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SUPREME COURT NO. 98682-7

NO. 78964-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEC SLANEY,

Petitioner.

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

The Honorable Timothy A. Bradshaw, Judge
The Honorable John H. Chun, Judge
The Honorable Lori K. Smith, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Alec Slaney seeks review of the Court of Appeals' unpublished decision in State v. Slaney, filed May 26, 2020 ("Op."), which is appended to this petition

B. ISSUES PRESENTED FOR REVIEW

1. At a medical appointment scheduled in part due to a rape complainant's disclosure of sexual assault to her mother, the complainant failed to disclose sexual assault to her personal physician. Did the trial court's exclusion of inquiry regarding this failure to disclose deny Slaney his right to present a defense and violate the rules of evidence?

2. The trial court gave jurors a written instruction sheet that included a section informing jurors their "job" was to "decide what really happened." CP 620. Did this trial court directive impermissibly ease the State's burden of proof and undermine the presumption of innocence?

3. Did the erroneous undisclosed instruction sheet—of which Slaney had no knowledge until after trial—violate the right to a public trial, the right to be present at all critical stages of trial, as well as the prohibition on judges' ex parte communication with jurors?

4. The trial court told jurors that reasonable doubt is doubt "for which a reason can be given." RP 275. Considering other instructional error, can the State demonstrate such error was harmless?

C. STATEMENT OF THE CASE

1. **Charge, verdict, and sentence**

The State charged Slaney with indecent liberties based on sexual contact occurring when another person was physically helpless.[1] CP 8. The complainant was M.P., Slaney's fellow University of Washington (UW) student. CP 8; RP 810. The State's theory was that M.P. was asleep when Slaney touched her vagina. RP 959. In contrast, Slaney's defense was that she was not asleep, **and** she later fabricated the claim that the touching was unwanted. RP 974. The jury convicted Slaney as charged. CP 326.

2. **Trial testimony supporting consensual sexual encounter**

Selena Neuberger and a group of roommates, including Slaney, lived in an eight-bedroom house in Seattle. RP 588, 591, 647-48, 702. Several roommates attended UW. RP 586, 642, 699. Neuberger participated in the Air Force's Reserve Officer Training Corps (ROTC) while at UW. RP 699. She invited her former roommate, M.P., to the ROTC ball held on January 13, 2017. RP 713-18. After the event, the two women returned to Neuberger's residence. RP 721-22. Sitting in the living room, they drank stiff mixed drinks. RP 723-28.

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[1] RCW 9A.44.100(1)(b) says a person is guilty of indecent liberties when he knowingly causes another person to have sexual contact with him when the other person is incapable of consent by reason of being physically helpless.

While accounts differed somewhat, the testimony at trial indicated that at least two of Neuberger's roommates—including Slaney—left for a nearby bar, then returned and spent time with Neuberger and M.P. RP 605-09, 613, 655-67, 680-82, 726. According to witnesses, Neuberger and M.P. were loud and excited, but coherent. RP 675, 679, 729.

At one point, Neuberger noticed that M.P., who had ingested a cannabis "edible," was sleepy. RP 735-39. Neuberger helped M.P. down a steep staircase to Neuberger's bedroom. RP 593, 742-44. M.P. lay down on Neuberger's bed and got under the covers. RP 746. Neuberger told M.P. she could sleep there; M.P. thanked Neuberger, and Neuberger left. RP 746.

Neuberger went upstairs and continued to socialize with her roommates. RP 748. Neuberger also exchanged text messages with Slaney, with whom she had a casual sexual relationship, in the hope of having sex with him that night. RP 710, 751-53. But Slaney's responses referenced the fact that M.P. was in Neuberger's room. RP 753-54. Around 1:20 a.m., Neuberger decided to take a ride share to another friend's house. RP 755. Neuberger returned to her room for her shoes and coat. RP 757-58. She saw an unexpected sight: Slaney, her occasional sexual partner, was having sex with M.P. on Neuberger's bed. RP 758-59.

M.P. was an active participant. RP 759. M.P.'s arms were grasping Slaney's back, and she was making noises of pleasure. RP 771-73.

Neuberger made eye contact with M.P. RP 774. Neuberger exclaimed, "What the fuck?" RP 760. Apparently surprised, Slaney jumped up, grabbed his clothes, and ran out of the room. RP 764. After gathering her things, Neuberger also left the room. She expressed irritation to her other roommates. RP 777-78. Based on her observations, Neuberger originally believed M.P. and Slaney were engaging in consensual sex. RP 766-67, 792. Neuberger left but returned around 2:30 a.m. RP 766. She saw M.P. leaving in a car. M.P. was looking at her phone and did not appear upset. RP 767, 791-92. M.P. told Neuberger she was sorry. RP 767-68.

Before Neuberger returned home, M.P. and Neuberger had exchanged messages via Facebook. RP 783, 798. M.P. forwarded Neuberger a screenshot of messages she had exchanged with a mutual acquaintance the women had seen at the ROTC ball. RP 783, 884. M.P. and the acquaintance had "liked" each other in high school. RP 888. Neuberger was perplexed M.P. was sharing those messages. RP 784. Neuberger expressed exasperation about what she had witnessed. RP 784.

> [Neuberger:] I'm kinda pissed at you, you know?
>
> [M.P.:] I was sleeping and he came in[.] I don[']t know what happened[.] I wasn[']t awake.
>
> [Neuberger:] So you just fucked him?? Jesus[.] I mean come on[.]

> [M.P.:] No? Like I woke up[.] And he was having sex[] with me.
>
> [Neuberger:] I walked in and he was plowing you.
>
> [M.P.:] Yeah [I] was shocked my[self.] He came b[a]ck like 2 times and [I] told him to go away[.]
>
> [Neuberger:] The fuck[.] So he raped you?
>
> [M.P.::] I don[']t wanna call it that[.]
>
> [Neuberger] Then what? Cuz that's what . . . it sounds like[.] Or you [are] lying to me and you wanted it[.] It's one of the two[.]
>
> [M.P.:] I really didn[']t want it[.] He came back and [I] shoved him off[.] I wouldn[']t do that to you.

Ex. 24. Thus, M.P.'s first claim that the sex was non-consensual occurred after Neuberger expressed irritation toward M.P. RP 886.

3. Contrasting trial testimony by complainant M.P.

M.P.'s testimony paralleled Neuberger's, for the most part. M.P. fell asleep in Neuberger's room. RP 818-29, 833-35, 838-39, 894. But she awoke to someone kissing her neck and touching her vagina.[2] RP 844. M.P. initially thought it was Neuberger but then realized the person had stubble. RP 844-45. M.P. rolled over. The person pulled M.P.'s pants off and asked, "do you want it[?]" RP 846-47. M.P. mumbled but did not say no. RP 847.

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[2] This act formed the basis for the charge. RP 959 (State's closing argument).

The person began having sex with her. RP 846. Neuberger entered the room. RP 847-49, 851. The person ran out of the room. RP 877.

Neuberger exclaimed, “What the heck?” RP 851. As Neuberger moved around the room, M.P. gathered her pants and lay back down on the bed. RP 851. Neuberger announced that she was leaving. RP 853. M.P. did not ask for help. RP 877. M.P. fell asleep but was awakened by the same person kissing her neck. He attempted to persuade her to go to his room. RP 854, 879-80. M.P. declined, and he left. RP 854-56. M.P. later saw him at the bedroom door; she told him to go away. RP 861-62. M.P., more awake, scanned her phone for messages. RP 857, 881-82. She accepted a “friend” request from Slaney on Facebook. RP 884. She exchanged the above messages with Neuberger. RP 884, 887-90.

M.P. went to the bathroom. On the way back to Neuberger’s room, using the Snapchat application on her phone, M.P. took a selfie with an overdramatic expression on her face. She overlaid the text, “Running from my rapist” and sent the video to two friends. RP 857, 873, 875.

4. Exclusion of evidence that M.P. failed to disclose sexual assault at a related doctor’s appointment

Before trial, M.P. moved to block disclosure of records relating to two post-incident medical appointments at which she sought medical treatment related to her sexual health. CP 560-61. The first appointment,

occurring at UW's student health service, Hall Health, occurred in January of 2017, shortly after the incident. CP 18. The second appointment, occurring at EvergreenHealth (Evergreen) with M.P.'s personal physician,[3] occurred March 20, 2017, shortly after M.P. told her mother she had been raped, and shortly before M.P. contacted police. CP 18; see RP 569 (M.P. contacted police March 22). Following in camera review, the trial court ruled records relating to the second appointment should be disclosed, but the first would remain sealed. CP 51-53, 71-73.

Before trial, Slaney moved to admit evidence that M.P. had failed to disclose any sexual assault at the two medical appointments even though it would have been expected that she do so, given the nature of the appointments. Under Slaney's theory, the lack of disclosure constituted a material omission and was thus important impeachment evidence. CP 782-84 (defendant's motion and memorandum); RP 410; see also CP 165-241 (Evergreen records). M.P.'s credibility—whether she was telling the truth about being asleep when the sexual contact began, or whether she had fabricated the claim to excuse her behavior—was the linchpin of the case. E.g. RP 974-95 (defense closing argument).

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[3] The Court of Appeals misleadingly characterizes the physician as the complainant's mother's "physician friend." Op. at 10. While M.P.'s mother was an employee Evergreen and had a personal relationship with the physician, e.g., RP 71 91-93, that does not change the fact that she was M.P.'s physician.

Per M.P.'s pretrial interview, M.P.'s mother, A.P., a practicing Roman Catholic, had learned about the Hall Health appointment and confronted M.P. about A.P.'s fear that M.P. visited the clinic for an abortion. M.P. initially lied that she sought treatment for a cold, but she eventually revealed that she had gone for sexually transmitted infection (STI) testing. She told her mother she was sexually active and, moreover, that she had been raped. CP 788-93; see also CP 283-87 (M.P. interview).

M.P.'s mother A.P. then scheduled the Evergreen appointment with M.P.'s physician at least in part based on the rape allegation. RP 91, 158-59, 230; see, e.g., Pretrial Ex. 7 at approx. 6:06-8:53 (mother's interview). A.P. was quite clear that M.P.'s rape allegation was a strong motivator for setting up the appointment. Id. In M.P.'s pretrial interview, M.P. acknowledged the sexual assault allegation was one of the reasons for the appointment, and moreover, that she had talked to the physician, Dr. Knox, about it. CP 284, 307-08. Moreover, the broader topic of the appointment was M.P.'s sexual health. RP 159. Thus, the defense argued, M.P.'s failure respond to a physician's inquiry about the incident was relevant and admissible. RP 160-61, 407-08, 416. M.P. also told defense counsel she disclosed. CP 307 (M.P. interview); RP 422-23 (defense argument).

The trial court also reviewed pretrial interviews of Dr. Knox and M.P.'s mother. Dr. Knox stated that M.P.'s mother had reported that M.P.

had gone to a party and woken up with someone on top of her. CP 380, 391 (Dr. Knox interview transcript). M.P.'s mother scheduled the appointment with Dr. Knox with M.P.'s consent. CP 380-81.

The subject matter of the appointment is somewhat opaque due limitations placed on the Knox interview. CP 314. However, related medical records indicate STIs and the risks of unprotected sex were discussed. CP 174, 180; see also CP 783 (defendant's motion and memorandum). Nonetheless, at the appointment, Dr. Knox also asked M.P. about that specific incident, i.e., waking up with someone on top of her. CP 379, 392. M.P. did not disclose sexual assault. CP 379. M.P. only indicated that she had been at an off-campus party and decided to sleep there. CP 381-82. M.P. did not provide additional details. CP 391. If M.P. had reported sexual assault, Knox would have included the information in her records. CP 392. M.P. was, in general, not particularly communicative throughout the appointment and was, on all topics, like a "deer in the headlights." CP 392. M.P.'s mother later confronted Dr. Knox about the fact that the records did not mention rape. CP 382, 385.

The trial court excluded inquiry regarding M.P.'s failure to disclose. RP 91-95, 153-80, 192-93, 229-30, 405-20 (parties' arguments); 4RP 420-

28 (court's oral ruling); CP 320-23 (court's written ruling).[4] The court determined the appointment's subject matter, which touched on M.P.'s sexual history and sexual health, was too prejudicial for the jury to hear. The doctor's inquiry regarding a sexual assault constituted only a brief portion of the appointment. RP 420-21.

Defense counsel proposed that the subject matter of the appointment be sanitized: M.P.'s failure to disclose was relevant regardless of the appointment's precise subject matter. RP 419-20, 423-24, 426. The court stated that M.P.'s failure to disclose could not be considered a material omission, so sanitization was not appropriate in any event. RP 426-27. The court's written ruling states, in relevant part, that

> Evidence of Evergreen Clinic Appointment is NOT ADMISSIBLE
>
> i. M.P. did not schedule the appointment for a sexual assault appointment.
>
> ii. When Dr. Knox questioned M.P. about the incident, M.P. did not deny the incident and there is nothing in the record that indicate there was an omission of the type that would rise to the level of the probative value being sufficient to put the proffered evidence in front of the jury.

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[4] The court prohibited the defense from introducing substantive evidence regarding failure to disclose, including through Dr. Knox. The court also prohibited the defense from cross-examining M.P. about her failure to disclose. RP 420-22. The court also prohibited Slaney from impeaching M.P. with her statement in a pretrial interview that she had discussed the incident with Dr. Knox. CP 307 (statement in interview); see CP 321 (written ruling barring all inquiry regarding appointment).

iii. Admitting a 1-2 minute portion of the appointment where Dr. Knox probes M.P. regarding the incident and M.P. being reluctant and non-verbal is more prejudicial than probative because all of the conversation that went on surrounding that small amount of time is relevant to M.P.'s state of mind in this appointment when she discussed her general sexual history.

CP 321. The trial court later denied Slaney's related motion for a new trial under CrR 7.5(b). CP 520.

5. **Facts related to instructional deficiencies**

As trial commenced, the court read to prospective jurors a preliminary instruction that twice incorrectly framed reasonable doubt as a doubt for which a reason "can be given." RP 275 (first paragraph).

During deliberations, the jury asked the following question:

> According to instruction 3, paragraph 1, sentence 4, and the entirety of section 4,[[5]] we are not to use the fact that the defendant did not testify to infer guilt or prejudice. However, according to section 3, paragraph 3, we are instructed that we may consider lack of evidence in reaching our verdict.
>
> Does this reasoning extend to considering a guilty verdict? Not prejudice against the defendant for not testifying; rather the absence of evidence that likely resulted from lack of defense testimony?

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[5] CP 336-37; see 11 WASHINGTON PRACTICE: WASHINGTON PATTERN INSTRUCTIONS: CRIMINAL (WPIC) 4.01 (3d ed. 2008); WPIC 6.31.

CP 327-28. The court instructed the jury to reread its instructions and that it was not entitled to use the fact that Slaney had not testified to infer guilt or to prejudice him. CP 329.

After the jury entered a guilty verdict, defense counsel moved for a new trial claiming the bailiff's meeting with jurors shortly before the verdict violated several court rules and the constitution. CP 348 (motion for new trial). In response, the bailiff filed a declaration claiming nothing improper occurred. But, attached to the declaration was a document, "Notes for Jurors," which the bailiff had provided to jurors. CP 620. The bailiff attached the document to support her assertion she had behaved properly. However, the document contains the instruction that jurors' job is to "'decide the facts' – **decide what really happened.**" Id. (emphasis added).

Upon learning about this document, defense counsel filed a new "consolidated" motion for a new trial. CP 414, 419-39, 454-68; RP 1030. Slaney raised several arguments related to the document: The defense had learned that the bailiff had placed 15 copies in the jury room. CP 417, 459. Even though the presiding juror did not recall referring to the document in deliberations, another juror saw it. CP 454, 459, 471-76.

Slaney himself filed a declaration averring he based his decision not to testify on his understanding that the State fully bore the burden of proof and that it could not use his failure to testify against him. He would have

testified had he known the jury would be told its job was to decide "what really happened." CP 452-53. The trial court denied Slaney's related motion for a new trial. CP 483 (finding/conclusion 1); RP 1095-97 (oral ruling).

6. **Appeal**

Slaney appealed, raising the issues identified above. The Court of Appeals rejected Slaney's claims. Slaney now asks that this Court grant review, reverse the Court of Appeals, and reverse his conviction.

D. <u>REASONS REVIEW SHOULD BE ACCEPTED</u>

1. **Exclusion of M.P.'s material omission violated Slaney's right to present a defense and the rules of evidence.**

This Court should grant review under RAP 13.4(b)(1) (decision conflicts with decision of this Court) and (3) (significant constitutional question). Exclusion of M.P.'s material omission to her physician, misleadingly characterized by the Court of Appeals as M.P.'s mother's "physician friend," violated Slaney's right to present a defense, the right to cross-examine adverse witnesses, and the rules of evidence. Further, the Court of Appeals failed to address Slaney's arguments regarding the applicability of federal persuasive authority on the locus of decision-making authority, in an area where Washington law is undeveloped.

The Sixth Amendment and article 1, section 22 guarantee an accused person the right to confront and cross-examine adverse witnesses.

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). The primary and most important component of the right to confront witnesses has long been held to be the right to conduct meaningful cross-examination. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). "Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis, 415 U.S. at 315.

Relatedly, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). That right is based on the right to due process of law under the Fourteenth Amendment and article 1, section 3, as well as the rights of an accused under the Sixth Amendment and article 1, section 22. See State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) ("'The right of an accused . . . to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'") (quoting Chambers, 410 U.S. at 294).

This Court reviews a trial court's limitation on the introduction of evidence and the scope of cross-examination for abuse of discretion. See State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). But if the trial court indeed excluded relevant defense evidence, this Court determines as a matter of law whether the exclusion violated the right to present a defense.

State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019) (citing State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017)). No government interest is compelling enough to preclude introduction of highly relevant defense evidence. Arndt, 194 Wn.2d at 812.

A witness may be impeached with a prior inconsistent statement. ER 613. A prior inconsistent statement can take the form of an affirmative statement, or it may take the form of an omission. United States v. Stock, 948 F.2d 1299, 1301 (D.C. Cir. 1991).

As a general matter, under Washington law, "where there are justifiable inferences from the evidence upon which reasonable minds might reach different conclusions, the questions are for the jury," not the court. Holland v. Columbia Irr. Dist., 75 Wn.2d 302, 304, 450 P.2d 488 (1969). "It is the . . . province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact." State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

Although Washington courts have not reached the nuances of this specific issue—including the Court of Appeals, seemingly avoiding the argument[6]—federal appellate courts have helpfully applied the foregoing general principles to the specific question in this case.

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[6] Op. at 6-14 (no mention of federal intermediate appellate authority or rationale).

In United States v. Ayotte, 741 F.2d 865 (6th Cir. 1984), the court reversed Ayotte's conviction, holding the trial court erred in preventing defense counsel from cross-examining a government agent about his failure to mention incriminating details (about which he later testified at trial) in a report and then in grand jury testimony. Id. at 870-71. "Latitude is normally permitted in cross-examining prosecution witnesses, and limitation of such cross-examination may only be based on sound reasons justifying a departure from this norm." Id. at 871. In determining whether cross-examination may be limited, a court should evaluate whether the jury had "sufficient other information upon which it may make a discriminating appraisal" of the prosecution witness's testimony. Id. Additional leeway should be granted on matters of credibility specific to the crime in question, versus general credibility. Id.

"[T]he 'naturalness' of a witness's decision to omit a point may depend on nuances of the prior statement's context[.]" United States v. Stock, 948 F.2d 1299, 1301 (D.C. Cir. 1991). A trial court's role is thus to determine whether "a jury might **reasonably** [find a witness's] omission unnatural and the prior statements inconsistent with [the witness's] trial testimony." Id. (emphasis added). If so, "[i]n the absence of some countervailing factor," then the matter should go to the jury. Id.

Here, M.P.'s credibility **was** the State's case. E.g. Brief of Respondent at 17 (claiming any error harmless but describing strength of State's case only in terms of M.P.'s credibility). Considering both the reason for the doctor's appointment and the subject matter of the appointment, M.P.'s failure to disclose to her personal physician was a matter suitable for the jury's evaluation. Stock, 948 F.2d at 1301; cf. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980) (fact that goes to trustworthiness of the witness, particularly a witness essential to the prosecution of a case, is relevant and admissible).

It was relevant under the federal test (with its roots in the right to defend and to cross-examine) because jurors could find the omission unnatural under the circumstances. It was relevant under the familiar Darden test[7]: M.P.'s credibility was the very core of the State's case, and thus her motive to fabricate was Slaney's most important line of defense.

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[7] This Court applies a three-part test to determine whether a trial court violated the rights to confrontation and to present a defense:

> **First**, the evidence must be of at least minimal relevance. **Second**, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. **Finally**, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Darden, 145 Wn.2d at 621 (emphasis added).

The defense theory was (1) that M.P. had initially fabricated the allegation that she was asleep after being confronted by her friend, Ex. 24, and (2) that M.P. again resorted to the fabrication to defuse her mother's anger. CP 781, 783 (motion and memorandum). The defense was prevented from presenting evidence to support the second facet of his defense—that immediately after the disclosure to her mother, M.P. failed to repeat the allegation to her personal physician. Exclusion violated Slaney's right to present a defense and requires reversal. Jones, 168 Wn.2d at 724-25.

The trial court denied Slaney his right to effectively challenge the credibility of the State's primary witness—his accuser—in violation of evidentiary rules and his constitutional rights. The Court of Appeals downplays the significance of the evidence, utterly fails to address Slaney's arguments regarding the applicability of federal persuasive authority in an area where Washington law is undeveloped, Op. at 10, and gives short shift to cogent arguments that, to the extent that sanitization was necessary, it could have been easily accomplished to avoid prejudice to the government. E.g. Brief of Appellant at 38. This Court should grant review.

2. **The trial court's undisclosed instructions to jurors, containing a prejudicially improper instruction, denied Slaney his right to a fair trial**.

This Court should also grant review to rectify a troubling trial irregularity—one that would have escaped notice but for a chance

disclosure. RAP 13.4(b)(3) and (4). The trial court's prejudicial, improper, and undisclosed instruction, that jurors' job was to "decide what really happened," unleveled the playing field and denied Slaney a fair trial.

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal, without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the right to a jury trial. Id. at 279-80. Where the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.[8]

A bailiff's actions are imputed to the judge. "When a judge delegates part of the judge's official duties to a bailiff, the bailiff becomes in effect the alter ego of the judge; the actions of the bailiff are the actions of the judge and the shortcomings of the bailiff are the shortcomings of the judge." Adkins v.

[8] In Sullivan, the judge gave a definition of "reasonable doubt" almost identical to the one held unconstitutional in Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (per curiam), overruled on another ground, Estelle v. McGuire, 502 U.S. 62, 72 n. 4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). The Supreme Court said the instruction violated the Sixth Amendment and harmless error analysis did not apply. Sullivan, 508 U.S. at 280-82.

Clark Cy., 105 Wn.2d 675, 678, 717 P.2d 275, 276 (1986). As far as jurors are concerned, the bailiff speaks on behalf of the judge. Id.

Washington courts have repeatedly rejected the notion that a jury's job is to decide what really happened and have repeatedly chastised the State for making such arguments. "A criminal trial may in some ways be a search for truth. But truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden." State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012); see also State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) ("[J]ury's job is not to determine the truth of what happened[.]").[9]

Here, the court (via bailiff) provided the jury several copies of written instructions misinforming the jury about its role. At least one juror remembered seeing the instructions. CP 471-76. This undermined the "beyond a reasonable doubt" standard mandated by the constitution. Reversal is required based on structural error. Sullivan, 508 U.S. at 281-82.

But even if harmless error analysis is applied, State v. Kalebaugh, 183 Wn.2d 578, 587, 355 P.3d 253 (2015), the State cannot show the error was harmless. Fifteen copies of the instruction, more than one for each

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[9] In Berube (as in Emery), the issue arose as a claim of prosecutorial misconduct. The appellate court held there was no objection and that the impropriety was curable. Thus, any objection was waived. Berube, 171 Wn. App. at 121. Here, however, the misstatement came from the trial court, not the prosecutor, and in any event, Slaney had no opportunity to object.

juror, were placed in the jury room throughout trial. The trial court acknowledged that at least one juror remembered seeing the document. E.g. CP 483 (finding/conclusion 1, bullet point 2); RP 1096.

Contrary to the Court of Appeals' assertion, Op. at 18, the jury's question during deliberations—whether the defendant's failure to testify could be used against him to reach a guilty verdict—makes no sense considering the plain language of the instructions. CP 327-28. But it does make sense if the jury believed its job was to decide what really happened. The jury's question indicates that, contrary to the written instructions, it had been considering using Slaney's failure to testify against him. As such, the undisclosed instruction likely infected deliberations.

3. **The undisclosed instruction also violated the right to a public trial, the right to be present at critical trial stages, and the prohibition on ex parte communication.**

This Court should also grant review under RAP 13.4(b)(3) because the undisclosed instruction violated Slaney's right to a public trial. The trial court also violated Slaney's right to be present at all critical stages of trial, and the prohibition on ex parte communications with jurors.

These constitutional matters are questions of law, subject to de novo review. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

As for the first argument, the guarantee of public criminal trials protected by the state and federal constitutions. U.S. CONST. amend. 6;

CONST. art. I, § 22. The right of a public trial is also vested with the public. CONST. art. I, § 10; U.S. CONST. amend. I.

In determining whether the public trial right applies to a specific portion of proceedings, Washington courts apply both experience and logic in the form of two inquiries. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The first prong, experience-based, asks "'whether the place and process have historically been open to the press and general public.'" Id. (quoting Press-Enterprise Co. v. Superior Ct., 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The second prong, logic-based, asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co., 478 U.S. at 8). When it is shown that the answer to both questions is yes, the public trial right applies. Sublett, 176 Wn.2d at 73.

If the public trial right applies, courts consider whether there has been a courtroom closure and whether that closure was justified by consideration, on the record, of the factors established under State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). See State v. Whitlock, 188 Wn.2d 511, 520-21, 396 P.3d 310 (2017).

In this case, a closure occurred. No member of the public was privy to the trial court's "Notes for Jurors" until the document was fortuitously disclosed after trial. For example, substantive email correspondence

between the court and counsel constitutes a courtroom closure. Irby, 170 Wn.2d at 883. In Irby, when a portion of jury selection occurred via email, this Court noted, "What ought to have happened [in the courtroom] was instead happening in cyberspace." Id. Although Irby addressed the right to be present, the rationale applies equally to whether the email amounted to a courtroom closure. And when proceedings that should be held in open court are instead held in some venue inaccessible to the public, a courtroom closure has occurred. See, e.g., Whitlock, 188 Wn.2d at 520 (proceedings occurring in judge's chambers are private and closed). Further, the closure was not justified. There was no attempt to conduct a five-part Bone-Club analysis or to identify a compelling reason for giving the jury undisclosed instructions touching on the jury's substantive duties.

The remaining question is whether an instruction to jurors was subject to the public trial right. Under the experience and logic test, the answer is yes. As noted in Sublett, 176 Wn.2d at 75-76, superior court rules establish that portions of the jury instruction procedure must occur in open court. Proposed instructions are submitted in writing at least three days before trial. CrR 6.15(a). But, before instructing the jury, counsel is to be given the opportunity to object outside the presence of the jury. CrR 6.15(c). Any objections to the instructions, as well as the grounds for the objections, must be placed on the record. Schmidt v. Cornerstone Inv., Inc.,

115 Wn.2d 148, 162-63, 795 P.2d 1143 (1990); Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 615-17, 1 P.3d 579 (2000).

Although not discussed in Sublett, court rules also require that "the court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal." CrR 6.15(d). Thus, "experience" (as well as court rules long in effect) demonstrate that the jury must be instructed in open court. See Sublett, 176 Wn.2d at 76 (CrR 6.15 in effect since 1973).

Under the "logic" prong, Sublett's analysis focuses on "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enter. Co., 478 U.S. at 8). It cannot be seriously disputed that public access to the law to be applied in a given case "plays a significant positive role" in criminal proceedings. Here, the undisclosed instruction was wholly outside the public's purview until it was discovered almost by accident.

A public trial violation occurred in this case. And public trial violation is structural error that requires automatic reversal. State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012). Structural error is a special category of constitutional error that "'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" Wise, 176 Wn.2d at 13-14 (quoting Arizona v. Fulminante, 499 U.S. 279,

310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Where there is structural error "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" Wise, 176 Wn.2d at 14 (quoting Fulminante, 199 U.S. at 310). A structural error analysis makes sense considering the undisclosed instruction affected the rules of engagement, without the public or Slaney being privy to those rules. CP 463. Tried within so rotten a framework, Slaney's conviction should not stand.

The hidden instruction also violated Slaney's right to be present at critical trial stages, as well as the prohibition on ex parte communications.

An accused has a fundamental right to be present at all critical trial stages under the confrontation clause of the Sixth Amendment and the due process clause. U.S. CONST. amend. VI, XIV; CONST. art. 1, §3; Irby, 170 Wn.2d at 880. "[A] defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge.'" Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). The right is not absolute; rather "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" Irby, 170 Wn.2d at 880 (quoting Snyder, 291 U.S. at 107-08). The right to be present is subject to

harmless error analysis. Irby, 170 Wn.2d at 885-86. But the State has the burden of proving harmlessness beyond a reasonable doubt. Id. at 886.

Relatedly, a trial court generally must not communicate with the jury in the absence of the defendant. State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120, 1129 (1997) (citing State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983)). As noted above, the bailiff is the "alter-ego" of the judge, and he or she is therefore bound by the same constraints. See O'Brien v. City of Seattle, 52 Wn.2d 543, 547, 327 P.2d 433 (1958). When ex parte communication occurs that relates to an aspect of the trial, the judge "generally should disclose the communication[.]" Rushen v. Spain, 464 U.S. 114, 119, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).

Although an improper communication between the court and the jury is an error of constitutional magnitude, State v. Rice, 110 Wn.2d 577, 613, 757 P.2d 889 (1988), the communication may be found to be harmless. Rushen, 464 U.S. at 118; Caliguri, 99 Wn.2d at 508. Once an accused raises the possibility that he was prejudiced by an improper communication between the court and jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. Id. at 509.

Slaney had a right to understand the law to be applied to his case. He was denied that opportunity because the jury received a secret instruction, thwarting the fairness of the proceedings. Snyder, 291 U.S. at

107-08. Slaney filed an unchallenged declaration indicating that he would have testified had he understood that the jury would be told its role was to determine what **really** happened. CP 452-53. For purposes of both the right to be present and the prohibition on ex parte communications, the State cannot demonstrate error was harmless beyond a reasonable doubt.

4. **Considering other instructional error, the court's misstatement of the law in its opening instruction cannot be considered harmless.**

Review is also appropriate because, considering the instructional error discussed above, the court's misstatement of the law in its opening remarks cannot be considered harmless. The initial instruction informed jurors they must be able to articulate their doubts to acquit, lowering the State's burden of proof. In light of the undisclosed instruction placed in the jury room, the State cannot demonstrate the harmlessness of this error.

F. CONCLUSION

This Court should accept review and reverse the Court of Appeals.

DATED this 23rd day of June, 2020.

Respectfully submitted,

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APPENDIX

FILED
5/26/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEC G. SLANEY, Appellant.	No. 78964-3-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — Alec Slaney appeals his judgment and sentence for indecent liberties. He challenges the trial court's decision to exclude certain evidence about one of the victim's appointments with her doctor. He also contends the court misstated the law to the jury in an oral instruction and in written materials provided to the jury at the beginning of his trial.

The excluded evidence was only minimally relevant and had the potential to confuse and mislead the jury. So, the trial court did not abuse its discretion by excluding it. Slaney could defend himself without the evidence, and its exclusion does not implicate his right of confrontation. So, the trial court did not violate his constitutional rights to present a defense or to confront witnesses.

The court did misstate the law about the burden of proof and the role of the jury. But it later provided, orally and in writing, correct statements of the law making any error harmless. And, because the incorrect document provided the jury does not implicate Slaney's right to a public trial or his right to be present at all critical

stages of the trial, he does not establish that the trial court violated either of these rights. Finally, because the only errors Slaney identifies are harmless, he cannot establish that cumulative error prejudiced him or that the trial court abused its discretion in denying his motion for a new trial. We affirm.

FACTS

In March 2017, M.P. reported to the police that, on the evening of January 13, 2017, Alec Slaney assaulted her while she was asleep in the eight bedroom house he shared with M.P.'s friend, Selena Neuberger. The State charged Slaney with indecent liberties.[1]

At trial, witnesses testified to the following facts. On January 13, 2017, M.P. attended a Reserve Officer Training Corp ball with Neuberger. After the ball, the two went to Neuberger's house and drank whiskey and Coke. M.P. also ate a marijuana edible. At one point, M.P. vomited, and by the end of the night she felt "very drunk, very sick." Because M.P. started to fall asleep and was clearly intoxicated, Neuberger led her to her bedroom and put her in bed. Neuberger left the room for about 30 minutes. M.P. testified that she passed out during this time. She "woke up to someone kissing the side of [her] neck, and then . . . their hands were in [her] vagina." At first, she did not know who was doing this.

Neuberger decided to leave the house and went to her bedroom to get her coat. She testified, that when she entered her room, she saw Slaney on top of M.P. She also testified that it initially appeared to her that they were engaged in consensual sex. She said she was angry because they were having sex in her

[1] RCW 9A.44.100(1)(b).

room rather than in Slaney's room. After Neuberger said "[w]hat the fuck," they stopped. Slaney stood up, grabbed his clothes, and left. Neuberger said M.P. looked like she was "in shock" and "[h]er face was drained of emotion." Neuberger then left the house in an Uber.

M.P. testified that she went back to bed and woke up to Slaney "touching up" on her again. She told him she did not want to go to his room and he left. She went to the bathroom and sent a Snapchat video of herself saying "'Running from my rapist.'" One of her friends responded, asked if she was okay, and offered to pick her up. While M.P. was waiting outside for her friend, Neuberger returned and saw her outside. Neuberger told M.P. she was angry about what happened. M.P.'s friend arrived, M.P. got into his car, and he drove her to her apartment.

After M.P. left, Neuberger sent her a text. It resulted in the following conversation.

> [Neuberger] I'm kinda pissed at you, you know?
>
> [M.P.] I was sleeping and he came in[.] I don[']t know what happened[.] I wasn[']t awake.
>
> [Neuberger] So you just fucked him?? Jesus[.] I mean come on[.]
>
> [M.P.] No? Like I woke up[.] And he was having sex[] with me.
>
> [Neuberger] I walked in and he was plowing you.
>
> [M.P.] Yeah [I] was shocked my[self.] He came b[a]ck like 2 times and [I] told him to go away[.]
>
> [Neuberger] The fuck[.] So he raped you?
>
> [M.P.] I don[']t wanna call it that[.]
>
> [Neuberger] Then what? Cuz that's what . . . it sounds like[.] Or you [are] lying to me and you wanted it[.] It's one of the two[.]

> [M.P.] I really didn[']t want it[.] He came back and [I] shoved him off[.] I wouldn[']t do that to you.

At opening and closing arguments, defense asserted that M.P. was not so intoxicated that she could not consent, that Neuberger's testimony and other circumstantial evidence undermined M.P.'s credibility concerning her consent testimony, and that M.P. decided to claim the incident was nonconsensual in response to Neuberger's apparent anger.

<u>Evidentiary Rulings</u>

Before trial, Slaney asked the court to compel the disclosure of medical records from two medical appointments after the alleged assault. M.P. made the first appointment at Hall Health at the University of Washington (UW) a few weeks after the incident. M.P.'s mother made the second appointment for her two months after the incident with Dr. Kristen Knox at Evergreen Health Signature Care (Evergreen). The trial court reviewed the records in camera and denied the request because neither the UW records, nor the Evergreen records, contained references to the incident at issue or "any reference to sexual assault." When Slaney asked the court to reconsider, it granted the request to compel the Evergreen records, ordering them produced to the defendant subject to a protective order. The court also allowed a pretrial interview with Knox, but it limited questioning to foundation with respect to M.P.'s medical record, Knox's general practice, and communication about the incident. It prohibited parties from asking about M.P.'s sexual history.

After the Knox interview, the trial court ruled the evidence from the medical appointments inadmissible.

Trial Court Pre-Trial Statement and Bailiff's Note

Just before voir dire, the trial court stated the following to the potential jurors:

> If, after your deliberations, you do not have a doubt for which a reason can be given as to the defendant's guilt, you are satisfied beyond a reasonable doubt. If, after your deliberations, you do not have a doubt for which a reason can be given as to the defendant's guilt, you are not satisfied beyond a reasonable doubt.

The bailiff met with jurors for about twelve minutes. She also left a copy of a document titled "Notes for Jurors" that included a statement that the job of the jurors was to "decide what really happened." At the end of the trial, the jury entered a guilty verdict.

Motion for a New Trial

Slaney asked for a new trial based on excluded evidence and the bailiff's meeting with the jurors. Upon learning the contents of the "Note for Jurors," Slaney submitted a consolidated request for a new trial. Defense counsel submitted a declaration that included an email exchange with a juror who remembered receiving the instructions. The presiding juror submitted a declaration to the court after the prosecutor asked her about the "Notes for Jurors." She stated in her declaration:

> 5. I have never seen the document sent to me labeled "Notes for Jurors" prior to [the prosecutor] sending me the document over email on August 7, 2018.
>
> 6. During the deliberations of the jury in this matter, I do not recall myself nor any other juror ever referencing or referring to the document labeled "Notes for Jurors."
>
> 7. During the deliberations of the jury we relied only upon the written instructions of law provided to us by the Judge and given to us in our jury binders provided by the court.

Slaney submitted a declaration that he would have testified had he known

the jury would be told it was to decide what really happened. The trial court denied his request for a new trial.

Slaney appeals.

ANALYSIS

Evidentiary Challenges

Slaney contends that by excluding evidence of M.P.'s medical appointment and limiting his cross-examination, the trial court denied him the right to present a defense. We disagree.

The United States and Washington State constitutions guarantee a defendant the right to present a complete defense.[2] This right includes the right to confront and cross-examine adverse witnesses.[3] But, trial courts "retain wide latitude. . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[4] And, a defendant has no right to present irrelevant or inadmissible evidence.[5]

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[2] U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22; Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994).

[3] State v. Romero-Ochoa, 193 Wn.2d 341, 346, 440 P.3d 994 (2019); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

[4] State v. Lee, 188 Wn.2d 473, 487, 396 P.3d 316 (2017) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

[5] State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006).

Washington appellate courts use a two-step standard to review a claim that an evidentiary ruling violated a defendant's right to present a defense.[6] The court first reviews the evidentiary ruling for abuse of discretion and reviews de novo whether that ruling violated the defendant's right to present a defense.[7] "A court abuses its discretion when its decision adopts a view that no reasonable person would take or that is based on untenable grounds or reasons."[8]

Evidence must be relevant to be admissible.[9] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[10] A court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[11] A party may impeach a witness using a prior inconsistent statement through cross-examination, or in certain circumstances, through the introduction of extrinsic evidence.[12]

The evidence from the Evergreen medical appointment contains no mention of the incident, of Slaney's name, or of any sexual encounter on the date in question.

During the pre-trial interview, Knox described the conversation she had with

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[6] State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019).
[7] Arndt, 194 Wn.2d at 797.
[8] State v. Boyle, 183 Wn. App. 1, 12-13, 335 P.3d 954 (2014).
[9] ER 402.
[10] ER 401.
[11] ER 403.
[12] ER 613. Slaney also raises ER 608 but does not explain how the evidence he sought to admit is proper prior conduct evidence to be used for impeachment under ER 608.

M.P. Knox and defense counsel had the following exchange.

> [Defense Counsel]: Okay. Now, during the appointment on March 20, 2017 did M-P tell you that she had been sexually assaulted, or raped, or that anyone had had nonconsensual sex with her?
>
> [Knox]: Not in . . . so many words.
>
> [Defense Counsel]: What do you mean by that?
>
> [Knox]: . . .if I could describe her presence during that appointment, it [was] shell shocked, and she shared very little information with me that day. It was like pulling teeth to try to get information from M-P.
>
> [Defense Counsel]: So, did [she] tell you that she had been sexually assaulted or raped by anyone?
>
> [Knox]: Not in those words, no.
>
> [Defense Counsel]: Did she use any other words to describe that type of conduct?
>
> [Knox]: In my recollection, no. . . . I asked her. . . based on some other information . . . not even specifically about, . . . an incident where she was semi-conscious and thought someone was on top of her, but I got very little if any information back from her about that experience.
>
> [Defense Counsel]: Did she tell you anything about making a report to the police?
>
> [Knox]: No.
>
> [Defense Counsel]: Did she tell you anything about a person named Ale[c] Slaney?
>
> [Knox]: No.
>
> [Defense Counsel]: When was the first time that you heard about the rape allegation?
>
> [Knox]: It was several days after that appointment when . . . her mother told me that M-P was going to go ahead and press charges.
>
> [Defense Counsel]: You referenced some other information that you had?

> [Knox]: Correct.
>
> [Defense Counsel]: . . . [P]rior to the appointment . . . that . . . caused you to ask a question. What was the . . . prior information?
>
> [Knox]: The prior information . . . was from her mother . . . who . . . was concerned about M-P.
> . . .
>
> [Defense Counsel]: Did . . . the mother tell you about an alleged sexual assault before the appointment on March 20th?
>
> [Knox]: . . . [S]he mentioned that at one point M-P had attended a party . . . I believe off campus, and . . . slept at that home that night, and at some point during the middle of the night or early the next morning . . . woke up with someone on top of her.
>
> [Defense Counsel]: Was there any other information that you recall the mother gave you about that allegation at that point?
>
> [Knox]: No. No.

Knox said M.P. was in “a dazed, almost shell-shocked state.”

When defense counsel asked whether Knox asked M.P. questions about the incident, she answered that she remembered “saying something like, ‘Let me tell you what I know, and then you chime in and, you know, fill in the details,’ and, um, and, uh, and that was how I, how I asked her. And again, um, I got very, very little information back from her.” Defense counsel asked if M.P. responded to the prompt and Knox said “only in a general sense . . . as part of other information” she asked about. Defense counsel asked whether M.P. provided “any information about that incident?” Knox responded that she “remember[ed] some of the details . . . in terms of . . . with whom she had gone to [the] party,” that they’d decided to stay there and not go home. She said “that was really the extent of it, other than what I had heard from her mother.”

Slaney asserts that M.P.’s failure to explicitly discuss the incident with Knox

is a material omission because the incident was a fact that a person in the same circumstances would have "naturally" asserted.[13] So, he claims he should have been allowed to introduce the evidence from the appointment about this omission to impeach her.

We find Slaney's argument unconvincing. Knox and M.P.'s mother are friends. A daughter attending a medical appointment, which her mother scheduled with her physician friend months after an incident, would not naturally be expected to assert she had been assaulted, particularly given the purpose of the appointment, and the fact that M.P. barely spoke about it, and was in a "dazed, almost shell-shocked state." And, Knox did not say that no discussion about the incident occurred during the appointment, only that M.P. was not forthcoming. While some might view this evidence as minimally relevant, it is not a clear material omission that makes it highly probative.

The risks of confusing the issues or misleading the jury by introducing this minimally relevant evidence outweighed its probative value.[14] M.P.'s mother made the appointment out of concern for M.P.'s sexual health and not to treat any injury. Evidence of M.P.'s failure to discuss the charged incident at the appointment required context about the purpose of the appointment, who made the appointment and why, and the information gathered by Knox to accomplish that purpose. The

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[13] Jenkins v. Anderson, 447 U.S. 231, 239, 100 S.Ct. 2124, 65 L.Ed.2d. 86 (1980). For example, Slaney's attorney asserted during one of the pretrial hearings on the evidence, "This is the type of appointment where if you had been sexually assaulted, you would disclose that, or at least we should be entitled to make that argument to the jury."

[14] ER 403.

court and the parties could have attempted to sanitize this evidence. But, to provide context, the evidence would need to include some aspects of M.P.'s sexual history, her potential exposure to sexually transmitted diseases, and any steps M.P. had taken to protect herself from them. So, the evidence would have remained potentially confusing or misleading. And, it would have provided the jury inappropriate information about M.P.'s sexual history.

While Slaney suggests that jurors are able to tolerate information about a victim's sexual activity without prejudicing the case unduly, he does not explain how the minimal relevancy of this evidence warrants the introduction of all the evidence necessary to put the appointment in context for the jury. The trial court did not abuse its discretion by excluding the evidence.

Slaney also asserts he should have been able to introduce the evidence as a prior inconsistent statement consisting of an omission. During a defense interview, M.P. and defense counsel had the following exchange regarding her appointment at Evergreen.

> [Defense Counsel]: Okay. And you talked with [Knox] about Alec?
>
> [M.P.]: I didn't give any -- I don't think I even gave a name. I don't think [we] went in depth about it. Maybe we did. Maybe a little bit. I don't -- I didn't share much with her. It was more like she wanted to know. Like . . . because I was there for testing she wanted to know, you know, if he had used a condom, and things like that.

M.P. did not say in the interview that she explicitly told Knox about the incident. So, she made no prior inconsistent statement. And, the trial court did not abuse its discretion by excluding the evidence.

Slaney assigns error to finding six of the order denying a new trial stating,

> Defendant's argument that he was unable to cross-examine and constitutionally confront M.P. with respect to any potential exculpatory evidence is without merit. Judge Smith's trial court order excluding the "Evergreen Clinic Appointment" but placed no restriction upon the defendant's ability to challenge M.P. with any inconsistency in her testimony at trial, and her prior non-medical disclosures.

Where findings of fact and conclusions of law are challenged, this court limits its review to determining whether substantial evidence supports the trial court's findings and whether those findings support its legal conclusions.[15] Substantial evidence is evidence sufficient to persuade a reasonable person of the truth of the finding.[16] This court considers unchallenged findings of facts as true on appeal.[17] This court reviews any conclusions of law, "including those mistakenly characterized as findings of fact, de novo."[18]

The trial court did not issue an order explicitly prohibiting cross-examination but it did restrict admission of the evidence related to the medical appointment. But, the court did not restrict Slaney's ability to challenge M.P. with inconsistencies "in her testimony at trial, and prior non-medical disclosures", so this finding is supported by substantial evidence.

Slaney asserts, that by excluding this evidence, the trial court denied him the right to present a defense. He claims his case rested on M.P.'s credibility, so he needed impeachment evidence. He also asserts his argument, that M.P. changed her story, required both evidence that she changed her story because

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[15] Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000).
[16] State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).
[17] State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).
[18] In re Estate of Haviland, 162 Wn. App. 548, 561, 255 P.3d 854 (2011).

Neuberger was angry with her, and evidence that she changed her story to appease her mother who was angry about M.P. being sexually active. But, Slaney's primary defense was that M.P. could and did consent. And, he had the opportunity to present this via cross-examination of Neuberger, who described what she saw that made her initially believe the sex was consensual. He also provided evidence that Neuberger was angry with M.P. and submitted the evidence of the text conversation he claims demonstrated that M.P. changed her story in response to Neuberger's anger. The trial court did not deny him the right to present a defense when it excluded the evidence.

Slaney asserts the trial court violated his right to confront witnesses. But, he does not explain how the court violated his confrontation right. Slaney seems to be conflating the right to a defense with the right to confront witnesses, which are both protected by the Sixth Amendment of the U.S. Constitution and article I, section 22 of the Washington State Constitution. Here, he did have the opportunity to confront adverse witnesses. And, as discussed above, any limitation of cross-examination did not violate his constitutional right to a defense.

Slaney challenges the following conclusions of law from the court's order denying his motion for a new trial.

> 3. …Thus, the claimed omission was immaterial, in context, and not inconsistent since, as Tegland opines, a witness may (only) be impeached who omits a material detail that, under the circumstances, would have been included if true. Here, while it is clear that there is no requirement to disclose sexual assault at medical appointments, it is not clear that such information would have naturally been asserted.
>
> 4. …He argues that such interview statement--about whether MP had talked to any medical providers about what happened with

> [Slaney]--is probative of her character for truthfulness. Defendant correctly argues that it is a valid consideration that MP was a central witness in the case. As non-reputation evidence (ER 608(a)), however, such allowance is only given at the discretion of the court. And considering the above context for the "omission" and the attenuation of the statement to defense counsel, it was not an abuse of discretion.
>
> 5. Additionally, any minimal probative value would have been substantially outweighed by the danger of confusing/misleading the jury, and unfair prejudice, per ER 403...

As discussed above, M.P.’s failure to explicitly describe the incident at her Evergreen appointment was not a material omission. And, the only way the jury could understand the context for the non-disclosure would be to admit the substance of the appointment and aspects of M.P.'s general sexual activity and sexual health practices. This context information risked misleading the jury. Slaney fails to establish the trial court erred in making these conclusions of law.

Information Sheet for Jurors

Slaney contends that an information sheet provided by the bailiff to the jury was an undisclosed written instruction that misrepresented the State’s burden of proof, undermined the presumption of innocence, violated Slaney’s right to a public trial, violated his right to be present at all critical stages of trial, because he did not learn about it until after the trial, and violated the prohibition against a judge’s ex parte contact with jurors. The information sheet provided miscellaneous information to jurors. Unfortunately, it included a statement that it was the jury’s “job . . . decide what really happened”.

Burden of Proof and Presumption of Innocence

Slaney asserts that the information sheet and the trial court’s statement

before voir dire constituted improper instructions about the presumption of innocence and the State's burden of proof. We agree the statements were improper.

The jury's presumption that the defendant is innocent until proven guilty "is the bedrock upon which the criminal justice system stands."[19] If a trial court provides instructions that misstate reasonable doubt or shift the burden of proof to the defendant, it commits a constitutional error.[20] This is because of the fundamental constitutional due process requirement that the State bear the burden of proving every element of a crime beyond a reasonable doubt.[21] The jury's job is not to determine the truth of what happened…Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.[22]

Before voir dire, the judge told the potential jurors:

> A reasonable doubt is one for which a reason exists . . . If, after your deliberations, you do not have a doubt for which a reason can be given as to the defendant's guilt, you are satisfied beyond a reasonable doubt. If, after your deliberations, you do have a doubt for which a reason can be given as to the defendant's guilt, you are not satisfied beyond a reasonable doubt.

The bailiff provided the jurors with a document titled "Notes for Jurors." This sheet of general information included the statement, "Your job as a Juror is to listen to all the evidence presented at trial, then 'decide the facts' - decide what really happened."

The oral instruction before voir dire misstated the definition of reasonable

[19] State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

[20] State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

[21] U.S. CONST. amend. XIV; State v. Camara, 113 Wn.2d 631, 640, 781 P.2d 483 (1989).

[22] State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

doubt.[23] The information sheet mistakenly tells jurors their job is to decide what happened. The juror's role is to determine whether, based on the evidence, the state had proven the elements of the crime charged beyond a reasonable doubt.[24]

Slaney first asserts that the instruction sheet created a structural error in the proceedings requiring reversal without any showing of prejudice. We disagree.

A trial court's failure to correctly instruct the jury on reasonable doubt is a structural error that violates a defendant's right to a jury trial.[25] Here, the trial court gave the following jury instruction orally and in writing.

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

The court also instructed the jury that each of the elements of the crime charged "must be proved beyond a reasonable doubt." This same instruction stated "On the other hand, if, after weighing all the evidence, you have a reasonable doubt as

[23] State v. Kalebaugh, 183 Wn.2d 578, 582, 355 P.3d 253 (2015).

[24] The State points out that the note includes the same language as found on the King County Superior Court website. But, the King County Superior Court's inclusion of this language on its website does not turn otherwise improper language into proper language.

[25] Sullivan v. Louisiana, 508 U.S. 275, 279-281, 113 S.Ct. 2078, 124 L.Ed.2d 192 (1993).

to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty".

These instructions correctly stated the law about the State's burden and reasonable doubt. So, Slaney fails to establish structural error based on the misstatement in the instruction sheet. We must still address whether the court's incorrect oral instruction and the information sheet was a harmless error.[26]

Courts presume that constitutional error is prejudicial.[27] A constitutional error is harmless if the appellate court is "persuaded beyond a reasonable doubt that the jury would have reached the same result in absence of the error."[28]

As described above, the court provided oral and written instructions that properly stated the State's burden of proof. Also, both the prosecutor and defense counsel told the jury in closing that the State had to prove each element of the charge beyond a reasonable doubt. Defense counsel reminded the jurors that the defense bore no burden and that Slaney was presumed innocent "and the only time that ever may change is if [the entire jury] unanimously agree that the state has proven every single element of the crime beyond a reasonable doubt." Defense also identified the evidence that it claimed raised a reasonable doubt.

This case is similar to State v. Kalebaugh[29] where the Washington Supreme Court concluded that, because the trial court provided instructions that correctly

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[26] State v. Brown, 147 Wn.2d 330, 332, 339-40, 58 P.3d 880 (2002). ("We hold that an erroneous jury instruction may be subject to harmless error analysis if the error does not relieve the State of its burden to prove each element of the crime charged"); Kalebaugh, 183 Wn.2d at 585.

[27] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

[28] State v. Fisher, 185 Wn.2d 836, 847, 374 P.3d 1185.

[29] Kalebaugh, 183 Wn.2d at 585.

stated the State's burden and what constituted a "reasonable doubt" numerous times in both written and oral form, its erroneous oral statement of what constituted "reasonable doubt" was harmless. Here, as in Kalebaugh, the trial court's provision of proper instructions ensured the jury understood its duty. The errors were harmless.

Slaney asserts the following written exchange between the judge and jury during deliberations establishes the jury did not understand the State's burden of proof. During deliberations, the jury submitted the following question.

> According to instruction 3, paragraph 1, sentence 4, and the entirety of section 4, we are not to use the fact that the defendant did not testify to infer guilt or prejudice. However, according to section 3, paragraph 3[,] we are instructed that we may consider lack of evidence in reaching our verdict. Does this reasoning extend to considering a guilty verdict? [Should we consider defendant's failure to testify] not [as] prejudice against the defendant for not testifying [, but] rather the absence of evidence … likely resulted from lack of defense testimony?

The court responded, "Please reread the jury instructions. The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way."

This exchange can be viewed as demonstrating the jury's diligence in following the written instructions. So, contrary to Slaney's assertion, it does not clearly demonstrate that the jury did not understand the presumption of innocence, the reasonable doubt standard, or the State's burden of proof. Slaney challenges certain findings and conclusions in the trial court's order denying his motion for a new trial relating to its decision that these errors were harmless. Because we independently review the record to make this determination, we do not need to address these challenges.

Prohibition Against Ex Parte Contact with Jurors

Slaney also asserts the trial court violated the prohibition against ex parte contact with jurors.

Generally, the trial court should not communicate with the jury if the defendant is not present.[30] If the trial court engages in ex parte communication related to the substance of the trial, the trial judge "generally should disclose the communication to counsel for all parties."[31] Because improper communication between the court and the jury is a constitutional error, the State bears the burden of showing that such error was harmless beyond a reasonable doubt.[32]

As discussed above, the information sheet provided jurors contained a serious misstatement of the law. But, as we have explained, this error was harmless.

Right to a Public Trial and Right to be Present at all Critical Stages of Trial

Slaney asserts the document the bailiff left in the jury room violated his right to a public trial. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the accused a right to a public

[30] State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997).

[31] Bourgeois, 133 Wn.2d at 407 (quoting Rushen v. Spain, 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983)).

[32] Bourgeois, 133 Wn.2d at 407.

trial.[33] Violation of the public trial right is a structural error that a reviewing court presumes is prejudicial.[34] This court reviews constitutional issues de novo.[35]

Before deciding if a trial court violated a defendant's right to a public trial, this court must determine if "the proceeding at issue implicates the public trial right, thereby constituting a closure."[36] The experience and logic test determines whether the challenged proceeding implicates the public trial right.[37] The "experience" prong of this test asks "'whether the place and process have historically been open to the press and general public.'"[38]

The process of leaving an information sheet for jurors in the jury room is not something typically open to the public and that implicates the public trial right. So, Slaney cannot establish that this activity violated this right. The trial court did not err in concluding "the mere fact of the 'Notes for Jurors' document being placed in the jury room did not represent a court closure under the Washington State Constitution and therefore no Bone-Club analysis was required by the trial court."

Slaney also asserts that trial court violated his right to be present at all critical stages of trial. Leaving the information sheet in the jury room did not implicate this right.

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[33] Presley v. Georgia, 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995).

[34] State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

[35] State v. Armstrong, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

[36] State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012).

[37] State v. Smith, 181 Wn.2d 508, 514, 334 P.3d 1049 (2014).

[38] Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1(1986)).

A defendant has the constitutional right to be present when evidence is being presented.[39] And, a defendant has the "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'"[40] But, a defendant does not have a right to be present during proceedings such as in-chambers or bench conferences between the court and counsel on legal matters[41] provided those matters do not require a resolution of disputed facts.[42]

Delivery of an information sheet is not a critical stage of the trial that implicated Slaney's right to be present. Slaney provides no authority to the contrary.[43] So, Slaney's argument to the contrary fails.

Cumulative Error

Slaney contends that, even if all of the errors were harmless, cumulatively they denied him a fair trial.

The cumulative error doctrine applies when a combination of trial errors denies the accused a fair trial, though one of the errors alone would not warrant

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[39] Matter of Personal Restraint of Lord, 123 Wn. 2d 296, 306, 868 P.2d 835 (1994).

[40] United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed. 2d 486 (1985) (quoting Snyder v. Commonwealth of Mass., 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)).

[41] United States v. Williams, 455 F.2d 361 (9th Cir. 1972).

[42] People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992).

[43] State v. Logan, 102 Wn. App. 907, 911, 10 P.3d 504 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

reversal.[44] Even when this court decides that each error standing alone would otherwise be harmless, cumulative error may warrant this court's reversal of a trial court decision.[45] But, if the errors are few and do not affect the trial's outcome, a court will not find cumulative error.[46]

Here, the trial court erred in its statement to the jurors before voir dire and in providing the "Notes to Jurors." But, as discussed above, these errors combined were harmless. And, Slaney does not establish that the court erred in excluding evidence. So, he does not establish cumulative error.

Denial of Motion for New Trial

Slaney claims the trial court should have granted his request for a new trial because the excluded evidence and the bailiff's note were irregularities that prejudiced him.

This court reviews a trial court's denial of a motion for a new trial for abuse of discretion.[47] "A court abuses its discretion when its decision adopts a view that no reasonable person would take or that is based on untenable grounds or reasons."[48] "We review a trial court's denial of a new trial more critically than ... its grant of a new trial because a new trial places the parties where they were before, but a decision denying a new trial concludes their rights."[49]

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[44] In re Pers. Restraint of Yates, 177 Wn.2d 1, 65–66, 296 P.3d 872 (2013).

[45] State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

[46] Weber, 159 Wn.2d at 279.

[47] State v. Boyle, 183 Wn. App. 1, 12, 335 P.3d 954 (2014).

[48] Boyle, 183 Wn. App. at 12-13.

[49] M.R.B. v. Puyallup Sch. Dist., 169 Wn. App. 837, 848, 282 P.3d 1124 (2012).

Only when an irregularity at trial so prejudices the defendant that only a new trial can provide the defendant with a fair trial, should the trial court grant a mistrial.[50] Because the trial court is in the best position to determine if an irregularity at trial prejudiced the defendant, it has broad discretion to grant or deny a mistrial based on those irregularities.[51]

Slaney asserted to the trial court the exclusion of evidence of the Evergreen appointment, the erroneous statement by the court, and presence of the Notes for Jurors, required the trial court to grant him a mistrial and new trial. But, as discussed above, the trial court did not err in excluding the evidence and the trial court's statement and Notes for Jurors were harmless error. So, the trial court did not abuse its discretion by denying Slaney's request for a new trial.

CONCLUSION

We affirm. Because the excluded evidence was only minimally relevant and risked confusing and misleading the jury, the trial court did not abuse its discretion by its decision about it. And, because Slaney could defend himself without the evidence, and its exclusion does not implicate his right of confrontation, the trial court did not violate his right to a defense or to confront witnesses when it excluded it.

The trial court made misstatements of law in an oral instruction before voir dire describing "reasonable doubt," and in a description of a juror's role in "Notes to Jurors." Because the trial court also provided accurate oral and written

[50] State v. Wade, 186 Wn. App. 749, 773, 346 P.3d 838 (2015).
[51] Wade, 186 Wn. App. at 773.

instructions to the jury, and because both attorneys clearly and repeatedly articulated the correct standard and burden, these errors were harmless. Slaney does not show prejudice from cumulative error and the trial court did not abuse its discretion by denying a new trial.

Leach, J.

WE CONCUR:

Brennan, J. Verellen, J.

NIELSEN KOCH P.L.L.C.

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