COA NO. 45665-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAROLD STENSON,

Appellant.

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

The Honorable S. Brooke Taylor, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in granting the State's motion to continue the trial, in violation of appellant's right to speedy trial under CrR 3.3.

2. The court erred in denying appellant's motion to dismiss the case under CrR 8.3(b).

3. The court erred in denying appellant's motion to dismiss the case due to failure to preserve evidence, in violation of the due process clauses of the federal and state constitutions.

4. The court erred in denying appellant's motion to dismiss the case due to the State's failure to timely disclose evidence favorable to appellant, in violation of due process.

5. The court erred in denying appellant's motion to exclude the pants evidence as a remedy for government mismanagement under CrR 8.3(b) and failure to preserve evidence under the due process clause.

6. The court erred in failing to give appellant's proposed spoliation instruction pertaining to the pants.

7. The court erred in denying appellant's motion for mistrial.

8. The court erred in admitting evidence of a defense witness's prior convictions under ER 609.

9. Prosecutorial misconduct violated appellant's due process right to a fair trial.

10. The court erred in giving a flawed reasonable doubt instruction, in violation of due process.

11. Cumulative error deprived appellant of his due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Whether the court erred in continuing the trial, in violation of the right to speedy trial under CrR 3.3, because insufficient staff in the prosecutor's office due to budgetary constraints did not satisfy the "administration of justice" ground for continuance under CrR 3.3(f)(2)?

2. Whether the court erred in denying appellant's motion to dismiss because the government failed to preserve evidence, including the bloodstained portions of the pants worn by appellant on the morning of the deaths, failed to disclose evidence favorable to the defense in a timely manner, and otherwise mismanaged the case?

3. Whether the court erred in denying appellant's motion to exclude the pants as an appropriate lesser sanction for government mismanagement under CrR 8.3(b) and for violating due process in failing to preserve evidence?

4. Whether the court erred in refusing to give appellant's proposed spoliation instruction, which would have allowed the jury to

draw a negative inference against the State for compromising the integrity of the bloodstained pants?

5. Whether the court erred in denying appellant's motion for mistrial after the other suspect in this case gave an impermissible opinion on guilt in testifying that appellant was the killer?

6. Whether the court erred in admitting evidence of prior drug convictions to impeach a defense witness under ER 609 without articulating why admission was justified on the record?

7. Whether the prosecutor committed prejudicial misconduct in quantifying the beyond reasonable doubt standard through use of a puzzle analogy in rebuttal argument?

8. Whether the reasonable doubt instruction, in stating a "reasonable doubt is one for which a reason exists," misdescribes the burden of proof?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 1994, Darold (DJ) Stenson was sentenced to death after he was found guilty of murdering Denise Stenson, his wife, and Frank Hoerner, his friend and business associate. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 476, 478, 276 P.3d 286 (2012). Following an unsuccessful appeal and several failed personal restraint petitions, the Supreme Court in

2012 reversed the convictions because the State withheld favorable evidence from the defense related to police mishandling of pants worn by Stenson at the time of the deaths, in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Stenson, 174 Wn.2d at 478-79, 493-94.

Before the start of the second trial, the defense moved to dismiss the charges or, in the alternative, to exclude the pants evidence, under a variety of legal theories, including government mismanagement resulting in prejudice under CrR 8.3(b), a due process Brady violation, and a due process destruction of evidence violation. CP 1534-50, 2000, 2010-2041, (motion to suppress pants and reply); CP 956-63, 1288-1310, 1966-67, 2398-2513 (motion to dismiss); 1RP[1] 124-129; 2RP 41-69, 82-87, 102-119, 127-47. The State opposed these motions. CP 945-46, 1277-78, 1921-1965; 1RP 129-31; 2RP 70-82, 119-127, 147-157. The trial court denied them. 1RP 131-38 (ruling on motion to exclude); 2RP 90-94 (ruling on motion to dismiss).

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[1] The verbatim report of proceedings is referenced as follows: 1RP - nine consecutively paginated volumes consisting of 8/16/12, 1/11/13, 1/30/13, 6/5/13, 7/10/13, 8/21/13, 8/28/13, 9/10/13, 9/13/13, 12/10/13; 2RP - one volume consisting of 1/4/13, 6/12/13, 8/15/13, 9/23/13 (opening statements); 3RP - 9/16/13, 9/17/13, 9/18/13, 9/23/13, 9/24/13, 9/25/13, 9/26/13, 9/30/13, 10/1/13, 10/2/13, 10/3/13, 10/7/13, 10/8/13, 10/9/13, 10/10/13, 10/14/13, 10/15/13, 10/16/13, 10/17/13, 10/21/13, 10/22/13, 10/23/13, 10/24/13, 10/28/13, 10/29/13, 10/30/13, 10/31/13, 11/4/13, 11/5/13, 11/7/13, 11/12/13.

After a second trial, the jury found Stenson guilty of aggravated first degree murder against Mrs. Stenson and Hoerner, returning special verdicts that the murders were part of a common scheme and that Hoerner's murder was committed to conceal the commission of a crime. CP 4826-29. The court sentenced Stenson to life in prison without the possibility of release.[2] CP 51. This appeal follows. CP 40.

2. Trial: Introduction

Darold Stenson and his wife, Denise Stenson, lived with their three young children on property called Dakota Farms, which was the site of Stenson's exotic bird business. 3RP 674, 761, 889, 1171, 1477, 2651-52, 3214; Ex. 217A at 7. By all accounts, Stenson and his wife had a loving and affectionate marriage. 3RP 2651, 2664-65, 3037-39, 3096-97, 3103-05, 3125-26, 3141-42, 3214. Stenson's friend, Frank Hoerner, had invested in the bird business. 3RP 686.

In the early morning hours of March 25, 1993, Stenson called 911 and stated: "this is D.J. Stenson at Dakota Farms. . . . Frank has just shot my wife, and himself, I think."[3] Ex. 185. The dispatch record showing when the 911 call was made no longer existed at the time of trial. 3RP 746-48, 3473-76. Officers who responded to the scene gave various times

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[2] The State did not seek the death penalty on remand. 1RP 18-19.
[3] During the course of the call, Stenson can be heard saying "hurry up" or "why are you taking so long?" a number of times. 3RP 433-34; Ex. 185.

for the call, ranging from 3:55 to 4:17 a.m. 3RP 580-81, 587, 605, 617, 721-22, 1780.

Stenson led responding officers to a downstairs guest bedroom in which Hoerner lay on the floor, dead of a gunshot wound to his head. 3RP 608. A gun was near his left hand. 3RP 588, 608, 619, 661-62, 849; Ex. 26-29.[4] Stenson also directed officers to the upstairs bedroom where his wife lay in bed bleeding with a gunshot wound to her head. 3RP 591, 663-64, 855-57. Stenson knelt by the bed, caressed his wife, and held her in his arms. 3RP 666, 736-37, 744-45. As medical personnel worked on his wife, Stenson said "oh my god, why." 3RP 592-93. Mrs. Stenson was airlifted to Harborview Hospital but died the following day. 3RP 991. The cause of death was a contact gunshot wound to the back of the head. 3RP 998, 1008, 1014.

3. Stenson's statements to police

Stenson told officers that the night before the shootings, he and his wife (Denise), and Frank Hoerner and his wife (also named Denise), had dinner together at a restaurant. 3RP 669. The Hoerners owned some exotic birds, which was the extent of their business interest in Dakota Farms. 3RP 686. A few days earlier, Stenson arranged for insurance to cover the birds that he was going to purchase in Texas for himself and

[4] Mr. Hoerner was left-handed. 3RP 1457.

Hoerner. 3RP 673-74, 1030-31.[5] After returning home from dinner, Stenson called Hoerner and told him that he should come to Stenson's house to sign the insurance forms. 3RP 675, 679-82. Hoerner said would come over at 3:30 a.m. on his way to catch the ferry to go to work. 3RP 680. Stenson told Hoerner to call beforehand because Stenson's alarm clock was unreliable. 3RP 680; Ex. 217A at 11.

Hoerner called Stenson at 3:30 and arrived 15 minutes later. 3RP 669-70. They went to Stenson's office in a separate building behind the house where Frank signed the insurance forms.[6] 3RP 670. Hoerner was agitated and acted strange. 3RP 2548. He became moody and "glum" when Stenson told him that he should raise his birds at his own home rather than at Dakota Farms. 3RP 671-72, 683-84. Hoerner then left the office building to go to the house to use the bathroom. 3RP 672.

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[5] In February 1993, Stenson and Hoerner went to an ostrich convention in Las Vegas. 3RP 1167, 1442. Stenson bought two pair of breeding birds at the convention. 3RP 3217, 3219. Stenson made actual preparations to go to Texas to pick up the birds, including mapping out the area, putting down a deposit for a travel trailer, and installing a trailer hitch on his pickup. 3RP 1029-31, 1074-75, 1115-16, 1137-39, 1921, 1943-46, 2544, 2554, 3148-49.

[6] Stenson said Hoerner signed two insurance papers for two different companies when he came over. 3RP 1767, 1769. One of the forms was found by Detective Martin in the file cabinet during the first trial. 3RP 1678-79; Ex. 152. The defense team located the second signed form in preparation for the second trial. 3RP 1768-69.

When Hoerner did not return after 10 or 15 minutes, Stenson went to the house to look for Hoerner and found him in the guest bedroom with blood on his face and a gun near his hand. 3RP 672-73; Ex. 217A at 13-15; Ex. 274A at 32. Stenson did not hear any gunshots and had never seen the gun before. 3RP 674; Ex. 217A at 18. Stenson bent down to touch him. Ex. 217A at 14-15. As he bent down on his knee, he heard moaning from upstairs and went up to find his wife in bed with blood on her head. 3RP 673; Ex. 217A at 15; Ex. 274A at 32. He slipped heading out of the guestroom. Ex. 274A at 32. He checked on the children and called 911. 3RP 673; Ex. 217A at 16.

Stenson knew Hoerner owned a handgun. Ex. 217A at 23. He did not know of any reason why Hoerner or someone would shoot his wife. 3RP 686, 2552; Ex. 217A at 24.[7]

4. Testimony on the background and surrounding timeframe of the deaths.

Denise Hoerner, Frank Hoerner's wife, testified that Stenson told her husband that he could get rich by investing in Stenson's exotic bird business. 3RP 1287, 1297. Mrs. Hoerner believed her husband invested around $40,000. 3RP 1299-1300, 1325. They had some rheas but no

[7] Stenson's three children, aged six, four and 18 months, were home at the time. 3RP 674, 741-42; Ex. 217A at 7. None of the children were interviewed in connection with the investigation. 3RP 1703-04, 1708-09.

ostriches. 3RP 1301-03, 1326. Stenson told them that the ostriches he went to purchase for them on an earlier trip to Texas looked sick. 3RP 1301-03. Stenson did not offer to return Mr. Hoerner's money. 3RP 1303. Weeks before his death, Mr. Hoerner wanted his money back. 3RP 1303-04. Stenson asked him to keep the money in Stenson's account because he had another investor for the business, and it looked better if his account had money in it. 3RP 1303. Stenson said he would buy an expensive pair of birds for the Hoerners if Mr. Hoerner allowed Stenson to keep the money. 3RP 1326-28. Mr. Hoerner agreed. 3RP 1303.

Mrs. Hoerner further testified that Stenson told Mr. Hoerner that he was going to Texas on March 25, 1993 to get birds but needed insurance money. 3RP 1306. During dinner at a restaurant the night before, Stenson told Mr. Hoerner to come to his house to sign insurance papers in case something happened to the birds on the way back from Texas. 3RP 1309. Mrs. Hoerner offered to come sign the papers, but Stenson wanted Mr. Hoerner to come over. 3RP 1309-10. Stenson later called and told him to come over in the morning. 3RP 1315. Mr. Hoerner left between 3:30 and 4 a.m. 3RP 1315-16. [8]

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[8] An officer testified it took 7-8 minutes to drive from the Hoerner residence to the Stenson residence when traffic is light. 3RP 1095.

Mr. Hoerner's friend, Darryl Joslin, testified that Mr. Hoerner told him the night of March 24 that he was upset because he had gotten a request for more money, and he was going to see Stenson in the early morning to "visit that situation." 3RP 1282-83.[9] Rick Knodell, Joslin's father-in-law, testified that Frank Hoerner told him the night before his death that he planned to visit Stenson because "he wanted to see if he could start making arrangements to get his money back." 3RP 1276.

Denise Stenson's brother, David Oberman, and his girlfriend, Tracey Reed, lived on the Dakota Farms property in a travel trailer behind the house. 3RP 409, 415-16, 674, 3135-36, 3140, 3144-45. Reed babysat the kids the night of March 24. 3RP 3138-39. She said goodnight to Denise Stenson at about 11 p.m. 3RP 3140. According to Oberman's testimony taken from the first trial,[10] he went to bed around 11 p.m. and was awakened in the morning by police. 3RP 3152[11]. Neither Reed nor Oberman heard gunfire later that night. 3RP 3141, 3152.[12]

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[9] Joslin gave no such statement back in 1993/1994. 3RP 1279-80, 1283.

[10] David Oberman was deceased by the time of the second trial. 3RP 3127. His testimony from the first trial was admitted into evidence at the second trial. 3RP 3144-57.

[11] According to David Oberman, there was a problem with predation, and so he and Stenson patrolled the grounds in the middle of the night. 3RP 3146-47. The routine was for Oberman to go out between 2 and 4 a.m., and Stenson would go out at 12 a.m. and 6 a.m., to check for predators. 3RP 3147-48. By mid-March, Oberman was going out in middle of night

Mrs. Hoerner said she called the Stenson house at 7 or 7:30 that morning. 3RP 1316, 1403. According to Mrs. Hoerner, a police officer answered the phone and informed her that Denise Stenson had been shot and the Stenson kids were at the Mendorf residence. 3RP 1316-17, 1337, 1403.[13] She imagined Frank was killed. 3RP 1338. She drove over to the Mendorf residence but was denied entry by Mr. Mendorf.[14] 3RP 1317-18, 1338, 1405. On her way back home, she encountered Becky Mendorf on the road. 3RP 1319, 1339.

Becky Mendorf testified that she got a call from her husband at about 5:30 or 5:45 a.m. that Mr. Hoerner had been killed and Denise Stenson shot and that the police were bringing the children over to Mendorf's home. 3RP 3003-04. Ms. Mendorf arrived home at 6:15 a.m. 3RP 3005. But while she was driving back to her house, she encountered Mrs. Hoerner on the road and the two talked.[15] 3RP 3005-06. Mrs. Hoerner asked if Frank was dead. 3RP 3006. Mendorf did not tell her.

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a couple of times a week, but he did not go out in early morning of March 25. 3RP 3154.

[12] Two sisters who lived across the road from the Stenson residence at the time testified a loud boom woke them up in the middle of the night. 3RP 1544-45, 1552.

[13] No officer testified at trial that a phone call was received from Mrs. Hoerner.

[14] Mrs. Hoerner admitted she wore only a robe; she was naked underneath. 3RP 1405.

[15] Ms. Mendorf testified that Mrs. Hoerner had pajamas on under her robe. 3RP 3006.

3RP 3006-07. Mrs. Hoerner was acting hysterical.[16] 3RP 3007. Mendorf drove her back home. 3RP 1320.

Officer Dunn encountered Hoerner with Mendorf on the road, and followed them to the Hoerner residence. 3RP 3251. Mrs. Hoerner was distraught, asking what happened to Frank. 3RP 3253-54. Toward the end of the interview Mrs. Hoerner asked if her husband was dead, and Dunn told her that he was. 3RP 3242. At one point during the interview, Mrs. Hoerner wondered why they found Denise Stenson in front and Frank on the front porch "if they thought they were sleeping together," although Dunn had not told her where Mr. Hoerner and Mrs. Stenson had been found. 3RP 3242, 3257.

5. Further investigation and forensic analyses

A .357 Magnum revolver rested beside Frank Hoerner's hand next to his head. 3RP 478, 480. There were two loaded rounds in the cylinder, three spent rounds, and one misfire. 3RP 481. They were all .38 special ammunition. 3RP 531-32. A .357 Magnum revolver can fire .38 special rounds and .357 Magnum rounds. 3RP 533-34. A spent a. 38 or .357 jacketed lead hollow pointed bullet was on the carpet next to Hoerner's body. 3RP 464, 472, 526-27, 1592-93. Bullet fragments from Hoerner's

[16] Mrs. Hoerner's brother, Vincent Hedrick, testified that his sister could hyperventilate and tear up at will. 3RP 3299-3300.

head were also from a .38 or .357 jacketed lead hollow pointed bullet. 3RP 1597-98.

Both Mr. Hoerner and Mrs. Stenson were shot with hollow point bullets. 3RP 3596-97. Police found a bag containing various calibers of ammunition in a garage on Stenson's property, including .38 special ammunition, but there were no hollow point bullets inside. 3RP 2090, 2125-26. Two spent .38 special caliber cartridge cases were recovered from Hoerner's vehicle and identified as having been fired by the gun found near Hoerner. 3RP 1609-10, 2068. .38 special cartridge cases were also recovered from Hoerner's driveway, one of which was identified as having been fired by the gun found next to Hoerner. 3RP 772-73, 1611-13, 3246. Nine rounds of .38 special ammunition (jacketed hollow point) were retrieved from Hoerner's pants pocket during the autopsy. 3RP 889-90, 1615, 1799, 1811-12, 1901.

There was a coffee cup on the dryer of the utility room, with coffee still in it. 3RP 627, 1770, 2072. Mrs. Hoerner said her husband used it every morning. 3RP 1329. Mr. Hoerner's DNA was on the cup. 3RP 2519, 2537.

Police collected the jeans that Stenson wore that morning. 3RP 1651. Detective Martin did not take a photo of Stenson wearing the pants, although he acknowledged it would have been advantageous to do so to

see how his jeans fit him at the time. 3RP 1705, 1784. There was blood on the jeans. 3RP 678, 733, 1651-52.

There was blood in the driveway, near an entranceway to the residence, and in the laundry room. 3RP 461-63, 468, 537-39, 542, 608-09, 612, 627, 631-32, 2410-15, 2428-35. There was a scuff or skid mark in the driveway gravel. 3RP 559, 753. There were apparent blood droplets on the gravel. 3RP 753-56.

According to the State's pathologist, a gunshot wound to the head caused Hoerner's death. 3RP 1891-92. The pathologist opined the gun was discharged 1 1/2 to 2 inches way from the head, while acknowledging he was not an expert on the subject. 3RP 1874, 1905. Hoerner also had a deep, linear laceration on the back of his head caused by being hit hard with something heavy. 3RP 1847, 1864, 1870. An injury of that force would either stun a person or render him unconscious. 3RP 1867-68. There was a linear pattern abrasion on Hoerner's right cheek, which could be caused by an object with sharp edges. 3RP 1849, 1861. It was possible that the same object caused both injuries. 3RP 1865. Different kinds of weapons could have caused the injuries. 3RP 1908.

Stenson had a collection of nunchakus on the wall of his office. 3RP 629-30.[17] Office Peiper testified one nunchaku appeared to be missing from the wall, as there was nothing hanging on an available hook/wire. 3RP 640. That something was missing was only an assumption. 3RP 897. The bare hook/wire that the officer said he saw did not show up in the photo. 3RP 641, 897; Ex. 36. The grounds were thoroughly searched by police but no weapon, including any nunchaku, was found that could have caused Hoerner's head injuries. 3RP 2139.

The State's pathologist opined at the second trial that being struck by a nunchaku of the type hanging on the wall could have caused the blunt force injuries to Hoerner's head. 3RP 1870-71, 1889. At the first trial, this pathologist acknowledged that he told a defense investigator "damned if I know" when asked if a nunchaku caused the injury. 3RP 1913-15.

The defense forensic pathologist testified the injury to Hoerner's face could possibly have been caused by a weapon with sharp angles, such as a nunchaku. 3RP 3431-32, 3463. The bruise on Hoerner's cheekbone was consistent with face first fall onto a carpeted floor. 3RP 3417-18,

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[17] A nunchaku is a martial arts weapon consisting of two pieces of wood or metal held together by a length of cord or string, used as a blunt force weapon through a swinging motion. 3RP 643. Stenson had previous martial arts training. 3RP 1205, 1295-96, 2103, 3073; Ex. 260. Witnesses testified that Stenson had foot problems and was gimpy. 3RP 3007, 3048. Stenson told the police his feet hurt due to stress fractures. Ex. 274A at 11.

3437-38. That injury was most consistent with a rug burn, but the pathologist could not rule out a nunchaku as a cause. 3RP 3470-72.

Gravel was found adhered to Hoerner's arm during the autopsy. 3RP 1855. Gravel also adhered to Hoerner's buttocks, and was in his underwear. 3RP 1808-09, 1833, 1844. According to a State's expert, a gravel sample taken from Stenson's driveway and the gravel found adhered to Mr. Hoerner's body, were generally consistent; the latter could have come from former but the expert could not say unequivocally. 3RP 1959-60, 1963-64, 1966, 1977. A defense expert opined the gravel from Mr. Hoerner's body could have come from other locations in the area around Sequim, and there was no definitive correspondence between Hoerner's gravel and gravel from Stenson driveway. 3RP 3396, 3405-07.

There were abrasions on Hoerner's back, buttocks, arm, left wrist and palm, and a tear on his left elbow. 3RP 1847-1849. There was a pattern abrasion on the side of his knee. 3RP 1856-57.[18] The State's pathologist opined the elbow injury and buttock abrasions were caused by being dragged across a rough, gravel surface. 3RP 1855, 1858. The palm injury was consistent with falling with an outstretched hand onto a rough surface. 3RP 1852-53, 1887.

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[18] The abrasions could have been inflicted within hours of death. 3RP 1898.

Stenson's sweatshirt, however, tested negative for blood. 3RP 2271-72, 2929-30. There was no gunshot residue on Stenson's hands. 3RP 1736, 2691-92. Gunshot residue was found on Hoerner's hands. 3RP 2693-94.

Joseph Errera, a forensic serologist formerly employed by the FBI, testified that Hoerner could not be excluded as possible source of DNA on the stained area below the right knee of the pants worn by Stenson. 3RP 2279, 2328-29. Errera (actually his assistant) cut the bloodstained portion of the pants from the right knee area to conduct the DNA testing and took a photograph of that area before cutting the pants up. 3RP 2329-30, 2350-51; Ex. 155, 156 (enlargement of Ex. 155). The cuttings were apparently consumed as part of the DNA testing process. 3RP 2364.

Thomas Wall, a DNA analyst employed by a private company called Genelex back in 1993, examined bloodstains from the front left knee area and the front left cuff area of the pants. 3RP 2179-80, 2204, 2207-09. Wall testified that Mr. Hoerner was a possible source of the bloodstain from left knee area (the other stain could not be DNA-typed). 3RP 2217-21, 2231. Wall cut two bloodstains out of the pants to conduct the DNA test. 3RP 2231-32. The cuttings were then tossed out instead of being returned to Detective Martin. 3RP 2232.

Greg Frank, a forensic scientist at the Washington State Patrol crime lab, testified that there was only enough DNA in one of the stains on the pants for DNA typing purposes. 3RP 2512-13, 2519-20. Blood from that stain, which was taken from the front left leg near the cuff, matched Mr. Hoerner's DNA. 3RP 2520, 2522-23; Ex. 282.

Michael Vick, a DNA analyst formerly employed by the FBI, testified the blood sample taken from below the right knee of Stenson's pants matched Hoerner's blood. 3RP 2574-75, 2627, 2635.

Michael Grubb, a forensic scientist at the Seattle crime laboratory in 1993, testified there was blood spatter (airborne droplets) on the left knee area and left cuff area of the pants. 3RP 2393, 2454-56. There was also a bloodstain on the upper right thigh area. 3RP 2454. The stains around the knee area could be dripped blood or contact transfer. 3RP 2393, 2448-52.[19] Grubb relied on the photograph of the jeans made before the first stains were cut out. 3RP 2448 (Ex. 155, 156). Grubb opined the pattern of blood on Stenson's jeans could not have come from a blood transfer as Mr. Hoerner lay on the floor. 3RP 2457-58, 2461-65. Grubb further opined the stains were inconsistent with Stenson's explanation that he possibly knelt and slipped when he got up but never touched Mr.

[19] Grubb also testified that a stain was transferred from the pants being folded a few minutes after the blood was put there, and could occur while the person was still wearing the jeans. 3RP 2452-53.

Hoerner's body. 3RP 2466. Grubb acknowledged blood spatter analysis is more art than science. 3RP 2493.

Rod Englert, a self-described blood pattern expert and crime scene reconstructionist,[20] testified for the State. 3RP 2868. Three bloodstains on Stenson's jeans consisted of projected stains, one drip stain and a contact transfer. 3RP 2930-34. Based on their location, Englert opined the bloodstains could not have come from kneeling down. 3RP 2939-40, 2946. The blood from outside the house or from the utility room could not have been the source of blood on the pants because they had not been disturbed. 3RP 2942-44. The jacket was the most likely source of blood. 3RP 2951. Englert conceded opinions on bloodstain patterns are subjective. 3RP 2976.

Englert further opined the blood got on the pants during a struggle somewhere between the outside and coming inside to the bedroom. 3RP 2946-47. Englert theorized a violent scuffle occurred outside while Hoerner was clothed, continued to the laundry room, and ended with him being shot in the bedroom. 3RP 3753-57, 3759-60. In support of his theory that Hoerner was dragged at some point during the altercation, he pointed to what he described as a drag mark and dirt on the jeans, stress marks on the jacket interior, and stains on Stenson's right leg pant area.

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[20] Englert is not a certified forensic scientist. 3RP 2977.

3RP 3757-59. Englert would also expect to see scuff marks on Hoerner's shoes if he had been dragged, but did not see any. 3RP 3766.

Hoerner's tissue on the gun muzzle indicated that Mrs. Stenson was shot first. 3RP 3759. Englert believed Hoerner's body was posed to make it look like a suicide. 3RP 3760-63. Grubb, meanwhile, believed the gun had been placed or settled on Hoerner's hand after the hand had come to its resting place because the hammer of the gun was pressing down on the skin at the base of the thumb. 3RP 2417-19; Ex. 31.

Dr. Kiesel, a forensic pathologist testifying for the defense, opined Mr. Hoerner was not wearing underwear at time he received the abrasions because there was no blood on the underwear. 3RP 3414, 3419-21, 3426. Kiesel acknowledged there was a stain on the underwear and, assuming it was blood, Hoerner received the hip injury while wearing underpants but not the buttock injury. 3RP 3443-44, 3446-47. Kiesel would not expect the abrasions on Hoerner's legs to have occurred while he wore jeans. 3RP 3420. He opined Hoerner was most likely not wearing jeans at the time the abrasions on the buttocks and knees occurred. 3RP 3423. He would expect to see blood on the inside of the jeans if the injuries occurred while he wore them. 3RP 3454-55.

Dr. Kiesel would also expect to see a defect in clothing if the elbow abrasion occurred while he was wearing clothing. 3RP 3422-23.

He would be surprised to see that kind of abrasion on the elbow if Hoerner was wearing the jacket at the time. 3RP 3441. The dirt ground into the underwear was consistent with Hoerner being dragged. 3RP 3447. The gravel in the underpants was more consistent with being dragged than falling if he wearing underpants at the time. 3RP 3447. Kiesel would expect that the jeans would exhibit signs of scraping. 3RP 3420.

Head wounds tend to bleed a lot. 3RP 3449. If Hoerner's head were bleeding profusely, Kiesel would expect to see a trail of blood from Hoerner being dragged on the ground unless the clothing soaked it up. 3RP 3450. There was fair amount of blood on Hoerner's jacket, but not a lot. 3RP 3461-62, 3469. Kiesel would expect the blood to be on the person doing the dragging. 3RP 3450. The blood pattern on Stenson's jeans did not seem to come from dragging someone. 3RP 3465-67.

Kay Sweeney, a forensic scientist with expertise in blood spatter and crime scene reconstruction, testified for the defense[21] and opined the injury to Hoerner's left elbow either occurred before he wore the jacket or occurred when did not have the jacket on because blood was deposited on the inside of the jacket lining but there was no tearing of the jacket fabric.

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[21] Sweeney was the former director of the King County Sherriff's crime laboratory and the Seattle crime laboratory. 3RP 3518-19.

3RP 3517, 3524-25, 3551-52, 3585, 3632, 3724-25.[22] Sweeney further opined the injuries to Hoerner's buttocks occurred when he had his underwear on but not his pants because there was soil marks and abrading on the underwear, but no soil staining or abrading on waistband area of the pants. 3RP 3556, 3583-84. The elbow abrasion, the skin flap on the wrist area and the abrasion on the buttocks related to skidding backward or forward on a rough surface. 3RP 3598-99, 3637-38, 3722-23. Sweeney opined Hoerner's elbow and buttocks were exposed at the time he fell. 3RP 3599.

According to Sweeney, the gun was fired in close proximity to Mr. Hoerner's head while he was sitting on the bed. 3RP 3571. He opined the gunshot wound was self-inflicted. 3RP 3600.[23] He could not eliminate the possibility that someone else shot him, but believed it would be very awkward for someone to do so given the constricted space. 3RP 3600, 3702.

In an earlier declaration, Sweeney opined three drops on the lower left of cuff leg of Stenson's pants were the result of a blood transfer, not

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[22] Englert and Grubb testified there was a little tear or abrasion in the left sleeve of the jacket. 3RP 2427-28, 2463, 2485, 2928, 2947, 2950, 3755-56.

[23] Dr. Kiesel had seen suicides where the gun was fired 3-6 inches from the head. 3RP 3453.

direct spatter. 3RP 3642. Sweeney gave no opinion on how the stain on the right knee of Stenson's pants was made. 3RP 3692-93. Examination of the photograph of the intact pants was an insufficient on which to render an opinion on how the blood was deposited. 3RP 3606-09. He did opine that if Hoerner had been dragged, he would expect to see a blood trail (if his head was at an acute angle) and damage to Hoerner's clothing. 3RP 3726-27, 3RP 3731.

6. Insurance and finances

In 1991, Stenson purchased life insurance polices on himself (total of $350,000) and his wife ($100,000). 3RP 1025-26, 1037, Ex. 128a, 171, 360. In May 1992, he took out a $300,000 life insurance policy on his wife and on himself for the purpose of mortgage protection. 3RP 1026-27, 1035-36; Ex. 128b; Ex. 358. Stenson originally requested a life insurance policy only for himself, but the agent suggested he get a policy on his wife as well because it was customary. 3RP 1036.

Kit Eldredge, the owner of the property known as Dakota Farms, entered in to a buy-sell agreement with Stenson in 1990. 1RP 384-88. Under the agreement, Stenson lived and paid rent on the property with the understanding that he would buy the property in the future. 3RP 387. Sometime around August/October 1992, Eldredge told Stenson he wanted to accelerate the timetable for the buyout. 3RP 390. Stenson was fine

with the proposal, said that business was good, and that he would be in a position to purchase the property in the near future, perhaps in a month or two. 3RP 390-91. When that did not happen, Eldredge continued to speak with Stenson about the matter about once a month. 3RP 391. Eldredge last spoke with Stenson around January/February 1993, at which time he pressed for the sale. 3RP 392. Stenson said he would be coming into some cash within the next couple of weeks from the business and a boat sale or insurance payoff. 3RP 392. Stenson did not act stressed about Eldredge's desire to accelerate the buyout. 3RP 398. He was current on his rent payments. 3RP 397.

In 1993, Stenson told Fred Frost, a business prospectus preparer, that he needed money to develop the business. 3RP 1475-77. Frost prepared a cash flow prospectus to show potential investors. 3RP 1478-81; Ex. 66. Frost told Stenson a successful loan from an investor could take anywhere from two months to a year. 3RP 1481. There were two Canadian investors who were interested. 3RP 1498. There was no reason for Stenson to believe any loan money stemming from the prospectus would be available by March 1993. 3RP 1492.

Louie Rychlik testified that Stenson contacted him in February 1993 about drilling a well, but did not go through with it because he was out of money. 3RP 1384-92.[24]

In early March 1993, Stenson sought a business loan from a bank. 3RP 949-50. A loan officer visited Dakota Farms on March 22. 1RP 952-53. Towards the end of the meeting, Stenson handed over a loan proposal. 3RP 959; Ex. 66. When asked about his request, Stenson said he no longer had one because he had his finances all figured out. 3RP 959. The loan officer later reviewed the loan proposal, which reflected a request for a $500,000 loan to expand the business operation. 3RP 960, 967. The proposal represented he had $12,000 cash on hand. 3RP 960.

Lonny Boyd loaned Stenson $28,000 in 1992 for the bird business, to be paid off by March 1993. 3RP 1463-68; Ex. 273. The insurance company paid him $30,000 from one of the life insurance policies on Mrs. Stenson. 3RP 1468-69

In spring 1993, Vern Vorenkamp, Stenson's insurance agent and an investor in the farm, was expecting money from Stenson for two chicks produced by the birds he owned. 3RP 1016, 1018-21, 1032-33, 1201-02;

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[24] In an earlier defense interview, Rychlik did not mention anything about lack of money being the reason offered why the well drilling was not done. 3RP 1393, 3348. In a prior statement to Deputy Kirst in 1993, Rychlik related that Stenson said about one week before the deaths that he did not have funds to drill the well. 3RP 3839.

Ex. 263. Stenson paid Vorenkamp $10,000 around the time of Stenson's arrest. 3RP 1033.

Eldredge was the beneficiary of the life insurance policy on Denise Stenson in the original amount of $300,000 (later changed to $250,000). 3RP 394, 1036. He was informed of his status as the beneficiary at the time the policy was taken out. 3RP 1047-48.[25]

Stenson bought property from Carol Johnson, and by the terms of the contract Stenson was to pay off the amount owing by August 1994. 3RP 1200-01; Ex. 249. Johnson was added as a beneficiary on Denise Stenson's life insurance.[26] 3RP 1036-17; Ex. 359.

Dwayne Wolfe, a certified public accountant called as a witness by the State, conducted a financial analysis of the Dakota Farms business. 3RP 2729. Wolfe concluded it was a legitimate business. 3RP 2735. Business and personal funds were commingled, but this was legal and commonplace with small businesses. 3RP 2736-38, 2790. The business had more than $300,000 of gross receipts over two or three years. 3RP 2779-80.

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[25] Eldredge kept the life insurance money but deeded the land to the Stenson family, although he was under no legal obligation to do so. 3RP 394-95, 398-99.

[26] Countrywide was added as well. 3RP 1036-17.

The Dakota Farms Corporation had $3,400 in the bank account at the time of Mr. Hoerner's death. 3RP 2758. According to Wolfe, substantial liabilities existed as of March 1993, and the business may have been generating minimal profit. 3RP 2754-55. Wolfe identified a $49,000 potential liability to Mr. Hoerner. 3RP 2757, 2793. Whether this was actually a liability was questionable; the $49,000 could actually have been profit. 3RP 2790-93. Wolfe was shown not to take into account all financial records, including a $40,000 receipt. 3RP 2769-77, 2794-95. Wolfe maintained there were two receipts that could not be verified and the $40,000 receipt was partially accounted for in other records. 3RP 2837-38, 2846-47. There was a possibility that not all cash receipts were taken into account. 3RP 2774-76. Wolfe only looked at one account. 3RP 2750. The bookkeeping records Wolfe examined covered the Dakota Farms corporation, not Stenson in his individual capacity. 3RP 2796-97.

Evidence also showed that in 1989/1990, about $335,000 in insurance money related to the loss of a boat was paid out. to Stenson and the Perry family trust. 3RP 3223, 3227-29. Stenson received a total of $169,000 from the payout, with about $139,000 ultimately available to him. 3RP 3870, 3932-35.

Stenson told police that $167,000 in cash was missing from a filing cabinet in his office, in addition to some additional envelopes of money

totaling about $22,000. 3RP 1086; Ex. 274A at 13-14, 16. Stenson said the only people who knew about the money were his wife and Mr. Hoerner.[27] Ex. 274A at 15, 17.

7. Denise Hoerner: the other suspect

Denise and Frank Hoerner were married in November 1991. 3RP 1417. Mrs. Hoerner painted a portrait of herself as the perfect, devoted wife, getting up at 3:30 in the morning with her husband when he got up to get ready for work, putting his towel and clothes in the bathroom for him, and making his coffee and lunch. 3RP 1291-92.[28] Frank Hoerner's friend, Darryl Joslin, testified the relationship between Mr. Hoerner and his wife was perfectly fine. 3RP 1226. Rick Knodell, Joslin's father-in-law, testified along the same lines. 3RP 1233-35, 1279.

Other witnesses painted different picture. Rae Wagner (now Shulda) was Mrs. Hoerner's neighbor and friend. 3RP 3011, 3017-18. Mrs. Hoerner confided to her that there were marriage difficulties. 3RP 3017-18. There was conflict over finances; Mrs. Hoerner was dissatisfied and angry about not having more money given to her to spend on things. 3RP 3018-19. Mrs. Hoerner "was one that would explode a lot." 3RP

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[27] The person who installed the trailer hitch on the truck testified that Stenson told him that he had $167,000 hidden in his office. 3RP 2546.

[28] According to Sergeant Snover, Mrs. Hoerner told him in a March 29, 1993 interview that Mr. Hoerner made his own breakfast and coffee and that she stayed in bed. 3RP 3497-98.

3018. When she talked about the issue with Wagner, she was "kind of like out of control, angry, kind of all over the place." 3RP 3020.[29] The most recent blow out was a couple months before the death of Mr. Hoerner. 3RP 3020. Mrs. Hoerner said she would be better off financially if her husband died, and she would get more money than if they divorced. 3RP 3021.

There was a prenuptial agreement. 3RP 1417-18; Ex. 306. Vincent Hedrick, Mrs. Hoerner's brother, testified that Mrs. Hoerner thought the agreement would not apply after two years. 3RP 3297. Two months into the marriage, Mrs. Hoerner said she was "going to take that son of a bitch for everything he's got." 3RP 3286, 3288, 3296-97. Hedrick further testified that shortly before Mr. Hoerner's death, Mrs. Hoerner argued with her husband and expressed anger that her husband made her sign the prenuptial agreement. 3RP 3286-87.[30]

Mrs. Hoerner told Janette Oberman (Denise Stenson's sister) that Mr. Hoerner was a horrible husband and a bad father. 3RP 3052. She said

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[29] Sergeant Snover described Mrs. Hoerner as a "tiny, small, skinny woman. Frail actually, in my mind." 3RP 760. Mr. Hoerner was described as strong in the upper body, but he was only 145-55 pounds and 5'4" to 5'7" tall. 3RP 760, 1210, 1845

[30] Mrs. Hoerner took the agreement over to the Stenson residence about two weeks before her husband's death and showed it to Stenson. 3RP 1420, 1424. A copy of the agreement was later recovered from a desk in Stenson's home office. 3RP 561-62.

"super cruel" things like he was a "lousy lay." 3RP 3052.[31] Before Mr. Hoerner's death, Mrs. Hoerner told Oberman that she had boyfriends. 3RP 3057-58. Mrs. Hoerner said she wanted to divorce her husband on several occasions. 3RP 3052-53.[32] She went to see an attorney, who told her she was stuck with the prenuptial agreement. 3RP 3053. She was unhappy about that. 3RP 3053. Mrs. Hoerner had showed the prenuptial agreement to Oberman and Mrs. Stenson about three months before her husband's death. 3RP 3053-54. Mrs. Hoerner asked them if there was any way to get out of it. 3RP 3054. Oberman said there wasn't; which made Mrs. Hoerner unhappy. 3RP 3054.

At one point, Mrs. Hoerner made a comment about burning down her own house and "now I need to wait for Frank to be in here too and then I can get rid of both of them." 3RP 3055. In that way, she would collect insurance for the house and insurance on him. 3RP 3055. On several occasions, Mrs. Hoerner brought up the subject of insurance or

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[31] Stenson told police that the Hoerners had sexual problems in their relationship. 3RP 674-75. The two had not been getting along well, at some point Mr. Hoerner had hit her, and Mrs. Hoerner referred to him sometimes as "the little weasel." 3RP 684. A week before the shooting, Mrs. Hoerner was upset at Tracey Reed and "bitching" about her. 3RP 685. Mr. Hoerner responded "I would take her home and fuck her," which made Mrs. Hoerner mad. 3RP 685.

[32] According to Detective Martin's notes from an interview with Cheryl Fabel, Mr. and Mrs. Hoerner were having regular discussions about divorce and Mrs. Hoerner said she was not getting enough sex. 3RP 1754.

killing her husband in talking about wanting to leave him and not being able to get out of the prenuptial agreement. 3RP 3055-56.

Mr. Hoerner had two life insurance policies in the total amount of $150,000. 3RP 3500-01. Mrs. Hoerner told Detective Martin that she would get $50,000 as beneficiary of her husband's death. 3RP 1717, 3264. Martin later found out, before the second trial, about an additional $100,000 policy. 3RP 3264.[33] As a result of her husband's death, Mrs. Hoerner also inherited the house and obtained social security benefits through her son. 3RP 1425.[34]

Mrs. Hoerner called her insurance agent over to her house the same morning on which her husband died. 3RP 1412. They went to the Stenson residence that morning and asked about $10,000 that she thought Mr. Hoerner had brought over earlier.[35] 3RP 1403, 1413. Richard Lapinski, the insurance agent, testified that Mrs. Hoerner called him at

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[33] A policy contained a two-year suicide exclusion clause, which meant the insurance would return premiums but not otherwise pay out if the insured committed suicide during that period. 3RP 3857-58; Ex. 243. Mrs. Hoerner was present when the insurance agent went over the suicide exclusion clause in Frank's life insurance policy. 3RP 3845-46.

[34] Mrs. Hoerner received $64,000 in a wrongful death action, which she claimed went to the Stenson children. 3RP 1425. Janette Oberman denied that the Stenson children received anything. 3RP 3068.

[35] At trial, Mrs. Hoerner denied asking about the money, but Detective Martin testified that she did (per Deputy Dunn's report). 3RP 1413, 1712. Office Dunn testified that $10,000 was never found. 3RP 3250. Stenson told police that Hoerner did not bring any cash with him. 3RP 683.

9:30 a.m., just hours after Mr. Hoerner was killed. 3RP 3850-51. Lapinski cleaned out Mr. Hoerner's desk on March 25th before police arrived, looking for a will. 3RP 3853. Both Lapinski and her lawyer, Tim Robbins, were with her on March 26th when Officer Dunn interviewed Mrs. Hoerner. 3RP 1416-17, 3243, 3951. The attorney was retained to protect her civil interests, and Mrs. Hoerner requested that he remain for the interview. 3RP 3244.

Less than two weeks after her husband died, Mrs. Hoerner took a trip to Hawaii with another man. 3RP 1230, 1434, 1719, 3021. Someone else took care of her young son during that time. 3RP 1435, 3021-22. Upon returning, Mrs. Hoerner showed Wagner photos of her time in Hawaii, one of which showed her lying on the hood of a Ferrari in a string bikini with men posed around the car. 3RP 1434-35, 3022. Mrs. Hoerner dated other men after her husband's death. 3RP 1722, 3022-23, 3289-93.

Mrs. Hoerner sold or otherwise got rid of most of her husband's things a couple weeks after his death. 3RP 3023-24. She told Wagner that her husband was not the perfect man everyone thought he was. 3RP 3023. She did not portray herself as missing or mourning him. 3RP 3023. Mrs. Hoerner "went through money like it was water" after her husband's death, buying all sorts of things, including cars, trips and a house. 3RP 3023.

Mrs. Hoerner testified that Mrs. Stenson was her best friend. 3RP 1293-94.[36] She thought Mrs. Stenson's kids were "magnificent, beautiful." 3RP 1437. She called Mrs. Stenson three or four times every day. 3RP 1304-05. She went over to the Stenson home at least five days a week, sometimes more than once a day. 3RP 1305.[37]

But according to Janette Oberman, the relationship between Mrs. Stenson and Mrs. Hoerner changed in the six months leading up to the deaths. 3RP 3033, 3049. Things became strained, strange and creepy; for example, they would find her rifling through Mrs. Stenson's belongings without them being aware she was in the house 3RP 3049, 3051. Mrs. Stenson tried to pull away from Mrs. Hoerner by making up excuses for why she could not spend time with her. 3RP 3051.[38]

Mrs. Hoerner told Janette Oberman that she wished her husband was like Stenson and wanted the Stenson children for her own. 3RP 3056. Mrs. Hoerner wanted Mrs. Stenson's life, her house, and her family. 3RP 3057.

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[36] Mrs. Hoerner did not attend Denise Stenson's funeral. 3RP 1435.

[37] Stenson told Mrs. Hoerner that he did not like her, and that although her husband allowed her to "gallivant" around town, his wife was not going to. 3RP 1306.

[38] Debbie Samuelson, Denise Stenson's sister, testified that Mrs. Stenson avoided Mrs. Hoerner and tried not to take her calls. 3RP 2670-71.

On the evening of March 25 and thereafter, Mrs. Hoerner called Janette Oberman and asked "when are my kids coming home." 3RP 3061. Oberman became apprehensive and told Detective Martin about her concern. 3RP 3061. Afterward, Mrs. Hoerner told Oberman that she better keep her mouth shut, "you know what will happen" and asked her if she wanted to "wind up like your sister." 3RP 3062-63.

Police did not swab Mrs. Hoerner's hands for gunshot residue. 3RP 1716. Police did not test her clothing or search her vehicle. 3RP 1717. In an April 1993 letter, Detective Martin informed Mrs. Hoerner's insurance agent that Mrs. Hoerner was not a suspect. 3RP 1709-10, 1785. Afterward, Martin expressed doubt regarding Mrs. Hoerner's involvement, saying she was "very problematic" at times. 3RP 1794.

8. Theories of case

The State's theory of the case was that Stenson killed his wife to collect life insurance proceeds and killed Hoerner to escape the debt he owed and to blame Hoerner for the murder of Mrs. Stenson. 3RP 4077-78. The defense theory was that the State did not prove its case beyond a reasonable doubt. 3RP 4086-87. The defense argued Mrs. Hoerner was the killer. 3RP 4094-98, 4104-05, 4128-29. In the alternative, the defense did not rule out that Mr. Hoerner committed suicide after shooting Mrs. Stenson. 3RP 4128-29.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED STENSON'S CrR 3.3 RIGHT TO A SPEEDY TRIAL IN GRANTING THE STATE'S MOTION FOR CONTINUANCE PAST THE SPEEDY TRIAL DEADLINE ON AN UNTENABLE GROUND.

The trial court granted the State's motion to continue the trial date because the prosecutor needed more time to prepare. But the reason the prosecutor needed more time to prepare was because the prosecutor's office had not sufficiently staffed the case. The availability of a speedy trial under CrR 3.3 does not turn on the willingness of a prosecutor's office to devote sufficient resources to enable compliance with trial deadlines. The court abused its discretion in continuing the trial because the administration of justice does not require a continuance under such circumstances. Dismissal is required because the court did not rely on a tenable reason for continuing the case past the speedy trial deadline.

a. Over defense objection, the trial court granted the State's motion to continue the case because the prosecutor's office did not have enough staff to prepare for trial by the deadline.

On January 11, 2013, the trial court granted the defense motion to continue the trial date. CP 4222. The trial was reset for July 15, 2013, with an outside date of August 14, 2013. CP 4221.

On June 5, 2013, the State filed a written motion to continue the trial. CP 1640-47. The trial prosecutor represented she was the only prosecutor working on the case. CP 1641. Other attorneys in the prosecutor's office were swamped or otherwise tied up with work on other cases. CP 1641-43. She had the limited assistance of a half-time investigator. CP 1644. Her time was consumed by responding to defense motions and public record requests. CP 1641, 1644-45. She complained that Stenson had three attorneys working on his case.[39] CP 1641. The prosecutor originally believed the State's resources were adequate to bring the case to trial by July 8, 2013, but the "additional burdens" the defense had placed on her office had made it impossible for her to adequately prepare the case for trial. CP 1646. The prosecutor also reported that she

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[39] The court originally appointed three attorneys to represent Stenson. CP 4270, 4272, 4285. After the death penalty was taken off the table, the prosecutor suggested the court remove two of Stenson's attorneys. 1RP 18-19. Defense counsel objected on the ground that removal of one or more attorneys would impermissibly interfere with Stenson's constitutional right to maintain the attorney-client relationships. 1RP 32-33, 73-77; CP 4209-20. The court ultimately declined to remove the attorneys, but one of them ended up working pro bono. 1RP 81-82, 288; 2RP 169. In ruling on the issue, the court noted "I have no authority to restrict the amount of resources the State would apply to this case in any, way shape or form. You could choose to put 4 attorneys on the case and/or whatever, so you know, I have to treat both sides the same way." 1RP 81-82. The court continued "in terms of looking at resources, and that's never a basis for decisions in this case, it is interesting that it's the State that appears at the present time to have a very serious restriction and it is what it is. That's up for the prosecuting attorney to deal with and I'm sure she will." 1RP 82.

had taken time to care for an ill family member, and that the defense had not provided some discovery. CP 1643-44.

The defense filed a written objection to the State's motion to continue. CP 1280-81. The defense acknowledged the case was difficult to prepare but argued Stenson had "no control over how the Clallam County Prosecutor's Office staffs a case such as this" and it was "unreasonable for Mr. Stenson to be forced to remain in custody for an additional extended period, because the Prosecutor has elected to try this case by herself." CP 1280-81. The prosecutor should have asked for additional staffing. CP 1281.

The parties argued the motion for continuance at the June 12, 2013 hearing, their arguments tracking what was presented in the written submissions. 2RP 17-38. The prosecutor complained "the Defense has effectively papered me to death." 2RP 18. In response to the defense argument that the prosecutor's office should devote additional staffing to handle the workload, she said there was "no help to be had from within my office." 2RP 19. According to the prosecutor, the defense had used its substantial resources "in such a manner that overwhelms the State" and a continuance would ensure that both sides have a fair trial. 2RP 22-23.

The defense continued to vehemently object to any continuance of the trial date. 2RP 24. The State had three months to prepare the case

before defense counsel was even assigned following remand. 2RP 24. The defense thought the State already had the entire discovery since the police reports at issue were obtained from the State's files in the first place, but those reports possessed by the defense could be e-mailed to the State that very day. 2RP 26. Stenson had no control over "how Clallam County prosecutor mans the case," but in light of her obligations, the prosecutor should have gone to the commissioners and asked for assistance to help her prepare rather than trying to do it herself. 2RP 26.

The judge cited the requirements for granting a continuance under CrR 3.3. 2RP 29-30. He said the prosecutor's office had been "papered to death" by defense motions. 2RP 30. The judge focused on the disparity between the defense resources and the State's resources:

> The Defense team is fully staffed at this time, continues to be, with people and resources. The prosecution team is not. I can take judicial notice of that fact because Ms. Kelly's office practices in my court every day. I know who are the felony deputies that would be capable of assisting in a case like this. I know how she has staffed the prosecuting attorney's office, and superior court go through the same budget process every year, and in a time of dwindling resources at the county level, both budgets have been seriously impacted by economic conditions. Now, I am not going to tell the prosecuting attorney or anyone else how to manage their office. The prosecuting attorney is an elected public official. She has an independent department within county government, it is up to her to decide how to allocate resources. But I do know that she is under-staffed and I do not find her request unreasonable because I am dealing

> with the same mountain of material that has to be digested and responded to.

2RP 31.

The court went on to say there was a voluminous amount of material to go over because of the protracted state of the litigation over the years. 2RP 32-33. The public records requests compounded the work of the prosecutor's office. 2RP 33. There needed to be a level playing field, and the court was not going to force the prosecutor to go to trial when she represented that she cannot be prepared to go to trial on July 8. 2RP 34-35.[40] The trial court entered a written order continuing the trial on the basis that the continuance was required in the "administration of justice" under CrR 3.3(f)(2). CP 1270. According to the order, the State "needs additional time for trial in complex case and prejudice to defendant is minimal." CP 1270. The trial was reset to September 16, 2013. CP 1269; 2RP 38, 94.

b. An understaffed prosecutor's office is not a valid reason to continue the trial.

The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. State v. Kingen, 39 Wn. App. 124, 127, 692 P.2d 215 (1984). The "time for trial" rules in CrR 3.3 protect a

[40] The court also noted the defense still had some discovery to turn over. 2RP 34.

defendant's right to speedy trial by establishing standard time limits and requiring dismissal with prejudice if the speedy trial period lapses. State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009).

A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the commencement date or 30 days after the end of any excluded period. CrR 3.3(b)(1); CrR 3.3(b)(5) ("*Allowable Time After Excluded Period.* If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period."). Continuances are part of the excluded period. CrR 3.3(e)(3) ("The following periods shall be excluded in computing the time for trial: . . . *Continuances.* Delay granted by the court pursuant to section (f).").

Under CrR 3.3(f)(2), on the motion of a party, "the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance."

A trial court's grant of a motion for a CrR 3.3 is reviewed for abuse of discretion. State v. Saunders, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009). The issue is whether the trial court here abused its discretion in

granting the continuance over defense objection, extending the date of trial beyond the 60-day time limit. A trial court abuses its discretion if its decision is based on untenable grounds or made for untenable reasons. State v. Williams, 104 Wn. App. 516, 521, 17 P.3d 648 (2001).

The trial court granted the continuance because the prosecutor needed more time to prepare. In general, "[a]llowing counsel time to prepare for trial is a valid basis for continuance." State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). On the other hand, "[s]elf-created hardship is not an excuse for violating mandatory rules." State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978).

State v. Wake, 56 Wn. App. 472, 783 P.2d 1131 (1989) is instructive in this regard. In Wake, the trial court abused its discretion by granting the State's motion for a continuance "in the interests of justice" based on the unavailability of an expert witness from the State crime lab. Wake, 56 Wn. App. at 473. Wake applied the rationale of docket congestion as insufficient reason for a continuance to "the use of expert witnesses who are employed by the State and whose departmental budgets are subject to State budgetary constraints." Id. at 475. In holding the continuance was unjustified, Wake reasoned "the State has failed to keep pace with the growing number of drug cases, has an inadequate staff available for court testimony and, as a result, a logjam is being created. If congestion at the

State crime lab excuses speedy trial rights, there is insufficient inducement for the State to remedy the problem." Id.

In both Wake and Stenson's case, delay was attributable to constrained departmental budgets leading to insufficient staff to do what needed to get done in order for the trial to proceed in compliance with the speedy trial rule. But in Stenson's case, the problem leading to delay did not arise out of another State agency doing work on behalf of the prosecutor's office, but out of the prosecutor's office itself. The rationale of Wake is applicable here: if the budgetary constraints of the prosecutor's office excused speedy trial rights, there is insufficient inducement for the State to remedy the problem by ensuring sufficient staff is available to meet the demands of trials in a timely manner. Where, as here, a prosecutor's office is understaffed due to budget problems, the remedy is to increase the budget and the staff, not to sacrifice the defendant's speedy trial rights. A systemic problem in the prosecutor's office does not excuse its obligation to comply with speedy trial deadlines.

The trial court gave credence to the prosecutor's complaint that she was being "papered to death." 2RP 30. But the charges here are aggravated murder. In a case of such serious nature, it is to be entirely expected that competent defense counsel will aggressively litigate issues in an attempt to obtain the maximum advantage for the client. So it could

come as no surprise that defense counsel did so for Stenson. That being said, the amount of litigation that did take place in the form of defense motions was by no means unusual for a case like this.[41]

The bottom line, though, is that the right to speedy trial should not be contingent on the quality and vigor of the defense that a defendant mounts. That would create a perverse dynamic where a zealous defense that requires the prosecutor's time results in an excuse not to meet a speedy trial deadline, thereby incentivizing feckless defenses to ensure speedy trial compliance. Defense counsel has an ethical duty to zealously advocate on behalf of the client. None of the "paperwork" generated by the defense in this case, in the form of various motion or objections to various state motions, were frivolous. They were all made in good faith. Speedy trial deadlines do not yield to prosecutor office's staffing problems. The prosecutor's office must accommodate the speedy trial deadlines.

Flinn is distinguishable. A continuance was justified in that case because the defense notified the prosecutor of its intent to raise a diminished capacity defense shortly before the scheduled trial date,

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[41] Substantive defense motions included a successful motion for change of venue (CP 3609-45), motion to dismiss (CP 2398-2513), motion to suppress pants/gravel (CP 2010-41), and a motion to suppress statements made during the video walkthrough (CP 2338-50). In regard to the motion to dismiss, the "8 inches" of paper referred to by the trial court for dramatic effect in actuality consisted mostly of exhibits attached to the motion. 2RP 30; see CP 2619-3334 (the exhibits).

necessitating additional time for the prosecutor to get its own expert on the issue. Flinn, 154 Wn.2d at 196-97, 200-01. There is no indication in Flinn that the prosecutor failed to get an expert earlier because of staffing or budget limitations. The timing of the notice given to the prosecutor in that case created a bona fide reason for more time to prepare.

In Stenson's case, by contrast, the prosecutor simply was not able to get the case ready for trial because her office did not invest the resources to do it. Unlike Flinn, there was no emergent issue that created the need for additional time to prepare. As the Supreme Court has observed in another context, if "administration of justice" can be invoked at any time to grant a continuance, then "there is little point in having the speedy trial rule at all." State v. Adamski, 111 Wn.2d 574, 580, 761 P.2d 621 (1988). "'[P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.'" Kenyon, 167 Wn.2d at 136 (quoting State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)). A strict application of the rule requires that a prosecutor's office needs to allocate the resources needed to prepare a case in a timely manner consistent with the speedy trial rules. If the State chooses not to allocate those resources, then the result is not, as the State claims, an unfair trial

for the State. The result is dismissal of the case for failure to comply with the speedy trial rules.

The trial court erred in granting the State's motion for continuance. An understaffed prosecutor's office is not a valid reason to continue a case past the speedy trial deadline. The State created its own problem in failing to invest in the resources needed to handle Stenson's trial in a timely manner. Absent a valid reason for the continuance granted on June 12, 2013, the trial court's order granting the continuance was exercised for an untenable reason. "[U]nder CrR 3.3, once the 60 or 90 day time for trial expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case." Saunders, 153 Wn. App. at 220; see CrR 3.3(h) ("A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice."). In Stenson's case, the court's basis for the continuance was unlawful. The charges against him must therefore be dismissed.

2. THE TRIAL COURT ERRED IN FAILING TO GRANT STENSON'S MOTION TO DISMISS THE CASE IN LIGHT OF THE STATE'S MISMANAGEMENT OF THE CASE AND DUE PROCESS VIOLATIONS.

The trial court erred in denying appellant's motion to dismiss under CrR 8.3(b) because the government mismanaged the case. Agents of the State destroyed bloodstained portions of the pants worn by appellant on

the morning of the death before a bloodstain analysis could be done, failed to preserve the 911 call record showing when the call was made, failed to disclose Brady information, and otherwise mismanaged the investigation. Stenson's right to a fair trial was prejudiced as a result. In the alternative, the court erred in failing to dismiss due to the Brady violation or .the State's failure to preserve evidence.

a. The court erred in failing to dismiss under CrR 8.3(b).

In 2012, the Washington Supreme Court overturned Stenson's convictions because key evidence presented at trial had been tainted by the police. Stenson, 174 Wn.2d at 491-94. The State's lead detective, Monty Martin, improperly experimented with the pants prior to the 1994 trial. Photos show Martin wearing the pants with turned-out pockets and ungloved hands.[42] Id. at 479. Six days after Martin wore the pants for these photos, samples from the same pants pockets were tested for gunshot residue ("GSR"). Id. at 480. The Supreme Court concluded that Martin's experiments irreversibly contaminated the GSR testing and rendered any result meaningless and inadmissible. Id. at 479-80, 483.

Two key pieces of forensic evidence formed the basis for Stenson's convictions at the first trial: (1) GSR found inside the front right pocket of

[42] Martin admitted that he falsely swore that he wore gloves in handling the pants in connection with the reference hearing on the matter. 3RP 1741.

jeans that Stenson was wearing when the officers arrived at his house and (2) blood spatter on the front of those jeans that was consistent with Hoerner's blood protein profile. Id. at 478, 491. The Court observed "[h]ad the FBI file and photographs been properly disclosed here, Stenson's counsel would have been able to demonstrate to the jury that a key exhibit in the case — Stenson's jeans — had been seriously mishandled and compromised by law enforcement investigators." Id. at 492. The Court further concluded it was likely that "the State's mishandling of the jeans with regard to GSR testing would have led to further inquiry by Stenson's counsel into possible corruption of the blood spatter evidence. In that regard, Stenson's defense theory at trial could have taken into account the fact that the jeans may have been folded over when the blood spatter was wet. Instead, the jury was left with only one explanation for the blood spatter, which was that it could not have appeared on Stenson's jeans after Frank came to his final resting place." Id. The Brady violation undermined confidence in the jury verdict. Id. at 493-94.

On remand, the defense argued the State's mismanagement of the case, including failure to preserve evidence, lost witness testimony, and discovery violations, prejudiced Stenson's right to a fair trial, his right to

present a defense, and his right to effective assistance of counsel. 2RP 41-69; CP 956-63, 1288-1310, 1966-67, 2398-2513.

The trial court denied the motion. 2RP 90-94. The court believed dismissal was warranted where there was actual misconduct, as opposed to mismanagement. 2RP 91. The court found the prosecutor's office acted in good faith. 2RP 92. Further, the mistakes did not compromise Stenson's right to a fair trial because those mistakes could be exploited in cross-examination. 2RP 92-93. The loss of information and witnesses could be expected after a 20-year hiatus and impacted the State and the defense equally. 2RP 92-93. The State had already been severely sanctioned by having to endure a retrial. 2RP 93. The court summed up: "I think the dismissal is too severe a sanction, under the circumstances. I do not find that the government's mismanagement was intentional or in bad faith, and I do not find that it arises to the level that would justify a dismissal such as courts found was the case in the numerous cases relied upon by the Defense." 2RP 93-94.

CrR 8.3(b) authorizes the trial court to "dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). A trial court's CrR

8.3(b) decision is reviewed for abuse of discretion. State v. Martinez, 121 Wn. App. 21, 30, 86 P.3d 1210 (2004).

To support dismissal under this rule, the defendant must show "arbitrary action or government misconduct, which may include simple mismanagement." State v. Oppelt, 172 Wn.2d 285, 297, 257 P.3d 653 (2011) (citing State v. Michielli, 132 Wn.2d 229, 239-240, 937 P.2d 587 (1997)). The defendant also "must show actual prejudice affecting his fair trial rights." Oppelt, 172 Wn.2d at 297. For purposes of CrR 8.3(b), prejudice includes the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of her defense." Michielli, 132 Wn.2d at 240 (citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). "Fairness to the defendant underlies the purpose of CrR 8.3(b)." City of Kent v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011).

The trial court ruled Stenson suffered no prejudice to his right to a fair trial. The State's mismanagement, however, "interfere[d] with [his] ability to present his case" not only during his first trial but also his second trial. Sandhu, 159 Wn. App. at 841.

First and foremost, the State's destruction of bloodstained portions of the pants compromised Stenson's defense at the second trial. As a result of the pants being cut up by the FBI in 1993 and Genelex in 1994,

Stenson's forensic expert was unable to give a comprehensive, definitive opinion on how the blood got on those pants. Whether the blood was deposited when Stenson kneeled down next to Hoerner's body, or whether the blood was deposited from a violent interaction with Hoerner, was a key issue at trial. The State's mismanagement of the pants severely undermined the defense ability to call into doubt this critical aspect of the State's case.

To understand the mismanagement and its significance in this respect, it is necessary to summarize the relevant timeline of events in some detail. Grubb, the State's blood spatter analyst, was at the scene on March 25, 1993 and "noted some larger stains on the right knee area of those jeans." 3RP 2441-42. Unlike defense expert Sweeney, Grubb was able to look at the jeans before they were cut up. Grubb was aware that the blood pattern analysis should be done before the pants were subjected to DNA testing. 3RP 2480-81, 2489. But Grubb either did not inform Detective Martin of the needed sequence or he did but Martin did not tell the FBI of the needed sequence. 3RP 2506 ("if since he sent it to the FBI laboratory I would have hoped that he asked that they do blood spatter prior to typing or DNA"); CP 456, 489-90, 2166-67 (letter to FBI: "We leave the order of examination in your capable expert hands").

In a letter dated April 8, 1993, Detective Martin wrote a letter to the FBI lab requesting testing be done on various pieces of evidence. CP 2165-73. With regard to Stenson's pants, Martin requested "Locate and identify any blood present. Does it compare to either victim or the suspect? Does this garment have high velocity blood spatter due to proximity to a near contact head wound?" CP 2170.

The FBI, instead of conducting the bloodstain analysis first, cut out the bloodstained portion of the right knee area of the pants for DNA testing. CP 958. The FBI took one photo of that area of the pants before cutting them up. CP 959; 3RP 2264, 2329-30, 2350-51; Ex. 155, 156 (enlargement of Ex. 155). Errera, the FBI analyst, recalled the cuttings were consumed as part of the DNA test.[43] 3RP 2364.

Grubb examined the jeans in his lab on June 16, 1994 and produced his blood analysis report. 3RP 2447; CP 1051. Detective Martin delivered the pants to Genelex on June 21, 1994 for further DNA testing. CP 1054, 2276-78. Wall, the Genelex DNA analyst, cut

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[43] Errera testified at the first trial that excess cut out portions not consumed in analysis were part of Exhibit 165. CP 1010-11. The defense contended the cuttings were subsequently lost, as they were not located in the exhibit envelope when Sweeney went to check it in 1999. CP 957, 958-59, 1079, 1314-15, 1293-94. The State disputed the cuttings were lost, believing Errera's testimony was mistaken and the cuttings were consumed in analysis. CP 945-48. Errera's testimony at the second trial can be interpreted to mean all the cuttings were consumed through DNA analysis, although it is still less than clear. 3RP 2365.

additional bloodstains from the pants to conduct the DNA test. 3RP 2231-32; CP 1053-54, 2277. The cuttings were then tossed out. 3RP 2232; CP 1294.[44]

Defense expert Sweeney examined Stenson's jeans in April 1999 and photographs that had been made of the jeans. CP 2286. He noted the pants were folded over in a manner that allowed for blotting transfer of the original deposits on the knee adjacent to the fabric. CP 2287. He also noticed portions of the jeans had been cut out, including apparent blood spots on the right knee and one spot on the lower front left leg near the cuff. CP 2286. Sweeney believed three elongated spots on the front lower left leg near the cuff were the result of contact transference rather than blood spatter related to firearm discharge. CP 1061, 2029, 2286-87.

However, definitive analysis of the blood pattern was impossible due to the fact that the stain from the right knee area was cut out of the pants and then discarded. CP 1061, 2029. "In order for me to analyze the manner in which blood on the right knee was deposited on the pants, it would be necessary for me to view both the pants and the cutouts from the pants." CP 1061, 2287. As a result, the defense expert was able to

[44] Defense expert James examined the pants on July 8, 1994. CP 1248.

conclusively interpret the blood pattern evidence on the pants. CP 1076, 2029.

Sweeney explained that examination of the original evidence allows the expert to examine important aspects of the evidence, including depth of penetration, crusting, size, pattern and the presence of any trace materials on the stains. CP 961, 1075-76. Sweeney's ability to analyze the bloodstain on the right pant leg was compromised by being unable to examine the intact pants and cutouts. CP 961, 1076-77. The photographs taken of the pants before they were cut up could not take the place of laboratory examination. CP 961, 1077. Further, the excision of the stains on the lower left leg by Genelex precluded any blood analysis of that area. CP 961, 1077. Sweeney could not offer an opinion on this area based on the "limited-quality" photos. CP 1077

There was no adequate substitute for the actual pants in their original condition. CP 2031. A single Polaroid photo made before the pants were cut up purports to show them in their original state. CP 1077, 2031 (Ex. 155, 156). It is of limited quality. CP 1077-78, 2031. "The viewing of photographs cannot take the place of laboratory examination of the evidence by microscopy for the presence or absence of trace materials in the bloodstains." CP 1077.

Moreover, an expert must analyze how the blood drops appear in the context of the material itself. CP 2031. How the edges of the drops appear, the degree of saturation and other aspects of appearance are gone. CP 2031. According to Sweeney, the FBI could have just taken the centers of the bloodstains, leaving the perimeter or "halo" intact. CP 1543. This by itself would have enabled Sweeney to render an opinion regarding the origination of the blood spatter. CP 1543.

Further, the police failed to take a photo of Stenson wearing the pants, and so how the pants fit Stenson and how they appeared on him at the time is not available. CP 2031. This was important to Stenson's claim that the blood may have been transferred to the pants when he knelt down next to Mr. Hoerner's body. CP 2032.

The State mismanaged the case, to the detriment of Stenson's defense, by not ensuring that a bloodstain analysis occurred before the pants were cut up. At minimum, the state of the pants should have been meticulously documented and photographed before they were cut up to enable a later defense expert to conduct a comprehensive blood spatter analysis. That did not happen. As a result, the defense was severely handicapped at the second trial on the critical issue of how the blood ended up on Stenson's pants.

Furthermore, evidence has been lost during the 20-year delay between the first and second trials caused by the State's untimely disclosure of the Brady material. The dispatch record showing when the 911 call was made no longer existed at the time of the second trial. 3RP 746-48, 3473-76. The original 911 call record went missing sometime after the county changed its system from reel-to-reel to electronic format.[45] CP 2591-92, 2596. The trial court recognized this evidence "inexplicably" disappeared. 3RP 3954. Officers who responded to the scene gave various times for the call, ranging from 3:55 to 4:17 a.m. 3RP 580-81, 587, 605, 617, 721-22, 1780. The defense wanted the exact time of the 911 call to support an argument that the compressed time frame would not have allowed Stenson to kill both his wife and Mr. Hoerner and dispose of the weapons (which were never found). CP 2469-70. But that evidence was unavailable for Stenson's second trial.

To make matters worse, memories faded and witnesses became unavailable for the second trial. Cf. State v. Stein, 140 Wn. App. 43, 58, 57, 165 P.3d 16 (2007) (recognizing such factors go to prejudice). For example, Jack Mendorf was a witness that the defense would have called for the second trial, but he had passed away. CP 2473-75. As the defense

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[45] The dispatcher did not know when the 911 call was made. 3RP 434. She said she gave that information to Bruneau, the prosecutor for Stenson's first trial. 3RP 450.

argued, Mendorf "said in a police interview that Denise Hoerner appeared on his door step, clad only in Frank's robe, asking what happened to Frank, where is Frank, before she could have known about the murders had she not been involved in them. He is the only person who could testify to that and he's gone." 2RP 59.

Deanne Chapman was another potential witness that was unavailable for the second trial. She now had memory problems. CP 2529; 2RP 63-64. As part of the motion to dismiss, the defense included a sworn declaration from Deanne Chapman made in 1999 at a time when her memory was intact. CP 3143 (Ex. 35 to motion). According to the declaration, Chapman lived with David Oberman at Dakota Farms for about three months beginning in late fall of 1994. Id. They talked about the murder weapon, a .357. Id. Oberman told her that the .357 belonged to him, but that it disappeared from his travel trailer several weeks before the murders. Id. Oberman did not tell the police about his ownership of the .357 because he was afraid it would implicate him in the murders. Id. During Chapman's stay at Dakota Farms, Oberman asked her to hide a "digging bar," which was an approximately 5' by 2" round bar that tapered to a sharp point. Id. Oberman told her that this bar was used to hit Frank Hoerner on the head. Id. Chapman took the bar and hid it in the ostrich barn. Id.

The defense also submitted a declaration from the defense investigator who interviewed Chapman in 2008. Chapman told him that Denise Hoerner started coming over to Dakota Farms for private meetings with David Oberman about twice a week approximately two to three months before Chapman moved out. CP 2520-21. In April 2013, a defense investigator interviewed Chapman; her memory of events related to the case had faded and did not recall some events from her prior declaration. CP 2529. Chapman's lost memory prevented the defense from presenting David Oberman as another suspect in this case.

Actions warranting dismissal take many forms, including untimely disclosure of information to which the defense is entitled shortly before trial or in its midst.[46] Here, the State did not disclose the Brady violation related to the mishandled pants until many years after the first trial. If dismissal is warranted when Brady information is not disclosed until the eve or midst of trial, then dismissal is warranted when it is not disclosed

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[46] See Martinez, 121 Wn. App. at 23 (failure to timely disclose Brady materials); State v. Brooks, 149 Wn. App. 373, 385, 203 P.3d 397 (2009) (violation of discovery rules and deadlines, including delayed disclosure of witness lists and documents); State v. Sherman, 59 Wn. App. 763, 768-69, 801 P.2d 274 (1990) (delayed disclosure of records that were important to cross-examine a State's witness); State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980) (State failed to timely provide information and lab reports to defense counsel).

until well after trial, by which point other important witnesses or evidence have become unavailable.

The trial court emphasized the State did not act in bad faith. But there is no bad faith requirement. 2RP 91-92. To the extent the trial court ruled otherwise, it erred. To justify dismissal under CrR 8.3(b), the State's actions "need not be of an evil or dishonest nature; *simple mismanagement is sufficient*." Michielli, 132 Wn.2d at 239 (quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). There would be no second trial had Detective Martin not mishandled Stenson's pants, leading to Stenson's wrongful conviction in 1994. That Stenson's first trial was flawed, and 20 years passed, is the State's fault.

The trial court opined the loss of information and witnesses after a 20-year hiatus impacted the State and the defense equally. 2RP 92-93. The only showing, however, was the one-sided impact on the defense through the loss of witnesses that had information favorable to the defense. The defense, meanwhile, had no expert witness to render a definitive opinion on significance of the bloodstained pants because of pants were cut up before the intact pants could be comprehensively documented and a blood analysis conducted.

The trial court reasoned the State's "mistakes" did not compromise Stenson's right to a fair trial because they could be exploited in cross-

examination. 2RP 92-93. The problem, though, is that those mistakes prevented the complete defense that could have been raised had those mistakes not been made. Lost witnesses and lost memories were not coming back. Chapman's lost memory, for example, ensured that there was no admissible evidence to establish David Oberman as another suspect.[47] Cross-examination of police officers is no substitute. The jury cannot understand the significance of police not conducting an adequate investigation or failing to turn over information without the defense being able to put the substance of what was lost before the jury.

For example, the court precluded the defense from cross-examining officers on the lack of police investigation into David Oberman as another suspect in this case: "I'm not going to allow the Defense to point the finger at other suspects under the guise of questioning the adequacy of the investigating officers' investigation." 1RP 395-96. The defense was handicapped as a result. In the same vein, the trial court ruled the defense would not be allowed to inform the jury about why a new trial was needed, which prevented jurors from understanding the magnitude of the State's mishandling of the pants. 1RP 214-17; 3RP 198.

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[47] David Oberman was no longer alive. Had Chapman been available to testify, Oberman's statements to her would have been admissible as statements against penal interest under ER 804(b)(3).

The trial court's conception of prejudice was too narrow. For the reasons described above, the court abused its discretion in failing to dismiss the case under CrR 8.3(b).

b. Dismissal is warranted due to the Brady violation.

The defense alternatively argued the charges should be dismissed because the Brady violation impacted Stenson's right to present a defense and a fair trial so severely that dismissal was necessary. CP 2498-2505. In 2009, more than a decade after Stenson's first trial, the State revealed that it withheld evidence from the defense, including: (1) photographs of Detective Martin taken after the murders, which showed Detective Martin wearing Stenson's jeans with the right pocket turned out and showing the detective's ungloved hands; and (2) an FBI file containing the GSR test results that revealed that another individual performed the tests than FBI Special Agent Ernest Peele, an expert witness who testified at trial and implied that he himself had performed the tests. Stenson, 174 Wn. 2d at 479. Both of these violations related to Stenson's pants, the most important piece of evidence in the State's case. CP 2504.

A violation of the State's Brady obligations may demand dismissal. Martinez, 121 Wn. App. at 36. This is because serious, irreparable damage both to the defense and to the adversarial process may occur when Brady evidence is withheld. See United States v. Bagley, 473 U.S. 667,

682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (where evidence not disclosed, "the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued."). Charges may be dismissed on the ground of outrageous government conduct if the conduct amounts to a due process violation or where the investigatory or prosecutorial process has violated a federal constitutional right and no lesser remedial action is available. United States v. Barrera-Moreno, 951 F.2d 1089, 1091-92 (9th Cir. 1991). A Brady violation resulting from flagrant and prejudicial misconduct can justify dismissal. United States v. Struckman, 611 F.3d 560, 577 (9th Cir. 2010).

In Martinez, the trial court dismissed the charges against the defendant based on a Brady violation. Martinez, 121 Wn. App. at 36. The State failed to timely reveal the existence of a police report that indicated that one of the weapons used in an assault had been stolen several months earlier, a fact which conflicted with a State witness' testimony. When the report was used during trial, the prosecutor told the court that this mistake was inadvertent — he thought that his office had sent the report to the defense counsel. Id. at 30-31. Trial proceeded and ended with a hung jury, and the trial court declared a mistrial. Id. at 29. After the trial, the State filed amended charges and the defendant moved to dismiss under CrR 8.3(b). The trial court granted the motion, concluding the State's

misconduct rose to the level of a Brady violation, and a violation of the defendant's due process rights. Id. at 32-33. The Court of Appeals affirmed: "the untimely revelation of exculpatory evidence here constituted governmental misconduct," which satisfied a CrR 8.3(b) dismissal "[e]ven if this misconduct is the result of mismanagement rather than deceit." Id. at 34. The late disclosure of the report prejudiced the defendant's right to counsel "because late discovery compromised defense counsel's ability to adequately prepare for trial" and his right to effective assistance of counsel." Id. at 34-35. "[I]f the State knows that the most severe consequences that can follow from withholding exculpatory evidence . . . is that it may have to try the case twice, it will hardly be seriously deterred from such conduct in the future." Id. at 35-36.

In Stenson's case, the Brady evidence was not disclosed until many years after the first trial. Contrary to the trial court's determination, dismissal, rather than a new trial, is the necessary remedy. "In the drive to achieve successful prosecutions, the end cannot justify the means." Martinez, 121 Wn. App. at 35. Fundamental fairness mandates that the State not now have another opportunity to prosecute a so badly bungled on the first go around. Here, as in Martinez, there is "no appropriate lesser sanction than dismissal of the charges in this case." Id. at 36. A new trial "would advantage the government, probably allowing it to salvage what

the district court viewed as a poorly conducted prosecution" by giving it "a chance to try out its case[,] identify[ ] any problem area[s], and then correct those problems in a retrial, and that's an advantage the government should not be permitted to enjoy." United States v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008).

c. Dismissal is warranted under the federal test for destruction of evidence.

The Fourteenth Amendment to the United States Constitution guarantees that criminal prosecutions will conform to prevailing notions of fundamental fairness, including a meaningful opportunity to present a complete trial defense. California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). The State must preserve material exculpatory evidence to comport with the essential due process rights to fundamental fairness and a meaningful opportunity to present a complete defense. State v. Burden, 104 Wn. App. 507, 511-12, 17 P.3d 1211 (2001).

"It is clear that if the State has failed to preserve 'materially exculpatory evidence' criminal charges must be dismissed." State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). "In order to be considered 'material exculpatory evidence,' the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable

evidence by other reasonably available means." Wittenbarger, 124 Wn.2d at 475 (citing Trombetta, 467 U.S. at 489).

If the evidence does not meet this test and is, instead, only "potentially useful," reversal is still required if the State acted in bad faith. Wittenbarger, 124 Wn.2d at 477 (citing Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). Stenson thus need not prove the destroyed evidence was materially exculpatory in order to prevail on a due process claim. He has met his burden if he proves the police acted in bad faith in failing to preserve potentially useful evidence. Youngblood, 488 U.S. at 57; Wittenbarger, 124 Wn.2d at 477. The record in this case demonstrates the bad faith of the State and its agents in failing to preserve bloodstain evidence from the pants before a bloodstain analysis could be done, and Stenson was denied due process as a result.

Bad faith will not be found where police followed normal procedures in destroying evidence. State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992). Conversely, a failure to follow "established procedures" is probative evidence of bad faith, although it does not inevitably establish as much. United States v. Elliott, 83 F. Supp.2d 637, 647 (E.D. Va. 1999)[48] (citing United States v. Deaner, 1 F.3d 192, 200

[48] Elliott, 83 F. Supp.2d at 647-48 ("Where, as here, there is no evidence of an established practice which was relied upon to effectuate the

(3rd Cir. 1993)); cf. State v. Groth, 163 Wn. App. 548, 560, 261 P.3d 183 (2011) (Division One declining to find bad faith in absence of evidence that any explicit regulation or policy was violated), review denied, 173 Wn.2d 1026, 272 P.3d 852 (2012). A cavalier attitude towards the preservation of evidence that should be preserved under police regulation has been held to constitute bad faith. State v. Durnwald, 163 Ohio App.3d 361, 370-71, 837 N.E.2d 1234 (Ohio Ct. App. 2005) (suppressing any evidence that could have been recorded by an erased videotape as remedy).

Here, Grubb was aware that the blood pattern analysis should be done before the pants were subjected to DNA testing. 3RP 2480-81, 2489. But either Grubb did not inform Detective Martin of the needed sequence or Detective Martin did not inform the FBI before the FBI cut off a bloodstained portion of the pants to conduct the DNA test. 3RP 1741-42, 2506; CP 2166-67. The FBI, acting on the State's behest, destroyed the bloodstain around the knee area before a bloodstain analysis could be conducted. CP 958. Further, the prosecutor and police allowed Genelex

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destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test.").

to cut out additional bloodstained pieces of the pants in June 1994, after State expert Grubb performed his bloodstain examination. CP 1053-54, 1542, 2021, 2277; 3RP 2447. As a result, the defense was unable to conduct a comprehensive blood pattern analysis based on the intact pants. 3RP 2934. This constituted a reckless disregard for the preservation of critical evidence, and as such amounted to bad faith destruction.

d. Dismissal is warranted under an independent due process test based on the Washington Constitution.

Assuming arguendo that Stenson cannot establish bad faith, he advances an alternative basis for dismissal based on the Washington Constitution: Washington's due process clause is more protective than its federal counterpart in cases where the government negligently destroys material evidence of a crime. If the destruction of crucial evidence in this murder prosecution did not violate the federal due process clause, the charges should be dismissed for violation of Stenson's right to due process under the Washington Constitution. Wash. Const. art. I § 3.

Washington previously used a different test to assess destruction of evidence claims. Washington courts determined, after a review of the entire record, whether there was a "reasonable possibility" that the evidence destroyed by law enforcement was "material to guilt or innocence and favorable to the appellant." State v. Wright, 87 Wn.2d 783,

789-90, 557 P.2d 1 (1976); accord State v. Vaster, 99 Wn.2d 44, 50, 52, 659 P.2d 528 (1983). The motive in destroying evidence was irrelevant except insofar as it might raise an inference that the evidence was harmful to the State. Wright, 87 Wn.2d at 791-92; Vaster, 99 Wn.2d at 50.

The Washington Supreme Court, however, later held that article I, section 3 is interpreted identically to the Fourteenth Amendment when the government destroys evidence of a crime, and that the applicable standard is the one set forth in Youngblood. Wittenbarger, 124 Wn.2d at 474, 481. A decision by the Supreme Court is binding on all lower courts in the state. 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). The Court of Appeals has therefore declined to reach a challenge to Wittenbarger. Groth, 163 Wn. App. at 560-61. But Stenson challenges the holding of Wittenbarger to preserve the issue for further review. Requiring Stenson to prove government bad faith in destroying evidence of potential exculpatory value before relief is available does not comport with due process under the Washington Constitution.

i. Washington's due process clause should be interpreted independently from the Fourteenth Amendment in the destruction of evidence context.

State constitutions were originally designed as the primary protection of individual rights. Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution, p. 3 (Conn. 2002). To find that a

Washington state constitutional provision supplies broader protections than the federal constitution, however, requires the court to analyze six non-exclusive criteria: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) pre-existing state law, (5) structural differences between the state and federal constitutions; and (6) matters of particular state of local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

Article I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law." This language is virtually identical to the Fourteenth Amendment. Even where state and federal constitutional provisions are identical, it is possible that the intent of the framers of the state constitution was different that that of the federal framers or that a different intent may be found in a different provision of the state constitution. Gunwall, 109 Wn.2d at 61; Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 514 (1984).

Concerning the third Gunwall factor, there does not appear to be any legislative history from the constitutional convention that demonstrates whether the state due process clause should be interpreted

differently than the federal one. See Ortiz, 119 Wn.2d at 303 (citing Journal of the Washington State Constitutional Convention, 1889, at 495-96 (B. Rosenow, ed. 1962)).

Regarding the fourth factor of independent state law, Washington previously used a different test that the one announced in Youngblood. In determining if an individual's right to due process was violated by the State's destruction of evidence, Washington courts determined, after a review of the entire record, whether there was a "reasonable possibility" that the evidence destroyed by law enforcement was "material to guilt or innocence and favorable to the appellant." Wright, 87 Wn.2d at 789-90; accord, Vaster, 99 Wn.2d at 50, 52. Bad faith for potentially useful evidence was not a requirement. Vaster, 99 Wn.2d at 50; Wright, 87 Wn.2d at 791-92.

Moreover, in contrast to the federal court system, Washington recognizes criminal defendants are entitled to copies of the information possessed by the State in order to prepare a defense. Court rules require the prosecutor to disclose a wide variety of evidence to the accused. CrR 4.7(a), (c), (d), (e), (h); State v. Boyd, 160 Wn.2d 424, 431-35, 158 P.3d 54 (2007); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

The fifth Gunwall factor, differences in structure between the state and federal constitutions, always supports an independent constitutional

analysis because the federal constitution is a grant of power from the states whereas the state constitution represents a limitation on the State's power. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Finally, state law enforcement measures are a matter of state and local concern. Young, 123 Wn.2d at 180. So is the fundamental fairness of trials within our state. State v. Bartholomew, 101 Wn.2d 631, 643-44, 683 P.2d 1079 (1984). As a result, "[r]ules concerning [the] preservation of evidence are generally matters of state, not federal, constitutional law." Trombetta, 467 U.S. at 491 (O'Conner, J., concurring). The final Gunwall factor thus points towards an independent evaluation of Stenson's case given our state's interest in encouraging fairness in its justice system, which calls for policies that encourage rather than discourage the preservation of evidence.

In his concurring opinion in Youngblood, Justice Stevens agreed with the result reached by the majority but not with the federal rule of law it established: "In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Youngblood, 488 U.S. at 61 (Stevens, J., concurring). That proposition applies to Stenson's case. Washington, through its state due process clause, should join the states

that have adopted an independent approach under their state constitutions.[49]

ii. The due process test set forth in Wright and Vaster requires dismissal.

In Wright, the State failed to preserve most of the physical evidence remaining at the scene of a murder after the body was removed, and the defendant was convicted upon largely circumstantial evidence. Wright, 87 Wn.2d at 785-86. The Supreme Court could not determine if the destroyed evidence would have been favorable to the defense or material to guilt or innocence, but it was obvious the evidence could have assisted the defendant. Id. at 787-88, 790. The defendant's due process rights were violated because there was a "reasonable possibility" the destroyed evidence was "material and favorable to the defense." Id. at 792. In determining remedy, the court weighed (1) the degree of negligence or bad faith, (2) the importance of the lost evidence, and (3) the evidence of guilt adduced at trial. Id.

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[49] A number of states have rejected the Youngblood rule and used an independent analysis under their respective state constitutions. State v. Tiedemann, 162 P.3d 1106, 1116 (Utah 2007) (citing cases from eight other states); Daniel R. Dinger, Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood, 27 Am. J. Crim. L. 329, 348-53 (2000) (13 states have rejected Youngblood's bad faith requirement).

In Stenson's case, the State was at least negligent in failing to ensure bloodstained portions of the pants were not destroyed before they could be adequately documented and subjected to a comprehensive blood pattern analysis. The destroyed evidence was material and could have helped Stenson. The pants were the key piece of forensic evidence at trial. Given the importance of the evidence destroyed, and the circumstantial nature of the State's case, the charges should be dismissed, and the trial court erred in refusing to order this remedy. See Wright, 87 Wn.2d at 792-93 (dismissal warranted due to serious violation of due process).

3. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE PANTS EVIDENCE.

As an alternative to dismissal, the defense argued the trial court must suppress the pants evidence to ensure Stenson received a fair trial. CP 956-62, 1534-50, 2010-41, 2511. The defense contended "the pants themselves (and photographs of the pants) should not be admitted as evidence for expert analysis regarding how the blood got on the pants." CP 962. The trial court abused its discretion in denying the motion to suppress because suppression was the only means to avoid prejudicing Stenson's right to a fair trial.

a. Summary of the CrR 8.3(b) and due process arguments in support of suppression.

The defense contended the pants should be suppressed due to the destruction of evidence, in violation of Stenson's right to due process. CP 2025-32.[50] The bloodstains cut from the pants were a key piece of evidence. CP 2028. Defense expert Sweeney's ability to render an opinion on how the blood got there was compromised by the pants being cut up. CP 1061, 2029. As a result, the defense expert was able to conclusively interpret the blood pattern evidence on the pants. CP 2029.

In addition to the due process argument, the defense advanced the alternative theory that the pants should be excluded under CrR 8.3(b). CP 2032-2036. Even if the trial court did not abuse its discretion in denying dismissal, the pants were so mishandled and compromised through government misconduct that suppression was the remedy. CP 2033. The State mismanaged the key piece of forensic evidence used against Stenson at trial. The bloodstained portions of Stenson's pants were cut up before the blood analysis occurred and then were discarded. Because of the insufficiency of the photograph and the destruction of bloodstained portions of the pants, the defense was deprived of the opportunity to

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[50] The defense originally sought to suppress evidence that gravel adhered to Hoerner's body because the gravel taken from Stenson's driveway had gone missing, but later agreed the gravel from the driveway had not been lost. 1RP 219.

obtain an expert opinion to comprehensively counteract the State's expert opinion on the significance of the bloodstains. CP 1542-43, 2022-23, 2029, 2286-87.

The trial court ruled the problems with the pants went to weight, not admissibility, as the defense could argue the issues to the jury. 1RP 131-38.

b. The pants should have been suppressed pursuant to CrR 8.3(b).

While dismissal is authorized by CrR 8.3(b), courts have recognized dismissal is an extraordinary remedy and is unwarranted in cases "where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct." State v. Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). Again, simple mismanagement is sufficient to show government misconduct. Michielli, 132 Wn.2d at 239. Prejudice to a fair trial occurs when the right to be represented by counsel who has a sufficient opportunity to prepare a material part of his defense has been compromised. Price, 94 Wn.2d at 814.

The trial court denied the motion to suppress because defense counsel could argue the defects in the evidence to the jury. 1RP 131-38. But being able to make an argument does not cure the prejudice to Stenson. See United States v. Cooper, 983 F.2d 928, 932 (9th Cir. 1993) ("General

testimony about the possible nature of the destroyed [evidence] would be an inadequate substitute for testimony informed by its examination."). The prejudice is that the defense expert was not able to give a definitive opinion on the blood evidence due to the compromised nature of the pants. The State's experts, feeling no comparable restraint, were able to give damning opinions on the matter. One of those experts, Grubb, was able to examine the pants in his laboratory before they were cut up a second time by Genelex, thus giving the State an edge for the bloodstain analysis. 3RP 2447; CP 1051, 1054, 2276-78. That put Stenson at a disadvantage as he sought to persuade jurors that the State had not proven its case.

Under these circumstances, the pants needed to be suppressed to ensure Stenson received a fair trial. See Marks, 114 Wn.2d at 732 (reversing trial court's dismissal under CrR 8.3(b) because "[a]ny possible prejudice resulting from the improper search and seizure procedure has been handled by the suppression of the evidence seized in the search."); State v. Grant, 9 Wn. App. 260, 266-67, 511 P.2d 1013, (upholding the trial court's denial of dismissal where the suppression of an illegal tape ensured absence of any prejudice to the defendant), review denied, 83 Wn.2d 1003 (1973).

c. The pants should have been suppressed under a due process destruction of evidence theory.

The analysis related to the due process test under the federal constitution set forth at section C. 2. c., supra and the due process test under the Washington Constitution set forth at section C. 2. d., supra is incorporated here. The difference is remedy. "Although there is a broad range of sanctions available to the trial court confronted with destruction of evidence . . . dismissal is the appropriate sanction if a lesser remedy is ineffective to assure a fair trial." State v. Boyd, 29 Wn. App. 584, 590, 629 P.2d 930 (1981). If, however, this Court determines the lesser sanction of suppression of evidence related to the pants is sufficient to assure a fair trial, then the convictions should be reversed and a retrial granted at which the pants evidence is excluded.

In the event this Court determines the failure to exclude the pants evidence does not alone warrant reversal, it should be considered as part of the cumulative error analysis advanced in section C. 9., infra of this brief.

4. THE TRIAL COURT ERRED IN REFUSING TO GIVE THE SPOLIATION INSTRUCTION PERTAINING TO THE PANTS.

The trial court erred in refusing to give the defense's proposed spoliation instruction for the pants worn by Stenson and subsequently tested. The legal requirements for such instruction were met and the State

cannot overcome the presumption that this instructional error affected the outcome.

The defense proposed the following instruction:

> If you find that the State lost or destroyed or mutilated, altered, concealed or otherwise caused portions of the pants where the State contends blood spatter or transfer to be present to be unavailable, and the missing portions of the pants would have been material in deciding the material issues in this case, then you may infer that the evidence would have been unfavorable to the State. You may consider this, together with the other evidence, in determining the issues of the case.

CP 380.

The defense filed a written motion in support of this instruction. CP 488-503. The State objected to it. CP 445-54. The trial court refused to give it.[51] 3RP 3953, 3956-57. The court believed the instruction constituted a comment on the evidence. 3RP 3953. The court also ruled the instruction was inappropriate because the State did not act in bad faith in failing to preserve the pants in an intact state. 3RP 3956-57. The defense took exception. 3RP 3978.

A trial court's refusal to give a jury instruction based on the evidence is reviewed for abuse of discretion; the refusal to give a jury

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[51] The defense also proposed a spoliation instruction for the missing PenCom dispatch record showing when the 911 call was made. CP 379, 383-92. The trial court denied this proposed instruction as well. 3RP 3953-57. Error is not assigned to the court's denial of the spoliation instruction pertaining to the 911 record.

instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Here, the court refused the missing evidence instructions based on its erroneous view of the law that (1) bad faith needed to be shown; and (2) the instructions constituted a comment on the evidence. "A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law." State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). The trial court erred in refusing to given the instruction because, contrary to the court's belief, bad faith is not a prerequisite in obtaining a missing evidence instruction and the instruction is not a comment on the evidence.

a. The requirements for the spoliation instruction were met.

"When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the nonproducing party." Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 689, 871 P.2d 146 (1994) (citing Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)). In deciding whether to apply a spoliation inference, two general factors are considered: (1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the adverse party. Tavai v. Walmart Stores, Inc., 176 Wn. App. 122, 135, 307 P.3d 811

(2013) (citing Henderson v. Tyrrell, 80 Wn. App. 592, 607, 910 P.2d 522 (1996)). "In weighing the importance of the evidence, we consider whether the adverse party was given an adequate opportunity to examine it." Tavai, 176 Wn. App. at 135. "As for culpability, we examine whether the party acted in bad faith or conscious disregard of the importance of the evidence or whether there was some innocent explanation for the destruction." Id. In this regard, consideration is also given to whether the party violated a duty to preserve the evidence and whether the party knew the evidence was important to the pending litigation. Id.; Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654 (2006).

The trial court refused to give the instruction because it did not find the government acted in bad faith in destroying portions of the pants. 3RP 3956-57. But bad faith is not a necessary prerequisite for a spoliation instruction. Spoliation "encompasses a broad range of acts beyond those that are purely intentional or done in bad faith." Homeworks, 133 Wn. App. at 900 (citing Henderson, 80 Wn. App. at 605). The Henderson court acknowledged that "conscious disregard" for the importance of evidence is sufficient. Homeworks, 133 Wn. App. at 900 (quoting Henderson, 80 Wn. App. at 609). It is therefore possible that a party may be responsible for spoliation without a finding of bad faith. Homeworks, 133 Wn. App. at 900.

Defense counsel also pointed out a spoliation instruction is very similar to a "missing witness" instruction. 3RP 3978-79. Under the "missing witness" doctrine, "'where evidence which would properly be a part of a case is within the control of the party whose interest it would be to produce it,'" and that party fails to do so, the jury may draw an adverse inference from that failure. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)). To be entitled to the instruction, a deliberate suppression of evidence need not be shown. Blair, 117 Wn.2d at 488. Based on Homeworks and Blair, the trial court was wrong in predicating the spoliation instruction on bad faith.

The record demonstrates a conscious disregard for the importance of the pants evidence. It is indisputable that the pants constituted the key piece of forensic evidence used against Stenson at trial. There were no eyewitnesses to the deaths. The bloodstain evidence and associated analysis constituted the cornerstone of the State's theory of guilt. Grubb, the State's bloodstain analyst, realized the importance of conducting a bloodstain analysis on the intact pants before they were cut up for DNA testing. Yet he either did not tell Detective Martin that the pants should be examined for bloodstains before being cut up or Martin did not tell the

FBI that the pants should be examined for bloodstains before being cut up. 3RP 2506; CP 456, 489-90. Either way, the State is at fault.

The State elicited evidence that the FBI cut up the pants for DNA testing without conducting the bloodstain analysis because the FBI office to which the pants were sent did not have a bloodstain analyst on staff at the time. 3RP 2360-62. That still leaves the question, though, of why the FBI office did not tell Detective Martin, or anyone else connected with the prosecution, about the lack of a bloodstain analyst on staff before destroying the integrity of the pants in this fashion. Had the FBI done so, then alternative arrangements could have been made to ensure someone else did the bloodstain analysis before the destructive DNA testing occurred. The State offered no explanation for why the FBI did not notify the Sheriff's Office or the prosecutor's office that a blood analyst was unavailable and that it would go ahead with the destruction of the bloodstained portion of the pants through DNA testing unless other arrangements were made. 3RP 2364 (FBI analyst Errera did not call Detective Martin or anyone else).

These circumstances show a conscious disregard of important evidence. At minimum, a comprehensive assessment of the bloodstains (including location, depth, texture etc.) through careful documentation and

clear photographs would have provided a basis for a later defense expert to examine the evidence and reach a definitive opinion.

The trial court stated, "I have not heard there was any alternative to removing some of those stains, testing them and thereby consuming the material on which the stains were found." 3RP 3957. But according to defense expert Sweeney, the FBI could have just taken the centers of the bloodstains, leaving the perimeter or "halo" intact. CP 1543. This by itself would have enabled Sweeney to render an opinion regarding the origination of the blood spatter on the right knee. CP 1543.

Further, as explained above, there were alternatives to avoiding the destruction before the bloodstain analysis took place. The trial court's conception of what might be an alternative was unduly constricted. By fixating on the lack of a different method of DNA extraction at the time, the court lost sight of the bigger picture in which the government could have preserved the bloodstains for later review through careful measurements before the bloodstained portions of the pants were destroyed.

Homeworks is instructive. That case involved a civil claim by a general contractor (Homeworks) against a subcontractor (Wells and Thompson) for deficient installation of stucco on a house. Homeworks, 133 Wn. App. at 894. The trial court applied the spoliation inference

against Homeworks because the homeowners repaired the house before Wells and Thompson could inspect the damage. Id. The Court of Appeals held the spoliation inference was unwarranted. Id. at 894-95.

The Court observed a party must do more than disregard the importance of the evidence; the party must also have a duty to preserve the evidence. Id. at 900. It acknowledged a party may have a general duty to preserve evidence on the eve of litigation, but this duty did not extend to evidence over which a party has no control. Id. at 901. The general contractor (Homeworks) and its insurance company (State Farm) had no duty to notify the subcontractors (Wells and Thompson) that the homeowners might repair the house because Homeworks/State Farm did not control the house and had no access to the premises being repaired. Id. at 894. As a result, "neither Homeworks nor State Farm was responsible for 'spoliation' of the evidence when the homeowners repaired the damage to the house before the subcontractors could hire experts to examine the house." Id. at 894-95. "Homeworks/State Farm had no control over the [homeowners] and because they did not know the [homeowners] were going to repair the house, they are not at fault for destroying evidence." Id. at 900.

Stenson's case presents the opposite dynamic. The State controlled the pants from the minute they were taken from Stenson. The FBI,

working on behalf of the State, destroyed a bloodstained portion of the pants through DNA testing before any bloodstain analyst examined the pants, let alone a defense expert. The FBI, and by extension the State, were responsible for the destruction. The same goes for the State and Genelex. The State undoubtedly knew the evidence was important to the pending litigation. Homeworks, 133 Wn. App. at 900. And a defense bloodstain expert was not given an adequate opportunity to examine the pants, either before or after the destruction occurred. Tavai, 176 Wn. App. at 135. The State failed to offer a satisfactory explanation for the destruction of the pants before they could be assessed for blood spatter. The spoliation instruction proposed by the defense was therefore proper.

b. The instruction was not a comment on the evidence because it did not convey the judge's personal attitudes about a factual issue in the case.

Further, contrary to the trial court's belief, the missing evidence instruction was not a comment on the evidence. Article IV, section 16 of the Washington Constitution prohibits the trial court from instructing a jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). "A jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence

by the trial judge." State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001).

The trial court never explained why it thought the instruction at issue here was a comment on the evidence. The instruction does not require the jury to draw a negative inference. That is left up to the jury. CP 380 ("you may infer that the evidence would have been unfavorable to the State"). Indeed, even the issue of whether the evidence was lost, destroyed, mutilated, altered, concealed or otherwise rendered unavailable is expressly left up to the jury. CP 380 (If you find . . ."). Nothing in the instruction reflects the trial court's personal attitude towards the merits of the case or of the particular evidence at issue.

Missing evidence instructions have been given in the past. See State v. Campbell, 103 Wn.2d 1, 18-19, 691 P.2d 929 (1984) (no constitutional error in failing to preserve police notes of interview with defendant in part because a "missing evidence" instruction "significantly aided" the defense); see also Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring) (government's failure to preserve evidence did not require reversal for several reasons, including that the trial judge instructed the jury "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest," which turned the uncertainty as to what

the evidence might have proved to the defendant's advantage). The instruction should have been given here. There was no legal impediment to it.

c. The instructional error was prejudicial.

"Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact." State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011); see also Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988) (trial court's refusal to give instruction may deprive defendant of fair trial guaranteed by due process); U.S. Const. amend XIV; Wash. Const. art I, § 3.

Where, as here, a constitutional error — denial of Stenson's due process right to have his defense theory presented to the jury — benefitted the prevailing party, namely the State, there is a presumption that the error was harmful. Koch, 157 Wn. App. at 40. To avoid reversal, the State must prove that the error was not prejudicial by showing, beyond a reasonable doubt, that the jury would have reached the same verdict even if the trial court had given the disputed instruction. Id.

The State cannot meet its burden. The pants worn by Stenson formed a crucial part of the State's case. The pants were the key piece of forensic evidence used against Stenson. The State's expert witnesses relied on the pants to opine that the blood was transferred to the pants as a result of a struggle with Hoerner, not as a result of kneeling down next to Hoerner's body in the bedroom after he was already shot. The missing evidence instruction, had it been given, would have placed these expert opinions in a different light, giving the jury the option to discount those opinions through the adverse inference available through the instruction.

The State might argue that defense counsel could still argue the jury should draw an adverse inference against the State, thereby ameliorating any prejudice resulting from the absence of these instructions. But "[a] jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). "[L]awyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). Allowing defense counsel to make the argument does not cure an error in failing to instruct, particularly where the instructions directed the jury to "disregard any remark, statement or argument" that was not supported by the court's instructions. CP 284 (Instruction 1).

In the event this Court determines the instructional error standing alone does not warrant reversal, it should be considered as part of the cumulative error analysis advanced in section C. 9., infra of this brief.

5. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE STATE'S WITNESS — THE OTHER SUSPECT IN THIS CASE — EXPRESSED HER OPINION THAT STENSON WAS GUILTY OF KILLING HER HUSBAND.

Mrs. Hoerner, the other suspect in this case, expressed her direct opinion to the jury that Stenson was the killer. Her testimony was an impermissible opinion on Stenson's guilt. The trial court erred in denying the defense motion for mistrial because the irregularity was serious and the curative instruction could not have been effective.

a. After being told not to express any opinions in testifying, Mrs. Hoerner expressed her opinion that Stenson was the killer.

Before Denise Hoerner testified, defense counsel commented on her inappropriate behavior during a pre-trial interview and requested that she be warned to just answer the questions put to her as opposed to making an outburst and causing a mistrial. 3RP 1195. The prosecutor agreed Mrs. Hoerner's behavior during the defense interview was poor and represented that she had been told to just answer the questions. 3RP 1196. The prosecutor said she would remind her again but that she had no control over her. 3RP 1196.

Just before taking the stand, the judge spoke with Mrs. Hoerner about the expectations for her testimony. 3RP 1285-87. The judge acknowledged she was an emotional person, and warned her behavior during the defense interview might cause a mistrial if repeated in the courtroom. 3RP 1286. Mrs. Hoerner assured the judge "I know the difference between behavior in a courtroom and not, sir, yes" and that such behavior would not be repeated. 3RP 1286. The judge asked her to just answer the questions put to her: "Don't elaborate or editorialize or offer opinions that haven't been asked for." 3RP 1287. Mrs. Hoerner said she would comply. 3RP 1287.

Examination began with the prosecutor asking a few preliminary questions regarding her son and Frank Hoerner's adoption of him. 3RP 1288. When the prosecutor asked if the adoption was finalized, Mrs. Hoerner responded "Um, we got the name changed and everything and afterwards we saw -- we saw a lawyer prior to Darold killing Frank." 3RP 1288. The defense objected, the judge sustained the objection, and instructed the jury to disregard the "last remark." 3RP 1289.

After a recess during the prosecutor's direct examination, the defense moved for a mistrial due to Mrs. Hoerner's testimony naming Stenson as the killer. 3RP 1312-13. Defense counsel described it as a "deliberate outburst on her part to prejudice my client." 3RP 1313. The

prosecutor predictably did not think it was intentional and did not warrant a mistrial because the court struck the comment and admonished the jury. 3RP 1313.

The court denied the motion for mistrial. 3RP 1313. While acknowledging the outburst was "unfortunate, to say the least," the court emphasized that it instructed the jury to disregard the comment: "We have a very attentive jury. I have to assume they will follow my instructions I think they're well aware at 3 weeks into this trial that the comment was on the very issue that they have to decide and it's up to them, not up to Mrs. Hoerner to decide. So I don't think the prejudice has been shown to the extent there was any -- I think it willing [sic] be overcome by my instructions which I expect the jury to follow." 3RP 1313. The judge made a similar comment after the court recessed for the day. 3RP 1354.

The judge anticipated the denial of the mistrial motion would be an assignment of error on appeal. 3RP 1507. After Hoerner finished her second day of testimony, the judge returned to the matter in an effort to supplement the record. 3RP 1506-13. Mrs. Hoerner's improper remark about Stenson killing Frank was unsolicited. 3RP 1507. It was made "quite forcefully so that there is no question it was heard at least by some of the jurors." 3RP 1507. Mrs. Hoerner improperly expressed an opinion on the ultimate issue, which no witness is allowed to do. 3RP 1508. The

judge then complained appellate courts occasionally find abuse of discretion without giving any deference to the trial judge who had first-hand observation and knows the context.[52] 3RP 1508. The judge then made an effort to make the issue appeal-proof. The judge said he was entitled to deference because he had 48 years of trial experience, including six as a trial judge. 3RP 1509. He had managed the case for nine months, and ordered a change of venue to Kitsap County at great inconvenience and expense. 3RP 1509. After observing how distraught Mrs. Hoerner became during her testimony, hyperventilating at times, the judge concluded she was either unable to comprehend his earlier warning or was unable to conform her behavior and emotions to the norm. 3RP 1509-11. Her behavior was not feigned or purposeful and, when "certain buttons were pushed, she completely lost it." 3RP 1511.

The jury was attentive, according to the judge, and it would come as no surprise to them that Mrs. Hoerner would think Stenson killed her

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[52] The judge's attitude toward appellate courts found further expression at sentencing, during which the judge addressed the Supreme Court's reversal of Stenson's original convictions, reading at length from Justice Jim Johnson's dissent, pointing out the majority overrode the determination of the original trial judge (Judge Williams) that no prejudice ensued from the Brady violation, and concluding "At this point Justice Johnson's words in his dissent now somewhat what prophetic as does the decision of Judge Williams who presided over the first trial, that timely disclosure of the so-called Brady material would not have affected the outcome." 1RP 460.

husband. 3RP 1512. The judge believed the prejudice to Stenson was "minimal, if any." 3RP 1512. The judge did not know how the jury would react to the content of her testimony in terms of credibility, but he thought the jury would follow his instruction and ignore the remark. 3RP 1512.

Defense counsel supplemented the record with his belief that Mrs. Hoerner feigned much of what she was doing in court. 3RP 1513. When she left the court, she was observed immediately laughing in the hallway with Joslin and Knodell.[53] 3RP 1513-14. Counsel reiterated the jury could not ignore her testimony and it was highly prejudicial to Stenson. 3RP 1514.

The judge did not find anything unusual in Mrs. Hoerner engaging in behavior that was "diametrically opposed to what we saw on the witness stand." 3RP 1514. The judge again said he was not a psychologist but did not think her behavior could be feigned and, if it were, it "would be an academy award performance."[54] 3RP 1514.

Shortly thereafter, the defense made another motion for mistrial, after it came to counsel's attention that Mrs. Hoerner whispered "liar, liar,

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[53] On cross-examination, Hoerner claimed not to recall laughing in the hall with Joslin. 3RP 1398.

[54] Mrs. Hoerner's brother testified later on that Mrs. Hoerner could hyperventilate and tear up at will. 3RP 3299-3300.

liar" to the jury during her cross examination. 3RP 1523-24. The jury was brought in and asked if any member had heard Mrs. Hoerner say anything. 3RP 1528-29. Juror 2 reported that Mrs. Hoerner looked over to the jury and made multiple comments to the effect that Stenson was the person who did the murders. 3RP 1530-31. Juror 8 heard her say "sorry" a couple of times. 3RP 1532-33. Juror 9 heard her talk about not getting birds. 3RP 1534-35. Juror 12 heard her make comments, and "some of her comments were things like, um, liar, she would turn and look and go he's lying, he's lying. That kind of thing." 3RP 1536. Juror 13 heard her say something about the whole property being fenced. 3RP 1537-38. In response to court questioning, all the jurors said what they heard had no effect on them. 3RP 1531-33, 1535-38.

Defense counsel believed Mrs. Hoerner was acting inappropriately on purpose. 3RP 1539. The court denied the motion for mistrial, accepting the jurors' representations that Mrs. Hoerner's comments had no effect on them and they could be fair and impartial. 3RP 1540.

b. Given the seriousness of the irregularity and the dubious effect of an instruction to disregard, the trial court abused its discretion in failing to grant a mistrial.

A criminal defendant is guaranteed the right to a fair trial by article I, sections 3 and 22 of the Washington Constitution as well as the Sixth and Fourteenth amendments. State v. Mullin-Coston, 115 Wn. App. 679,

692, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107 (2004). The erroneous denial of a motion for mistrial violates that right. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983).

The trial court's decision to deny a motion for a mistrial is generally reviewed for an abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). A trial court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his right to a fair trial. Escalona, 49 Wn. App. at 254. In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was capable of curing the irregularity. Id.

Violation of a pre-trial order is a serious trial irregularity. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Right before Mrs. Hoerner took the stand, she assured the judge that she would abide by the judge's directive to just answer the questions put to her without offering any opinions. 3RP 1286-87. Right after Mrs. Hoerner started testifying, she violated that order by opining that Stenson killed Frank Hoerner. 3RP 1288. In denying the motion for mistrial, the trial court made a concerted effort to absolve Mrs. Hoerner of any intentional wrongdoing. The court focused on her distraught behavior during the later parts of her testimony

as proof that she could not control herself, but Mrs. Hoerner injected her improper opinion in the very beginning of her testimony on a preliminary manner, before she engaged in what the defense would call histrionics.

But whether Mrs. Hoerner deliberately violated the court's order is irrelevant and distracts from the real issue. In considering the prejudicial effect of a trial irregularity, "the judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" Weber, 99 Wn.2d at 164-65.

The irregularity here is of constitutional magnitude. State v. Quaale, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014). No witness lay or expert, may opine as to the defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Mrs. Hoerner's opinion that Stenson killed Frank Hoerner implicates Stenson's right to a fair trial under article 1, section 21 of the Washington State Constitution and the Sixth Amendment to the United States Constitution. State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). "These provisions guarantee a criminal defendant the right to a fair trial and an impartial jury. Lay witness opinion testimony about the defendant's guilt invades this right." Johnson, 152 Wn. App. at 934.

Similarly, impermissible opinion testimony regarding the defendant's guilt "violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Quaale, 182 Wn.2d at 199. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" Montgomery, 163 Wn.2d at 590 (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Opinion testimony is unfairly prejudicial to the defendant because it invades the exclusive fact-finding province of the jury. Johnson, 152 Wn. App. at 930.

Mrs. Hoerner's testimony that Stenson killed Frank Hoerner was a direct and explicit opinion on guilt. 3RP 1288. In light of the constitutional rights violated, there is no question that the irregularity is serious.

The second factor in assessing the effect of an irregularity is whether the statement in question was cumulative of other evidence properly admitted. Escalona, 49 Wn. App. at 254. There was no other evidence consisting of an opinion that Stenson was the killer. The case against Stenson was circumstantial. No other evidence directly tied

Stenson to the murder of Frank Hoerner. Mrs. Hoerner's impermissible opinion testimony was singular. It cannot be considered cumulative because it was of a different nature than the various strands of circumstantial evidence that were admitted elsewhere.

The third factor is whether the irregularity could be cured by an instruction to disregard the remark. Escalona, 49 Wn. App. at 254. The court here gave such an instruction, but some errors simply cannot be fixed in this manner. See Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk into the jury box, you can't instruct the jury not to smell it."); Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

While jurors are presumed to follow the court's instructions to disregard testimony, "no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255 (in assault prosecution for threatening complainant with a knife, testimony that Escalona stabbed someone else in the past required a mistrial, despite court's curative instruction) (quoting State v. Miles, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968) (prejudicial effect of testimony

suggesting defendant had committed other crimes was not removed by trial court instruction to disregard)).

As courts have recognized, there are times when jurors cannot reasonably be expected to insulate themselves from a prejudicial reference. Mrs. Hoerner's testimony falls into this category. Mrs. Hoerner was the other suspect in this case. The central defense theory was that she was the killer. She drew attention to herself through her dramatic expressions of emotion while on the stand. She was a spectacle. And she was a pivotal figure in this case. Under these circumstances, the jury could not reasonably be expected to just forget what she said. They could not be reasonably expected to ignore her explicit opinion that Stenson was her husband's killer.

The judge's determination that the instruction to disregard cured the prejudice must be assessed in light of statements made in other contexts that suggest the judge was invested in seeing the trial through to the end. The judge earlier informed the defense: "One thing the Defense team may not know, one of the reasons I am so adamant on getting this to trial in September is I'm going to retire at the end of this year and it would be an absolute travesty to have to start over again with a new judge in 2014." 1RP 224. At sentencing, the court stated with reference to how he handled the proceedings: "My ultimate goal was to make sure no matter

what the outcome of the second trial was, there would never be a trial number 3." 1RP 462. The judge's willingness to find no prejudice here must be assessed in light of all the circumstances. The judge's own concern over avoiding a third trial is one of them.

An opinion on guilt does not always require reversal. See State v. Thompson, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998) ("In light of the cumulative evidence of recklessness and the trial court's reasonable instruction to disregard Detective Genther's statement, the irregularity here was not so egregious as to deny Ms. Walker a fair trial."). Conversely, improper testimony may not always be susceptible to a curative instruction. State v. Hager, 171 Wn.2d 151, 160, 248 P.3d 512 (2011). "Each case must rest upon its own facts, and in some instances the error may be so serious that an instruction, no matter how framed, will not avoid the mischief." State v. Morsette, 7 Wn. App. 783, 789, 502 P.2d 1234 (1972) (quoting State v. Albutt, 99 Wn. 253, 259, 169 P. 584, 586 (1917)).

The prejudice against Stenson was compounded when Mrs. Hoerner repeatedly muttered that Stenson was the murderer during cross examination. One juror heard her do this. 3RP 1530-31. Another juror heard Mrs. Hoerner say "he's lying" and "liar, liar." 3RP 1536. Those jurors denied the statements had any effect, but "it is 'unlikely that a prejudiced juror would recognize his [or her] own personal prejudice - or knowing it,

would admit it.'" Wayne R. LaFave et. al, Criminal Procedure, § 22.3(c), at 308 (2d ed. 1999) (quoting A. Friendly & R. Goldfarb, Crime and Publicity 103 (1967)).

A mistrial is warranted when an irregularity in the trial proceedings, when viewed against the backdrop of all the evidence, is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008); Weber, 99 Wn.2d at 164. Witness opinion on guilt is a constitutional error that the State must prove is harmless beyond a reasonable doubt. Quaale, 182 Wn.2d at 201-02. Again, the backdrop here is that the case against Stenson was circumstantial. The evidence allowed for competing inferences on whether the State proved its case beyond a reasonable doubt. Mrs. Hoerner's improper opinion on guilt may have tipped the scales in favor of the State. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn.2d at 70. Such is the case here. The convictions should be reversed.

In the event this Court determines this irregularity standing alone does not warrant reversal, it should be considered as part of the cumulative error analysis advanced in section C. 9., infra of this brief.

6. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A DEFENSE WITNESS'S PRIOR DRUG CONVICTIONS UNDER ER 609.

The trial court erred in admitting evidence of prior drug convictions under ER 609(a) to impeach a defense witness. These prior convictions were irrelevant to the witness's credibility, and the court failed to analyze on the record exactly how the drug convictions were probative of truthfulness and why any probative value outweighed prejudice.

a. The court admitted evidence of a defense witness's prior drug convictions over defense objection.

Defense witness Rae Wagner (Shulda) was Mrs. Hoerner's neighbor and friend in the early 1990's. 3RP 3011, 3017-18. According to Wagner, Mrs. Hoerner confided there were difficulties in her marriage. 3RP 3017-18. Mrs. Hoerner was dissatisfied about not having more money and she was angry at her husband about finances. 3RP 3018-20. Mrs. Hoerner said she would be better off financially if Frank died, and she would get more money than if they divorced. 3RP 3021.

Wagner further testified that less than two weeks after her husband died, Mrs. Hoerner took a trip to Hawaii with another man.[55] 3RP 3021. Upon returning, Mrs. Hoerner showed Wagner photos of her time in Hawaii, one of which showed her lying on the hood of a Ferrari in a string

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[55] Someone else took care of her son during that time. 3RP 3021-22.

bikini with men posed around the car. 3RP 3022. Mrs. Hoerner also dated other men after Frank's death. 3RP 3022-23. Mrs. Hoerner sold or otherwise got rid of most of Frank's things a couple weeks after his death. 3RP 3023-24. Mrs. Hoerner "went through money like it was water" after Frank's death, buying all sorts of things, including cars, trips and a house. 3RP 3023. She told Wagner that Frank was not the perfect man everyone thought he was. 3RP 3023. She did not portray herself as missing or mourning him. 3RP 3023.

The above testimony was all elicited by the defense on direct examination. Such testimony supported the defense theory that Mrs. Hoerner was the real killer, as she had motive to kill her husband and her actions shortly after his death did not comport with those expected of a grieving widow. Her trip to Hawaii, involvement with other men, spending spree and expressed bitterness toward her husband supported the defense argument that she wanted to get rid of her husband to benefit financially and to pursue relationships with other men.

The court, however, allowed the State to impeach Wagner with evidence of prior drug convictions, the most recent of which occurred in 2011. 3RP 3027-31. The State argued evidence of prior drug convictions was admissible under as impeachment material under ER 609. 3RP 3028-29. Defense counsel objected, arguing the drug convictions had "nothing

to do with truth telling." 3RP 3030. Counsel pointed out "there has to be a finding under 609(a) that the probative value of the evidence outweighs the prejudice, and I don't think that showing has been made." 3RP 3031. The court responded, "Well, I do find that. I think it goes right to the credibility of the witness's testimony. I think it should be allowable. Let the jury determine the issue of credibility. I think the State is entitled for the jury to know that those facts exist." 3RP 3031. The State then elicited Wagner's testimony that she had been convicted of drug offenses more than once for which she had been sent to prison, the most recent occurring in 2011. 3RP 3030-31.

b. The court failed to articulate why the evidence supposedly impacted credibility and why such evidence was more probative than prejudicial.

ER 609 governs use of prior convictions for impeachment purposes. ER 609(a) provides:

> For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

Crimes of dishonesty are per se admissible under ER 609(a)(2) if they are less than 10 years old. State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991). But ER 609(a)(2) does not apply to drug convictions because they are not crimes of "dishonesty or false statement." State v. Hardy, 133 Wn.2d 701, 707, 946 P.2d 1175 (1997). The inquiry for drug convictions focuses on ER 609(a)(1), which allows admittance of prior felony convictions only if "the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered." Hardy, 133 Wn.2d at 707.

Prior convictions are only "probative" under ER 609(a)(1) to the extent they are probative of the witness's truthfulness. Id. at 707-08. "Prior drug convictions are generally not probative of a witness's veracity and thus are usually inadmissible for impeachment purposes under ER 609(a)(1)." Id. at 715. "Simply because a defendant has committed a crime in the past does not mean the defendant will lie when testifying." State v. Jones, 101 Wn.2d 113, 119, 677 P.2d 131(1984), overruled in part on other grounds by State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Drug convictions therefore "have little to do with a defendant's credibility as a witness." Hardy, 133 Wn.2d at 704-05 (quoting Jones, 101 Wn.2d at 122). There is "nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful." Hardy, 133 Wn.2d at 709-10.

"[P]rior convictions not involving dishonesty or false statements are not probative of the witness's veracity until the party seeking admission thereof shows the opposite by demonstrating the prior conviction disproves the veracity of the witness." Id. at 708. Before admitting a prior offense under ER 609(a)(1), the trial court is required to balance the following factors on the record: (1) the length of the defendant's criminal record;(2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility issue; and (6) the impeachment value of the prior conviction." State v. Calegar, 133 Wn.2d 718, 722, 947 P.2d 235 (1997).

Further, the trial court must conduct an on-the-record analysis of probative value versus prejudicial effect, which "requires an articulation of exactly how the prior conviction is probative of the witness's truthfulness." Hardy, 133 Wn.2d at 712. "The State bears the burden of proving that the probative value of the prior conviction outweighs any undue prejudice." Calegar, 133 Wn.2d at 722.

The trial court in Stenson's case woefully failed to fulfill its obligation to balance the requisite six factors on the record before admitting evidence of Wagner's drug convictions. It completely failed to articulate, on the record, "exactly how the prior conviction is probative of the witness's

truthfulness." Hardy, 133 Wn.2d at 712. Simply parroting the legal requirement by finding the probative value of the evidence outweighs the prejudice" and saying "I think it goes right to the credibility of the witness's testimony" does not cut it. 3RP 3031. The trial court thus erred in allowing the State to impeach the defense witness with her prior drug convictions. See Hardy, 133 Wn.2d at 713 ("The trial court erred when it admitted Hardy's prior drug conviction as neither the State nor the trial court articulated how it was probative of Hardy's veracity.").

Reversal is required when there is a reasonable probability the erroneous admission of ER 609 evidence affected the outcome. State v. Russell, 104 Wn. App. 422, 435, 438, 16 P.3d 664 (2001). In making that determination, appellate courts look to the importance of the witness's credibility and the possible effect of prior conviction evidence on the jury. Hardy, 133 Wn.2d at 712.

Wagner was an important witness for the defense. Her testimony supported the defense theory that Mrs. Hoerner was the killer, as she hated her husband, wanted him dead for financial gain, and acted like someone who was glad he was dead. Whether the jury ascribed any weight to that testimony turned, however, on whether it regarded her as a credible witness. Admission of her drug convictions undermined her standing with the jury. It painted her as a dysfunctional drug addict. Her prior convictions were not

legally relevant to her credibility. But they had the practical effect of destroying her credibility. Because the case against Stenson was circumstantial, and the evidence against him was not overwhelming in light of the other suspect evidence, there is a reasonable likelihood that this error affected the outcome.

In the event this Court determines this error standing alone does not warrant reversal, it should be considered as part of the cumulative error analysis advanced in section C. 9., infra of this brief.

7. PROSECUTORIAL MISCONDUCT VIOLATED STENSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed misconduct by using a puzzle analogy to quantify the beyond a reasonable doubt standard. Even in the absence of objection, reversal of the conviction is required because the misconduct was incurable through instruction and resulted in a substantial likelihood that the verdict was affected.

a. The prosecutor impermissibly quantified its burden to prove its case beyond a reasonable doubt by resorting to a puzzle analogy.

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 706, 286 P.3d 673 (2012). During closing argument, the prosecutor argued Stenson had misrepresented the financial status of the business in the investor prospectus. 3RP 4018-19. In that context, the prosecutor contended that the prospectus

> says that Dakota Farms for the last few years has been holding back breeder pairs, but you also know that Dakota Farms -- and you have to piece this together because the evidence is not very clear on this point, but you look at Mr. Stenson in the Gates video walk through, the video talks about the ostriches that are on the farm. You have statements from Mr. Vorenkamp -- testimony from Mr. Vorenkamp and Valentini about who owns birds on the farm. And you know that Mr. Stenson does not own adult breeding pairs. Dakota Farms does not own any breeding pairs. They belong to the Valentini's, they belong to the Vorenkamp's, they belong to other people. Now, the prospectus however suggests that the farm owns the land, owns the ostriches.

3RP 4019.

Defense counsel raised the theme of unclear evidence in his closing argument:

> Now, you know Ms. Kelly started out by going over each piece of evidence with you and trying to kind of mold

> this into something and another one of her -- one of the things she said to you is you have to piece this together because the evidence is not very clear. Evidence that's not very clear leads to a reasonable doubt. The State has the burden of proof, they haven't done anything with it. We have tried -- this case has been going on now for 20 years, plus 20 years. I don't think anybody could ever really know what happened at the Stenson residence on March 25, 1993. The State's evidence is all jumbled up.

3RP 4097.

The prosecutor, in rebuttal argument, responded:

> And reasonable doubt, at the end of the day you can be convinced beyond a reasonable doubt that abiding belief in the truth of the charge and the truth that Defendant is the person who murdered these 2 people in cold blood by shooting them in the head and still have a question or 2 left. I wonder exactly how it happened, that's not part of what you have to be convinced beyond a reasonable doubt of.
>
> Mr. Hunko said at one point that I said that the evidence isn't clear. Well, I did say on one point that it wasn't clear, that the evidence was there, you were going to have to put it together. Told you where you could put it together from and he made the statement the State's evidence is all jumbled up. Well, of course it is. Look at how it comes in? That's the natural way evidence comes in. You come in with pieces from one person, from another person, witnesses come in out of order. That's the natural way that a jury sees that a trial commences, unless prosecutor gets very lucky and is able to bring in witnesses chronologically. But witnesses have lives too and we don't get to do that.
>
> Defense counsel would have you ignore or toss the evidence if it doesn't immediately fit into a nice, clean, tidy picture. *It it's jumbled up, just like a jig saw puzzle. And I understand you folks over the last 7 weeks have worked quite a few of those.* And you [sic] it's all jumbled up. You might have a spot of it's that clear, I mean, you can see what it is but you can't tell from 1 piece what the picture is.

How do you solve a jig saw puzzle? Most people start by separating the straight edges out into a pile, put the others a way, aside and start by doing the outline. I've tried to give you an outline in my closing argument yesterday, then you fill in the case piece by piece. And even in composing the outline you pick up one of those pieces and you pick up another and you try to match, and when you start usually you're not so lucky as the first couple of pieces fit, but what you don't do is go, uh, they don't fit, toss it, pick up another, doesn't fit, pick up another, no it doesn't fit. You could go through the entire puzzle and winds up with one or 2 pieces at the end if you approach it that way, and obviously you still won't be able to tell what the picture is.

But no, what you do is you pick up a piece. That one does not fit, you look for one with the same color or pattern, okay, until you -- and you set it aside until you find one that fits. And then you do the same thing over and over again, and you do it within that frame work. Sometimes you are able -- particularly if you have multiple people to see here's the sky, somebody will work on the sky, while somebody works on the outline. We know there are trees over here, someone will work on the trees. But you still -- you're not tossing the evidence. You are not tossing the pieces of your puzzle. And *I'm sure you have the experience if you have ever worked a jig saw puzzle or more than one of getting even with a brand new straight out of the box puzzle and you are missing a piece or 2, and some times 4 or 5, and you say crap, I've just spent all these hours working on it and you are missing a piece of the puzzle or 2, but you still you have done that. You don't need the box top to see the picture.*

Here, the evidence is here. The pieces are here. At the end you may conclude that you're missing a few pieces, that you have pieces that are gone. But I submit to you, you may have questions, but I submit to you that after full, fair and careful consideration of the facts of the evidence, of the lack of evidence, *you're still going to be able to see the picture of what happened to Frank Hoerner and Denise Stenson on March 25, 1993.* You will be convinced, you will have an abiding belief in the truth of the charge, that

> the Defendant killed them. That he caused their deaths by shooting them. That he did so with premeditation.
>
> And I ask you to return verdicts of guilty on Count 1 for the death of Denise Stenson, guilty on Count 2 for the death of Frank Hoerner, and to answer yes on the special verdict forms. Thank you.

3RP 4169-73 (emphasis added).

Quantifying the standard of proof by means of a jigsaw puzzle analogy is improper. State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). In State v. Johnson, for example, the prosecutor argued "'You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.'" State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011). This Court held "the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." Johnson, 158 Wn. App. at 685. "[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden

and undermines a defendant's due process rights." Id. at 685-86 (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

In State v. Curtiss, a different panel reached a different conclusion regarding a jigsaw puzzle argument. State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496 (2011), review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011). There, the prosecutor stated, "'There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.'" Curtiss, 161 Wn. App. at 700. The court did not mention Johnson but held the State's comments about identifying a puzzle before it was complete were not improper. Id. at 700-01.

In State v. Fuller, this Court explained the difference between Johnson and Curtiss. State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). The quantification by the prosecutor of the number of pieces and percentage of completion required for reasonable doubt in Johnson was different from the prosecutor's general reference to being able to discern the subject of a puzzle with some pieces missing in Curtiss. Fuller, 169 Wn. App. at 825-28. The former statement introduced elements of specific quantification into the reasonable doubt analysis, while the latter did not. Id.; see also Lindsay, 180 Wn.2d at 436 (misconduct for prosecutor to argue "you put

in about 10 more pieces and see this picture of the Space Needle. Now, you can be halfway done with that puzzle and you know beyond a reasonable doubt that it's Seattle. You could have 50 percent of those puzzle pieces missing and you know it's Seattle.").

In Stenson's case, the prosecutor committed misconduct by referring to missing one or two pieces, or four or five pieces of the puzzle, in the context of whether the State had proven its case beyond a reasonable doubt: "I'm sure you have the experience if you have ever worked a jig saw puzzle or more than one of getting even with a brand new straight out of the box puzzle and you are missing *a piece or 2, and some times 4 or 5*, and you say crap, I've just spent all these hours working on it and you are missing *a piece of the puzzle or 2*, but you still you have done that. You don't need the box top to see the picture. Here, the evidence is here. The pieces are here. *At the end you may conclude that you're missing a few pieces, that you have pieces that are gone*. But I submit to you, you may have questions, but I submit to you that after full, fair and careful consideration of the facts of the evidence, of the lack of evidence, you're still going to be able to see the picture of what happened to Frank Hoerner and Denise Stenson on March 25, 19." 3RP 4172-73. The prosecutor in this manner impermissibly quantified the beyond a reasonable doubt standard through use of a puzzle analogy. Lindsay, 180

Wn.2d at 436; Johnson, 158 Wn. App. at 685-86; Fuller, 169 Wn. App. at 825-28.

The prosecutor compounded the misconduct by referring to jurors working quite a few actual jigsaw puzzles during the trial in the midst of explaining why the jumbled evidence, once pieced together in some fashion, added up to guilt beyond a reasonable doubt. 3RP 4170. The link drawn between the juror's task and the mundane task of working a jigsaw puzzle trivialized the State's burden. Johnson, 158 Wn. App. at 685.

b. Reversal is required because the misconduct could not be cured by court instruction and there is a substantial likelihood that it affected the outcome.

Defense counsel did not object to the misconduct. There are good reasons for requiring contemporaneous objection to improper comments in order to preserve the error for review, but "the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." State v. Walker, 182 Wn.2d 463, 341 P.3d 976, 984 (2015). In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921

P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). A prosecutor's misconduct is similarly flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. Glasmann, 175 Wn.2d at 707. Case law in existence well before Stenson's trial clearly warned against the prosecutor's improper use of a puzzle analogy in this case. Johnson, 158 Wn. App. at 685-86; Fuller, 169 Wn. App. at 825-28.

The misconduct here was not the type to be remedied by a curative instruction in the circumstances of this case. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). "[A] jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." Washington v. Hofbauer, 228 F.3d 689, 700 (6th Cir. 2000). Prosecutors, in their quasi-judicial capacity, thus usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956).

Under the circumstances of this case, a feeling of prejudice was engendered in the minds of the jury, which prevented Stenson from having a fair trial. Misconduct is particularly damaging when the jury hears it immediately prior to beginning its deliberations. State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991). The prosecutor's improper rebuttal argument was the last thing the jury heard before beginning deliberation; this timing increased the risk that the prosecutor's improper statement influenced the jurors. Lindsay, 180 Wn.2d at 443 ("comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice.").

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Id. at 711.

The State's case against Stenson was circumstantial. Those circumstances allowed for the inference that Stenson committed the charged crimes. But they also allowed for a reasonable decision that the State had not proved its case beyond a reasonable doubt. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215. The evidence against Stenson was not overwhelming.

Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

In the event this Court determines this error standing alone does not warrant reversal, it should be considered as part of the cumulative error analysis advanced in section C. 9., infra of this brief.

8. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

Stenson's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 289 (Instruction 5). The Washington Supreme Court requires that trial courts provide this instruction, based on WPIC 4.01, in every criminal case, at least "until a better instruction is approved." Bennett, 161 Wn.2d at 318; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008). This instruction is constitutionally defective because it requires the jury to articulate a reason to establish a reasonable doubt. This structural error requires reversal.

WPIC 4.01 is invalid for two reasons. First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just

a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring exactly the same thing. Instructing jurors with WPIC 4.01 is constitutional error.

a. WPIC 4.01's language improperly adds an articulation requirement.

Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a "not guilty" verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." Webster's Third New Int'l Dictionary 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61

L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'") (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation of a belief or assertion or as a justification." Webster's Third New Int'l Dictionary at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Washington's reasonable doubt instruction is unconstitutional because its language requires more than just a reasonable doubt to acquit. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt"). Indeed, under the current instruction, jurors could have a reasonable doubt but also

have difficulty articulating or explaining why their doubt is reasonable. A case such as this one presents such voluminous, conflicting and ambiguous evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.[56]

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[56] Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes

In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. U.S. Const. amends. XIV; Wash. Const. art. I, § 3.

b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This Court should safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. Fill-in-the-blank arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Emery, 174 Wn.2d at 759. The Court of

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in the Burden of Proof Have Weakened the Presumption of Innocence, 78 Notre Dame L. Rev. 1165, 1213-14 (2003) (footnotes omitted).

Appeals has repeatedly rejected such arguments as prosecutorial misconduct.[57]

Although it does not explicitly require jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt — this is, in substance, the same mental exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the exact same undermining to occur through a jury instruction.

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[57] See, e.g., State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilty, you have to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? 'My reason was ____.'"); Johnson, 158 Wn. App. at 682, 684 (holding improper argument when prosecutor told jurors that they have to say, "'I doubt the defendant is guilty and my reason is I believed his testimony that . . . he didn't know that the cocaine was in there, and he didn't know what cocaine was'" and that "'[t]o be able to find reason to doubt, you have to fill in the blank, that's your job'"(quoting reports of proceedings)); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (holding flagrant and ill-intentioned the prosecutor's statement "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank'"(quoting report of proceedings), review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010)); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor's statement that "'in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank'"), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010)).

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

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. Id. at 422-23. In considering a challenge to fill-in-the-blank arguments, the Emery court similarly approved of defining "reasonable doubt as a 'doubt for which a reason exists.'" Emery, 174 Wn.2d at 760. But neither Emery nor Kalebaugh gave any explanation or analysis regarding why an articulation requirement is unconstitutional in one context but not unconstitutional in all contexts. Furthermore, neither court was considering a direct challenge to the WPIC 4.01 language, so their approval of WPIC 4.01's language does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

Just like a preliminary instruction to jurors that they must give a reason to have a reasonable doubt and just like a fill-in-the-blank argument, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt." Emery, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence. WPIC 4.01 is unconstitutional.

c. This structural error requires reversal.

Defense counsel did not object to the instruction at issue here, nor did counsel affirmatively agree to it. 3RP 3977-3979. The error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The error here is structural. The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); State v. Smith, 174 Wn. App. 359, 368-69, 298 P.3d 785, review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Sullivan, 508 U.S. at 279-80. Indeed, where, as here, the

"instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires a reasonable, articulable doubt. Its articulation requirement undermines the presumption of innocence. WPIC 4.01 misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Stenson's convictions.

9. CUMULATIVE ERROR DEPRIVED STENSON OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

Even where some errors are not properly preserved for appeal,[58] the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As discussed above, an accumulation of errors affected the outcome and produced an unfair trial in Stenson's case. These errors include (1) those advanced as part of the motion to dismiss (section C. 2., supra); (2) failure to suppress the pants evidence because of government mismanagement or failure to preserve evidence (section C. 3., supra); (3) failure to give the spoliation instruction (section C. 4., supra); (4) the irregularity involving Mrs. Hoerner's impermissible opinion of Stenson's guilt (section C. 5., supra); (5) the erroneous admission of prior drug convictions to impeach a defense witness (section C. 6., supra); (6) prosecutorial misconduct (section C. 7., supra); and (7) the flawed reasonable doubt instruction (section C. 8., supra). Because the cumulative effect of two or more of the above errors produced an unfair trial, the convictions should be reversed.

[58] This could potentially apply to the prosecutorial misconduct claim here.

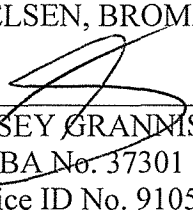
D. CONCLUSION

For the reasons stated, Stenson requests that this Court reverse the convictions and dismiss the charges, or in the alternative, remand for a new trial.

DATED this 28th day of May 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 45665-6-II
DAROLD STENSON,	)	
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 28TH DAY OF MAY, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAROLD STENSON
DOC NO. 232018
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MAY, 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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

STATE OF WASHINGTON, Respondent. v. DAROLD STENSON, Appellant.	)	No. 45665-6-II NOTICE OF ERRATA

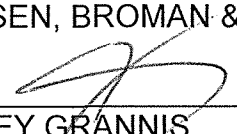
Darold Stenson, by and through his attorney of record, Casey Grannis of Nielsen Broman & Koch, notifies the Court of the following errata in the Brief of Appellant filed May 28, 2015:

On page 73, the last sentence of the first paragraph states "As a result, the defense expert was <u>able</u> to conclusively interpret the blood pattern evidence on the pants." The underlined word should read "unable."

DATED this 28th day of January 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

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