NO. 48244-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM GRISSO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 14-1-02695-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When viewed in the light most favorable to the State, was there sufficient evidence for the jury to find that the defendant acted with premeditation when he invited another woman to the residence he shared with the victim, took the victim to a secluded area, armed himself with a gun, fired two shots into the victim's head, lied to the police and then staged the incident to look like she had committed suicide? (Appellant's Assignment of Error No. 1 and 2)

2. Should this court apply the correct standard for reviewing the sufficiency of the evidence regarding premeditation, which is was it proven to the jury beyond a reasonable doubt in the light most favorable to the State, and is the appellant's request for this court to overturn existing caselaw unnecessary? (Appellant's Assignment of Error No. 3)

3. Did the State make an appropriate rebuttal argument and, if prosecutorial error did occur, was any error harmless? (Appellant's Assignment of Error No. 4-9)

4. Did the trial court correctly instruct the jury regarding the burden of proof by using an instruction that this division has held to be proper? (Appellant's Assignment of Error No. 10-14)

5. Are appellate costs appropriate in the event that this court affirms the defendant's judgment? (Appellant's Assignment of Error No. 15)

B. STATEMENT OF THE CASE.

1. Procedure

On June 8, 2015, WILLIAM JASON GRISSO, hereinafter "defendant" was charged with murder in the first degree. CP 1-2. On September 11, 2015, both parties appeared for trial. RP 1.

a. CrR 3.5 hearing

A CrR 3.5 hearing was held on September 16, 2015. RP 109. Deputy Hales testified that on June 30, 2014, he responded to a missing person report. RP 111-112. The defendant provided police with a handwritten statement containing information surrounding the disappearance of Nancy Gardner. RP 117.

On July 1, 2014, and again on July 8, 2014, Detective-Sergeant Lund contacted the defendant. RP 122. On July 1, 2014, the defendant was contacted by phone and answered questions. *Id.* On July 8, 2014,

Detective-Sergeant Lund went to the victim's residence to attempt to contact the defendant or see who was at the house. RP 123. The defendant was contacted by phone initially, then in person. *Id.* The defendant was at a different residence belonging to Kim Desoto, which was where Detective-Sergeant Lund met the defendant. RP 124. At that time, the defendant again spoke to Detective-Sergeant Lund. RP 125. On June 9, 2014, Detective-Sergeant Lund contacted the defendant again. RP 127. At that time, the defendant was placed in handcuffs and transported to the County-City Building for questioning. RP 128. Prior to questioning at the County-City Building the defendant was advised of his constitutional rights, which he waived. RP 128-129, 133. At the conclusion of the CrR 3.5 hearing, the court admitted certain statements made by the defendant. RP 162-164.

2. Facts

On June 30, 2014, Deputy Hales was working as a patrol deputy and responded to an address in Lakebay regarding a missing person report. RP 282-283. He contacted the defendant, who reported that his live-in girlfriend, Nancy Gardner, was missing. RP 285, 289, 451. The defendant stated that when he returned to the residence he shared with Gardner their dogs were loose in the backyard and the back door was open. RP 290. He stated that her phone, car keys, and identification were

in the house but her Smith & Wesson pistol was missing. RP 291. Deputy Hales observed suspected blood spatter on the defendant's shoe. RP 297. The defendant reported that the blood had come from a cat that he had kicked. *Id.* Deputy Hales collected the shoes. RP 299.

The same day he reported Gardner missing, the defendant moved items of value to Kimberly Desoto's residence for safekeeping, claiming that he wanted to keep them safe in case Gardner returned to their home. RP 370. The defendant also moved Gardner's vehicle to Desoto's home. *Id.* The defendant attempted to trade Gardner's vehicle to Desoto. RP 371. The defendant left the title to the vehicle with Desoto. *Id.* On July 8, 2014, the defendant returned to Desoto's home and told her that the police were on their way to her home. RP 376. He asked Desoto if he could store a gun at her house. *Id.* Desoto declined to store the gun for the defendant and he left it in his truck. RP 377.

On July 1, 2014, Detective-Sergeant Brian Lund was assigned the Gardner case as the lead homicide investigator. RP 417. He contacted the defendant the same day by phone. RP 421. The defendant told Detective-Sergeant Lund that he had found a message on Gardner's phone stating that she was heading out of town. *Id.* The defendant also stated that Gardner had been institutionalized prior due to self-harm. *Id.* Detective-Sergeant Lund examined the shoes belonging to the defendant that had

been collected by Deputy Hales. RP 423. He requested that the shoes be sent to the crime laboratory to determine if the suspected blood on the defendant's shoes came from Gardner. RP 426. A presumptive test for blood was positive. RP 594. The blood on the defendant's shoes was confirmed to be Gardner's blood. RP 900-901.

On July 8, 2014, Detective-Sergeant Lund again contacted the defendant. RP 427. The defendant told Detective-Sergeant Lund that he had moved Gardner's vehicle to a friend's house for safekeeping and that he needed to evict Gardner to prevent her from returning to their residence. RP 428. He also stated that he had boxed up Gardner's belongings and placed them in a shed. RP 428-429. The defendant gave Detective-Sergeant Lund permission to look inside his vehicle and Detective-Sergeant Lund observed suspected blood on the side of the seat. RP 434. The blood observed in the defendant's vehicle was concluded to be the defendant's own blood. RP 897. Also in the defendant's vehicle was a handgun with the same serial number as the gun the defendant reported missing on June 30th. RP 440. That gun was later recovered from Carolynne Rapier's apartment. RP 398.

On July 9, 2014, Detective John Jimenez obtained the 911 calls that had been made in relation to the missing person case. RP 392. Detective Jimenez reviewed the 911 recording and compared it to the

statement that the defendant had provided to Deputy Hales and found the statements to be contradictory. RP 392. The defendant had told Deputy Hales that Gardner's identification and purse had been left and that the only item missing was a gun. RP 392-393. The defendant had earlier claimed that Gardner's identification was missing. RP 393.

On July 9, 2014, a search warrant was executed on Carolynne Rapier's apartment. RP 393, 396. Rapier was also involved in a romantic relationship with the defendant. RP 436. Inside the master bedroom of Rapier's residence police located the Smith & Wesson 9mm handgun that had been reported missing by the defendant. RP 396-397. The gun contained eight rounds of ammunition in the magazine. RP 398-399. The ammunition was red-tipped Hornady brand ammunition, which contain a plastic red tip inside the hollow point of each bullet. RP 399. During the autopsy of Gardner's remains several bullet fragments and a piece of red plastic were recovered from her skull. RP 407. One of the shell casings recovered from the area where Gardner's remains were located was a Hornady 9mm Luger spent casing. RP 605.

The defendant was taken into custody at Rapier's residence. RP 442. The defendant gave police a recorded statement. RP 448. The defendant relayed that in the week leading up to Gardner's disappearance they were sleeping in separate rooms. RP 451. On the Thursday prior to

Gardner's disappearance the defendant had spent the day with his other girlfriend Carolynne Rapier. RP 451. The defendant told police that he wanted Gardner to leave their residence but that she said that she would leave only when she was ready to do so. RP 452. The defendant was asked to explain why he was in possession of a Smith & Wesson handgun that he reported as missing. RP 457. The defendant indicated that he and Gardner had identical handguns. *Id.* Photographs of the two handguns on both the defendant and Gardner's phones, however, depict a Smith & Wesson and a Sig Sauer handgun—different makes and models. RP 457-458. A box for a Sig Sauer handgun was found in the defendant's vehicle. RP 467, 591. No Sig Sauer handgun was recovered, but a receipt for a Sig Sauer was located in the defendant's vehicle showing a purchase for both a Smith & Wesson and a Sig Sauer was made on April 19, 2014. RP 467, 497, 592, 619-620. The bullets recovered from the scene where Gardner's remains were found were excluded as having been fired from the Smith & Wesson pistol. RP 857. The bullets were, however, consistent with having been fired from a Sig Sauer pistol. RP 861.

Detective Ryan Salmon examined Gardner's cellular phone and located photographs that contained GPS coordinates associated with them. RP 443-444, 665-666. The defendant maintained that Gardner's phone never left the Lakebay residence on June 30, 2014. RP 500. The

coordinates on the phone, however, led police to Tahuya State Park in Mason County, Washington. RP 444. The location is approximately an hour north of the defendant's residence. According to the phone, the photographs were taken after 3:00 p.m. on June 30, 2014, after the defendant reported to police that he was at his home and that Gardner's phone was with him. RP 445.

Using the GPS coordinates from Gardner's phone, officers went to those coordinates in Mason County and located Gardner's remains within 20-50 feet of the coordinates for one of the photos. RP 465, 519-522. Gardner's body was badly decomposed. RP 411. Despite the level of decomposition, the associate medical examiner, Dr. Lacy, was able to identity a bullet entry wounds. RP 411. Dr. Lacy described one of the bullet wounds as being from the back of the head through the side of Gardner's face, or the converse as he could not determine an entry or exit. RP 882. The other wound discovered entered the side of Gardner's head where the ear would be, and exited the head up high hear the top of the head. RP 881. That trajectory was determined to be left to right and upward. RP 890. Gardner was further identified via the surgical serial numbers from an earlier hip replacement. RP 883.

Gardner's phone was also taken and processed. RP 666. Gardner's phone, an iPhone, was enabled with a "location services"

feature which captures information about the specific location, date, and time a photograph is taken. *Id.* The information from certain photographs on Gardner's phone indicated that photos were taken in the Belfair, Washington area. RP 687. Gardner's body was located 18.81 feet from the GPS coordinates for one of the photographs. RP 690.

The day the defendant reported Gardner missing, the defendant stated that he went to his attorney's office and some auto part stores. RP 455. He indicated to police that Gardner was not with him during the time he was away from their residence. *Id.* He stated he returned home between 3:00-3:30 p.m. to find the back door open and Gardner missing. RP 455-456. When asked about the blood on his shoes, the defendant stated that it could have been from a cat or it could have been his own blood because he got punched in the mouth while wearing those shoes. RP 461-462. The defendant alleged that the shoes were shared by both him and Gardner, but a video of the defendant proposing marriage to Gardner shows him wearing the same shoes. CP 111-121 (exhibit 80); RP 461, 1059-1060.

Carolynne Rapier testified that she had a romantic relationship with the defendant that ended in September of 2013. RP 534. The defendant reinitiated contact with Rapier in June of 2014, claiming that he was sorry and wanted to reconcile. RP 535. The defendant did not tell

Rapier that he had a fiancé—Nancy Gardner—or any other relationship. RP 536. The defendant told Rapier that he was working in Sequim on June 30, 2014. RP 545. At 3:20 p.m. the defendant sent Rapier a text message indicating that his wife had been served with divorce papers. RP 546. Rapier discovered Nancy Gardner on Facebook and asked the defendant who she was. RP 547-548. The defendant stated that Gardner was a "one-date stalker." RP 548. After some other exchanges, the defendant sent Rapier a text message at 4:28 p.m. stating "It's all good. I understand. I am not losing you again. Remember, open book, no secrets." RP 550. He sent another text message that stated in part, "You are one hot lady, and I love you a lot." RP 553. On the evening of July 30, 2014, the defendant told Rapier that Gardner was his "roommate" and that she was missing. RP 557.

Rapier became aware of a tattoo the defendant had recently acquired that depicted a heart with a lock in the middle of it and the initials "N.G." RP 563. The defendant told Rapier the initials represented the words "never give." After Gardner was reported missing, Rapier observed a photo of a tattoo that Gardner had depicting a key that corresponded to the defendant's heart tattoo. RP 563-564.

At the time of his arrest, the defendant's phone was taken by police. RP 647. Cell phone records indicate that on the night of Gardner's

disappearance the defendant was not in Sequim as he told Rapier. RP 704. In fact, on June 30th, the defendant's phone utilized a cell phone tower in the general vicinity as the area where Gardner's body was recovered. RP 723-726. Also recovered off of the defendant's phone was an application used to monitor police and fire radio traffic that was tuned to the Pierce County Sheriff's Department's frequency. RP 714. Gardner's body was recovered on July 9, 2014 on the Elfendahl Pass Road in Tahuya State Park. RP 715-716. On July 5, 2014, however, the defendant's phone contained web searches for "Woman's body found on Elfendahl" and "Tahuya State Trail System" indicating that the defendant was searching for Gardner's body before it was located by police. *Id.* Additional web searches for "Mason County body found" and "Tahuya State Forest Park shooting" were also conducted on the defendant's phone before Gardner's body was located. RP 718. Prior to Gardner's disappearance, Rapier's cell phone number appeared in the defendant's phone as "Hound Dog" and "Prosser." RP 748. Gardner's contact information on the defendant's phone was saved on the defendant's phone to "Dusty Watson" the day before her disappearance. RP 750. After Gardner's disappearance, however, Rapier's contact information was changed so that her actual name appeared on the defendant's phone. *Id.*

At trial, defense recalled Detective Ryan Salmon to testify regarding analysis of Timothy Grisso's phone. RP 934-935. Timothy Grisso is the defendant's son. RP 934. Records show that Timothy Grisso was not in Belfair during the relevant time period. RP 935. In fact, it would have been physically impossible for Timothy Grisso to have traveled to Belfair because of the locations of the cell towers used by his phone on the day of Gardner's disappearance. RP 938-939.

Defense also called Felisha McCall, who was a former girlfriend of Timothy Grisso. RP 954. She stated that Timothy Grisso borrowed her vehicle on July 1st or July 2nd and that when he returned it her handgun had been moved, his clothing was dirty and he was acting "a little weird." RP 957, 963. McCall stated that the handgun she had owned had later been stolen by Timothy Grisso. RP 964. On cross examination, McCall admitted that she and Timothy Grisso broke up after Timothy had called CPS to report her for neglect. RP 965. She also admitted that she misidentified the make and model of the firearm that was stolen from her—initially reporting more than seven times that it was a Ranger .30 caliber handgun. RP 969. At trial, McCall stated that it was a Ruger .38 caliber gun that was taken. RP 970.

Defense also called Brenda Grisso, the defendant's mother, who testified that the defendant had sent her four letters purportedly from Timothy Grisso to the defendant. RP 972-977. The defendant then forwarded the letters to his mother to give to his lawyer. RP 976. Brenda

Grisso was able to identify one of the letters as belonging to Timothy Grisso, but a handwriting expert found no similar characteristics between the letters and Timothy Grisso's handwriting. RP 975, 1039, 1049. The handwriting expert did find, however, similarities between two of the letters and the defendant's handwriting. RP 1039.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND THAT THE DEFENDANT ACTED WITH PREMEDITATION WHEN HE MURDERED NANCY GARDNER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v.***

Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. *See* ***Camarillo***, *supra*. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. *See* ***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

Id. (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant challenges the sufficiency of the evidence regarding the premeditation element of murder in the first degree[1]. Br. of Appellant at page 7. He contends that there is insufficient evidence that he acted with premeditated intent to kill the victim. *Id.*

In order to find defendant guilty of murder in the first degree the jury had to find that: 1) on or about the 30th day of June, 2014, the defendant acted with intent to cause the death of Nancy Gardner; 2) that the intent to cause the death was premeditated; 3) that Nancy Gardner died as a result of the defendant's acts and; 4) that any these acts occurred in Washington. CP 40-57 (Instruction No. 10); *see also* RCW 9A.28.020(1); RCW 9A.32.030(1)(a); ***State v. Smith***, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

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[1] The defendant does not challenge the sufficiency of the evidence regarding any of the other elements of murder in the first degree. While the defendant, in his assignments of error, states that, "The State presented insufficient evidence to convict Mr. Grisso of first degree murder" the defendant presents no authority or argument regarding any element except premeditation. Brief of Appellant, pages 7-14. Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (*citing* ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a). To the extent that the defendant has raised a challenge to any other element of murder in the first degree, such a claim should not be considered.

The jury was also instructed as to the meaning of premeditated:

> Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 40-57 (Instruction No 8). Defendant now claims that there was insufficient evidence to support a determination that he was acting with a premeditated intent to kill.

The evidence in this case shows that, when taken in the light most favorable to the State, sufficient evidence was presented to establish premeditation. The defendant took the victim to a secluded area[2]. RP 519-522. He took a gun with him[3]. The trajectory of the bullets show that Gardner was shot twice in the head. R 881-890. The path of the bullet was upward—entering near the ear and exiting at the top of the head. RP 881. This could lead a jury to infer that Gardner was on the ground when she was shot. The bullets were in the immediate area of Gardner's

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[2] The appellant argues that the defendant did not take Gardner to a secluded area, but rather that he "took a friend for a walk." Brief of Appellant, page 10. While viewed alone, taking a victim to a secluded area may be insufficient, but here, as argued by the State, there are additional facts when combined establish premeditation.

[3] The appellant alleges that the defendant "regularly carried his handgun." Brief of Appellant, page 11, fn. 9. This assertion, however, is unsupported by the record. The appellant cites to RP 435 in support of this claim, but that testimony was only that on July 8, 2014, the defendant was carrying a gun. No testimony was presented that the defendant did so on a regular basis.

remains, suggesting that she was already on the ground when shot, as the bullets did not fly far past her.

Evidence was presented that the defendant, even though living with Gardner, had recently reconciled with Rapier and lied to her about his relationship with Gardner. The defendant also lied to Rapier about where he was on the day of Gardner's murder—telling Rapier he was in Sequim when he was really in Belfair. RP 545, 704. Rapier, who became suspicious about the defendant's relationship with Gardner, began sending him text messages confronting him. RP 545-557. The defendant denied the relationship. *Id.* These multiple incidents of deception by the defendant is particularly relevant in the context of evidence of premeditation. At 4:28 p.m., the defendant sent Rapier a text message telling her "I'm not losing you again." RP 550. At 4:29 p.m. the defendant sends Rapier another message inviting her to his home later that evening. RP 715-716. The last flower photograph Gardner takes in Belfair is at 4:58 p.m., which shows that Gardner was alive at the time that the defendant was inviting Rapier to his home. RP 550, 686. The only logical reason the defendant would invite his girlfriend to a home that he shared with his fiancé is because the defendant planned to kill Gardner that very night and he knew she would not be at their shared home when Rapier later arrived. At 5:11 p.m. the defendant calls Rapier from the cell tower nearest Gardner's last known location. RP 553, 723. After the murder, the defendant changes Rapier's contact information in his cell

phone to her true name because he knew there was no way Gardner was going to find it because she was already dead. RP 748-750.

The defendant tells police that the blood on his shoes was possibly from kicking a cat. RP 297. The blood, however, is from Gardner and was likely placed on the defendant's shoes when he retrieved the purse and phone from Gardner's body after the murder. RP 900-901. He then lies to the police about the missing firearm and his whereabouts and tries to sell Gardner's SUV. RP 396-400, 371.

The appellant asserts that that the defendant, if he indeed wanted to pursue a relationship with Rapier and not Gardner, did not need to resort to killing Gardner to do so. In the light most favorable to the State, however, the defendant *did* feel that he needed to kill Gardner to rekindle his relationship with Gardner. At least in the defendant's mind, with Gardner alive there would always be a chance of Gardner exposing him to Rapier. The defendant told Rapier a series of lies about Gardner, including that she was a one-night stand and a stalker. To leave Gardner alive would allow her, in the defendant's view, to remain a liability. All of the evidence, as argued above, supports the jury's finding that the defendant premeditated to kill Gardner.

In ***State v. Pirtle***, 127 Wn.2d 628, 904 P.2d 245 (1995), the court held that there were four characteristics relevant to establishing premeditation: motive, procurement of a weapon, stealth, and method of killing. *Id.* at 644, *citing* ***State v. Ortiz***, 119 Wn.2d 294, 312, 831 P.2d

1060 (1992), *disapproved on other grounds by* ***State v. Condon***, 182 Wn.2d 307, 343 P.3d 307 (2015).

As in ***Pirtle***, all four of these characteristics are present in this case. First, the defendant had motive. He wanted to pursue a relationship with Rapier, not Gardner. The defendant was fearful that Gardner would expose the lies that he told Rapier and the only way to ensure that Gardner would not expose those lies was to murder her. Second, the defendant had access to a gun, which he took with him the day of the murder. Third, he used stealth by taking Gardner to a secluded place, ensuring that he would not be seen or heard. Finally, the method of killing suggests premeditation—he shot Gardner twice in the head while she was on the ground. After the murder the defendant, like ***Pirtle***, had the presence of mind to attempt to conceal the crime. The defendant took Gardner's phone and purse in an attempt to make her disappearance look like a suicide. In the light most favorable to the State, the evidence shows that the defendant committed premeditated murder in the first degree as found by the jury.

2. THE APPELLANT'S REQUEST THAT THIS COURT OVERRULE PRIOR CASELAW THAT MISAPPLIED THE STANDARD IS UNNECESSARY WHEN THE COURTS HAVE, AND CONTINUE TO, APPLY THE CORRECT STANDARD FOR REVIEWING EVIDENTIARY CHALLENGES TO PREMEDITATION— WHETHER A RATIONAL TRIER OF FACT COULD HAVE FOUND PREMEDITATION BEYOND A REASONAL DOUBT.

The jury in this case was properly instructed that they had to find premeditation beyond a reasonable doubt. CP 40-57. The appellant asserts that appellate courts have historically applied an incorrect standard, requiring only "substantial evidence," not proof beyond a reasonable doubt. The appellant appears to be misapplying applicable law. As the court in ***State v. Finch***, 137 Wn.2d 792, 975 P.2d 967 (1999), stated:

> The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'" *Pirtle*, 127 Wash.2d at 643, 904 P.2d 245 (*quoting Gentry*, 125 Wash.2d at 596–97, 888 P.2d 1105). All reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. *Pirtle*, 127 Wash.2d at 643, 904 P.2d 245; *Gentry*, 125 Wash.2d at 597, 888 P.2d 1105.
>
> Premeditation must involve "more than a moment in point of time," RCW 9A.32.020(1), but mere opportunity to deliberate is not sufficient to support a finding of premeditation. *Pirtle*, 127 Wash.2d at 644, 904 P.2d 245. Rather premeditation is "the deliberate formation of and reflection upon the intent to take a human life " and involves "the mental process of thinking beforehand,

> deliberation, reflection, weighing or reasoning for a period of time, however, short." *Pirtle*, 127 Wash.2d at 644, 904 P.2d 245 (*quoting Gentry*, 125 Wash.2d at 597-98, 888 P.2d 1105 and *State v. Ortiz*, 119 Wash.2d 294, 312, 831 P.2d 1060 (1992)). Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial. *Pirtle*, 127 Wash.2d at 643, 904 P.2d 245; *Gentry*, 125 Wash.2d at 597, 888 P.2d 1105.

In this case, the jury correctly found that the defendant premeditated to kill Gardner beyond a reasonable doubt. They did so using circumstantial evidence to infer intent. When using circumstantial evidence, the appellate courts review that jury's conclusion to determine if that conclusion was reasonable and if there is substantial evidence supporting it. ***State v. Luoma***, 88 Wn.2d 28, 558 P.2d 756 (1977). The court's use of the "substantial evidence" standard to review a jury's finding does not lessen the State's burden at trial. The State's burden has always been to prove premeditation beyond a reasonable doubt. ***State v. Neslund***, 50 Wn. App. 531, 557-558, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988). Every case cited by the appellant to support his claim actually states that the correct standard is that the jury must find premeditation beyond a reasonable doubt. In this case, the jury's conclusion that the defendant premeditated to kill Gardner was reasonable and supported by substantial evidence, as argued above. Premeditation in this case was proven beyond a reasonable doubt.

3. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR[4] OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute error, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged error is both

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[4] "'Prosecutorial misconduct' is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "Prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited March 14, 2016); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited March 14, 2016). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). *See also* ***Kansas v. Sherman***, __ Kan. __, __ P.3d __ (2016) (whenever a clam is asserted that any act of a prosecutor has denied a criminal defendant his or her due process rights to a fair trial, the Kansas Supreme Court will refer to the claim and judicial inquiry as a claim of "prosecutorial error"). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

improper and prejudicial. ***Stenson***, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial error bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) *citing* ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, *citing* ***Gentry***, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) *citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d

314 (1990). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86, *citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

"Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice." ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011); ***State v. Larios-Lopez***, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Even where there was a proper objection, an appellant claiming prosecutorial error "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." ***State v.***

Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); ***State v. Fisher***, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); ***State v. McKenzie***, 157 Wn.2d 44, 134 P.3d 221 (2006) (*quoting* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). "The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." ***Anderson***, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not error for a prosecutor to argue that the evidence does not support a defense theory, ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." ***Russell***, 125 Wn.2d at 87. Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (*quoting* ***Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); ***Fisher***, 165 Wn.2d at 747. "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (*quoting* ***Brown***, 132 Wn.2d at 561; ***State v. Johnson***, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). "[R]emarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999), *abrogated in part on other grounds by* ***State v. Gamble***, 154 Wn.2d 457, 114 P.3d 646 (2005); ***State v. Larios-Lopez***, 156 Wn. App. 257, 261, 233 P.3d 899 (2010).

Prosecutorial error may be neutralized by a curative jury instruction, ***Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court's instructions. ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, although the defendant argues that the State committed error in two ways, Appellant's Opening Brief, p. 15-20, he is incorrect.

a. The state's argument asking the jury to return a verdict of guilty was proper and, even if prosecutorial error, was not objected to.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. ***State v. Dhaliwal***, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); ***State v. Smith***, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. *See* ***Russell***, 125 Wn.2d at 85-86.

A jury is presumed to follow the court's instructions regarding the proper burden of proof. ***State v. Gregory***, 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006), *overruled on other grounds by* ***State v. W.R.***, 181 Wn.2d 757, 336 P.3d 1134 (2014). A jury is presumed to follow the trial court's instructions. ***State v. Lough***, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

In this case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your

> deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 40-57, Instruction 2, *see also* Washington Pattern Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury, in part:

> The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 40-57, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

The jury instructions make it clear that the State had the burden of proof and that the jury was the sole judges of credibility. The State also told the jury that they must be convinced beyond a reasonable doubt. RP 1108, 1115. The defense also told the jury that the elements must be proven beyond a reasonable doubt. RP 1118. The State reiterated in rebuttal that it had the burden of proof beyond a reasonable doubt. RP 1146.

In rebuttal closing, the State made the following statement:

> For example, in this case, the crime is not on videotape. There are no eyewitnesses. But what you do have is enough pieces of the puzzle, enough evidence to know what happened here, to have an abiding belief in the truth of what happened here.
>
> So the last thing I am going to ask you is to return the only verdict that reflects the truth of what happened, the only verdict that is just for Nancy Gardner, for her family and for our community. Thank you.

RP 1147.

There is nothing improper about the State's argument. The statement about the verdict reflecting the truth that immediately precedes the State's concluding remarks discussing the abiding belief jury instruction, which as argued below, was properly given in this case. It is clear that the State's comment that the verdict "reflect the truth" relates directly back to the abiding belief instruction in the sentence before. There was no objection by the defense. Therefore, the appellant must prove, even if the comment was improper, that such comment was so flagrant and ill-intentioned that a curative instruction would have cured it. In this case, not only was the comment proper, but it was in line with the burden of proof and the jury instructions. There was no error.

The appellant relies on ***State v. Thierry***, 190 Wn. App. 680, 360 P.3d 940 (2015). Brief of Appellant at p. 15. ***Thierry***, however, is distinguishable from this case. First, the defendant raised a timely objection in ***Tierry***. Second, the prosecutor in ***Thierry*** raised policy

argument to the jurors that a guilty verdict was needed in order to protect future sexual assault victims from abuse. ***Thierry***, 190 Wn. App. at 691. In this case, no such argument was made. The State did not argue that a guilty verdict was necessary to protect future potential victims of homicide. The State's comment was mere rhetoric that asked the jury, in essence to return a just verdict. The comment also clearly related back to the comments regarding an abiding belief in the truth of the charge.

Moreover, the argument almost identical to that made in ***Thierry*** was reviewed in ***State v. Smiley***, __ Wn. App. ___, ___ P.3d ___ (2016). In ***Smiley***, the State made a policy argument that the State might as well given up prosecuting sex abuse cases if the victim's word is insufficient for conviction. *Id.* at *5. The court affirmed Smiley's conviction, holding that any prejudice would have been curable and no objection was raised. *Id.* at *6.

While this case is distinguishable from both ***Thierry*** and ***Smiley***, it is more similar to ***Smiley*** in that no objection was made to the comment. Unlike either case, however, the comment here—that the verdict reflect the truth of what happened—related directly to the reasonable doubt instruction and was proper based on the instructions. If this court were to find that the comment was not proper, however, any prejudice would have been cured by a timely objection and curative instruction, therefore any error was harmless.

b. The Prosecutor's puzzle analogy was proper.

The State argued in rebuttal closing:

> So let's say you have a jigsaw puzzle, and let's say you get some pieces of the puzzle, you get some evidence, but it's not enough pieces. It's not enough evidence to know beyond a reasonable doubt what the picture portrays.
>
> And then you get some more pieces and some more evidence, and it's still not enough for you to have an abiding belief in the truth of what the picture portrays.
>
> And then you get some more pieces, and you get some more evidence. And at some point, you've seen enough. You have enough evidence. You've seen enough pieces of the puzzle to know beyond a reasonable doubt what the picture portrays. You have an abiding belief in the truth that that is a picture of the Tacoma Dome.
>
> What is significant about this is that you don't need every single possible piece of evidence. There can be some unanswered questions. There can be some pieces that aren't there for you.
>
> For example, in this case, the crime is not on videotape. There are no eyewitnesses. But what you do have is enough pieces of the puzzle, enough evidence to know what happened here, to have an abiding believe in the truth of what happened here.

RP 1146-1147.

In ***State v. Fuller***, 169 Wn. App. 797, 282 P.3d 126 (2012), this court found that an almost identical argument was permissible. In ***Fuller***, the State used the jigsaw puzzle argument as follows:

> What I am going to do now is use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt.... We

> get a few of the pieces of the puzzle.... [W]e might think it looks like Tacoma, but we don't know—
>
> ... [W]e do not have enough pieces of enough evidence beyond a reasonable doubt that it's [a picture] of Tacoma. But let's say we get some more pieces.... But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma.
>
> Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma....
>
> A trial is very much like a jigsaw puzzle. It's not like a mystery novel or CSI or a movie. You're not going to have every loose end tied up and every question answer[ed]. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?

Id. at 827.

This court held that the argument in ***Fuller*** was proper, holding that the State neither equated its burden of proof to everyday decision making not quantified the level of certainty needed to be satisfied beyond a reasonable doubt. *Id.* The court further held that the State, as it did in this case, accurately stated that it had to prove every element beyond a reasonable doubt. *Id.*

In ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011), this court also upheld a similar argument, holding that "the State's comments about *identifying* the puzzle with certainty before it is complete are ***not*** analogous to the weighing of competing interests inherent in a *choice* that

individuals make in their everyday lives." *Id.* at 509-10 (2011) (emphasis on "not" added). In ***Curtiss***, the deputy prosecutor argued:

> [R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. ***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.***

Id. at 509. This Court held that such an argument did not equate proof beyond a reasonable doubt with the certainty required to properly identify a partially-completed puzzle. ***Curtiss***, 161 Wn. App. at 699. Rather, it was a proper "analogy" used "to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof." *Id.*

The same can be said of the State's arguments in the present case. In this case, the prosecutor who gave closing argument did not explicitly draw any analogy between a puzzle and proof beyond a reasonable doubt. *See* RP 1146. He never equated solving a puzzle with being convinced beyond a reasonable doubt, and therefore, never misstated the law or minimized his burden of proof. Indeed, under ***Fuller***, 169 Wn. App. at 827, and ***Curtiss***, 161 Wn. App. at 700-701, he committed no misconduct or error whatsoever. Hence, these comments were not improper and the defendant has failed to meet his burden of showing prosecutorial error.

The defendant attempts to distinguish this case, *citing* ***In re Personal Restraint of Glassman***, 175 Wn.2d 696, 286 P.3d 673 (2012), by asserting that the State quantified the burden of proof through "visual means." Brief of Appellant at 19. In ***Fuller***, however, a PowerPoint presentation accompanied the State's closing argument. ***Fuller***, 169 Wn. App. at 811. In fact, it was the same prosecutor in both ***Fuller*** and in the present case and the same exact PowerPoint slide was utilized in both cases. RP 1143. The court found the argument acceptable in ***Fuller*** and should do so here.

In this case, similar to ***Fuller*** and ***Curtiss***, the prosecutor made no statements which equated proof beyond a reasonable doubt to the certainty required to identify a partially-completed puzzle. Indeed, the prosecutor's comments were, as this Court held in ***Curtiss***, a proper "analogy" used "to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof." ***Curtiss***, 161 Wn. App. at 700. As such, they were not improper and the defendant has failed to meet his burden of showing prosecutorial error.

However, even assuming the impropriety of the deputy prosecutor's comments, the defendant has failed to show that they were prejudicial.

In the present case, as in ***Fuller*** and ***Curtiss***, the trial court gave a proper instruction on proof beyond a reasonable doubt, and a proper instruction that the jury "must disregard any remark, statement, or argument [made by the lawyers] that is not supported by the evidence or the law in my instructions." CP 40-57 (instruction 1); ***Curtiss***, 161 Wn. App. at 699. Because this Court "presume[s] that the jury follows the court's instructions," *Id.* (*citing* ***State v. Stein***, 144 Wn.2d 236, 247, 27 P.3d 184 (2001)), this Court must presume that even if the prosecutor misstated the law with respect to proof beyond a reasonable doubt, the jury would, under instruction number 1 disregard that misstatement, and, under instruction number 2, apply the proper standard. ***Curtiss***, 161 Wn. App. at 699.

This is especially true given other statements made by both prosecutors and the defense. The State told the jury that they must be convinced beyond a reasonable doubt. RP 1108, 1115. The defense also told the jury that the elements must be proven beyond a reasonable doubt. RP 1118. The State reiterated in rebuttal that it had the burden of proof beyond a reasonable doubt. RP 1146.

In this context, there could be no "substantial likelihood" that the prosecutor's comments regarding a jigsaw puzzle, even if they were to be construed as improper, "affected the jury's verdict," and therefore, they

could not have been prejudicial. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Because the deputy prosecutor's comments were a proper "analogy" used "to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof," ***Curtiss***, 161 Wn. App. at 699, and because, even if they were construed as improper, they were not prejudicial, the defendant has failed to meet his burden of showing prosecutorial error. Therefore, the defendant's conviction should be affirmed.

4. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE BURDEN OF PROOF AND REASONABLE DOUBT.

The language of Instruction 2 is taken verbatim from WPIC 4.01. The challenged language is at the end of the instruction, in brackets as optional:

> [The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

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

WPIC 4.01 (emphasis added).

The Supreme Court specifically directed the use of WPIC 4.01 in ***State v. Bennett***, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), in order to standardize the reasonable doubt instruction. There, the Supreme Court criticized, but did not overrule, the use of a non-standard instruction which originated with ***State v. Castle***, 86 Wn. App. 48, 935 P.2d 656 (1997). ***Bennett*** specifically refers to WPIC 4.01 as "the abiding belief" instruction. ***Bennett***, at 308. The Court did not criticize or question the use of the "abiding belief" language.

Multiple cases have upheld the use of the "abiding belief" language. ***State v. Pirtle*** 127 Wn.2d 628, 658, 904 P.2d 245 (1995) upheld the same language of the instruction given. The Court found that the language was "unnecessary but was not an error." *Id.* The Courts of Appeal have found that it "adequately instructs the jury," ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988), and "could not have misled or confused" it. ***State v. Price***, 33 Wn. App. 472, 476, 655 P.2d 1191 (1982). *See also* ***State v. Lane***, 56 Wn. App. 286, 299–301, 786 P.2d 277 (1989). The U.S. Supreme Court has also upheld the use of traditional "abiding

belief" instructions. *See* ***Victor v. Nebraska***, 511 U.S. 1, 14-15, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

The defendant contests the "abiding belief" language in instruction 2 (CP 40-57). Brief of Appellant at page 21. He contends that it confused the jury's role, because it impermissibly suggested that the jury's job is to search for the truth. *Id.*

The defendant urges this court not to follow Division I in finding the abiding belief language proper. However, this division has already recently upheld the inclusion of the "abiding belief" language in WPIC 4.01, consistent with the Washington Supreme Court and Division I. In ***State v. German***, 185 Wn. App. 1044 (2015)[5], this division ruled that the abiding belief language has never been held to be improper and that the Washington Supreme Court in ***Bennett***, 161 Wn.2d 303 at 318, directed its use.

Here, the challenged instruction does not direct jurors to find the truth themselves. It merely elaborates on what it means to be "satisfied beyond a reasonable doubt." Defendant's claim that the abiding belief language was improper is without merit.

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[5] While ***State v. German***, 185 Wn. App. 1044 (2015) is an unpublished opinion, it is permissibly cited under amended GR 14.1, effective September 1, 2016.

5. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court pointed out in ***State v. Sinclair***, 192 Wn. App. 380, 612-613, 367 P.3d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[6], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.* In ***State v. Barklind,*** 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful)

[6] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

defendant to pay appellate costs. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in ***State v. Keeney***, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. ***Keeney***, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in ***State v. Edgley***, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. ***Nolan***, at 624-625, 628.

In ***Nolan***, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in ***Blank***, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in ***Sinclair***, at *5, prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

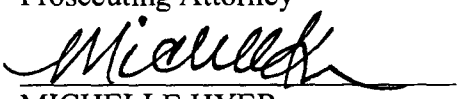
Here, the defendant appeared to be able-bodied and capable of working. The State has yet to "substantially prevail." It has not submitted a cost bill. Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's conviction below.

DATED: SEPTEMBER 21, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MICHELLE HYER
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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-22-16 Theresa Kar
Date Signature

PIERCE COUNTY PROSECUTOR

September 22, 2016 - 9:28 AM

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