENNETT CHOSE TO REVIEW FOR EXCULPATORY EVIDENCE ALL 250 HOURS OF JAIL CALLS WITH HIS WIFE WHEN THE STATE INTENDED TO USE ONLY ONE CALL FOR IMPEACHMENT AFTER LEARNING THE WIFE WOULD TESTIFY. WAS BENNETT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL VIOLATED BY PROSECUTORIAL MISMANAGEMENT? (Assignment of Error No. 1).....1

B. BENNETT'S DNA AND THE DNA OF TWO UNIDENTIFIED MALES WAS FOUND ON A BLOODY PILLOW COVERING MOORE'S FACE. IT WAS UNCONTESTED BENNETT HAD BEEN INSIDE MOORE'S HOUSE THE DAY SHE WAS KILLED AND A NEIGHBOR IDENTIFIED HIM AS THE PERSON SHE SAW THAT AFTERNOON IN THE ALLEY BEHIND MOORE'S HOUSE. BENNETT SOUGHT TO ADMIT EVIDENCE A NUMBER OF PEOPLE, SOME UNIDENTIFIED, HAD BOTH MOTIVE AND OPPORTUNITY TO KILL MOORE, BUT FAILED TO ESTABLISH THE REQUIRED NEXUS BETWEEN ANY OF THESE PEOPLE AND MOORE'S MURDER. DID THE TRIAL COURT PROPERLY EXCLUDE BENNETT'S PROFFERED "OTHER SUSPECTS" EVIDENCE? (Assignment of Error No. 2).....1

C. IN CLOSING, THE PROSECUTOR ARGUED REASONABLE INFERENCES FROM BODZIAK'S TESTIMONY, ACCURATELY ARGUED BUNAKOVA'S IDENTIFIED BENNETT, DISPLAYED COURTESY TO COURT STAFF AND THE JUDGE, ENSURED THE JURY

KNEW HE SHOULD NOT HAVE SAID "WE KNOW," ACCURATELY NOTED BENNETT WOULD HAVE ARGUED CONTAMINATION EVIDENCE HAD THERE BEEN ANY, AND DISPUTED BENNETT'S ACCUSATION HIS CASE WAS BASED ON SPECULATION, OUTLANDISH THEORIZING, AND JUMPING TO CONCLUSIONS. DID BENNETT DEMONSTRATE ANY OF THESE ACTIONS WERE IMPROPER OR IN ANY WAY PREJUDICE THE OUTCOME OF HIS TRIAL? (Assignment of Error No. 3). 1

D. WAS THE TRIAL COURT'S DECISION TO IMPOSE AN EXCEPTIONAL 660 MONTH SENTENCE WELL-GROUNDED IN PRECEDENT OR EXERCISED ON UNTENABLE GROUNDS OR FOR UNTENABLE REASONS, AND CLEARLY EXCESSIVE? (Assignment of Error No. 4). 2

II. STATEMENT OF THE CASE 2

A. CIRCUMSTANCES LEADING TO THREE TRIAL CONTINUANCE ORDERS ISSUED MAY 31, JUNE 6, AND JULY 6 2

B. "OTHER SUSPECTS" EVIDENCE. 9

C. ALLEGATIONS OF PROSECUTORIAL MISCONDUCT 15

D. EVIDENCE OF DELIBERATE CRUELTY AND PARTICULARLY VULNERABLE VICTIM 26

III. ARGUMENT 28

A. AN AGREEMENT BETWEEN THE DEFENSE AND THE STATE TO DELAY PRODUCTION OF DISCOVERY AND TRY THE CASE IN SEPTEMBER 2016 UPENDED ON APRIL 25, 2016 WHEN BENNETT DEMANDED IMMEDIATE TRIAL. DURING THE ENSUING ACCELERATED DISCOVERY PRODUCTION AND TRIAL PREPARATION, THE STATE DETERMINED AN ITEM PREVIOUSLY THOUGHT UNLIKELY TO YIELD DNA EVIDENCE MIGHT PROVE USEFUL. BENNETT AGREED TO THE 11TH HOUR TEST AND TO A FUTURE TRIAL CONTINUANCE, BUT OBJECTED TO THAT SAME CONTINUANCE A MONTH LATER WHEN THE DNA RESULTS INCRIMINATED HIM. BENNETT CHOSE TO

REVIEW FOR EXCULPATORY EVIDENCE ALL 250 HOURS OF JAIL CALLS WITH HIS WIFE WHEN THE STATE INTENDED TO USE ONLY ONE CALL FOR IMPEACHMENT AFTER LEARNING THE WIFE WOULD TESTIFY. BENNETT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED BY PROSECUTORIAL MISMANAGEMENT.. 28

B. BENNETT'S DNA AND THE DNA OF TWO UNIDENTIFIED MALES WAS FOUND ON A BLOODY PILLOW COVERING MOORE'S FACE. IT WAS UNCONTESTED BENNETT HAD BEEN INSIDE MOORE'S HOUSE THE DAY SHE WAS KILLED AND A NEIGHBOR IDENTIFIED HIM AS THE PERSON SHE SAW THAT AFTERNOON IN THE ALLEY BEHIND MOORE'S HOUSE. BENNETT SOUGHT TO ADMIT EVIDENCE A NUMBER OF PEOPLE, SOME UNIDENTIFIED, HAD BOTH MOTIVE AND OPPORTUNITY TO KILL MOORE, BUT FAILED TO ESTABLISH THE REQUIRED NEXUS BETWEEN ANY OF THESE PEOPLE AND MOORE'S MURDER. THE TRIAL COURT PROPERLY EXCLUDED BENNETT'S PROFFERED "OTHER SUSPECTS" EVIDENCE. 36

C. IN CLOSING, THE PROSECUTOR ARGUED REASONABLE INFERENCES FROM BODZIAK'S TESTIMONY, ACCURATELY ARGUED VERA BUNAKOVA'S IDENTIFIED BENNETT, DISPLAYED COURTESY TO COURT STAFF AND THE JUDGE, ENSURED THE JURY KNEW HE SHOULD NOT HAVE SAID "WE KNOW," ACCURATELY NOTED BENNETT WOULD HAVE ARGUED CONTAMINATION EVIDENCE HAD THERE BEEN ANY, AND DISPUTED BENNETT'S ACCUSATION HIS CASE WAS BASED ON SPECULATION, OUTLANDISH THEORIZING, AND JUMPING TO CONCLUSIONS. BENNETT FAILS TO DEMONSTRATE ANY OF THESE ACTIONS WERE IMPROPER OR IN ANY WAY PREJUDICED THE OUTCOME OF HIS TRIAL. 42

D. THE TRIAL COURT'S DECISION TO IMPOSE AN EXCEPTIONAL 660 MONTH SENTENCE WAS WELL GROUNDED IN PRECEDENT, NOT EXERCISED ON UNTENABLE GROUNDS OR FOR UNTENABLE REASONS, AND NOT CLEARLY EXCESSIVE. 53

IV. CONCLUSION. 61

Table of Authorities

State Cases

Leonard v. Territory,
2 Wash. Terr. 381, 7 P. 872 (1885).....14, 41

State v. Allen,
182 Wn.2d 364, 341 P.3d 268 (2015).....46

State v. Barry,
184 Wn. App. 790, 339 P.3d 200 (2014).....34

State v. Bluehorse,
159 Wn. App. 410, 248 P.3d 537 (2011).....58

State v. Bradfield,
29 Wn. App. 679, 630 P.2d 494 (1981).....34

State v. Butler,
75 Wn. App. 47, 876 P.2d 481 (1994).....57

State v. Clark,
143 Wn.2d 731, 24 P.3d 1006 (2001).....13, 41

State v. Clinton,
48 Wn.App. 671, 741 P.2d 52 (1987).....56, 57

State v. Delarosa–Flores,
59 Wn.App. 514, 799 P.2d 736 (1990), *review denied*,
116 Wn.2d 1010 (1991).....54

State v. DeLeon,
185 Wn.App. 171, 341 P.3d 315 (2014).....53

State v. Dhaliwal,
150 Wn.2d 559, 79 P.3d 432, 442 (2003).....43

State v. Downs,
168 Wn. 664, 13 P.2d 1 (1932).....40

State v. Duggins,
68 Wn.App. 396, 401, 844 P.2d 441, *aff'd*,
121 Wn.2d 524, 852 P.2d 294 (1993) 29, 32

State v. Dunivan,
65 Wn.App. 728, 829 P.2d 799 (1992) 33

State v. Emery,
174 Wn.2d 741, 278 P.3d 653 (2012) 43, 47, 48

State v. Franklin,
180 Wn.2d 371, 325 P.3d 159 (2014) 15, 37, 38, 39, 40, 42

State v. Garibay,
67 Wn.App. 773, 841 P.2d 49 (1992), *abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996) 56

State v. Gentry,
125 Wn.2d 570, 888 P.2d 1105, *cert. denied*,
516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) 44, 53, 54

State v. Jones,
130 Wn.2d 302, 922 P.2d 806 (1996) 56

State v. Martinez,
121 Wn. App. 21, 29, 86 P.3d 1210 (2004),
as amended on reconsideration (Apr. 20, 2004) 29

State v. Michielli,
132 Wn.2d 229, 937 P.2d 587 (1997). 29

State v. O'Dell,
183 Wn.2d 680, 358 P.3d 359 (2015) 60, 61

State v. Otton,
185 Wn.2d 673, 374 P.3d 1108 (2016) 37

State v. Phillips,
160 Wn. App. 36, 56246 P.3d 589 (2011) 56, 57

State v. Pierce,
169 Wn. App. 533, 280 P.3d 1158 (2012) 44

State v. Ritchie,
126 Wn.2d 388, 894 P.2d 1308 (1995) 59

State v. Rohrich,
149 Wn.2d 647, 658, 71 P.3d 638 (2003) 29

State v. Ross,
71 Wn. App. 556, 861 P.2d 473, 479 (1993), *amended*,
71 Wn. App. 556, 883 P.2d 329 (1994) 56

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994) 50, 51

State v. Russell,
69 Wn.App. 237, 848 P.2d 743, *review denied*,
122 Wn.2d 1003 (1993) 54

State v. Scherf,
192 Wn.2d 350, 429 P.3d 776, 801 (2018) 48

State v. Scott,
72 Wn. App. 207, 866 P. 2d 1258 (1993), *aff'd sub nom.*
State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995), *abrogated by*
State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 55, 56, 58, 59

State v. Starbuck,
189 Wn. App. 740, 355 P.3d 1167 (2015) 37, 38, 41, 42

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 47

State v. Stith,
71 Wn. App. 14, 856 P.2d 415 (1993) 51, 52

State v. Sweet,
138 Wn.2d 466, 980 P.2d 1223 (1999) 56

State v. Thorgerson,
172 Wn.2d 438, 258 P.3d 43 (2011) 43

State v. Van Buren,
112 Wn.App. 585, 601, 49 P.3d 966 (2002) 59
State v. Weber,
159 Wn.2d 252, 149 P.3d 646 (2006) 47

State v. Wilson,
149 Wn.2d 1, 65 P.3d 657 (2003) 29

Federal Cases

Holmes v. South Carolina,
547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) 37, 39, 40, 42

Statutes and Court Rules

CrR 4.7 33

RAP 10.3 2

Other Authorities

13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE:
CRIMINAL PRACTICE AND PROCEDURE § 4505 (3d ed. 2004) 47

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. AN AGREEMENT BETWEEN THE DEFENSE AND THE STATE TO DELAY PRODUCTION OF DISCOVERY AND TRY THE CASE IN SEPTEMBER 2016 UPENDED ON APRIL 25, 2016 WHEN BENNETT DEMANDED IMMEDIATE TRIAL. DURING THE ENSUING ACCELERATED DISCOVERY PRODUCTION AND TRIAL PREPARATION, THE STATE DETERMINED AN ITEM PREVIOUSLY THOUGHT UNLIKELY TO YIELD DNA EVIDENCE MIGHT PROVE USEFUL. BENNETT AGREED TO THE 11TH HOUR TEST AND TO A FUTURE TRIAL CONTINUANCE, BUT OBJECTED TO THAT SAME CONTINUANCE A MONTH LATER WHEN THE DNA RESULTS INCRIMINATED HIM. BENNETT CHOSE TO REVIEW FOR EXCULPATORY EVIDENCE ALL 250 HOURS OF JAIL CALLS WITH HIS WIFE WHEN THE STATE INTENDED TO USE ONLY ONE CALL FOR IMPEACHMENT AFTER LEARNING THE WIFE WOULD TESTIFY. WAS BENNETT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL VIOLATED BY PROSECUTORIAL MISMANAGEMENT? (Assignment of Error No. 1).

B. BENNETT'S DNA AND THE DNA OF TWO UNIDENTIFIED MALES WAS FOUND ON A BLOODY PILLOW COVERING MOORE'S FACE. IT WAS UNCONTESTED BENNETT HAD BEEN INSIDE MOORE'S HOUSE THE DAY SHE WAS KILLED AND A NEIGHBOR IDENTIFIED HIM AS THE PERSON SHE SAW THAT AFTERNOON IN THE ALLEY BEHIND MOORE'S HOUSE. BENNETT SOUGHT TO ADMIT EVIDENCE A NUMBER OF PEOPLE, SOME UNIDENTIFIED, HAD BOTH MOTIVE AND OPPORTUNITY TO KILL MOORE, BUT FAILED TO ESTABLISH THE REQUIRED NEXUS BETWEEN ANY OF THESE PEOPLE AND MOORE'S MURDER. DID THE TRIAL COURT PROPERLY EXCLUDE BENNETT'S PROFFERED "OTHER SUSPECTS" EVIDENCE? (Assignment of Error No. 2)

C. IN CLOSING, THE PROSECUTOR ARGUED REASONABLE INFERENCES FROM BODZIAK'S TESTIMONY, ACCURATELY ARGUED BUNAKOVA'S IDENTIFIED BENNETT, DISPLAYED COURTESY TO COURT STAFF AND THE JUDGE, ENSURED THE JURY KNEW HE SHOULD NOT HAVE SAID "WE KNOW," ACCURATELY NOTED BENNETT WOULD HAVE ARGUED CONTAMINATION EVIDENCE HAD THERE BEEN ANY, AND DISPUTED BENNETT'S ACCUSATION HIS CASE WAS BASED ON SPECULATION, OUTLANDISH THEORIZING, AND JUMPING TO CONCLUSIONS. DID BENNETT DEMONSTRATE ANY OF THESE ACTIONS WERE IMPROPER OR IN ANY WAY PREJUDICE THE OUTCOME OF HIS TRIAL? (Assignment of Error No. 3)

D. WAS THE TRIAL COURT'S DECISION TO IMPOSE AN EXCEPTIONAL 660 MONTH SENTENCE WELL-GROUNDED IN PRECEDENT OR EXERCISED ON UNTENABLE GROUNDS OR FOR UNTENABLE REASONS, AND CLEARLY EXCESSIVE? (Assignment of Error No.4).

II. STATEMENT OF THE CASE[1]

Respondent State of Washington adopts and supplements the substantive and procedural facts recited by appellant Chad Bennett in his Statement of the Case. RAP 10.3(b).

A. CIRCUMSTANCES LEADING TO THREE TRIAL CONTINUANCE ORDERS ISSUED MAY 31, JUNE 6, AND JULY 6

Bennett was arrested November 25, 2014 for the murder of Lucille Moore. CP 176, 282. Over the ensuing 16 months, Bennett did not object to trial being continued. In mid-April 2016, his attorney was occupied by an unrelated homicide trial[2] and the parties expected to try Bennett's case in September or October. CP 280. Because both sides believed the fall trial date would allow ample time for defense counsel to review the State's evidence, the prosecutor had agreed not to "ramp up . . . [and] dump a mountain of evidence" while counsel was focused on the older homicide case. CP 280. That trial concluded April 21, 2016. CP 269.

---

[1] The record in this case consists of four separate verified reports of proceedings, prepared by four transcriptionists. State cites to as these verified reports of proceedings following the appellant's form as RP (date of proceeding) ____, and to the related Clerk's Papers as CP ____.

[2] *State v. Jose Abilio Aguilar*, Grant County Superior Court Cause No. 12-1-00585-3

Four days later, April 25, 2016, the State learned Bennett no longer agreed to a September trial date and demanded to go to trial immediately. CP 281. On May 13, after court and counsel discussed the still-incomplete status of discovery, the court set trial for June 8. CP 281. A hearing was subsequently set for May 31 on the State's motion to continue trial to September as the parties originally had agreed. CP 281. Meanwhile, the State produced the discovery it had agreed to delay. CP 149.

Bennett's counsel interrupted preparation for another high-profile trial,[3] to schedule a June 1 telephonic interview with Washington State Patrol Crime Laboratory (crime lab) forensic scientist Anna Wilson regarding her DNA[4] evidence testimony. CP 148–49. During the last week of May, in preparation this interview and for trial, Owens and the State's in-house investigator, Dan Dale, went to the Cheney, Washington crime lab to interview Wilson. CP 281. The State Patrol Crime Scene Response Team (CSRT) had collected evidence at Moore's residence immediately following her murder and assisted Ephrata Police Department Detective Todd Hufman in determining the evidence to be tested. CP 284. CSRT identified items most likely to yield meaningful results: a cigarette butt found near Moore's body, swabs gathered from three locations in the

---

[3] *State v. Josephine Ellen Johnson*, Grant County Superior Court Cause No. 14-1-00826-3.

[4] Deoxyribonucleic acid

house, the blood-soaked sofa pillow found partially covering Moore's face, and the blood-saturated tee-shirt Moore wore. CP 284–85. It was either Wilson or Trevor Allen, the lead CSRT forensic scientist, who initially believed the tee-shirt too saturated to be likely to yield any DNA other than Moore's. CP 285. In Wilson's opinion, the massive amount of female DNA on the shirt would mask any male DNA. RP (7/5/16) 66; CP 281. Due to resource limitations inherent in complex investigations, the crime lab limited initial testing to only the five most likely items: the cigarette butt, the three swabs, and the pillow. RP (7/5/16) 40-41; CP 282.

During their late-May Cheney interview, Wilson told Owens and Dale that Bennett was an unusually "heavy shedder" of his DNA, meaning he left more DNA on items he touched than is usual in the general population. CP 281. Dale, a former trooper with the State Patrol, asked whether that would make it more likely Bennett's DNA could be recovered from Moore's blood-saturated tee-shirt. CP 281. After further discussion, and considering the surprising amount of Bennett's DNA on the pillow, Wilson concluded there was a greater chance the tee-shirt would yield fruitful evidence than originally believed. RP (7/5/16) 42. She agreed to test the shirt. CP 281. The State did not intend to test the shirt if trial remained set for June 8, but when trial was continued to July 7, the State instructed Wilson to test the shirt. CP 281.

Defense counsel interviewed Wilson on June 1 with the State present. CP 282. When Wilson said she was testing Moore's tee-shirt, counsel responded "Oh, good." CP 203, 282. Counsel later told the court he expected these test results to be exculpatory and would not object to admission of the evidence if that turned out to be the case. CP 282. The State offered to allow a defense expert to observe Wilson's testing, but only if the expert was not Dr. Randell Libby, who was barred from the testing areas in all State Patrol crime labs. CP 282. The State gave counsel a list of private DNA experts who were not restricted, but counsel declined to use someone other than Libby. CP 282.

Wilson tested the shirt and produced her "rush" report June 28, three days earlier than anticipated. CP 282. The procedure destroyed the entire DNA sample, a circumstance to which defense counsel had agreed in advance. CP 282. Bennett's DNA was found across the chest area of the shirt, covering the area in which Moore was repeatedly stabbed. RP (7/5/16) 45–46. Other potential suspects, including John Rehfield, Wendy Swain, and Guy Austin,[5] were excluded. RP (7/5/16) 46.

Investigation of Moore's murder had continued following Bennett's November 25, 2014 arrest and incarceration, impelled in part by

[5] Guy Austin lived with Moore in a romantic relationship for over 20 years, but had moved to a different residence sometime in 2013. RP (9/19/16) 367.

Bennett's numerous and lengthy calls to his wife from the Grant County jail. CP 176, 282–83. Resources limitations within the Ephrata Police Department caused Hufman to be the only officer assigned to review recordings of these calls. CP 282. Although a recorded message at the beginning of each call informs the parties all calls are subject to recording and monitoring,[6] Hufman did not want Bennett to know law enforcement was reviewing all calls between Bennett and his wife. CP 176.

Hufman started the project in late November 2014. CP 285. In January 2015, Huffman realized he needed to organize the data into a searchable format and created a spreadsheet log on which he entered a synopsis of each call he reviewed after late January 2015. CP 285. He did not start listening to calls made between December 2, 2014 and January 27, 2015 until April 2016. CP 286. By June 2016, Hufman was still reviewing the 250-plus hours of recordings and had gotten only as far as September 11, 2015. CP 285–86.

Bennett disclosed in late May or early June he was waiving marital privilege so his wife could testify. RP (7/5/16) 53. Sometime between June 6 and June 15, Hufman first heard a late 2014 conversation in which Bennett cautioned his wife they needed to keep their stories straight. CP

[6] Before an inmate and an outside party are connected, the jail telephone system plays a message that includes: "This is a call from a corrections facility and is subject to monitoring and recording." RP (9/29/16) 1718.

283, 286. Hufman immediately notified the prosecutor's office and, on June 15, delivered a report and a copy of all of recordings he had reviewed to date. CP 176. Prosecutors knew Hufman was listening to Bennett's calls but did not intend to use any of their conversations until, shortly after having been notified Mrs. Bennett would testify, it learned Bennett told his wife to ensure their stories matched. RP (7/5/16) 53.

The prosecution interviewed Mrs. Bennett on June 27. RP (7/5/16) 53–54. After confirming she knew all her calls were being recorded, Owens disclosed to counsel the possibility of using recordings relevant to impeachment. CP 283. The prosecution then produced a copy of all recordings to defense counsel. RP (7/05/2016) 31–32.

On July 1, Bennett filed a Motion to Dismiss for Arbitrary Action or Governmental Misconduct . . . ; Motion for Continuance and Ancillary Motions. CP 139–41. As an alternative to dismissal, he asked the court to suppress all evidence received after May 31, 2016 or to continue trial two months. CP 139. Bennett's expert needed four or five weeks to separately test the tee-shirt and his analysis was expected to include the DNA from two unidentified males also found at the murder scene. RP (7/5/16) 70–71.

Toward the end of the July 5 hearing on Bennett's motion, the court commented that when testing the tee-shirt had first come up several weeks earlier, Bennett "kind of tossed the dice there." RP (7/5/16) 67. The

court reminded counsel he had apparently thought it unlikely the tee-shirt test would produce a match, but had "said we want to proceed, it will be retested and we'll live with the results when they come in." RP (7/5/16) 68. Counsel replied it would have been ineffective assistance to reject possibly exculpatory evidence. RP (7/5/16) 68. He reminded the court he had said either way, he would need more time to get the opinion of an independent expert. RP (7/5/16) 68–69. Counsel pointed out that the "very miniscule amount" of Bennett's identified DNA on the tee-shirt was potentially exculpatory, that it "cuts both ways." RP (7/5/16) 69. He also said he needed to review all Bennett's recorded calls because "some of those calls could be potentially exculpatory. . . ." RP (7/5/16) 34.

The court observed the combination of circumstances necessitating this continuance was "apparently beyond anyone's control," wondered whether further analysis from Libby would be in any way helpful, then summarized where the parties stood: both sides agreed the case should be continued approximately two months, to sometime in the fall. RP (7/5/16) 73–74. Bennett, himself, refused to support a continuance. RP (7/5/16) 76. The court announced it would rule the next day, but disclosed it was not going to dismiss the case or suppress the new evidence. RP (7/5/16) 77.

The State responded that while Bennett's recorded conversations may have been a surprise to his lawyer, they were not a surprise to

Bennett. RP (7/5/16) 82–83. Nobody contested that inmates and the people on the outside with whom they speak are always informed their calls may be monitored and recorded. RP (7/5/16) 82. The State also reiterated it had been cooperating to schedule evidence production while defense counsel focused on his earlier homicide trial, proceeding on a reasonable, good faith understanding that Bennett's matter would be tried in the fall, "so we could plan it out ourselves, and when that didn't happen and we were told we were going to go to trial now, we've just been working as hard as we can." RP (7/5/16) 83–84. Defense counsel added that Bennett's pre-trial motions would not be ready if trial started the next day. RP (7/5/16) 84. The following morning, defense counsel filed a supplemental brief explaining why Libby needed four or five weeks to prepare, and Bennett told the court he had now chosen prepared counsel over speedy trial. RP (7/5/16) 88–89. The parties agreed the State would produce Hufman's jail call summary log. RP (7/5/16) 92.

B. "OTHER SUSPECTS" EVIDENCE[7]

Before his second trial, Bennett filed a disclosure of "other suspects" evidence he intended to introduce "implicating John Rehfield, Wendy Swain, Charles Larr, and other tenants of [murder victim] Lucille

[7] The State recites its "other suspect" facts from the February 6, 2017 limine motions hearing and as presented in Bennett's pleadings, cited to the Clerk's Papers page number.

Moore . . . ." CP at 866–72. He argued he "should be permitted to present evidence that Wendy Swain, John Rehfield, Charles Larr, or another of Lucille Moore's tenants may have committed the murder." CP at 872. The disclosure recited the following facts: Swain was Moore's daughter, who, according to Bennett, lived within a mile of Moore and "stood to inherit a substantial portion of [Moore's] estate." CP at 867. Rehfield was Moore's domestic partner. CP at 867. The two had gone together to Moore's bank within two days of the murder, asking how to gain access to the safe deposit box belonging to a deceased person. CP at 867. A family member told investigators Swain's children were all just waiting for Moore to die. CP at 869. Swain was in town "the approximate time of the murder" and had given investigators "improbable" accounts of certain events. CP at 869. Huffman described his initial encounter with Swain and Rehfield as " 'cold and unsettling.' " CP at 870. Huffman initially thought the crime was committed by a close associate or family member because there was no sign of forced entry. CP at 870.

Bennett argued that whomever ransacked Moore's house following her death left behind many valuable items, a fact indicating "the murderer was not motivated by a desire for *immediate* monetary gain, possibly because that person stood to gain financially in the long run; i.e., through inheritance." CP at 867 (double emphasis in original). Bennett also

proposed an alternate hypothesis: "[A]ssuming it were true that someone was about to be evicted, then any of Lucille Moore's renters could conceivably have had the motive and opportunity to have committed the murder." CP at 870. Evidence at the crime scene included DNA from two unidentified males on the bloody pillow that covered Moore's face and also on the tee-shirt she was wearing. CP at 870. Larr was a tenant who had been late on his rent in the past. CP at 870. A few days before the murder, Moore and Larr's wife had been observed in heated argument. CP at 870. An elderly neighbor, Anastasia Bunakova, had seen a man walking down the alley the day of the murder from the vicinity of Larr's house, then entering Moore's residence. CP at 870.

The State moved in limine to exclude this evidence. RP (2/6/17) 3153.[8] At the hearing, the court addressed Bennett first: "I think you've laid out motive and opportunity, potentially, but what is it there that's going to show me an intention to act on either the motive or opportunity?" RP (2/6/17) 3155. The court quoted *Starbuck's*[9] requirement that other suspect evidence show the third party took a step indicating intention to act on the identified motive or opportunity, and asked "What is the

---

[8] The header on the Report of Proceedings of the afternoon session of the February 6, 2017 hearing misidentifies the date as February 2, 2017. RP (2/6/17) 3146.

[9] *State v. Starbuck*, 189 Wn. App. 740, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008, 366 P.3d 1245 (2016).

evidence that shows a step indicating an intention to act on the motive or opportunity?" RP (2/6/17) 5154–55. Bennett replied the word "step" was ambiguous, lending itself to many interpretations. RP (2/6/17) 3155. He conceded he had no evidence any of these people actually tried to kill Moore, but argued that on the afternoon of the murder one of Moore's neighbors saw someone walking "directly from the area where Mr. Larr's residence is located" toward Moore's house, and there had been a recent heated argument with Larr's wife over rent. RP (2/6/17) 3156. When the court challenged Bennett's assertion "somebody matching Charlie Larr's description [was seen] leaving from the direction of his house walking toward [Moore's] house" on the day of the murder, Bennett admitted the witness did not describe the person she saw, nor did she mention Larr's name. RP (2/6/17) 3155. He acknowledged the witness did not give any descriptive details about the person she saw and further conceded nobody saw that person enter Moore's house. RP (2/6/17) 3161–62.

After arguing that a missing receipt book could lead to an inference Moore was killed by any one of her tenants, Bennett speculated the missing receipt book could also have been evidence Moore's daughter, Swain, was trying to cast blame on a tenant. RP (2/6/17) 3164. He concluded the missing receipt book "evidence could be used to show guilt on the part of Wendy Swain or on the part of one of the other tenants. RP

(2/6/17) 3164. Again bringing up the number of valuable items left behind after Moore's house was ransacked, Bennett argued this evidence could demonstrate someone was faking a burglary or, alternatively, someone was looking for something specific. RP (2/6/17) 3165.

Bennett also argued other suspects could be inferred from the three separate DNA profiles on the pillow found over Moore's face after her death. RP (2/6/17) 3165. These included his own profile and two that were unidentified. "Circumstantial evidence, I grant you, that someone else was there at the time of the killing besides Mr. Bennett."[10] RP (2/6/17) 3165.

Ultimately, Bennett had to concede: "[T]here's no evidence of a step [taken by any of the potential other suspects] that your Honor asked me about, of an actual step. It's merely circumstantial." RP (2/6/17) 3161. Comparing the facts of this case to those in *Clark*,[11] in which the car belonging to the identified other suspect was seen near a house the defendant was accused of torching, the court asked whether there was a similar fact with either of the individuals—Swain or Larr—Bennett had named. RP (2/6/17) 3161. Bennett countered that because Swain and Larr lived close by, nobody would expect to see a car. RP (2/6/17) 3161. He said no evidence supported Swain's assertion she had been "rock picking"

---

[10] Bennett admitted being in Moore's house three separate times the day she was murdered. *See, e.g.*, RP (3/14/17) 7316, RP (3/15/17) 7406–07, 7409–10.

[11] *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001).

the day her mother was killed, arguing no evidence established Swain was *not* in her mother's neighborhood at that time. RP (2/6/17) 3161. Swain lived within a mile of her mother and used busses for transportation. RP (2/6/17) 3161. He conceded the evidence pointing to Swain "is kind of bits and pieces here and there, it's scattered. RP (2/6/17) 3164. After further discussion in which Bennett could not point to a fact similar in substance to those of *Clark* and *Leonard*,[12] "evidence of the same nature tending to identify some other person as the perpetrator," Bennett conceded the cases for his "other suspects" were entirely circumstantial. RP (2/6/17) 3167.

The State argued that the witness, Vera Bunakova, had picked Bennett out of a photo montage as the person she saw in the alley. RP (2/6/17) 3167. Anastasia Bunakova said she saw two men, not just one, but neither mother nor daughter picked Rehfield or Larr from the montage. RP (2/6/17) 3167. Bennett did not contradict the State's assertion there was no evidence Rehfield or Lahr were at Moore's the day she was killed while there was evidence "Bennett was there, at least twice, if not three times." RP (2/6/17) 3167–68.

The trial court granted the State's limine motion, stating Bennett failed to identify evidence showing some kind of step taken by any of the

---

[12] *Leonard v. Territory*, 2 Wash. Terr. 381, 396, 7 P. 872 (1885) ("other suspect" lived in neighborhood of supposed homicide, was there on the day of it, was hostile toward and had threatened to kill deceased).

various people, named or unnamed, identified as potential suspects. RP (2/6/17) 3170. Citing *State v. Franklin*, [13], the Court noted evidence of motive or animus, without more, is insufficient. RP (2/6/17) 3171. "[W]ithout something that shows some affirmative step towards actually doing the crime, it comes down to basically it not being relevant enough to . . . outweigh the danger of potential confusion of the issues or misleading the jury or potentially unfair prejudice." RP (2/6/17) 3171.

C. ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

1. Bodziak testimony and related closing argument

Bennett asked in limine for an order preventing the State's shoeprint expert, Dr. William J. Bodziak, from testifying to any facts or conclusions not specifically stated in his report. RP (3/3/17) 6027. Bodziak's report stated:

> In addition, present throughout this entire area are wipe marks in multiple directions. The wiping action has physically smeared the blood in some of those areas, including portions of the herringbone pattern. The characteristics evident [in] these images as well as images taken before enhancement are typical of attempts to clean-up bloody footwear evidence.

RP (3/3/17) 6027. Bennett argued that saying evidence "is typical of attempts to clean-up footwear evidence is quite different from rendering

[13] *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014).

an opinion that someone actually tried to clean up that scene." RP (3/3/17) 6027. He argued Bodziak never said it was his opinion that the wipe marks were evidence that someone cleaned up bloody footwear prints in this case, and that it would be unfair to require the defense to respond to such an opinion without advance notice. RP (3/3/17) 6028. The court granted there was a distinction, albeit slight. RP (3/6/17) 6069. The State pointed to Bodziak's immediately-preceding sentence: "In addition, present throughout this entire area are wipe marks in multiple directions. The wiping action has physically smeared the blood in some of those areas, including portions of the herringbone pattern." RP (3/6/17) 6069–70. The State argued this sentence "clearly says that [Bodziak] sees some wiping action through the herringbone pattern." The court clarified that Bodziak was prohibited from stating there was an attempt to clean up, but the State would be allowed to argue in closing that Bodziak's opinion, as stated in his report, "is in fact, what you just argued." RP (3/6/17) 6070. The court later reiterated this order affected Bodziak's testimony: "So again, the ruling that I made on Friday is that he is limited to what he placed in his opinion on page four, exactly word for word what he said. That's what he's limited to, his opinions." RP (3/6/17) 6070–71.

Bodziak testified about wipe marks visible in several photographs of the same shoe print. Concerning slide number eight, he said:

> You see on the left . . . from left to right, are a series of streaks. . . . And on the right, right underneath the orange -- the B on the orange paper are again some other streaks. And at the bottom part of those there are actually streaks running down in a different direction. . . . So at least three different angles of wiping or wipe marks or streaks in these areas. And in the center are some remnants of a herringbone design impression.

RP (3/6/17) 6104. Describing slide number nine, he continued:

> In addition, present throughout this entire area are wipe marks in multiple directions. So these were the streaks, this direction, this direction. And then over here outside of this close-up over in this direction. So at least three very obvious areas where there's some wipe marks. . . . The wiping action has physically smeared the blood in some of those areas, including portions of the herringbone pattern.

RP (3/6/17) 6108. After further discussion, he continued:

> So this is just showing that the wipe marks are not just in different directions, but there's actually some additional ones in there that are curved. Then the end of the paragraph of my report says, "The characteristics evident in these images, as well as images taken before enhancement, are typical of attempts to clean up bloody footwear evidence."

RP (3/6/17) 6110. Concerning a third photograph, Bodziak said: "If someone's wiping, it's not always straight. . . . There's both evidence of curvature, curving streaks and straight streaks in multiple areas." RP (3/6/17) 6111.

Bennett objected immediately when the State, in closing, said: "[Bodziak's] observation was that there was clear evidence of clean-up to the [shoe print] impression B, the blood." RP (3/21/17)

8202. The court responded by addressing the jury: "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) 8202–03. The State continued:

> Impression B was not visible until processed with LCV.[14] That's the reason I showed you those two photographs earlier. And in those photographs, you heard him testify about the clear swipe marks around and through the impressions. The swipe marks are multi-directional, as well. *His testimony is this is a typical characteristic of clean-up.* . . . And the testimony he's talking about looking at the purple there, you can see the swipe marks through here and the swipe marks coming along there that he was talking about, and the swipe marks up there.

RP (3/21/17) 8203 (emphasis added). Referring to a second photo, he said, "this is the same thing showing it, but a larger picture of showing the swipe marks. Coming through." RP (3/21/17) 8203.

During a recess in which the jury left the courtroom, Bennett renewed his objection to the prosecutor's assertion Bodziak had "testified there was clear evidence of cleanup to [shoeprint] impression B." RP (3/21/17) 8221. He moved for a mistrial, arguing "the state was limited to what Mr. Bodziak said in his report, which was simply that the swiping patterns were typical of what you see in clean-up." RP (3/21/17) 8222.

---

[14] Leucocrystal violet is a reagent used in forensic analysis. RP (3/6/17) 6102.

The prosecutor responded that, following the court's admonition to the jury to disregard the statement, he "left it be. And I didn't go back to there." RP (3/21/17) 8224. The court denied Bennett's motion for a mistrial, stating: "I'm taking that as at this point closing argument." RP (3/21/17) 8224. After commenting Bodziak's testimony had included the phrase "[a]ttempt to clean-up," the court said it took the prosecutor's closing argument phrase "clear evidence of clean-up" as argument, and concluded: "I don't see that as an issue." RP (3/21/17) 8225.

2. Vera Bunakova testimony and related closing argument

Vera Bunakova testified that in the late afternoon of the day of the murder, she was picking cucumbers along her alleyway fence adjacent to Moore's shop when she first heard, then saw, a man approaching, talking on his cell phone. RP (3/1/17) 5574–75. When the man saw Bunakova, he turned and walked away, RP (3/1/17) 5576, but not before they looked directly at one another for two or three seconds. RP (3/1/17) 5578. Bunakova saw the same man walking with a female a short while later. RP (3/21/17) 5584–85. Again, he turned away from Bunakova. RP (3/1/17) 5585. Bunakova testified he was taller than 5'10", not overweight, very young, and both times she saw him he was wearing a dark baseball cap, dark T-shirt, and dark-wash, wide-legged jeans. RP (3/21/17) 5585.

At trial, Bunakova testified she identified the man she saw in the alley in a photo montage shown to her at the prosecutor's office about a year after the murder. RP (3/1/17) 5596. She answered "correct" when asked whether her initials next to a particular photograph in a montage exhibit indicated the person she believed she saw behind Moore's house. RP (3/1/17) 5597. The prosecutor then asked Bunakova: "From your observation today, is that person in the courtroom today?" RP (3/1/17) 5598. Bunakova answered "Yes", then turned and identified Bennett as both the man she believed she had seen in the alley and had picked out of the photo montage a year later. RP (3/1/17) 5598.

In closing, the prosecutor argued Vera Bunakova "saw the defendant, Chad Bennett, from approximately 15 feet away in the alley on his cell phone. She testified he looked right at Vera and made eye contact." RP (3/21/17) 8207. Bennett objected: "That is misstating the testimony and is arguing facts that are not in evidence. Again, I'm moving for a mistrial, or at the very least, a curative instruction." RP (3/21/17) 8207. To this, the court responded: "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.

3. Thanking and commending judge and court staff in front of jury at end of six-week trial

Bennett did not object when the prosecutor thanked and commended the judge, court staff, and jail personnel at the start of rebuttal closing argument. RP (3/23/17) 8530.

4. "We know" as an expression of personal opinion

Bennett did not object when the prosecutor used the phrase "we know" to introduce evidence in a PowerPoint slide during closing on March 22, 2017. RP (3/22/17) 8314–15. He did object a day later when the prosecutor used the phrase a second time, leading to the following exchange in front of the jury:

> Counsel Objection, objection, your Honor, that form of the argument, what we know.
>
> Prosecutor Excuse me, Counsel.
>
> Counsel It's counsel's opinion.
>
> Prosecutor I apologize, Counsel. *I know counsel did that a few times himself, so—*
>
> Counsel *It's easy enough.*
>
> Prosecutor It's an occupational hazard. Sorry folks. The state's position, I'll say that, I've got to keep saying that, the state's position is that it's only -- the only plausible explanation for that is that Chad Bennett grabbed that pillow after he killed Lucille Moore, and that's why his DNA is there.

RP (3/23/17) 8531–32 (emphasis added).

5. *Argument Bennett would have brought up evidence of crime scene contamination had there been any*

Bennett's closing argument included extensive discussion of the DNA evidence, including the myriad of ways in which contamination could impair the validity of such evidence. RP (3/22/17) 8377–468. Counsel questioned how it was, if Bennett had strangled Moore, no male DNA was found at the neck of Moore's shirt and proposed that either the killer was wearing gloves or was female. RP (3/22/17) 8377–78. He then asked how, if Bennett was wearing gloves, his DNA could have been deposited at the site of a blood smear on a kitchen cabinet. RP (3/22/17) 8377–78. He asked how DNA from two unidentified males could have gotten on Moore's shirt when Moore was not a hugger or hand-shaker. RP (3/22/17) 8377–78. Counsel emphasized that the "highly trained bunch of professionals" of the CSRT were constantly changing their gloves to avoid inadvertent transfer of DNA. RP (3/22/17) 8433. He recited Allen's hypothetical example of how "secondary transfer" cross-contamination could occur. RP (3/22/17) 8433–34. He told the jury "Allen knows you can transfer, you can contaminate the evidence if you're not careful. . . . even talking over an object can contaminate it." RP (3/22/17) 8434–35. Moving to Wilson's testimony, he gave several examples of how DNA could be deposited, both through direct contact and through secondary

transfer, "and secondary transfer could be either before the crime scene people got there, it could be while the crime scene people were processing the scene, or it could be in the laboratory." RP (3/22/17) 8437. Counsel recited the hypothetical example of a worker in a swab manufacturing facility contaminating a swab later used at a crime scene, arguing someone would have to be aware they had contaminated an item to recognize a problem. RP (3/22/17) 8438. Mishandling even one piece of evidence at a crime scene, he argued, could result in secondary transfer without any evidence of contamination. RP (3/22/17) 8438–39.

Counsel argued the presence of Bennett's DNA at the kitchen cabinet blood smear could be innocently accounted for if anything having a large amount of Bennett's DNA came into contact with that location. RP (3/22/17) 8442. He argued Wilson had said, hypothetically, anything having Bennett's DNA could do it—"[a]nything could be anything. It could be an object, an article of clothing, a hand, a pillow. Who knows what." RP (3/22/17) 8443. He argued Bennett's DNA could have been deposited on the pillow covering Moore's face by something else coming into contact with the pillow. RP (3/22/17) 8443. Counsel then went into detail about various ways in which Bennett's DNA could have been left on the pillow, the tee-shirt, and the blood smear on the cupboard. RP (3/23/17) 8452. He reminded the jury Wilson had admitted such transfer

was "easy" without the necessary precautions. RP (3/23/17) 8457–58. He wrapped up this argument recounting a hypothetical he had given Wilson, arguing Wilson's testimony allowed them to consider "that if [Bennett] was a heavy shedder and his hand was very sweaty on a hot summer day when he shook hands with Lucille Moore, that might have been enough." RP (3/23/17) 8467–68.

In rebuttal, the prosecutor recounted the steps law enforcement had taken to lock down the crime scene, stressing "[t]hey were meticulous about changing gloves." RP (3/23/17) 8526. He then said Bennett

> spent a lot of time talking with you 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. I know you recall that Anna Wilson talked about that.

RP (3/23/17) 8526–27 (emphasis added). Bennett did not object. RP (3/23/17) 8526–27. The prosecutor then summarized the State's evidence of Bennett's DNA on each item where it was located and explained why Bennett's speculative hypotheses were unlikely. RP (3/23/17) 8527–35.

6. Argument the six week trial satisfied due process and extensive law enforcement investigation established State did not rush to judgment or decide to frame the wrong man

Bennett's closing summation after six weeks of trial launched with the assertion "90 percent of the State's case is based on one of four things[.]".RP (3/22/17) 8329. The first three things were the various statements Bennett made to Huffman, the statements Bennett made after his arrest, and the "statements and testimony from unreliable witnesses who changed their stories from what they originally told the police at the time the investigation first started." RP (3/22/17) 8330–31. "And finally, the State's case is based on speculation, supposition, outlandish theorizing and jumping to conclusions and inviting you, ladies and gentlemen, to go along for the ride." RP (3/22/17) 8331. The prosecutor disagreed:

> I did want to say one other thing, as well, that I forgot to say at the outset [of rebuttal closing argument]. 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).

D. EVIDENCE OF DELIBERATE CRUELTY AND PARTICULARLY VULNERABLE VICTIM

1. Evidence of deliberate cruelty

The wounds that killed Moore were in excess of what it takes to kill a person. RP (2/23/17) 5111. The jury heard testimony from the forensic pathologist who attended Moore's autopsy about blunt force trauma to her head that would not necessarily have been fatal. RP (2/23/17) 5101. A photograph of Moore's head showed a number of "injuries, abrasions, contusions on both sides of the head, as well as the nose, cheek and the lips." RP (2/23/17) 5081. A blow with the level of force seen in a boxing injury or car crash fractured her maxilla. RP (2/23/17) 5083–84, 5095. She had a subarachnoid hemorrhage around her brain, indicating her brain had been severely shaken up. RP (2/23/17) 5084–85. This injury was to the front of her brain, demonstrating it did not come from falling down and hitting her head on the floor and was consistent with the blunt force trauma evident on her face and the side of her head. RP (2/23/17) 5100. Petechial hemorrhages in both eyes correlated with fractures to the superior horns of the thyroid cartilage in Moore's neck, suggesting manual strangulation. RP (2/23/17) 5089–90.

There was a sharp, incised wound to Moore's right hand, implying a defensive wound incurred while she was alive. RP (2/23/17) 5080–81. In

addition, there were about "17 sharp force or stab wounds to [Moore's] chest." RP (2/23/17) 5078–79. Two incised wounds to her neck were not lacerations—they were sharp force injuries caused by blunt force. RP (2/23/17) 5085. There was also stab wound to the right side of her neck. RP (2/23/17) 5085. The pathologist thought the blunt force injuries were caused by a fist or a hand, the sharp force injuries most likely by a knife. RP (2/23/17) 5086. He could not be certain of the order in which these injuries were inflicted, but concluded Moore was on the ground when she suffered the sharp wounds. RP (2/23/17) 5095. She was still alive when she received the 17 stab wounds to her heart, 11 of which penetrated into the heart itself. RP (2/23/17) 5096. Moore's death could have been caused by heart arrhythmia from the stabbing, but it was more likely due to exsanguination. RP (2/23/17) 5107. She also could have been killed by the injuries to her throat. RP (2/23/17) 5107. The pathologist's final conclusion was that Moore was killed by the sharp force wounds to her neck and chest. RP (2/23/17) 5107–08.

2. Evidence Moore was a particularly vulnerable victim

Moore was around 82 years old when she died. RP (2/22/17) 4923. Nothing at the crime scene indicated she was able to put up a fight—no furniture was moved around nor was anything broken in the kitchen where her body was found. RP (2/22/17) 4923. CSRT forensic scientist Allen

testified he did not know how much of a fight an 82 year old woman could put up. RP (2/22/17) 4923. Bennett, born September 23, 1989, was about to turn 25 on September 7, 2014. CP 2138. At the time of the murder, he was employed as a farm worker. RP (3/17/17) 6173. He raked hay, ran farm equipment, helped with the irrigation systems, helped with cattle, and built fences. RP (3/17/17) 6173–74. There is no evidence Bennett ever lost his temper working around the ranch among the other young, healthy men.

3. Factors leading to court's determination of appropriate exceptional sentence

The trial record contains no evidence of Bennett's age having impaired his capacities. He did not argue his youth as a mitigating factor at sentencing. RP (5/12/17) 8684 - CP 1904–11. During allocution, he maintained his innocence. 2RP (5/12/17) 8746, 8748, 8750.

III. ARGUMENT

A. AN AGREEMENT BETWEEN THE DEFENSE AND THE STATE TO DELAY PRODUCTION OF DISCOVERY AND TRY THE CASE IN SEPTEMBER 2016 UPENDED ON APRIL 25, 2016 WHEN BENNETT DEMANDED IMMEDIATE TRIAL. DURING THE ENSUING ACCELERATED DISCOVERY PRODUCTION AND TRIAL PREPARATION, THE STATE DETERMINED AN ITEM PREVIOUSLY THOUGHT UNLIKELY TO YIELD DNA EVIDENCE MIGHT PROVE USEFUL. BENNETT AGREED TO THE 11TH HOUR TEST AND TO A FUTURE TRIAL CONTINUANCE, BUT OBJECTED TO THAT SAME CONTINUANCE A MONTH LATER WHEN THE DNA RESULTS INCRIMINATED HIM. BENNETT CHOSE TO REVIEW FOR EXCULPATORY EVIDENCE ALL 250 HOURS OF JAIL CALLS WITH HIS WIFE WHEN THE STATE INTENDED TO USE ONLY ONE CALL FOR IMPEACHMENT AFTER LEARNING THE WIFE WOULD TESTIFY. BENNETT'S CONSTITUTIONAL

RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED BY PROSECUTORIAL MISMANAGEMENT.

1. Standard of Review

A CrR 8.3 motion to dismiss for government mismanagement is reviewed for abuse of discretion and will be overturned only if the trial court's decision was manifestly unreasonable or based on untenable grounds. *State v. Wilson,* 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

2. Legal Principles

Dismissal of charges is an extraordinary remedy available only when a defendant establishes "by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting [his] right to a fair trial." *State v. Martinez*, 121 Wn. App. 21, 29, 86 P.3d 1210 (2004), *as amended on reconsideration* (Apr. 20, 2004) (citing *State v. Rohrich,* 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003); *State v. Wilson,* 149 Wn.2d at 9). Dismissal is available only in "truly egregious cases of mismanagement or misconduct." *State v. Duggins,* 68 Wn.App. 396, 401, 844 P.2d 441, *aff'd,* 121 Wn.2d 524, 852 P.2d 294 (1993). Government misconduct can include simple mismanagement, but "[a]bsent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges under CrR 8.3(b)." *State v. Michielli,* 132 Wn.2d 229, 239–240, 937 P.2d 587 (1997).

A fair review of all the facts leading up to Bennett's July 6, 2016 decision to forego his right to speedy trial in favor of having prepared counsel demonstrates the truth of the trial court's comment the day before, that the combination of circumstances necessitating a two-month continuance were "beyond anyone's control." RP (7/5/16) 73.

3. Bennett agreed to 11th hour testing of Moore's bloody tee-shirt and told the court June he would probably need to continue trial one more time to allow testing by his expert. He then objected to continuance in July on speedy trial grounds when the DNA results further incriminated him.

There is no evidence Bennett raised any speedy trial concerns between his November 25, 2014 arrest and late April, 2016, nor that he initially objected to the parties' agreement to delay trial until September 2016 in light of his attorney's other trial responsibilities. CP 280; CP 269. Because both sides believed the fall trial date would allow ample time for review of the State's evidence, the State agreed not to "ramp up . . . [and] dump a mountain of evidence" on defense counsel while he was still occupied with the older cases. CP 280.

The State jolted its efforts to produce its evidence into high gear when it learned on April 25, 2016 Bennett had just demanded an immediate trial CP 280. RP (7/5/16) 84. Following the May 13 trial set hearing, the State produced all the discovery it had agreed to delay. CP 149.

Defense counsel scheduled a June 1 telephonic interview with Washington State Patrol Crime Laboratory forensic scientist Anna Wilson to discuss her DNA testimony. CP 148–49. In preparation for that interview and for trial, the prosecutor and State investigator met with Wilson in Cheney, and, in the course of that meeting, determined a bloody tee-shirt originally rejected as being unlikely to produce useful DNA evidence might prove fruitful in light of Bennett being a "heavy shedder," someone shed more DNA than is usual in the general population. CP 281. The State intended to test the tee-shirt only if trial were continued past its scheduled June 8 date. CP 281. On May 31, the court continued trial to July 7. CP 281.

Bennett cannot claim either surprise or failure of due process over the tee-shirt evidence. He did not object when he first learned about it on June 1, over a month before trial. CP 282. His attorney's first response was: "Oh good." CP 282. At the June 6 hearing, the State told the court about the shirt, that it was being tested after the crime lab had initially refused, and that nobody knew what the lab would find. RP (6/06/16) 24. Defense counsel added: "Yeah, so again, in principle, I am totally in favor of testing these items. I believe they may exonerate my client." RP (6/06/16) 25. Counsel commented this was government mismanagement,

although not the prosecutor's fault. RP (6/06/16) 25. Bennet made no objection. RP (6/06/16) 25.

These facts are nowhere near the requisite level of "truly egregious . . . mismanagement or misconduct" required for reversal under *Duggins,* 68 Wn. App. at 401, and, with over a month's notice, Bennett cannot establish actual prejudice flowing from state action. When Bennett learned the tee-shirt evidence incriminated him and tended to exonerate several other suspects, he chose to have his own tests conducted and, on July 5, asked for an additional four or five weeks for that testing. RP (7/5/16) 70–71. For the first time, Bennett moved for dismissal for governmental misconduct and, alternatively, to suppress the evidence he welcomed a month earlier. RP (7/5/16) 31. This was also the first time Bennett objected to waiving his right to speedy trial, the first time he complained of having to choose between that right and his right to counsel fully prepared to defend him.

It was Bennett's choice a month earlier not to use the services of an expert who could have observed Wilson's laboratory test procedures, despite the State's offer of assistance in finding a substitute for that purpose. CP 282. Libby's expulsion from Washington state crime labs cannot be laid on the prosecutor's doorstep.

Bennett's silence on the speedy trial issue during the June 6 hearing reveals the strategic core of his July 5 objection. Counsel confirmed at the July 5 hearing he had told the court a month before he would need a continuance to obtain the opinion of an independent expert, regardless of the tee-shirt test results. RP (7/5/16) 68–69. Bennett apparently did not mention any speedy trial concerns to his lawyer at that time, giving rise to a reasonable inference that the strength of Bennett's speedy trial objection was proportionate to his perception of the strength of the State's evidence against him.

This Court should conclude Bennett has failed to demonstrate arbitrary action or governmental mismanagement of any sort, much less an egregious level sufficient to support dismissal or remand for a new trial.

4. The State produced recordings of over 250 hours of jail calls between Bennett and his wife upon learning of a single call, shortly after being notified Mrs. Bennett would testify, in which Bennett cautioned his wife to keep their stories straight. Bennett chose to review the remaining calls for exculpatory evidence.

Superior Court Criminal Rule (CrR) 4.7 imposes an ongoing duty on prosecutors to disclose evidence in its possession or control it may reasonably expect to use at trial, including a defendant's oral, written, or recorded statements. *State v. Dunivan*, 65 Wn.App. 728, 733, 829 P.2d 799 (1992); CrR 4.7. "The purpose behind discovery disclosure is to

protect against surprise that might prejudice the defense. *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014) (citing *State v. Bradfield*, 29 Wn. App. 679, 682, 630 P.2d 494 (1981)).

To justify dismissal for discovery violations constituting misconduct, Bennett must establish his July 7, 2016 choice between his right to a speedy trial and his right to prepared counsel was compelled by the prosecution's failure to act with due diligence and the withholding, or untimely production, of material facts. *Barry*, 184 Wn. App. at 796–97.

The two questions here are: (1) at what time did the conversations between Bennett and his wife became "material"—that is, at what time did the conversations produce evidence the prosecution could reasonably expect to use at trial; and (2) whether production of recordings of all calls between the couple required continuance of Bennett's July 7 trial date.

Between his arrest and mid-June 2016, Bennett and his wife had engaged in over 400 conversations spanning more than 250 hours of recorded telephone calls. RP (7/6/16) 92; CP 285–86. By mid-June, Hufman had found time to review and log calls only through the previous September. CP 285–86. Of these calls, only one is relevant to the issue of governmental mismanagement—a late 2014 conversation in which Bennett cautioned his wife they needed to keep their stories straight. CP 283, 286. Huffman did not listen to that call until sometime between June

6 and June 15, 2016, shortly after defense counsel disclosed in late May or early June that Bennett was waiving marital privilege so Mrs. Bennett could testify. RP (7/5/16) 53. The State had not intended to use any of Bennett's calls at trial until that one call became relevant for Mrs. Bennett's impeachment. RP (7/5/16) 53. The only question remaining was whether Mrs. Bennett knew she was being recorded, a fact she confirmed in her June 27 interview. RP (7/5/16) 53–54; CP 283. The prosecution then disclosed to defense counsel the possibility of recordings relevant to her impeachment and produced a copy of all the recordings. RP (7/05/2016) 31–32; CP 283.

To adequately prepare for trial on July 7, defense counsel had only to review the call in which Bennett told his wife to keep their stories straight. Exploring the relevance and import of that piece of evidence could have taken no more than a day.

It was defense counsel who decided he needed to review all mind-numbing 250 hours of these conversations because "some of those calls could be potentially exculpatory." RP (7/5/16) 34. Arguably, Bennett could have helped him there, as could Mrs. Bennett. Both knew about the calls and both had received—over 400 times—the warning each call could be recorded and monitored. RP (9/29/16) 1718. Arguably, Bennett did not want his own lawyer to know about the telephone calls and did not

consider them particularly useful to his defense. Had he or his wife considered them useful, it is likely one or the other would have said something to counsel. Further, nothing prevented Bennett's lawyer from obtaining at any time all information about the jail call recordings between his client and Mrs. Bennett. At the very least, once the Bennetts learned law enforcement had reviewed their conversations, they could have searched their memories for discussions tending to shed doubts on Bennett's guilt.

While it is commendable that counsel felt duty-bound to comb these calls for something helpful to his client, his decision cannot be laid at the feet of the prosecution. The evidence the prosecution reasonably expected to use at trial was promptly produced as soon as its materiality and admissibility was determined.

This Court should find that, under these facts and circumstances, the prosecution did not mismanage its production of evidence and that remand for retrial with suppression of the tee-shirt and jail call evidence is unwarranted.

B. BENNETT'S DNA AND THE DNA OF TWO UNIDENTIFIED MALES WAS FOUND ON A BLOODY PILLOW COVERING MOORE'S FACE. IT WAS UNCONTESTED BENNETT HAD BEEN INSIDE MOORE'S HOUSE THE DAY SHE WAS KILLED AND A NEIGHBOR IDENTIFIED HIM AS THE PERSON SHE SAW THAT AFTERNOON IN THE ALLEY BEHIND MOORE'S HOUSE. BENNETT SOUGHT TO ADMIT EVIDENCE A NUMBER OF PEOPLE, SOME UNIDENTIFIED, HAD BOTH MOTIVE AND OPPORTUNITY

TO KILL MOORE, BUT FAILED TO ESTABLISH THE REQUIRED NEXUS BETWEEN ANY OF THESE PEOPLE AND MOORE'S MURDER. THE TRIAL COURT PROPERLY EXCLUDED BENNETT'S PROFFERED "OTHER SUSPECTS" EVIDENCE.

1. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Otton*, 185 Wn.2d 673, 689, 374 P.3d 1108 (2016).

2. Legal Principles

Without a "train of facts or circumstances" linking one or more proffered "other suspects" to a charged crime, opportunity, motive, and character evidence are insufficient to infer guilt; such evidence is "the most remote kind of speculation." *State v. Franklin*, *supra,* 180 Wn.2d at 379. As this Court recently pointed out in *State v. Starbuck*, 189 Wn. App. 740, 355 P.3d 1167 (2015), a post-*Franklin* analysis of "other suspect" evidence, trial courts must apply "the general evidentiary rule that excludes evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Starbuck*, 189 Wn. App. at 751 (citing *Franklin*, 180 Wn.2d at 378 (citing *Holmes v. South Carolina,* 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).

Nothing in *Franklin* obviated the venerable requirement that "the defendant must present a combination of facts or circumstances that points

to a nonspeculative link between the other suspect and the crime." *Id.* (citing *Franklin,* 180 Wn.2d at 381). "Other suspect" evidence is relevant only when "it tends to connect someone other than the defendant with the charged crime." *Id.* (citing *Franklin,* 180 Wn.2d at 381). The trial court must focus on " 'whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.' " *Id.* (citing *Franklin,* 180 Wn.2d at 381) (emphasis in *Franklin*). The strength of the State's case against the proffering defendant is irrelevant; "the probative value of 'other suspect' evidence must be based on whether it has a logical connection to the crime[.]" *Id.*

3. Bennett argued three identified people and all of Moore's unnamed tenants had both motive and opportunity to kill her, but failed to provide facts or circumstances pointing to a nonspeculative link between any of those people and Moore's murder.

Despite seeking evidence of "a step" taken by one or more of the proffered other suspects, the trial court's ruling does not offend the principles set out in *Franklin.* Examination of the *Franklin* facts distinguishes the circumstances in that case from what Bennett proposed to introduce here. The defendant in *Franklin* had two girlfriends and lived with one of them. *Franklin*, 180 Wn.2d at 372. Franklin was charged with a series cyber-stalking related crimes against the woman with whom he

did not live. *Id.* at 374–75. The State's evidence included threats and ridicule directly from Franklin to the victim, in person and through cell phone calls. *Id.* at 375.

Franklin asserted his live-in girlfriend had posted the offending Craigslist advertisements containing sexually-explicit photographs and had been the one to send the harassing e-mails. *Id.* at 376. The trial court granted the State's motion to exclude this "other suspect" evidence, holding "mere motive and opportunity" were not enough, that Franklin was required to produce "specific facts showing that someone else committed the crime." *Id.* at 377.

The Washington Supreme Court reversed, holding the trial court erred when it considered the strength of the State's case against Franklin in addition to the other suspect evidence. *Id.* at 378. The Court held "the exclusion of other suspect evidence is a 'specific application' of the general evidence rule permitting a judge 'to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.' " *Franklin*, 180 Wn.2d at 371 (citing and quoting *Holmes* at 327, 326, 126 S.Ct. 1727)).

Application of this general evidence rule goes astray when a court focuses on the strength of the State's case instead of the relevance and

probative value of the other suspect evidence. *Franklin,* Wn.2d at 378–79 (citing *Holmes*, 547 U.S. at 329, 126 S.Ct. 1727). This is what the trial court did in *Franklin.* In addition to the live-in girlfriend's motive of jealousy, Franklin's proffered evidence included the fact that the only computer in his household belonged to her, not him. *Id.* at 376. This girlfriend had accessed Franklin's email in the past and was also known to have sent threatening e-mail messages to the same victim. *Id.* Unlike the evidence before this Court, the other suspect evidence in *Franklin* was relevant and established a nonspeculative link between the cyber-stalking crimes and the live-in girlfriend. The *Franklin* Court stated the correct test was whether the proffered evidence "tends to create a reasonable doubt as to the *defendant's* guilt." *Id.* at 381 (emphasis in original). The Court cited with approval its 1932 decision in *State v. Downs,* 168 Wn. 664, 13 P.2d 1 (1932), requiring "other suspect" evidence demonstrate " 'a train of facts or circumstances as tend clearly to point out someone besides the [accused] as the guilty party.' " *Franklin*, 180 Wn.2d at 379 (quoting *Downs,* 168 Wn. At 667) (alteration in *Franklin*).

In this case, no train of facts and circumstances tends clearly to point to someone other than Bennett, no evidence establishes a nonspeculative link between Moore's murder and Swain, Rehfield, Larr, or any of Moore's other tenants. Because this is a circumstantial case,

Bennett's evidence would have been admitted if he could have established "sufficient evidence *of the same character* tending to identify some other person as the perpetrator of the crime.' " *Starbuck*, 189 Wn. App. at 751–52 (quoting *State v. Clark,* 78 Wash.App. 471, 479, 898 P.2d 854 (citing *Leonard v. Territory of Wash.,* 2 Wash. Terr. 381, 396, 7 P. 872 (1885)), (remaining citations omitted) (alterations added). The circumstantial evidence against Bennett included his DNA on the bloody pillow covering Moore's face after her murder, RP (2/6/17) 3165, and the Bunakova daughter's identification of him as the man she saw in the alley the afternoon of the murder. Bennett admitted he was inside Moore's house that day. RP (2/6/17) 3165.

There was nothing of a similar character—a nonspeculative character—concerning the whereabouts of any of the proposed "other suspects." Bennett could not place Swain, Rehfield or Larr near Moore's house the day of the murder. Bennett's proffered evidence indicated only that Swain was not particularly close to her mother, fought with her mother, and was definitely interested in acquiring access to her mother's assets. Rehfield was Swain's romantic partner. There was no evidence he held any personal animus toward Moore. Bennett's arguments about evidence of valuables left untouched and the missing receipt book across were splattered across each and all of his "other suspects"—Swain,

Rehfield, Larr, and any other tenant who might have been late on their rent—rendering his evidence relevant to none of them.

None of this evidence tended to create a reasonable doubt as to Bennett's guilt because he was the only person shown to have been in Moore's house the day she was killed. The evidence concerning each of the other suspects required speculative leaps to get them into the same location at the relevant time. Conversely, the negligible probative evidentiary value is far "outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Franklin*, 180 Wn.2d at 371.

This Court should find the trial court applied to Bennett's "other suspect" evidence the general evidentiary rule weighing probative value against "those certain other factors," exactly as directed by controlling higher courts from *Holmes* to *Franklin* to *Starbuck*, and did not err when it granted the State's limine motion.

C. IN CLOSING, THE PROSECUTOR ARGUED REASONABLE INFERENCES FROM BODZIAK'S TESTIMONY, ACCURATELY ARGUED VERA BUNAKOVA'S IDENTIFIED BENNETT, DISPLAYED COURTESY TO COURT STAFF AND THE JUDGE, ENSURED THE JURY KNEW HE SHOULD NOT HAVE SAID "WE KNOW," ACCURATELY NOTED BENNETT WOULD HAVE ARGUED CONTAMINATION EVIDENCE HAD THERE BEEN ANY, AND DISPUTED BENNETT'S ACCUSATION HIS CASE WAS BASED ON SPECULATION, OUTLANDISH THEORIZING, AND JUMPING TO CONCLUSIONS. BENNETT FAILS TO DEMONSTRATE ANY OF THESE ACTIONS WERE IMPROPER OR IN ANY WAY PREJUDICED THE OUTCOME OF HIS TRIAL.

Prosecutor's comments during closing argument are reviewed in the context of the entire argument, the issues, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432, 442 (2003). When claiming prosecutorial misconduct, the defendant bears the burden of proving the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The first question whether the prosecutor's conduct was improper. *Emery*, at 759. Only when the prosecutor's conduct was improper does the reviewing court determine whether the conduct resulted in prejudice. *Emery*, at 760.

1. The prosecutor did not violate a limine order when he argued reasonable inferences from Bodziak's testimony.

Bennett fails to prove impropriety in the prosecutor's closing argument summarizing Bodziak's testimony. The limine motion on which Bennett's complaint is based precluded Bodziak from testifying that evidence of wipe marks showed someone tried to clean-up bloody footwear evidence because his report stated that the evidence was typical of attempts to do so, not that he concluded somebody had. RP (3/3/17) 6028. With no objection from Bennett, Bodziak testified at length about visible wipe marks in several photographs of one bloody footprint, how

the wiping action physically smeared blood left by the shoe, how the marks came from different angles, how some marks were curved, and how people do not always wipe in straight sweeps. RP (3/6/17) 6108–11. The court had clarified during the limine hearing Bodziak could testify to that evidence because it was in his report, and that the State could argue in closing that Bodziak "clearly says that he sees some wiping action through that herringbone." RP (3/6/17) 6070.

A prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence. *State v. Gentry,* 125 Wn.2d 570, 641, 888 P.2d 1105, *cert. denied,* 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995); *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Bennett makes too fine a distinction here. The prosecutor argued Bodziak testified to "clear evidence of clean-up" after Bodziak testified he saw extensive evidence of wipe marks over a bloody footprint, testimony that included the phrase "[a]ttempt to clean-up." These facts were properly in evidence under the court's limine ruling. The trial court correctly dismissed Bennett's objection as a non-issue. RP (3/21/17) 8225.

Even if the prosecutor's characterization was somehow improper, Bennett cannot prove prejudice. Immediately following his objection, the court instructed the jury to recall what they believed to have been Bodziak's testimony and told them it would ultimately be up to them to

determine what that testimony was. RP (3/21/17) 8203. The written jury instructions included the standard admonition that it was important for the jurors "to remember that the lawyer's statements are not evidence. The evidence is the testimony and the exhibits. . . .You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 2248. The prosecutor did not return to his characterization following Bennett's objection, arguing instead,

> you heard [Bodziak] testify about the clear swipe marks around and through the impressions. The swipe marks are multi-directional, as well. His testimony is this is a typical characteristic of clean-up. . . . [Y]ou can see the swipe marks through here and the swipe marks coming along there that he was talking about, and the swipe marks up there.

RP (3/21/17) 8203. This Court should find the prosecutor argued reasonable inferences from Bodziak's testimony and that Bennett cannot prove prejudice.

2. The prosecutor accurately argued Vera Bunakova identified Bennett as the man she twice saw in the alley near Moore's house the afternoon of the murder.

The trial court correctly overruled Bennett's objection to the statement that Vera Bunakova identified Bennett as the person she saw twice in the alley on the day of the murder. The court correctly cited and applied the rule authorizing argument of reasonable inferences in closing. *Gentry,* 125 Wn.2d at 641. The fact that Bunakova did not know who

Bennett was when they came face to face on September 7, 2014 is irrelevant. Identification does not require knowledge of identity. She told the jury the man sitting at counsel table was the man she identified in the photo montage, the same man she saw in the alley. RP (3/1/17) 5598. It was accurate to argue she "saw the defendant, Chad Bennett, from approximately 15 feet away in the alley on his cell phone. She testified he looked right at Vera and made eye contact." RP (3/21/17) 8207. These factual circumstances not those of *State v. Allen*, 182 Wn.2d 364, 372, 378, 341 P.3d 268 (2015), where the trial court wrongly overruled a defense objection to closing argument that misstated the definitional "knowledge" standard. *Allen* at 371–72. That argument was undeniably reversible error. The trial court's muted exasperation here is not. Arguably, Bennett's objection was frivolous and disruptive.

This Court should find the prosecutor's closing remarks truthfully recounted Bunakova's testimony and that neither he nor the court prejudiced Bennett on this issue.

3. Unchallenged courteous behavior is not prosecutorial misconduct

a. Bennett waived error when he failed to object.

Bennett waived any conceivable error when he failed to object to the prosecutor thanking and commending the court staff, jail staff, and

judge and the close of a six week trial. RP (3/23/17) 8530. The standards of review in such circumstances are based on a defendant's duty to object. *State v. Emery, supra,* 174 Wn.2d at 761 (citing 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)). " 'This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.' " *Id.* at 761-62. Timely objection prevents further improper remarks. *Id.* at 762. Timely objection also prevents potential abuse of the appellate process. *Id.* The *Emery* court reiterated a long-standing concern in this regard: that if not required to object, a defendant could "simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *Id.* (quoting *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (remaining internal citations omitted)). By failing to object, Bennett waived any conceivable error. He cannot establish the alleged misconduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61 (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

b. The prosecutor's remarks were not improper and did not jeopardize the fairness of Bennett's trial.

Bennett's argument would fail even if he had objected. Whether

the prosecutor's remarks were improper is debatable. Regardless, a de minimis attempt to ingratiate oneself with jurors does not jeopardize the fairness of trial. *State v. Scherf*, 192 Wn.2d 350, 396, 429 P.3d 776, 801 (2018). In *Scherf*, the prosecutor repeatedly took advantage of his courtroom seating position to smile and thank individual jurors during voir dire despite multiple objections from the defense and correspondent admonishments from the court. *Scherf*, 192 Wn.2d at 394. The Washington Supreme Court dismissed the ensuing allegation of misconduct by noting the defendant failed to "show that the prosecutor's smiling and thanking jurors raised the risk of influencing the verdict; any such contact was de minimis. The prosecutor's conduct did not deny [the defendant] a fair trial." *Scherf*, 192 Wn.2d at 396.

This Court should likewise reject Bennett's claim that the attempted courtesy here prejudiced him in any measurable way.

4. Bennett objected to the prosecutor saying "we know" in closing and the prosecutor lightly noted defense counsel had done the same, both let the jury know it was an easy mistake to make, and the prosecutor made a point of ensuring the jury knew this was not a personal opinion.

Bennett's failure to object to the prosecutor's rhetorical use of "we know" in his March 22, 2017 PowerPoint presentation waived any error flowing from that particular incident. *Emery*, 174 Wn.2d at 760-61. When it happened again the following day, Bennett did object. RP (3/23/17)

8531. But the ensuing conversation between defense counsel and the prosecutor highlighted for the jury the true nature of the prosecutor's use of the phrase, making it clear he was not expressing a personal opinion and that this was a fairly common trial mistake. Defense counsel admitted having done it himself in this trial and that it was "easy enough." RP (3/23/17) 8532. The prosecutor then let the jury know he misspoke:

> It's an occupational hazard. Sorry folks. The state's position, I'll say that, I've got to keep saying that, the state's position is that it's only -- the only plausible explanation for that is that Chad Bennett grabbed that pillow after he killed Lucille Moore, and that's why his DNA is there.

RP (3/23/17) 8532. While "we know" is technically improper, the prosecutor's behavior here was not. It was nothing more than careless speech, "easy enough" to do when summing up weeks of trial evidence. Further, Bennett cannot show a scintilla of prejudice from the remark, considering the prosecutor's own "curative" comment.

This Court should find there was no prejudice because the jury clearly knew the prosecutor was not expressing an improper personal opinion about the evidence.

5. The prosecutor did not assert Bennett failed to produce favorable evidence or had any responsibility to do so. He asserted that had there been favorable evidence, Bennett would have argued it.

"Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994) (citations omitted). Bennett did not object when the prosecutor posited "if there was any evidence that there was actual contamination of this crime scene, the defense *would have been talking about it.*" RP (3/23/17) 8526–27. There was no reason to object.

First, the prosecutor did not even hint Bennett had any duty whatsoever to present evidence of actual contamination. He merely pointed out there was no such evidence, reasonably positing that, in light of Bennett's various contamination hypotheses, he surely would have argued actual contamination had there been evidence of any. Second, the prosecutor's remarks responded directly to Bennett having invited the jury to speculate about nonexistent evidence in the State's case.

> Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

Id. at 86 (citations omitted). The prosecutor merely reminded the jury that nothing in Wilson or Allen's testimony suggested a contaminated crime scene and that Bennett would have argued such evidence if it had.

Finally, Bennett's failure to object waived any error because, yet again, he has not, and cannot, demonstrate "there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *Id.* (citations omitted).

6. The prosecutor did not trivialize the jury's role or undermine the presumption of innocence by arguing trial had given both sides a full and fair opportunity to present their cases and thousands of investigative man-hours demonstrated the charges were not due to a snap "decision to frame the wrong man."

The prosecutor did not encroach on Bennett's constitutional right to be presumed innocent, nor did he trivialize the jury's role, when he disputed Bennett's claim that "the state's case is based on speculation, supposition, outlandish theorizing and jumping to conclusions and inviting you, ladies and gentlemen, to go along for the ride." RP (3/22/17) 8331. The prosecutor argued trial had given both sides a full and fair opportunity to present their positions to the jury and that, with thousands of man hours devoted to the investigation, this was not a "snap judgment" or, worse, "a decision to frame the wrong man." RP (3/23/17) 8536.

These comments bear, at most, only superficial similarity to the two offensive, prejudicial comments condemned in *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993), as irreversibly prejudicial.

> The first comment indicated to the jury that the prior crime for which appellant was convicted was drug related (a fact

> which had not previously been entered into evidence) and is also impermissible opinion "testimony" that the appellant was selling drugs again and thus was guilty, not only of the previous charge, but also of the current charge. Moreover, the remark was made in spite of a direct court order on a motion in limine to exclude any evidence of prior drug convictions.

Id. at 22. In the second comment, the prosecutor told the jury there were "incredible safeguards to prevent police officers from lying and that probable cause had already been determined, implying guilt." *Id.* at 19. This 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. These comments were personal assurances as to the defendant's guilt. *Id.* at 23. "Taken together these comments not only implied that the trial was a useless formality because the real issues had already been determined but also directly stated that Stith was out on the streets, dealing again." *Id.*

Nothing like that that happened here. Here, the prosecutor did not violate a limine motion to introduce prejudicial facts not in evidence or imply Bennett's guilt had already been determined through a finding of probable cause. Here, the prosecutor said simply due process was satisfied because both sides had been given ample opportunity to present their

respective cases to the jury and that the lengthy investigation showed there was no snap decision to frame the wrong man. RP (3/23/17) 8536.

Had Bennett objected, any potential taint from this argument could easily have been cured by an instruction from the court.

This Court should find Bennett has failed to establish that any of the prosecutor's comments were improper, that the trial court did not denigrate Bennett in any way by overruling a frivolous objection, that he waived error by his failure to object and fails to demonstrate prejudice from the comments to which he did object.

D. THE TRIAL COURT'S DECISION TO IMPOSE AN EXCEPTIONAL 660 MONTH SENTENCE WAS WELL GROUNDED IN PRECEDENT, NOT EXERCISED ON UNTENABLE GROUNDS OR FOR UNTENABLE REASONS, AND NOT CLEARLY EXCESSIVE.

1. *Standard of review for substantial evidence supporting aggravating factors*

A reviewing court assess substantial evidence supporting a jury's verdict on aggravating factors just as it does when evaluating whether sufficient evidence supports the elements of a crime. *State v. DeLeon,* 185 Wn.App. 171, 212, 341 P.3d 315 (2014). Evidence is sufficient when, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *Gentry, supra,* 125 Wn.2d at 596–97 (citations omitted). "[A]ll reasonable inferences from the evidence must be drawn in favor of the

State and interpreted most strongly against the defendant." *Id.* at 597 (citations omitted). By claiming insufficient evidence to support the aggravating factors of deliberate cruelty and particularly vulnerable victim, Bennett admits the truth of the State's evidence and all reasonably drawn inferences. *Id.*

2. *Substantial evidence supported the jury's determination Bennett's brutal murder of Moore exhibited deliberate cruelty.*

Deliberate cruelty is gratuitous violence or other conduct which is significantly more serious than typical of the crime and which inflicts physical, psychological, or emotional pain as an end in itself. *State v. Russell,* 69 Wn.App. 237, 253, 848 P.2d 743, *review denied,* 122 Wn.2d 1003 (1993); *State v. Delarosa–Flores,* 59 Wn.App. 514, 518, 799 P.2d 736 (1990), *review denied,* 116 Wn.2d 1010 (1991).

It was impossible for the pathologist to determine exactly which series of wounds actually killed Moore, the sharp force stabbing wounds to her heart or the slashing that slit her throat. RP (2/23/17) 5107–08. What he could determine, however, was that Moore was alive when Bennett beat her face, fracturing her maxilla with a level of force consistent with a boxing blow or car crash, RP (2/23/17) 5095, and inflicting abrasions and contusions on both sides of her head, her nose, cheeks, and lips. RP (2/23/17) 5081. The defensive knife wound to her

hand establishes she was alive at some point during the attack, alive and desperate to defend herself. RP (2/23/17) 5080. She was alive when Bennett stabbed 17 wounds into her chest, including eleven of which penetrated her still-beating heart. RP (2/23/17) 5096. Moore most likely died from exsanguination, that is, she bled to death. RP (2/23/17) 5107.

A similarly violent murder established deliberate cruelty in *State v. Scott,* 72 Wn. App. 207, 866 P. 2d 1258 (1993). Neighbors found the victim with a badly beaten face and a telephone cord bound tightly around her neck. *Id.* at 210. An autopsy revealed six fractures to her neck, fractures to her eye, cheekbone, base of the skull, and to eight ribs. *Id.* She had two gaping lacerations to the top of her head. *Id.* Division One of this Court determined the defendant's attack went well beyond what was necessary to establish the elements of murder, and that his conduct exhibited deliberate cruelty. *Id.* at 215.

The reasonable inference here is inescapable—Bennett wanted not only to kill Moore, but to hurt her, to hurt her badly. The State did not need to put on evidence of the type or level of violence inflicted in a "typical" homicide for the jury to conclude he went far beyond where he needed to go to end Moore's life. This Court should conclude Bennett's extreme and excessive violence exhibited deliberate cruelty.

3. Substantial evidence supported the jury's determination Moore was a particularly vulnerable victim.

Moore was around 82 years old. RP (2/22/17) 4923. The question here is whether substantial evidence established Moore was more vulnerable to being murdered than other victims due to her relatively advanced age, and did the defendant know of that vulnerability? *State v. Ross,* 71 Wn. App. 556, 565, 861 P.2d 473, 479 (1993), *amended*, 71 Wn. App. 556, 883 P.2d 329 (1994). This aggravating factor must distinguish the victim significantly from other victims of the same crime. *State v. Garibay*, 67 Wn.App. 773, 779, 841 P.2d 49 (1992), *abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). Advanced age, of itself, may, as a matter of law, be used to justify imposition of an exceptional sentence. *State v. Clinton*, 48 Wn.App. 671, 676, 741 P.2d 52 (1987). This particular vulnerability does not have to be extreme or unusual. *State v. Phillips*, 160 Wn. App. 36, 48, 246 P.3d 589 (2011) citing *State v. Sweet,* 138 Wn.2d 466, 980 P.2d 1223 (1999). The particularly vulnerable victim in *Sweet* "was a 52-year-old woman, five feet two inches tall, and not otherwise disabled." *Phillips,* 160 Wn. App. at 48. In cases involving violent crime, advanced age alone can support a finding of particular vulnerability. *Id.* (citing *State v. Jones*, 130 Wn.2d

302, 312, 922 P.2d 806 (1996); *State v. Butler*, 75 Wn. App. 47, 53, 876 P.2d 481 (1994); *Clinton*, 48 Wn. App. at 676).

Nothing in the record explains why Bennett, a healthy young farm worker in his mid-20s, killed his 82-year-old landlady with such appalling brutality. There was no sign of struggle, of broken items in the kitchen. RP (2/22/17) 4923. The evidence is that Bennett's attack took Moore by surprise. The State argued Bennett "snapped" when Moore told him he and his family would have to move if he could not come up with both the rent and his past-due damage deposit. RP (3/23/17) 8567. That does not suggest Bennett would have attacked a younger, stronger landlord, male or female, or that such a person could not have successfully fought him off before he managed to pull a knife. It is improbable he would have even attempted such an act. Moore's advanced age was a substantial factor accelerating Bennett's impulse to take the brakes off his anger. The fact that she was elderly and alone allowed him to lose control.

Moore did not have to be disabled, her age and vulnerability did not have to be extreme. *Phillips*, 160 Wn. App. at 48. At least 55 years separated her age from Bennett's. She was a vulnerable old woman in a vulnerable situation. This Court should find substantial evidence supports the jury's finding Moore was a particularly vulnerable victim.

4. The length of Bennett's exceptional sentence is well-grounded in precedent and neither arbitrary nor excessive.

a. Standard of review

To reverse a sentence outside the standard sentence range when a jury has found aggravating circumstances beyond a reasonable doubt, this Court must find, on the record that was before the sentencing court, the sentence imposed was clearely excessive or clearly too lenient. RCW 9.94A.585(4), (5). "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).

b. The sentencing court reasonably determined Bennett's 660 month sentence by considering factual similarities between his case and those in *State v. Scott*, then modifying the duration of Bennett's sentence to reflect the factual differences.

There is nothing untenable or unreasonable about the manner in which the trial court determined the appropriate exceptional sentence in this case. The court informed its decision by seeking guidance from prior case law, identifying *State v. Scott*,[15] for its similarity to the factual circumstances here. Scott was convicted of first degree murder for raping

[15] *State v. Scott*, 72 Wn. App. 207, 210, 866 P.2d 1258, 1260 (1993), *aff'd sub nom. State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995), *abrogated by State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

and murdering a 78 year old woman suffering Alzheimer's disease who lived alone. *Scott*, 72 Wn. App. At 210. His standard sentencing range was 240 to 320 months and the jury found four aggravating circumstnces. *Id.* Reviewing courts have upheld the 900 month sentence. *Id.* The factual circumstances of *Scott* case and conviction differed from Bennett's facts in that Bennet was convicted of second degree murder with two aggravating circumstances, and his standard sentencing range was 240 to 320 months. *Id.*

The process by which the trial court came to its determination here was reasonable and thoughtful. Our legal system is predicated on precedent, even when factual circumstances are not entirely "on all fours." Bennett's 660 month sentence reflects the differences between *Scott's* facts and his. The different felony levels of their convictions is reflected the the length of their respective sentences. While the aggravating facts in Scott are undeniably more egregious, his 900 month sentence is 270 months longer than Bennett's.

Exceptional sentences of similar magnitude have been affirmed on appeal. See, e.g. *State v. Ritchie,* 126 Wn.2d 388, 399, 894 P.2d 1308 (1995) (affirming 900 month aggravated sentence for first degree murder where standard range was 240 to 320 months); *State v. Van Buren,* 112 Wn.App. 585, 596–601, 601, 49 P.3d 966 (2002) (affirming 600 month

sentence for first degree murder where plea agreement recommended standard range sentence of 292 months).

This Court should find Bennett's 660 month sentence appropriate to his conviction and that the trial court did not impose it for untenable reasons.

c. Bennett's youth is not an appropriate factor for the court's sentencing consideration.

Bennett was born September 23, 1989, making him two weeks shy of 25 years on September 7, 2014. CP 2138. His defense was based exclusively on an unwavering claim of innocence, a position from which he never wavered, even at sentencing. 2RP (5/12/17) 8746, 8748, 8750. At sentencing, he did not argue youth as a mitigating factor. RP (5/12/17) 8684–743; CP 1904–11

It is arguable whether a 25 year old with a wife and children could establish youth as a mitigating factor, but that cannot be determined here. Youth does not "per se automatically reduce an offender's culpability." *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). For the court to consider youth, the "defendant must provide some evidence that youth *in fact* impaired his capacities." *Id.* (emphasis in original). "[T]he trial court may not impose an exceptional sentence automatically on the basis

of youth, absent any evidence that youth in fact diminished an adult offender's culpability." *Id.*

There was no evidence presented in this case that Bennett's youth impaired his capacities in any way. That factor was appropriately absent from the trial court's sentencing determination.

d. Resentencing is not required.

This Court should conclude Bennett's sentence was not clearly excessive and that Bennett was not entitled to a consideration of youth as a mitigating factor. Resentencing is not required.

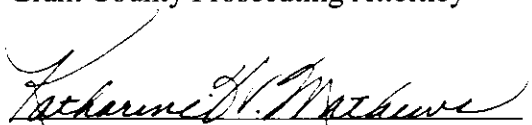
IV. CONCLUSION

For the reasons stated above, this Court should affirm Bennett's conviction and 660 month exceptional sentence.

DATED this 16th day of April, 2019.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney



Katharine W. Mathews, WSBA# 20805
Deputy Prosecuting Attorney
Attorneys for Respondent
kwmathews@grantcountywa.gov

CERTIFICATE OF SERVICE

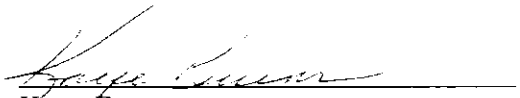
On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Gregory C. Link
greg@washapp.org

Lila J. Silverstein
lila@washapp.org

wapofficemail@washapp.org

Dated: April 16 2019.



Kaye Burns

GRANT COUNTY
PROSECUTING ATTYORNEY
PO Box 37
Ephrata, Washington 98823
PH: (509)754-2011 * Fax (509)754-6574

GRANT COUNTY PROSECUTOR'S OFFICE

April 16, 2019 - 3:50 PM

Transmittal Information

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

The following documents have been uploaded:

- 352978_Briefs_20190416154942D3253341_5782.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was BRIEF OF RESPONDENT.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov
- greg@washapp.org
- lila@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Kaye Burns - Email: kburns@grantcountywa.gov
Filing on Behalf of: Katharine W. Mathews - Email: kwmathews@grantcountywa.gov (Alternate Email:)

Address:
PO Box 37
Ephrata, WA, 98823
Phone: (509) 754-2011 EXT 3905

Note: The Filing Id is 20190416154942D3253341