No. 42761-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

DANIAL HALVERSON, APPELLANT

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DIVISION II
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STATE OF WASHINGTON
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Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 10-1-00293-6

BRIEF OF RESPONDENT (Amended)

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Although the audio recording of the closing arguments of Halverson's first trial was not preserved due to malfunctioning equipment, Halverson has not shown that the missing record entitles him to a new trial.

2. Because the State's comment that there was no reason to doubt that anyone other than Halverson shot the victim in this case was in direct response to Halverson's argument that someone else did the shooting, and because the jury instructions and the prosecutor's argument in the whole were correct, error did not occur.

3. Halverson's right to an open trial was not violated when the trial court briefly questioned a single juror *in camera* during deliberations about a report of juror misconduct.

4. The trial court did not make required findings before imposing mental health treatment as a condition of community custody.

5. Halverson's objection to the court's finding that he has the current or future ability to pay costs is premature because he has not yet shown that the finding is in error.

B. INTRODUCTORY STATEMENT REGARDING CITATIONS TO RECORD

This case was tried to two different juries. The jury at the first trial returned guilty verdicts on two of four charges but were unable to unanimously agree as to the two remaining charges. Therefore, the two remaining charges were tried to a second jury, which returned guilty

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verdicts on the remaining two charges. All four convictions were joined at a single sentencing hearing and judgment and sentence.

Apparently because there were two trials, two sets of verbatim reports were prepared -- one for each trial, with the sentencing appearing in the second set. Because there are two sets of transcripts, there are duplicate page and volume numbers. To avoid confusion, citations in this brief refer to RP-I, followed by the page number, to refer to the first set of verbatim reports, and RP-II, followed by the page number, to refer to the second set of transcripts.

Due to an apparent typographical error, volumes two through six of RP-II have an incorrect trial court case number and an incorrect appellate court case number typed onto the cover page of each volume.

C. FACTS AND STATEMENT OF THE CASE

On September 14, 2010, in Mason County, Washington, Danial Halverson shot Michael Okoniewski. RP-I, 217; RP-II 92, 122. Around 6:30 that morning, Halverson showed up on Okoniewski's porch and offered to buy Okoniewski's motorcycle. RP-I 219-222; RP-II 96. Okoniewski told Halverson that he would decide later whether to accept the offer. RP-I 222; RP-II 97.

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Halverson stepped off the porch, as if to leave, but then stopped, turned, and asked Okoniewski for an electrical box. RP-I 222; RP-II 98. Okoniewski uses electrical boxes in his trade, and in the past he had provided other electrical boxes to Halverson. RP-I 251-252, 757; RP-II 98-99. Okoniewski stepped off the porch and began walking to his tool shed to retrieve an electrical box, and as he walked he heard a gunshot and realized that he'd been shot in the shoulder. RP-I 224, 227; RP-II 99.

Okoniewski began scrambling to get away, and as he scrambled for safety, he heard four or five more gunshots. RP-I 225; RP-II 100. One of the additional shots hit Okoniewski in the groin and hip. RP-I 227; RP-II 101-103, 108. He fell and looked up, and he saw Halverson standing over him, looking at him, and holding a gun. RP-I 226; RP-II 101.

On September 25, on a neighboring property near where Halverson shot Okoniewski, police recovered a Ruger .357 handgun that had been abandoned in the bushes. RP-I 347-348, 351, 632-639; RP-II 315-325, 431-434. The handgun was purchased by Halverson's wife in 1999. RP-I 615; RP-II 326. Halverson admitted having at one time possessed the .357 handgun and said that he had recently given it to the neighbor. RP-I 767-769, 819.

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The pistol that police recovered was first discovered abandoned in the bushes by the owner of the property where it was found. RP-I 347-348. On a past occasion, on or about August 31, 2010, Halverson was at that neighbor's property, and while there Halverson put a shotgun on the hood of his truck and then confronted the neighbor about the neighbor having previously accused Halverson of stealing from him. RP-I 357-358, 362, 363, 385. After hearing the neighbor's explanation, Halverson ejected two shells from the shotgun and commented something to the effect of, "one for you, one for me." RP-I 358.

About two weeks prior to this incident, Halverson was out shooting a shotgun, maybe the same shotgun, with a friend of his. RP-I 495. This was a Mossberg Model 500-A security pump shotgun. RP-I 496. A week or two later, which was near in time to when he confronted his neighbor and put a shotgun on the hood of his truck, Halverson gave the Mossberg Model 500-A to his friend's father. RP-I 496, 504-505, 640, 761-762, 807-808.

Prior to 2010, Halverson was convicted of a felony, and he was, therefore, ineligible to legally possess a firearm. RP-I 614, 781, 805.

Initially, the State charged Halverson with assault in the first degree. CP 223-224. On September 22, 2010, Halverson appeared in the

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Mason County Superior Court to address the charge. RP-I 1. At this hearing, Halverson's attorney and the prosecutor presented an order to the court to have Halverson evaluated for competency by a mental health professional at Western State Hospital. RP-I 2-5.

On October 18, 2010, Western State Hospital completed its evaluation, and Halverson was seen again in court on the following day, October 19, 2010. RP-I 8; CP 211-220. The mental health evaluation reported that Halverson "lacked the capacity to understand the nature of the proceedings against him and to assist in his own defense" and recommended that Halverson be admitted to the hospital for up to 90 days for competency restoration treatment. CP 217-218. The licensed psychologist at Western State Hospital who evaluated Halverson and drafted the report found that "major mental illness" presented a risk factor that placed Halverson at extreme risk of future dangerousness and criminal acts that would jeopardize public safety. CP 219.

The court found that Halverson was incompetent to stand trial, and it ordered that Halverson be admitted to Western State Hospital for competency restoration treatment. RP-I 9. On January 13, 2011, Western State Hospital issued a report stating that Halverson's competency had been restored through successful treatment. CP 206-210. On January 14,

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2011, Halverson was back in court. RP-I 11-16. The court found Halverson competent, lifted the stay that previously entered, arraigned Halverson on the pending charge (prior to subsequent amendments), and set a trial date. RP-I 11-16.

Prior to trial, on June 13, 2011, the State filed an amended information and charged Halverson with attempted first degree murder (with a firearm enhancement), assault in the first degree (with a firearm enhancement), and two counts of unlawful possession of a firearm in the second degree. CP 190-192. The jury trial then commenced on July 19, 2011. RP-I 78, 107.

The jury returned guilty verdicts for both counts of unlawful possession of a firearm, but were unable to reach unanimous verdicts in regard to the other counts. CP 108-113. The court, therefore, declared a mistrial on the remaining counts. CP 107.

Due to a malfunction of the audio recording equipment, a portion of this trial (the first trial) was not audio recorded, but the parties were unaware of it at the time because the equipment appeared to be functioning appropriately. RP-I 933; RP-II 1047; CP 21. The parts of the trial that were not recorded included the admission of defense exhibits, the reading of jury instructions, closing arguments, and the reading of the

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verdicts. CP 21. The parties entered an "Agreed Report of Proceedings" to substitute for the lost record, but the agreed report stated that "the defense cannot stipulate that there was no error by either defense attorney or prosecutor" and that "closing argument can not be re-created." CP 21-22.

The two charges for which the first jury was unable to reach a unanimous verdict (assault in the first degree and attempted first degree murder -- each with firearm enhancements) went to trial on September 23, 2011. RP-II 13. In closing argument, Halvorson (through his attorney), argued that "[t]here's no doubt Mr. Okoniewski was shot" but that Halverson did not commit the crime. RP-II 953.

In rebuttal closing argument, the State responded as follows:

> Like Mr. Sergi just told you, the issue here is not necessarily pre-meditation and the intent and everything like that. That's basically all within the scenario. The issue is -- is that Danial Halverson did not shoot him, that somebody else shot him.
>
> So you have an eyewitness, the person who got shot. And you have all the other evidence to show that Danial Halverson was the person who shot him. So to acquit Danial Halverson then, you have to have a reasonable doubt that Mr. Halverson was the person who shot Okoniewski. And I challenge you -- I challenge you to find a reason for that doubt....

RP-II 1016-1017.

After closing arguments were completed, the jury was excused from the courtroom to begin its deliberations. RP-II 1019. Three days

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later, while the jury was still in deliberations, the court went on the record in the absence of the jury to state for the record that on the previous evening, after the jury had been released for the evening, the bailiff reported to the court that one of the jurors had looked up three words in a dictionary. RP-II 1021.

The court stated for the record that, in response to this information, the court had the juror remain after the others were excused for the evening, and that the court then had the juror, a deputy prosecutor, and the defense attorney brought into chambers. RP-II 1021-1022. In open court and for the record, the court described what had occurred in chambers:

> The juror was asked whether or not he disclosed that to the other jurors. His response was no. He was asked whether or not -- as a yes or no question -- whether or not it influenced his deliberations. His response was no.

RP-II 1022. The attorneys asked that the juror be interviewed again so that the interview could be on the record. RP-II 1023-1024.

The juror was brought into the courtroom, with Halverson present. RP-II 1024-1026. The trial judge carefully instructed the juror, as follows:

> I want first of all to caution you. That you are in the deliberation process, and so my questions are not meant to be asking for you to provide us with long explanations. I have on question that will ask you that is not a yes or no question. The rest will be yes or no questions. And if I feel that you're providing us too much information, I may cut you off. It's not -- I'm not trying to be rude

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> to you sir, but it's just important that we protect the actual -- the integrity of the deliberation process. Do you understand that?

RP-II 1026. The trial judge then went through a short series of short questions and answers with the juror, from which the court determined that the juror had, in fact, looked up the words "intent" and "reasonable doubt" on an internet dictionary, but that he had not shared the definitions with any other juror. RP-II 1026-1027. The juror was excused from the trial, and an alternate juror was substituted. RP-II 1035-1036.

With the seating of the alternate juror, deliberations began anew. RP-II 1036. The jury found Halverson guilty of both counts (attempted murder in the first degree and assault in the first degree), and it found the firearm enhancement in regard to each count. RP-II 1037-1038.

Sentencing on all four convictions (the two from the first trial and the two from the second trial) was joined into one hearing and one judgment and sentence on all counts. RP-II 1050; CP 7-20. In addition to a prison sentence of 305 months, the court ordered Halverson to pay costs of $46,424.83. CP 9-12. Page three of the judgment and sentence states that:

> The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

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[x] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 9. No other citation to the record was located where either party or the court discussed Halverson's ability to pay the imposed costs.

Before the court adjourned the sentencing hearing, the State asked the court to impose mental health counseling as a part of the sentence. RP-II 1062. The court asked Halverson's attorney whether he objected, to which he answered, "[n]o, your Honor." RP-II 1062. Attached to the judgment and sentence is an addendum captioned "Conditions of Community Custody." CP 16-18. These conditions are incorporated into the judgment and sentence by paragraph 4.2 of the judgment and sentence. CP 10-11. One of the conditions is that "[t]he defendant shall participate in mental health counseling or treatment at the direction of the CCO." CP 18. No other discussion of, or reference to, mental health treatment was located in the record of the sentencing hearing.

D. ARGUMENT

1. Although the audio recording of the closing arguments of Halverson's first trial was not preserved due to malfunctioning equipment, Halverson has not shown that the missing record entitles him to a new trial.

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Criminal defendants are entitled to a record of proceedings that is sufficient to allow the appellate court to review defendant's claims on appeal. *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). An appellant is not, however, necessarily entitled to a verbatim transcript. *Id.* Where the record has been lost or destroyed, a reconstructed record will suffice. *Id.* at 782.

In the instant case, Halverson bears the burden of reconstructing the record and providing a record sufficient to allow review. *Tilton* at 782; RAP 9.3. One method of providing a record is to provide an "agreed report of proceedings." RAP 9.4. Ordinarily, where a record is lost or destroyed the appellant should seek to supplement the record with affidavits from third parties, such as attorneys, witnesses, jurors, court personnel, or anyone else who was present during the trial. *State v. Larson*, 62 Wn.2d 64, 68, 381 P.2d 120 (1963) (Hill, J., concurring). If the affidavits are insufficient to enable review, the court must order a new trial. *Tilton* at 783. But, if the appellant has failed to obtain affidavits to reconstruct the record, appellant waives the right to a complete record. *State v. Miller*, 40 Wn. App. 483, 488, 698 P.2d 1123 (1985).

When reviewing whether the record is sufficient to allow review, the reviewing court considers the following factors:

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(1) whether all or only part of the trial record is missing or reconstructed[;]
(2) the importance of the missing portion to review the issues raised on appeal[;]
(3) the adequacy of the reconstructed record to permit appellate review[;] and[,]
(4) the degree of resultant prejudice from the missing or reconstructed record, if any, to the defendant.

State v. Classen, 143 Wn. App. 45, 57, 176 P.3d 582 (2008).

In the instant case, only a part of the record is missing, and the only missing part that Halverson takes issue with is the closing arguments of the first trial. Halverson does not raise any specific error in regard to the missing record of closing arguments at the first trial. Instead, he asserts that there was error during closing arguments of the second trial and that, because he makes this assertion of error arising out of closing arguments at the second trial, this assertion of error supports his proposition that there was probably error during closing arguments of the first trial. Appellant's Brief at 14. But Halverson does not identify or specify any error from the closing arguments of the first trial; so, it cannot be concluded that the missing record is important to any issue raised on appeal.

"The absence of a portion of the record is not reversible error unless the defendant can demonstrate prejudice." *State v. Burton*, 165 Wn.

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App. 866, 883, 269 P.3d 337, *review denied*, 174 Wn.2d 1002, 278 P.3d 1111 (2012). "Where the nature of the error is one that 'trial counsel probably would have remembered,' such as prosecutorial misconduct during closing argument..., even the entire loss of the pertinent record may not prevent effective review." *Burton* at 883-884, quoting *State v. Putman*, 65 Wn. App. 606, 611, 829 P.2d 787, *review denied*, 122 Wn.2d 1015, 863 P.2d 73 (1993).

Additionally, Halverson cannot show prejudice because in the first trial the only convictions that the jury returned were for two counts of unlawful possession of a firearm, and there was ample, overwhelming evidence to support these convictions at trial, including Halverson's trial testimony. RP-I 226, 357-358, 362, 363, 385, 495, 496, 504-505, 614, 640, 761-762, 767-769, 781, 805, 807-808, 819; CP 107, 108-113.

2. Because the State's comment that there was no reason to doubt that anyone other than Halverson shot the victim in this case was in direct response to Halverson's argument that someone else did the shooting, and because the jury instructions and the prosecutor's argument in the whole were correct, error did not occur.

To prevail.on a claim that the prosecutor committed prosecutorial misconduct, Halverson must show both that misconduct occurred and that

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the misconduct resulted in prejudice to him. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). To establish the second prong, that there was prejudice, Halverson "must demonstrate that there is a *substantial likelihood* [emphasis added]the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998); see also, *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Because it is Halverson's burden to show that the alleged misconduct was both improper and prejudicial, the harmless error standard does not apply, and the State is not required to prove that the error, if it was error, was harmless beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d 741, 756-757, 278 P.3d 653 (2012).

Where prosecutorial misconduct is alleged in closing arguments, the prosecutors comments "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown* at 561. The court in the instant case provided jury instructions to the jury that, when read as a whole, correctly instruct the jury in regard to the burden of proof. CP 121-152.

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Additionally, Halverson argued during closing arguments that there was no doubt that someone shot the victim, but that Halverson did not do the shooting. RP-II 953. Other than argument and Halverson's denial, there was no evidence that anyone other than Halverson shot the victim. The direct and circumstantial evidence showed that Halverson was the shooter. RP-II 92, 99-101, 122, 315-325, 326, 431-434. Generally, evidence that someone other than the defendant is the one who committed the charged crime is inadmissible "unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party." *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (further citations omitted). As in *Stenson*, "nothing in the record" of Halverson's trial, "except for the unsubstantiated suspicions voiced by the Defendant, tends to point to anyone else as the [shooter]." *Id.* at 735.

Thus, Halverson's comments in closing invited a response from the prosecutor, and as such, the prosecutor's response is not reversible error. *State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984), citing *State v. La Porte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961). On review of the trial court's decision, the trial court is given great deference in regard to the trial court's ruling on defendant's objection to prosecutorial

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misconduct. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). """The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.""" *Stenson* at 719, citing *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995), quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

"Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), citing *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Because the prosecutor's comments in the instant case were in response to Halverson's argument that someone other than Halverson committed the crime, and because the jury instructions as a whole correctly instructed the jury, the prosecutor's comment was not error, and Halverson has not shown that "'there is a substantial likelihood'" that the prosecutor's comment "'affected the jury's verdict.'" *Dhaliwal* at 578, quoting *State v. Pirtle,* 127 Wash.2d 628, 672, 904 P.2d 245 (1995).

3. Halverson's right to an open trial was not violated when the trial court briefly questioned a single juror *in camera* during deliberations about a report of juror misconduct.

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The Washington State Constitution and the United States Constitution both guarantee to criminal defendants the right to an open and public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009).

The right to a public trial applies to the evidentiary phases of the trial and to other adversary proceedings. *State v. Rivera*, 108 Wn. App. 645, 652-653, 32 P.3d 292 (2001), citing *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997). "Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire." *Rivera*, 108 Wn. App. at 653, citing *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

In the instant case, after the jury had begun deliberations and had been engaged in deliberations for more than a day, a juror was briefly questioned after hours, in chambers and off the record, in regard to a report from the bailiff that the juror had committed misconduct by looking up words in a dictionary. RP-II 1021-1022.

If the contact with the juror was an adversarial hearing or a hearing that was equivalent to voir dire, then public trial rights would be offended on the facts of the instant case. *State v. Sadler*, 147 Wn. App. 97114, 193

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P.3d 1108 (2008); *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001). If, however, questioning of the juror was a ministerial matter or was a mere inquiry to determine legal issues that did not involve disputed facts, then the in-chambers questioning of the juror would not offend the right to a public trial. *Rivera* at 653.

Arguably, the questioning of the juror in the instant case did involve disputed facts, because it cannot be claimed that the facts were not in dispute, primarily because the facts were unknown. Thus, the reason for the court to question to the juror was to determine whether there was, in fact, an issue of juror misconduct. RP-II 1021-1024. Once it was discovered that there was at least an issue of juror misconduct, the in-chambers inquiry of the juror was summarized for the record and the juror was brought into the courtroom with all parties present to question the juror again, but to then question the juror on the record in open court. PR-II 1021-1024. The in-chambers questioning of the jury did not require the resolution of disputed facts, but instead required only the discovery of unknown facts; thus, the in-chambers questioning should not be deemed to have violated Halverson's public trial rights. *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001).

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Because the juror was suspected of misconduct, it can fairly be argued that the in-chambers questioning of the juror, however brief and however carefully it was done, was nonetheless done to determine the fitness of the juror to serve on the jury. As such, the in-chambers questioning would appear to offend Halverson's right to a public trial. *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). However, the present case is distinguishable because the issue in *Irby* involved the voir dire of the jury prior to the selection of the jury that would hear the case, whereas the instant case involves the examination of a juror for misconduct while the jury is involved in deliberations.

An *in camera* review of a juror to inquire of juror misconduct while deliberations are in progress is not exceptional. See, e.g., *United States v. Wheaton*, 426 F. Supp. 2d 666, 668 (N.D. Ohio 2006) aff'd, 517 F.3d 350 (6th Cir. 2008). Arguably, such a hearing is required. *Id.* at 670. "Courts routinely employ the use of *in camera* juror interviews as a means of determining whether extraneous information, not presented in open court, came to the attention of the jury and affected the final verdict." *U.S. v. Posner*, 644 F.Supp. 885, 887 -888 (S.D.Fla.,1986), citing *United States v. O'Keefe,* 586 F.Supp. 998 (E.D.La.1983) (investigating juror misconduct through the use of *in camera* questioning of all jurors with

counsel present, and sealing the transcript of the hearing so as to make it a part of the record).

> Similarly, in *U.S. v. Edwards*, 823 F.2d 111 (5th Cir.1987), the Fifth Circuit held that "no presumption of openness attaches to proceedings involving the midtrial questioning of jurors" regarding their alleged misconduct, *see id.,* 823 F.2d at 117, but nonetheless discerned "a limited right of access" to these closed proceedings that "raise[d] a presumption that the transcript of such proceedings [would] be released within a reasonable time." *Id.* at 118.

Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona, 156 F.3d 940, 947 (C.A.9 (Ariz.),1998).

In the instant case, the questioning of the juror was carefully limited to a mere inquiry of whether the juror had, as reported, looked up words in a dictionary. RP-II 1021-1022. There was no cross examination or interrogation of the juror, but instead, merely a simple inquiry. RP-II 1021-1022. As such, the in-chambers question was a mere ministerial matter to determine whether further action was needed, and by conducting the mid-deliberation inquiry in chambers, the trial court protected and preserved the deliberation process. The in-chambers questioning of the juror was then summarized for the record, and the entire process was then repeated for the open court on the record. RP-II 1021-1026.

The State asserts that on these facts Halverson's right a public trial was not violated.

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4. The trial court did not make required findings before imposing mental health treatment as a condition of community custody.

RCW 9.94B.080 provides that:

> [T]he court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

In the instant case, Halverson was evaluated at Western State Hospital, and as a result a report was issued that described Halverson as having a "major mental illness" that put him and the community at extreme risk of future dangerousness and criminal behavior. CP 219.

However, no citation to the record was located where the court made an explicit finding "that reasonable grounds exist to believe that [Halverson] is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." RCW 9.94B.080. The court may order mental health treatment only if it makes a finding that

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Halverson suffers from a mental illness and the illness contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 202, 76 P.3d 258 (2003).

Arguably, the court's findings are implicit in the court's consideration of the Western State Hospital reports and the court's sentencing order requiring mental health treatment, but there are no express findings that are located in the record on review. As such, the State must concede that the record is insufficient to support the community custody condition of mental health treatment.

The State requests that the matter be returned to the sentencing court where the sentencing court can make the appropriate findings.

5. Halverson's objection to the court's finding that he has the current or future ability to pay costs is premature because he has not yet shown that the finding is in error.

A trial court may order a convicted defendant to pay costs related to the conviction. RCW 10.01.160(2). The trial court's order that a convicted defendant pay costs related to conviction must and the court's determination that the defendant has the ability to pay the costs is reviewed for an abuse of discretion. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991).

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The sentencing court does not need to enter formal, specific findings regarding a defendant's ability to pay court costs. *State v. Curry,* 118 Wn.2d 911, 916, 829 P.2d 166 (1992). "[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." *Baldwin,* 63 Wn. App. at 310.

In the instant case, while no discussion of Halverson's ability to pay was located in the verbatim report, there is a finding by the court that Halverson "had the ability or the likely future ability to pay the legal financial obligations imposed...." CP 9. The facts considered by the court in making this finding are not clearly identified for the record.

Nevertheless, as stated above, "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." *Baldwin,* 63 Wn. App. at 310. Thus, the State asserts that Halverson's dispute about costs is not ripe for review.

E. CONCLUSION

Halvorson's first trial resulted in convictions on the charges of unlawful possession of a firearm, but resulted in a mistrial due to a hung jury on the remaining charges of attempted murder in the first degree and assault in the first degree.

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A part of the audio recording of the first trial, including closing argument, was not preserved at the first trial due to malfunctioning audio recording equipment. However, Halverson was not prejudiced by the missing closing argument because a mistrial was declared on the attempted murder and assault charges, and when he testified Halverson admitted the charges for which he was convicted. Also, Halverson has identified no error arising out of the closing argument, and it is the appellant's burden to provide a record to support his assignment of error.

The prosecutor did not misrepresent the burden of proof or the meaning of reasonable doubt in the closing argument of the second trial. The prosecutor merely pointed out, in response to Halverson's arguments that someone else other than him committed the charged crimes, that based upon the evidence presented at trial, as distinguished from argument, there was no reason to doubt that anyone other than Halverson committed the crimes.

The trial court did not err when during deliberations it briefly questioned a juror *in camera* in regard to a report of juror misconduct. The open public trial right was not offended or violated because the question was mid-deliberation and was not an adversarial proceeding related to the trial.

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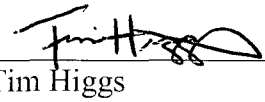
The trial court's order that Halverson participate in mental health treatment as a condition of community custody is unsupported by an express finding in the record that Halverson suffers from a mental illness that contributed to his crime. Therefore, if the court invalidates the condition, the State requests that the matter be returned to the trial court for the appropriate findings.

Halverson's objection to the payment of costs based upon his ability to pay is premature because there is no record that the State has imposed or required a payment that is currently in excess of his ability to pay.

DATED: September 12, 2012.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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

STATE OF WASHINGTON, Respondent, vs. DANIAL HALVERSON, Appellant,	)	No. 42761-3-II DECLARATION OF FILING/MAILING PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 17 AM 9:13
STATE OF WASHINGTON
BY _____ DEPUTY

I, TIM HIGGS, declare and state as follows:

On September 14, 2012, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT (Amended), to:

Thomas E. Doyle
Attorney for Appellant
PO Box 510
Hansville, WA 98340

I, TIM HIGGS, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 14th day of September 14, 2012, at Shelton, Washington.

Tim Higgs (25919)

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