70529-6 70529-6

NO. 70529-6-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

BRIAN LONG,

Appellant,

v.

BRUSCO TUG & BARGE, INC., a Washington corporation; BO BRUSCO and his marital community,

Respondents.

BRIEF OF RESPONDENTS

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JAN 27 PM 3:06

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involved a single claim for unlawful employment retaliation under the Washington Law Against Discrimination. Appellant Brian Long ("Long") sued his former employer Brusco Tug & Barge, Inc. ("Brusco") and its Chief Executive Officer, Bo Brusco ("Bo Brusco") (collectively, "Respondents") for money damages after Brusco reassigned Long to a new position. After a two-and-a-half-week trial, a jury returned a defense verdict because Long failed to meet his burden of proof as to liability. CP 1764–65. This appeal followed.

Brusco provides tugboat services to many ports on the Pacific Coast, including the Port at Everett, Washington. RP 1289–92; 1295; 1475–76; 1479–81. Long had been Brusco's port manager at the Port of Everett. RP 1546. In that role, he had several managerial duties, but he was also responsible for captaining one of two tugboats that Brusco used in the Port of Everett. RP 1513–14; 1483; 1485. In December 2009, Long abandoned his post to go on an unapproved vacation that put him in Long Beach, Washington, four and a half hours away from the Port of Everett, despite knowing that (1) a ship was scheduled to come into port while he was away and (2) he was expected to captain a second tugboat to assist the ship, if necessary. RP 1585–95; 1344–47; 2009–35. Long had been told earlier that if he wanted to take such a vacation, he would have to arrange

it with his immediate boss, Kevin Campbell, or with the CEO, Bo Brusco. RP 1585–86. In this instance, Long did neither. Instead, he presumed that the incoming ship would not require a second tug to assist it (one tug was already available) and, therefore, that no one at Brusco's main office would know that he was gone. RP 2019–20.

Contrary to Long's assumption, the ship, Westwood Shipping, Inc.'s, M/V SEVILLA, called for a second tug to assist its entry into the port. John Juker, who was Long's second-in-command, attempted to contact Long, who missed the call because he was out jogging. After learning of the situation, Long attempted to find coverage. In the meantime, Juker located David Brusco, a fully qualified ship assist tug skipper who was Bo Brusco's son and the former port manager at the Port of Everett—he was Long's predecessor in that position. David Brusco happened to be only 20 minutes away, so he dropped everything, drove to the Port of Everett, and captained the second tugboat that assisted the M/V SEVILLA safely in. RP 2021–35; 1854–56.

As soon as Bo Brusco discovered that Long was four and a half hours away when a ship called for the assistance of a second tug, he told Brusco's Chief Operating Officer Dave Callantine and its Compliance Manager Dan Zandell to "get him out of Everett!" RP 915–17. Callantine and Zandell telephoned Kevin Campbell, who in turn telephoned Long.

RP 1586–95. Campbell told Long that he was relieved from his position in the Port of Everett. RP 1592–93.

That same day, Long and Campbell spoke again. Campbell offered Long a reassignment as a captain in Brusco's ocean division. RP 1594–95. Long had been a successful ocean captain for five years before taking the job of port manager for the Port of Everett. Long never responded to this offer. Brusco attempted to get Long to accept the ocean job several more times over the next six days, but he did not accept the position or return to work. RP 1617–43.

Instead, Long sued Brusco and Bo Brusco and alleged that the reassignment (or "termination," as Long preferred to describe it) was in retaliation for Long's involvement—months earlier—in hiring a deckhand with a prosthetic leg named Anthony Morgan. CP 1–8.

This trial was about one issue: whether Brusco retaliated against Long for his involvement in hiring Anthony Morgan. As is the case with all trials, there were several rulings on evidence and the use of certain exhibits.

Before the trial, Long and Respondents filed cross-motions regarding the admission or exclusion of evidence of how Brusco treated other Brusco employees. Long sought to introduce evidence of so-called "comparators" in an effort to show that Brusco's reassignment of Long

because he abandoned his post was pretext because Brusco allegedly did not reassign others who engaged in what Long alleged was similar conduct. CP 1189–94. (Brusco sought to have such evidence excluded because, in Brusco's view, the employees about whom Long sought to introduce evidence were not similarly situated to Long. CP 904–14, 916–84). The trial court permitted some of this testimony, and excluded some. RP 260–63, 278–83.

During the trial, Long unsuccessfully attempted to use the recorded portion of an interview with a witness for impeachment purposes. RP 673–74; 686. Long, however, never sought to admit the evidence or took issue with the trial court's preliminary decision to delay its use until after the witnesses' testimony was complete. Also during the trial, Long attempted to offer a third-party's handwritten notes without offering any witness who could explain what the notes were or what they meant. RP 2077–79.

And after the jury's verdict, Long moved for a new trial, arguing that a juror had introduced "extrinsic evidence" that affected the jury's verdict. CP 1768–79. This appeal followed.

II. ASSIGNMENTS OF ERROR

Respondents Bo Brusco and Brusco Tug & Barge, Inc., do not assign any error to the jury verdict or the trial court's post-trial rulings. This Court should affirm in all respects.

III. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>

Respondents condense and reframe the issues pertaining to Long's Assignments of Error as follows:

1. Did the trial court permissibly exercise its discretion in denying Long's motion for a new trial based on alleged jury misconduct where the purported extrinsic evidence inhered in the verdict? **Yes.**

2. Did the trial court permissibly exercise its discretion in denying Long's motion for a new trial based on alleged jury misconduct where the purported extrinsic evidence was irrelevant to any issue before the jury and therefore could not possibly have affected the verdict? **Yes.**

3. Did the trial court permissibly exercise its discretion in declining to admit indecipherable handwritten notes created by an unknown constituent of a non-party company, where no witness could testify as to what the notes meant or why they were created? **Yes.**

4. Did the trial court permissibly exercise its discretion in declining to permit Long to use a partial, convoluted, and vague audio recording to impeach a witness where the content of the recording did not actually contradict the witness's trial testimony? **Yes.**

5. Did the trial court permissibly exercise its discretion in excluding evidence of other Brusco employees who had different employment responsibilities and circumstances such that it could not be

said that they were similarly situated in all material respects? **Yes.**

The trial court permissibly exercised its discretion as to each of the above-referenced issues. Moreover, and even if there were error, any such error was harmless. This Court should affirm.

IV. COUNTER-STATEMENT OF THE CASE

A. During deliberations, the jurors discussed life experiences and issues that were not pertinent to the issues in the case.[1]

After losing at trial, Long sought a new trial and filed declarations from four of the twelve jurors in an attempt to establish juror misconduct. CP 1768–92. After briefing from the parties and reviewing the record, the trial court concluded that the declarations did not establish misconduct that affected the verdict. CP 1945–50.

The declarations mentioned (1) the status of jury deliberations at certain points in time (CP 1780, 1782, 1784); (2) some jurors' thoughts and feelings regarding deliberations and the desire to review notes and exhibits (CP 1781–82, 1784–86, and 1791); (3) thoughts and feelings about a speech or presentation reportedly made by juror David Wlaschin, during which he relied on notes and spoke forcefully for between twenty and thirty minutes (CP 1781, 1784–85, 1788, and 1791); (4) partial

[1] Rather than addressing issues in chronological order, Respondents address them in the order in which they are presented in Long's brief.

summaries of what Wlaschin said, including that he was in the Navy,[2] the waters were rough, there were ladders and slippery decks, and his belief that Navy/ocean/maritime law would not permit one with a prosthesis to work on deck (CP 1781, 1784, 1788–89, and 1791); (5) juror reactions to Wlaschin's monologue (CP 1781–82, 1785, and 1791); and (6) other issues not relevant to this appeal.

In ruling upon Long's motion for a new trial, the trial court examined the context of the case and the issues that were then at hand (in addition to others not raised in this appeal). CP 1945–49. The trial court then noted as follows:

> Most of what has been put before the Court concerns the jury's deliberative process behind closed doors and a proper respect for the jurors and for the jury system precludes the Court from considering it. The one thing that potentially stands out is the assertion that a juror may have inserted into the discussions a personal belief, based on his experience that Coast Guard regulations would not permit a man with a prosthetic leg to work on a vessel.

CP 1949. The trial court then concluded, however, that this aspect related solely to a non-issue:

> Regardless of whether one stretches to call this an insertion of outside facts or law into the deliberations, **it is clear it**

[2] During voir dire, Wlaschin openly disclosed that he was "retired from the U.S. Navy." RP 172. In addition, he disclosed that he retired from a power generation business in sales. *Id.* He further disclosed that his activities include, *inter alia*, boating on Puget Sound. *Id.* Long's counsel chose to ask no questions to determine the extent of Wlaschin's naval experience. RP 176–93, 213–29.

> **only related to the non-issue** of whether or not Mr. Morgan was actually discriminated against **and not to those matters that were in issue**.

Id. (emphasis added). In issuing its order, the trial court expressly concluded "that there was no jury misconduct resulting in outside information being put before the jury and affecting the verdict." CP 1950.

B. The trial court excluded handwritten Westwood notes when there was no witness who could testify as to what they said, why they were created, or what they meant.

Through ER 904, Long attempted to have deemed admissible handwritten notes that had been obtained from a third party, Westwood Shipping, Inc. Respondents objected to this designation, thereby preventing the notes from being deemed admissible under the rule. *See* Brief of Appellant at 40.[3]

The Westwood notes were listed in the joint statement of evidence as part of Trial Exhibit 80, but with objections on the grounds of "Hearsay ER 801, 802[;] Authentication ER 901[.]" CP 1230. During trial, Long considered calling a records custodian to authenticate the documents in the exhibit,[4] but declined to do so after Respondents merely agreed that the Westwood records were "business records." RP 1736–38.

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[3] These objections were then again noted in the parties' joint statement of evidence. CP 1230.

[4] Long did not seek a trial subpoena for such a records custodian until the middle of trial, when he obtained one ex parte, without the prior knowledge of the trial judge.

During the cross-examination of John Juker, Long attempted to introduce the handwritten notes. Respondents objected that there was no foundation, and the trial court agreed, saying "I'm not sure what the foundation is for the handwritten." RP 2077.[5]

The trial court then indicated that Long could inquire as to the witness's recollection and "see if there's a foundation to be laid for it ...." *Id.* In response to Long's questions, Juker stated "I've never seen any of this. I don't know what it is." RP 2079.

Although Long was not able to lay a proper foundation for admission of the handwritten notes, during his attempts, his counsel read aloud through questions the substance of what he had hoped to elicit from the handwritten notes, including the fact that the document said "1024" (which Long's counsel argued was a reference to military time), the name, "John," and the date 12/20/2009. RP 2078–80, 2084. Long also implied through his counsel's argumentative questions that there was a correlation between the notes and certain phone records. RP 2080–85. But Juker had no recollection regarding the notes or a phone call that Long argued they related to. RP 2079, 2081–82, 2085–92.

The next day, Long made an argument that he referred to as an

[5] The record on review provides no evidence that Long knew the identity of the notes' author or had any intention to call the notes' author.

"offer of proof" asking that the handwritten notes be admitted. RP 2129–33. But it was clear to the court that the handwritten notes were of such a character that a simple records custodian would not be able to explain what they meant. RP 2131, 2133–34, 2138–39. After colloquy, the trial court ruled as follows:

> All right. Well, I'm not persuaded that with a custodian of the records this would be admitted. It takes an awful lot of explanation to try to see what the significance of the document might be. I think there's—I don't think a custodian could lay the foundation for it. It would have taken a witness to explain it in order to get that interpretation before the jury, so I'm going to adhere to my earlier ruling.

RP 2139–40.

The trial court permitted Long to address his understanding of the arrival time scheduled for the M/V SEVILLA, to which Long's counsel stated, "[t]hat makes sense." RP 2140. And on rebuttal examination, Long testified as follows:

> Q: From your review of the documents, when was Mr. Juker notified that the ship had moved from 4:30 in the morning to 12:30?
>
> A: According to documents I saw, he had got a call on the 20th around—
>
> MS. GAMBLIN: Objection, lack of foundation.[6]
>
> A: —10:00-something.

[6] The trial court did not rule on this objection.

> Q: That's the day before?
>
> A: Yes.
>
> Q: And you spoke with him—had a conversation sometime—a couple conversations, but there was a longer one that you testified earlier around 6:00-ish—
>
> A: At—
>
> Q: —on Sunday night?
>
> A: Yes.
>
> Q: Did Mr. Juker tell you about—anything about learning that the job had been changed from 4:30 A.M. to 12:30 P.M.?
>
> A: John Juker never told me the job changed at all.
>
> Q: Had you known that the job had changed, what would you have done with respect to relief?
>
> A: I would have let the relief know the job is at this time, it could be possible you're needed.

RP 2224–25. Notwithstanding the exclusion of the handwritten notes, Long iterated the content of the notes in closing argument: "according to the Westwood records that the witnesses reviewed—you're going to get parts of them—[Juker] received a call at 12/20 at 1024, which is 10—so that's Sunday at 10:24 A.M." RP 2312; RP 2311–14. The trial court correctly noted the lack of foundation in Long's attempt to use the notes, but Long was able to get that information before the jury through the

colloquy of counsel and his own testimony.

C. <u>Long's counsel abandoned his attempt to use for impeachment a partially recorded interview that did not contradict trial testimony elicited by Long's counsel.</u>

During questioning of J.C. Anderson, whom Long called as a witness, Long's counsel sought to impeach him using a transcribed audio recording made by the office of Long's counsel. RP 674, 686, and 688. At each instance, the trial court indicated that Long's counsel should address this at the end of the witness's testimony. *Id.* However, at the end of Anderson's testimony, Long's counsel did not renew this request:

> Q: [By Mr. Blankenship] Is—is there—is there a reason why you agree that you were qualified to—to captain a harbor tug in the Port of Everett when that question was asked of you by my office?
>
> MR. KEELEY: Objection, argumentative.
>
> THE COURT: Okay. Go ahead. Anything you can say in response to that?
>
> A: I—I—I did not agree to anything.
>
> Q: [By Blankenship] Okay.
>
> MR. BLANKENSHIP: Well, he did, Your Honor.

RP 691. Notwithstanding this exchange, and notwithstanding Long's counsel attempt to offer what amounted to testimony of his own at the end of the exchange, Long's counsel did not further attempt to use the recorded statement to impeach Anderson, who was then excused from the

stand. RP 691–92.

After Anderson was excused, Long's counsel inquired why he was not permitted to use the statement to impeach Anderson, and the trial court explained that the recording was insufficient for impeachment purposes. RP 694–97. As discussed in the sections that follow, the recording established essentially three facts, none of which were inquired about on direct examination at trial. *Compare* CP 2055–57 *with* RP 667–92.

1. ***Anderson testified consistently with his interview that he received a call from Long, requesting coverage for a tug job.***

In the earlier tape-recorded interview conducted by Long's counsel, Anderson told Long's counsel that Long had called Anderson in late 2009 to see if Anderson would be willing to cover a second tug job if something came up in Everett:

> PW: Okay. So just really quickly JC, we talked before I started recording that you remember back around, in late 2009, Brian Long gave you a phone call to see if you would be willing to cover a second tug job if something came up up in Everett. Is that right?
>
> JA: That's correct.

CP 2055. At trial, Anderson testified consistently with this statement, stating that, at a point in time, Long called him regarding his **wanting** Anderson to cover a job for him, but Anderson also testified that he was not available. RP 678.

Anderson testified that he did not recall the timing of a call from Long; it was either: (1) in "early—the middle of December" about a job for "the 21st of December" or (2) "on the 21st of December…." RP 679–80. The earlier interview did not inquire as to whether the call was early or the middle of December. CP 2055–57. Long's counsel merely asked if Anderson recalled getting a call from Long in "late 2009." CP 2055.

Anderson further testified that, when he found out the details of the job, he was not interested.

RP 679. Anderson recalled that he received a telephone request and that he told Long that he was not interested in the job. RP 680. The earlier interview did not inquire as to whether Anderson was interested in the job. CP 2055–57. And at no time in the recorded portion of the interview did Anderson state that he would cover the job. *Id.*

2. ***Anderson stated that he was qualified to do his work as an ocean captain, but he did not agree that he was qualified to run the specific parts of an Everett operation.***

In the earlier interview, Anderson told Long's counsel that he was an ocean captain and was qualified to handle the *ocean* tug jobs:

> PW: And back at that time you were a, *an ocean captain* and **you were qualified to cover *those tug jobs***, is that right?
>
> JA: That's correct.

CP 2055 (emphasis added).

At trial, instead of inquiring as to Anderson's qualification to handle an *ocean captain's tug jobs*, Long's counsel inquired about whether Anderson agreed that he was qualified to handle *Everett tug jobs*:

> Q: Do you—do you—do you remember—let me ask you this: Do you—as an ocean captain, you're qualified to do a ship assist, weren't you, you just said it, and you would have been then, right in 2009?
>
> ....
>
> Q: Were you qualified—
>
> A: Well, I'm thinking about it.
>
> Q: Please. It's important.
>
> A: As far as qualifications go for the operation in general, probably yes. **For the—the specific part of that operation, probably no**. I had not been through an orientation with any of the people at the Port of Everett.
>
> I had called—I think I had called Tom Lehto—I found out that Brusco had a couple of boats in Everett, and I called him and asked him about it, and he gave me a phone number to call to see if—you know, if I was interested in it. And when I called and got the details, when I found out the details of that particular operation, I wasn't very interested in it.
>
> **I never went through any orientation with them. I never met any of the people there**. I never—**I never went down to the boats**. It was totally—the only—the only participation I had was a couple of phone calls.

RP 675–676 (emphasis added). Long's counsel made a similar inquiry later in Anderson's testimony:

> Q: [By Mr. Blankenship] Is—is there—is there a reason why you agree that you were qualified to—to captain a harbor tug *in the Port of Everett* when that question was asked of you by my office?
>
> MR. KEELEY: Objection, argumentative.
>
> THE COURT: Okay. Go ahead. Anything you can say in response to that?
>
> A: I—I—I did not agree to anything.

RP 691 (emphasis added). Anderson further testified as to the differences between the work as an ocean captain and what he understood work as a tugboat captain in a port would be, as well as the level of preparatory work that would be required for him to handle a boat that he had not handled before. RP 679, 687, and 688–89. The whole of Anderson's testimony was that he was not qualified to perform the ship assist in the Port of Everett, which he was not asked about during the recorded portion of the interview.

3. ***Anderson stated that he had permission to cover ocean tug jobs, which was authorized by Tom Lehto or Kevin Campbell.***

In the earlier interview, Anderson told Long's counsel that he had permission to handle ocean tug jobs:

> PW: And back at that time you were a, *an ocean captain* and **you were qualified to cover *those tug jobs***, is that right?
>
> JA: That's correct.

PW: And you had previously spoke with, with somebody about having **permission to cover *those, those jobs***, is that right?

JA: That's correct.

PW: And who is that that you had previously received that authorization from? Was, do you remember who that was?

JA: Not specifically. I believe that it was, it's probably either Tom Lehto or, or a um Brian, or Kevin Campbell.

CP 2055 (emphasis added).

At trial, instead of inquiring as to Anderson's permission to cover *ocean tug jobs*, Long's counsel inquired about whether Anderson received a call from Campbell or Lehto:

Q: Okay. And isn't it true that you basically said on the tape that prior to getting a—you know that you got a call from—I think you mentioned Kevin Campbell and Tom Lehto that you got a call from Tom Lehto or Kevin Campbell. Is that familiar with what you heard?

A: Well, that's incorrect.

Q: Okay. Well, that's the—you remember hearing that when you listened to the recording?

A: No, I don't remember hearing anything like *that*.

RP 674 (emphasis added). Anderson also testified as follows:

Q: Okay. So it sounds like you had a conversation with Mr. Lehto at some point, right?

A: I called him and asked him about the Everett—the boats that were in Everett, because I found out from a

> neighbor of mine, who ships stuff out of Port of Everett, that there was [sic] two Brusco boats there.
>
> Q: Okay.
>
> A: Now, I never went down there. I just—I was coming off a job, and I asked Tom—he called me or I called him—I called him and I asked him, "You got a couple of boats in Everett, you know. What's going on there?" and he said, "Oh, they do this and that" and "Here's the number. Give them a call if you're interested."

RP 676.

Anderson did not agree that he had asked for permission to cover Everett jobs:

> Q: [By Mr. Blankenship] Okay. And—and you had—had you spoken with someone about having permission to cover those jobs at the Port of Everett?
>
> A: No.
>
> Q: Okay. You listened to the recording and you said that was correct, that you actually had gotten permission to cover those jobs. Do you remember listening to that this morning?
>
> A: I can't imagine why I would call somebody for permission to handle those jobs. I wasn't really interested in those jobs. I mean, I had other things on my schedule as far as—you know, I just came off of a relatively long job, and I wanted to get some dental work done and take care of my stuff.
>
> As an ocean captain, I'm gone for months at a time, and when I get home, there's a whole laundry list of things for me to do, including, you know, medical, dental, and so forth, you know, that I need to do in order to prepare for the next voyage.

> Q: Okay. Would it refresh your recollection to hear the tape as to what you said about—it sounds like you don't remember agreeing that you had spoken with someone with authorization, correct?
>
> A: I certainly don't remember that.
>
> Q: And you don't remember that it was either Tom Lehto or Kevin Campbell, right?
>
> A: I guess I really don't understand your question. I don't really—**I'm not sure why I would ask them for permission to do *this job*** if I wasn't interested in it.

RP 677–78 (emphasis added).

D. The trial court permitted some comparator evidence and excluded some other evidence.

Before trial, Long moved for the admission of "comparator" evidence relating to five Brusco employees—Rich Nordstrom, Adam Wellenbrock, Nick Bernert, David Brusco, and Craig Petit. CP 1192–93. Respondents moved to exclude evidence of seven employees whom Respondents anticipated Long would offer—Adam Wellenbrock, Craig Petit, Cory Johnson, Nick Bernert, Joe Bromley, Rich Nordstrom, and Mark Guinn. CP 904–14. Respondents argued that, *inter alia*, deckhands, engineers, captains, and the bay area manager were not similarly situated enough to Long for evidence about them to be admissible. *Id.* Long opposed Respondents' motion, arguing that evidence about all eight Brusco employees identified in both parties' motions should be

admissible. CP 1372–73.[7]

1. ***Long's former duties as port manager***

Long was a port manager for Brusco's Port of Everett location. CP 133. This position required Long to perform managerial and supervisory duties related to the port. *Id.* It also required him to perform the duties of a tugboat captain. *Id.* Long was responsible for ensuring that two tugboats were available at all times to assist incoming ships. CP 133–34. Long also needed to ensure that the tugs were crewed by qualified and trained Brusco tugboat captains. CP 134.[8] Although not every ship requires a two-tug assist, Brusco must provide this service if it receives such a request from a ship. *Id.*

As a tugboat captain, Long provided coverage for one of the two tugs that always needed to be available. *Id.* In the event that Long was not immediately available to captain one of the tugs, he was responsible for arranging for coverage. *Id.*

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[7] There was some overlap between the employees who were the subject of Long's motion and the employees who were the subject of Respondents' motion.

[8] Tugboat captains supervise individuals on their boats, but they have fewer management and supervisory duties and responsibilities than those who work as port managers. CP 134. Because of their duties, port managers have different standards of conduct. *Id.*

2. ***Deckhands are not comparators because they have different responsibilities, pay, and licensure requirements than port managers.***

Long sought to have admitted, and Respondents sought to have excluded, evidence about Brusco employees other than port managers, ostensibly to show that those other employees engaged in conduct similar to Long's abandoning his post but who were not offered a reassignment like Long. CP 1192–94. Some of those employees were deckhands. Unlike port managers and tugboats captains, deckhands do not supervise other employees. CP 883. Deckhands are not required to maintain the same licenses or certificates as captains, and they are paid less than captains and port managers. *Id.* Some are unionized. *Id.*

Deckhands report directly to the vessel captain. *Id.* Mates, engineers, and deckhands are held to lower standards than tugboat captains. CP 134. Craig Petit and Corey Johnson were deckhands. CP 883.

Petit missed a job after being pulled over and questioned for drunk driving. CP 2010. Brusco gave him a verbal warning for tardiness. CP 2008–09.

Johnson missed some jobs and was laid off. CP 1537. He was later offered a "last chance agreement," but he was later dismissed due to drug use. CP 1538–42.

3. ***Engineers are not comparators because they have different responsibilities, pay, and licensure requirements than port managers.***

Long sought to have admitted evidence about Nick Bernert, an engineer. CP 1192. Engineers do not supervise any staff. CP 883. They do not oversee port operations, and they have no responsibility for ensuring ship assists. CP 883–84. Engineers are not subject to the same licensing requirements as captains or port managers. CP 884.

Engineers are compensated at rates different from captains or port managers. *Id.* Engineers' duties and responsibilities are similar to deckhands, but they have additional skills that apply to a boat's engine room. *Id.*

Nick Bernert was an engineer. CP 884. He missed a crew-up, causing ship delay, because he allegedly kidnapped his daughter from his ex-wife. CP 1997. Bernert later got drunk and attempted to punch a mechanic. *Id.* He was later found drinking on a tug and was replaced. *Id.*

4. ***Bromley and Guinn are not comparators because their circumstances are not similar to Long's circumstances.***

Long sought to have admitted evidence about two employees who were not involved with being late, missing work, or abandoning their posts. CP 1373. Joe Bromley[9] was an ocean tugboat captain who never

[9] In Long's motion in limine to admit evidence of supposed comparators, he did not move

worked at the Port of Everett. CP 884. He pleaded guilty to a count of misdemeanor assault. CP 2024.

Mark Guinn was Brusco's Bay Area manager, and he had significant management responsibilities. CP 884. Guinn was involved in the discharge of dredged materials without a permit, and this caused Brusco to pay significant penalties and be subject to a criminal conviction for violating the Clean Water Act. *Id.*

5. ***The trial court's ruling on purported comparators***

The trial court gave a tentative pre-trial ruling, noting its intent "to disallow testimony on the purported comparators" that it felt were not analogous. RP 260–62. The trial court agreed that deckhands or engineers were not analogous and that evidence about them would not be appropriate. RP 262. The trial court further reasoned that, because Guinn was fired over an oil spill incident, testimony about him did not "seem at all analogous ...." *Id.*

The trial court did, however, tentatively rule that Long could provide evidence regarding three others because of absenteeism, a "no show," or "tardiness ... for a ship assist at the Everett port." *Id.* The trial

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regarding Bromley. But in opposition to Respondents' motion to exclude such evidence, he briefly discussed Bromley. CP 1373. Then at trial, he mentioned to the court his desire to ask questions about Bromley. RP 1608–15. He then asked one vague question about Bromley, which was objected to. RP 1804.

court ruled that evidence regarding Adam Wellenbrock, evidence of Rich Nordstrom's absence, and David Brusco's lateness could be presented. RP 262–63. The trial court also ruled that comparator evidence regarding deckhands Petit and Jackson could not be presented. *Id.*

The next day, the trial court expounded upon its reasoning. RP 278–79. The trial court concluded that the situations involving Dave Brusco and Captain Nordstrom were sufficiently similar, and that Adam Wellenbrock's employment circumstances could be discussed as well. RP 279. But because the others involved "assaults, kidnappings, and oil spills," they were not sufficiently similar. RP 280. The trial court did not revisit or change its earlier ruling excluding evidence regarding deckhands or engineers. RP 278–82.

V. ARGUMENT AND AUTHORITY

A. Standard of review

Each issue in this appeal is governed by a single standard of review: abuse of discretion. Yet Long has failed to establish a single instance in which the trial court abused its discretion. The trial court and jury verdict should be affirmed.

Long's assignments fall into one of two categories: alleged juror misconduct and evidentiary rulings.

1. ***Juror misconduct and decision to deny a new trial***

A trial court's decision whether to grant a new trial is reviewed only for abuse of discretion. *E.g.*, *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993). In fact, every individual aspect of the inquiry is evaluated on an abuse of discretion standard:

> Initially, with regard to the claims of juror misconduct, it must be noted that a decision of whether the alleged misconduct exists, whether it is prejudicial and whether a mistrial is declared are **all matters for the discretion of the trial court**.

Richards v. Overlake Hospital Medical Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990) (emphasis added). Even if misconduct is found, "great deference is due the trial court's determination that no prejudice occurred." *Id.*

A trial court does not abuse its discretion unless its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* A verdict cannot be impeached without a "strong, affirmative showing of juror misconduct[.]" *Id.*

2. ***Evidentiary rulings***

A trial court's evidentiary rulings are to be upheld absent a manifest abuse of discretion. *Carson v. Fine*, 123 Wn.2d 206, 225–26, 867 P.2d 610 (1994). Discretion is abused only when no reasonable person would adopt the trial court's position. *See Jankelson v. Cisel*, 3 Wn. App.

139, 142, 473 P.2d 202 (1970). If reasonable people could differ as to the propriety of the trial court's action, then there is no abuse of discretion. *Id.* The judgment of the trial court will not be reversed when it can be sustained on any theory, even if different from the one stated. *See, e.g., Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 347, 552 P.2d 184 (1976); *see also Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 744, 218 P.3d 196 (2009) (holding that the appellate court may affirm on any basis supported by the law and the record).

In this case, Long has failed to establish any abuse of discretion. Therefore, the verdict and rulings should be affirmed.

B. No juror misconduct affected the verdict.

To determine whether juror conduct warrants a new trial, a court must determine (1) whether the juror interjected new or novel extrinsic evidence so as to constitute misconduct and, if so, (2) whether such misconduct affected the verdict. *E.g., Richards*, 59 Wn. App. at 270.

"A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003). In this case, no alleged juror misconduct could have affected the verdict, because any alleged misconduct did not relate to any issue before the jury.

A juror who injects extrinsic evidence that is outside the record and that affects the verdict commits misconduct. *Breckenridge*, 150 Wn.2d at 199 n.3; *Richards*, 59 Wn. App. at 272–73. When a juror actually reviews pre-printed material regarding laws, like Black's Law Dictionary or a pre-printed pamphlet regarding forest protection laws, the trial court is within its discretion to grant a new trial. *See Adkins v. ALCOA*, 110 Wn.2d 128, 131–32, 135–38, 750 P.2d 1257 (1988); *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 681–84, 143 P. 146 (1914). But a juror's reliance on personal life experience in evaluating the evidence does not inject "extrinsic evidence" into deliberations, especially when those life experiences are disclosed in voir dire. *Breckenridge*, 150 Wn.2d at 199; *Richards*, 59 Wn. App. at 273–74. And jurors expressing opinions based on life experience and the admitted evidence do not inject "extrinsic evidence" into jury deliberations. *See Richards*, 59 Wn. App. at 272–73. For example, a new trial is not warranted when a juror who had some medical training made statements to other jurors about her interpretation of medical records in evidence. *Id.*

Here, Wlaschin's discussion of the circumstances of his Navy and maritime experience was merely a discussion of his personal life experience. This does not constitute extrinsic evidence. To the extent that Wlaschin vaguely, though passionately, referred to whatever he might

have thought was maritime law, there is no indication that he consulted any authorities, reviewed any external sources, or brought with him any legal texts.[10] The record on review is simply not robust enough to consider his vague statements to be extrinsic evidence.[11] And vague references to unknown "statistics," without more, certainly do not warrant a new trial.

Even if Wlaschin's beliefs about maritime law were extrinsic evidence, they could not possibly have had an effect on the verdict, because neither maritime law nor the propriety of Morgan's hiring were issues before the jury. Indeed, Long expressly *concedes* this in his briefing, characterizing Wlaschin's beliefs to be related to "laws not at issue in Long's case…." Brief of Appellant at 28. Long argues that this goes to the reasonableness of his belief that Morgan was discriminated against, but this is irrelevant. In closing, Respondents *expressly conceded and did not dispute* Long's assertion that he had such a reasonable belief:

> Counsel spent the vast majority of his closing argument talking about Anthony Morgan. But as the judge has instructed you, this is not a discrimination case. This is not a case about whether Anthony Morgan was discriminated against or not. **The defendants don't even dispute that**

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[10] Long appears to take issue with a reference in Respondents' opening statement to Coast Guard regulations. Brief of Appellant at 18. Notwithstanding what might have been said in opening statement, it was and remains clear that such regulations or law were not at issue in the case.

[11] Moreover, whether Wlaschin distilled his thoughts on paper that he brought from outside the courtroom is of no moment. His thoughts—by definition—inhere in the verdict.

> ***Mr. Long reasonably believed that Anthony Morgan was discriminated against.***

RP 2329–30 (emphasis added).

Notwithstanding the reported passion of his deliberations with his fellow jurors, Wlaschin's comments had nothing to do with any issue in the case. The trial court was correct that there was simply no possibility—let alone any reasonable doubt—that the verdict was improperly affected by Wlaschin's discussion of his Navy experience and beliefs about maritime law.

Long has not shown (and cannot show) that the alleged misconduct—which was focused on whether Long acted improperly with respect to Anthony Morgan—prejudiced Long when his claim was that Respondents retaliated against him. This case was *not* about whether Respondents discriminated against Anthony Morgan. Nor was this case about whether Long did anything wrong in hiring Anthony Morgan.[12] In fact, the jurors were expressly instructed that they were to make no decisions regarding alleged discrimination against Anthony Morgan. RP 2269–70.

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[12] At one point in his brief, Long appears to take issue with a reference to Long possibly violating the Americans with Disabilities Act by requiring Anthony Morgan to submit to a physical after he began work. Brief of Appellant at 19. Long neither articulates nor assigns error on this basis. Moreover, Long provide no clear or cogent explanation for why such error is not harmless. The argument should be disregarded.

Long makes much about whether the trial court should have used the talismanic incantation of "beyond a reasonable doubt" in its order. Yet the trial court carefully examined the issues and expressed certainty (*i.e.*, **no** doubt) that there could not possibly have been any prejudicial misconduct because the information was irrelevant: "it is clear [Wlaschin's communication to the jury] only related to the non-issue of whether or not Morgan was actually discriminated against and not to those matters that were in issue." CP 1949. "[O]bjectively, ... **their determinations were not impacted** by the introduction of extrinsic information into the deliberative process." CP 1950.

The trial court went further than merely concluding beyond a reasonable doubt that there was no effect on the verdict. The trial court concluded that there was *no doubt at all*.

C. The remaining aspects of the four jurors' declarations inhere in the verdict.

Affidavits of jurors may be considered unless they attest to matters that inhere in the verdict. *Richards*, 59 Wn. App. at 272. Although a juror may state facts from which the court will determine their probable effect, the juror may not say what *effect* that extrinsic information might have had upon the verdict. *Id.*; *see also Gardner v. Malone*, 60 Wn.2d 836, 840, 376 P.2d 651 (1962).

"The individual or collective thought processes leading to a verdict

inhere in the verdict and cannot be used to impeach a jury verdict." *Breckenridge*, 150 Wn.2d at 204–05 (internal quotation marks omitted). A juror's post-verdict statements about the way in which the jury reached its verdict cannot be relied upon to grant a new trial. *Id.* at 205. More specifically:

> The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179–80, 422 P.2d 515 (1967) (as quoted in *Breckenridge*, 150 Wn.2d at 205); *see also State v. Gobin*, 73 Wn.2d 206, 210–11, 437 P.2d 389 (1968) (affidavits from jurors stating which considerations entered into their deliberations and controlled their actions "could not be rebutted without probing the mental processes of the jurors"). "It is not for the juror to say what effect the remarks may have had upon his verdict[.]" *State v. Parker*, 25 Wash. 405, 415, 65 P. 776 (1901).

The *Breckenridge* court addressed a specific statement by and situation of a juror. The case involved migraines, and the juror—who disclosed during voir dire that his spouse experienced migraines—

allegedly compared his spouse's experiences with those of the plaintiff. 150 Wn.2d at 201–06. The court explained that the juror's statement inhered in the verdict because it explained "reasons for weighing the evidence in the case the way [the juror] did and believing that [the defendant] was not liable .... [The] statement attributed to [the juror] explains this juror's mental process in reaching his conclusion, a factor inhering in the jury's process in arriving at its verdict." *Id.* at 206.

In this case, the jury declarations contain precisely those aspects that inhere in the verdict: the status of jury deliberations at certain points in time, arguably implying a *post-hoc-ergo-propter-hoc* change in view point (CP 1780, 1782, and 1784); some jurors' thoughts and feelings regarding deliberations and the desire to review notes and exhibits (CP 1781–82, 1784–86, and 1791); thoughts and feelings about Wlaschin's comments during deliberations, including the tenor and force of his argument (CP 1781, 1784–85, 1788, and 1791); partial summaries of what Wlaschin said, including that he was in the Navy (something that he disclosed in voir dire), the waters were rough, there were ladders and slippery decks, and that he felt that Navy/ocean/maritime law would not permit one with a prosthesis to work on deck (CP 1781, 1784, 1788–89, and 1791); juror reactions to Wlaschin's comments during deliberations (CP 1781–82, 1785, and 1791); and other issues not relevant to this

appeal. Those comments inhere in the verdict and are not evidence of misconduct or any effect upon the verdict. Similarly, the passion with which Wlaschin spoke, as well as the impressions or reactions of the jurors, inhere in the verdict and cannot be considered misconduct.

D. Westwood Shipping handwritten notes

1. ***The trial court exercised discretion and properly excluded the handwritten Westwood notes, because there was no foundational witness to testify as to what they said, why they were created, or what they meant.***

The trial court properly exercised its discretion and excluded the portion of the exhibit that contained handwritten Westwood notes when it was clear that there was no foundation upon which to elicit testimony. Although ER 904 can cause a document to be deemed "admissible," it does not necessarily mean that the document is to be deemed "admitted."

Under ER 904, the trial court retains its gatekeeper role to exclude evidence. And, as pertinent here, the rule specifically preserves for the time of trial *all objections as to relevancy*:

> If an objection is made to a document on the basis of admissibility, the grounds shall be specifically set forth, except **objection on the grounds of relevancy need not be made until trial**.

WASH. R. EVID. 904(c)(2) (emphasis added); *see also Hendrickson v. King County*, 101 Wn. App. 258, 268, 2 P.3d 1006 (2000) (recognizing that "ER 904 reserves relevance objections for trial"). Irrelevant evidence "is

not admissible." WASH. R. EVID. 402.

When the relevance of evidence is not clear without more foundational testimony, the evidence's admission is subject to the necessary development of that foundation. *Cf.* WASH. R. EVID. 104(b) (providing that "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it *upon*, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." (emphasis added)).

Washington's ER 904 was designed to "expedite the admission of documentary evidence," but its "language does not *require* the trial court to admit enumerated documents." *Miller v. Artic Alaska Fisheries*, 133 Wn.2d 250, 258–59, 944 P.2d 1005 (1997) (emphasis in original).[13] As noted in *Miller*,

> [T]he trial court may exercise its traditional discretion to address a party's evidentiary objection and admit or exclude the documentary evidence, provided that the objection to the admission of the evidence is made in accordance with the terms and time limits of ER 904.

Id. at 259.

Long relies heavily on *Miller* and *Hendrickson*, but neither opinion provides a basis for a new trial in this case.

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[13] The *Miller* case referred to former ER 904, but as to the aforementioned citation, its force remains, because the current form of the rule also preserves all relevance objections for trial.

Contrary to Long's argument, the *Miller* case does not say and does not hold that ER 904 makes a document "per se admissible." *See* Brief of Appellant at 38 (so arguing). Moreover, in *Miller*, the objections were solely as to hearsay, and those objections were untimely. *Miller*, 133 Wn.2d at 260. Nowhere in the *Miller* case did it appear that there were any foundational conditions that needed to be satisfied to establish the documents' relevance.

The *Hendrickson* opinion is also unhelpful. The *Hendrickson* case involved claims for personal injuries, and the documents in question were medical records. *Hendrickson*, 101 Wn. App. at 259. Medical records are expressly enumerated as a type of document that can be "deemed admissible" under ER 904. *See* WASH. R. EVID. 904(a)(1).

In this case, although Long might have believed that authenticity would not be the basis for further objection, Long had no expectation (at least no reasonable expectation) that the actual content of the handwritten Westwood notes would be deemed relevant. Obviously, and as the trial court noted, a mere document custodian would not have been able to establish the conditional foundation for establishing relevance (*i.e.*, what the notes meant). Long would have had to call the author himself, and he took no steps to do so.

In the alternative, ER 904 does not apply to a third-party's

handwritten business records—the type of document at issue on this appeal. Although the trial court did not expressly exclude the handwritten notes on that basis, this court can affirm on any basis supported by the record. *See, e.g.*, *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn. 2d 700, 709, 399 P.2d 338 (1965)). In any event, "notes … are not admissible as business records." *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 904, 151 P.3d 219 (2007) (holding that trial court erred in admitting an expert report under ER 904(a)(6), despite lack of timely objection by opposing party).

In *Lutz*, the Washington Court of Appeals recognized that ER 904 was limited in its scope: "… the rule seems to be intended to cover only routine documentary evidence like hospital records and photographs, and not documents that present conclusions or opinions on evidence." *Id.* at 904. "[D]ocumentary evidence is inadmissible for the purpose of proving any conclusions recorded in the documents." *Id.* (citing *Miller*, 133 Wn.2d at 260 n.4). When a document contains "subjective facts, opinions, and conclusions[,]" it is not properly admitted under ER 904, "because the parties should have a chance to cross-examine the opinions and conclusions and present alternate opinions." *Id.* It is not enough for a document to merely relate to a material fact and have guarantees of trustworthiness. *Id.*

In this case, the fact that Long listed a document in an ER 904 designation is not enough. Although Respondents did not challenge Long's assertion that the handwritten notes were authentic business records of Westwood, they were not the kind of routine documentary evidence contemplated by the rule because, *inter alia*, their meaning and the facts allegedly contained in the notes were indecipherable. Without a witness to testify as to facts, the notes conveyed no meaning and were not relevant. The trial court was correct to decline to admit them.

Long made no attempt to call any witness who could testify as to what the handwritten notes meant. ER 904 does not divest the trial court of its gatekeeper duty to exclude irrelevant evidence, as well as unduly prejudicial, confusing, or unhelpful evidence. The trial court exercised its discretion by excluding the handwritten notes.

2. ***Even if it were error to exclude the handwritten notes, any such error was harmless, because they were of speculative value and Long has shown no prejudice.***

A jury verdict will not be overturned for error that is harmless. An error is considered harmless and not prejudicial unless it affects the outcome of the case. *E.g.*, *Brown v. Spokane Cy. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). And exclusion of cumulative evidence is not reversible error. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169–70, 876 P.2d 435 (1994). Excluded evidence does not need to be

identical to admitted evidence in order to be cumulative. *Havens*, 124 Wn.2d at 170. Harmless error results when a trial court excludes evidence that is, in substance, the same as other admitted evidence. *Id.*

Moreover, there is no reversible error where, as here, the excluded evidence is of speculative probative value. *Id.* (citing *Henry v. Leonardo Truck Lines, Inc.*, 24 Wn. App. 643, 602 P.2d 1203 (1979); *Tumelson v. Todhunter*, 105 Wn.2d 596, 603, 716 P.2d 890 (1986); and *Moore v. Smith*, 89 Wn.2d 932, 941–42, 578 P.2d 26 (1978)).

In this case, even if it were error to exclude the handwritten portion of the Westwood exhibit, there was no harm or prejudice. Long cannot credibly say that the exclusion of the handwritten notes affected the outcome of the case. The probative value of the notes is purely speculative, given that Long did not attempt to call any witness who could testify as to what the notes actually meant.

In addition, Long managed to get what he claims is the gist of the evidence before the jury by other means: Long's counsel read the allegedly pertinent content into the record during the questioning of Juker. RP 2078–80, 2084. Long's counsel also implied through argumentative questions a correlation between the handwritten notes and phone records. RP 2080–85. Moreover, Long himself testified about the handwritten notes. RP 2224–25. And his counsel specifically mentioned them during

closing argument. RP 2311–14. Given that the typewritten records were admitted, that the information from the handwritten notes was read to the jury by Long and his counsel, and that Long argued during closing what the handwritten notes said and meant, Long has not shown—and cannot show—any prejudice from the exclusion of the handwritten notes. The trial court's decision to exclude the handwritten notes, even if it were in error, was harmless.

E. Recorded interview of Anderson

1. The record shows that Long's counsel failed to preserve any error regarding the use of the recorded portion of a pre-trial interview with Anderson.

To obtain appellate review of a trial court's decision to exclude evidence, one must make an offer of proof. *See* WASH. R. EVID. 103(a)(2); *State v. Vargas*, 25 Wn. App. 809, 816–17, 610 P.2d 1 (1980). The appellate court may refuse to review any claim of error that was not raised in the trial court. *See, e.g.*, *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); RAP 2.5(a).

In this case, Long's counsel asked to use[14] the recorded portion of the interview, and the trial court indicated that he first needed to ask all of

[14] Although Long never offered the recorded portion of the interview for admission, Long argues that the statement should have been admitted. *See* Brief of Appellant at 45. Long cannot now claim as error the trial court's failure to admit a document where Long never asked the court to admit it. This Court should disregard Long's argument regarding admission or exclusion of the interview.

his questions of Anderson. RP 674, 686, and 688. When Long's counsel had completed his questioning of Anderson, however, he did not again ask to utilize the recorded portion of the interview. RP 691. Instead, after Anderson had been excused as a witness,[15] Long's counsel inquired of the trial court's earlier rationale:

> I don't necessarily, Your Honor[,] want to take issue with you on anything, but what—what—just so I know for the future, as, I mean, we're always learning, why couldn't I impeach this gentleman with his prior statement?

RP 694. Long's counsel merely asked for guidance in a way that did not remotely resemble an offer of proof. RP 696–97 (stating, *inter alia*, "And it's good for me to know, and I appreciate your—your feedback on that[,]" "Yeah[,]" and "Well, that's—I will let my office know and, thank you, Your Honor.").

Considering this record on review, Long did not properly preserve the issue for appeal.

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[15] This timing is important. If Long's intent was to use the recording as a prior inconsistent statement of Anderson, it would not have been admissible unless Anderson was "afforded an opportunity to explain or deny the same, and the opposite party is afforded an opportunity to interrogate him thereon[.]" WASH. R. EVID. 613(b). Because Long never attempted to offer the recording, and because Long did not raise this issue with the trial court until after Anderson had completed testifying, he could not have offered the recording under ER 613(b).

2. ***Long was not permitted to use a previously recorded partial interview of Anderson, because the substance of his testimony was not contradicted by the recording.***

The trial court properly declined Long's request to utilize a prior out-of-court statement during the testimony of Anderson, because the statement could not be used for impeachment purposes. Anderson's trial testimony did not contradict the recorded portion of his pre-trial interview.

Trial courts are empowered to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. WASH. R. EVID. 611(a). The goal of this power is to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment. *Id.*

A party may attack the credibility of a witness through impeachment. WASH. R. EVID. 607. But a witness may not be impeached with a prior out-of-court statement unless it meets Washington's test for inconsistency. *See State v. Dickenson*, 48 Wn. App. 457, 466–67, 740 P.2d 312 (1987). That test for inconsistency has been articulated as follows:

> Inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?

Id. at 467 (emphasis original) (quoting 5 K. TEGLAND, WASH. PRAC. § 256 (2d ed. 1982) (quoting *Sterling v. Radford*, 126 Wash. 372, 218 P. 205 (1923))). The important consideration is whether they help the trier of fact evaluate the credibility of the witness. *United States v. Morgan*, 555 F.2d 238, 242 (9th Cir. 1977).[16]

In this case, a comparison of the trial testimony and the pre-trial interview shows that the questions asked in the interview were on different topics than those asked about during trial. The interview questions were so vague and convoluted that the witness (and any reasonable reader of the transcript) obviously had a different impression of what Long's interviewer purportedly intended to ask. For example, in the interview, Anderson was asked only about his qualifications as an ocean captain, not his qualifications for Port of Everett jobs. CP 2055. In contrast, at trial, he was asked about his qualifications for Port of Everett jobs. RP 675–76, 691.[17]

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[16] This case was cited favorably by the *Dickinson* court. *Dickenson*, 48 Wn. App. at 467.

[17] Another portion of the recorded interview was so unintelligible as to be useless for impeachment or any other purpose:

> PW: Oh I see, okay. So it helps kind of narrow down when, when Brian called because he called for a job that, if I understand correctly he asked if you would have potential availability to cover a job but the job got moved so you couldn't, could no longer be available because the new time was the same time you were going to the dentist, is that right?
>
> JA: I believe that's the circumstances, yeh.

Long's interviewer chose the wording and syntax of his questions. His choices were poor. Because his questions were vague and poorly worded, the recorded part of the interview could not be used for purposes of impeachment.

The trial court, recognizing the problems inherent in the pre-trial questioning, properly exercised discretion to control the courtroom and declined the request to utilize the recorded portion of the interview for impeachment. RP 694–97. Answers to argumentative, vague, and poorly worded questions do not create material for impeachment when they do not contradict trial testimony. It cannot be said that the trial court's ruling was an abuse of discretion.

3. ***Even if the ruling regarding the recorded portion of the interview were error, it was harmless.***

Even if the trial court's ruling were to have been error, it was harmless, because the excluded evidence is of speculative probative value. *See, e.g.*, *Havens*, 124 Wn.2d at 169–70 (holding that the erroneous exclusion of evidence of speculative probative value is no basis for reversal). The questions in the recorded portion of the interview were so poorly worded and ambiguous that it cannot be said that its use for impeachment purposes would have made any difference in the outcome of

CP 2056.

the case.

Moreover, Long's counsel made so many argumentative statements about his interpretation of the content of the inadmissible recording—in front of the jury—that Long's counsel essentially communicated his interpretation and opinion of the substance of the recorded portion of the interview through the improper colloquy. RP 674, 677–78, 680, 686, 688, and 691.

F. <u>The trial court correctly excluded improper evidence of employee actions that were unlike Long's alleged circumstances.</u>

The trial court exercised its discretion as to the admissibility of purported comparators, admitting some evidence and excluding other evidence. Irrelevant evidence is not admissible. WASH. R. EVID. 402. Evidence is not relevant unless it has a tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. WASH. R. EVID. 401. A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. WASH. R. EVID. 403. A court may also exclude relevant evidence in the consideration of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.* Those rules vest the trial court with broad discretion. *See Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 801, 791

P.2d 526 (1990). And those rules permit the trial court to exclude, *sua sponte*, evidence that is not relevant.

When seeking to avoid summary judgment dismissal, certain employee plaintiffs will seek to offer comparator evidence in order to demonstrate that an employer's proffered reason for adverse action was a mere pretext. *See, e.g., Vasquez v. County of Los Angeles*, 349 F.3d 634, 640–41 (9th Cir. 2003); *see also Johnson v. Dept. of Social & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996) (reversing grant of summary judgment dismissal of race discrimination claim where the plaintiff offered comparator evidence).[18] In doing so, the plaintiff might offer indirect evidence, including that the employer treated "similarly situated employees outside [of the plaintiff's] protected class" more favorably than the plaintiff. *Vasquez*, 349 F.3d at 641.

The Ninth Circuit has held that "individuals are similarly situated when they have similar jobs and display similar conduct." *Id.* "Employees in supervisory positions are generally deemed not to be similarly situated to lower level employees." *Id.* (citations omitted). And when employees hold the same level position but do "not engage in problematic conduct of

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[18] Although Respondents submit that such issues can be resolved solely by proper application of the evidence rules, cases interpreting federal laws similar to the Washington Law Against Discrimination are also instructive. *Cf. Davis v. Dept. of Labor & Indus.*, 94 Wn.2d 119, 125, 615 P.2d 1279 (1980) (noting that Washington courts have looked to interpretations of portions of the Civil Rights Act of 1964 in construing

comparable seriousness[,]" they are not similarly situated. *Id.*

Beyond the evidence rules, Washington courts have not identified a particular test for determining, at trial, what comparator testimony should be admitted. Therefore, the evidence rules, standing alone, govern. In this case, the trial court properly exercised its discretion in deciding to permit some comparator evidence and exclude some other evidence.

Washington courts describing the burdens on summary judgment have explained that, to satisfy the burden of proving a prima facie case, an employee must prove, among other things, that he was treated differently than other similarly situated employees who were engaged in substantially similar work. *Johnson*, 80 Wn. App. at 227.[19]

In order to be "similarly situated," a comparator should also work for the same supervisor and be subject to the same standards. *See Kirby v. City of Tacoma*, 124 Wn. App. 454, 475, 98 P.3d 827 (2004) (citing *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir. 2003)); *see also Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404–05 (7th Cir. 2007) (showing that someone is a comparator "*normally* entails a showing that

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Washington's Law Against Discrimination).

[19] To prove that an employer's explanation for an adverse employment action was merely a pretext for an unlawful purpose, an employee will often seek to introduce evidence that a non-protected employee (in the case of a retaliation claim, one that did not engage in protected opposition activity) engaged in misconduct of "comparable seriousness" and was not subject to the same demotion or other adverse employment action. *Johnson*, 80 Wn. App. at 227.

the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them" (emphasis in original)), *aff'd*, 553 U.S. 442 (2008). Even the Second Circuit has held that, at the very least, employees must be similarly situated in all material respects. *See, e.g.*, *McGuinness v. Lincoln Hall*, 263 F.3d 49, 54 (2d Cir. 2001).[20]

In this case, the trial court recognized that it was appropriate to disallow testimony on purported comparators that were not analogous. RP at 261–62. Those in the position of a deckhand or an engineer are not analogous to a port captain, and it is appropriate to exclude them; their responsibilities are qualitatively different. And for this particular case, those (1) whose responsibilities did not include ensuring that vessels were

[20] Long's reliance on *Bowden v. Potter*, 308 F. Supp. 2d 1008 (N.D. Cal. 2004), and *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654 (9th Cir. 2002) is misplaced. The *Bowden* decision was merely a trial court decision denying a motion for summary judgment. *Bowden*, 308 F. Supp. 2d at 1108–09. And the *Aragon* opinion was decided more than a year *before* the *Vasquez* opinion. *See Aragon*, 292 F.3d at 654. Moreover, the *Vasquez* court expressly contemplated the *Aragon* opinion, citing it four times. *See Vasquez*, 349 F.3d at 648–49. Notably, the more recent Ninth Circuit cases cited by Long make no mention of *McGuinness*. *See Hawn v. Exec. Jet Management*, 615 F.3d 1151 (9th Cir. 2010); *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108 (9th Cir. 2011).

It should also be noted that, as to comparators, the *Earl* opinion merely noted that for age discrimination cases, it was permissible to compare younger employees within the protected class. *Earl* 658 F.3d at 1116. As to comparators, the *Hawn* opinion merely held that the district court should not have applied a "strict 'same supervisor' requirement." *Id.* at 1157. And the *Hawn* opinion continued to cite favorably to *Vasquez*. 615 F.3d. at 1157. The *Hawn* court noted that the inquiry was not rigid, mirroring the trial court's analysis in this case. *Compare Hawn*, 615 F.3d at 1158–59 *with* RP 279 (noting that "It's a relatively

properly crewed up and (2) whose circumstances did not involve leaving their post were not proper comparators. Long sought to introduce irrelevant evidence regarding employees who were in different positions and did not engage in misconduct of comparable seriousness and quality to Long's conduct. The trial court properly excluded that evidence. But even if it were error, Long has not established that such error was anything more than harmless.

VI. CONCLUSION

As Judge Downing said in his order denying Long's motion for a new trial, the perfect trial is a rarity and all could have done better. "[B]ut ultimately, it was a fair trial." CP 1950.

Long has failed to establish error, let alone reversible error. The jury's verdict should stand.

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flexible standard.").

Respectfully Submitted on this 21st day of January, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 21st day of January, 2014, I arranged for service of the foregoing BRIEF OF RESPONDENTS to the parties to this action as follows:

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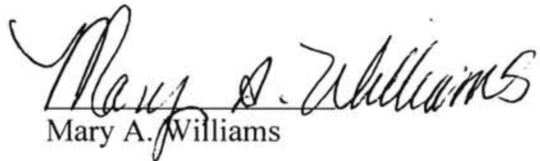

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