

No. 96017-8

No. 75072-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID MORGAN,

Appellant.

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Court of Appeals
Division I
State of Washington

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

CORRECTED BRIEF OF APPELLANT

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A. INTRODUCTION

David Morgan and Brenda Welch were married for several years and had one child together. They divorced, and one Sunday evening Ms. Welch went to pick up their daughter from Mr. Morgan's home. The house caught fire, however, and Ms. Welch suffered severe burns and head trauma. Ms. Welch has no memory of what happened.

Detectives interrogated Mr. Morgan at the hospital without advising him of his *Miranda* rights, and he told them that he had fallen asleep and awoke after being struck in the head. He went downstairs to discover the house thick with smoke and Ms. Welch on fire. Without obtaining a warrant, the detectives seized his clothing from the hospital.

The State charged Mr. Morgan with first degree attempted murder, first degree assault, and first degree arson, and alleged they were crimes of domestic violence. Mr. Morgan was tried twice. His first trial resulted in a mistrial as a result of the State's misconduct. Despite providing discovery that stated the State's expert witnesses would testify the cause of the fire was undetermined, the State intentionally elicited from one fire investigator his opinion that the fire had been deliberately set. Because Mr. Morgan was prejudiced by the State's misconduct, dismissal was required under the criminal rules. Because the record demonstrates the

prosecutor acted in bad faith, dismissal was required under the constitutional prohibition against double jeopardy.

This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Morgan's motion to dismiss the charges after the State's misconduct resulted in a mistrial.

2. Retrial of the charges violated the Fifth Amendment prohibition against double jeopardy.

3. The trial court erred when it found Mr. Morgan's clothing was lawfully seized and denied Mr. Morgan's motion to suppress the pattern analysis of this clothing.

4. The trial court failed to enter written findings of fact and conclusion of law as required by CrR 3.6.

5. In the absence of sufficient evidence, the trial court erred when it entered Finding of Fact 11 for the CrR 3.5 hearing. CP 13.

6. In the absence of sufficient evidence, the trial court erred when it entered Finding of Fact 12 for the CrR 3.5 hearing. CP 13.

7. In the absence of sufficient evidence, the trial court erred when it entered Finding of Fact 20 for the CrR 3.5 hearing. CP 14.

8. The trial court erred when it entered Conclusion of Law 4 for the CrR 3.5 hearing. CP 15.

9. The trial court erred when it entered Conclusion of Law 6 for the CrR 3.5 hearing. CP 15.

10. The trial court erred when it entered Conclusion of Law 8 for the CrR 3.5 hearing. CP 15.

11. The trial court erred when it entered Conclusion of Law 9 for the CrR 3.5 hearing. CP 15.

12. The trial court erred when it entered Conclusion of Law 11 for the CrR 3.5 hearing. CP 15.

13. Mr. Morgan was denied his constitutional right to a fair trial when the deputy prosecuting attorney shifted the burden of proof to Mr. Morgan and impugned the integrity of his defense counsel.

14. Mr. Morgan was denied his constitutional right to a unanimous jury as to the charge of first degree arson.

15. The trial court erred when it denied Mr. Morgan's request for an "accidental fire" instruction.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court has the authority to dismiss an action under CrR 4.7(h)(7)(i) and CrR 8.3(b) when a party fails to comply with a discovery order or rule. The State intentionally and repeatedly elicited opinion testimony from its expert witness that contradicted the information it provided in discovery and, as a result, Mr. Morgan was forced to waive his

speedy trial rights and lost the jury he selected to hear his case. Under these circumstances, should this Court reverse and dismiss the charges against Mr. Morgan?

2. Double jeopardy protects the right of the defendant to be tried by the jury he selected. Retrial is barred where (1) the defendant did not consent to the mistrial and no emergency justified the mistrial or (2) where the defendant consented but the prosecutor's conduct was committed in bad faith. Where Mr. Morgan only requested a mistrial because he had no other choice, and the prosecutor acted in bad faith by intentionally and repeatedly eliciting highly prejudicial testimony from its expert in violation of the court's discovery order, should this Court reverse and dismiss?

3. The Fourth Amendment and article I, section 7 protect against warrantless searches and seizures by the State. The State did not prove "exigent circumstances" permitted it to seize Mr. Morgan's clothing without a warrant, because it provided no evidence of what chemicals it suspected were on his clothing or the dissipation rates of such chemicals. Is reversal required where the trial court failed to suppress the resulting analysis of Mr. Morgan's clothing, prejudicing Mr. Morgan at trial?

4. Under the Fifth Amendment, an individual must be informed of his right to remain silent and his right to the presence of counsel during

any custodial interrogation. Detectives failed to advise Mr. Morgan of these rights and confronted Mr. Morgan in his hospital room with allegations that he caused Ms. Welch's injuries and set the house on fire. An officer stood guard outside Mr. Morgan's room and the detectives did not inform him that he was free to terminate the questioning. Should this Court reverse where the State used Mr. Morgan's statements against him at trial, and Mr. Morgan was prejudiced?

5. Criminal defendants are guaranteed the right to a unanimous jury verdict under article I, section 21. For alternative means crimes, like first degree arson, this means that the jury must agree on which means is the basis for the conviction. Is reversal of Mr. Morgan's arson conviction required where the trial court instructed the jury it did not need to reach agreement on the means by which Mr. Morgan allegedly committed arson?

6. Under *State v. Smith*,¹ an individual charged with arson is entitled to have the jury instructed that where a building is burned, it is presumed that the fire was caused by accident or natural causes rather than a deliberate act of the defendant. Should this Court reverse where the trial court wrongly denied Mr. Morgan's request for this instruction?

¹ 142 Wash. 57, 57, 252 P. 530 (1927).

D. STATEMENT OF THE CASE

David Morgan and Brenda Welch met when she began working as a nanny for his son. RP 2439. At the time, both were married to other people and Ms. Welch had two daughters of her own. RP 2440. They later divorced their respective spouses and Mr. Morgan moved into Ms. Welch's home. RP 2443. Ms. Welch became pregnant, and the two married in Hawaii. RP 2444. Their daughter was born in 2007. RP 2444.

Several years later, in 2014, Mr. Morgan and Ms. Welch divorced and Ms. Welch moved out of the family's home. RP 2446, 2588. Their daughter lived primarily with Ms. Welch, but visited Mr. Morgan three weekends each month. RP 2452. On the weekends that their daughter was in Mr. Morgan's care, he picked her up from school on Friday afternoon and Ms. Welch picked her up from Mr. Morgan's home on Sunday evening. RP 2452.

Mr. Morgan worked at Boeing, and had undergone back surgery. RP 2665, 2667. Mr. Morgan's mother, Patricia Mayfield, often assisted him with childcare on the weekends so that he could work or attend physical therapy. RP 2664-65. One weekend, Mr. Morgan and his daughter stayed with Ms. Mayfield Friday and Saturday night, both because Mr. Morgan was ill and because he had to work that weekend. RP 2664-67. On Sunday, Mr. Morgan left his daughter with Ms.

Mayfield, but after falling asleep at his house, did not return to pick his daughter up. RP 1764, 2667.

That evening, Ms. Welch went to Mr. Morgan's home to get their daughter. RP 1588. Exactly what happened after Ms. Welch arrived at the house was unclear, but shortly after she got there, neighbors reported the house ablaze. RP 1599. When the fire department arrived, paramedics found Mr. Morgan outside the home, coughing and choking. RP 1977. He was initially unable to speak, but directed firefighters to the garage, where they discovered Ms. Welch close to death, with severe burn injuries and life-threatening head trauma. RP 1645, 2109, 2115.

Both Mr. Morgan and Ms. Welch were treated at the scene and transported to a hospital. RP 1918, 2003, 2015, 2109. Ms. Welch required surgery and has no memory of what happened that night. 3/29/1RP 169; 2439. Mr. Morgan appeared confused and lethargic. RP 1537. His hair was singed by the fire and he had an abrasion on his forehead. RP 2034.

Detectives questioned Mr. Morgan in his hospital room and he explained he had fallen asleep that afternoon and awoke after being struck in the head twice. RP 1764. He heard a voice, and went downstairs to find the house filled with black smoke and Ms. Welch on fire. RP 1765. He ripped off her sweater and attempted to put out the flames, but was

unsuccessful. RP 1765. He ran from the house, only realizing after he was outside that Ms. Welch was not with him. RP 1807, 1827. He attempted to spray the house with water, and at some point realized that Ms. Welch might be in the garage. RP 1827-28.

Mr. Morgan appeared to have blood on his clothing and one of his hands. RP 2008, 2980-81. The detectives quickly decided Mr. Morgan was responsible for Ms. Welch's injuries and the fire. RP 100. They directly confronted him with these allegations but did not advise Mr. Morgan of his *Miranda*² rights. Without obtaining a warrant, they seized his clothing in the hospital room and months later, performed a "blood"³ splatter pattern analysis of the clothing. RP 154, 182; 3/29/16 RP 73. The State charged Mr. Morgan with attempted first degree murder, first degree assault, and first degree arson, and alleged that they were crimes of domestic violence. CP 182.

Ed Hardesty, the deputy fire marshal who investigated the fire, concluded the cause of the fire was undetermined. RP 2140. However, at Mr. Morgan's first trial, the supporting fire investigator, Mikael Makela, testified that he believed the fire was intentionally set. RP 951. Because

² *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602 (1966).

³ Although the stain on Mr. Morgan's clothing was referred to as a "bloodstain," the forensic scientist who performed the analysis admitted she had never verified whether the liquid substance on Mr. Morgan's clothing was actually blood. 3/29/16 RP 77, 90.

this testimony directly contradicted the summary of Mr. Makela's opinion the State provided to the defense in discovery, the trial court granted Mr. Morgan's motion for a mistrial. RP 1001. Mr. Morgan was retried after the trial court denied Mr. Morgan's motion to dismiss the charges. RP 1002.

At Mr. Morgan's second trial, the deputy prosecuting attorney argued to the jury that defense counsel had failed to fulfill his obligation to attend witness interviews and that Mr. Morgan's account of what happened that night, as presented to the detectives at the hospital, failed to answer all of the questions raised by the State's case. RP 2802, 2805. Mr. Morgan objected to these statements, but the trial court overruled his objections. RP 2802, 2805.

When deciding how to instruct the jury, the trial court denied Mr. Morgan's request for an accidental fire instruction. RP 2649. The court also instructed the jury that it need not be unanimous as to the means by which Mr. Morgan committed first degree arson. CP 81.

The jury found Mr. Morgan guilty as charged. CP 58-60, 62. He was sentenced to 260.25 months in prison on the attempted first degree murder and first degree arson convictions, both of which the jury found were crimes of domestic violence. CP 36.

E. ARGUMENT

1. Dismissal of the charges against Mr. Morgan was required following the mistrial.

a. Dismissal was required under CrR 4.7(h)(7)(i) and CrR 8.3(b).

The trial court has the authority to dismiss an action under CrR 4.7(h)(7)(i) where “a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto.” Under CrR 8.3(b), the court has the authority 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.

Prior to trial, Mr. Morgan moved to compel the State to provide a summary of the opinions of its expert witnesses under CrR 4.7. CP 431. The trial court granted Mr. Morgan’s motion and the State provided a memorandum stating that Ed Hardesty, the deputy fire marshal who examined the residence, would testify, among other things, that “[t]he exact cause of the fire is undetermined.” CP 419, 426. The State’s memorandum also stated that Mikael Makela, a fire investigator who accompanied Mr. Hardesty on his examination of the home, “signed off on Mr. Hardesty’s report and it is expected that he would join in the ultimate conclusions listed above if called to testify.” CP 419.

Despite the State's representations to defense counsel in this written memorandum, at trial the State repeatedly elicited from Mr. Makela his opinion that the fire was the result of a deliberate act. RP 950-

51. The State engaged in the following exchange with Mr. Makela:

Q. And would you share with us the first paragraph please?

A. "Introduction, an incendiary fire is a fire that is deliberately set with the intent to cause the fire to occur in an area where the fire should not be."

Q. And do you believe that's what occurred in this case?

A. Yes, I do.

Q. Two pages in, 24.2.7.3.1 does that reiterate anything about ignitable liquid?

A. It does.

Q. What does it say?

A. "The presence of ignitable liquids may indicate that a fire was incendiary, especially when the ignitable liquids are found in areas which they are not normally expected."

Q. Did you find that in this particular case?

A. Yes.

Q. And the last paragraph in that same page, 24.3.3.3.

A. "Absence of personal items prior to the fire, the absence of items that are personal, irreplaceable, or difficult items to replace should be investigated.

Examples of those items include jewelry, photographs, awards, certificates, trophies, art, pets, sports and hobby equipment, and so forth; also the removal of important documents, e.g., fire insurance policies, business records, tax records – prior to the fire – should be investigated and explained.”

Q. In consideration of all of that, of the standards of what you both eliminated and what you found, do you have an opinion as to whether this is an intentionally set fire?

A. Yes, I do.

Q. Which is?

A. Yes. It is an incendiary fire.

RP 950-51.

On cross-examination, Mr. Makela testified that he had informed the prosecutor of this opinion several months prior to the trial and had spoken with him about this conclusion “[m]aybe three or four times.” RP 951-52.

Mr. Morgan immediately moved for a mistrial. RP 954. The State argued that although its discovery memorandum did not inform the defense that Mr. Makela would testify the fire was incendiary, the State may have provided other materials to the defense that did. RP 957-58. However, after the court took a recess, the deputy prosecuting attorney offered a different explanation and represented that he had not intended to

elicit this information from Mr. Makela on direct examination. RP 960-61.

The trial court granted Mr. Morgan's motion for a mistrial, and Mr. Morgan moved to dismiss the charges against him. RP 964. In response to Mr. Morgan's motion, the prosecutor filed a declaration that directly contradicted the record. CP 151. In that affidavit, the prosecutor claimed that "in the flow of direct examination" he "asked a concluding question" that "was sloppy, inartful, unfocused" and that had "elicited far more" than he intended. CP 152.

In fact, the record shows the prosecutor repeatedly and deliberately elicited from Mr. Makela his opinion that the fire was set intentionally. RP 950-51. The trial court pointed this out, finding:

In looking at the materials submitted by the parties for this motion, including the affidavits of Mr. Stern, Mr. Langbehn, and Mr. Makela, I am presented with a different presentation of the facts as were presented to me at the time the motion was originally made. And it causes me concern.

RP 997.

The trial court specifically rejected the prosecutor's claim that he had simply asked an inartful question, finding the prosecutor's questions were clearly designed to elicit Mr. Makela's opinion that the fire was

incendiary, and that the “five minutes or so of testimony that was elicited cannot be attributed to a mistake.” RP 998-99. The trial court found:

But this is not an inadvertent mistake. And it wasn't sloppy work. The amount of time that was spent on it, the number of questions, the type of questions, the leading questions, all designed to reach one conclusion. Particularly, you're using two separate additions [sic] of the NFPA. And so there's a purpose. There's a scheme of questions, designed to elicit a – this testimony.

RP 999.

The trial court concluded the State committed a discovery violation under CrR 4.7 but denied Mr. Morgan's motion to dismiss the charges.

RP 1000-02. The denial of Mr. Morgan's motion to dismiss was error.

i. *The State committed misconduct.*

Under CrR 8.3(b), dismissal of the charges is appropriate where the defendant demonstrates by preponderance of the evidence that (1) the State committed misconduct and (2) the defendant's right to a fair trial was prejudiced. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (citing *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993); *State v. Martinez*, 121 Wn. App. 21, 86 P.3d 1210 (2004)).

“However, simple governmental mismanagement satisfies the ‘misconduct’ element.” *Michielli*, 132 Wn.2d at 243 (citing *Blackwell*,

120 Wn.2d at 831). Prosecutorial vindictiveness is not required.

Michielli, 132 Wn.2d at 243.

In *Michielli*, the court found the defendant satisfied the misconduct element where the State filed four additional charges against Mr. Michielli five days before his trial was scheduled to begin, despite the State's admission it had all of the information it needed to file the additional charges when it filed the original information. 132 Wn.2d at 243. The court determined that "[t]he long delay, without any justifiable explanation, suggests less than honorable motives." *Id.* at 244.

Here the trial court determined the State committed a discovery violation under CrR 4.7. This alone constitutes "government mismanagement" under *Michielli*. However, after committing the discovery violation, the prosecutor acted egregiously, first claiming he had provided the information in discovery and later declaring under penalty of perjury that he had not intended to elicit the information from his expert witness. RP 957-58; CP 152. The claims made in the prosecutor's affidavit were contrary to the record, and the trial court properly rejected them. RP 999. As the trial court determined when it found the discovery violation, the first prong of the *Michielli* test was satisfied. RP 1001.

ii. *Mr. Morgan suffered prejudice.*

The prejudice suffered by an individual as a result of the State's misconduct "includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.'" *Michielli*, 132 Wn.2d at 240 (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). In *Michielli*, the court held the defendant was prejudiced because he was forced to waive his speedy trial right and ask for a continuance in order to prepare for trial. *Id.* at 244. The court found that being forced to waive his rights "was not a trivial event" and that our supreme court, "as a matter of public policy, has chosen to establish speedy trial time limits by court rule and to provide that failure to comply therewith requires dismissal of the charge with prejudice." *Id.* at 245 (quoting *State v. Duggins*, 68 Wn. App. 396, 399-400, 844 P.2d 441 (1993)).

The question of whether dismissal is appropriate is "a fact-specific determination that must be resolved on a case-by-case basis." *State v. Sherman*, 59 Wn. App. 763, 770-71, 801 P.2d 274 (1990). Our courts have repeatedly found that a discovery violation by the State warrants dismissal. *See e.g., State v. Brooks*, 149 Wn. App. 373, 393, 203 P.3d 397 (2009) (dismissal warranted where State repeatedly failed to provide defense with discovery); *Sherman*, 59 Wn. App. at 773 (State's failure to

produce Internal Revenue Service records justified dismissal); *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980) (record amply supported dismissal of negligent homicide case where the State added nine additional witnesses immediately before trial).

Here, Mr. Morgan demonstrated prejudice. As his defense counsel explained to the trial court, the State's mismanagement forced him to waive his speedy trial rights. CP 164. This alone demonstrates prejudice under *Michielli*. 132 Wn.2d at 240. In addition, the State's conduct resulted in the loss of the jury Mr. Morgan had selected, which was particularly significant because the media coverage of Mr. Morgan's case, and resulting mistrial, made it particularly difficult to ensure he would obtain a second fair and unbiased jury. RP 982. Despite the harm to Mr. Morgan, the State faced no consequences from its actions.⁴ Indeed, the mistrial worked to the State's benefit, as it simply gave the State additional time to prepare for trial. RP 983.

In addition, this Court has found that when the State's conduct is outrageous, it exceeds the bounds of fundamental fairness and dismissal is required. *Martinez*, 121 Wn. App. at 35. In *Martinez*, the State withheld

⁴ Although the trial court reserved the right to impose sanctions against the State when it denied Mr. Morgan's motion to dismiss, it ultimately declined to do so. RP 1002; RP 2864.

exculpatory evidence from the defendant until the middle of trial. *Id.* at

35. This Court determined dismissal of the charges was required, holding:

In the drive to achieve successful prosecutions, the end cannot justify the means. And if the State knows that the most severe consequence that can follow from withholding exculpatory evidence until late in the trial 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.

The State exhibited similarly egregious behavior here when, by its own expert's account, it engaged in multiple conversations in which the expert revealed he believed the fire was deliberately set. RP 951-52. Yet the prosecutor provided discovery stating information to the contrary and, when confronted with this discrepancy, repeatedly refused to admit to the error. CP 419; RP 957-58, 960-61. Instead, the prosecutor first claimed he had provided the information in discovery and then claimed he had unintentionally elicited the information from this expert. CP 152; RP 957-58, 960-61. Both of these claims were shown to be false.

This outrageous conduct exceeded the bounds of fundamental fairness, and Mr. Morgan demonstrated prejudice. This Court should reverse the trial court's ruling and dismiss the charges pursuant to CrR 4.7(h)(7)(1) and CrR 8.3(b).

b. The constitutional prohibition against double jeopardy requires dismissal.

Dismissal of the charges was also required under the double jeopardy clause. U.S. Const. amend. V; Const. art. I, § 9; CP 165. Both our federal and state constitutions protect individuals from being put in jeopardy twice for the same offense. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). These “clauses have been interpreted so as to protect against the same triumvirate of constitutional evils: ‘being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.’” *Turner*, 169 Wn.2d at 454 (citing *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)); see also *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

Double jeopardy also protects the right of the defendant to be tried by the jury he selected. *State v. Juarez*, 115 Wn. App. 881, 887, 64 P.3d 83 (2003) (citing *State v. Jones*, 97 Wn.2d 159, 162, 651 P.2d 708 (1982)). When a court declares a mistrial, the individual’s “‘valued right to have his trial completed by a particular tribunal’ is implicated.” *Juarez*, 115 Wn. App. at 887; see also *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d

1027 (2009); *Arizona v. Washington*, 434 U.S. 497, 504, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

In *Arizona*, the United States Supreme Court explained the reason why this “valued right” merits constitutional protection:

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

434 U.S. at 503-505.

In order to determine whether an individual’s constitutional rights were violated, this Court must first determine whether jeopardy had attached at the time the mistrial was declared. *State v. Rich*, 63 Wn. App. 743, 746, 821 P2d 1269 (1992). Jeopardy attaches once the jury is sworn. *Id.* at 887. In Mr. Morgan’s case, the jurors had been sworn and, in fact, were several days into trial when the court declared a mistrial. RP 975. Jeopardy had clearly attached.

Once jeopardy has attached, this Court must engage in two separate inquiries to determine whether a retrial is barred. *Rich*, 63 Wn. App. at 747. First, this Court must determine whether the defendant

consented to the mistrial. *Id.* If the defendant consented, the Court must determine whether the prosecutor's conduct was committed in bad faith. *Id.* If the defendant did not consent, this Court must determine whether there was an emergency or other necessity that justified the mistrial over the defendant's objection. *Id.*

Given the facts of this case, Mr. Morgan's motion for a mistrial should not be construed as "consent." Further, even if this Court finds Mr. Morgan consented to the mistrial, the prosecutor's misconduct barred the retrial.

- i. *Because Mr. Morgan was faced with a "Hobson's Choice," his motion should not be construed as "consent."*

In *Rich*, the defendant failed to initially appear for his trial and the court ordered the parties to proceed over defense counsel's objection. 63 Wn. App. at 745. Mr. Rich appeared after the State rested its case, and defense counsel moved to dismiss on the grounds that the State had failed to prove the identity of the person who committed the alleged crime. *Id.* at 746. The trial court forced Mr. Rich to choose between a mistrial or permitting the State to reopen its case. *Id.* Mr. Rich resisted both options and the trial court granted a mistrial sua sponte. *Id.*

This Court found Mr. Rich was faced with a “Hobson’s Choice,” meaning no actual choice at all,⁵ because allowing the State to reopen its case would clearly prejudice his prospects for acquittal. *Id.* at 748. It held that “[h]is failure to select either of two unfavorable options cannot be considered consent to the declaration of a mistrial.” *Id.*

Here, Mr. Morgan moved for the mistrial, but he did so only because his other option was to proceed with a jury that the State had irreparably prejudiced. The State’s misconduct forced him to choose between giving up his right to have his trial completed by the particular tribunal he had selected, or permitting the State’s actions to prejudice his prospects for acquittal. As in *Rich*, Mr. Morgan was faced with no genuine alternative.

Because Mr. Morgan had no choice but to request the mistrial, retrial is barred unless “manifest necessity” prompted the court’s ruling. *Juarez*, 115 Wn. App. at 889. However, the State cannot commit misconduct and then claim its own actions created a “manifest necessity.” *Id.* Because the State’s actions, rather than an emergency, necessitated the

⁵ Relying on the dictionary, the Court defined “Hobson’s Choice” as “[a]n apparent freedom to take or reject something offered when in actual fact no such freedom exists; an apparent freedom of choice where there is no real alternative.” *Rich*, 63 Wn. App. at 748, n.3.

discharge of the jury, retrial was barred and this Court should reverse.

Rich, 63 Wn. App. at 748; *Juarez*, 115 Wn. App. at 889.

- ii. *The State acted in bad faith when it intentionally elicited highly prejudicial testimony from its expert witness that directly contradicted the information provided to the defense in discovery.*

Even if this Court finds Mr. Morgan’s motion for a mistrial qualifies as “consent,” it should find the retrial was barred because the “prosecutor’s conduct was motivated ‘in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal.’” *Rich*, 63 Wn. App. at 747 (quoting *State v. Jones*, 33 Wn. App. 865, 870, 658 P.2d 1262 (1983)); *see also United States v. Dintz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976). Here, the record demonstrates the prosecutor acted in bad faith.

The State’s memorandum was clear that Mr. Makela would join in Mr. Hardesty’s opinion. CP 419. Mr. Hardesty testified before Mr. Makela and, as expected, stated that the cause of the fire was undetermined. RP 762. Despite this, the prosecutor deliberately and repeatedly elicited the expert’s opinion that the fire was intentionally set by asking very specific questions. RP 999. The evidence suggests that the prosecutor took a risk by eliciting testimony he knew he had not provided in discovery, presuming that the evidence would simply be stricken if

defense counsel objected. RP 964 (deputy prosecuting attorney repeatedly asking the trial court for the option to “walk [the testimony] back”). When the trial court granted a mistrial instead, the prosecutor argued that he had been “sloppy” and unfocused during the direct examination and had simply asked one question too many. CP 152, 154.

However, as the trial court found, the prosecutor did not elicit the prejudicial testimony from his expert witness by mistake or as the result of “sloppy work.” RP 999. Indeed, the record demonstrates the opposite: the questioning was carefully constructed and focused on eliciting the expert witness’s opinion that the fire was intentionally set. RP 951. The prosecutor’s questioning, combined with his subsequent false assertions that he had provided the information in discovery or asked the questions by accident, show that he was acting in bad faith.

When the trial court found, simply, that it did not “think there is a basis to dismiss under [a double jeopardy] theory,” it erred. RP 1001-02. This Court should find the prosecutor’s misconduct barred a retrial and dismiss.

2. The State’s warrantless seizure of Mr. Morgan’s clothing, and subsequent search, violated article I, section 7.

The Fourth Amendment and article I, section 7 protect against warrantless searches and seizures by the State. *State v. Eisfeldt*, 163

Wn.2d 628, 634, 185 P.3d 580; U.S. Const. amend. IV; Const. art. I, § 7. Under our state constitution, warrantless searches are per se unreasonable and “subject to a limited set of carefully drawn exceptions.” *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012) (citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010)). The existence of “exigent circumstances” is one such exception, and applies when “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.” *State v. Cruz*, 195 Wn. App. 120, 123, 380 P.3d 599 (2016) (quoting *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009)).

“The State bears the burden of establishing the applicability of an exception by clear and convincing evidence.” *Cruz*, 195 Wn. App. at 123 (citing *State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009)). Whether exigent circumstances exist is a legal question that this Court reviews de novo. *City of Seattle v. Pearson*, 192 Wn. App. 802, 811, 369 P.3d 194 (2016) (citing *State v. Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015)).

The State seized Mr. Morgan’s clothing on November 16, 2014, after his clothes were removed and placed in bags in his hospital room. RP 154, 182. The officers who seized the clothing did not ask Mr.

Morgan's permission or obtain a warrant. RP 162. Several months later, the clothing was analyzed by Kim Duddy, a forensic scientist with the Washington State Patrol Crime Lab. RP 182; 3/29/16 RP 71.

Mr. Morgan filed a motion to suppress, arguing the seizure and analysis of his clothing violated article I, section 7. CP 298. The State argued it was justified in seizing Mr. Morgan's clothing without obtaining a warrant because the officers were concerned chemicals on the clothing could dissipate before the clothing was secured in special bags. RP 179. The trial court agreed, finding the seizure lawful under the exigent circumstances exception. RP 182. Mr. Morgan moved to reconsider, but the trial court denied his motion. RP 191; CP 202.

The trial court determined that any testing of the clothing for an accelerant, of which no evidence was admitted at trial, was lawful. RP 183. However, the trial court initially suppressed the results of Ms. Duddy's examination, expressing concern about whether the subsequent splatter pattern analysis of the clothing was lawful without a warrant. RP 182-84. In response to the court's ruling, the State obtained a warrant and Ms. Duddy re-examined the clothing. The trial court determined the results of the second analysis were admissible. RP 1039-40.

- a. The State did not establish exigent circumstances justified the warrantless seizure of Mr. Morgan's clothing.

Whether an exigency exists is based on the totality of the circumstances. *Pearson*, 192 Wn. App. at 812; *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). However, the State may demonstrate exigent circumstances only when there is “a true emergency.” *Cruz*, 195 Wn. App. at 125; *see also Tibbles*, 169 Wn.2d at 369-70. A warrantless search is unlawful when other, less intrusive, options were available to the officers. *Cruz*, 195 Wn. App. at 126.

The sole witness at the 3.6 hearing, Officer Christopher Breault, testified that he arrived at Mr. Morgan's hospital room around 8:45 p.m. RP 158. A couple of hours passed before he noticed the bags with Mr. Morgan's clothing. RP 159. However, after identifying the clothing, he took no action. RP 162.

After detectives arrived to interview Mr. Morgan, they requested that a crime scene technician come to the hospital and collect the clothing. RP 160-61. Officer Breault assisted the crime scene technician with seizing the clothing, but admitted he had no knowledge of what chemicals might have been on the clothing as a result of the fire or the chemicals' rate of dissipation. RP 161.

In *Pearson*, this Court determined that the natural dissipation of THC in the defendant's bloodstream did not justify a warrantless blood draw under the exigent circumstances exception. 192 Wn. App. at 816-17. Relying on *Missouri v. McNeely*, ___ U.S. ___ 133 S.Ct. 1552, 1562, 185 L.Ed.2d 696 (2013), and noting that jurisdictions have found multiple ways to streamline the warrant process, including the use of technological advances, it held:

the natural dissipation of THC in a suspect's bloodstream will constitute an exigency sufficient to forgo the warrant requirement only if the party seeking to introduce evidence of a warrantless blood test can show that waiting to obtain a warrant would result in losing evidence of the defendant's intoxication.

Pearson, 192 Wn. App. at 813.

This Court reversed in *Pearson* after determining the State had not satisfied its heavy burden to prove that obtaining a warrant would have significantly delayed collecting the sample. 192 Wn. App. at 816. Similarly, here the State failed to show that seeking a warrant would have caused any chemicals on Mr. Morgan's to dissipate. Neither Officer Breault nor the detectives made any attempt to immediately secure Mr. Morgan's clothing. Instead, the detectives called in a crime scene technician to collect it. There was no showing by the State as to why the

detectives did not have time to seek a warrant while they waited for the crime scene technician to arrive.

In addition, the State presented no evidence as to what chemicals might be present on the clothing or the rate at which the chemicals could be expected to dissipate. In *Pearson*, this Court rejected the State's claim that exigent circumstances existed even assuming a three to five hour dissipation window. 192 Wn. App. at 815. Here, Officer Breault offered nothing more than a vague assertion that evidence "can be dissipating rapidly." RP 155. Because the State did not show what chemicals might be on the clothing, or how long it would take the chemicals to dissipate, it could not demonstrate by clear and convincing evidence that it was necessary to seize the clothing without a warrant.

- b. Because the State's application for the search warrant relied on the unlawful seizure, the evidence should have been suppressed.

Several months after the State seized Mr. Morgan's clothing, it asked Ms. Duddy, a forensic scientist with its crime laboratory, to analyze the appearance of the stains on the clothing. CP 133. The trial court suppressed the results of Ms. Duddy's first analysis, finding the exigent circumstances no longer applied and the State was required to obtain a warrant. RP 183-84. After the State obtained a warrant and asked Ms.

Duddy to conduct her analysis again, the court ruled the results of her second analysis were admissible at trial. RP 1039-40.

The State argued Ms. Duddy's second analysis was admissible because it had satisfied the independent source doctrine, but this exception to the exclusionary rule is satisfied only where the evidence is obtained "pursuant to a valid warrant or other lawful means independent of the unlawful action." *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005); CP 126. This is not the case here.

In the State's affidavit requesting the search warrant, the State explained the clothing was transported to the crime lab for forensic testing of ignitable liquids and returned to evidence storage. Supp. CP ____ (Affidavit for Search Warrant at 4). Once in storage, the detective conducted a "visual examination" of the clothing in which he identified a significant amount of staining that appeared to be consistent with blood splatter. Supp. CP ____ (Affidavit for Search Warrant at 4). This visual exam prompted him to request that the crime laboratory conduct a pattern analysis of the stains on the clothing. Supp. CP ____ (Affidavit for Search Warrant at 4). Thus, the results of the pattern analysis was not obtained independently of the unlawful seizure.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and

must be suppressed.” *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

This strict exclusionary rule prevents article I, section 7 “from becoming a meaningless promise.” *Ladson*, 138 Wn.2d at 359 (internal citations omitted). Because the seizure of Mr. Morgan’s clothing was unlawful, the results of Ms. Duddy’s analysis should have been suppressed.

c. The error was not harmless.

This Court applies a constitutional harmless error standard when the trial court admits evidence that is the product of a warrantless search. *Smith*, 165 Wn. App. at 316 (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)); *see also Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). Reversal is required unless the untainted evidence is “so overwhelming that it necessarily leads to a finding of guilt.” *Smith*, 165 Wn. App. at 316.

Here, there were no witnesses to the crime and the State’s case left many questions unanswered. The splatter pattern analysis, purportedly of Ms. Welch’s blood, was the only physical evidence suggesting that Mr. Morgan was in close proximity to Ms. Welch at the time she suffered the head injury. Given these facts, the erroneous admission of this evidence was not harmless and this Court should reverse.

- d. The trial court failed to enter written findings of fact and conclusions of law, as required by CrR 3.6.

If this Court requires additional guidance on this issue, it should require the trial court to comply with CrR 3.6 and enter written findings of fact and conclusions of law. Despite the rule's plain requirement, no findings were entered in this case. However, this Court has chosen to overlook their absence when the oral ruling leaves "no doubt as to the trial court's findings and the basis for its decision." *State v. Cruz*, 88 Wn. App. 905, 946 P.2d 1229 (1997).

Here, the trial court issued an oral ruling, and the State relied on the minutes' memorialization of part of this ruling. RP 182-84, 191, 1039-40; CP 131. However, if additional guidance is needed, this Court should require the trial court to comply with CrR 3.6.

3. Mr. Morgan's statements to Sergeant Cohnheim and Detective Jorgensen should be suppressed because they did not advise Mr. Morgan of his *Miranda* rights.

To protect a defendant's Fifth Amendment right against self-incrimination, a suspect must be informed of his right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602 (1966); *State v. Richmond*, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992); U.S. Const. amend. V; Const. art. I, § 9. "*Miranda* warnings must be given when a

suspect endures (1) custodial (2) interrogation (3) by an agent of the State.” *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)). Without *Miranda* warnings, a suspect’s statements made during a custodial interrogation are presumed involuntary and are inadmissible in the State’s case-in-chief. *State v. Lozano*, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994).

When the facts are not in dispute, a *Miranda* claim is an issue of law that is reviewed de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

a. Sergeant Cohnheim and Detective Jorgensen interrogated Mr. Morgan.

Prior to trial, Mr. Morgan moved to suppress the statements he made to Sergeant Detective Rodney Cohnheim and Detective Brian Jorgensen.⁶ The State did not dispute that the officers interrogated Mr. Morgan and the trial court’s conclusions of law did not address whether the detectives’ questioning constituted an interrogation. CP 323; RP 127, 129; CP 15 (Conclusions of Law). However, in the trial court’s oral

⁶ Mr. Morgan agreed with the State that his statements to Lieutenant John Puetz and Officer Christopher Breault were not made during the course of a custodial interrogation. RP 59, 132.

ruling, the judge indicated he did not believe Mr. Morgan had been interrogated. RP 143.

The court's ruling was made in error. An individual is interrogated when he is "subjected to either express questioning or its functional equivalent" that the police should know is "reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *Sargent*, 111 Wn.2d at 650. Prior to their arrival at Mr. Morgan's hospital room, the detectives were notified that Ms. Welch was severely burned, smelled of gasoline, and had suffered significant head trauma. CP 328. The detectives were also informed that Mr. Morgan and Ms. Welch were separated and shared custody of their daughter. CP 328.

Detective Jorgensen testified that he did not immediately suspect that Mr. Morgan was responsible for the fire, but that this quickly changed after Mr. Morgan began answering the detectives' questions. RP 100. The detectives arrived at approximately 10:40 p.m. and interrogated Mr. Morgan until 11:30 p.m. RP 79. At that point, the detectives stopped questioning to allow Mr. Morgan to receive medical treatment and use the bathroom. RP 68-69. The interrogation resumed at 12:05 a.m., and lasted until 12:45 a.m. RP 79.

Before pausing their questioning to permit Mr. Morgan to use the bathroom, Detective Jorgensen told Mr. Morgan he believed Mr. Morgan had assaulted Ms. Welch and started the fire. RP 109. During the break, Detective Jorgesen contacted the on-duty homicide deputy prosecutor to determine how to proceed. RP 102-03. When they resumed the interrogation, Detective Jorgensen admitted the tone of the questioning turned even more confrontational. RP 103.

The detectives should have known that their questions were reasonably likely to elicit an incriminating response from Mr. Morgan. *Innis*, 446 U.S. at 300-301; *Sargent*, 111 Wn.2d at 650. The detectives' testimony at the suppression hearing indicated that not only did they quickly decide Mr. Morgan was responsible for the fire and injuries sustained by Ms. Welch, but that they directly confronted him with these allegations. RP 100, 109. The detectives' questioning of Mr. Morgan constituted an interrogation.

b. Mr. Morgan was in custody.

The primary issue at the suppression hearing was whether Mr. Morgan was in custody at the time of the interrogation. A person is "in custody" for *Miranda* purposes if a reasonable person would not have felt free to terminate the interrogation and leave. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013); *United States v. Craighead*, 539

F.3d 1073, 1082 (9th Cir. 2008). As this Court has held, “Miranda has been interpreted to mean that, if the facts and circumstances are such that a reasonable man, innocent of any crime, would believe he is in custody or that his freedom of action has been restricted in any significant way, no further action may take place in the absence of warnings.” *State v. Dennis*, 16 Wn. App. 417, 421, 558 P.2d 297 (1967).

Where the individual would not wish to “leave” the location of the interrogation, because he is at home or, as in Mr. Morgan’s case, receiving treatment at the hospital, the determination of whether the interrogation was custodial “is necessarily fact intensive.” *Craighead*, 539 F.3d at 1084 (quoting *United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir. 1993)). The Court must perform a “totality of the circumstances” analysis which includes (1) the number of law enforcement personnel present and whether they were armed; (2) whether the individual was restrained by force or threats; (3) whether the individual was isolated from others; and (4) whether the individual was informed he was free to leave or terminate the interview. *Craighead*, 539 F.3d at 1082-88. Consideration of these factors demonstrates that under a totality of the circumstances, Mr. Morgan was in custody.

- i. *Multiple armed officers were present during the interrogation.*

During Mr. Morgan's interrogation, multiple armed officers were present. Officer Breault was sent to Mr. Morgan's hospital room to gather any updates about Mr. Morgan's medical status and to confirm Mr. Morgan's daughter was safe. RP 115. Officer Breault was in uniform and armed. RP 123. He described the room as "pretty small," and when Detective Cohnheim and Detective Jorgensen arrived, he positioned himself outside Mr. Morgan's room. RP 73, 118. The detectives were also armed and displayed their badges to Mr. Morgan. RP 76, 97.

- ii. *Mr. Morgan was unable to leave his bed without assistance and was isolated in the hospital.*

While the detectives did not physically restrain Mr. Morgan, he was tethered to medical equipment, which made it difficult for him to get out of the bed. CP 13 (Finding of Fact 12). Mr. Morgan was wearing an oxygen mask and required assistance by hospital staff in order to use the bathroom. CP 14 (Finding of Fact 22); RP 69, 104. Thus, the trial court's finding indicating Mr. Morgan was entirely unrestrained was unsupported by the evidence presented at the hearing. CP 13-14 (Findings of Fact 12, 20).

In addition, Mr. Morgan was completely isolated at the hospital. He had no family or friends present and he was unable to unlock his cell

phone. RP 122. No other patients nor medical staff were in Mr. Morgan's room during the interrogation. RP 66.

- iii. *The police did not inform Mr. Morgan he was free to terminate the interview, and the officer standing guard outside his door indicated he was not.*

The detectives never informed Mr. Morgan he was free to leave the room or terminate the interview, and their actions suggested otherwise.

An officer was present in Mr. Morgan's room or stationed outside the door beginning at 8:50 on the evening in question. RP 107. This, alone, suggested that Mr. Morgan was in custody. *See State v. Butler*, 165 Wn. App. 820, 828, 269 P.3d 315 (2012) (finding the defendant was not in custody, in part, because no police were stationed inside or outside of the hospital room while one detective asked the defendant questions).

After completing their interrogation of Mr. Morgan, the detectives arranged for an officer to continue to stand guard outside Mr. Morgan's room 24 hours a day. RP 106. They chose not to place him under arrest until they learned he would be discharged from the hospital. RP 109; CP 14 (Findings of Fact 26-27). The trial court properly found that an officer was stationed outside Mr. Morgan's room during his stay at the hospital, but inexplicitly also found that Mr. Morgan's room "was not secured and not under guard." CP 13 (Findings of Fact 9, 11). This finding was made

in error. The fact that an officer was stationed outside Mr. Morgan's door demonstrated he was under guard.

As this application of the *Craighead* factors demonstrates, Mr. Morgan was in custody. The trial court wrongly denied Mr. Morgan's motion to suppress the statements he made to Sergeant Cohnheim and Detective Jorgensen.

c. Reversal is required.

A constitutional error is harmless only where this Court "is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Rhoden*, 189 Wn. App. 193, 356 P.3d 242 (2015) (quoting *Guloy*, 104 Wn.2d at 425); *Chapman*, 386 U.S. at 22. The State cannot meet that heavy burden here.

The detectives testified extensively at trial about the statements Mr. Morgan made in response to their interrogation. RP 1764-65, 2333-2339. Although Mr. Morgan had denied any wrongdoing when he spoke to the detectives, the State used Mr. Morgan's statements against him by eliciting testimony from the detectives that his statements were inconsistent with the physical evidence. RP 1766, 2342. For example, Sergeant Cohnheim testified Mr. Morgan told the detectives he had torn off Ms. Welch's burning sweater, but the officers observed no burns on his body. RP 1766. Detective Jorgensen testified he observed only a small

bump on Mr. Morgan's forehead, despite Mr. Morgan's statement that he had been struck in the head twice. RP 1765-66; RP 2342.

Mr. Morgan exercised his right not to testify at his trial, and the deputy prosecuting attorney used the detectives' testimony in his closing argument to argue that Mr. Morgan's account of that evening was fabricated and failed to align with the physical evidence observed by the detectives. RP 2804-05. The State's presentation of Mr. Morgan's statements significantly prejudiced the defense. This Court should reverse.

4. Mr. Morgan was denied a fair trial when the deputy prosecutor shifted the burden of proof to Mr. Morgan and impugned defense counsel during closing argument.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id.*; see also *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

“[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” *Berger*, 295 U.S. at 88. “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Id.* A prosecutor’s misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, 181 Wn. App. 953, 327 P.3d 67, 69-70 (2014) (citing *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 675).

a. The State committed misconduct.

During his closing argument the prosecutor made two statements that shifted the burden of proof to Mr. Morgan and, in the one instance, impugned defense counsel. When addressing the jury, the deputy prosecuting attorney stated:

And if there was any reason to believe that every single known fact would be reported by these firefighters at 1:09 in the morning, after they’ve saved a woman’s life, after they’ve fought other fires, after they cleaned their equipment – Why did Todd Reeves tell you this morning, I interviewed 40 people; we had statements from most of these folks, reports, forensic reports? Well, there may be more questions. And in those few interviews where Ms. Silbovitz was there, even when you are done, did she ask some questions? Yep. *Well, Mr. Wackerman ever show up at any of these interviews? No. And that’s fine.* But they were never asked until –

RP 2802 (emphasis added). Mr. Morgan immediately objected, but the court overruled his objection. RP 2802.

Shortly after, the prosecutor told the jury:

No soot. If he had been helping her take off that sweater, he would have breathed in that soot. If he had lit her on fire and ran out of that room and chased her down and hit her, there would be no soot. There would be no smoke inhalation. Thank you. *And the one question that isn't answered by his theory, by his question –*

RP 2804-05. Again, the defense objected and again, the objection was overruled. RP 2805. The State continued:

The one question that his explanation that you've heard does not provide for us, was this self-inflicted? Did she break the eye herself, smash that in herself, wound herself, and spray blood on the left-handed Mr. Morgan's left arm?

RP 2802 (emphasis added).

The State must prove “beyond a reasonable doubt... every fact necessary to constitute the crime with which [a defendant] is charged.”

State v. W.R., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Because a defendant has no duty to present evidence, a prosecutor may not comment on a defendant's failure to present evidence. *State v.*

Thorgerson, 172 Wn.2d 438, 467, 258 P.3d 43 (2011).

In *State v. Fleming*, the prosecuting attorney shifted the burden to the defendants in closing argument, arguing that they had failed to offer explanations for the State's evidence against them. 83 Wn. App. 209, 921 P.2d 1076 (1996). The court reversed, finding that the misconduct was not harmless beyond a reasonable doubt and agreeing with appellate counsel's characterization that "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." *Id.* at 215.

Here, the prosecutor suggested Mr. Morgan's statements to the detectives failed to answer all of the questions raised by the State's case. RP 2805. This improperly shifted the burden to Mr. Morgan, as it wrongly suggested Mr. Morgan had an obligation to present a defense to the State's claims. RP 2802; *Thorgerson*, 172 Wn.2d at 467.

The prosecutor also improperly shifted the burden of proof to Mr. Morgan when he told the jury defense counsel had failed to attend the witnesses' interviews. RP 2802. Initially, the prosecutor countered Mr. Morgan's argument that some of the firefighters testified inconsistently with their prior statements by arguing that they would not have had the time or energy to include every detail in their original statements. RP 2801-02. However, the prosecutor then moved beyond this argument and

claimed that defense counsel had failed to fulfill his investigatory obligations by failing to attend interviews. RP 2802. He attempted to soften the improper statement by saying, “[a]nd that’s fine,” but the damage was done. RP 2802. When the trial court overruled Mr. Morgan’s objection, it signaled to the jury that it was proper to consider that one of Mr. Morgan’s attorneys had not appeared to interview the State’s witnesses. *State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015) (when a court improperly overrules the defense’s objection, it wrongly leads the jury to believe the State is correct).

This argument also impugned the integrity of defense counsel. “Prosecutorial statements that malign defense counsel can severely damage an accused’s opportunity to present his or her case and are therefore impermissible.” *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014) (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983)). Here, it *was* fine that only one of Mr. Morgan’s attorneys attended the witness interviews, but despite the prosecutor’s attempt to add this qualifier, his improper statement signaled to the jury that it was not fine, and that defense counsel had failed to perform a duty. This argument suggested that defense counsel was either lazy or deceptive, and such statements were improper.

b. This Court should reverse.

Reversal is required because there is a substantial likelihood the State's misconduct affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. There were no witnesses to the crime and Ms. Welch had no memory of how the fire started or how she had suffered her injuries. While Mr. Morgan was able to offer only a limited account of what happened that night, his testimony, if accepted by the jury, effectively refuted the State's claims.

Given the evidence at trial, the State's improper shifting of the burden to Mr. Morgan to offer a complete explanation for the events of that night, and the suggestion that defense counsel had failed in his investigatory duties, had a substantial likelihood of affecting the jury's verdict. Mr. Morgan was denied a fair trial and this Court should reverse.

5. Reversal of the first degree arson charge is required because Mr. Morgan was denied his right to a unanimous jury.

Article I, section 21, of our state constitution guarantees criminal defendants the right to a unanimous jury verdict. In alternative means cases, this requires the jury of 12 to unanimously agree on which means is the basis for conviction. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). First degree arson is an alternative means crime. *State v. Sweany*, 174 Wn.2d 909, 282 P.3d 305 (2012).

In *Ortega-Martinez*, our supreme court stated:

In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime.

124 Wn.2d at 707; *see also State v. Owens*, 180 Wn.2d 90, 95 n. 2, 323 P.3d 1030 (2014); *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987).

However, some of the court’s statements have indicated that “unanimity” carries utility only because it may allow a guilty verdict to be affirmed on appeal, when one means was not supported below:

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.

Ortega-Martinez, at 707-08 (emphasis in original, citations omitted).

These cases have resulted in a pattern jury instruction that informs jurors that they need not be unanimous on the alternative means in the first place. WPIC 4.23 (2005) (and Comment).

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (4)(a), or (4)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

Id.

The State incorporated this pattern instruction into its proposed first degree arson “to convict” instruction, informing the jurors they each needed to find Mr. Morgan caused a fire that either “(a) damaged a dwelling or (b) was in a building in which there was at the time a human being who was not a participant in the crime.” Supp. CP ____ (Plaintiff’s Proposed Jury Instructions, WPIC 80.02). The defense generally objected to the State’s instructions, and the trial court instructed the jury on first degree arson according to the State’s proposed instruction. RP 2634; CP 81.

Whether WPIC 4.23 is erroneous is currently under consideration by our supreme court. *State v. Armstrong*, 192 Wn. App. 1049 (2016) (unpublished) (*review granted* at 186 Wn.2d 1002, 380 P.3d 451 (2016)). This Court should find it was error to instruct the jurors they did not need to be unanimous as to the alternative means of first degree arson.

- a. Where a charged criminal offense involves “alternative means,” jury unanimity on the means is required.

When a statute is deemed to set forth alternative means, the different means represent distinct and dissimilar statutory alternatives, and each punish fact patterns that vary too greatly to be considered simply as descriptions of mere ways of committing a single-means crime. *See Owens*, 180 Wn.2d at 99; *State v. Franco*, 96 Wn.2d 816, 833-35, 639 P.2d 1320 (1982) (Utter, J., dissenting). Irrespective of sufficiency, a case in which a jury splits 6 and 6 on alternative factual theories of different means is not a case in which a single, comprehensible basic fact pattern has been proved to the entire jury of 12 beyond a reasonable doubt. *See Franco*, at 838 n. 4 (Utter, J., dissenting); *see also People v. Olsson*, 56 Mich. App. 500, 505-06, 224 N.W.2d 691 (1974) (reversing because some jurors may have voted for felony murder while the remaining members may have voted for premeditated murder, and, “[s]uch a verdict would not be unanimous and could not convict defendant.”).

As Justice Utter recognized, article I, section 21’s requirement of a unanimous verdict on the means is closely related to the prosecution’s Due Process burden to prove every fact necessary to conviction beyond a reasonable doubt. *Id.* at 831-32 (citing *Winship*, 397 U.S. at 358; U.S. Const. amend. IV). Proving guilt to the jury of 12 should require all the

jurors to be in substantial agreement as to just what the defendant factually did in order to merit conviction and loss of liberty. *Id.* at 831-32.

In addition, other states have recognized that the jury cannot be instructed in a manner that renders unanimity on the means unnecessary, and that sufficiency is immaterial. For example, in *State v. Boots*, 308 Or. 371, 374-81, 780 P.2d 725 (1989), the Court reversed an aggravated murder conviction without regard to sufficiency of the evidence, where the jury was instructed contrary to Article I, section 11, that “[a]ny combination of twelve jurors agreeing that one or the other or both occurs is sufficient to establish this offense.”

The first degree arson “to convict” instruction affirmatively informed the jurors that they did not need to be unanimous. This error violated Mr. Morgan’s constitutional right to unanimity under article I, section 21.

b. Reversal of the first degree arson charge is required.

Unanimity error in alternative means cases should be considered structural error. Structural error is automatically reversible constitutional error wherein no amount of inquiry into the record for application of a harmlessness standard can possibly be assessed to remedy the deficiency or result. *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

The requirement of a unanimous jury is part and parcel of the requirement of proof to a jury, beyond a reasonable doubt, of every fact required for conviction. *Franco*, 95 Wn.2d at 830 and n. 1 (Utter, J., dissenting) (citing *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980) and *In re Winship*, *supra*); Const. art. I, § 21; U.S. Const. amend. IV. In general, improperly instructing the jury on the proof beyond a reasonable doubt standard in a way that reduces that burden is structural error. U.S. Const. amend. IV; *Sullivan*, 508 U.S. at 281–82. In *Boots*, the Oregon court determined it was structural error. 308 Or. 371, 381, 780 P.2d 725 (1989).

Affirmatively telling the jury it need *not* be unanimous is structural error that goes to the core of the state constitutional right to unanimity and the Due Process right to a fair trial.⁷ Where the first degree arson “to convict” instruction affirmatively told the jury it need *not* be unanimous as to the means, the trial court committed structural error because no amount of inspection of the record could possibly determine that the jury, given that instruction, was unanimous nonetheless.

⁷ The Fourteenth Amendment provides, in part, “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .”. U.S. Const. amend. IV.

6. The trial court committed reversible error when it denied Mr. Morgan’s request to instruct the jury it must presume the fire was the result of an accident or natural causes.

- a. A defendant is entitled to the instruction on this presumption when he requests it.

Our supreme court has long held that “[w]here a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused.” *State v. Pienick*, 46 Wash. 522, 525, 90 P. 645 (1907). The court has relied on this presumption when evaluating the sufficiency of the evidence presented at trial for an arson charge. *See e.g., State v. Pfeuller*, 167 Wash. 485, 489, 9 P.2d 785 (1932); *State v. Kirkby*, 20 Wn.2d 455, 458-59, 147 P.2d 947 (1944).

When a defendant requests the jury be specifically instructed on this presumption, a court’s denial of the request constitutes reversible error. *State v. Smith*, 142 Wash. 57, 57, 252 P. 530 (1927). Here, Mr. Morgan asked the trial court to instruct the jury on the presumption, proposing the language used by the supreme court in *Pienick*, but the trial court refused. 46 Wash. at 525; CP 108; RP 2647. The trial court’s ruling requires reversal under *Smith*.

In *Smith*, the trial court denied the defendant’s request to instruct the jury on the presumption that the fire was the result of accidental or

natural causes. 142 Wash. at 57. On appeal, the State argued Mr. Smith was not entitled to the presumption because the State had introduced evidence at trial indicating the fire had been started intentionally. *Id.* at 58.

The court rejected the State's argument, explaining:

Was not the appellant entitled to the presumption that the fire was of accidental origin in a case where its origin was actually disputed?

To hold otherwise is to say that the presumption can never be available to a defendant in any case where the state seeks to show what caused the fire. Manifestly, this robs the defendant of a very vital protection in a case of this character.

Id. at 58. It further described the deficiencies in the State's argument:

The state seems to argue that this presumption is proper for the court to indulge in when it determines whether there is sufficient evidence to sustain the verdict. If this be so, then we know of no reason why the jury should not be so instructed when they are to determine whether the evidence is sufficient to establish the origin of the fire.

Id. The court held that where the instruction was "timely requested," it was reversible error to deny it.

b. The trial court erroneously relied on this Court's misapprehension of Smith.

Despite the unambiguous holding in *Smith*, this Court has relied on *Smith* to find a defendant was entitled to an instruction only where the defendant contests the cause of the fire *and* “there is substantial evidence that the fire was of accidental or natural causes.” *State v. Kindred*, 16 Wn. App. 138, 140-41, 553 P.2d 121 (1976); *see also State v. Picard*, 90 Wn. App. 890, 903, 954 P.2d 336 (1998). This is contrary to the court’s findings in *Smith*, in which the court indicated the instruction was required where the cause was “actually disputed,” but did not suggest the trial court should evaluate whether the defendant had presented “substantial evidence” in order to grant the defendant’s request for an instruction on the presumption. 142 Wash. at 58.

The trial court relied, in part, on this misapplication of *Smith* to deny Mr. Morgan’s request for the instruction. RP 2648. It found, first, that the instruction was unwarranted because it was not a pattern instruction, and second, that that it was improper because Mr. Morgan had not presented “substantial evidence of an accidental or natural fire.” RP 2649.

The trial court was wrong to be influenced by the fact a pattern instruction had not been created for this presumption, as the instruction

proposed by Mr. Morgan was an accurate statement of the law. CP 108. The accuracy of the instruction, not whether a pattern instruction has been developed, is the relevant inquiry. *See State v. Zimmerman*, 130 Wn. App. 170, 182-83, 121 P.3d 1216 (2005) (holding that despite the Washington Supreme Court Committee on Jury Instructions' recommendation against the instruction at issue, the instruction was properly given because it was an accurate statement of the law).

Moreover, the trial court's reliance on this Court's misapprehension of *Smith* was error. *Smith* does not require the defendant to produce "substantial evidence" in order to be entitled the presumption. In fact, *Smith* addressed the problem with this analysis when it discussed the dangers of withholding this presumption in any instance where the State sought to prove the cause of the fire. 142 Wash. at 58. As the *Smith* court explained, "[t]here is always a presumption that a fire is of accidental origin where the origin is a contested issue." 142 Wash. at 58. But the court did not describe a "contested issue" as one in which the defendant presented substantial evidence. To the contrary, the cause of the fire was "contested" in *Smith* because "[t]here were facts relied upon by the state that it believed showed the fire was incendiary" and "the appellant insisted just as strongly that the evidence did not establish that

fact.” *Id.* Because the defendant disputed the cause of the fire, he was entitled to the presumption. *Id.*

Smith aligns with our supreme court’s understanding of how presumptions operate. Presumptions arise not from the presentation of evidence but are instead “assumptions of fact which the law requires to be made from another fact or group of facts.” *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989). As the court discussed in *Smith*, simply because the State presents evidence to refute this presumption does not mean the defendant is not entitled to the presumption in the first place. 142 Wash. at 58. Mr. Morgan was not required to present “substantial evidence” that the fire was accidental or a result of natural causes, and the trial court erred when it denied Mr. Morgan’s request to instruct the jury as to this presumption. RP 2649.

c. The error was not cured by the remaining instructions.

Smith is clear that where an “accidental fire” instruction is timely requested, a failure to give the instruction constitutes reversible error. 142 Wash. at 59. Despite the court’s plain language, this Court determined in *Picard* that *Smith* was “dubious authority” for this proposition because *Smith* did not address what other instructions were given to the jury, and whether those instructions could have cured the error. 90 Wn. App. at 903. In *Picard* the court held reversal was not required because the jury

had been instructed on the crime of arson, that the State had the burden of proving the elements of the crime beyond a reasonable doubt, and that the defendant was presumed innocent. *Id.* at 904.

These instructions do not render the trial court's failure to instruct the jury as to this specific presumption – that when a building is burned, it is presumed the fire was the result of an accident or natural causes rather than a deliberate act of the accused – harmless. Our supreme court has long recognized the importance of instructing the jury on the specific presumption at issue, rather than relying on the jury to infer the presumption from more general instructions. *See Cramer v. Cramer*, 106 Wash. 681, 683-84, 180 P. 915 (1919). Where a defendant is entitled to a specific presumption, “its existence should not have been left to be felt out and inferred by way of implication and argument by the jury, but it should have been boldly and plainly declared.” *Cramer*, 106 Wash. at 684 (quoting *Miller v. Miller*, 154 Iowa 344, 134 N.W. 1058 (1912)).

Here, the presumption was not boldly nor plainly declared. The remaining instructions required the jury to presume Mr. Morgan's innocence and find that he caused the fire beyond a reasonable doubt. CP 68, 81. However, the instructions did not inform the jury that it must begin its deliberations with the presumption that the fire was the result of an accident or natural causes, rather than the deliberate act of a person.

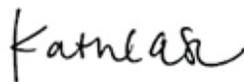
The presumption at issue is specific as to how jurors are required to begin their evaluation of the fire, and it was not encompassed in the remaining instructions. Because the general instructions did not cure the trial court's instructional error, reversal is required.

F. CONCLUSION

Dismissal of the charges against Mr. Morgan is required under the criminal rules and the constitutional prohibition against double jeopardy. Reversal is also required because Mr. Morgan's statements to detectives and the analysis of his clothing should have been suppressed. Finally, this Court should reverse because the State committed misconduct during closing argument and because the trial court erroneously denied Mr. Morgan's request for an "accidental fire" instruction. The arson conviction must be reversed because the jury instructions as to this count violated Mr. Morgan's right to a unanimous jury.

DATED this 22nd day of February, 2017.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75072-1-I
)	
DAVID MORGAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2017, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF FEBRUARY, 2017.



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