71254-3

NO. 71254-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICE POLLOCK,

Appellant.

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

The Honorable Mary E. Roberts, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR SECOND DEGREE ASSAULT BY A DEADLY WEAPON BECAUSE THE ALLEGED VICTIM'S UNMISTAKABLE TESTIMONY WAS THAT HE DID NOT EVER SEE THE DEADLY WEAPON

Where second degree assault by a deadly weapon is based solely on the fear and apprehension means, no assault can occur when the supposedly assaulted party sees no deadly weapon and experiences no fear or apprehension therefrom. Greer's testimony was clear and unmistakable: Greer never saw Pollock with a shotgun. 2RP 44-45. Because Greer never saw Pollock with a shotgun, there was no evidence presented that Greer was placed in reasonable apprehension and imminent fear of bodily injury by Pollock lunging at him with a shotgun, aimed or not. The State's failure to provide sufficient evidence of the lunging act at trial requires reversal and dismissal with prejudice.[1]

This court's opinion in State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), abrogated in part on other grounds by State v. Smith, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007), is instructive. Bland, armed with a gun, approached Jefferson, who was sitting in a running car. Id. at 348. As Jefferson sped away, Bland shot toward the car, frightening Jefferson but

[1] As with the opening brief, this brief will use "lunging act" to refer to Pollock's alleged lunging at Greer with a shotgun and "gun-to-forehead act" to refer to Pollock's alleged pointing a gun directly at Greer's forehead. See Br. of Appellant at 11.

actually sending a bullet through the window of a nearby house. Id. at 348-49. The bullet shattered the window onto Carrington, who was asleep in his recliner. Id. at 349. The State charged Bland for assaulting Carrington based on Carrington's fear and apprehension, despite the fact that he was asleep and was unaware of the shot when it was fired. Id. at 350, 355. This court held the apprehension and fear means of assault was not met, reasoning, "it is clear that Carrington did not experience apprehension or fear *before* the bullet entered his window. He was asleep at the time. Nor is there evidence that he feared future injury *after* the bullet came through his window." Id. at 355. Furthermore, the court stated "any fear and apprehension experienced by Jefferson as a result of being shot at cannot be transferred to Carrington." Id. at 356.

Bland's reasoning applies here. Like Carrington, Greer was not placed in any fear or apprehension by Pollock lunging at him with a shotgun because he (1) never saw Pollock lunge at him and (2) never saw a shotgun. Even if Pollock did lunge at Greer with the shotgun aimed, Greer was completely unaware of it. Because there was no evidence Greer experienced fear or apprehension, the lunging act could not have been an assault. No rational juror could conclude otherwise, even when drawing all inferences in favor of the prosecution.

The State contends the evidence was sufficient because "the jury was not required to accept th[e] part [of] Greer's testimony" that he never saw a shotgun or Pollock lunge at him with a shotgun. Br. of Resp't at 10. The State speculates, "Having heard testimony that Greer was a convicted felon, and therefore prohibited from possessing a firearm, the jury reasonably could have concluded that Greer denied seeing the shotgun in order to distance himself from any possibility of having retrieved his own firearm." Br. of Resp't at 11.

The State is grasping at straws. The State does not explain why Greer would deny seeing a shotgun in order to "distance himself" from the possibility he possessed his own firearm. Pollock and Greer did not know each other, so there is no reason Pollock's possession of a shotgun would implicate Greer for firearm possession in any way. Furthermore, Greer testified explicitly that Pollock "had a -- I am sure he had a handgun in his hands." 2RP 44. Greer's clear statement that Pollock had a handgun wholly undermines the State's conjecture that Greer lied about seeing a shotgun to protect against the possibility he could be associated with firearms. Indeed, if Greer was concerned about being perceived as a felon in possession, why would he deny seeing the shotgun but admit seeing the handgun? And, for that matter, it is unlikely Greer lied to the jury to "distance himself" from firearms given that Greer acknowledged he had two guns in his apartment

that purportedly belonged to his girlfriend. 2RP 41-42 (Greer testifying he knew Lain had guns and where they were). Given the circumstances, the State's argument that Greer lied about not seeing the shotgun to distance himself from firearms makes no sense.

The State also claims that because all the other witnesses saw a shotgun, there was "no plausible explanation for how Greer could have missed seeing a shotgun" so "it was reasonable for the jury to conclude that Greer *did* see the shotgun and simply lied about it for some ulterior motive." Br. of Resp't at 12. The State also contends "Greer had an incentive to claim a different sequence of events" because he was a felon. Br. of Resp't at 12. There was no evidence presented to suggest Greer had any "ulterior motive" to perjure himself. Nor does being a felon, without more explanation, provide an incentive to Greer to lie.[2] The State's proposed inferences amount to nothing more than rank speculation and cannot sustain Pollock's conviction. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (holding inferences arising from the evidence must be reasonable and "cannot be based on speculation").

The State also posits "Greer was misremembering the details of a stressful event that occurred several years previously." Br. of Resp't at 12.

[2] The State seems to suggest that Greer had an incentive to give a "different sequence of events" from Pollock's. Br. of Resp't at 12. But Greer was the first witness to testify at trial so he could not have known how Pollock's "sequence of events" would differ from his own.

This additional conjecture is not supported by the record, as Greer never indicated the passage of time or the "stressful event" had any impact whatsoever on his memory. This court should not sustain the State's unsupported, post hoc conjecture.

Even when viewing it in the light most favorable to the prosecution, the evidence was insufficient to prove beyond a reasonable doubt that Pollock assaulted Greer by lunging at him with a shotgun.

Because the evidence was insufficient to support one of the acts that State argued was second degree assault, the appropriate remedy is dismissal with prejudice. As Pollock discussed in his opening brief, any lesser remedy, such as retrial, would gamble on the possibility that Pollock would be placed twice in jeopardy for an act the State has failed to support with sufficient evidence. See Br. of Appellant at 20-26. The State does not respond to Pollock's proposed remedy, indicating it agrees with Pollock's analysis on this point. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). Because this court cannot say whether the jury relied on the lunging act, which was not supported by sufficient evidence, or on the gun-to-forehead act, which was, retrial would violate the prohibition on double jeopardy. The only appropriate remedy is dismissal with prejudice.

2. POLLOCK'S STATEMENT WAS THE ONLY EVIDENCE ADDUCED AT TRIAL TO SHOW THE LUNGING ACT OCCURRED, WHICH VIOLATES THE CORPUS DELICTI DOCTRINE

a. The State's waiver claims are meritless

The State asserts Pollock waived his corpus delicti claim because he did not object on that basis before the verdict was returned. Br. of Resp't at 13-14. But the Washington Supreme Court has permitted challenges to the corpus delicti to be raised for the first time in a post trial motion, and even for the first time on appeal. Pollock has adequately presented the corpus delicti issue for appellate review.

In State v. Brockob, Brockob told police that he wasn't going to manufacture methamphetamines with Sudafed tablets he took but was "'stealing [the tablets] for somebody who was going to use it to make Methamphetamines.'" 159 Wn.2d 311, 319, 150 P.3d 59 (2006) (quoting report of proceedings). Brockob's attorney filed a post trial motion for a judgment notwithstanding the verdict challenging the corpus delicti of Brockob's statement, arguing "the State did not present any 'corpus evidence' proving Brockob's specific intent to deliver the tablets and corroborating Brockob's incriminating statement." Id. at 320. The Washington Supreme Court fully considered Brockob's corpus delicti arguments and reversed given that mere possession of the tablets was not sufficient to show intent to manufacture methamphetamine under the corpus

delicti rule. Id. at 330-33. According to Brockob, Pollock adequately preserved his challenge to the corpus delicti of the lunging act by raising it in a post trial motion.

The State relies on State v. Dodgen, 81 Wn. App. 487, 915 P.2d 531 (1996), and State v. C.D.W., 76 Wn. App. 761, 887 P.2d 911 (1995), for its assertion that Pollock waived the corpus delicti issue. Dodgen does not support the State's position: although this court stated "a defendant must make proper objection to the trial court to preserve the issue," it nonetheless proceeded to address the corpus delicti claim in full. 81 Wn. App. at 492-94.

In C.D.W., this court held the corpus issue waived when C.D.W. failed to object at all during trial. 76 Wn. App. at 762-64. Thus, C.D.W. is readily distinguished because Pollock did challenge the sufficiency of the corpus in the trial court. 7RP 23-29. Because Pollock objected, the State had an opportunity to point out corroborating evidence to the trial court, unlike what occurred in C.D.W.[3] See 76 Wn. App. at 763-74 (holding issue waived because the absence of the objection did not give the State an opportunity to point to proof of the corpus). C.D.W. does not control here.

[3] Of course, the State did not point to corroborating evidence in this case because no evidence exists to corroborate Pollock's incriminating statement. See 7RP 32 (prosecutor arguing jury "relied upon the defendant's words and the other corroborating evidence to find that he did in fact commit the assault two" but failing to actually point to any such corroborating evidence); 6RP 119-20 (prosecutor's closing argument pointing to Pollock's statement as the evidence supporting the lunging act and failing to point to any other evidence).

Moreover, C.D.W.'s harsh waiver rule has been abrogated by Brockob. There, one of the petitioners in a consolidated case, Cobabe, "did not specifically refer to the corpus delicti rule or argue that the corpus did not support Cobabe's statements." 159 Wn.2d at 326. Cobabe raised the corpus delicti argument for the first time in the Court of Appeals. Id. The supreme court nonetheless fully considered Cobabe's corpus arguments and concluded the "independent evidence was insufficient to corroborate Cobabe's incriminating statement under the corpus delicti rule because the independent evidence supports hypotheses of both guilt and innocence." Id. at 334-35. The State's current waiver argument based on C.D.W. cannot withstand Brockob's willing consideration of a corpus delicti claim raised for the first time on appeal. This court should reject the State's waiver arguments and reach the merits.

The State next argues that Pollock is barred from raising a corpus delicti claim because he did not separately assign error to the insufficiency of the corpus. This was Pollock's oversight given the fine distinction between sufficiency of the evidence to support the corpus delicti and the sufficiency of the evidence to support the conviction. The opening brief assigns error to the insufficiency of the State's evidence "to support one of the acts the State argued was assault in the second degree," which was intended to challenge the overall insufficiency of the State's evidence to prove the lunging act—

both the corpus delicti and the conviction. Br. of Appellant at 1. Pollock clearly challenged the corpus delicti in the argument section of the brief. Br. of Appellant at 18-20. The State has had an opportunity to respond to Pollock's corpus arguments. Br. of Resp't at 13-16. Therefore, Pollock asks that this court overlook the oversight of not separately assigning error to the corpus delicti and treat the insufficiency of the corpus delicti claim as properly challenged. See State v. Olson, 126 Wn.2d 315, 318-24, 893 P.2d 629 (1995) (failure to assign error in opening brief will be overlooked where issue addressed in brief and nature of argument are clear).

Moreover, RAP 1.2(a) requires that the rules be liberally interpreted to promote justice and facilitate decisions of cases on the merits. "Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands . . . ." Id. The State does not attempt to make any showing of compelling circumstances that justly demand the avoidance of this issue's merits. This court should review the merits of Pollock's corpus delicti claim and reverse.

b. No evidence corroborates Pollock's incriminating statement, requiring reversal for insufficient evidence of the corpus delicti

The purpose of the corpus delicti doctrine is to ensure "evidence sufficient to support the inference that there has been a criminal act." Brockob, 159 Wn.2d at 327. "A defendant's incriminating statement alone

is not sufficient to establish that a crime took place." Id. at 328 (footnote omitted). To be sufficient to support the corpus, independent evidence "must provide a prima facie corroboration *of the crime described in a defendant's incriminating statement.*" Id. There was no prima facie corroboration here.

Pollock's incriminating statement was that he charged at Greer with a shotgun aimed. 5RP 18, 52-53. The State points to Wolfe's and Lain's testimony that "Pollock was holding a shotgun or rifle, wrapped in a blanket or shirt when he confronted Greer." Br. of Resp't at 16 (citing 2RP 87-88, 90; 5RP 132). While this testimony might corroborate that Pollock had a shotgun, it does not corroborate that Pollock charged at Greer with a shotgun, whether or not the shotgun was aimed. Wolfe testified Pollock and Greer walked toward each other, but said nothing about Pollock charging, lunging, or aiming a gun at Greer. 6RP 119-20. Lain, with bad vision and in a drug-induced state, said "it's kind of hard to recollect exactly what I saw." 2RP 87-88. Although she said she saw a shotgun or rifle, she never described Pollock charging Greer with a shotgun aimed. Neither Wolfe's nor Lain's testimony corroborates the crime described in Pollock's incriminating statement.

The State also relies on the fact that "[p]olice searched Wolfe's apartment after the shooting and found a shotgun, next to a blanket,"

claiming this "evidence is sufficient to support a logical and reasonable inference that Pollock assaulted Greer with a shotgun." Br. of Resp't at 16 (citing 4RP 129-30; Ex. 18). But this evidence is only sufficient to support a reasonable inference that Pollock had a shotgun. It does not corroborate the assault Pollock described in his incriminating statement because it does not support a reasonable inference that Pollock lunged at Greer with a shotgun aimed.

The State presented insufficient independent evidence to corroborate Pollock's incriminating statement. Under the corpus delicti rule this court must reverse.

3. REQUIRING JURORS TO ARTICULATE THE REASON FOR THEIR DOUBT IS UNCONSTITUTIONAL

The State asserts the invited error doctrine bars review because Pollock's trial counsel stated he "endorse[d]" the State's instructions, which included WPIC 4.01. Br. of Resp't at 19 (citing CP 96 and 3RP 113). In reality, however, counsel merely failed to object.

Under the invited error doctrine, "a party who set up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). Trial counsel did not "set up" any error but merely

acquiesced in the State's instructions. This was a failure to object and failing to object is not invited error. State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999) (noting that when State argues defense counsel's acquiescence is invited error, it "blur[s] the lines between the invited error doctrine and the waiver theory"). In addition, applying the invited error doctrine to counsel's conduct here would be inappropriate, as counsel did not affirmatively propose the offending instruction or mislead the trial court—defense counsel was just unaware of the nature of the challenge Pollock raises now.

Moreover, the State's claim that Pollock's challenge to WPIC 4.01 is procedurally barred is inconsistent with its acknowledgment that our supreme court has required trial courts to give the WPIC 4.01 instruction in every criminal case. Br. of Resp't at 20 (discussing State v. Bennett, 161 Wn.2d 303, 319-18, 165 P.3d 1241 (2007)). Even if Pollock's attorney had not "endorse[d]" the instruction, the trial court would have given the instruction anyway. This situation is unique because, as the State recognizes, (1) trial courts must define reasonable doubt and (2) trial courts must use WPIC 4.01 to do so. In such circumstances, Pollock's purported invitation of the error should not preclude review.

While the Bennett court required trial courts to instruct juries using WPIC 4.01, it also recognized, "The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161

Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. Courts must therefore vigilantly protect the presumption of innocence and have done so in other contexts. See Br. of Appellant at 29-31 (collecting cases holding articulation requirement was unconstitutional burden-shifting when prosecutor argued jurors had to "fill in the blank" with a reason to doubt).

In addition to the cases regarding the unconstitutional fill-in-the-blank argument, Division Two recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288, review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. Id. at 422-23. The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." Id. at 423. But the court did not explain or

analyze why an articulation requirement is unconstitutional in one context but is not unconstitutional in all contexts. A judge's erroneous instruction requiring articulation of a reasonable doubt more greatly damages the presumption of innocence than a prosecutor's closing argument ever could. See id. at 427 (Bjorgen, J., dissenting) ("[I]f the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge.").

The State also argues Washington courts have already considered and rejected Pollock's challenge to WPIC 4.01, citing State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). Br. of Resp't at 22. The Thompson court acknowledged the "instruction has its detractors" yet felt "constrained to uphold it." 13 Wn. App. at 4-5. Similarly, the Bennett court recognized WPIC 4.01 was not problem-free, noting WPIC 4.01 was required only "until a better instruction is approved." 161 Wn.2d at 318. Bennett and Thompson hardly provide a ringing endorsement for WPIC 4.01.

The State's reliance on Thompson and also on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), to claim the "reason to doubt" argument has been decided is particularly feeble because these cases were decided more than 40 years ago and can no longer be squared with State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), and the other fill-in-the-blank cases. See Br. of Appellant at 29-31.

In Emery, our supreme court held that an articulation requirement "impermissibly undermine[s] the presumption of innocence." 174 Wn.2d at 759. Because WPIC 4.01 requires jurors to articulate the reason for their doubt, it "subtly shifts the burden to the defense." Id. at 760. Given that the State will avoid supplying jurors with reasons to doubt, WPIC 4.01 suggests that either the jury or the defense should supply them, which degrades the presumption of innocence. Id. at 759.

The State simplistically points out that the Emery court approved of WPIC 4.01's language. Br. of Resp't at 21. However, aside from repeatedly relying on old case law, see Br. of Resp't at 21-22 & n.7, the State does not respond to Pollock's observation that Emery did not explain how or why an articulation requirement is unconstitutionally unfair when the prosecutor argues it in closing but not unconstitutionally unfair when the trial court requires articulation in a jury instruction. Br. of Appellant at 31. Because the Emery court was not considering a direct challenge to WPIC 4.01's language, its approval of WPIC 4.01's language does not and cannot preclude Pollock's argument that the articulation requirement is unconstitutional in any and all contexts in which it arises.

The State further posits that "Pollock's argument is a hypertechnical exercise in semantics that should be rejected." Br. of Resp't at 22. The State is correct that courts "'should be concerned with the meaning of the

instruction . . . to a jury of ordinarily intelligent laymen." Br. of Resp't at 23 (quoting Wims v. Bi-State Dev. Agency, 484 S.W.2d 323, 325 (Mo. 1972)). Indeed, the State has identified the precise problem with WPIC 4.01.

The difference between "reason" and "a reason" is obvious to any English speaker. The first requires logic and the second requires an explanation or justification. The plain language of WPIC 4.01 instructs jurors they must articulate the reason for their doubt. This is not a strained or hypertechnical interpretation of WPIC 4.01 but a commonsense recognition that placing the article "a" before the word "reason" invokes a different meaning in the English language. An instruction like "a reasonable doubt is one based in reason" means something entirely different than "a reasonable doubt is one for which a reason exists." The former does not require jurors to articulate their doubt; it requires only that their doubt be based on reason and logic, which properly comports with United States Supreme Court precedent. Br. of Appellant at 28-29; see, e.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). WPIC 4.01 engrafts an articulation requirement onto the reasonable doubt standard. Recognizing that it plainly does so is not "hypertechnical hairsplitting." Br. of Resp't at 23.

In addition to the harms Pollock identified with respect to requiring articulation, see Br. of Appellant at 29, scholarship also helpfully elucidates the problems with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that is hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, a juror could not vote to

acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. As Pollock noted in his opening brief, this violates the federal and state due process clauses. Br. of Appellant at 29.

Moreover, an instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as structural error." Id. at 281-82 (internal quotation marks omitted); see also State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (error in defining reasonable doubt is "a grievous constitutional failure").

Finally, the State invokes the doctrine of stare decisis, arguing that Pollock must show the cases approving WPIC 4.01 are incorrect and harmful. Br. of Resp't at 20-21, 22 n.7 (citing In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). But, as discussed, none of the cases the State cites addresses the precise arguments or issues Pollock raises, and therefore none of them needs to be overruled for Pollock to challenge WPIC 4.01's articulation requirement. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994)

("[Courts] do no rely on cases that fail to specifically raise or decide an issue."). Moreover, given that this court lacks the authority to overrule Washington Supreme Court cases, it would be counterproductive to ask this court to do so even if it were necessary.

Nowhere in the State's response does the State actually address the substance of the articulation problem Pollock has identified. The State instead attempts to deflect the issue in hopes this court will not consider the serious flaw that a basic examination of WPIC 4.01's language reveals. This court should consider the substance of Pollock's arguments and reverse.

B. CONCLUSION

Dismissal is required because the State presented insufficient evidence to support the corpus delicti or the conviction for one of the acts it claimed constituted second degree assault. Alternatively, reversal and a new trial is required because Pollock's jury was given a constitutionally defective reasonable doubt instruction.

DATED this 24th day of April, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71254-3-I
	)	
MAURICE POLLOCK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 24TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAURICE POLLOCK
18815 110TH CT. SE
RENTON, WA 98055

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF APRIL 2015.

X Patrick Mayovsky