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State of Washington

Supreme Court No. (to be set)
Court of Appeals No. 34977-2-III

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,
vs.

Roberto Diaz-Lara
Appellant/Petitioner

Clark County Superior Court Cause No. 14-1-01948-3
The Honorable Judge Robert Lewis

PETITION FOR REVIEW

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DECISION BELOW AND ISSUES PRESENTED

Petitioner Roberto Diaz-Lara, the appellant below, asks the Court to review the Court of Appeals opinion entered on August 29, 2017.[1] This case presents four issues:

1. Should appellate courts review *de novo* any discretionary decision that violates a constitutional right?

2. Did the trial judge violate Mr. Diaz-Lara's double jeopardy right to a verdict from the jury he'd selected by declaring a mistrial over his objection?

3. In the absence of specific language indicating that the sentencing judge would impose the same sentence if two of the three aggravating factors were reversed, must the sentence be vacated and the case remanded for a new sentencing hearing?

4. Does a reasonable doubt instruction focusing jurors on "the truth" violate due process and the right to a jury trial?

STATEMENT OF THE CASE

At sixteen, in early 2012, J.G. wanted to live with her boyfriend. RP 22, 2353. She lied about her relationship with him and about his visits to the family home. RP 2255, 2321, 1446. During this period, she told her friends and teacher that her stepfather, Roberto Diaz-Lara, was molesting her. RP 26, 2275, 2315, 2321.

Roberto Diaz-Lara and J.G.'s mother had a child together. That child, Z.D.G. (hereafter Z.), was 8 when J.G. made her accusation. RP 22, 40, 2346. Once J.G. told staff at her school that Mr. Diaz-Lara had molested her, both girls were placed into foster care. RP 2180-2081, 2315-

[1] A copy of the opinion is attached.

2316. They returned to their mother after 5 months, but J.G. did not stay. She soon moved out and got married. RP 1574, 2271-2274.

For a few months, while with her sister in foster care, Z. also claimed that her father molested her. RP 32-37, 2162, 2191. Although Mr. Diaz-Lara was initially charged with molesting both girls, the state did not pursue the charges involving J.G. after the first trial ended in a mistrial. CP 1-3, 127-129, 892.

Z. recanted long before the first trial. She testified at a pre-trial hearing that her father hadn't touched her inappropriately, and that her sister J.G. had confused her. RP 2203-2204, 2212, 2347-2349. She told the court her sister had told her to say falsely that her father touched her privates, so she did. RP 2205, 2216.

Z. said J.G. had told her that her father was a bad person, and for a time she believed it. RP 2214. She described how her older sister started telling her that the way her father touches her is bad when they were both still at home. RP 2222. She said that J.G. began making this point about Mr. Diaz-Lara weeks before J.G. told her story at school. RP 2222-2224.

Z. said that J.G. would come into the bathroom with her daily to talk to her about her father.[2] RP 2224, 2245. During her testimony at the child hearsay hearing, and at both jury trials, Z. maintained that her father had not molested her. RP 669-699, 1834, 2242-2243, 2250.

[2] Z. also described an incident when she overheard her grandmother and J.G. talking. She heard her grandmother telling J.G. that since Mr. Diaz-Lara isn't her biological father, he should not touch or hug her at all. RP 2246.

The first jury to hear the case sent a note to the judge indicating that it was "split," and that jurors could "not come to an agreement on any of all 6 counts." CP 879; RP 1399-1402. Over Mr. Diaz-Lara's objection,[3] the court declared a mistrial and discharged the jury. CP 892, 913; RP 1402-1409.

The charges relating to J.G. were severed and were later dismissed.[4] RP 1413, 2106. At the second trial, the state only pursued the charges relating to Z. CP 1. The second jury convicted Mr. Diaz-Lara of all three counts involving Z. CP 952-957.

The jury also returned special verdicts on three aggravating factors, two of which required proof that abuse occurred over a prolonged period of time. CP 952-957. At the state's request, the court defined a "prolonged period of time" as "more than a few weeks." CP 949.

The court's reasonable doubt instruction (also proposed by the state) included the following language: "If… you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 932. Defense counsel did not object to either instruction. RP 1850-1852, 1970-1975.

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[3] Initially, defense counsel told the court she wanted deliberations to continue. She then changed her mind and asked for a mistrial. RP 1403-1406; CP 913. She told the court she had not yet consulted with her client. RP 1405-1406. After consulting with Mr. Diaz-Lara, she told the court that he objected to the mistrial. RP 1406. The court specifically found that Mr. Diaz-Lara did not consent to discharge of the jury. CP 892.

[4] The trial court assigned the case involving Z. a new cause number. The original cause number was 12-1-0102-8, and the new cause number was 14-1-01948-3. The trial court ordered that all materials from the earlier file be copied into the second file. CP 22.

The court imposed exceptional sentences on each count. RP 2113, 2129; CP 958-977. The Judgment and Sentence included a preprinted checkbox finding indicating that "[i]n the case of more than one aggravating factor, the Court finds that the same sentence would be imposed if any one of the aggravating factors is not upheld on appeal." CP 960.

Mr. Diaz-Lara appealed, and the Court of Appeals affirmed. CP 978; Opinion, pp. 2, 17.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT MR. DIAZ-LARA'S SECOND TRIAL VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY. THIS SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW IS OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DETERMINED BY THE SUPREME COURT. RAP 13.4 (B)(3) AND (4).

Before the first jury was discharged, Mr. Diaz-Lara personally objected to the court's declaration of a mistrial. RP 1405-1406; CP 892. The court declared a mistrial precipitately, without the consent of either party, and without giving Mr. Diaz-Lara a full opportunity to explain his position. RP 1402-1409; CP 892. The court did not give careful consideration to Mr. Diaz-Lara's interest in having the trial concluded in a single proceeding. RP 1402-1409. Nor did the court consider alternatives to a mistrial. RP 1402-1409. Under these circumstances, the second trial violated Mr. Diaz-Lara's right to be free from double jeopardy. *State v. Robinson*, 146 Wn. App. 471, 479-480, 191 P.3d 906 (2008).

A. The Supreme Court should accept review and unequivocally hold that double jeopardy claims are always reviewed *de novo*.

The Supreme Court reviews constitutional claims *de novo. State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 820, 389 P.3d 543 (2017); *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017). This general rule applies to double jeopardy claims. *State v. Fuller*, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016); *State v. Reeder*, 184 Wn.2d 805, 825, 365 P.3d 1243, 1253 (2015); *In re Moi*, 184 Wn.2d 575, 579, 360 P.3d 811, 813 (2015), *as amended* (Jan. 25, 2017), *cert. denied sub nom. Washington v. Moi*, 137 S. Ct. 566, 196 L. Ed. 2d 456 (2016).

A *de novo* hearing is one in which the reviewing court gives "no deference to a lower court's findings," and considers the matter "as if the original hearing had not taken place." HEARING, Black's Law Dictionary (10th ed. 2014). Here, the Court of Appeals failed to apply *de novo* review to Mr. Diaz-Lara's constitutional claim. Opinion, pp. 10-11.

The *de novo* standard of review appears to be in tension with oft-quoted language suggesting that great deference should be afforded the trial court's decision to declare a mistrial. *See, e.g., State v. Strine*, 176 Wn.2d 742, 753, 293 P.3d 1177 (2013). In fact, the apparent tension is easily resolved. Appellate deference stems from two sources that do not apply to state criminal proceedings.

First, courts affording deference to trial court decisions rely on federal appellate procedure. *Id.* (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824) and *Arizona v. Washington*, 434 U.S.

497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).[5] This is the mistake made by the Court of Appeals. Opinion, pp. 10-11. The standard of review and level of deference afforded in state court is controlled by *state* appellate procedure. It is "within the power of the State to regulate procedures under which its laws are carried out." *Speiser v. Randall*, 357 U.S. 513, 523, 78 S. Ct. 1332, 1341, 2 L. Ed. 2d 1460 (1958). A state court procedure is not subject to federal interference "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201–02, 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281 (1977) (quoting *Speiser,* 357 U.S. at 523). *De novo* review of double jeopardy claims does not violate any fundamental principle of justice. Accordingly, federal appellate procedure does not dictate the standard of review to be applied by Washington appellate courts evaluating a double jeopardy claim stemming from a Washington state conviction. *Id.* The *de novo* standard governs, as the Supreme Court has repeatedly held. *Fuller*, 185 Wn.2d at 34.

The second source of appellate deference is *civil* appellate procedure. *See., e.g., Anderson v. Dobro*, 63 Wn.2d 923, 928, 389 P.2d 885 (1964). But the *de novo* standard applicable to double jeopardy claims does not apply to civil cases. In civil appeals, appellate courts may afford great deference to trial court decisions without offending any constitutional right. Such deference in civil cases is entirely consonant

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[5] The *Strine* court also cites *Jones,* 97 Wn.2d at 163 (*Jones* I). *Jones* I*,* like *Strine,* relies on federal law. *Id.* (citing *Washington, supra.*)

with *de novo* review of double jeopardy violations in criminal appeals. Although there are some early criminal cases according "great weight" to the trial court's decision to deny a new trial without citation to any precedent,[6] those decisions predate the Supreme Court decision extending double jeopardy protections to state prosecutions. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707 (1969). Because such cases do not address the double jeopardy issue, they cannot provide a basis for a more deferential standard of review.

The Supreme Court should accept review and unequivocally hold that double jeopardy claims are reviewed *de novo,* with no deference to the trial court's decision to declare a mistrial. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). This case presents a significant constitutional issue that is of substantial public interest. Review is therefore appropriate under RAP 13.4(b)(3) and (4).

B. The Supreme Court should clarify that discretionary decisions violating constitutional rights are reviewed de novo.

The Supreme Court has issued conflicting opinions on the proper standard of review of discretionary decisions violating an accused person's constitutional rights. The better approach is to review *de novo* a trial court's discretionary decisions that infringe constitutional rights.

The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of

[6] *See, e.g., State v. Van Luven*, 24 Wn.2d 241, 247, 163 P.2d 600 (1945).

discretion. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576, 579 (2010) (*Jones* II); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). In *Jones* II, for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones* II, 168 Wn.2d at 719.[7] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id*.

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones* II , the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones* II— the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* II and *Iniguez*. Cases applying the abuse-of-discretion standard have not grappled with the rationale supporting the *Jones* II and *Iniguez* decisions. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017) .

[7] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

For example, in *Dye,* the court indicated that "[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review." *Id.,* at 548. However, the *Dye* court did not cite *Iniguez* or *Jones* II. *Id.,* at 548. Nor did it address the rationale underlying application of the *de novo* standard for constitutional violations. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. *See* Petition for Review[8] and Supplemental Brief.[9] As the *Dye* court noted, the petitioner "present[ed] no reason for us to depart from [an abuse-of-discretion standard]." *Id.*[10] There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones* II. *Id.*

In *Clark,* the court announced it would "review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court." *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded "relevant defense evidence," the reviewing court would then "determine as a matter of law whether the exclusion violated the constitutional right to present a defense." *Id.*

[8] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf (last accessed 7/11/17).

[9] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf (last accessed 7/11/17).

[10] By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye,* Respondent's Supplemental Brief, pp 8-9, 17-18, available at http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf (last accessed 7/11/17).

Although the *Clark* court cited *Jones* II, it did not suggest that *Jones* II was incorrect, harmful, or problematic, and did not overrule it. *See, e.g., Armstrong*, 188 Wn.2d at 340 n. 2 ("For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it.")

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* II court. *Id.* Nor does the *Clark* opinion mention *Iniguez.* Furthermore, as in *Dye*, the Respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See* Respondent's Supplemental Brief, p. 16;[11] Petitioner's Supplemental Brief.[12]

Furthermore, the two-part standard outlined in *Clark* makes the *de novo* stage meaningless. Once the court finds an abuse of discretion, there is no need to separately determine if the error violates a constitutional right: a trial court that abuses its discretion by excluding relevant and admissible evidence necessarily infringes the constitutional right to present a defense. *Jones* II, 168 Wn.2d at 719. Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import.

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[11] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf (last accessed 2/10/17).

[12] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf (last accessed 2/10/17).

The Supreme Court should accept review and adhere to the *de novo* standard as applied in *Iniguez* and *Jones* II. *Jones* II, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This case raises constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

C. By declaring a mistrial and discharging the first jury over Mr. Diaz-Lara's objection, the trial judge infringed his valued right to a verdict from the jury he selected to try his case.

The double jeopardy right[13] protects "the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). That interest "embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. at 503 (quoting *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). In this case, the court infringed Mr. Diaz-Lara's right to have his trial completed by the first jury.

Absent the accused person's consent, a judge's discretion to declare a mistrial does not come into play unless extraordinary and striking circumstances exist. *Robinson*, 146 Wn. App. at 479 (citing *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982)) (*Jones* I). A mistrial ordered without the defendant's consent is "tantamount to an acquittal," unless justified by manifest necessity. *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003).

[13] U.S. Const. Amends. V, XIV; Wash. Const. art. I, §9.

Mr. Diaz-Lara objected to the court's decision to declare a mistrial.[14] CP 892. Accordingly, the discharge functions as an acquittal unless prompted by manifest necessity and the existence of extraordinary and striking circumstances. *Id.; Robinson*, 146 Wn. App. at 479. The court's decision here to declare a mistrial and discharge the jury was not prompted by manifest necessity or the existence of extraordinary and striking circumstances.

Appellate courts consider three factors in assessing a mistrial ordered over the defendant's objection. *Robinson*, 146 Wn. App. at 479-480. In this case, all three factors establish a violation of Mr. Diaz-Lara's double jeopardy rights. *Id.* Accordingly, the trial court's decision declaring a mistrial and discharging the jury is not entitled to deference.

First, the trial court must not act precipitately. Instead, the judge must give both sides a full opportunity to explain their positions.[15] *Id.* Here, the court acted precipitately, and did not provide Mr. Diaz-Lara any opportunity to explain his position. RP 1406. Given defense counsel's admission that she had not even consulted with her client prior to making

[14] Although his attorney flip-flopped, Mr. Diaz-Lara's personal objection was made clear to the court. RP 1405-1406. The court found that he did not consent to discharge of the jury. CP 892.

[15] The *Robinson* opinion refers to the positions of "defense counsel and the prosecutor." *Robinson*, 146 Wn. App. at 479–80. Here, Mr. Diaz-Lara personally objected to the trial court's decision to declare a mistrial. RP 1405-1406; CP 892. The objection came before the court discharged the jury. RP 1406, 1408-1409. The court specifically found that Mr. Diaz-Lara did not consent to discharge of the jury. CP 892.

her initial statements,[16] the court should have allowed Mr. Diaz-Lara an opportunity to explain his objection. *Robinson*, 146 Wn. App. at 479-480.

Instead, the court entered the order declaring a mistrial, and discharging the jury immediately after being apprised of Mr. Diaz-Lara's position. RP 1406. The court's failure to provide Mr. Diaz-Lara a full opportunity to explain his position establishes that the decision was precipitate. *Robinson*, 146 Wn. App. at 479-480.

Other facts also suggest that the court's decision was precipitate under the circumstances. The decision to discharge the jury followed the very first time jurors indicated they were deadlocked. RP 1402-1409. In addition, the prosecutor noted that there had been five days of testimony, with "a lot going on." RP 1403. He described the case as "rather complex." RP 1403. These considerations warranted a more deliberate process, rather than a rush to declare a mistrial. Furthermore, the court erroneously considered itself bound by the jury's belief that it was deadlocked, stating "I think we're stuck with that." RP 1406.[17] The court did not ask for any argument from the parties on this issue. In fact, "[a] jury's own assessment that it is deadlocked, while helpful, is not

[16] RP 1405.

[17] In addition, when jurors returned to the courtroom , the court asked if the jury had "reached a decision in the meantime," but did not ask if they remained hopelessly deadlocked. This contributed to the court's error: because the state of jury deliberations is ever-changing, prior evidence of deadlock is not always dispositive of the jury's present inability to reach a unanimous verdict." *United States v. Byrski*, 854 F.2d 955, 962 (7th Cir. 1988).

controlling." *State v. Labanowski*, 58 Wn. App. 860, 866–67, 795 P.2d 176 (1990), *review granted*, 115 Wn.2d 1027, *aff'd,* 117 Wn.2d 405, 816 P.2d 26 (1991).

The trial court made a precipitate decision. The first factor outlined by the *Robinson* court suggests the court violated Mr. Diaz-Lara's double jeopardy rights by declaring a mistrial over his objection. *Robinson*, 146 Wn. App. at 479-480.

Second, the court must "'accord[ ] careful consideration to the defendant's interest in having the trial concluded in a single proceeding.'" *Id.* (quoting *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999) (footnotes and internal quotation marks omitted by *Robinson*). This factor is particularly important: a trial judge "must always temper the decision" to declare a mistrial "by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, 400 U.S. 470, 486, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

Here, the court did not even mention Mr. Diaz-Lara's "interest in having the trial concluded in a single proceeding," much less give it "careful consideration." *Robinson*, 146 Wn. App. at 479-80 (internal quotation marks and citation omitted); *see* RP 1402-1409; CP 892. The court's failure to acknowledge this important interest means its decision need not be given the usual deference afforded to a trial judge's decision to declare a mistrial. *See Strine*, 176 Wn.2d at 753.

Third, the trial court must consider alternatives to mistrial. *Robinson*, 146 Wn. App. at 479-80. Here, the court did not consider available alternatives. Although the judge mused that another hour wouldn't make any difference,[18] he did not investigate the possibility of giving jurors a break from their deliberations. RP 1402-1409. Nor did he consider allowing deliberations to continue until the end of the day, or into the following day. RP 1402-1409. Nor did the judge consider providing "a carefully neutral" supplemental instruction. *See State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983).

For all these reasons, the court's decision declaring a mistrial and discharging the jury violated Mr. Diaz-Lara's valued right to have a decision from the jury he selected to try his case. *Jorn*, 400 U.S. at 484. The Supreme Court should accept review, reverse the convictions, and dismiss the case with prejudice. *Id.; Robinson*, 146 Wn. App. at 484. This case presents signficant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE THE EXCEPTIONAL SENTENCE BECAUSE THE TRIAL COURT COMMENTED ON THE EVIDENCE. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S OPINION IN *BRUSH* AND ITS OWN DECISION IN *WELLER*. RAP 13.4(B)(1) AND (2).

The Supreme Court has held that the trial court's instruction defining a "'prolonged period of time'" to mean "more than a few weeks" amounts to an improper comment on the evidence. CP 949; *State v. Brush*,

[18] RP 1404.

183 Wn.2d 550, 556-560, 353 P.3d 213 (2015); Wash. Const. art. IV, §16. The Court of Appeals found that the error infected two of the three aggravating factors found. Opinion, pp. 12-13.

The court should have vacated the exceptional sentence and remanded for resentencing. *Brush*, 183 Wn.2d at 556-560. This is so despite the court's boilerplate finding that "the same sentence would be imposed if *any one of the aggravating factors* is not upheld on appeal." CP 960 (emphasis added). Because the judicial comment infected *two* of the three aggravating factors, the finding does not permit the Court of Appeals to uphold the exceptional sentence. *See State v. Weller*, 185 Wn. App. 913, 930, 344 P.3d 695 (2015), *review denied,* 183 Wn.2d 1010, 352 P.3d 188 (2015).

In *Weller,* the trial court's finding that two aggravating factors "independently provided authority" for exceptional sentence was not sufficient to uphold an exceptional sentence. *Id.* This was so because the sentencing court "did not specifically state that it would impose the same [sentence] … based on each of the aggravating factors standing alone." *Id.* Here, as in *Weller,* the trial court did not specifically state that each aggravator, standing alone, supported the sentence imposed.

The Supreme Court should accept review, vacate the exceptional sentence, and remand for a new sentencing hearing. *Id.; cf. State v. Moses*, 193 Wn. App. 341, 365, 372 P.3d 147 (2016). The Court of Appeals decision conflicts with *Brush* and *Weller*. Review is appropriate under RAP 13.4(b)(1) and (2).

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE COURT'S "REASONABLE DOUBT" INSTRUCTION IMPROPERLY FOCUSED JURORS ON A SEARCH FOR "THE TRUTH." THIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL ISSUE THAT IS OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(B)(3) AND (4).

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 11. A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id*. at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 11. This violated Mr. Diaz-Lara's constitutional rights to a jury trial and to due process. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 21, and 22.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery.* In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language

reached the jury in the form of an instruction from the court. CP 11. Jurors were obligated to follow the instruction.

The Court of Appeals implicitly adopted arguments based on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007) and *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995).[19] *Bennett* does not support the court's decision. In *Bennett,* the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.[20] *Id.*

In *Pirtle,* as in *Bennett,* the defendant *favored* the "truth of the charge" language. *Id.,* at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.,* at 656.[21] The *Pirtle* court was not asked to rule on the constitutionality of the "truth of the charge" provision.

Neither *Bennett* nor *Pirtle* should control this case. The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must

[19] *See* Opinion, pp 15-16; *see also State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied,* 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied,* 181 Wn.2d 1009, 335 P.3d 941 (2014); *State v. Jenson*, 194 Wn. App. 900, 378 P.3d 270 (2016), *review denied,* 186 Wn.2d 1026, 385 P.3d 119 (2016).

[20] The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.,* at 318.

[21] The challenged language in *Pirtle* read as follows: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction "invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit." *Id.,* at 656.

vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id*.

Improper instruction on the reasonable doubt standard is structural error.[22] *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Diaz-Lara his constitutional right to a jury trial.

The Supreme Court should accept review, reverse Mr. Diaz-Lara's convictions, and remand for a new trial with proper instructions. *Id.* This case presents a significant constitutional issue that is of substantial public interest. RAP 13.4(b)(3) and (4).

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse the convictions, and remand for a new trial.

Respectfully submitted September 20, 2017.

[22] RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier,* 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'")

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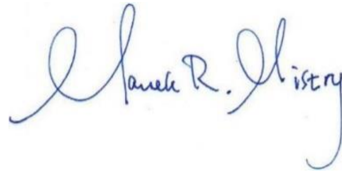

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Roberto Diaz-Lara, DOC #383527
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PO Box 769
Connell, WA 99326

and I sent an electronic copy to:

Clark County Prosecuting Attorney
rachael.probstfeld@clark.wa.gov
CntyPA.GeneralDelivery@clark.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 20, 2017.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Unpublished Opinion, filed on August 29, 2017.

Renee S. Townsley
Clerk/Administrator

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CASE # 349772
State of Washington, Respondent v. Roberto Diaz-Lara, Appellant
CLARK COUNTY SUPERIOR COURT No. 141019483

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enc.

c: **E-mail**—Hon. Robert A. Lewis

c: Roberto Diaz-Lara
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FILED
AUGUST 29, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 34977-2-III
Respondent,	)	
	)	
v.	)	
	)	
ROBERTO DIAZ-LARA, aka RIGOBERTO DIAZ, aka ROBERTO DIAZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — In 2014, following a week of trial and eight hours of deliberation, the trial court declared a mistrial in the State's prosecution of Roberto Diaz-Lara for six counts of first degree child molestation. Over the objection of the State and the defendant, the court found that the jury was hopelessly deadlocked and there was no reasonable possibility that further deliberations would result in a verdict. On retrial of

three of the counts, the jury found Mr. Diaz-Lara guilty and returned special verdicts finding aggravating factors, on the basis of which the trial court imposed an exceptional sentence upward.

Mr. Diaz-Lara appeals, arguing (1) the second trial subjected him to double jeopardy, (2) the trial court's instruction defining a term used in two of three aggravating factors charged in support of an exceptional sentence was a comment on the evidence, and (3) the trial court's reasonable doubt instruction violated his right to a jury trial. The trial court definition challenged by Mr. Diaz-Lara has since been found by our Supreme Court to constitute a comment on the evidence, but remand for resentencing is not required because we are satisfied the trial court would have imposed the same sentence based on an aggravating factor we uphold. Finding no other error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Roberto Diaz-Lara was prosecuted in 2014 for six counts of first degree child molestation, three involving his stepdaughter, who was 19 years old at the time of trial, and three involving his biological daughter, who was 11 years old at that time. The alleged abuse came to light in early 2012, when the older girl—then 16—turned in an essay at school in which she claimed to have been molested and raped. She and her younger sister were removed from their home and placed in foster care. While in foster care, the younger girl told her foster mother that she, too, had been molested by her

father. She repeated the charges when interviewed by a child abuse pediatrician and a forensic interviewer.

By the time of Mr. Diaz-Lara's first, 2014 trial, the then 11-year-old had recanted. She testified that her older sister told her "to say stuff" and told her "that hugging and giving a kiss on the cheek was bad." Report of Proceedings (RP) at 693. The defense theory at this first trial was that the 16-year-old had become sexually involved with an adult boyfriend, was worried Mr. Diaz-Lara might "throw [her boyfriend] in jail" if he found out, wanted to get out of her home, and "told a story" so that would happen. RP at 1381-82. Defense counsel argued that the older girl's story about the molestation was "inconsistent and . . . ever-changing," and asked the jury to believe the younger girl's testimony that she had gone along with her sister's story even though her father never touched her inappropriately. RP at 1380.

After the close of evidence and eight hours of deliberation, the jury submitted the following note to the trial court: "We cannot come to an agreement on any of all 6 counts. We are split." Clerk's Papers (CP) at 879. The trial court called the jury back into the courtroom and inquired whether there was a reasonable probability of reaching a verdict in a reasonable time. When the presiding juror answered no, the trial court declared a mistrial over objections from the State and Mr. Diaz-Lara, both of whom wanted the jury to be directed to deliberate for at least a few additional hours.

Within about a week after the mistrial was declared, the State moved to sever the three counts that involved the older daughter, asking the court to dismiss them without prejudice. With its motion granted, the State filed a new information charging only the three counts of molestation of the younger daughter, alleged that the crimes were committed against her between April 7, 2007 (the girl's fourth birthday) and February 3, 2012 (three days before the sisters were removed from their home and placed in foster care). The State had alleged aggravating factors in charging the crimes before, and now alleged three aggravating factors—that

- the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time (RCW 9.94A.535(3)(g)),
- the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple' incidents over a prolonged period of time (RCW 9.94A.535(3)(h)(i)), and
- the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. (RCW 9.94A.535(3)(n)).

CP at 1-2.

In the second trial, both parties agreed that the older girl's claims about being abused by Mr. Diaz-Lara should not be admitted. The trial court warned that if the defense elicited evidence that the younger girl was coached to make allegations by her older sister, it would open the door to evidence about the alleged abuse of the older sister. Faced with the choice, defense counsel acknowledged, "I might just have to sit with the fact that there's a recantation, and that's it." RP at 1461. Much less information about

how the allegations came to light or the younger girl's conversations with her older sister was presented to the second jury.

Among the jury instructions given in both trials was the Washington pattern instruction on reasonable doubt, including its optional statement that if after fully, fairly, and carefully considering all of the evidence "you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP at 932 (Instruction 3); 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 4.01, at 85 (3d ed. 2008). The court also instructed the jury, in connection with the two "ongoing pattern of . . . abuse" aggravating factors it would consider, that "[a]n 'ongoing pattern' means multiple incidents over a prolonged period of time," and "[t]he term 'prolonged period of time' means more than a few weeks." CP at 949 (Instruction 19). Mr. Diaz-Lara made no objection to these instructions.

The second jury found Mr. Diaz-Lara guilty of all three counts of first degree child molestation, and by special verdict, found all three aggravators on each count.

At sentencing, the trial court imposed a minimum sentence of 154 months' confinement—a 24-month increase from the standard range, based on the aggravating factors. In announcing its sentence, the court observed that the jurors had unanimously found not only that Mr. Diaz-Lara was guilty, but also the three aggravating factors charged by the State, stating, "I will sentence you accordingly." RP at 2129-30. It then

made the following comment about the aggravating factors that involved an ongoing pattern of abuse:

> The factors of ongoing pattern of abuse, to some extent, I discount, not because they aren't serious, but because they are factored into the offender score of six, which you received for being convicted of multiple counts.

RP at 2130. Asked by the prosecutor if the court would indicate on the judgment and sentence a finding that the same sentence would be imposed if any one of the aggravating factors was not upheld on appeal, it answered, "I would," and thereafter did. RP at 2132.

Mr. Diaz-Lara appeals.

ANALYSIS

I. Double jeopardy

Mr. Diaz-Lara's first assignments of error are to the trial court declaring a mistrial and discharging the first jury over his objection, which he contends violated both state and federal constitutional rights to be free from double jeopardy. *See* U.S. CONST. amend. V; WASH. CONST. art. I, § 9. A double jeopardy claim raises manifest constitutional error and may be raised for the first time on appeal. *State v. Kassahun*, 78 Wn. App. 938, 948, 900 P.2d 1109 (1995). The parties disagree about two legal issues that are key to our review of this alleged error: they disagree whether the standard of review is de novo or abuse of discretion, and disagree whether steps a trial court must take to avoid terminating jeopardy identified in *State v. Robinson*, 146 Wn. App. 471,

191 P.3d 906 (2008), apply only where the State moves for a mistrial, or apply any time a mistrial is declared over a defendant's objection.

We agree with Mr. Diaz-Lara that the steps identified in *Robinson* apply where he objected to the mistrial.

Federal and state constitutional protections "not only protect a criminal defendant from a second prosecution for the same offense after conviction or acquittal, and from multiple punishments for the same offense, but also the 'valued right [of the defendant] to have his trial completed by a particular tribunal.'" *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (alteration in original) (citation omitted) (quoting *Arizona v. Washington*, 434 U.S. 497, 503 n.11, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)). The United States Supreme Court in *Washington* repeated the reasons why a defendant's right to have his trial completed by a particular tribunal is valued:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Washington, 434 U.S. at 503-05 (footnotes omitted). Unlike in the situation where a trial has ended in an acquittal or conviction, however, retrial is not automatically barred when a criminal proceeding is terminated by the declaring of a mistrial, since the circumstances

that lead a court to declare a mistrial do not invariably create unfairness to the accused. *Id.* at 505. Yet, as explained by the Supreme Court,

> in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

Id.

In *Robinson*, during the third day of trial and well before the jury was to deliberate, the prosecutor repeated to the court the bailiff's report that "the jury" wanted to see a document that had been described by a witness. 146 Wn. App. at 475 n.2. The State moved for a mistrial on the basis of juror misconduct because "[o]bviously, the jury is not following the court's instruction that they not discuss the case." *Id.* Without questioning the bailiff or any juror, the court granted the request for a mistrial over the defendant's objection. *Id.* When the defendant was convicted at a second trial, he argued that double jeopardy barred his retrial. *Id.* at 477.

This court agreed, expressing concern that by not developing a record, the trial court had not determined that misconduct *had* occurred or that there were not alternatives to declaring a mistrial. *Id.* at 481-82. Quoting *State v. Melton*, 97 Wn. App. 327, 983 P.2d 699 (1999), it identified three factors considered to determine whether a mistrial was based on manifest necessity:

> (1) whether the court 'act[ed] precipitately [or] gave both defense counsel and the prosecutor full opportunity to explain their positions'; (2) whether it 'accorded careful consideration to the [defendant's] interest in having the trial concluded in a single proceeding'; and (3) whether it considered alternatives to declaring a mistrial.

Robinson, 146 Wn. App. at 479-80 (alterations in original) (quoting *Melton*, 97 Wn. App. at 332). The *Robinson* court sometimes referred to the "manifest necessity" requirement and the three factors as applying to "a mistrial without the defendant's consent"; elsewhere, it referred to them applying "[w]hen the State seeks a mistrial over the defendant's objection." *Id.* at 479. Based on these latter references, the State argues that it is only if the State moves for the mistrial—which it did not do here—that the factors bearing on manifest necessity are reviewed.

We disagree. As Mr. Diaz-Lara points out, the State did not move for a mistrial in *Melton*, in which the trial court declared a mistrial due to defense counsel's illness and without affording "the parties" an opportunity to be heard. 97 Wn. App. at 331. This court stated that "manifest necessity" must be found "[w]hen a mistrial is granted *without the defendant's consent.*" *Id.* (emphasis added). There must be a "manifest necessity" to declare a mistrial any time it is declared over the defendant's objection. The only difference between the case where the State moves for mistrial and where the court acts on its own is that if the State moves for the mistrial, it must shoulder the "heavy burden" on appeal of justifying the mistrial. *Washington*, 434 U.S. at 505. Where a judge acts sua sponte, it is the judge who "must similarly make sure, and must enable a reviewing

court to confirm, that there is a '"manifest necessity"' to deprive the defendant of his valued right." *Renico v. Lett*, 559 U.S. 766, 782, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (citing *Washington*, 434 U.S. at 505) (Stevens, J., dissenting); *accord United States v. Rivera*, 384 F.3d 49, 56 (3d Cir. 2004) (reviewing whether the trial court failed to consider reasonable alternatives to a mistrial even where the government opposed the mistrial).

We agree with the State, however, that our review of the trial court's decision to declare a mistrial is reviewed for abuse of discretion, not de novo. Many reported state and federal cases addressing double jeopardy in the context of a second trial following a mistrial observe that appellate courts give "'[g]reat deference'" to the trial court's decision to declare a mistrial. *E.g.*, *State v. Strine*, 176 Wn.2d 742, 753, 293 P.3d 1177 (2013) (alteration in original) (quoting *Jones*, 97 Wn.2d at 163); *Washington*, 434 U.S. at 510; *State v. Taylor*, 109 Wn.2d 438, 443, 745 P.2d 510 (1987)). Respect for a trial court's broad discretion is "'especially compelling'" in cases involving a potentially hung jury because "'the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate.'" *Renico*, 599 U.S. at 774 (quoting *Washington*, 434 U.S. at 510 n.28); *Strine*, 176 Wn.2d at 754. The case Mr. Diaz-Lara cites as supporting de novo review involved concerns about double jeopardy arising in a different context: a defendant receiving multiple punishments in a single trial

for the same offense. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). In that context, courts are presented with what is "ultimately 'a question of statutory interpretation and legislative intent,'" making de novo review appropriate. *Id.* at 980 (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)).

"In determining whether a jury is deadlocked, the judge may consider the length of jury deliberations relative to the length of the trial and the complexity of issues and evidence. . . . [and] the court may rely upon the representations of the presiding juror regarding whether the jury is deadlocked." *State v. Barnes*, 85 Wn. App. 638, 656-57, 932 P.2d 669 (1997). There is no minimum period of time a jury must deliberate before a jury determines it is deadlocked provided it is genuinely deadlocked. *See Renico*, 599 U.S. at 775-76 (holding that a trial court did not abuse its discretion when it declared a mistrial after the presiding juror stated that a unanimous verdict could not be reached); *Strine*, 176 Wn.2d at 756, *cf. Jones*, 97 Wn.2d at 160-61, 165-66 (finding the grant of a mistrial—after the jury had deliberated well into the middle of the night—was an abuse of discretion where there was no indication of a deadlock and the jury simply needed more time to deliberate).

In this case, the trial court did not initiate dialogue about the progress of the jury's deliberation; it acted only after the jury notified the court it was deadlocked. The jury had been deliberating for eight hours. Following the language in WPIC 4.70 almost

verbatim,[1] the trial court asked the presiding juror if there was any reasonable possibility that the jury would reach a verdict within a reasonable amount of time, to which the juror answered, unqualifiedly, "No." RP at 1402. Sending the jury back to deliberate while it considered what to do, the trial court gave both defense counsel and the prosecutor a full opportunity to explain their positions, and then allowed defense counsel to speak privately with Mr. Diaz-Lara, so as to understand his wishes as well. The trial court clearly considered the alternative of further deliberations, since it acknowledged that option when it told the parties it did not believe another half an hour or another hour would make a difference. It attached importance to the fact that the presiding juror's note indicated that no progress was being made on any count. Considering the factors identified in *Robinson*, we find no abuse of discretion in the trial court's determination that there was a manifest necessity to declare a mistrial.

II. Instructional error

Defining "a prolonged period of time"

The trial court's instructions on the meaning of an "ongoing pattern of sexual abuse" for purposes of the aggravating factors charged under RCW 9.94A.535(3)(g) and (h)(i) was based on a former version of what is now WPIC 300.16. The former version included the statement, "'prolonged period of time' means more than a few weeks.'"

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[1] *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.70, at 142 (3d ed. 2008).

11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 300.17, at 719 (3d ed. 2008). In *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015), our Supreme Court held that the former WPIC was an unlawful comment on the evidence, violating article IV, section 16 of the Washington Constitution ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). A challenge to a court's comment on the evidence is a manifest constitutional error that can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

The State concedes it was error to define "prolonged period of time" as the trial court did, but argues it was harmless because the evidence presented was of abuse occurring over years. It also argues that we can affirm the sentence based on the finding in the judgment and sentence that the same sentence would be imposed based on the jury's finding that Mr. Diaz-Lara used a position of trust or confidence to facilitate the commission of the crimes.

We agree with Mr. Diaz-Lara that given the victim's recantation, this is not a case in which we can confidently infer which acts the jury believed occurred, and therefore that they occurred over a sufficiently prolonged period of time. Jurors might have found some of the evidence of molestation credible, but not all of it. But we agree with the State that in light of the trial court's oral statements and indication on the judgment and

sentence that the same sentence would be imposed if any one of the aggravating factors is not upheld on appeal, there is no need to remand for resentencing.

Mr. Diaz-Lara disagrees, citing *State v. Weller*, 185 Wn. App. 913, 930, 344 P.3d 695 (2015), *review denied*, 188 Wn.2d 1017, 396 P.3d 337 (2017), in which the trial court stated that either of two aggravating factors *independently provided authority* for an exceptional sentence, but without saying it would impose the *same length* exceptional sentence based on one factor standing alone. Given the lack of clarity, this court remanded. Mr. Diaz-Lara's judgment and sentence does not suffer from that infirmity; it specifically says that "the same sentence would be imposed" in the event of reversal of a factor on appeal. CP at 960. Mr. Diaz-Lara nonetheless argues that the judgment and sentence speaks only of what the court would do "if any *one* of the aggravating factors is not upheld on appeal," RP at 2132 (emphasis added), not what it would do "if any *two*" are not upheld.

Whether remand is required in a case like this does not turn on whether a trial court's statement about consequences of reversal on appeal can withstand all defense parsing. We can take into consideration other evidence of the trial court's thinking. The question is whether we are "satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld," in which case we may uphold the exceptional sentence rather than remanding for resentencing." *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (emphasis added). Here, we have the court's

explicit statement that it discounted the "ongoing pattern" aggravators, clearly implying that Mr. Diaz-Lara's violation of a position of trust or confidence was the more important reason for imposing an exceptional sentence. We are satisfied it would have imposed the same exceptional sentence based on that finding alone.

WPIC 4.01

Mr. Diaz-Lara assigns error to the trial court's reasonable doubt jury instruction, which was based on WPIC 4.01. He objects in particular to its statement, "If, from such consideration, you have an abiding *belief in the truth of the charge*, you are satisfied beyond a reasonable doubt." CP at 932 (Instruction 3) (emphasis added). He claims the highlighted language directs the jury to engage in a search for the truth, undermining the presumption of innocence and impermissibly shifting the burden of proof.

All three divisions of this court have upheld the challenged language "reasoning that WPIC 4.01's 'belief in the truth' language, when read in context, accurately informs the jury that its role is to determine whether the State has proved its case beyond a reasonable doubt." *State v. Muse*, No. 34056-2-III, slip op. at 10 (Wash. Ct. App. Jan. 19, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/340562_unp.pdf (Division Three);[2] *State v. Jenson*, 194 Wn. App. 900, 902, 378 P.3d 270 (Division Two),

[2] We would not ordinarily point to an unpublished opinion of our division. In this context, the decision not to publish *Muse*—like our decision not to publish this opinion—reflects the well settled validity of the challenged language in WPIC 4.01.

review denied, 186 Wn.2d 1026, 385 P.3d 119 (2016); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 (Division One), *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). All three divisions have rejected defense arguments that WPIC 4.01's language is problematic under *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), as Mr. Diaz-Lara argues here. *Muse*, No. 34056-2-III, slip op. at 10; *Jenson*, 194 Wn. App. at 902; *Fedorov*, 181 Wn. App. at 199-200.

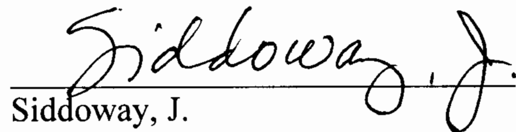
No instructional error is shown.

III. Appellate costs

Mr. Diaz-Lara asks us to waive costs on appeal if he does not prevail, claiming he is currently indigent and will unlikely be able to pay in the future. "RAP 14.2 affords the appellate court latitude in determining if costs should be allowed." *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). By general order, this court has created a procedure by which appellants may provide a panel with evidence and argument on the basis of which the panel can exercise informed discretion whether to deny costs. See Gen. Order of Division III, *In re the Matter of Court Administration Order re: Request to Deny Cost Award* (Wash. Ct. App. June 10, 2016). Because this case was transferred from Division Two, Mr. Diaz-Lara (understandably) did not comply with our general order. We therefore decline to consider his request, but without prejudice to his right to demonstrate to our commissioner his current or likely future inability to pay. *See* RAP 14.2.

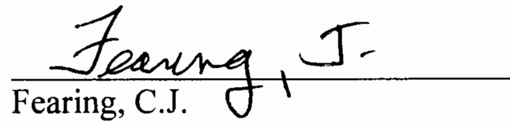
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

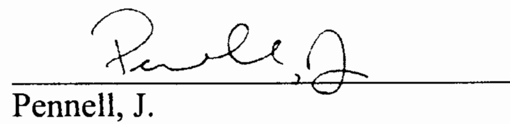


Siddoway, J.

WE CONCUR:



Fearing, C.J.



Pennell, J.

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September 20, 2017 - 8:02 AM

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