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State of Washington

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NO. 72516-5-I

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

STATE OF WASHINGTON,
Respondent / Cross-Appellant,

v.

JIMI HAMILTON,
Appellant / Cross-Respondent.

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

The Honorable Marybeth Dingley, Judge

REPLY BRIEF OF APPELLANT & CROSS-RESPONDENT

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A. ARGUMENT IN REPLY

1. THE ERRONEOUS ADMISSION AND USE OF HAMILTON'S PRISON MEDICAL RECORDS AT TRIAL REQUIRES REVERSAL

a. The State misapprehends the proper scope of impeachment

The State asserts its impeachment of Dr. Grassian was proper because Grassian reviewed “all of [Hamilton]’s mental health records, and he based his opinions on everything that he reviewed.” Br. of Resp’t at 73. The State fails to acknowledge that reviewing records is not equivalent to relying on the records’ contents to formulate an expert opinion.

This analysis is controlled by ER 705, which provides that an expert “may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise.” However, the “expert may in any event be required to disclose the underlying facts or data on cross examination.” Id. The disclosure an expert must give during cross examination pertains solely to the reasons or bases for his or her opinion. A party may not cross-examine an expert with anything and everything the expert might have reviewed to undermine or impeach the expert’s opinion.

This was the holding of Washington Irr. & Dev. Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986), which is controlling here. The Sherman court stated, “ER 705 provides that an expert who offers an opinion may be

required to disclose the underlying facts or data upon which that opinion is based during cross-examination.” Sherman, 106 Wn.2d at 688 (emphasis added). Where the record “fails to indicate that [the expert] relied upon the conclusions of the non-testifying doctors to formulate his opinion” “the conclusions were improperly admitted into evidence.” Id. (emphasis added).

The Sherman court discussed several out-of-state cases, each of which establishes that impeachment for ER 705 purposes may only be accomplished by challenging the conclusions in medical records that the experts actually relied on in forming their own opinions. In Ferguson v. Cessna Aircraft Co., for instance, the court stated ER 705 permits “disclosure of otherwise hearsay evidence to illustrate the basis of the expert witness’ opinion;” it does not “permit the unrelied upon opinions and conclusions of others to be introduced in cross-examination for impeachment purposes.” 132 Ariz. 47, 49, 643 P.2d 1017 (Ariz. App. 1981) (emphasis added and omitted). Ferguson, on which our supreme court relied in Sherman, plainly limits expert impeachment to material that the expert actually uses as a basis for opinion.

In Bobb v. Modern Prods., Inc., likewise, defense counsel used hearsay statements to attempt to impeach the plaintiff’s expert. 648 F.2d 1051, 1055 (5th Cir. 1981). While the plaintiff’s expert had seen the report, he “did not state that he had relied on the report.” Id. at 1056. Until the

defendant could establish the plaintiff's expert relied on the report of the nontestifying doctor, "it was improper for the defendant to read from that report in cross-examining plaintiff's witness." Id.

Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541 (5th Cir. 1978), is also particularly instructive. There, the expert's opinion was based in part on data contained in reports prepared by two metallurgists who did not testify at trial. Id. at 544. Importantly, the expert's opinion was based solely on the non-testifying metallurgists' data, not their conclusions. Id. During cross examination, "counsel made maximum use of the opinions expressed in the two reports. He paraphrased parts of them in questioning, he read from them verbatim, and he referred to them in his jury argument. He made much greater use of the opinions than of the data underlying them." Id.

The court reversed on several grounds, but, significantly here, the court indicated that "reports of others examined by a testifying expert and conflicting with the testimony of the expert could not be admitted even as impeachment evidence unless the testifying expert based his opinion on the opinion in the examined report or testified directly from the report." Id. at 546 (emphasis added). Thus, although the expert relied on the data contained in the reports and that data was proper fodder for cross examination, "[t]he conclusions reached by the other experts did not

impeach [the testifying expert]’s use of the statistics.” Id. Since the expert’s testimony “could only be undercut by arguing the substantive correctness of the other experts’ conclusions, this evidence should have been brought out, if at all, on direct examination of the reporting experts.” Id. at 546-47.

The prosecutor in this case did exactly what the Bryan and Sherman courts forbade: she attempted to undercut Grassian’s conclusions by asserting that the contradictory conclusions of nontestifying providers were substantively correct. She stated this was her express purpose. 25RP 10 (“It goes strictly to his diagnosis, and what Dr. Grassian has chosen to ignore in making his diagnosis.”); 25RP 165 (“And I am entitled to impeach [Grassian’s claims] with the facts that he reviewed, he considered, or should have considered when making his statements and his opinions.” (emphasis added)). This was not impeachment. If the prosecutor wanted to argue the substantive correctness of others’ opinions, she should have called those others as witnesses.

To be sure, Grassian reviewed the prison medical records as part of his general review of Hamilton’s mental health history. He stated it would be “dangerous” not to do so given the importance of providing context. 23RP 39-40. But Grassian then proceeded to criticize the DOC system for providing inadequate mental health treatment due to a lack of resources and

a lack of training among providers. 23RP 41-44. Grassian gave a specific example of this:

In one of the Hamilton records . . . there's some people said he's a malingerer, some people said he's psychotic. I favor malingerer. Okay. Why? No explanation. It's just what you do at the moment, because you got about two minutes to make a decision, you know, so you don't know anything. And that's what tends to happen. I mean, it's bad, it's really very bad.

23RP 44. As discussed in Hamilton's opening brief, Grassian proceeded to refer to the prison records he reviewed as "helter-skelter" and described a complete lack of continuity in the records, mismanagement in medication protocols, and "grossly inadequate service." Br. of Appellant at 58-59; 23RP 47-55. He stated in no uncertain terms that Hamilton's records failed to "rise to the level of appropriate standard of care." 23RP 54. Given this extensive criticism, it is crystal clear that Grassian did not substantively rely on the conclusions in the various prison records, about which the State cross-examined him, to formulate his opinion.

Instead, Grassian relied on his extensive experience working with inmates who, like Hamilton, have spent significant periods in the "catastrophe" of solitary confinement. 23RP 57-75. Grassian described the various perceptual distortions and hallucinations that occur in the human brain from the complete deprivation of all human contact and environmental stimulation. 23RP 64-69. He discussed specific records that demonstrated

Hamilton's paranoia and panic attacks consistent with spending significant time in solitary confinement. 23RP 69-70. He recounted that his review of records demonstrated that almost all of Hamilton's prison time since 1996 had been served in solitary confinement. 23RP 75. Grassian also relied on his interview with Hamilton: "in my report I quoted him at some length about what he experienced," which was "strikingly consistent" with what he heard from other inmates who had served a significant amount of time in solitary confinement. 23RP 76. Grassian went on to quote several of Hamilton's interview statements, which in his opinion were consistent with his experience with others who have spent time in solitary. 23RP 77-80.

Grassian also relied on his interviews of Hamilton's wife and other family members to formulate his opinion, which he described in detail as bases for his diagnoses. 23RP 80-87.

Grassian listed all the documents he reviewed to prepare for his testimony. 23RP 87-88. He stated that based on the "totality of everything that [he] reviewed" he was "able to develop a picture of Mr. Hamilton's psychiatric history." 23RP 89. Based on the records he reviewed, he indicated he identified patterns in the symptoms Hamilton exhibited. 23RP 92. Grassian proceeded to identify these patterns, testifying very specifically about several of the records he relied on as a basis for his opinion. 23RP 93-99.

What Grassian did not rely on were the opinions and conclusions in the records the State introduced during cross examination. Indeed, as discussed, Grassian explicitly disagreed, discounted, or disparaged the statements, opinions, and conclusions in these records. See Br. of Appellant at 55-57. The State's attempts to impeach Grassian with opinions and conclusions in records he did not rely upon were unlawful. The State's unlawful use of this improper impeachment evidence requires reversal.

- b. Because the prosecutor's purpose in introducing evidence that contradicted Grassian's opinion was not proper impeachment, it was inadmissible hearsay

The State first attempts to argue that Hamilton waived his challenge to the foundational requirements of the business-record hearsay exception. Br. of Resp't at 75. But defense counsel and Hamilton himself repeatedly objected to the State's use of the prison records on the basis of hearsay.¹ 25RP 103-05, 160, 165. These objections were sufficient to preserve all hearsay-related arguments on appeal, given that the statutory business records exception to the hearsay rule, by its own terms, incorporates requirements for foundation, identification, and authentication. RCW 5.45.020; State v. DeVries, 149 Wn.2d 842, 847, 72 P.3d 748 (2003); Br. of Appellant at 64-65.

¹ The State concedes these hearsay objections preserved the error for this court's review. Br. of Resp't at 82, 84-85.

Second, the State argues that the out-of-court statements were not admitted for the truth of the matter asserted “but only as they related to Dr. Grassian’s diagnosis.” Br. of Resp’t at 75. Incongruously, the State relies on State v. Lucas, 167 Wn. App. 100, 109, 271 P.3d 394 (2012), which stated, “out-of-court statements on which experts base their opinions are not hearsay under ER 801(c) because they are not offered as substantive proof” but rather only to explain the expert’s opinion. Br. of Resp’t at 75. The State’s argument and reliance on Lucas rests on the faulty presumption that Grassian based his opinions on the out-of-court statements in the prison records even though he clearly did not. See Br. of Appellant at 54-61; Part A.1.a supra. The State fails to show that Grassian relied on the prison records in forming his opinions. The State fails to provide any analysis of any other hearsay exception that might apply.² Therefore, the State fails to overcome Hamilton’s claim that the prison records introduced during the cross examination of Grassian were inadmissible hearsay.

Third, the State argues Hamilton’s statements contained in the records were admitted as statements of a party opponent, but also concedes that the “statements were reported by non-testifying witnesses” and therefore were contained within a second level of hearsay. Br. of Resp’t at 76-77.

² The State’s complete lack of response regarding the other hearsay exceptions Hamilton analyzed indicates the State agrees with Hamilton’s analysis on these points. 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.”).

Therefore, the State agrees with Hamilton that statements attributed to him in the medical records should not have been considered as substantive evidence and were admitted in error. Br. of Resp't at 77.

The State instead argues the error was not prejudicial because it did not affect the outcome of trial within a reasonable probability. Br. of Resp't at 77. The State avers, "Had the court extended the limiting instruction [to consider the prison records only to assess Grassian's opinion] to the defendant's statements as well, the outcome of the trial would not have been materially different." Br. of Resp't at 77. The State provides no analysis to support this argument. Instead, the State again erroneously presumes that the evidence it adduced constituted proper impeachment. And, as discussed in the following subsection, by introducing Hamilton's purported statements, the State improperly put prejudicial character evidence before the jury. The admission of this evidence was extremely prejudicial to Hamilton.

The hearsay statements of various providers—including statements attributed to Hamilton—do not fall under any exception to the rule against hearsay. These statements were inadmissible.

- c. The prison records were also inadmissible under ER 404(b)

The State asserts Hamilton's ER 404(b) argument was waived. But in the midst of Grassian's cross examination, defense counsel clearly raised

objections based on ER 404(b). 25RP 6-7, 11. The defense also broadly sought to exclude all evidence of “jail/prison misconduct” in the pretrial motions in limine. CP 215; 25RP 18-19. Indeed, the motion in limine specifically stated, “Although both expert witnesses may have considered these instances of misconduct in jail and prison in forming their opinion, this evidence is still inadmissible.” CP 216. Hamilton himself also objected to the admission of this evidence, asserting the prison record evidence was prejudicial and should not be admitted under ER 403. 25RP 166-67. “An objection based on ‘prejudice,’ is adequate to preserve an appeal, based on ER 404(b), because it suggests the defendant was prejudiced by the admission of evidence or prior bad acts.” State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). The ER 404(b) issue was preserved for appellate review.

The State maintains its position that the prison record evidence was admitted for the proper purpose of impeachment, and therefore ER 705, rather than ER 404, governs the admission of the evidence. Br. of Resp’t at 81. The State’s argument again assumes its use of this evidence was proper impeachment under ER 705. The State again is wrong.

The State further claims the record does not support Hamilton’s assertion that the State used the prison medical records to show Hamilton “was violent, destructive, and faked a mental illness in the past, and therefore

he acted in conformity with those behaviors in this case.” Br. of Resp’t at 80. The State picks and chooses portions of its closing arguments to try to demonstrate the prosecutor did not argue the prison records as propensity evidence. Br. of Resp’t at 80. But the prosecutor plainly used the medical record evidence to show propensity, expressly inviting jurors to conclude Hamilton acted in conformity with the conduct contained in the prison records. She asserted Hamilton was “an intelligent guy, capable of coming up with schemes . . . to get what he want[s].” 28 RP 119 (emphasis added). The prosecutor also argued Hamilton was “trying to explain it away, which is what he has done before. He goes back to his old standby, I was hallucinating, his old standby.” 28RP 124 (emphasis added). The prosecutor stated, “And you heard of other evaluations where he indicated I did this because I wanted to get someone’s attention. I broke this, because you didn’t send me to the other side of the mountains. He doesn’t feel bad about it, he justifies it, and that’s what he has done here, justified his behavior, DOC was treating me badly.” 28RP 169-70 (emphasis added). The prosecutor told jurors Hamilton had “[i]nappropriate intense anger or difficulty controlling anger, and that’s what we are seeing on August 23rd, 2012, and that’s what they’ve seen many times before.” 28RP 171 (emphasis added). During Hamilton’s testimony, the prosecutor improperly gave her personal opinion that Hamilton was feigning his mental health

issues as he had in the past. 25RP 36. The State's assertion that its trial deputy did not use the prison record evidence to argue Hamilton's propensity to commit the instant assault is patently false.³ The trial court erred in admitting significant quantities of inadmissible ER 404(b) evidence. This error requires reversal.

- d. The erroneous admission of the prison record evidence under the guise of impeachment affected the outcome of trial within a reasonable probability

As discussed in Hamilton's opening brief, the State's improper use of the opinions and conclusions of nontestifying witnesses for "impeachment" of Dr. Grassian was extremely prejudicial because it went to the sole issue at trial—whether Hamilton's capacity was diminished. See Br. of Appellant at 82-87. Indeed, the Sherman court reversed because improper impeachment, identical to that which occurred here, went to the central issue at trial. 106 Wn.2d at 690 ("Since the central issues in the case dealt with the cause and extent of the worsening of Sherman's condition, we find that the trial court's decision allowing respondents to introduce as evidence the hearsay conclusions of non-testifying experts was prejudicial and therefore constitutes reversible error." (emphasis added)). Hamilton was left without

³ In its prejudice section, the State also posits, "Although the court allowed jurors to consider the defendant's statements for the truth of the matter asserted, none of those statements concerned the defendant's mental state on the date that he assaulted Officer Trout and they were not used for that purpose." Br. of Resp't at 86. The State's argument is untenable in light of the prosecutor's closing argument where she indeed used Hamilton's alleged statements contained in the prison records to undermine Hamilton's credibility with respect to the assault on Trout.

any avenue to challenge the opinions and conclusions contained in the prison records because he was unable to cross-examine the nontestifying authors of these records. These records contained several of Hamilton's alleged prior bad acts, including acts that went directly to Hamilton's credibility such as feigning mental health issues. Cf. Lucas, 167 Wn. App. at 112 ("The jury's possibly negative assessment of Lucas's credibility—arising from the erroneous admission of his prior conviction—conceivably and negatively influenced the weight they gave to Larsen's testimony, and Lucas's key witness for his only viable defense of diminished capacity. Accordingly, we hold that the error was not harmless and reverse"). The erroneous admission of the opinions and conclusions of nontestifying witnesses and Hamilton's previous misconduct affected the outcome of Hamilton's trial within a reasonable probability and requires reversal.

The State contends there was no prejudice because the evidence of diminished capacity was weak. The State asserts that second degree assault "does not require intent to assault a specific person" and Grassian merely stated he did not have the intent to assault Trout rather than any other person. Br. of Resp't at 89. The State's argument fails, however, because the jury instructions required the jury to find beyond a reasonable doubt that Hamilton "intentionally assaulted another person, to wit: Nicholas Trout." CP 59. Therefore, even if the State is correct that Hamilton was not required

to have formed intent to specifically assault Officer Trout because second degree assault “does not require intent to assault a specific person,” the law of this case nonetheless required proof beyond a reasonable doubt of Hamilton’s intent to assault Trout specifically. See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (“In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.”).

Grassian was crystal clear in his testimony that Hamilton did not form the intent to assault Trout:

Thus [sic] clarify and repeat the conclusions in my January report. I concluded there that the evidence made it extremely likely that Mr. Hamilton, a man suffering with a severe bipolar mood disorder, was in a dissociative state at the time of the assault, and that he lacked the capacity to know that he was assaulting a corrections officer as opposed to defending himself against an inmate with a knife, and thus lacked the capacity to form the intent to assault the officer. I further stated that the alternative hypothesis that he had the requisite knowledge and intent was exceeding unlikely.

25RP 184. Given Grassian’s explicit conclusions for the jury that Hamilton did not have the capacity to form intent to assault Officer Trout, evidence of diminished capacity was not weak, as the State claims.

Grassian’s conclusion was further supported by his other testimony that Hamilton was in a dissociative state due to spending significant time in

solitary confinement. See Br. of Appellant at 12-14, 83-84. Grassian's opinion was that Hamilton's behavior was "perfectly consistent" with Grassian's research regarding solitary confinement and its damaging mental health effects. 23RP 105-06.

Moreover, Grassian testified Hamilton lacked the "capacity to understand or to know the potential for the injury he was going to cause to Officer Trout." 23RP 115. Thus, not only did Grassian opine Hamilton could not form the intent to assault Trout, he also opined Hamilton was not reckless given that he did not appreciate or understand the potential for injury and disregard it. Recklessness is an element of second degree assault. CP 58-59; RCW 9A.36.021(1)(a). Grassian's conclusions that Hamilton lacked the capacity to form either of the mental elements of second degree assault rendered Hamilton's diminished capacity defense strong, not weak.

It was the State's impropriety that weakened Hamilton's diminished capacity defense. The State unlawfully cross-examined Grassian with the conclusions of nontestifying experts that Hamilton never had the opportunity to rebut. These conclusions were entirely hearsay and contained extremely prejudicial ER 404(b) evidence. The prosecutor made the most of this impermissible evidence, arguing to the jury that Hamilton was faking his mental illness just like he had faked mental illness in the past. The prosecutor disparaged Grassian and his opinions because his opinions were

inconsistent with the conclusions in the prison records. Br. of Appellant at 85-86. The erroneous admission of the prison record evidence affected the outcome of the trial. This grave error requires reversal and retrial.

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

In his opening brief, Hamilton asserted that WPIC 4.01 is unconstitutional because it plainly requires jurors to articulate a reason for their doubt. Br. of Appellant at 96-105. In response, the State argues Washington Courts have approved of WPIC 4.01 and therefore there was no manifest error affecting a constitutional right. The State is incorrect for several reasons.

The State does not dispute that Hamilton's claim has constitutional dimensions. Br. of Resp't at 100 ("Whether the reasonable doubt instruction was faulty does raise a constitutional issue."). Nor does the State contest Hamilton's argument that a faulty reasonable doubt instruction is structural error; nor can it. See Br. of Appellant at 105 (citing Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). "Nothing in our rules or our precedent precludes different treatment of structural error as a special category of 'manifest error affecting a constitutional right.'" State v. Wise, 176 Wn.2d 1, 18 n.11, 288 P.3d 113 (2012) (quoting RAP

2.5(a)(3)); see also State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012) (holding “there is good reason to treat structural errors . . . differently” because assessing the effects of a structural error are difficult and “[r]equiring a showing of prejudice [for RAP 2.5(a) purposes] would effectively create a wrong without a remedy”). The structural nature of the instructional error on reasonable doubt overcomes the State’s RAP 2.5 waiver argument as a matter of law.

Furthermore, the rules of appellate procedure are to “be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). The determination of cases will not depend on compliance or noncompliance with the rules “except in compelling circumstances where justice demands” Id. The State makes no attempt to show any compelling circumstance that would support the avoidance of this issue’s merits. And even if the structural error in this case did not qualify as manifest constitutional error under RAP 2.5(a)(3), that rule is permissive, not mandatory. RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.” (emphasis added)). This court should thus reach the merits and reverse.

- a. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

The State provides no substantive analysis regarding WPIC 4.01's language. The State does not explain how requiring a reason to exist for reasonable doubt is not an unconstitutional articulation requirement. Instead, it asserts that Hamilton's arguments are foreclosed by Washington court's approval of WPIC 4.01 in other cases.

In State v. Bennett, the supreme court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In State v. Emery, the court contrasted the "proper description" of reasonable doubt as a doubt "for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d 741, 759, 278 P.3d 653 (2012). More recently, in State v. Kalebaugh, the court concluded that the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." 183 Wn.2d 578, 585, 355 P.3d 253 (2015).

The supreme court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily

interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for having reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh provided no answer, as appellate counsel wrongly conceded the correctness of WPIC 4.01 in that case.

In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued that the language requiring “a reason” in WPIC 4.01 misstated the reasonable doubt standard. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in Kalebaugh, Emery, or Bennett, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. Contrary to the State’s argument, these cases’ approval of WPIC 4.01’s language is not controlling.

- b. As elucidated by a close review of the *Thompson* case, WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given

The State points to State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), asserting Hamilton’s “argument here was rejected.” Br. of Resp’t at 101. In Thompson, Division Two addressed an argument that “[t]he doubt

which entitled the defendant to an acquittal must be a doubt for which a reason exists' (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit." Thompson, 13 Wn. App. at 4-5 (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating "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." Id. at 5.

This cursory statement is untenable. The first sentence defining reasonable doubt read to every criminal jury plainly requires a reason to exist in order to have a reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious different in meaning between a doubt based on "reason" and a doubt based on "a reason." See Br. of Appellant at 97-100. The Thompson court wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court also recognized the reasonable doubt instruction “has its detractors,” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. In holding the trial court did not err in refusing the defendant’s proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction “has been accepted as a correct statement of the law for so many years” that the defendant’s argument to the contrary was without merit. 54 Wn.2d at 291. Nabors cited Tanzymore as its support. 8 Wn. App. at 202. Neither case specifically addresses the doubt “for which a reason exists” language in the instruction. There was no challenge to that language in either case, so it was not at issue.

As the State observes, the Thompson court stated “[a] phrase in this context has 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; Br. of Resp’t at 101. Harras found no error in the instruction, “It should be a doubt for which a good reason exists.” 25 Wash. at 421. Harras simply maintained the “great weight of authority” supported this instruction, citing to the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss.

1894).⁴ Harras, 25 Wash. at 421. The problem is that this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.⁵

So Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then the Thompson court upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it 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 serious problem because, under recent jurisprudence, any suggestion that jurors must be able to give a reason for having reasonable doubt is improper. Kalebaugh, 183 Wn.2d at 585 (“The law does not require that a reason be given for a juror’s doubt[.]”); Emery, 174 Wn.2d at 759-60 (suggestion that jury must give a reason for reasonable doubt “inappropriate because the State bears the

⁴ A copy of this note is appended to this brief.

⁵ See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) (“A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.”); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) (“But the doubt must be a reasonable doubt, 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.”); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (1894) (“A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.”).

burden of proving its case beyond a reasonable doubt, and the defendant bears no burden”). The supreme court in Kalebaugh explicitly held, moreover, that it was manifest constitutional error to instruct the jury that a reasonable doubt is “a doubt for which a reason can be given.” 183 Wn.2d at 584-85.

Another old case, State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), further elucidates the inconsistency in Washington Supreme Court case law. Harsted took exception the following instruction: “The expression ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. The court explained the phrase “reasonable doubt” means:

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. 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. In support of its holding that the challenged language was not error, Harsted cited several out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899), in which the court stated, “A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” The

Harsted court noted some courts disapproved of the same kind of language, but was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wash. at 165.

Now we arrive at the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any assertion that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and a doubt “for which a reason can be given.” Cf. Kalebaugh, 183 Wn.2d at 584 (“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.”). In Harsted and Harras, the Washington Supreme Court found no distinction between these definitions.

This problem has continued unabated since Harras, as 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 a reasonable doubt. Yet Harras and Harsted explicitly contradict Emery’s and Kalebaugh’s condemnation. The law and our understanding of the reasonable doubt standard have evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in

the past, outpaced by the Washington Supreme Court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic articulation language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous "for which a reason can be given." Both require a reason for why reasonable doubt exists. Because this requirement repugnantly distorts the reasonable doubt standard, Hamilton asks this court to reverse.

B. ARGUMENT OF CROSS-RESPONDENT

1. THE STATE IS NOT AGGRIEVED BY ANY OF THE TRIAL COURT'S FINDINGS OR CONCLUSIONS WITH RESPECT TO HAMILTON'S UNSUCCESSFUL DISMISSAL MOTIONS

"Only an aggrieved party may seek review by the appellate court."

RAP 3.1. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." In re Guardianship of Lasky, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). Generally, courts define "aggrieved" to require the denial of some personal or proprietary legal or equitable right or the imposition upon a party of a burden or obligation. Mestrovac v. Dep't of Labor & Indus., 142 Wn. App. 693, 704, 176 P.3d

536 (2008), aff'd on other grounds sub nom. Kustura v. Dep't of Labor & Indus., 169 Wn.2d 81, 233 P.3d 853 (2010).

The State cannot show it is aggrieved by any of the findings or conclusions to which it assigns error. Hamilton lost his dismissal motions. As Hamilton argued in his opening brief, the trial court failed to provide any remedy to DOC's repeated intrusions into Hamilton's communications and relationship with his attorneys. Br. of Appellant at 28-41. Because the prosecution was not dismissed and no remedy was provided to Hamilton in any respect, the State was not denied a legal or equitable right. Nor did the trial court impose any burden or obligation on the State. The State prevailed in the dismissal motions. The State is not aggrieved.

Moreover, the State's current challenges to the trial court's findings and conclusions are inconsistent with the position it took below. In the trial court, the prosecutor repeatedly stated Hamilton's dismissal motions were a waste of her time and collateral to the issues at trial because they were related to DOC misconduct, not the Snohomish County Prosecutor's office. 2RP 323, 623-24; 15RP 32-33. The State now appears to take the opposite position, appealing the trial court's findings and conclusions related to the egregious misconduct of DOC personnel. The State's inconsistent positions further reveal that it was not aggrieved by the trial court's denial of

Hamilton's dismissal motions. This court should dismiss the State's cross appeal.

2. THE TRIAL COURT'S FINDING THAT THERE WAS POSSIBLE VIDEO TAMPERING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellate courts review challenged findings of fact for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person of the truth of the finding. Id. "A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence." Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

The trial court determined there was possible tampering with the videotape that showed DOC officer Shannon Reeder entering and exiting Hamilton's cell. The trial court found the video "has two camera shots, each of which shows a different angle of CO Reeder approaching and leaving Mr. Hamilton's cell." CP 597. "One of the videos shows CO Reeder entering and leaving the area of Mr. Hamilton's cell. The other video speeds up at the exact times CO Reeder comes into the frames as he enters and leaves the cell." CP 597 (emphasis added).

In finding possible video tampering, the trial court relied on the fact that Reeder believed there was only one set of video cameras recording the

entrance to Hamilton's cell. 2RP 287. Yvette Stubbs, another DOC employee, did not know if there were one or two recorded angles either. 2RP 471-72. Stubbs testified she permitted Reeder to review the videotape of one of the angles in her office. 2RP 472. Because these DOC witnesses were only aware of one recording angle and only one of the videos skipped over the precise moments Reeder entered and exited the cell, the trial court reasonably inferred the obvious—one of the videotapes had been altered in an attempt to cover up Reeder's misconduct.

The State asserts the trial court did not find Reeder credible only with regard to whether he read Hamilton's legal materials in the cell, not in toto. Br. of Resp't at 24-25. This court should reject the State's attempted hairsplitting, especially since the purpose of altering the videotape was to hide Reeder's unlawful reading of Hamilton's confidential and privileged legal materials.

The State also relies on the testimony of Stubbs that she did not alter the videotape and that the recording system was old and jumpy, and was therefore just a malfunction. Br. of Resp't at 25; 2RP 459-60, 500. First, as a matter of common sense, if a state actor is willing to tamper with evidence, then the state actor is also likely willing to lie about it under oath. Second, a DOC technology staff person submitted a declaration that there was no malfunction of the video recording system and that it is jumpy because each

frame represents two seconds of video. 2RP 548-49; Ex. 38. Although this witness did not review the videotapes in question, according to counsel's offer of proof based on his declaration, he could not explain why the video would have skipped over a significant amount of time. 2RP 550; Ex. 38.

Considering all the evidence and testimony, the court was not persuaded that the video, which inexplicably speeds up at the exact times Reeder entered and left Hamilton's cell, was a technical malfunction. Given the court's low opinion of Reeder's credibility, the fact that Stubbs allowed Reeder to review the video in advance of the hearing, and the fact that no DOC witness could provide a convincing explanation for the skipping on the video, the court reasonably inferred that the alterations to the video were likely intentional. The trial court's finding of apparent video tampering was supported by substantial evidence.

3. THE TRIAL COURT'S FINDING THAT DOC PURPOSEFULLY INTRUDED INTO THE ATTORNEY-CLIENT RELATIONSHIP BY NOT PROVIDING APPROPRIATE ATTORNEY-CLIENT MEETING SPACES WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

The State disputes the trial court's finding that "the arrangements for the meeting between the defendant and his attorneys on March 12, 2014 at Stafford Creek" in a no-contact room constituted a purposeful intrusion into the attorney-client relationship. Br. of Resp't at 25-27.

The trial court's finding of DOC mismanagement was based on DOC's failure to comply with its order expressly requiring the State to provide meeting spaces where Hamilton and his attorneys could freely pass documents back and forth. CP 905. During the March 12, 2014 meeting, despite the court's order, DOC staff placed Hamilton and his attorneys in a no-contact room in which they were not permitted to exchange documents. CP 13; 11RP 29-30, 102-03; 13RP 29-30, 115, 117, 129, 173; 14RP 43. DOC staff was aware of the court order but chose to ignore it. CP 14; 13RP 115-16, 123-24, 141; 14RP 57-58. Defense counsel asked DOC personnel to contact their legal counsel regarding the court order, but they refused. 13RP 77-78, 119, 128-29, 146, 153-55. Inexplicably, defense counsel was removed from the DOC facility 15 minutes before the scheduled end of the attorney-client meeting. CP 14; 11RP 32; 13RP 132. The trial court expressed outrage at the DOC's failure to comply with its order. 16RP 98-99.

The trial court had already determined how to protect Hamilton's right to counsel and avoid further intrusion into the attorney-client relationship. Indeed, it duly issued court orders requiring DOC to adhere to certain procedures expressly intended to honor Hamilton's rights. DOC refused to comply. The trial court's determination that DOC's placement of Hamilton and his attorneys in a no-contact room was an intrusion into the

attorney-client relationship was thus amply supported by substantial evidence.

4. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT DOC INVADED HAMILTON'S ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS BY REFUSING TO PROVIDE A CONFIDENTIAL MEETING SPACE AND BY REEDER'S 30-MINUTE "SEARCH" OF HAMILTON'S BOX OF LEGAL MATERIALS

The State next argues, "None of the court[']s factual findings that are supported by the record support the conclusion that DOC actions constituted governmental mismanagement or misconduct in either the manner in which DOC provided space for meetings with the defendant's attorney or Officer Reeder's cell search." Br. of Resp't at 29-30.

As an initial matter, as discussed, the trial court's findings regarding DOC's misconduct were supported by substantial evidence in the record. The trial court's conclusions of government misconduct based on these findings were therefore correct.

As for the confidential meeting space issue, the State omits significant discussion of the fact that, because Hamilton and his attorneys could not pass documents back and forth, they had to use a DOC officer as a courier. 2RP 367, 378, 398-400, 422, 559-60. This DOC officer was absent with the privileged documents for approximately 10 minutes and then delivered only one of the documents, asserting that the other would have to

be sent through the mail. 2RP 400, 405, 407, 425-27. This officer testified she spoke to a sergeant who “made the decision that [Hamilton] could have the paperwork to sign off on, but he couldn’t have the other stuff.” 2RP 400. Given that it is reasonable to conclude that a DOC officer read the documents themselves to permit delivery of one but require mailing of the other, the State’s argument that there was no factual basis to support the trial court’s conclusion that DOC had invaded Hamilton’s confidential communications is mystifying.⁶ Moreover, the officer testified there was absolutely no security concern with giving Hamilton pieces of paper because they contained no staples, sharp objects, or illegal substances, revealing that its refusal to deliver one of the documents to Hamilton was wholly arbitrary. 2RP 405-06. The trial court’s conclusion that the lack of confidential meeting space intruded into the attorney-client relationship was factually supported and correct.

The State also asserts there was no factual basis for the trial court’s conclusion that Reeder improperly read Hamilton’s legal materials kept in a box in his cell. Br. of Resp’t at 33-34. But the trial court heard that inmates are limited to having legal paperwork in their cells. 2RP 29, 51, 140-41, 410, 457. Reeder was in Hamilton’s cell for about 30 minutes. CP 673-74,

⁶ The State’s assertion that Hamilton did not cite the record to support his argument that a DOC officer read Hamilton’s documents is similarly mystifying. Br. of Resp’t at 35; cf. Br. of Appellant 15, 33-34 (discussion of DOC officer’s couriering of privileged documents due to no-contact room with ample citations to the record).

702, 707, 713; 2RP 26, 47, 79, 84, 128, 162, 487-88; 14RP 75. Routine searches typically take five minutes. CP 674, 706-07, 712, 718-19. Witnesses saw Reeder closely reading papers in Hamilton's cell. CP 674, 677, 702, 707, 713, 719; 2RP 86-87, 117, 162-63, 168-69, 172, 175. When Reeder exited Hamilton's cell, he stated something to the effect of, "I was in there trying to learn how someone can sucker punch a CO and say they didn't form the intent." CP 677, 702, 707, 713, 719; 2RP 34-35, 89, 118, 165. Reeder testified he was conducting a mere routine search that disclosed "contraband" in the form of a paperclip and pen. CP 598; 2RP 228-29, 242-43, 271-72. But despite this "routine search" of 30 minutes, he apparently missed several other contraband items. CP 601; 2RP 518. And Reeder claimed he disposed of this contraband in a trash can accessible to inmates, which is either stupid or disingenuous, as other DOC personnel pointed out. 2RP 229-30, 278-79, 336-37, 470, 495-96, 518-19, 531. Based on this evidence, the trial court specifically found that Reeder was not a credible witness and that "Reeder did read some of Mr. Hamilton's paperwork." CP 598. This court should reject the State's baseless claim that the trial court erred in concluding that Reeder's actions constituted voluntary and dishonest governmental misconduct.

C. CONCLUSION

For the reasons stated herein and in his opening brief, Hamilton asks this court to reverse his conviction and either dismiss this prosecution or remand for a fair trial.

DATED this 15th day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant and Cross-Respondent

APPENDIX

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. Garrillo*, 70 Cal. 843.

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*, 123 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: *Fann 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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and no other person, committed the offense:

It is, therefore, error to instruct the jury, the defendant guilty, although they may not e, and no other person, committed the alleged Cal. 446; *People v. Carrillo*, 70 Cal. 643.

—In a case where the evidence as to the defendant, the evidence must lead to the conclusion as to exclude every reasonable hypothesis in a case of that kind an instruction in these defendant is to have the benefit of any doubt. Established necessarily lead the mind to the conclusion though there is a bare possibility that he may d him guilty." It is not enough that the mind to a conclusion, for it must be such as Men may feel that a conclusion is necessary, assured, beyond a reasonable doubt, that it is v. *State*, 123 Ind. 189; 25 Am. St. Rep. 429, evidence must produce "in" effect "a" reaf defendant's guilt is probably as clear, praordinary juror as if the court had charged ace "the" effect "of" a reasonable and moral h a charge is not error: *Loggins v. State*, 32 : v. *Shaeffer*, 89 Mo. 271, 282, the jury were ying the rule as to reasonable doubt you will e facts and circumstances proven can be reaheory other than that the defendant is guilty; in another form, if all the facts and circumt be as reasonably reconciled with the theory nt as with the theory that he is guilty, you favorable to the defendant, and return a ver-

This instruction was held to be erroneous, as le in a civil case, and not in a criminal one. fit of a reasonable doubt in criminal cases is a defendant has in a civil case, with respect nce. The following is a full, clear, explicit, i capital case turning on circumstantial eviyou in convicting the defendant in this case, st not only be consistent with his guilt, but h his innocence, and such as to exclude every at of his guilt, for, before you can infer his dence, the existence of circumstances tending compatible and inconsistent with any other at of his guilt": *Lancaster v. State*, 91 Tenn.

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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; *Bowden 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 COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72516-5-I
)	
JIMI HAMILTON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 15TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JIMI HAMILTON
DOC NO. 747622
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JANUARY 2016.

X *Patrick Mayovsky*