96428-9

Supreme Court No. (to be set)
Court of Appeals No. 50118-0-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Shelly Arndt
Appellant/Petitioner

Kitsap County Superior Court Cause No. 14-1-00428-0
The Honorable Judge Leila Mills

PETITION FOR REVIEW

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DECISION BELOW AND ISSUES PRESENTED

Petitioner Shelly Arndt, the appellant below, asks the Court to review the Court of Appeals published opinion entered on September 25, 2018.[1] This case presents two issues:

1. Does an undecided juror's internet search regarding "premeditation" require reversal where the State is unable to show which websites the juror viewed?
2. Did the trial judge err by refusing to grant Ms. Arndt a new trial in the absence of proof beyond a reasonable doubt that juror misconduct could not have affected the verdict?

STATEMENT OF THE CASE

After several days of deliberations in the murder trial of Shelly Arndt, Juror Violet Honey Watson searched the internet for definitions of "premeditation." RP (2/6/17) 19-20. She later told an acquaintance, Attorney Janiece LaCross,[2] that she'd been one of the last holdout jurors, that she'd struggled with the definition of premeditation, and that she'd agreed to convict as a result of her online research. CP 37, 39, 44.

Juror Watson confirmed this to a defense investigator named James Harris and showed him some search results on her phone. RP (2/6/17) 31; CP 16-20, 37. Harris photographed these search results. RP (2/6/17) 32-33; CP 16-20, 37; Ex. 1-3.[3] Watson told Harris these results

[1] A copy of the Opinion is attached.

[2] She didn't know that Ms. LaCross was defense counsel's sister. RP (2/6/17) 24; CP 37, 39.

[3] The photographs were later admitted into evidence at a hearing on Ms. Arndt's motion for a new trial. RP (2/6/17) 33.

were among the websites she reviewed. RP (2/6/17) 31-33. She told him she had reviewed other websites as well. RP (2/6/17) 31-33.

Watson made similar statements to Alexandra Mangahas, an investigator from the prosecutor's office. CP 37-40. She told Mangahas that

> [s]he was bothered by the term "premeditation" and was having a difficult time deciding guilty or not guilty… [S]he looked up the definition of premeditation while she was at home and that assisted her with deciding on guilty.
> CP 37.

After two interviews with the prosecution investigator, Watson refused to speak with defense investigator Harris or provide a declaration. RP (2/6/17) 23, 33-34.

Ms. Arndt filed a motion for a new trial. CP 13-20. At a hearing on the motion, Juror Watson testified that she'd googled "premeditation" on her phone. She conducted her search in bed one evening after deliberations had started. RP (2/6/17) 20, 27-28. Watson explained her motivation:

> I wanted to make sure when I made my decision I understood that word. And it wasn't really clear to me.
> RP (2/6/17) 26.[4]

She believed what came up was from "Wedipedia." RP (2/6/17) 21.[5] She explained that she reviewed "whatever that does when you Google, and that's the definition." RP (2/6/17) 21.

[4] She told the court that she hadn't thought that looking up premeditation was wrong. RP (2/6/17) 26.

[5] She may have meant to say "Wikipedia."

She searched using the phrase "What is the definition of premeditation?" RP (2/6/17) 27. She reviewed "whatever popped up on [her] phone" following her search. RP (2/6/17) 27. This included "several" or "a couple" different definitions. RP (2/6/17) 28.

She believed these definitions were "completely different" from the screenshots photographed by Harris and shown in Exhibits 1-3, although she'd previously told him these results were among those she'd viewed. RP (2/6/17) 20-21, 27. She testified that "when I had talked to Mr. Harris, it was different sites that came up on– on that, because the definition was– it seemed like it was different." RP (2/6/17) 27.

Defense counsel objected when the prosecutor asked "[W]hat was kind of the key thing in these definitions that stuck out to you?" RP (2/6/17) 24. Counsel argued that such information inhered in the verdict. RP (2/6/17) 24-25. Before the court ruled, Juror Watson testified that "One of the definitions was about premeditation being short." RP (2/6/17) 24.

The court overruled the defense objection. RP (2/6/17) 25. The prosecutor followed up by asking if the definition that stuck out for Juror Watson required "some deliberative process" that "was however short?" RP (2/6/17) 25.

Juror Watson had not used these phrases in her testimony or in her statements to Janiece LaCross and the two investigators. RP (2/6/17) 18-28; CP 16-20, 37-40. She accepted the prosecutor's summary but did not claim these were the exact phrases she'd read online. RP (2/6/17) 25.

Despite this, the prosecutor relied on the phrase "however short" to argue that Juror Watson found definitions containing the same language as the court's instructions.[6] RP (2/6/17) 56, 76.

The court found that Juror Watson had engaged in misconduct by researching the meaning of the word "premeditation." CP 137. However, the court refused to order a new trial. CP 138, 141.

The court acknowledged that Juror Watson had viewed some unknown websites but did not find this fatal to the State's burden. CP 136, 138. Instead, the court relied on evidence that Juror Watson reviewed definitions that "included the word 'short' or the phrase 'however short,' and that these definitions were "indistinguishable" from the instructions given by the court. CP 138. The court did not attempt to determine if any of the unspecified websites included definitions that were inconsistent with the court's instructions. CP 138.

Ms. Arndt appealed, and the Court of Appeals affirmed her conviction. CP 141; *see* Appendix.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT JUROR MISCONDUCT HAD NO IMPACT ON THE VERDICT.

During deliberations, Juror Watson violated the court's instructions by searching the internet and reviewing multiple definitions of the word

[6] In her testimony, she claimed she did not share the definition with other jurors. RP (2/6/17) 26. She also testified that there were no discussions in the jury room after she reviewed the definitions online. RP (2/6/17) 26.

"premeditation." RP (2/6/17) 19-20, 31-33; CP 16-20, 37, 39, 44. Because this misconduct "could have" affected Juror Watson's verdict on the charge of premeditated murder, Ms. Arndt's conviction on that charge must be reversed. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740, 742 (2006); *State v. Johnson*, 137 Wn. App. 862, 870, 155 P.3d 183, 187 (2007).

A. The Supreme Court should clarify how courts should determine if juror misconduct "could have" affected a verdict.

In criminal cases, the state and federal constitutions guarantee a fair trial by an impartial jury. *State v. Irby*, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015), *review denied*, 184 Wn.2d 1036, 379 P.3d 953 (2016); U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22. Each juror must reach a verdict "uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978).

The right is violated "if even a single juror's impartiality is overcome by an improper extraneous influence." *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002); *see also Chambers v. State*, 321 Ga. App. 512, 520, 739 S.E.2d 513 (2013).

A juror commits misconduct by consulting a dictionary or otherwise researching the definition of a legal term material to the case. *United States v. Lawson*, 677 F.3d 629, 639-651 (4th Cir. 2012); *see also Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 138 n. 6, 750 P.2d 1257, 1264 (1988), *clarified on denial of reconsideration*, 756 P.2d 142 (Wash.

1988). In *Lawson,* the Fourth Circuit found that jurors committed misconduct by consulting Wikipedia to research the definition of the word "sponsor." *Lawson,* 677 F.3d at 636. The *Adkins* court found that jurors committed misconduct by procuring (from the bailiff) a copy of Black's Law Dictionary and researching the words "negligence" and "proximate cause." *Adkins,* 110 Wn.2d at 137-138.

During deliberations in this case, Juror Watson committed misconduct by searching the internet for definitions of the term "premeditation." RP (2/6/17) 19-21, 27, 31-33; CP 16-20, 37, 39, 44. The trial judge unequivocally found that Watson committed misconduct. CP 136-137. That finding has not been challenged on appeal.

Once misconduct is established, prejudice is presumed. *Boling,* 131 Wn. App. at 332-33. To overcome the presumption, the prosecution must show beyond a reasonable doubt that the misconduct, viewed objectively, could not have affected the verdict. *Id.; Johnson,* 137 Wn. App. at 870.[7] Any doubts must be resolved against the verdict. *Johnson,* 137 Wn. App. at 869.

In this case, the State cannot overcome the presumption of prejudice. The juror's misconduct "could have" affected the verdict.[8] *Id.* at

[7] *See also Lawson,* 677 F.3d at 651 (noting the government's "heavy obligation to rebut the presumption of prejudice by showing that there is no reasonable possibility that the verdict was affected by the external influence") (internal quotation marks and citations omitted).

[8] Numerous other courts have found prejudicial misconduct in similar circumstances. *Lawson,* 677 F.3d at 651; *see also, e.g., Tapanes v. State,* 43 So. 3d 159 (Fla. Dist. Ct. App. 2010); *Com. v. Wood,* 230 S.W.3d 331, 332 (Ky. Ct. App. 2007); *Allers v. Riley,* 273 Mont. 1, 901 P.2d 600 (1995); *Fulton v. Callahan,* 621 So. 2d 1235 (Ala. 1993); *Jordan v. Brantley,* 589 So. 2d 680 (Ala. 1991); *Glage v. Hawes Firearms Co.,* 226 Cal. App. 3d 314, 276 Cal. Rptr. 430 (Cal. Ct. App. 1990); *Alvarez v. People,* 653 P.2d 1127 (Colo. 1982).

870*; Boling*, 131 Wn. App. at 333. Reversal is required because the State cannot show beyond a reasonable doubt that the misconduct could not have affected the verdict. *Boling*, 131 Wn. App. at 333.

This is especially true because the government did not provide the websites reviewed by Juror Watson, and thus cannot show that she read only web pages consistent with the court's instructions. RP (2/6/17) 21, 28, 31-33. As the trial court noted, "the exact websites and content that [Watson] viewed is unclear." CP 136. In fact, Watson testified that the definitions she read were "completely different" from the screenshot photographs that were admitted into evidence. Ex. 1-3; RP (2/6/17) 21.

Any doubts about the specific definitions Watson read must be resolved against the verdict. *Johnson*, 137 Wn. App. at 869. In Judge Maxa's words "[w]hen the evidence is insufficient to determine what extrinsic evidence a juror considered when engaging in misconduct, allocation of the burden of proof necessarily resolves the issue." Opinion, p. 14 (Maxa, C.J., dissenting).

The trial judge did not resolve doubts against the verdict. CP 138. This was error. Contrary to the trial judge's conclusion, it *is* appropriate "[t]o base a decision for a new trial on what is 'not known.'" CP 138. Where "what is 'not known'" prevents the State from meeting its burden, reversal is required.[9] *Lawson*, 677 F.3d at 648. As the *Lawson* court

[9] *See also* have *State v. Williamson*, 72 Haw. 97, 103, 807 P.2d 593, 596 (1991) ("[B]y not inquiring into the identity of the juror who brought the dictionary and obtaining a personal explanation from him or her as to its use, the trial court did not have before it the totality of circumstances surrounding the misconduct to decide whether it was harmless.")

remarked, "'it is the prosecution' that 'bears the risk of uncertainty'" once misconduct is shown. *Lawson*, 677 F.3d at 651 (quoting *United States v. Vasquez–Ruiz*, 502 F.3d 700, 705 (7th Cir.2007)).

In *Lawson*, for example, the court reversed even though there was "no indication in the record regarding the actual content of the Wikipedia entry" obtained by the juror. *Id.*; *see also Chambers*, 321 Ga. App. at 520 (the content must be "*established* without contradiction" if it is to prove lack of prejudice) (emphasis in original).

The Court of Appeals majority ignored the problem created by the unknowns in this case.[10] This was improper. The State's inability to produce evidence should have resulted in reversal, because the State failed to show beyond a reasonable doubt that the misconduct could not have affected the verdict. *Boling*, 131 Wn. App. at 333.

As the dissent points out, Juror Watson "reviewed *multiple* definitions." Opinion, p. 11 (Maxa, C.J., dissenting) (emphasis in original). Although one or more of these definitions included the word "short" or "however short," no one was able to clarify for the record what other language was included in these multiple definitions.[11] CP 136; *see* Opinion, p. 12 (Maxa, C.J., dissenting).

[10] The Court of Appeals majority excused the absence of evidence by purporting to defer to "the role of the trial court as fact finder." Opinion, p. 9, n. 8. Given the absence of evidence produced by the State, this "deference" shifted the burden of proof. *See* Opinion, p. 14 (Maxa, C.J., dissenting). The trial court erred as a matter of law by resolving doubts in favor of the verdict rather than against it. *Johnson*, 137 Wn. App. at 869.

[11] In Judge Maxa's words, "there was no evidence regarding what else the multiple definitions juror 2 viewed stated about premeditation." Opinion, p. 12 (Maxa, C.J., dissenting).

Even if some of the definitions were consistent with the court's instructions, this does not mean that none of the definitions conflicted with the instructions. Depending on what she read, Juror Watson's research "could have" impacted her verdict.[12] *Boling*, 131 Wn. App. at 333.

The Court of Appeals erred by upholding the verdict in light of the State's failure to prove that the misconduct could not have affected the verdict. Ms. Arndt's conviction for premeditated murder must be reversed, and the charge remanded for a new trial. *Id.*

B. The Supreme Court should determine the appropriate standard of review for discretionary decisions that infringe an accused person's constitutional rights.

This case presents a pure question of law based on established historical facts. In juror misconduct cases, "[t]he court's inquiry is an objective one." *Boling*, 131 Wn. App. at 332. The question is "whether the extrinsic evidence could have affected the jury's determinations." *Id.*

Such mixed questions of fact and law are reviewed *de novo*. *See State v. Lopez*, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018); *see also State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016) ("[U]nchallenged factual findings are verities on appeal and we review application of those facts to the law de novo.")

[12] Indeed, Juror Watson told LaCross, Harris, and Mangahan that her research *did* cause her to change her verdict. CP 16, 17, 37; RP (2/6/17) 5.

Because this case presents a mixed question of law and fact, review is *de novo.* The Court of Appeals erred by applying an abuse-of-discretion standard.

In addition, appellate courts review constitutional issues *de novo. Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *Samalia*, 186 Wn.2d at 269. However, the Supreme Court has issued conflicting opinions on the proper standard of review of discretionary decisions violating an accused person's constitutional rights. The better approach is to review *de novo* a trial court's discretionary decision that infringes a constitutional right.

The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of discretion. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576, 579 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). In *Jones*, for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.[13] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court

[13] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

specifically pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id*.

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones* , the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*— the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez.* Cases applying the abuse-of-discretion standard have not grappled with the reasoning outlined by the *Jones* and *Iniguez* courts. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017).

In *Dye,* the court indicated that "[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review." *Id.*, at 548. However, the *Dye* court did not cite *Iniguez* or *Jones. Id.*, at 548. Nor did it address the reasoning outlined in those decisions. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. *See* Petition for Review[14] and Supplemental Brief.[15] As the *Dye* court noted, the petitioner "present[ed] no reason for us to depart

[14] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf (last accessed 7/11/17).

[15] Available at http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf (last accessed 7/11/17).

from [an abuse-of-discretion standard].” *Id.*[16] There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*. *Id.*

In *Clark*, the court announced it would “review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court.” *Clark*, 187 Wn.2d at 648–649 (internal quotation marks and citations omitted). Upon finding that the lower court had excluded “relevant defense evidence,” the reviewing court would then “determine as a matter of law whether the exclusion violated the constitutional right to present a defense.” *Id.*

Although the *Clark* court cited *Jones*, it did not suggest that *Jones* was incorrect, harmful, or problematic, and did not overrule it. *See, e.g.*, *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017) (“For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it.”)

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez.* Furthermore, as in *Dye*, the respondent in *Clark* argued for the abuse-of-discretion standard, and petitioner did not ask the court to

[16] By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf (last accessed 7/11/17).

apply a different standard. *See* Respondent's Supplemental Brief, p. 16;[17] Petitioner's Supplemental Brief.[18]

This Court should follow the reasoning in *Iniguez* and *Jones*. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye* and *Clark.*

Constitutional errors should be reviewed *de novo. Jones,* 168 Wn.2d at 719; *Iniguez,* 167 Wn.2d at 281. This rule encompasses discretionary decisions that violate constitutional rights. Review of constitutional violations for abuse of discretion puts the constitutional rights of an accused person in the hands of the individual judge presiding over that person's trial.

Furthermore, the standard set forth in *Clark* renders the *de novo* standard meaningless: an abuse of discretion resulting in the exclusion of relevant and admissible defense evidence will always violate the right to present a defense. *Jones,* 168 Wn.2d at 719; *Iniguez,* 167 Wn.2d at 281. Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import.

Jones and *Iniguez* set forth the proper standard. Given the Supreme Court's inconsistency on this issue, review here should be *de novo. Jones*, 168 Wn.2d at 719; *Iniguez,* 167 Wn.2d at 281. The Supreme Court should

[17] Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf (last accessed 2/10/17).

18 Available at http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf (last accessed 2/10/17).

accept review and clarify that a trial court's discretionary decision is reviewed *de novo* if it is alleged to infringe a constitutional right.

II. THE COURT OF APPEALS' PUBLISHED DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS AND PRESENTS SIGNIFICANT ISSUES OF CONSTITUTIONAL LAW THAT ARE OF SUBSTANTIAL PUBLIC INTEREST.

A. The Court of Appeals improperly focused on the juror's subjective mental impressions, and erroneously shifted the burden of proof by resolving doubts in favor of the verdict.

The Court of Appeals' published decision conflicts with *Adkins*, *Boling*, and *Johnson*. In each of those cases, the appellate court made an objective inquiry into the possibility of prejudice. *Adkins*, 110 Wn.2d at 138; *Boling*, 131 Wn. App. at 332; *Johnson*, 137 Wn. App. at 870.

Here, by contrast, the Court of Appeals majority focused on "the part of those definitions[19] that had an impression on [the juror] and affected her verdict." Opinion, p. 9. This focus on the juror's subjective mental impressions was improper. The correct analysis "is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence." *Johnson*, 137 Wn. App. at 870.

The Court of Appeals majority also improperly shifted the burden of proof. As Judge Maxa pointed out in his dissent, the State's inability to produce the websites viewed by Juror Watson "precludes the State from establishing beyond a reasonable doubt that her research could not have affected the verdict." Opinion, p. 13 (Maxa, C.J., dissenting).

[19] Referring to the definitions of "premeditation" improperly viewed by Juror Watson.

Because the State could not prove what definitions the juror viewed, "it is possible that they were *not* indistinguishable from the jury instruction and *not* consistent with the law." Opinion, p. 13 (Maxa, C.J., dissenting) (emphasis in original). The trial court should have resolved doubts against the verdict; its failure to do so was error. *Johnson*, 137 Wn. App. at 869.

Instead of recognizing the State's failure to meet its burden, and resolving doubts against the verdict, the Court of Appeals majority upheld the conviction. This "essentially shifted the burden of proof to Arndt." Opinion, p. 13 (Maxa, C.J., dissenting).

Because the Court of Appeals' published decision conflicts with *Adkins, Boling,* and *Johnson,* the Supreme Court should accept review under RAP 13.4(b)(1) and (2).

B. The Court of Appeals erred by applying discretionary review to a mixed question of law and fact; in addition, the Supreme Court should clarify the appropriate standard of review where a discretionary decision is alleged to infringe a constitutional right.

The Court of Appeals refused to apply a *de novo* standard to Ms. Arndt's argument that juror misconduct infringed her constitutional right to a fair trial by an impartial jury. Opinion, pp. 4-6. Instead, the court applied an abuse-of-discretion standard, relying on *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540, *review denied*, 186 Wn.2d 1028 (2016). Opinion, p. 5.

The Supreme Court has always reviewed *de novo* any claimed violation of a constitutional right. *State v. Vanhollebeke*, 190 Wn.2d 315, 321, 412 P.3d 1274 (2017) (citing *Iniguez*). However, the Court has issued inconsistent decisions regarding the standard of review for discretionary decisions that infringe a constitutional right. *Compare Jones*, 168 Wn.2d at 719, *with Clark*, 187 Wn.2d at 648–649. The proper standard of review in such cases is a significant issue of constitutional law that is of substantial public interest. Review is appropriate under RAP 13.4(b)(3) and (4).

Furthermore, the impact of Juror Watson's misconduct presents a mixed question of law and fact, and thus should have been reviewed *de novo*. *Samalia*, 186 Wn.2d at 269. The Court of Appeals' refusal to review this mixed question of law and fact *de novo* conflicts with *Samalia* and other similar Supreme Court cases. The Supreme Court should accept review under RAP 13.4(b)(1).

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse the Court of Appeals, and remand the case for a new trial.

Respectfully submitted October 16, 2018.

BACKLUND AND MISTRY

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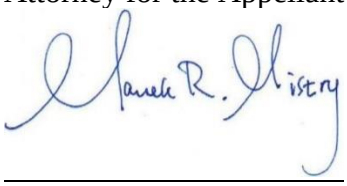

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Shelly Arndt, DOC #318981
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and I sent an electronic copy to:

Kitsap County Prosecuting Attorney
rsutton@co.kitsap.wa.us
kcpa@co.kitsap.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 16, 2018.

_____

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Published Opinion, filed on September 25, 2018.

Filed
Washington State
Court of Appeals
Division Two

September 25, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHELLY MARGARET ARNDT, Appellant.	No. 50118-0-II PUBLISHED OPINION

MELNICK, J. — A jury convicted Shelly Arndt of numerous crimes, including premeditated murder in the first degree and arson in the first degree. She appeals the trial court's denial of her motion for a new trial on the basis of juror misconduct and requests reversal of her murder conviction. Because the trial court did not abuse its discretion in denying the motion, we affirm.

FACTS

I. TRIAL

On February 23, 2014, Arndt and her boyfriend, Darcy Veeder Jr., spent the night at their friends' home. *State v. Arndt*, No. 48525-7-II, slip op. at 2 (Wash. Ct. App. Dec. 12, 2017) (unpublished) (http://www.courts.wa.gov/opinions/). Late that night, the house caught fire. *Arndt*, No. 48525-7-II, slip op. at 2. Everyone in the home escaped except Veeder, who died. *Arndt*, No. 48525-7-II, slip op. at 2-3.

After an investigation, the State charged Arndt with murder in the first degree with an aggravating circumstance of arson in the first degree,[1] felony murder in the first degree with aggravating circumstances,[2] arson in the first degree, and six counts of assault in the second degree. *Arndt*, No. 48525-7-II, slip op. at 3.

The trial court instructed the jury that "[a] person commits the crime of murder in the first degree . . . when, with a premeditated intent to cause the death of another person, he or she causes the death of such person." Clerk's Papers (CP) at 169 (Instr. 9). It further instructed:

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

CP at 182 (Instr. 22). The jury found Arndt guilty as charged. The trial court sentenced Arndt to life in prison without the possibility of release or parole.

Arndt appealed her convictions.[3]

II. JUROR MISCONDUCT

Months after the verdict, Juror 2 approached a woman whom she did not know was the sister of Arndt's trial attorney. Juror 2 related that in Arndt's trial, she struggled with the term "premeditation." She further related that to better understand the term, she looked it up on the internet. The attorney's sister told her brother what she had learned.

[1] This aggravating circumstance is under RCW 10.95.020(11)(e). The State also alleged the aggravating circumstance of a particularly vulnerable victim. *See* RCW 9.94A.535(3)(b).

[2] This aggravating circumstance is under RCW 9.94A.535(3)(b).

[3] Before a mandate issued, Arndt appealed on the issue we are presented with in this appeal.

Defense investigator James Harris then met with Juror 2, explained that he worked for Arndt's trial attorney, and asked to speak with her about her experience as a juror. Juror 2 spoke with Harris and told him that during deliberations she did internet research on the word "premeditation." Juror 2 provided Harris with additional information, including sites she may have viewed. The State's investigator also interviewed Juror 2.

Arndt moved for a new trial on grounds of juror misconduct. At a hearing on the motion, the court heard testimony from Juror 2 and Harris. Juror 2 testified that she had researched the term "premeditation" and had found different sites, but did not remember whether she had viewed any of the specific sites she had showed Harris when he earlier interviewed her. She said "I believe it was from Wedipedia [verbatim], whatever that does when you Google, and that's the definition." Report of Proceedings (RP) (Feb. 6, 2017) at 21. She stated that the "key thing" that stuck out to her in the definitions she viewed was that "[o]ne of the definitions was about premeditation being short." RP (Feb. 6, 2017) at 24. She said that she looked at a couple different definitions, but it was the word "short" that made her understand. Juror 2 also testified that she had not shared her research with other jurors.

The trial court entered a written memorandum opinion with findings of fact[4] and conclusions of law. The court made explicit credibility determinations. It found that during deliberations, Juror 2 performed an internet search for the definition of "premeditation" from her home. The trial court found it could not determine the exact websites and content Juror 2 had viewed. Juror 2 consistently said that the definitions she viewed included the word "short" or the phrase "however short." CP at 136. The court found that Juror 2's sworn statements in court were

[4] Because neither party challenges any of the trial court's findings of fact, they are considered verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

more reliable than her out-of-court statements to the two investigators which were used in an attempt to impeach her in-court testimony. The court also found that Juror 2 had not shared her research with the other jurors.

The court concluded that Juror 2 had committed misconduct which created a presumption that Arndt was entitled to a new trial. It determined that it must grant a new trial unless it was satisfied beyond a reasonable doubt that the extrinsic evidence Juror 2 found in her research did not contribute to the verdict.

The court ruled:

> Here, the facts show that Juror #2 conducted outside research on the definition of "premeditation," and that the definitions she viewed included the word "short" or the phrase "however short." In substance, the Court finds that the definitions viewed by Juror #2 were indistinguishable to the jury instruction and were consistent with the law. Because the known research results, as presented to the Court, were consistent with the jury instruction on premeditation and the law, the Court is satisfied beyond a reasonable doubt that Juror #2's research could not have affected the verdict. Therefore, the motion for a new trial is denied.

CP at 138. It stated "[t]o base a decision for a new trial on what is 'not known' would be inapposite to the 'strong, affirmative showing' requirement and would endanger the stability of all jury verdicts. Therefore, this Court's decision relies on evidence that has been credibly presented, not on unknowns." CP at 138 n.49. Arndt appeals.

ANALYSIS

I. STANDARD OF REVIEW[5]

Arndt urges us to review the trial court's denial of her motion for a new trial de novo because it infringed her constitutional rights. She acknowledges the existence of inconsistent case law on this issue, but maintains that *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), and *State*

[5] The dissent says it is reviewing the evidence for an abuse of discretion; however, it appears to review the evidence de novo. It also fails to consider the unchallenged findings of fact as verities.

v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009), provide the proper guidance for what standard should apply.

We have expressly stated that we "review a trial court's investigation of juror misconduct for abuse of discretion." *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540, *review denied*, 186 Wn.2d 1028 (2016). We also review "a trial court's decision denying a motion for a mistrial based on juror misconduct for an abuse of discretion." *Gaines*, 194 Wn. App. at 896. "[W]hile great deference is due to the trial court's determination that no prejudice occurred, greater deference is owed to a decision to grant a new trial than a decision not to grant a new trial." *State v. Johnson*, 137 Wn. App. 862, 871, 155 P.3d 183 (2007).

Iniguez, 167 Wn.2d at 281, and *Jones*, 168 Wn.2d at 719, reviewed de novo the denial of the constitutional rights to a speedy trial and to present a defense, respectively. Neither case affects the standard of review that we utilize to review a trial court's decision on a mistrial motion for juror misconduct. It remains abuse of discretion.[6] *Gaines*, 194 Wn. App. at 896.

Unchallenged findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). "Direct and circumstantial evidence carry the same weight." *State v. Hart*, 195 Wn. App. 449, 457, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017). "Credibility determinations are for the trier of fact and are not subject to review." *Hart*, 195 Wn. App. at 457.

A trial court "abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable." *Gaines*, 194 Wn. App. at 896. A "decision is based 'on untenable

[6] This standard of review is consistent with the one used for dismissal of a juror. *See State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). We use this standard because the trial court is able to observe the juror's demeanor and, based on that observation, interpret and evaluate the juror's answers to determine the juror's impartiality. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012).

grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). A "decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' and arrives at a decision 'outside the range of acceptable choices.'" *Rohrich*, 149 Wn.2d at 654 (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990); *Rundquist*, 79 Wn. App. at 793).

II. JUROR MISCONDUCT

Based on the trial court's unchallenged finding of misconduct, both parties proceed from the premise that Juror 2 committed misconduct. They disagree on whether the trial court abused its discretion by concluding the misconduct did not affect the verdict beyond a reasonable doubt.

Arndt contends that Juror 2's internet research could have affected the verdict of guilty. She argues that the juror misconduct gives rise to a presumption of prejudice that the State can only overcome by a showing beyond a reasonable doubt that the misconduct could not have affected the verdict. She contends that the State failed to meet this burden. Because the trial court made unchallenged findings of fact that support its legal conclusions, we conclude the trial court did not abuse its discretion in ruling the misconduct did not contribute to the verdict beyond a reasonable doubt.

"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." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). "[T]he consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial." *Balisok*, 123 Wn.2d at 118.

"Juror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced." *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). The court need not delve into the actual effect of the evidence, "[b]ut any doubts must be resolved against the verdict." *Boling*, 131 Wn. App. at 332-33. "The subjective thought process of the jurors inheres in the verdict." *Boling*, 131 Wn. App. at 333.

"Once juror misconduct is established, prejudice is presumed." *Boling*, 131 Wn. App. at 333. 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. *Boling*, 131 Wn. App. at 333. We do not disturb the court's ruling denying the motion for a new trial based on juror misconduct unless the court abused its discretion. *Gaines*, 194 Wn. App. at 896

Washington law defines "premeditation" as "'the deliberate formation of and reflection upon the intent to take a human life' and [it] involves 'the mental process of . . . deliberation, reflection, weighing or reasoning for a period of time, however short.'" *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357 (2015) (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995)). "Premeditation must involve 'more than a moment in point of time.'" *Condon*, 182 Wn.2d at 315 (quoting RCW 9A.32.020(1)). The trial court's instructions to the jury in this case stated:

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

CP at 182 (Instr. 22).

In *State v. Fry*, a juror looked up the word "substantial" in a dictionary at home and brought the dictionary to deliberations. 153 Wn. App. 235, 238, 220 P.3d 1245 (2009). The juror did not

share the definition or the dictionary with other jurors until after the jury had delivered its verdict to the bailiff. *Fry*, 153 Wn. App. at 238. She said that the definition "'had a little bit to do' with her verdict, 'but it wasn't the majority of it by any means.'" *Fry*, 153 Wn. App. at 238. The trial court found that the juror "was not enlightened by the definition" and that the instruction for third degree assault, the crime charged, "contained the word 'substantial.'" *Fry*, 153 Wn. App. at 238. It ruled that the juror's conduct did not influence the verdict. *Fry*, 153 Wn. App. at 238.

Reviewing for abuse of discretion, the appellate court concluded that there was no showing of prejudice. *Fry*, 153 Wn. App. at 238, 240. The trial court "concluded, based on adequate findings of fact, that neither the dictionary nor the juror's use of the dictionary influenced the verdict" and the defendant "ma[de] no showing that the language in the dictionary, even if someone did look at it, adversely influenced the resolution of the case."[7] *Fry*, 153 Wn. App. at 240.

In this case, the trial court found that "the exact websites and content that Juror #2 viewed is unclear" and that her research "resulted in her viewing definitions of 'premeditation' that included the word 'short' or the phrase 'however short.'" CP at 136-37. Based on these findings, it concluded that, in substance:

> [T]he definitions viewed by Juror #2 were indistinguishable to the jury instruction and were consistent with the law. Because the known research results, as presented to the Court, were consistent with the jury instruction on premeditation and the law, the Court is satisfied beyond a reasonable doubt that Juror #2's research could not have affected the verdict.

CP at 138. It reasoned that "[t]o base a decision for a new trial on what is 'not known' would be inapposite to the 'strong, affirmative showing' requirement and would endanger the stability of all

[7] Arndt urges us to consider the federal case *United States v. Lawson*, 677 F.3d 629 (4th Cir. 2012). In *Lawson* a juror conducted online research and the court was unable to definitively determine the content of the definitions the juror viewed, like this case. 677 F.3d at 639-40. *Lawson* is not persuasive and we instead rely upon Washington law.

jury verdicts. Therefore, this Court's decision relies on evidence that has been credibly presented, not on unknowns."[8] CP at 138 n.49.

Like *Fry*, the juror in this case researched the meaning of a critical word in a jury instruction and the trial court ruled that the juror's conduct did not influence the verdict. Unlike *Fry*, however, the trial court was unable to identify what specific definitions Juror 2 found in her research so as to evaluate their prejudicial effect.

The trial court here applied the correct legal standard. It found juror misconduct. It presumed prejudice that the State could overcome by satisfying the court beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. It determined that it must "make a finding of not only whether misconduct occurred, but also the nature and extent of the misconduct." CP at 138.

Although the exact websites Juror 2 visited and the precise definitions she viewed are unknown, the part of those definitions that had an impression on her and affected her verdict were the word "short" and phrase "however short." As the trial court ruled, these definitions "were indistinguishable to the jury instruction and were consistent with the law." CP at 138. This ruling is sufficient to satisfy beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict and to overcome the presumption of prejudice. The court did not abuse its discretion.

[8] The dissent fails to acknowledge this reasoning by the trial court. Instead it says that because the exact nature of Juror 2's research is unknown, the State could never establish beyond a reasonable doubt that her research could not have affected the verdict. This interpretation improperly ignores the role of the trial court as fact finder and the equal weight direct and circumstantial evidence are afforded. It also exceeds what is necessary to decide this case.

The trial court did not abuse its discretion by concluding that Juror 2's research did not contribute to the verdict. Accordingly, we affirm Arndt's conviction.

Melnick, J.

I concur:

Johanson, J.

MAXA, C.J. (dissenting) – The trial court's denial of Shelly Arndt's motion for a new trial and the majority's opinion affirming that denial are inconsistent with the applicable facts and with the law. Accordingly, I dissent.

A. APPLICABLE FACTS

There is no dispute that during deliberations, juror 2 performed an internet search for the definition of "premeditation" and reviewed *multiple* definitions. The trial court made an unchallenged finding that this outside research was misconduct. And the trial court expressly recognized that the misconduct created a presumption that Arndt was entitled to a new trial and that the State had the burden of overcoming that presumption.

There also is no dispute that nobody, including juror 2 herself, knows the exact websites and definitions of premeditation that juror 2 viewed in the course of her internet search. All that juror 2 remembered was that *one* of the definitions included the word "short" or "however short." Clerk's Papers (CP) at 136. Despite not knowing the language of the multiple definitions juror 2 viewed, the trial court found that these unknown definitions were indistinguishable from the court's instruction on premeditation and therefore concluded beyond a reasonable doubt that juror 2's research could not have affected the verdict.

B. PRESUMPTION OF PREJUDICE

A juror's consideration of evidence not presented at trial constitutes misconduct and can require a new trial. *State v. Gaines*, 194 Wn. App. 892, 897, 380 P.3d 540 (2016). Juror misconduct in considering extrinsic evidence entitles a defendant to a new trial if the misconduct prejudiced the defendant. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). The prejudice inquiry is objective – whether the extrinsic evidence *could have* affected the jury's determination. *Gaines*, 194 Wn. App. at 898.

Significantly, prejudice is presumed once juror misconduct is established. *Id*. at 897; *see also State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). The burden then shifts to the State to overcome the presumption. *See Boling*, 131 Wn. App. at 333.

> To overcome this presumption, the State must satisfy the trial court that, viewed objectively, it is unreasonable to believe that misconduct could have affected the verdict. . . . 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.

Id.

"Any doubt that the misconduct affected the verdict must be resolved against the verdict." *State v. Johnson*, 137 Wn. App. 862, 869, 155 P.3d 183 (2007). Similarly, the Supreme Court stated in a civil case that "[i]f the trial court has any doubt about whether the misconduct affected the verdict, it is obligated to grant a new trial." *Adkins v. Alum. Co. of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257, 756 P.2d 142 (1988).

C. PREJUDICE ANALYSIS

I agree with the majority that the trial court's denial of Arndt's motion for a new trial is reviewed for an abuse of discretion. But I believe that the trial court abused its discretion here because the evidence did not support the court's crucial factual finding.

The key, undisputed fact is that juror 2 did not know what definitions of "premeditation" she reviewed. In its memorandum opinion, the trial court specifically stated that "[b]ased on the provided testimony and declarations, the exact websites and content that Juror #2 viewed is unclear." CP at 136.

The trial court found that "Juror #2's research resulted in her reviewing definitions of 'premeditation' that *included* the word 'short' or the phrase 'however short.' " CP at 136-37 (emphasis added). But there was no evidence regarding what else the multiple definitions juror 2 viewed stated about premeditation.

This uncertainty regarding what juror 2 learned from her internet research necessarily precludes the State from establishing beyond a reasonable doubt that her research could not have affected the verdict. Without knowing the language of the multiple definitions of premeditation juror 2 viewed, it is impossible to know whether those definitions affected the verdict.

Inexplicably, the trial court ignored the lack of evidence regarding the definitions juror 2 viewed during her internet research. Instead, the court made the following finding: "In substance, the Court finds that the definitions viewed by Juror 2 were indistinguishable to the jury instruction and were consistent with the law." CP at 138. This crucial finding is completely unsupported by the evidence. If the trial court did not know what definitions juror 2 viewed, how could the court find that the multiple definitions juror 2 viewed were indistinguishable from the jury instruction and consistent with the law? Because nobody knows what the definitions stated, it is possible that they were *not* indistinguishable from the jury instruction and *not* consistent with the law.

The trial court concluded, "Because the *known research results*, as presented to the Court, were consistent with the jury instruction on premeditation and the law, the Court is satisfied beyond a reasonable doubt that Juror #2's research could not have affected the verdict." CP at 138 (emphasis added). However, this conclusion ignores the *unknown* research results. The fact that the one phrase juror 2 remembered may not be inconsistent with the jury instruction cannot somehow support the conclusion that the unknown research results also were not inconsistent with the jury instruction.

The majority emphasizes the trial court's explanation for ignoring the fact that nobody knows what juror 2 viewed: "To base a decision for a new trial on what is 'not known' would be inapposite to the 'strong, affirmative showing' requirement and would endanger the stability of

all jury verdicts. Therefore, this court's decision relies on evidence that has been credibly presented, not on unknowns." CP at 138 n.49. But the trial court failed to recognize that the State had the burden of overcoming the presumption of prejudice. *Boling*, 131 Wn. App. at 333. What was not known prevented the State from meeting that burden.

Further, the trial court mixed its concepts. The "strong, affirmative showing" requirement applies to whether *misconduct has occurred*, not whether that misconduct caused prejudice. *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). The trial court made an unchallenged finding that misconduct had occurred, satisfying the strong, affirmative showing requirement.

Finally, the majority relies on *State v. Fry*, 153 Wn. App. 235, 220 P.3d 1245 (2009). But that case is easily distinguishable. In *Fry*, a juror looked up the word "substantial" in a dictionary that she brought to the deliberations. *Id*. at 238. The appellate court affirmed the trial court's denial of a new trial motion because there was no showing of prejudice. *Id*. at 240. However, in that case the trial court knew exactly what definition the juror viewed. Here, the trial court acknowledged that what definitions of premeditation juror 2 reviewed was unclear and unknown.

When the evidence is insufficient to determine what extrinsic evidence a juror considered when engaging in misconduct, allocation of the burden of proof necessarily resolves the issue. Because the State has the burden of proving that no prejudice occurred, the absence of evidence should be fatal to its position. By ruling that the absence of evidence precluded a finding of prejudice, the trial court essentially shifted the burden of proof to Arndt.

D. CONCLUSION

The State could not satisfy its burden of disproving prejudice without more specific evidence regarding juror 2's internet search. As a result, the trial court clearly abused its discretion in denying Arndt's motion for a new trial. I would reverse and remand for a new trial untainted by juror misconduct.

Maxa, C.J.

MAXA, C.J.

BACKLUND & MISTRY

October 16, 2018 - 11:05 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. Shelly Arndt, Appellant
Superior Court Case Number:	14-1-00428-0

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