92358-2

SUPREME COURT NO. _____

NO. 71254-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MAURICE POLLOCK,

Petitioner.

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

The Honorable Mary E. Roberts, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Maurice Henry Pollock, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Pollock requests review of the Court of Appeals decision in State v. Pollock, 2015 WL 4399703, No. 71254-3-I (Wash. Ct. App. Jul. 20, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. The State argued Pollock committed second degree assault by lunging at Nigel Greer with a shotgun aimed. Greer testified he saw no shotgun. The only evidence that Pollock lunged at Greer with a shotgun was Pollock's own pretrial statement, which Pollock testified to at trial. May a defendant's uncorroborated statements at trial provide the sole corroborating evidence for his pretrial admissions under the corpus delicti rule? If not, did the State fail to provide sufficient evidence to support the conviction and the corpus delicti of one of the acts it argued was second degree assault?

2. When one of the acts in a multiple acts case was not supported by sufficient evidence, and it is unclear on which act the jury relied, is dismissal required to avoid double jeopardy?

3. WPIC 4.01 requires jurors to articulate a reason for having reasonable doubt. Does this articulation requirement violate due process,

undermine the presumption of innocence, and impermissibly shift the burden of proof?

4. Is review appropriate under RAP 13.4(b)(1), (2), and (3) because the Court of Appeals decision conflicts with a decision of this court and with other Court of Appeals decisions, and because this case involves a significant constitutional question?

D. STATEMENT OF THE CASE[1]

The State charged Pollock with two counts of first degree assault, one count pertaining to Nigel Greer and one count pertaining to Annaka Lain. CP 11-12. Both counts alleged Pollock committed the assaults while armed with a firearm per RCW 9.94A.533(3). CP 11-12.

The jury acquitted on all but the lesser included charge of second degree assault against Greer. CP 101-04; 7RP[2] 11-15. The jury also returned a special verdict stating Pollock was armed with a firearm at the time of this second degree assault. CP 105; 7RP 12.

Toward the end of trial, the State asserted two separate acts could form the basis for a lesser included second degree assault against Greer.

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[1] For a more complete statement of the facts, Pollock respectfully refers this court to his opening brief. See Br. of Appellant at 2-10.

[2] The verbatim reports of proceedings are referenced as follows: 1RP—September 9, 2013; 2RP—September 10 and 11, 2013; 3RP—September 12, 2013; 4RP—September 16, 2013; 5RP—September 17, 2013; 6RP—September 18 and 19, 2013; 7RP—September 20 and November 8 and 22, 2013.

6RP 6, 8. For one of the acts, the State indicated, "There has been testimony and a statement from the defendant that he initially approached -- he used the word 'charged' [Greer] with his shotgun aimed, and then you heard some different testimony about what 'aimed' means." 6RP 8. For the other act, the prosecutor explained, "You also heard testimony from both Annaka Lain and [Greer] that the defendant pointed his revolver at [Greer]'s head." 6RP 8-9. Given these different acts, the State proposed and the trial court gave a Petrich[3] instruction. 6RP 9; CP 131.

The trial court also gave the standard reasonable doubt instruction, WPIC 4.01, which read, in part, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 115; 7RP 100.

During its closing, the State asserted Pollock "told you that he is guilty of assault in the second-degree -- by charging at [Greer] and forcing him back into his apartment."[4] 6RP 119. The State continued, "The other way he is guilty of that count . . . is by pointing that gun at [Greer]'s head as [Lain] said. That is also an assault in the second-degree." 6RP 119.

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[3] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 405-06 & n.1, 756 P.2d 105 (1988).

[4] During a pretrial interview, Pollock told police he had "moved towards [Greer] with the shotgun aimed, loaded with beanbags." 5RP 53. This statement was deemed admissible by the trial court pursuant to CrR 3.5. 1RP 155-57. Pollock testified at trial that he had made the statement but that he meant aimed as "[r]eadied" and stated he never pointed the shotgun at Greer. 5RP 18, 52-53. This was the full extent of evidence adduced at trial regarding Pollock having moved towards Greer with a shotgun aimed.

Following the guilty verdict on this second degree assault, Pollock moved to arrest judgment under CrR 7.4(a)(3), asserting the evidence was insufficient to sustain his conviction. CP 145-53. Pollock correctly asserted that Greer testified "he did not see a shotgun or a rifle of any kind." CP 147; see also 2RP 44-45 (Greer's testimony he saw no shotgun). Pollock thus argued "it would be impossible for Maurice Pollock to have assaulted Nigel Greer by pointing a shotgun at him." CP 147-48. Pollock also challenged the corpus delicti of the second degree assault, asserting that the State presented no independent evidence corroborating Pollock's incriminating statement he lunged at Greer with the shotgun. 7RP 23-24, 28-29, 34-35. Based on counsel's post-trial conversations with six jurors, Pollock also asserted jurors convicted Pollock based on his statement that he charged Greer with a shotgun aimed. CP 150-51. The State agreed that jurors did not believe Greer and Lain that Pollock had held a gun to Greer's head. 7RP 31-32.

The trial court denied the motion to arrest judgment and sentenced Pollock to 39 months of incarceration. CP 156, 158; 7RP 53.

Pollock appealed. CP 164-65. He challenged the sufficiency of the evidence of the shotgun lunging act given that Greer stated he never saw a shotgun and therefore could not have experienced fear or apprehension from being charged at with a shotgun aimed. Br. of Appellant at 11-26. Pollock

also argued insufficiency of the corpus delicti because the trial evidence did not independently corroborate Pollock's statement to police that he "moved towards [Greer] with the shotgun aimed." Br. of Appellant at 18-20. Because the State failed to present sufficient evidence of one of the acts it alleged was second degree assault, Pollock contended dismissal was required, as any lesser remedy would subject Pollock to double jeopardy for an act the State failed to support with sufficient evidence. Br. of Appellant at 20-26. Pollock also challenged WPIC 4.01 given its unconstitutional articulation requirement. Br. of Appellant at 26-32.

The Court of Appeals rejected Pollock's sufficiency challenge because jurors "could have chosen to disbelieve Greer's account" and "found Pollock's account of the circumstances surrounding the display of the shotgun to be credible. Pollock's arguments on appeal regarding the credibility of the evidence are properly directed to the trier of fact, not this court." Pollock, slip op. at 12. As for Pollock's corpus delicti argument, the Court of Appeals opined, "Pollock's own trial testimony essentially corroborated his statements to police. Pollock testified that in response to his removal of the blanket from the shotgun, Greer jumped back behind a wall, shouting 'Don't pull that gun.'" Id. at 14. The Court of Appeals rejected Pollock's WPIC 4.01, concluding "Pollock's challenged to WPIC 4.01 must be directed to our supreme court." Id. at 16.

E. ARGUMENT

1. POLLOCK'S TRIAL TESTIMONY DID NOT AND COULD NOT PROVIDE THE SOLE CORROBORATION OF HIS PRETRIAL STATEMENTS UNDER THE CORPUS DELICTI RULE, AND THE FAILURE TO ESTABLISH THE CORPUS RESULTED IN INSUFFICIENT EVIDENCE TO SUPPORT ONE OF THE ACTS THE STATE ARGUED WAS SECOND DEGREE ASSAULT

Due process requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This court will reverse a conviction when, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

The State argued the jury could rely on either of two acts to convict Pollock of the lesser included offense of second degree assault against Greer: (1) Pollock's lunging at Greer with a shotgun (lunging act) or (2) Pollock's pointing a handgun at Greer's forehead (gun-to-forehead act). The State failed to provide sufficient evidence of the lunging act given that there was no evidence that Greer experienced fear or apprehension from being charged at with a shotgun.[5] Greer testified he saw no shotgun. 2RP 44-45. Pollock testified he never aimed a shotgun at Greer. 5RP 18, 52-53. While other

[5] Under the law of this case, the apprehension-and-fear-of-bodily-injury means of second degree assault is the only means at issue. See CP 121; 6RP 103; Br. of Appellant at 11-13, 17-18.

witnesses testified they saw a shotgun, none testified the lunging act occurred. See 2RP 87-88; 5RP 91-95, 132.

The sole evidence of the lunging act came from Pollock's pretrial statement to police that he "moved towards [Greer] with the shotgun aimed, loaded with beanbags." 5RP 53. The Court of Appeals determined this statement was corroborated under the corpus delicti rule by Pollock's trial testimony that he unwrapped the shotgun from a blanket in front of Greer and Greer jumped behind a wall and asked Pollock not to pull the shotgun on him. Pollock, slip op. at 14-15. Based solely on this testimony, the Court of Appeals concluded there was sufficient evidence to convict.[6]

a. Pollock's testimony did not establish the corpus delicti of second degree assault, and, even if it did, Washington jurisprudence is in conflict on the issue of whether a defendant's trial testimony may provide the sole corroboration of the corpus delicti

Under the corpus delicti rule, "A defendant's incriminating statement alone is not sufficient to establish that a crime took place." State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006) (footnote omitted) (citing State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996)). Rather, "the State

[6] The State argued that Pollock waived the corpus delicti issue because he did not object during trial, asserting the corpus delicti rule "governs whether a defendant's confession is admissible in the first place—not whether the evidence is sufficient to convict." Br. of Resp't at 14-15. This court has explicitly rejected this argument. State v. Dow, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010) ("The corpus delicti doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. That is, the State must still prove every element of the crime charged by evidence independent of the defendant's statement.").

must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred." Id. This prima facie corroboration "exists if the independent evidence supports a '"'"logical and reasonable inference" of the facts sought to be proved.'" Id. (quoting State v. Aten, 130 Wn.2d at 656 (quoting State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995))).

Pollock told police he "moved towards [Greer] with a shotgun aimed." 5RP 53. But at trial Pollock testified that he never aimed a shotgun at Greer. 5RP 18, 53. Pollock's trial testimony regarding Greer's statements—Greer jumping behind a wall asking Pollock not to pull a gun because he had been shot before, 5RP 53-54—likewise fails to demonstrate Pollock had lunged at Greer with a shotgun aimed. Because Pollock's testimony was that no gun was aimed at Greer, Pollock's testimony failed to provide "evidence independent of [his pretrial] incriminating statement that the crime [Pollock] *described in the statement* actually occurred." Brockob, 159 Wn.2d at 328. The Court of Appeals decision conflicts with this court's corpus delicti jurisprudence, warranting review under RAP 13.4(b)(2).

But even if Pollock's testimony were corroborative of his pretrial statement, as the Court of Appeals concluded, it would violate the aims of the corpus delicti doctrine to permit uncorroborated trial testimony to corroborate an uncorroborated out-of-court statement.

The policy objective of the corpus delicti rule is twofold. It "was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false." City of Bremerton v. Corbett, 106 Wn.2d 569, 576-77, 723 P.2d 1135 (1986). In Corbett, this court rejected a rule that would limit the rule's application to police interrogations, acknowledging, "The danger that an admission is false though voluntarily made is present both when it is made under custodial interrogation and when it is not." Id. at 577. This court thus held that *all* admissions by a criminal defendant "whether made in a Miranda[7] setting or not, require corroboration under the corpus delicti rule." Id.

Likewise, in State v. Aten, Division Two thoroughly explained why the corpus delicti rule requires the State to corroborate a defendant's incriminating statements with independent evidence:

> The doctrine guards not only against coerced confessions, but against uncorroborated admissions springing from a false subjective sense of guilt. A defendant who falsely believes herself guilty may "admit" that guilt through any description of the events in question, whether that description is given to police or a close friend, whether inculpatory, exculpatory, or facially neutral. The purpose of the corpus delicti doctrine would be frustrated if the court allowed a false confession to be "corroborated" by a false admission, or even by seemingly innocent statements. The corpus delicti doctrine incorporates a policy that we will not find a defendant guilty beyond a

[7] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> reasonable doubt based solely on the defendant's subjective belief; we require prima facie corroboration.

79 Wn. App. 79, 88, 900 P.2d 579 (1995) (emphasis added), aff'd, 130 Wn.2d 640, 927 P.2d 210 (1996). In affirming this reasoning, this court concluded that a defendant's "statements should not be considered independent proof of the *corpus delicti* in this case." Aten, 130 Wn.2d at 658. Given the Corbett and Aten courts' emphasis on ensuring corroboration of all of a defendant's incriminating statements, it would frustrate the purpose of the corpus delicti rule to permit uncorroborated trial testimony to provide independent corroboration of out-of-court statements.

Nonetheless, Division One has allowed a defendant's testimony to provide the sole corroboration of the corpus in at least one opinion aside from this case, albeit without analysis. In State v. Liles-Heide, 94 Wn. App. 569, 572-73, 970 P.2d 349 (1999), the court concluded that the defendant's own "testimony establishes the corpus delicti for driving under the influence of alcohol." This holding plainly conflicts with Aten and Corbett because it would allow a defendant's false or mistaken testimony to corroborate a false or mistaken pretrial statement.

Division Three has recognized this problem. In State v. Lopez Angulo, 148 Wn. App. 642, 647-54, 200 P.3d 752 (2009), the court provided a detailed discussion of the history and purpose of the corpus delicti rule.

Citing Aten, the court stated "one reason a suspect's statements could not be considered in establishing the *corpus delicti* was concern that one false statement would corroborate another untruthful statement." Id. at 654. The court went on to opine, "While the *corpus delicti* rule does not apply to in-court testimony, we need to bear in mind the Aten court's concern about the potentially false statement corroborating another and *question how much weight a defendant's own testimony should be given in establishing corroboration.*" Id. at 656 n.2 (second emphasis added). Conflicting case law provides no clear answer to this question, necessitating review under RAP 13.4(b)(1) and (2).

As discussed, the only evidence of Pollock's alleged second degree assault on Greer with a shotgun consisted of Pollock's pretrial statement that he lunged at Greer with a shotgun aimed. 5RP 53. Indeed, Greer testified he never saw any shotgun. 2RP 44-45. While other witnesses testified Pollock might have carried a shotgun, none testified Pollock aimed the shotgun at Greer or that Pollock lunged at Greer with the shotgun, aimed or not. 2RP 87-88; 5RP 132. The only evidence that could conceivably have provided any corroboration of Pollock's pretrial statement was Pollock's own trial testimony that he unwrapped the shotgun from a blanket and Greer "jumped around the corner with the gun that he had in his hand, and he is saying, 'Don't pull that gun. I have been shot. I don't want to be shot again.'" 5RP

18, 53-54. The Court of Appeals seized on this testimony to conclude "the independent evidence established the corpus delicti of assault in the second degree as charged here."[8] Pollock, slip op. at 14-15.

Pollock's testimony explaining his pretrial incriminating statement did not qualify as "[t]he State's evidence" supporting an inference Pollock committed a second degree assault. Brockob, 159 Wn.2d at 329. Nor can Pollock's testimony *independently* corroborate his pretrial statement given the goal of the corpus delicti rule to prevent convictions based solely on a defendant's subjective belief or incorrect memory of the facts. Aten, 130 Wn.2d at 658; Aten, 79 Wn. App. at 88. Pollock's trial testimony could not and did not corroborate Pollock's pretrial statement that he had charged at Greer with a shotgun aimed. Because there was no corroboration of Pollock's pretrial statement and because no other evidence remotely established Greer had experienced fear or apprehension from being lunged at with a shotgun aimed, the State failed to meet its constitutional burden of

[8] The Court of Appeals pointed to other testimony that Pollock carried a shotgun when he confronted Greer. Pollock, slip op. at 14. This evidence is not sufficient to corroborate the corpus delicti, however, because it does not "present evidence independent of the incriminating statement that the crime [Pollock] *described in the statement* actually occurred." Brockob, 159 Wn.2d at 328. The Court of Appeals, moreover, relied solely on State v. Mathis, 73 Wn. App. 341, 869 P.2d 106 (1994), for the proposition that Pollock's trial testimony alone could establish the corpus. But this was not Mathis's holding. The court merely concluded Mathis's testimony he digitally penetrated the victim "*when combined* with the testimony of L.P. that Mathis kissed her, put his hands down her underpants, and allowed her to sleep overnight at his house . . . was sufficient to establish the corpus delicti of the crime" of child rape. Id. at 346-47 (emphasis added).

proving of proving every element of the lunging act beyond a reasonable doubt.

The Court of Appeals opinion conflicts with the decisions of this court and with other Court of Appeals decisions requiring independent corroboration of a defendant's statement and suggesting that a defendant's trial testimony alone cannot satisfy the objectives of the corpus delicti rule. This issue also implicates the constitutional sufficiency of the evidence standard. Review is appropriate under RAP 13.4(b)(1), (2), and (3).

b. The insufficiency of the evidence to support the lunging act requires reversal and dismissal to guard against a double jeopardy violation

When the State presents evidence of multiple acts, any one of which it argues could form the basis of a single count, the State must elect which act the jury should rely on or the trial court must instruct the jury to be unanimous on the specific act. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 405-06 & n.1, 756 P.2d 105 (1988); State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911).

Here, though the trial court provided a Petrich instruction, it is unclear whether the jury unanimously convicted Pollock of the lunging act, which was not supported by sufficient evidence, or the gun-to-forehead act, which was. CP 131; 6RP 107. The only constitutionally adequate remedy is

dismissal of the second degree assault charge because 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.[9] See Br. of Appellant at 20-26.

2. WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

WPIC 4.01 instructs jurors a reason must exist for having a reasonable doubt. Jurors thus must have more than just a reasonable doubt; they must also have an articulable doubt. The difference between "reason" and "a reason" is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having "a reason" to doubt. WPIC 4.01 is gravely flawed because it requires both a reasonable doubt and a reason to doubt for a jury to acquit.

This articulation requirement also undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments Washington courts have invalidated in prosecutorial misconduct cases. Indeed, WPIC 4.01 is the precise source of the improper fill-in-the-blank

[9] Given that the Court of Appeals erroneously determined there was sufficient evidence of the lunging act based on its misapplication and misapprehension of the corpus delicti rule, it did not address Pollock's arguments regarding dismissal. In its briefing, the State likewise provided no response to the dismissal remedy Pollock proposed, indicating that the State concurs with Pollock's analysis on this point. See 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.").

arguments. In State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009), for instance, the prosecutor recited WPIC 4.01 before the fill-in-the blank argument: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." The same occurred in State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

As is true of the related prosecutorial misconduct, WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, which directly shifts the burden and undermines the presumption of innocence. Id. at 759.

Any instruction that erroneously defines reasonable doubt vitiates the jury-trial right, violates due process, and is structural error. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 125 L. Ed. 2d 182 (1993). Where an "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 on reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

In dodging Pollock's arguments, the Court of Appeals cited State v. Thompson, 13 Wn. App. 1, 5-6, 533 P.2d 395 (1975), in which Division Two stated, "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Pollock, slip op. at 16 n.53. This is untenable. No further "context" erases the taint of the articulation requirement contained in the first sentence that defines reasonable doubt as a doubt for which a reason exists. The Thompson court's suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between "reason" and "a reason." And the Thompson court's explanation contradicts itself: it asserts on the one hand there is no articulation requirement while on the other hand posits a reasonable doubt must be capable of at least some articulation given its statement that a reasonable doubt cannot be based on something vague. Thompson fails to adequately explain away WPIC 4.01's articulation requirement.

This court recently addressed the articulation issue with respect to a trial court's preliminary instruction that a reasonable doubt is "'a doubt for which a reason can be given.'" State v. Kalebaugh, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 4136540, at *1-2 (Jul. 9, 2015). This court held this

instruction was erroneous: "the law does not require that a reason be given for a juror's doubt." Id. at *3. This court compared the instruction with WPIC 4.01: "The trial judge instructed that a 'reasonable doubt' is a doubt for which a reason can be given, rather than the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists." Id. But there is no appreciable difference between the acceptable "a doubt for which a reason exists" and the erroneous "a doubt for which a reason can be given." Both instructions require *a reason.* "A reason" means there must be articulation, explanation, or justification, regardless of whether it merely exists or can expressly be given.

Furthermore, Kalebaugh's observation that it is error to require articulation of reasonable doubt overlooks this court's older precedent that equated WPIC 4.01's "for which a reason exists" language to the offensive "for which a reason can be given" language.

The Thompson court observed WPIC 4.01's phrasing had "been declared satisfactory in this jurisdiction for over 70 years," citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the instruction, "It should be a doubt for which a good reason exists." 25 Wash. at 421. The Harras court maintained the "great weight of authority" supported this instruction, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (16 So. 342). Id. This note, however,

cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[10]

Harras thus viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason be given for the doubt. Then the Thompson court upheld the doubt "for which a reason exists" instruction by equating it with the instruction approved in Harras. Thompson's explicit reliance on Harras amounts to a concession that WPIC 4.01's doubt "for which a reason exists" language means a doubt for which a reason can be given. This is a problem because, under more recent decisions, any requirement that jurors be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 2015 WL 4136540, at *3; Emery, 174 Wn.2d at 759-60.

This court's decision in State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), further illustrates this problem. Harsted objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. This court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This court then cited out-of-state cases upholding instructions that defined reasonable doubt as a doubt for which a reason can

[10] This note is attached as Appendix B.

be given. Id. at 164. One of these authorities stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899). This court noted that while some courts had disapproved of similar language, it was "impressed" with the Wisconsin view and felt "constrained" to uphold the instruction. 66 Wash. at 165.

Harsted and Harras elucidate the genesis of WPIC 4.01's infirmity. In these cases decided more than 100 years ago, this court equated two propositions when it addressed the reasonable doubt instruction: a doubt for which a reason exists and a doubt for which a reason can be given were equivalent in meaning and substance. This revelation destroys this court's recent assertion that there is any real difference between the acceptable "doubt for which a reason exists" in WPIC 4.01 and the erroneous "doubt for which a reason can be given." Kalebaugh, 2015 WL 4136540, at *3. This court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet this court's decisions in Harras and Harsted explicitly contradict Emery and Kalebaugh. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01

remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and eschewal of an articulation requirement.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both erroneously require articulation. Because this court's and the Court of Appeals' case law is in disarray on the significant constitutional issue of properly defining reasonable doubt for Washington juries, this court should grant review pursuant to RAP 13.4(b)(1), (2), and (3).

F. CONCLUSION

Because Pollock satisfies review criteria under RAP 13.4(b)(1), (2), and (3), he asks that this court grant review and reverse.

DATED this 23d day of September, 2015.

Respectfully submitted,

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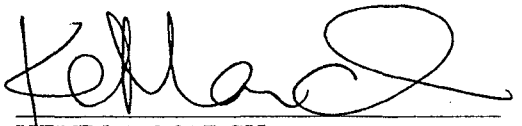

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71254-3-I
Respondent,	)	DIVISION ONE
v.	)	
MAURICE HENRY POLLOCK,	)	UNPUBLISHED
Appellant.	)	FILED: July 20, 2015

Cox, J. – Maurice Pollock appeals from his conviction for assault in the second degree while armed with a firearm, asserting insufficient evidence and instructional error. But viewed in the light most favorable to the State, the evidence was sufficient to establish the corpus delicti and to support Pollock's conviction. Our supreme court has approved the challenged reasonable doubt instruction. Pollock's statement of additional grounds raises no meritorious issues. We affirm.

On November 19, 2010, Nigel Greer lived with his fiancée Annaka Lain and their two young children in apartment 73 at the Sunset Vista Apartments in Renton. At about 10:00 a.m., Greer walked downstairs from his apartment to pick up his mail.

After walking back upstairs, Greer encountered Brandon Wolfe, who lived two doors away in apartment 75. Wolfe was a casual acquaintance who had

purchased marijuana from Greer on several occasions. According to Greer, prior conversations between the two involved nothing more than "what weed, what kind of weed I had or if he wanted to purchase some or whatever."[1]

As Greer walked by, Wolfe asked if Greer knew his friend "Moe." Wolfe indicated that "Moe" had been selling marijuana in the area for a long time and had "the spot sewed up."[2] Greer expressed a lack of interest in the message that Wolfe appeared to be conveying.

Upon returning to his apartment, Greer watched television while Lain slept in the bedroom with the couple's infant son. Suddenly, Greer heard a "loud bang" on the door and someone yelled "Police, open up."[3] Acknowledging that he was paranoid "because I have got some weed in my house,"[4] Greer looked through the peephole on the door, but could see nothing at first. At some point, Lain came out of the bedroom and stood near Greer.

After a short time, Greer was able to see through the peephole, but saw no one outside. When Greer opened the door, he saw Wolfe and a man he identified as Pollock nearby. Pollock was holding a handgun and ranting about a prior robbery incident in which he had been shot. Greer moved just outside the door to block Pollock's entry. In the meantime, Lain armed herself with one of

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[1] Report of Proceedings (Sept. 11, 2013) at 31.
[2] Id. at 34.
[3] Id. at 38-39.
[4] Id. at 39.

her handguns. At some point Pollock pointed his handgun at Greer's head and said, "I hate fucking niggers."[5]

Greer put his hands up and stepped back into the apartment as "all hell broke loose."[6] Greer heard about 20 to 25 shots fired in rapid succession. Greer believed that Lain had hit Pollock, who quickly retreated, firing wildly. Wolfe had started firing as well.

Greer acknowledged that he had a 2009 conviction for witness tampering and was not allowed to possess a firearm. He denied that he had held or fired a gun or that he or Lain had pursued the assailants beyond the alcove just outside his apartment door. Greer recalled that Pollock had a handgun during the confrontation, but claimed he did not see Pollock carrying a shotgun or "anything . . . wrapped up."[7]

Lain testified that she was awakened by pounding on the apartment door. On her way to the living area, she placed her infant son on a sofa. Lain heard someone at the door yelling "Police. Search warrant. Open the door."[8]

When Greer opened the door, Lain saw a man carrying "like a rifle or something wrapped in his shirt."[9] The man was standing just inside of the

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[5] Id. at 46.
[6] Id. at 47.
[7] Id. at 44.
[8] Id. at 86.
[9] Id. at 88.

apartment as Greer tried to calm him down and back him out. Lain later saw a second man standing behind the intruder.

Lain retrieved her .45 caliber handgun from a backpack and stood near Greer. The intruder became increasingly aggressive and eventually pulled out a handgun, held it to Greer's head, and uttered a racial slur. Thinking that the man was going to kill Greer, Lain opened fire, emptying her gun:

> All I remember was shooting. I just started pulling the trigger. I just – as fast as I could, and both of them started pulling their trigger as fast as they could.[10]

One of the bullets went through Lain's shorts, but she was otherwise uninjured. Lain then scrambled along the floor to grab her 9 mm handgun and resumed shooting. Lain and Greer eventually closed the apartment door and called 911.

Pollock and Wolfe gave different accounts of the confrontation.[11]

Wolfe testified that on the day before the confrontation, he was returning to his apartment when he encountered Greer. Greer, who had previously sold marijuana to Wolfe, seemed upset. As Wolfe walked by, Greer appeared to be "dry-firing"[12] a pistol in the pocket of his sweatshirt, which Wolfe believed was some kind of a warning.

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[10] Id. at 111-12.
[11] Prior to trial, Wolfe pleaded guilty to two counts of second degree assault.
[12] Report of Proceedings (Sept. 17, 2013) at 78.

On the following morning, a neighbor asked Wolfe for some marijuana. Wolfe reluctantly sold him a "dime bag," but just as a one-time "favor."[13]

A short time later, Wolfe heard a loud "bang" at his door. Through the peephole, Wolfe saw Greer and another man standing outside. Both men looked intimidating, and Wolfe stepped outside to talk to them.

Greer informed Wolfe that he was not allowed to sell marijuana "on my tier."[14] Wolfe acknowledged his understanding and apologized profusely. Wolfe admitted, however, that he also told Greer, "I have a gun and I will defend myself."[15] Greer and the other man left and Wolfe went back inside. Wolfe then called Pollock, a close friend, to arrange for "something that I would be able to protect myself with."[16]

A short time later, Pollock arrived at Wolfe's apartment with an AK-47 assault rifle, a shotgun loaded with "beanbags,"[17] and two .357 revolvers. Pollock was wearing a bullet proof vest.[18] After bringing the weapons into the apartment, Pollock showed Wolfe how to use them.

Wolfe followed Pollock over to Greer's apartment, where Pollock knocked on the door and yelled "police." Both Pollock and Wolfe were armed with

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[13] Id. at 79.
[14] Id. at 82.
[15] Id. at 112.
[16] Id. at 84.
[17] Id. at 15.
[18] Id. at 16.

Pollock's handguns. Pollock was also carrying the shotgun, wrapped in a blanket. Wolfe heard someone shouting inside, but no one opened the door. Pollock shouted "Leave my brother and his family alone"[19] through the door, and the two returned to Wolfe's apartment. In a statement to police, Wolfe said that he and Pollock had gone over to Greer's apartment to "intimidate" him.[20]

Wolfe insisted on taking his family to Pollock's house and made preparations to leave. As Wolfe followed Pollock out the door, he saw Greer, who was "yelling and cussing and stuff."[21] Pollock walked up to Greer and made a racial slur. In the ensuing shooting, Wolfe was hit in the chest and leg and fell to the ground. Greer retreated and resumed shooting from behind a wall near his apartment. Wolfe emptied his gun into the wall, hoping to stop Greer.

When the shooting stopped, Pollock helped Wolfe back into his apartment and left. Wolfe told the 911 operator that Greer had shot him. Wolfe acknowledged that he might have told a paramedic that Greer had come into the apartment and fired a shot. Wolfe did not see Lain in the confrontation.

Pollock testified that Wolfe called him on November 19, 2010, and said he was terrified for the safety of his family. Pollock responded by bringing Wolfe "a form of protection" that had saved Pollock's life in the past:

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[19] Id. at 91.
[20] Id. at 133.
[21] Id. at 94.

> The only reason my life was saved wasn't because I had a gun . . . it was because I had a big, scary, loud gun.[22]

Pollock knew that Wolfe had been selling some of the marijuana that Pollock gave him.

Pollock informed Wolfe that they were going over to talk to Greer and "tell them to just leave you alone."[23] Pollock armed himself with a concealed pistol and carried the shotgun wrapped in a blanket. Pollock, followed by Wolfe, walked over to Greer's apartment. When Pollock knocked, he heard "guns click"[24] and jumped back. Pollock shouted "Police. We know you have guns" and then "Leave my little brother and his family alone."[25]

When there was no response, Pollock and Wolfe started back toward Wolfe's apartment. As the two approached Wolfe's apartment, Greer appeared with a gun in his waistband. Pollock told Greer not to pull out the gun. When Greer started to reach for the gun, Pollock pulled the blanket off the shotgun. Greer jumped behind a wall.

In his statement to police after the shooting, Pollock said that he "move[d] towards [Greer] with the shotgun aimed, loaded with beanbags"[26] and that Greer turned and ran back through the open door of his apartment. At trial, Pollock explained that he pulled the blanket off the shotgun, but did not aim it directly at

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[22] Id. at 14.
[23] Id. at 16.
[24] Id. at 17.
[25] Id.
[26] Ex. 13, at 6.

Greer. While Pollock pulled the blanket off, Greer jumped behind a wall and said, "Don't pull that gun. I have been shot. I don't want to be shot again."[27]

Pollock claimed that he then walked toward the wall, peeked around the corner, and asked Greer to leave Wolfe and his family alone. He and Wolfe then returned to Wolfe's apartment.

Pollock decided that Wolfe and his family should get away from the apartment. Pollock and Wolfe walked out the door, armed with the handguns. The shotgun and assault rifle remained in the apartment. As Pollock and Wolfe exited the apartment, Greer stood nearby with his hand on a gun, screaming and acting aggressively. Pollock repeatedly told Greer to leave Wolfe and his family alone. Pollock acknowledged that when Greer did not respond, he turned to Wolfe and made an "ignorant stupid" racial slur.[28] Pollock saw Lain standing behind Greer.

Pollock maintained that he was immediately hit by a bullet in the chest. As Pollock ran, another bullet hit him in the hand. Pollock then pulled out his handgun and returned fire. Greer hid behind a wall and continued firing. Pollock managed to return to Wolfe's apartment and grab the assault rifle. He then went outside and saw several members of what he believed to be Greer's "gang."[29]

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[27] Report of Proceedings (Sept. 17, 2013) at 53-54.
[28] Id. at 26.
[29] Id. at 31.

By this time, the shooting had stopped. Pollock helped a wounded Wolfe back into his apartment. Pollock then left and drove himself to the hospital.

Based on the physical evidence, including blood drops, bullet casings and bullet strikes, police investigators concluded that the gunfight had occurred "around or just outside, or just inside the door"[30] to Greer's apartment, rather than farther down the walkway toward Wolfe's apartment. Kim Duddy, the defense's forensic expert, testified that the evidence indicated that no weapons were fired out of or into Greer's apartment, and that the shooting occurred near the alcove outside of Greer's apartment.

The State charged Pollock with separate counts of assault in the first degree against Greer and Lain. Both counts alleged that Pollock was armed with a firearm.

A short time after the incident, Pollock approached the police and asked to provide his account of the events. In the recorded interview, Pollock acknowledged that he brought the weapons to Wolfe's apartment, attempted to contact Greer at his apartment, and directed a racial slur at Greer. He maintained that he had acted only in self-defense after Greer opened fire. After a CrR 3.5 hearing, the trial court ruled that Pollock's statements were admissible.

The jury acquitted Pollock of both counts of assault in the first degree and found him guilty of a single count of the lesser offense of assault in the second

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[30] Report of Proceedings (Sept. 16, 2013) at 31.

degree for assaulting Greer with a firearm. Following the verdict, Pollock moved to arrest judgment, arguing that the evidence was insufficient and that the State failed to establish the corpus delicti. The court denied the motion and imposed a 39-month standard range sentence, including firearm enhancement.

SUFFICIENCY OF THE EVIDENCE

At trial, the State alleged that Pollock committed the lesser offense of assault in the second degree when he pointed the handgun at Greer's head and when "he charged at Nigel Greer with a shotgun pointed – loaded, obviously – and basically chased him back into his apartment."[31] The trial court instructed the jury that it needed to unanimously agree as to which specific act constituted the charged assault.

On appeal, Pollock concedes that the evidence was sufficient to prove that Pollock pointed the handgun at Greer's head. He argues that the State failed to prove any assault with the shotgun.

We review Pollock's challenge by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt.[32] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it.[33] Circumstantial evidence and

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[31] Report of Proceedings (Sept. 19, 2013) at 119.
[32] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[33] Id.

direct evidence are equally reliable.[34] As charged here, the State had to prove that Pollock committed an assault "done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury . . . ."[35]

Both Wolfe and Pollock testified that Pollock carried the shotgun when they went to Greer's apartment to intimidate him. Pollack admitted that when confronting Greer, he removed the blanket from the shotgun, causing Greer to jump behind a wall shouting "Don't pull that gun." In his statement to police, Pollock said that he moved toward Greer with "the shotgun aimed," causing Greer to turn and flee into his apartment.

Pollock explained at trial that he did not aim the shotgun directly at Greer. But the circumstances surrounding Pollock's display of the shotgun and Greer's immediate reaction were sufficient to permit the jury to find beyond a reasonable doubt that Pollock assaulted Greer with the intent to create apprehension and fear of bodily injury and that Pollock's actions created in Greer a reasonable apprehension and imminent fear of bodily injury. The evidence was sufficient to support Pollock's conviction for assault in the second degree.

Pollock maintains that the evidence was insufficient because neither Greer nor Lain testified that Pollock charged or displayed the shotgun, and Greer

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[34] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).
[35] Instruction 9, Clerk's Papers at 121.

denied even seeing the shotgun. Pollock argues that because Greer did not see the shotgun, Pollock's actions could not, as a matter of law, have created a reasonable apprehension and imminent fear of bodily injury.

Pollock's arguments rest on the mistaken assumption that the jury was required to accept Greer's testimony at face value. But the trier of fact "is the sole and exclusive judge of the evidence."[36] An appellate court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence."[37]

In resolving the charges against Pollock, the jury here had to assess the credibility of four different and inconsistent accounts of the shooting. The jury necessarily made credibility determinations when it acquitted Pollock of the assault charge against Lain and found him guilty of assault in the second degree for assaulting Greer. Based on the physical evidence, a rational trier of fact could have chosen to disbelieve Greer's account of the location of the gunfight and Pollock's claim of self-defense, but still found Pollock's account of the circumstances surrounding the display of the shotgun to be credible. Pollock's arguments on appeal regarding the credibility of the evidence are properly directed to the trier of fact, not this court.

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[36] State v. Hathaway, 161 Wn. App. 634, 645, 251 P.3d 253 (2011).
[37] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

CORPUS DELICTI

As part of his challenge to the sufficiency of the evidence, Pollock contends that the State failed to establish the corpus delicti of assault in the second degree. He argues that the State failed to present any independent evidence corroborating his admission that he lunged at Greer with the shotgun.

Under the corpus delicti rule, a defendant's extrajudicial confession or admission is not admissible unless there is independent evidence "that the crime charged has been committed by someone."[38] The independent evidence need not be sufficient to support a conviction, "but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement."[39] Prima facie corroboration exists if the independent evidence supports a "logical and reasonable inference of the facts sought to be proved."[40] In assessing the sufficiency of the independent evidence, we assume the truth of the State's evidence and draw all reasonable inferences in the light most favorable to the State.[41] Our review is de novo.[42]

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[38] State v. Dodgen, 81 Wn. App. 487, 492, 915 P.2d 531 (1996).
[39] State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006) (emphasis omitted).
[40] State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).
[41] State v. Aten, 130 Wn.2d 640, 658, 927 P.2d 210 (1996).
[42] State v. Pineda, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000).

The State relies on cases supporting its claim that Pollock waived the corpus delicti issue because he failed to raise an objection at trial.[43] Pollock argues that he preserved the issue by raising it in his post-trial motion to arrest judgment, noting that our supreme court has addressed corpus delicti claims raised for the first time in a post-trial motion.[44] But even if Pollock preserved his corpus delicti challenge for review, his arguments fail.

Because Pollock did not raise his corpus delicti challenge until after trial, a court may consider all of the trial testimony, including a defendant's testimony, in determining whether independent evidence established the corpus delicti.[45] Here, Wolfe testified that Pollock was carrying the shotgun when he and Pollock went to intimidate Greer. Lain testified that she stood nearby as Pollock held the shotgun and aggressively confronted Greer. Pollock's own trial testimony essentially corroborated his statements to the police. Pollock testified that in response to his removal of the blanket from the shotgun, Greer jumped back behind a wall, shouting "Don't pull that gun." Viewed in the light most favorable

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[43] See Dodgen, 81 Wn. App. at 492 (The corpus delicti rule "is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make [a] proper objection to the trial court to preserve the issue.") (citing State v. C.D.W., 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995)).

[44] See Brockob, 159 Wn.2d at 320; see also State v. Grogan, 158 Wn. App. 272, 275-76, 246 P.3d 196 (2010).

[45] State v. Mathis, 73 Wn. App. 341, 347, 869 P.2d 106 (1994) (where defendant first raised challenge during jury deliberations, trial court properly considered defendant's trial testimony and other trial evidence in determining sufficiency of evidence establishing corpus delicti).

to the State, the independent evidence established the corpus delicti of assault in the second degree as charged here.

REASONABLE DOUBT INSTRUCTION

Pollock contends that the instruction defining reasonable doubt as a doubt "for which a reason exists" was constitutionally deficient because it required the jury to articulate a reason for having a reasonable doubt. Relying on State v. Emery,[46] Pollock also argues that the instruction resembles the improper "fill in the blank" arguments that may constitute prosecutorial misconduct. In a supplemental assignment of error, Pollock contends that he was denied effective assistance when defense counsel "endorse[d]" the reasonable doubt instruction, rather than objecting to it.

Pollock concedes that the trial court instructed the jury on reasonable doubt using Washington Pattern Jury Instruction: Criminal 4.01 (WPIC)[47] and that our supreme court has directed trial courts to use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt.[48] In State v. Kalebaugh, the supreme court recently reaffirmed that WPIC 4.01 was "the

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[46] 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

[47] "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." Instruction 3, Clerk's Papers at 115.

[48] . State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007); see also State v. Castillo, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009).

correct legal instruction on reasonable doubt . . . ."[49] After correctly instructing the jury during preliminary remarks that reasonable doubt was "a doubt for which a reason exists," the trial judge in Kalebaugh paraphrased the explanation as "a doubt for which a reason can be given."[50] In concluding that the error in the trial judge's "offhand explanation of reasonable doubt"[51] was harmless beyond a reasonable doubt, the Court rejected any suggestion that WPIC 4.01 required the jury to articulate a reason for having a reasonable doubt or was akin to an improper "fill in the blank" argument.[52] Pollock's challenge to WPIC 4.01 must be directed to our supreme court.[53]

Because the trial court did not err in giving the reasonable doubt instruction, Pollock's claim of ineffective assistance also fails.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds for review, Pollock contends that defense counsel was constitutionally deficient because he failed to file certain motions and failed to interview all of the State's witnesses before trial started.

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[49] State v. Kalebaugh, No. 89971-1, July 9, 2015, Slip. Op. at 8-9.
[50] Id. at 7 (emphasis in original).
[51] Id. at 9.
[52] "We do not agree that the judge's effort to explain reasonable doubt was a directive to convict unless a reason was given or akin to the 'fill in the blank' approach that we held improper in State v. Emery." Id. at 8.
[53] See also State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (the phrase "a doubt for which a reason exists" does not direct the jury "to assign a reason for their doubts"); State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784, review denied, 181 Wn.2d 1009 (2014) ("abiding belief in the truth" language in WPIC 4.01 is not comparable to improper "speak the truth" argument").

Pollock relies primarily on a letter from defense counsel apologizing for the outcome of the trial and acknowledging that "there were clearly some areas that I could have done more and done better for you."[54]

But Pollock has not identified the specific nature of counsel's alleged deficient performance or the resulting prejudice. His allegations are therefore too conclusory to address. See RAP 10.10(c) (appellate court will decline to consider issues in statement of additional grounds for review if they do not "inform the court of the nature and occurrence of alleged errors"). In any event, Pollock's allegations rest on matters that are outside the record and therefore cannot be addressed in a direct appeal.[55]

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

[54] Statement of Additional Grounds (Jan. 7, 2015) at 5.
[55] See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

APPENDIX B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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Jones, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71254-3-I
	)	
MAURICE POLLOCK,	)	
	)	
Petitioner.	)	

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 23RD DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 23RD DAY OF SEPTEMBER 2015.

X Patrick Mayovsky