Supreme Court No. 97772-1

No. 78006-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HECTOR CRUZ-ANAYA,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Hector Cruz-Anaya, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Cruz-Anaya appealed his convictions for indecent liberties and domestic violence felony violation of a court order. The Court of Appeals affirmed in an unpublished decision on September 16, 2019. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

Defendants have a constitutional right to have the jury decide their case based only on the admitted evidence. The jury's receipt of extrinsic evidence is improper. The State's laptop, which was provided to the jury to play the disc of the 911 call, contained a number of exhibits not admitted into evidence and unrelated to this prosecution. Were Mr. Cruz-Anaya's due process rights violated where the jury received unadmitted, extrinsic evidence during deliberations, and was the Court of Appeals decision thus in conflict with decisions of this Court and other decisions of the Court of Appeals, requiring review? RAP 13.4(b)(1), (2).

D. STATEMENT OF THE CASE

Hector Cruz-Anaya has two children with his former partner, Maria Huerta Pelayo; he supported his children by working at two different restaurants. RP 390, 498-99. After the two separated, Ms. Pelayo allowed Mr. Cruz-Anaya regular visitation with the children, as permitted by a no-contact order which was in place starting in 2015. RP 375-77. Mr. Cruz-Anaya often walked the children to the school bus, so their mother could sleep late, and this happened a few times per month. RP 377-78. He would notify her of his plans to see the children by phone. RP 377.

Ms. Pelayo claimed that on April 11, 2017, Mr. Cruz-Anaya returned to her home after walking with the children and pressured her to reconcile. RP 386. She stated that he forcibly kissed and touched her, pulling her pajama pants down and causing her to fall. RP 386. She stated Mr. Cruz-Anaya only left her when she said she would call the police. RP 387-91. Mr. Cruz-Anaya was charged with indecent liberties and with violating the no-contact order under which his former partner had permitted him to visit their children. CP 1-2.

Mr. Cruz-Anaya denied these allegations, and at trial, his boss testified that on the date in question, Hector had been at work at the restaurant, as usual. RP 524-27.

The State did not produce any evidence of text messages or calls between Ms. Pelayo and Mr. Cruz-Anaya to support Ms. Pelayo's claim they had agreed for Hector to walk the children to the bus on this particular day. RP 582-83, 586 (no phone records or screen shots of text messages offered at trial). In closing argument, Mr. Cruz-Anaya emphasized the lack of evidence that he had been at the apartment on the morning that Ms. Pelayo had claimed. RP 578, 581-84, 586. The defense particularly pointed to the State's failure to produce any messages or calls that might have supported the victim's story. RP 582-83, 586.

The jurors began their deliberations on the morning of October 24th, after receiving a laptop computer from the deputy prosecutor to allow them to listen to the compact disc (CD) containing the 911 call. RP 600. The prosecutor assured the court the jury was provided a "clean" laptop – a computer "that doesn't have any other information on it." RP 600. The prosecutor was also asked whether the computer had internet access; she stated that "jury computers do not." Id.

The jurors deliberated for approximately five hours the first day; the following morning, the jury resumed deliberations again from 9:15 a.m. to 10:40 a.m., when the parties went on the record again. RP 604; CP __, sub. no. 67 (clerk's minute entry) at 20-21. At that point, the deputy prosecutor apologized and revealed that she had mistakenly given the jurors a regular laptop rather than a "clean" one – and it was unclear what the jurors had examined during their six hours of deliberations with the State computer. RP 605-08 (STATE: "So that's so incredibly frustrating to me. I apologize to everyone for the time on this.").

The court immediately stopped the jury's deliberations and the laptop was brought into the courtroom and inspected. RP 607. The prosecutor revealed that the State laptop in the jury room required a password, but the laptop's password was affixed to it with a sticky note. RP 607. The parties turned on the laptop and read into the record the files visible on the laptop's desktop, which included the following items: a file entitled "text messages;"[1] several power point

[1] The State's failure to produce evidence of text messages and calls between Mr. Cruz-Anaya and the complaining witness from the morning of the alleged incident was a key argument of the defense; therefore, a file containing "text messages" was highly prejudicial. E.g. RP 582-83, 586.

presentations; and closing arguments from various King County criminal prosecutions. RP 609-12.

The trial court polled the jurors as a group, and each juror stated he or she had used the laptop only to listen to the 911 call and for no other purpose. RP 613-16. Mr. Cruz-Anaya moved for a mistrial due to the jurors' access to this laptop containing prejudicial extrinsic evidence. RP 617. The court denied the motion for mistrial but preserved the laptop for the Court's review. RP 617-19.

The jury convicted Mr. Cruz-Anaya as charged. CP 44-45. He appealed, and on September 16, 2019, the Court of Appeals affirmed in an unpublished decision. Appendix.

He seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

1. The jury received unadmitted extrinsic evidence, in violation of the federal and Washington constitutions.

A criminal defendant has a federal and state constitutional right to a fair and impartial trial by jury. U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 21, 22. "[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.2d 424 (1965). This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Id. Relatedly, our Supreme Court has long observed courts must exercise 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)).

Accordingly, "[i]t is error to submit evidence to the jury that has not been admitted at trial." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012); accord State v. Pete, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004). A jury's consideration of extrinsic evidence is misconduct. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). This Court has defined "extrinsic evidence" as "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).[2]

When juries receive extrinsic evidence, defendants are deprived of many of their Sixth Amendment rights, including 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.

Gibson v. Clanon, 633 F.2d 851, 854-55 (9th Cir. 1980).

2. The laptop in the deliberations room contained unadmitted extrinsic evidence.

When the jurors began their deliberations on the morning of October 24th, the deputy prosecutor assured the court and the defense that the laptop provided by the State was a "clean" laptop. RP 600. The defense did not object to the jury being provided the technology to

[2] Extrinsic evidence is also improper because it bypasses the rules of evidence, which are "designed to aid in establishing the truth." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

play the CD of the admitted 911 call, given the State's assurances that the laptop did not "have any other information on it" and had no internet access. RP 600.

The jurors had access to the State's laptop for the rest of the court day – deliberating until 4:00 p.m. that afternoon. CP __, sub. no. 67 at 20-21. The following morning, the jury resumed deliberations again from 9:15 a.m. to 10:40 a.m., when the parties went on the record again. RP 604; CP __, sub. no. 67 at 20-21.

At some point, the deputy prosecutor realized the jurors had been provided with a laptop containing numerous Power Point presentations and closing arguments related to other King County prosecutions. At 10:40 a.m. on October 25th, the prosecutor went on the record to apologize and ask that deliberations be suspended and the laptop removed from the jury room. RP 605. At this point, the jurors had been using the laptop for approximately six hours. RP 608; CP __, sub. no. 67 at 20-21.

An inspection of the laptop in the courtroom revealed that the jury had accessed the State's encrypted laptop with the password written on a sticky-note pasted to the laptop. RP 607 (STATE: "That's how they got in."). The desktop contained several easily accessible

files, including Power Point presentations for the closing arguments in two King County prosecutions, State v. Gonzalez-Martinez and State v. Perry.[3]

The desktop also contained a file with the title, "texts and emails." A critical element of the defense theory here was the State's lack of evidence, considering Mr. Cruz-Anaya's alibi; the defense argued a number of times in closing that the State had failed to produce text messages or any other evidence that Mr. Cruz-Anaya and Ms. Pelayo had communicated on the day of the alleged incident, as Ms. Pelayo had claimed. RP 561, 594.

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[3] The State v. Perry Power Point presentation contains slides with photographs of a woman, bruised and injured, in an assault-2-strangulation case, as well as jury instructions and portions of closing argument. The State v. Gonzalez-Martinez Power Point contains a slide apparently used in the closing argument in that trial: "He is presumed innocent. He is not presumed to be telling the truth." Mr. Cruz-Anaya would have objected to this slide, given the opportunity.

The desktop contained a number of other files and documents, including "stun gun montage," a file entitled "PAO programs," AOC, "JC Video Still shot," Outlook, and Adobe. RP 609-11. The recycle bin also contained a number of additional Power Point presentations and closing arguments, including the following matters: State v. Bladimiro Perez, State v. Faysal Aden, State v. Gonzalez-Martinez (older version); State v. Yates (two versions); State v. Jerimiah Reynolds, State v. Christenson, and two Power Point presentations regarding police officers: Sergeant Barin Majack and Detective Brian Lewis. It was unclear whether internet access was possible from the laptop. Id.

Further, the State urged the jury to convict, based upon Ms. Pelayo's testimony that "he sent her a text message," and then came over to take the children to school before the alleged incident. RP 594. argues in closing that text messages). Twice the deputy prosecutor emphasized that Ms. Pelayo "received a text message," and urged the jury to rely on this non-existent evidence to convict Mr. Cruz-Anaya of the charged crimes. RP 561, 594.

The Court of Appeals was wrong to dismiss, in a footnote, Mr. Cruz-Anaya's due process concerns. Appendix at 7 n.2. Where the deputy prosecutor argued there were text messages confirming Mr. Cruz-Anaya's presence at the apartment, but failed to offer any in evidence this supports the likelihood the jurors were influenced by the items visible on the desktop of the prosecutor's laptop during deliberations – specifically, the file labelled "texts and emails."

3. The jury's receipt of extrinsic evidence caused prejudice, was not harmless, and the Court of Appeals decision is in conflict with decisions of this Court and with other decisions of the Court of Appeals.

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.'" Pete, 152 Wn.2d at 555 (quoting State v. Rinkes, 70 Wn.2d at 854, 862, 425 P.2d 658 (1967) (jury's receipt of unadmitted newspaper editorial and cartoon improper)). This standard can be traced to early decisions by our Supreme Court. Boggs, 33 Wn.2d at 929-33; State v. Burke, 124 Wash. 632, 637-38, 215 P. 31 (1923). In making this assessment, the court makes "an objective inquiry into whether the extraneous evidence could have affected the jury's determinations . . . ." Pete, 152 Wn.2d at 555 (emphasis added). Any doubt must be resolved in the defendant's favor. State v. Smith, 55 Wn.2d 482, 484, 348 P.2d 417 (1960).

Additionally, because the jury's receipt of extrinsic evidence is constitutional error, a "new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (internal quotation and citation omitted); see Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (recognizing Chapman standard).

The State bears the burden to overcome the presumption of prejudice. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740

(2006); State v. Gaines, 194 Wn. App. 892, 897, 380 P.3d 540 (2016) (inquiry is objective – whether the extrinsic evidence could have affected jury's determination).

The Court of Appeals recently considered the admission of extrinsic evidence in State v. Arndt, where a juror was found to have committed misconduct by conducting internet research on the definition of "premeditation" – a key word in the jury instructions – during deliberations. 5 Wn. App.2d 341, 354-54, 426 P.3d 804 (2018). The Arndt Court held that because the exact websites and definitions this rogue juror accessed were unknown, the trial court's finding was sufficient to satisfy beyond a reasonable doubt that the extrinsic evidence introduced by this juror did not contribute to the verdict, overcoming the presumption of prejudice. Id.

The dissent, however, found the very uncertainty regarding what the juror's extrinsic research included to be problematic, and the trial court's denial of a new trial an abuse of discretion.

> 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 decisions affected the verdict.

Id. at 353-54 (Maxa, J., dissenting).

Here, Mr. Cruz-Anaya likewise argues, as he argued below, that any uncertainty regarding what jurors may have accessed on the laptop, consciously or inadvertently, is not necessary to find prejudice. RP 617. Mr. Cruz-Ayala was prejudiced by the amount of extrinsic material the jurors were exposed to for six hours during deliberations, giving them the indication there was evidence and additional information they were entitled to, but not permitted to see. Id. This evidence included inadmissible photographs of injuries and closing arguments from other cases, as well as a file marked "texts and emails" – a critical issue here. "Because the State has the burden of proving that no prejudice occurred, the absence of evidence should be fatal to its position." Arndt, 5 Wn. App.2d at 355 (Maxa, J., dissenting).

Lastly, this was a serious trial irregularity for which a mistrial should have been granted. A mistrial is appropriate where a trial irregularity so prejudices a defendant "that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). An error is deemed prejudicial if it affects the outcome of the trial. Id.; State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). For the reasons discussed, the court abused

its discretion when it failed to grant a mistrial; this Court should grant review. RAP 13.4(b)(1), (2).

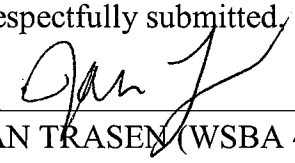
This Court should grant review, whether considering this error under the constitutional harmless error standard or as an abuse of discretion by the trial court, as the Court of Appeals decision is in conflict with decisions of this Court and with decisions of the Court of Appeals. See Gaines, 194 Wn. App. at 899; Arndt, 5 Wn. App.2d at 353-54.

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court and with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 15th day of October, 2019.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. HECTOR MANUEL CRUZ-ANAYA, Respondent.	DIVISION ONE No. 78006-9-I UNPUBLISHED OPINION FILED: September 16, 2019

DWYER, J. — Hector Cruz-Anaya challenges his convictions of indecent liberties and domestic violence felony violation of a court order following a jury trial. Because there is nothing in the record to indicate that any juror considered evidence that was not admitted at trial, the trial court properly denied Cruz-Anaya's motion for a mistrial. The prosecutor did not commit misconduct by suggesting, during cross-examination and closing argument, that the defendant tailored his testimony to align with the evidence presented. We affirm.

I

Hector Cruz-Anaya and M.H.P. lived together as a couple for several years and have two children.[1] In April 2017, they were separated and M.H.P. lived with the children in an apartment in Federal Way. Although there was a no-contact order in place prohibiting contact between Cruz-Anaya and M.H.P., they

[1] The State refers to M.H.P. as Cruz-Anaya's wife, but it is not clear from the record whether the couple ever married.

intermittently contacted one another to facilitate visitation between Cruz-Anaya and the children. According to M.H.P., once or twice a month, Cruz-Anaya would call her in the morning and arrange to come to her apartment and walk the children to their school bus stop.

On April 11, 2017, M.H.P. called the police to report that Cruz-Anaya sexually assaulted her earlier that morning. A police officer went to her apartment in response to the report. M.H.P. was distraught and sobbed at several points while she described what happened. She had bruising on both sides of her neck that appeared to be fresh. The police officer took photographs of M.H.P.'s apparent injuries. Based on M.H.P.'s report, the State charged Cruz-Anaya with indecent liberties and felony violation of a court order.

At the October 2017 trial, M.H.P. testified that on the morning she called the police, Cruz-Anaya came to her apartment and accompanied the children to the bus stop. A short time later, Cruz-Anaya returned to the apartment to retrieve his cigarettes. Once inside, Cruz-Anaya told M.H.P. that he needed to talk to her. Cruz-Anaya said he missed her and tried to convince her that they should live together as a family again. Cruz-Anaya then pushed M.H.P. against a wall, grabbed her, and tried to forcibly kiss her. Cruz-Anaya continued to kiss her while rubbing her breasts and pelvic area, ignoring her pleas to stop. M.H.P. lost her balance while trying to fend him off and fell to the floor. Cruz-Anaya got on top of her, took her pants off, and started to remove his clothing. When Cruz-Anaya's cell phone fell out of his pocket and landed within her reach, M.H.P.

grabbed it. After she threatened to call the police, Cruz-Anaya stopped and left the apartment. Later that morning, M.H.P. called the police.

Cruz-Anaya testified and denied seeing M.H.P. or the children on April 11, 2017. He said he was working all day at a restaurant in Auburn called Garcia's. Cruz-Anaya explained that he worked at Garcia's every Wednesday and Thursday. He said that every other day, he worked at a different restaurant in Federal Way.

Cruz-Anaya testified that he had not visited M.H.P.'s apartment since December 2016, when he delivered gifts to the children. Cruz-Anaya testified that occasionally, when he was able to borrow a vehicle, he drove the children from the apartment to school. But he insisted that he never walked the children to the school bus stop. Cruz-Anaya said he primarily saw the children on rare occasions when he was not working and could arrange for M.H.P. to bring the children to meet him at a shopping mall.

In light of Cruz-Anaya's testimony that he was working at Garcia's on April 11, 2017, and only worked at that restaurant on Wednesdays and Thursdays, the prosecutor pointed out in cross-examination that the day in question was a Tuesday. Confronted with this discrepancy, Cruz-Anaya admitted that he did not know which day of the week April 11 fell upon, but did not retract his claim that he was working at Garcia's on the day M.H.P. reported the assault.

During M.H.P.'s testimony, the State admitted a recording of her telephone call to 911 and later played the recording for the jury. Before the jury

retired to deliberate, the State agreed to provide a "clean" laptop computer that contained no files or documents and did not allow Internet access, so the jury could listen to the audio exhibit.

The next morning, the prosecutor informed the court that she had just learned that the jury might have been provided with the wrong computer. The court halted the jury's deliberations and upon further investigation, the parties determined that the State had inadvertently provided the jury with a "media cart" computer. Although it was password-protected, the password was written on a note affixed to the computer. There were several files saved to the desktop, including files labelled "text messages," "stun gun montage" and power point presentations for closing arguments related to other King County prosecutions. Once logged into the computer, the Internet was accessible and the computer contained other programs, such as Microsoft Outlook, Adobe Acrobat, and a video viewer. There were no files saved on the computer associated with Cruz-Anaya's case.

The court brought out the jury as a group and polled the jurors individually. The court asked each juror whether the computer had been used only to listen to the audio exhibit and whether the computer was used to access any other documents or programs or to access the Internet. Each juror confirmed that he or she used the computer only to listen to the audio exhibit and for no other purpose.

Despite these assurances, the defense moved for a mistrial. Defense counsel acknowledged that there was no reason to disbelieve the jurors'

statements. Yet, the defense argued that access to a computer during deliberations that contained information about other criminal cases created an "appearance of impropriety." Counsel also argued that even if none of the jurors opened any documents or files, the files that were visible on the desktop would have created a "subconscious belief" that there was additional damaging evidence against Cruz-Anaya that the jurors were not permitted to consider. The court denied the motion.

The jury continued deliberations and convicted Cruz-Anaya as charged. The court imposed a standard range indeterminate sentence. He appeals.

II

Cruz-Anaya argues that his convictions must be reversed because the jury's "access" to prejudicial extrinsic evidence on the laptop computer amounted to a serious trial irregularity and deprived him of a fair trial.

A jury's verdict must be based on evidence admitted at trial and the jury's consideration of extrinsic evidence may be a ground for a new trial. Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); State v. Gobin, 73 Wn.2d 206, 211-12, 437 P.2d 389 (1968). Jury consideration of evidence outside of the evidence admitted at trial is improper because it is not subject to objection, cross-examination, explanation, or rebuttal. See Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Where the defendant suffers prejudice, a juror's consideration of extrinsic evidence entitles a defendant to a new trial. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). We will affirm a trial court's order granting or denying a motion for a new

trial absent a manifest abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994); State v. Marks, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967).

Cruz-Anaya argues that the State failed to meet its burden to establish that he was not prejudiced by extrinsic evidence contained on the laptop. He relies on the dissenting opinion in State v. Arndt, 5 Wn. App. 2d 341, 353-54, 426 P.3d 804 (2018) (Maxa, C.J., dissenting), review denied, 192 Wn.2d 1013 (2019), to argue that any uncertainty about the prejudicial effect of the extrinsic information must be resolved in the defendant's favor. But we need not evaluate prejudice because there is nothing in the record to suggest that any juror used the computer to access extraneous information or considered any evidence that was not properly before it.

For instance, in Arndt, the defendant was charged with first degree murder and the undisputed evidence established that a juror considered extrinsic information by independently researching the term "premeditation." Arndt, 5 Wn. App. 2d at 344; see also State v. Pete, 152 Wn.2d 546, 550-51, 98 P.3d 803 (2004) (unadmitted documents, including a police report, were inadvertently provided to the jury during deliberations); State v. Boggs, 33 Wn.2d 921, 925-26, 207 P.2d 743 (1949) (physical exhibits, bullet and rifle, not admitted at trial were sent to the jury room), overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980). Here, on the other hand, the computer provided to the jury contained no information that pertained to Cruz-Anaya's case. More importantly, the evidence in the record established that none of the jurors used the laptop

computer to view or access any extrinsic information.[2] The trial court did not abuse its discretion by denying the motion for a mistrial.

III

Cruz-Anaya next argues that the prosecutor engaged in misconduct when, in closing argument, she called attention to the fact that he had the benefit of hearing other witnesses' accounts before he testified and thereby infringed on his constitutional trial rights, including the right to be present at trial.

Consistent with his testimony on direct examination, Cruz-Anaya confirmed on cross-examination that he specifically remembered working at Garcia's restaurant on April 11, 2017. In response, the prosecutor pointed out that, before he testified, Cruz-Anaya had the opportunity to review the documents, photographs, and "everything in this case" and was able to hear M.H.P.'s testimony, thus suggesting that Cruz-Anaya tailored his testimony to conform to the evidence presented. On re-cross, when the prosecutor asked Cruz-Anaya whether he was aware that April 11, 2017 was a Tuesday, Cruz-Anaya admitted that he did not know which day of the week it was, but did not change his position about where he had been on that day.

In rebuttal closing argument, the prosecutor responded to defense counsel's characterization of the evidence as a "swearing contest" between

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[2] As he argued below, Cruz-Anaya contends that even assuming none of the jurors manipulated or opened files, the items visible on the desktop would have led the jury to believe that incriminating evidence was withheld because one of the files was labeled "text messages" and the absence of text messages to corroborate M.H.P.'s testimony was an issue he raised. But M.H.P. did not testify that Cruz-Anaya sent her a text message on the morning of the assault. Nor did she testify, in general, that she communicated with Cruz-Anaya by text message. There is simply no basis to conclude that, upon seeing the names of files on the desktop, the jury would have made a speculative assumption about the existence of additional damaging evidence.

equally credible witnesses. The prosecutor argued that M.H.P. was significantly more credible than the defendant, in part, because of Cruz-Anaya's opportunity to hear the evidence against him before he testified. The prosecutor pointed out that when the defendant testified "definitively" that he was working at Garcia's restaurant on the date of the alleged assault, he did so after having heard the other witnesses' accounts. The prosecutor also reminded the jury that it was only after she informed Cruz-Anaya that the date in question was a Tuesday that "all of a sudden" he became less certain of his ability to remember because it was "so long ago." Cruz-Anaya did not object to the prosecutor's line of questioning on cross-examination or to this argument.

Under both the United States and the Washington Constitutions, a defendant has the right to "appear and defend in person," to testify on his own behalf, and to confront the witnesses against him.[3] CONST. art. I, § 22; U.S. CONST. amend. VI. In Portuondo v. Agard, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), the United States Supreme Court held that a testifying defendant should be treated as other witnesses are treated, observing that comments on a defendant's opportunity to tailor his testimony are appropriate and "sometimes essential."

[3] Article I, section 22 of the Washington Constitution provides, in relevant part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face." The Sixth Amendment of the United States Constitution provides, in relevant part, that the accused "shall enjoy the right . . . to be confronted with the witnesses against him." The confrontation clause includes the right to be present at trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

A decade later, in State v. Martin, 171 Wn.2d 521, 533-36, 252 P.3d 872 (2011), our Supreme Court, analyzing tailoring arguments under our state constitution, concluded that the Washington Constitution provides greater protection than does the Sixth Amendment, and adopted the standard articulated by Justice Ginsburg in her Portuondo dissent. Justice Ginsburg agreed with the majority in Portuondo that when a defendant takes the stand the State may fairly use cross-examination to explore an accusation of tailoring because it is important to the truth-seeking function of a trial that the credibility of the defendant be tested in the same manner as any other witness. Portuondo, 529 U.S. at 79 (Ginsburg, J., dissenting). But Justice Ginsburg opined that tailoring arguments should be disallowed "where there is no particular reason to believe that tailoring has occurred and where the defendant has no opportunity to rebut the accusation." Portuondo, 529 U.S. at 78 (Ginsburg, J., dissenting). Applying this rule, the court in Martin held that a prosecutor is not prohibited "from indicating, via questioning, that a defendant has tailored his or her testimony to align with witness statements, police reports, and testimony from other witnesses at trial." Martin, 171 Wn.2d at 533.

Cruz-Anaya claims that the prosecutor's argument here was impermissible under Martin and incompatible with our state's constitutional protections because, unlike the prosecutor in Martin, the prosecutor herein did not directly cross-examine him about the possibility of tailoring and instead, made only a generic argument that he tailored his testimony. We disagree. As noted, the prosecutor here did, indeed, cross-examine Cruz-Anaya on the issue of

tailoring.[4] Cruz-Anaya had an opportunity to meaningfully respond to the allegation. Moreover, even if this were not the case, our courts have rejected the claim that a tailoring argument is necessarily prohibited if not preceded by cross-examination on the issue. State v. Berube, 171 Wn. App. 103, 116-17, 286 P.3d 402 (2012); State v. Teas, No. 51098-7-II, slip op. at 11-12 (Wash. Ct. App. August 20, 2019), http://www.courts.wa.gov/opinions/pdf/D2%2051098-7-II%20Published%20Opinion.pdf.

In Berube, in which the prosecutor did not raise the issue of tailoring on cross-examination, we concluded that when an accusation of tailoring is based on the defendant's testimony, "the argument is a logical attack on the defendant's credibility and does not burden the right to attend or testify." Berube, 171 Wn. App. at 117. The prosecutor's argument in this case was based on Cruz-Anaya's testimony. On both direct and cross-examination, Cruz-Anaya implausibly claimed to independently remember, for no particular reason, exactly where he was on the date of the assault. Then, when the prosecutor made him aware of a fact that did not align with his narrative, he asserted that the date was too far in the past to remember details. Properly viewed in the context of the entire argument, the prosecutor's allegation of tailoring was a logical attack on Cruz-Anaya's credibility and thus did not constitute misconduct.

[4] We reject Cruz-Anaya's apparent assertion that the prosecutor's suggestion of tailoring on cross-examination was insufficiently explicit.

Affirmed.

WE CONCUR:

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. 78006-9-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:

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Washington Appellate Project

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