Supreme Court No. 92271-3
Court of Appeals No. 70904-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALAN NORD,

Petitioner.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Alan Nord, the appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Nord's conviction for unlawful possession of a controlled substance. The court rejected Mr. Nord's argument this conviction should be reversed due to extrinsic evidence discovered by the jury in a backpack that was admitted with undisclosed items inside. The court, however, reversed Mr. Nord's conviction for resisting arrest because the charging document was deficient. The unpublished opinion was issued on June 29, 2015. After calling on a response from the State, the court denied Mr. Nord's motion for reconsideration on August 18, 2015. These rulings are attached in the appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Drugs and other items were found in a backpack in a car that Mr. Nord had driven with two passengers, one male and the other female. At trial, the State successfully had the backpack itself admitted as an exhibit while admitting other items from the backpack as separate exhibits. Unbeknown to the defense and the court, items remained in the

backpack, including a cell phone, a large sized shirt, and a stick of men's deodorant. During deliberations, the jury told the court it had found items in the backpack and specifically asked if it could use the cell phone as evidence. Although the admission of extrinsic evidence is constitutional error and prejudice is presumed, the Court of Appeals refused to assume prejudice. Despite a plethora of cases reversing for error related to extrinsic evidence, the court affirmed. Does the Court of Appeals opinion conflict with precedent? RAP 13.4(b)(1), (2). Does the decision, which refused to apply the constitutional harmless error test, raise a significant constitutional question? RAP 13.4(b)(3).

2. It is prosecutorial misconduct to knowingly put extrinsic evidence before the jury. The prosecutor, who has a history of prosecutorial misconduct, admitted he knew that undisclosed items remained in the backpack when he moved to admit the backpack as an exhibit. He defended himself by saying that the defendant had failed to object and compared the trial to a "game." Does the Court of Appeals decision refusing to hold this was prosecutorial misconduct conflict with precedent? RAP 13.4(b)(1), (2).

D. STATEMENT OF THE CASE

Law enforcement in Bellingham observed what they believed to be a drug transaction involving two cars, a Honda and an Eagle Talon, in a

parking lot. 2RP 185, 191, 232.[1] From their vehicle about 20 yards away, Border Patrol Agent Dante Moreno and Bellingham Police Officer William Medlen saw the driver of the Eagle Talon, later identified as Alan Nord, walk over to the driver's side of the Honda. 2RP 185, 231-32. Although they did not see any items passed, they saw what they thought was a hand-to-hand transaction between Mr. Nord and the driver of the Honda, a man. 2RP 185, 191, 232. They approached and identified themselves as police. 2RP 187, 234.

The Eagle Talon had two passengers, a woman in the front and a man in the back. 2RP 234. The passenger in the Honda was a woman named Kayly West, whom law enforcement had conducted a controlled buy from earlier that evening. 2RP 175, 177-78, 191. Officer Medlen told Mr. Nord to stand on the sidewalk in front of the cars. 2RP 234-35, 237. Officer Medlen asked if Mr. Nord had identification. 2RP 235. According to Officer Medlen, Mr. Nord said he had identification in a backpack in the car. 2RP 235. Officer Medlen told Mr. Nord to stay where he was and went to ask the passengers about the backpack. 2RP 236. The male passenger was uncooperative. 2RP 236. Officer Medlen

[1] The report of proceedings are referred to as follows: volume 1 ("1RP"); volume 2 ("2RP"); volume of proceedings from June 27, 2013 ("6/27/13RP"); and volume of proceedings from September 4, 2013 ("9/4/13RP"). Volume 1 contains the proceedings from June 17, 2013; July 18, 2013; July 25, 2013; and August 5, 2013. Volume 2 contains the proceedings from August 6 and 7, 2013.

was unable to retrieve the backpack. 2RP 236. Mr. Nord, who had a warrant out for his arrest, ran away. 2RP 238. Agent Moreno started to chase, but stopped. 2RP 191.

Officer Medlen called for a drug dog. 2RP 239. Before the dog arrived, the police permitted the remaining four people to claim possessions from the cars. 2RP 241-42, 268. When the dog arrived, it "alerted" to both cars and the police seized the cars. 2RP 240.

Police executed a search warrant on the Eagle Talon on January 15, 2013. CP 6; 2RP 242, 269. Police found a backpack in the front passenger seat area of the car and searched it. 2RP 207, 244. Among the items inside were a knife, a laptop, and a book-safe. 2RP 244-45. Inside the safe was methamphetamine and a digital scale. 2RP 246. No identification was found. 2RP 257. According to police, the registered owner of the Eagle Talon was a person named Samuel Alvorez. 2RP 266. Police did not contact him. 2RP 266.

On January 24, 2013, police arrested Mr. Nord, suspecting he had been in possession of the drugs found in the backpack. 2RP 118, 213.[2]

[2] Mr. Nord had earlier been arrested on a Department of Corrections warrant on January 11, 2013. 1RP 19; 2RP 217. He was later released. See 2RP 118.

The State ultimately charged Mr. Nord with possession of a controlled substance and resisting arrest.[3] CP 5, 32-33.

At the State's request, the court admitted the backpack as an exhibit. 2RP 245; Ex 5. The knife, safe, drugs, and the digital scale were admitted as separate exhibits. 2RP 247, 250; Ex. 1-4. The prosecutor did not disclose that items remained in the backpack when he moved to admit it. 2RP 244-45. During deliberations, the jury asked if it could consider as evidence a cell phone that the jury had found when examining items left inside the backpack. CP 55; 2RP 322. The prosecutor explained that he had not removed all the items out of the backpack, including a laptop, and had admitted the backpack as it was. 2RP 323 ("If they picked it up, you can feel there is [sic] items. There is a laptop computer in there and other objects."). The prosecutor urged the court to answer "yes." 2RP 323. Mr. Nord argued the answer was "no." 2RP 324. The court answered yes, the jury could consider the cell phone as evidence. CP 55; 2RP 327. The jury found Mr. Nord guilty. CP 56.

In addition to the cell phone, the backpack contained a litany of miscellaneous items inside.[4] Ex. 5. Among these items was the cell

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[3] Because the resisting arrest conviction was reversed, the facts related to that charge are omitted.

[4] Appellate counsel examined exhibit 5, the backpack and the items inside, in the presence of a Whatcom County prosecutor and a Bellingham Police

phone, revealed to be a Verizon Motorola Droid smartphone, model number XT912. Ex. 5. Other significant items included a large Old Navy long-sleeved shirt and stick of men's deodorant. Ex. 5. While a box with a Hewlett-Packard laptop power adaptor inside was in the backpack, a laptop was not. Ex. 5. The backpack also had USB (Universal Serial Bus) cables, a two-pronged charging adaptor that might be used to charge the cell phone; a USB flash drive; and a micro-SD (Secure Digital) card within an SD Card adaptor. Ex. 5.

The Court of Appeals rejected Mr. Nord's arguments that the convictions should be reversed due to the extrinsic evidence in the backpack. The court, however, reversed the conviction for resisting arrest because the charging document failed to allege all the elements of that offense.

E. ARGUMENT

1. In conflict with precedent, the Court of Appeals misapplied the standard of review in extrinsic evidence cases, which presumes prejudice and requires the State to prove harmless error beyond a reasonable doubt.

"[A jury's] verdict must be based upon the evidence developed at the trial." Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed.

Department evidence technician on June 6, 2014. The evidence technician removed the items from the backpack and handled them. The technician returned the items to the backpack.

2d 424 (1965). This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Id. Evidence not developed at trial is "extrinsic evidence," meaning it is "information that is outside all the evidence admitted at trial . . . ." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Extrinsic evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal. Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

This Court has long observed serious care "in seeing to it that only properly admitted exhibits are submitted for the consideration of a jury." State v. Boggs, 33 Wn.2d 921, 929, 207 P.2d 743 (1949) (overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980)). The long-standing rule in Washington is that "'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" State v. Pete, 152 Wn.2d 546, 555, 98 P.3d 803 (2004) (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)). This standard can be traced to earlier decisions by this Court. Boggs, 33 Wn.2d at 929-33; State v. Burke, 124 Wash. 632, 637-38, 215 P. 31 (1923).

While this Court has not explicitly held so, this standard must be read with the modern constitutional harmless error standard in mind.

Before "constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under this standard, "prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). As opinions from the Court of Appeals and the Ninth Circuit have recognized, admission of extrinsic evidence requires application of the constitutional error standard. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006) ("The court must grant a new trial unless it is satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict."); State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989); Gibson v. Clanon, 633 F.2d 851, 854 (9th Cir. 1980) (holding on collateral review that California court erred in not applying constitutional harmless error test when assessing the prejudice of extrinsic evidence). As explained by the Ninth Circuit, admission of extrinsic evidence deprives defendants of their constitutional rights under the Sixth Amendment to confrontation, cross-examination, and assistance of counsel:

> [W]hen a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense the violation may be more serious

> than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact. We believe that the California trial judge erred in applying a reasonable probability standard and that the proper standard to be applied is whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.

Gibson, 633 F.2d at 854-55 (footnote omitted).

Here, while the Court of Appeals recited the standard enunciated in Pete, the court did not cite the constitutional harmless error standard. Neither did the court state that it was presuming prejudice and that the State bore the burden of proving the error harmless beyond a reasonable doubt. The Court's analysis, which recounts the inculpatory evidence against Mr. Nord, is inconsistent with the Chapman standard. The court incorrectly placed the burden on Mr. Nord to prove prejudice. Op. at 8 ("his arguments are speculative . . . . To the extent that he concedes, for purposes of appeal only, that the cell phone was his, this is still insufficient to show prejudice in view of the other evidence . . . ."). Viewing the circumstantial evidence linking Mr. Nord to the backpack, which the Court of Appeals viewed as "strong," the court held Mr. Nord was not prejudiced. Op. at 8-10. But even strong evidence of guilt may be insufficient to overcome the constitutional harmless error test. See,

e.g., State v. Belmarez, 101 Wn.2d 212, 218-19, 676 P.2d 492 (1984) (State's admittedly strong evidence was not so overwhelming as make error harmless beyond a reasonable doubt).

There was no showing by the State that the cell phone could not be turned on or that it did not have information tying Mr. Nord to the backpack. See Riley v. California, __ U.S. __, 134 S. Ct. 2473, 2489-91, 189 L. Ed. 2d 430 (2014) (explaining the vast amount of information a cell phone may contain and noting that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house."). Moreover, the other items in the backpack were prejudicial. For example, because Mr. Nord is a large sized man, both the large sweatshirt and men's deodorant linked him to the backpack. 2RP 125, 286. Without explanation, the Court of Appeals ignored this latter argument. In fact, the opinion does not even recount that there was a large sweatshirt or stick of men's deodorant in the backpack.[5]

Applying the proper standard, the Court of Appeals should have reversed, as in other cases where the jury received extrinsic evidence. See

[5] The Court of Appeals may have erroneously believed these items were outside the record. However, "[t]he 'record on review' may consist of (1) a 'report of proceedings', (2) 'clerk's papers', (3) exhibits, and (4) a certified record of administrative adjudicative proceedings." RAP 9.1(a) (emphasis added). The backpack was an exhibit admitted at trial. Ex. 5. It was sent to the jury room and the jury examined the items inside. CP 55. The backpack, with the items inside, was designated and was before the Court of Appeals. Thus, the items in the backpack are part of the appellate record.

Pete, 152 Wn.2d 554-55 (receipt of unadmitted written statement by defendant and police report reversible error); State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (receipt of unadmitted newspaper editorial and cartoon reversible error); State v. Smith, 55 Wn.2d 482, 484, 348 P.2d 417 (1960) (receipt of alias on jury instructions and forms reversible error); Boggs, 33 Wn.2d at 925-26 (receipt of unadmitted gun and bullets reversible error). Because of the conflict and the significant constitutional issue as to the standard of review in reviewing extrinsic evidence, this Court should grant review. RAP 13.4(b)(1), (2), (3).

2. By not disclosing that the backpack contained items, the prosecutor committed misconduct by knowingly having the backpack admitted with items inside. The Court of Appeals contrary holding conflicts with precedent.

"The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is misconduct "to submit evidence to the jury that has not been admitted at trial." In re Pers. Restraint Pet. of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012) (citing Pete, 152 Wn.2d at 553-55).

Mr. Nord did not object to the admission of the backpack. 2RP 245. However, the record shows that defense counsel did not know that items were left in the backpack until the jury submitted its question on

whether it could consider the cell phone as evidence. See 2RP 325 ("I am at a loss as to how those things would have been admitted."). The trial court was also unaware until the jury submitted its question. See 2RP 323 ("And the question is different than I thought it would be. It says, when reviewing items from the backpack, there is a cell phone, it would suggest there are other items in the backpack."); 2RP 324 ("I don't know anything about this cell phone.").

The prosecutor, Craig Chambers, who has a history of misconduct,[6] defended his actions by asserting that it would have been "obvious" to defense counsel that there were items inside if defense counsel had tried to pick the backpack up. 2RP 325. He also admitted that he had looked through the backpack. 2RP 326. The prosecutor then compared the trial to a "game" that defense counsel had failed to play well. See 2RP 326 ("he didn't object. And that's kind of how the game goes."). But a "criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice . . . ." Giles v. Maryland, 386 U.S. 66, 100, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) (Fortas, J. concurring). Further, if disclosure by prosecutors of items in

[6] Mr. Chambers has been named in at least one appellate opinion for engaging in misconduct. State v. Neidigh, 78 Wn. App. 71, 75, 895 P.2d 423 (1995). As Judge Kozinski wrote recently, "When prosecutors misbehave, don't keep it a secret." Hon. Alex Kozinski, *Preface: Criminal Law 2.0,* 44 Geo. L.J. Ann. Rev. Crim. Proc. xxxv (2015).

containers they seek to have admitted is not required, trial judges cannot fulfill their duty to ensure that the jury only considers evidence properly adduced at trial. See Boggs, 33 Wn.2d at 933 ("The court did not allow the objects to be admitted in evidence and it was the duty of the court to see to it that they did not go to the jury room to be there considered, examined, and compared by the members of the jury.').

The Court of Appeals decision that there was no prosecutorial misconduct is in conflict with this Court's decisions. RAP 13.4(b)(1). In connection with the extrinsic evidence issue, this Court should also review whether the prosecutor committed misconduct by not disclosing that items remained inside the backpack.

F. CONCLUSION

This Court should grant review because the Court of Appeals opinion conflicts with precedent and raises a significant constitutional question. RAP 13.4(b)(1), (2), (3). Granting review will give this Court an opportunity to clarify that the constitutional harmless error test applies to errors in admitting extrinsic evidence and to reaffirm that it is misconduct for the prosecutor to submit extrinsic evidence to the jury.

DATED this 17th day of September, 2015.

Respectfully submitted,

Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Petitioner

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 70904-6-I
Respondent,	)	DIVISION ONE
v.	)	
ALAN JOHN NORD,	)	UNPUBLISHED
Appellant.	)	FILED: June 29, 2015

Cox, J. — Alan Nord appeals his judgment and sentence for unlawful possession of a controlled substance and resisting arrest. He claims to have been prejudiced by the jury's discovery of a cell phone in a backpack that had been admitted into evidence. He also claims that the State committed pretrial misconduct under CrR 8.3. Finally, he claims that the information fails to contain essential elements of the charge for resisting arrest.

We assume, without deciding, that the cell phone the jury discovered during its deliberations, which was in a backpack that the trial court properly admitted into evidence, is extrinsic evidence. Nevertheless, there is no reasonable ground to believe that Nord was prejudiced by the jury's discovery. Other evidence admitted at trial connected Nord to the backpack. Nord's

misconduct claim is not persuasive. However, the information fails to allege all the essential elements of the resisting arrest charge.

We affirm Nord's conviction of unlawful possession of a controlled substance and accept the State's proper concession that the information fails to state all the essential elements of resisting arrest. We remand for dismissal, without prejudice, of the resisting arrest charge.

The State charged Nord with unlawful possession of a controlled substance and resisting arrest.

At trial, a police officer testified that he saw Nord driving a car with two passengers. He observed Nord exit the car and engage in what appeared to be a drug transaction. The officer and his partner then approached Nord and asked for his identification. Nord told the officer that his identification was inside his backpack, in the car he had been driving. While the officer went to the car, Nord ran away. Police did not apprehend him at that time.

The officer went to the car Nord had been driving and asked the two passengers in the car to pass him the backpack that Nord had mentioned. They did not.

A drug dog arrived on the scene and alerted to the possible presence of drugs in the car. The officer instructed the two passengers in the car to exit the vehicle and to take all of their property with them. They did so. Neither took the backpack, which remained in the car after the police impounded the car.

After obtaining a search warrant, the officer who testified at trial searched the car and the backpack. Inside the backpack, he found a small safe, which

contained methamphetamine and drug paraphernalia. The officer also testified that the backpack contained a knife and a laptop. He further testified that the backpack might have contained other personal effects, but could not remember specifically what they were.

Police later located Nord. When they attempted to arrest him, he resisted. The resisting arrest charge arose from this incident.

On June 17, 2013, the parties were scheduled to present pretrial motions and begin the trial. But after a CrR 3.5 hearing, the State decided to subpoena an additional witness. The same public defender's office represented both Nord and this witness, creating a potential conflict of interest. The court granted a continuance based on this conflict. Nord did not object to the continuance. Before the continuance, Nord's CrR 3.3 speedy trial expiration date was on July 17.[1]

The parties resolved the potential conflict of interest by June 27. Nord never moved to set his trial date before the CrR 3.3 speedy trial expiration. Although Nord's trial did not begin until August 5, this was due to additional good cause continuances.

On August 5, Nord moved to dismiss the case, alleging that the State had mismanaged the case by subpoenaing the additional witness. According to this motion, the State's actions forced Nord to give up his right to a speedy trial. The court denied the motion, and trial began that day.

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[1] CrR 3.3(b)(5), (e)(3).

During trial, the State introduced and the court admitted into evidence several exhibits. They included the backpack where the police discovered the methamphetamine on which the possession of a controlled substance charge was based. When the State offered the backpack into evidence, Nord stated that he had no objection.

The State also offered other items into evidence, including a knife and a safe that had been inside the backpack. From our review of the record, it appears that there likely were other items in the backpack when the court admitted it into evidence. But it is unclear to us why neither the State nor Nord was aware that the backpack also contained a cell phone when the court admitted the backpack.

While the jury deliberated, it appears that it discovered a cell phone in the backpack. The jury sent the court a question. The question read, "When reviewing items from backpack, there is a cell phone. Can we use as evidence? [sic]"

The court asked both counsel for their views on how to answer the question. The State urged the court to answer in the affirmative. Nord disagreed, urging the court to answer in the negative. The court agreed with the State and answered "yes" to the jury's question.

Shortly thereafter, the jury returned its verdict, convicting Nord on both counts.

Nord appeals.

EXTRINSIC EVIDENCE

Nord argues that the cell phone was extrinsic evidence because it was unknown that it was inside the backpack when the court admitted the backpack into evidence. Based on this assertion, he claims he was prejudiced by the jury's discovery of the cell phone during its deliberations. We hold that it is unnecessary to decide whether the cell phone was extrinsic evidence. Assuming, without deciding, that it was, there is no reasonable ground to believe Nord was prejudiced by the discovery.

"'[E]xtrinsic evidence is defined as information that is outside all the evidence admitted at trial.'"[2] Such "'evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal.'"[3]

Washington courts apply "'the long-standing rule'" that "'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'"[4] This is an objective inquiry.[5] We consider "whether the extrinsic

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[2] State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (emphasis omitted) (internal quotation marks omitted) (quoting State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)).

[3] Id. at 553 (internal quotation marks omitted) (quoting Balisok, 123 Wn.2d at 118).

[4] In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012) (quoting Pete, 152 Wn.2d at 555 n.4).

[5] State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740 (2006).

evidence could have affected the jury's determinations," not the "subjective thought process of the jurors."[6]

Here, it is implicit in Nord's argument that the cell phone contained information that could have linked him to the backpack where police discovered the drugs. Also implicit in this argument is that information on the cell phone was accessible to the jury when it discovered the cell phone during deliberations. Because no one made a record about either of these points when the issue arose below, there is nothing in this record to substantiate either point.

We note that it is unclear to us whether the cell phone qualifies as extrinsic evidence. That is because this case differs from the extrinsic evidence cases that we have considered. Those cases typically involve either accidentally giving the jury exhibits that were marked but not admitted,[7] or misconduct by the jury.[8] Here, in contrast, the cell phone remained in the backpack because neither party thoroughly examined it before the court properly admitted the backpack into evidence.

But we need not decide whether the cell phone is extrinsic evidence. It is clear that what the cell phone inside the backpack may have contained was

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[6] Id. at 332-33.

[7] See, e.g., Pete, 152 Wn.2d at 550-52; State v. Rinkes, 70 Wn.2d 854, 859-62, 425 P.2d 658 (1967).

[8] See, e.g., State v. Fry, 153 Wn. App. 235, 238-39, 220 P.3d 1245 (2009); State v. Johnson, 137 Wn. App. 862, 866, 155 P.3d 183 (2007).

never "subject to objection, cross-examination, explanation or rebuttal."[9] That is because neither the parties nor the court was aware of it when the court properly admitted the backpack. Thus, in an abundance of caution, we assume without deciding that the cell phone should be treated as extrinsic evidence. Accordingly, the question becomes whether there is a reasonable ground to believe that Nord was prejudiced by the jury's discovery of the cell phone.

We conclude that there are no reasonable grounds to believe that Nord was prejudiced by the jury's discovery.

The State had a strong case against Nord. Before the stop, officers had seen Nord engage in a "hand to hand" transaction typical of drug sale. Nord was also the one who first indicated to the officer questioning him that his identification was in a backpack in the car he had been driving. The only backpack remaining in the car after the other occupants left it contained the drugs serving as the basis for the unlawful possession charge. This was sufficient to show that Nord either owned the backpack or had possession of it when driving the car.

Other evidence corroborates Nord's tie to the backpack and the drugs found in it. When the passengers were told to take their belongings and leave the car, neither took the backpack.

And significantly, Nord fled the scene. When the officer who approached Nord at the stop asked him about identification, Nord stated that his identification

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[9] Pete, 152 Wn.2d at 553 (internal quotation marks omitted) (quoting Balisok, 123 Wn.2d at 118).

was in a backpack in the car. After pacing nervously outside the car, Nord fled while the officer went to retrieve the backpack. Doing so under these circumstances is evidence of guilt.[10]

Thus, because the State presented strong evidence linking Nord to the backpack, there is no reasonable ground to believe that he was prejudiced by the jury's discovery of the cell phone.

Nevertheless, Nord argues that he was prejudiced by the jury's discovery of the cell phone in the backpack during deliberations for several reasons. But his arguments are speculative and unpersuasive.

First, Nord argues that the jury could have found information on the cell phone that linked him to the backpack. But this record does not establish whether the jury actually found information on the cell phone that was prejudicial to him during its deliberations. To the extent that he concedes, for purposes of appeal only, that the cell phone was his, this is still insufficient to show prejudice in view of the other evidence to tie him to the backpack that we previously discussed.

Second, Nord argues that the evidence against him was weak. He argues that he was not the registered owner of the car and that the backpack could have belonged to one of the passengers. But the charge did not require establishing that he was the registered owner of the car. And the assertion that the backpack belonged to one of the other passengers is unpersuasive since they were told to

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[10] See State v. McDaniel, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010).

take their belongings when they were told they could go and none took the backpack.

Third, Nord argues that the officer did not find his identification in the backpack. Although this is true, it misses the point. Nord identified the backpack as the place where his identification could be found, establishing his link to the backpack. That identification was not actually found is not dispositive.

Fourth, he argues that his flight from the scene could have been for other reasons. We agree. But that does not overcome the fact that the jury could also have found that his flight was evidence of guilt for the drug charge in this case.

Fifth, Nord argues that other items inside the backpack could have prejudiced him. Statements by the prosecutor and the officer who searched the backpack indicate that it may have contained a laptop computer. But when Nord's appellate counsel examined the backpack, it did not contain a laptop. Nord argues that if the laptop was inside the backpack, the jury may have been able to turn it on and find additional information connecting Nord to the backpack.

But this argument is wholly speculative. In order to find prejudice, the court would have to assume that the laptop was in the backpack, the jury found the laptop, the jury was able to turn on the laptop and obtain access to information it contained, and information on the laptop linked Nord to the backpack. The record fails to establish any of this.

Finally, Nord argues that the prosecutor committed misconduct by intentionally submitting extrinsic evidence to the jury. He argues that this court

should not allow "parties to effectively sneak in 'evidence' through [containers.]" This is not a fair reading of this record, and we reject the argument.

There simply is no evidence that the prosecutor tried to "sneak in" evidence to the jury. Rather, it appears from a fair reading of the record that the prosecutor did not thoroughly examine the backpack before offering it into evidence. The prosecutor stated, and we have no reason to doubt, that "I haven't examined the contents [of the backpack], but it was obvious that it was not empty."[11]

We need not address whether "it was obvious that [the backpack] was not empty" when offered into evidence. The record is clear that neither counsel thoroughly examined the backpack before the court admitted it.

In sum, the jury's discovery of the cell phone in the backpack during deliberations did not prejudice Nord.

CrR 8.3

Nord argues that the State committed misconduct under CrR 8.3 by waiting until the day of trial before subpoenaing a witness, "forc[ing] Nord to choose between conflict free counsel and his [CrR 3.3] right to a speedy trial." We disagree.

Under CrR 8.3(b), "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or

[11] Report of Proceedings (August 7, 2013) at 325.

governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

There are two requirements for a dismissal under this rule. First, the "defendant must show arbitrary action or governmental misconduct."[12] Second, the defendant must show "prejudice affecting the defendant's right to a fair trial."[13]

Under this analysis, forcing the defendant to waive CrR 3.3 speedy trial rights is prejudice.[14] In State v. Michielli, the State initially charged the defendant with a single count of theft, with a potential sentencing range from 0 to 60 days.[15] Three business days before trial, the prosecutor amended the information to add four new charges, with a potential sentencing range from 15 to 20 months.[16] The additional charges were not based on new information.[17] The supreme court held that the "[d]efendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial."[18]

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[12] State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

[13] Id. at 240.

[14] Id. at 244.

[15] 132 Wn.2d 229, 233, 937 P.2d 587 (1997).

[16] Id.

[17] Id. at 243.

[18] Id. at 244.

This court reviews "[a] court's power to dismiss charges" under CrR 8.3 for abuse of discretion.[19]

Here, the court did not abuse its discretion by denying Nord's motion under CrR 8.3. The prosecutor's request for a continuance was not misconduct, and Nord did not suffer prejudice.

When the prosecutor sought a continuance, he noted that he had been unaware of some of the facts elicited at the CrR 3.5 hearing. And in light of these facts, he decided to subpoena an additional witness.

Nord now argues that the prosecutor should not have learned anything new at the hearing, because only the State's witnesses testified. But Nord did not make this argument at the time. Additionally, Nord had initially agreed to plead guilty in both this case and an unrelated case. But at the plea hearing on June 6, 2013, which was shortly before the scheduled trial, Nord changed his mind and decided to go to trial. Both of Nord's cases were scheduled to go to trial within a week of each other. And the same prosecutor was handling both cases. Thus, even if the prosecutor was not as prepared for trial as normal, it does not indicate that he mismanaged the case so severely that it constituted misconduct.

Additionally, Nord cannot show prejudice. The conflict created by subpoenaing the witness had been resolved by June 27, 10 days after the State moved for the continuance. Before the continuance, Nord's speedy trial expiration date was on July 17. His trial did not begin before this date because

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[19] Id. at 240.

his other trial was set for July 8 and his counsel was unavailable on July 15. Although trial did not begin until August 5, this was due to additional good cause continuances. Thus, the delay caused by the State's initial continuance was minimal, and Nord cannot show prejudice.

Nord argues that this case resembles Michielli. But the present case is distinguishable. First, in Michielli, the prosecutor filed four additional charges without learning any new facts.[20] In the present case, the prosecutor sought a short continuance after discovering additional facts. Additionally, the defendant in Michielli suffered much greater prejudice—four new charges that increased his potential sentencing range from 0 to 60 days to 15 to 20 months.[21] Thus, Michielli is not analogous to Nord's case.

Nord also argues that the court abused its discretion by granting the State a continuance on the day of trial.

But Nord failed to object to the continuance. On appeal, he argues that the court abused its discretion "[b]ecause the conflict was speculative and the State inexcusably delayed in deciding" to subpoena the additional witness. But Nord did not make these arguments when the State sought the initial continuance. At trial, when the court asked Nord's attorney about the proposed continuance, he replied only by stating that the conflict of interest put Nord in "a difficult position" and reiterating that Nord would prefer to have new counsel.

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[20] Id. at 243.

[21] Id. at 233.

document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?"[26]

Under the first prong, the essential question is "whether all the words used would reasonably apprise an accused of the elements of the crime charged."[27]

The remedy for a conviction based on a defective information is dismissal without prejudice.[28]

Here, the State properly concedes that the information did not appraise Nord of all of the essential elements of resisting arrest, even under the post-verdict standard of review.

Under RCW 9A.76.040, "A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her."

Under the plain text of RCW 9A.76.040, both intentional resistance and a lawful arrest are essential elements. Here, the information charging Nord alleged that he "did prevent or attempt to prevent a police officer from arresting him." Thus, the information did not allege that the resistance was intentional or that the arrest was lawful. This is fatal.

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[26] Id. at 105-06.

[27] Id. at 109.

[28] Vangerpen, 125 Wn.2d at 792-93.

Because the information does not reasonably appraise Nord of all essential elements of resisting arrest, the proper remedy is to remand to the trial court for dismissal, without prejudice, of this charge.

We affirm the conviction for possession of a controlled substance. We remand to the trial court for dismissal, without prejudice, of the resisting arrest charge.

Cox, J.

WE CONCUR:

Trickey, J

Spearman, C.J.

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

STATE OF WASHINGTON, Respondent, v. ALAN J. NORD, Appellant.	)	No. 70904-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Alan Nord, has moved for reconsideration of the opinion filed in this case on June 29, 2015. The panel hearing the case has called for an answer from respondent, state of Washington. The court having considered the motion and respondent's answer has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 18th day of August 2015.

FOR THE PANEL:

Cox, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70904-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas, DPA
Whatcom County Prosecutor's Office
[Appellate_Division@co.whatcom.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 17, 2015