No. 44203-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY EDWARD CHENAULT,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in excluding evidence of the alleged victim's mental health disorder, where the evidence was relevant to help explain her behavior on the day of the incident and to support Mr. Chenault's defense that he reasonably believed she was capable of consenting to sexual intercourse.

2. The trial court's decision to exclude evidence of the complainant's mental health disorder violated Mr. Chenault's state and federal constitutional right to confront his accuser.

3. The trial court's decision to exclude evidence of the complainant's mental health disorder violated Mr. Chenault's state and federal constitutional right to defend against the charge.

4. Juror misconduct in considering extrinsic evidence about the role of a jury foreman, located by Juror 12 in an internet search during trial, required that the trial court grant Mr. Chenault's motion for a new trial.

5. Prosecutorial misconduct in referring to facts not in evidence during closing argument prejudiced Mr. Chenault.

6. Numerous trial court errors cumulatively denied Mr. Chenault a fair trial.

7. The trial court's finding that Mr. Chenault had the ability to pay the ordered financial obligations is not supported by the record. Judgment and Sentence Finding of Fact 2.5.

8. The trial court erred in ordering Mr. Chenault to pay discretionary legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Expert testimony established that the complaining witness's behavior on the day of the incident could not be fully explained by her ingestion of drugs or alcohol and could instead have been due to a mental health disorder. Did the trial court violate Mr. Chenault's constitutional rights to present a defense and confront his accuser by excluding evidence of her mental health disorder?

2. Juror 12 violated the trial court's warning to the jurors not to do any research on the internet or elsewhere during Mr. Chenault's trial. In denying Mr. Chenault's motion for new trial, did the trial court abuse its discretion when it failed to apply the correct standard, where the court found clear juror misconduct occurred, but did not require the State to overcome the resulting presumption of prejudice and prove beyond a reasonable doubt there was no reasonable ground to believe that the extrinsic evidence might affect the verdict?

3. Did the prosecutor commit prejudicial misconduct by referring to facts not in evidence during closing argument?

4. Did numerous trial errors cumulatively deny Mr. Chenault a fair trial?

5. The trial court did not inquire as to Mr. Chenault's financial condition or his present or future ability to pay legal financial obligations but entered a written finding that Mr. Chenault had the present or future ability to pay them. Must the court's factual finding be stricken in the absence of any supporting evidence in the record?

C. STATEMENT OF THE CASE

On July 23, 2010, at around 7 p.m., 21-year-old Timothy Chenault walked to a wooded area near his home in Vancouver. RP 1149, 1158. There, he encountered 17-year-old J.D. and her friend Damien. RP 1158. They invited him to hang out with them. RP 1158. Mr. Chenault had never met J.D. before. RP 1171.

When Mr. Chenault first arrived, J.D. was standing next to Damien and talking to him; she seemed to be flirting with him. RP 1159-60. She was speaking coherently. RP 1160. Mr. Chenault sat in a chair and drank some beer. RP 1161. J.D. came over and sat in his lap and asked him his name. RP 1161. She took the beer out of his

hand, shook it and said, "There's nothing in this." RP 1161. Then she threw the beer away, got up from his lap, walked back over to Damien and started talking to him again. RP 1161. She appeared tipsy but was not stumbling and was apparently able to walk and talk normally. RP 1161, 1186.

Damien left the area to buy some energy drinks at a nearby store. RP 1165. After he left, J.D. came back over and sat on Mr. Chenault's lap again. RP 1163. Mr. Chenault had opened another beer and she accidentally kicked it over. RP 1163. J.D. apologized and started kissing him. RP 1164. Mr. Chenault got an erection and J.D. rubbed her rear end against it and whispered sexual things in his ear. RP 1164, 1167. She said, "I want you inside me" and put his hand down her pants. RP 1166-68. She led him to the ground and he opened his pants. RP 1165. She then stood over him, opened her pants and took one leg out of her pants. RP 1165. She got on top of him and put his penis in her vagina. RP 1169. He climaxed. RP 1169. J.D. continued what she was doing until they both heard Damien returning to the area. RP 1170. J.D. jumped up and they both put their clothes back on. RP 1170. Soon after, Mr. Chenault left the scene but J.D. and Damien remained. RP 1174.

Mr. Chenault never thought J.D. was unable to consent to sexual intercourse. RP 1179. Although she appeared to be under the influence of alcohol or drugs, she was still able to function normally. RP 1178. Her words and actions led him to believe she was freely consenting to sex. RP 1184.

J.D., who still lived with her parents, had left the house that day at around 2 p.m. RP 714, 1362. She met up with her friend Cameron, who was with Damien, whom she did not know. RP 715. They decided to drink alcohol and found someone who was willing to buy it for them. RP 717-19. J.D. called her mother and told her she was hanging out with friends and would be home in about an hour. RP 721. She and Cameron and Damien then walked to the wooded area nearby and drank the alcohol. RP 722. J.D. drank almost all of a 40-ounce bottle of "Steel Reserve," which is a malt liquor that contains 8.1% alcohol. RP 719, 723, 1304. She immediately threw up and within 15 to 20 minutes she was asleep. RP 1355. From that time until around 6:15, when Cameron left the scene, J.D. alternated between sleep and wakefulness. RP 1376.

When J.D.'s mother had not heard from her by 9:30, she called police. RP 479. Vancouver Police Detective Dustin Nicholson called

J.D.'s cell phone. RP 480. J.D. answered in a normal voice but once he identified himself as a police officer, she became hysterical. RP 491. J.D. was taken by ambulance to the hospital. RP 465. A sexual assault examination was performed. RP 466. J.D. told the nurse she had pain in her "private parts" but could not recall whether she was sexually assaulted. RP 594. She had minor cuts and bruises on her hip, ankle, knees, arm, and the back of her neck. RP 500. She had no injuries to her sexual organs. RP 596-97. Once the exam was concluded, J.D. was taken to the psychiatric ward of a different hospital because she was distraught and suicidal. RP 741.

A test was performed of J.D.'s urine but no blood test was performed. RP 600, 629. J.D.'s urine was negative for ethanol. RP 631. It was positive for trace amounts of Zopiclone, which is a sleep aid, and Oxazepam, which is an anti-anxiety medication. RP 644-45. But the forensic scientist could not say when those substances were ingested. RP 646-47. Only the inactive parts of the drugs were present in the urine. RP 1308. In other words, there was no correlation between the inactive breakdown products present in J.D.'s urine and

the amount of active drug in her blood or her level of intoxication at the time the urine sample was produced.[1] RP 1309.

By August 11, 2010, J.D. began to have memories of events that had happened that day. RP 785. She gave police Cameron and Damien's names. RP 743. She and Cameron identified Mr. Chenault in a photo lineup. RP 1073-74.

Mr. Chenault was charged with one count of second degree rape, alleging he had sexual intercourse with J.D. when she "was incapable of consent by reason of being physically helpless or mentally incapacitated," RCW 9A.44.050(1)(b). CP 5.

Prior to trial, defense counsel moved to admit evidence of J.D.'s history of mental health problems. Sub 90A; Sub 90B; RP 110-12, 123, 290. He renewed the motion several times, without success, during trial. RP 439, 445-46, 697-98, 701, 711, 748, 1000-06. J.D. had a history of mental health problems, including self-mutilation and multiple suicide attempts. Sub 90B at 2-3. She had undergone periods of inpatient psychiatric treatment both before and after the present incident. Sub 90A at 2. She had been diagnosed with depression and

[1] J.D. testified she had been prescribed Lunesta, a sleep aid, and Porazin, an anti-anxiety medication, in the past but was not taking either one at the time of the incident. RP 928-30.

anxiety and had been prescribed medications to treat those conditions. Sub 90A at 2.

Counsel presented the report of Megan McNeal, Psy.D., a clinical and forensic psychologist. Sub 90B. Dr. McNeal had reviewed the toxicology results and other discovery in the case. She concluded that J.D.'s behavior, including her reported inability to move during the sexual assaults but her ability to move, talk and engage in flirtatious behavior at other times during the relevant time period, as well as her ability to remember some of the events, could not be explained by the presence of drugs or alcohol in her system. Dr. McNeal opined that "[J.D.]'s behavior on the day of the alleged offense was likely influenced by mental health problems." Sub 90B at 2-3. Counsel argued the evidence was relevant and admissible because it showed J.D.'s behavior that day was probably the result of her mental health disorder and had nothing to do with whether she had the ability to consent to sexual intercourse. RP 123.

The court repeatedly denied counsel's motions to admit evidence of J.D.'s mental health problems. The court reviewed J.D.'s inpatient medical records *in camera* and acknowledged they plainly showed she had mental health issues before and after the incident and

received treatment for them. RP 295. Nonetheless, the court ruled the evidence was inadmissible because J.D.'s mental health condition was not relevant to her ability to consent. RP 57, 127, 296, 439, 445-46, 699-700, 748. The court reasoned that whether or not J.D. was incapacitated due to her mental health condition, as opposed to alcohol or drugs, was not relevant in the case. RP 1006-10.

J.D. testified she drank most of the 40-ounce bottle of Steel Reserve that day. RP 723. After she finished drinking it, she blacked out and the next thing she remembered was that Cameron was on top of her having sex with her. RP 727. He had pulled down her pants and underwear. RP 727. She was not capable of telling him she did not want to engage in sexual intercourse. RP 728. When he was finished, Cameron left the area. RP 728.

J.D. testified the next thing she remembered was that Mr. Chenault had showed up on the scene and was talking to Damien. RP 729. He sat on the chair and pulled her onto his lap. RP 730. She blacked out again and awoke to find that she was on the ground with her pants down and Mr. Chenault having sex with her. RP 730. Again, she did not feel capable of participating in sex. RP 730. The next thing she remembered, she was sitting in the chair and talking to Damien.

RP 731. He walked her to his house, where he gave her water and food, and then he walked her to a nearby elementary school. RP 733. He laid a blanket on the ground and she sat on it. RP 733. Then Damien had sex with her.[2] RP 734. She did not know what she was doing and was still intoxicated. RP 734. J.D. blacked out again and awoke to Detective Nicholson's call on her cell phone. RP 734.

J.D. testified that at times during the day, she could not move and her body felt like lead. RP 765. During those periods, she was physically incapable of movement but still conscious; "the lights were on but no one was home." RP 766.

Russell Barnes testified he is a homeless man who happened to be at the wooded area on the day of the incident. RP 937. He saw Mr. Chenault sitting on the chair and a young redhead bouncing on his lap "like a rag doll." RP 937. When Mr. Chenault saw him, he pushed the girl off his lap and she landed on her face in the dirt and did not move or make a sound for a couple minutes. RP 938. Mr. Barnes left the area to go to the store for a beer and when he returned, he saw Mr. Chenault on top of the girl in the chair, pulling up his shorts. RP 938. The girl was lolling on the chair and trying to talk but she was

[2] Both Cameron and Damien pled guilty to third degree rape as a result of this incident. RP 752, 1357-58.

incoherent and he could not understand her. RP 939. Mr. Barnes did not see the girl with her pants off and did not see any sexual activity. RP 972.

Robert Julien testified he has an M.D. and a PhD and is an expert in psychopharmacology and anesthesiology. RP 1289-91. He reviewed the medical and toxicology reports in the case. RP 1294. He said no drug would cause a person to be unable to move while still conscious and able to form new memories. RP 1297. He said a person drinking alcohol will not suffer a "blackout" unless the person's blood alcohol concentration (BAC) is at least .25. RP 1298, 1303. A person who suffers an alcohol-induced "blackout" is unable to form new memories. RP 1298. Dr. Julien estimated that J.D.'s BAC at the time she allegedly had sex with Mr. Chenault was around .08. RP 1331. Her maximum BAC, soon after ingesting the Steel Reserve, would have been around .17. RP 1306. Thus, J.D.'s BAC was never high enough for her to "black out." RP 1313-14. Moreover, because she remembered portions of the incident, she had not blacked out. RP 1302. Therefore, J.D.'s behavior could not be explained by the ingestion of drugs or alcohol. RP 1300, 1313-14. Instead, her behavior must be due to a psychiatric or other condition. RP 1300.

The jury was instructed on Mr. Chenault's defense that at the time he had sexual intercourse with J.D. he "reasonably believed that [she] was not mentally incapacitated or physically helpless."[3] CP 60.

The jury found Mr. Chenault guilty of second degree rape as charged. CP 63.

Additional facts are set forth in the relevant argument sections below.

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[3] The instruction stated:

> It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [J.D.] was not mentally incapacitated or physically helpless.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 60.

D. ARGUMENT

1. **Mr. Chenault's constitutional rights to present a defense and confront his accuser were violated when the trial court excluded evidence of the complaining witness's mental health disorder, which could have explained her behavior on the day of the incident and undermined the State's claim that she was too intoxicated to consent to sexual activity**

A criminal defendant's right to confront the witnesses against him is guaranteed by both the United States[4] and the Washington Constitutions.[5] In addition, the right to confront witnesses has long been recognized as essential to due process.[6] Chambers v. Mississippi, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294; U.S. Const. amend. XIV; Const. art. I, § 3. A defendant's right to an opportunity to be heard in his defense includes the rights to examine witnesses against him and to

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[4] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

[5] Article 1, section 22 of the Washington Constitution guarantees that "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

offer testimony and is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers, 410 U.S. at 294); Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

These rights are not absolute. Jones, 168 Wn.2d at 720. Evidence that a defendant seeks to admit "must be of at least minimal relevance." Id. (citing State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). But if the evidence is relevant, the evidence may be excluded only if the State shows the evidence is so prejudicial that it will disrupt the fairness of the fact-finding process at trial. Jones, 168 Wn.2d at 720 (citing Darden, 145 Wn.2d at 622). The State's interest in excluding prejudicial evidence must be balanced against the defendant's need for the evidence; relevant evidence can be withheld only if the State's interest outweighs the defendant's need. Jones, 168 Wn.2d at 720. For evidence of high probative value, "'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.'" Id. (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

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[6] The Fourteenth Amendment provides no state shall "deprive any person of life, liberty, or property, without due process of law."

In Jones, a prosecution for second degree rape, the trial court excluded evidence that, on the night of the incident, the victim used alcohol and cocaine and engaged in consensual sex not only with Jones but with two other men. Jones, 168 Wn.2d at 717. In reversing the conviction, the Washington Supreme Court acknowledged that Jones's version of the events was "not airtight," as he did not call any of the other members of the alleged sex party as witnesses, the victim's testimony directly contradicted Jones's, and only Jones's semen was found on the victim. Id. at 724. Nonetheless, the court concluded that, because exclusion of the evidence precluded Jones from presenting his version of the events, the error was not harmless beyond a reasonable doubt. Id.

Here, evidence of J.D.'s mental health problems was relevant to Mr. Chenault's defense—and was therefore admissible at trial—because the evidence was material to the two principal issues in the case: (1) whether J.D. had the capacity to consent to sexual intercourse and (2) whether Mr. Chenault reasonably believed she was not mentally incapacitated or physically helpless.

To prove the charged crime of second degree rape, the State was required to prove beyond a reasonable doubt that Mr. Chenault engaged

in sexual intercourse with J.D. when she was "incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b); CP 56 (jury instruction). "Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." CP 54. The jury was further instructed:

> Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.
>
> A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

CP 55; RCW 9A.44.010(4), (5).

The State's theory was that J.D. was mentally incapacitated, and therefore incapable of consenting to sexual intercourse, because she was highly intoxicated as a result of consuming almost 40 ounces of the malt liquor "Steel Reserve." Sub 27; RP 194, 661-72, 723-40, 900-07, 1372-76, 1433-40. But expert testimony undermined the State's theory that J.D.'s behavior was caused by her consumption of alcohol. Dr. Julien testified that, at its highest, J.D.'s BAC would have been only .17, well below the level required to cause a "blackout." RP 1306. By

the time she encountered Mr. Chenault, hours after she consumed the malt liquor, her BAC would have been only about .08. RP 1331. Even the State's expert, Sarah Swenson, agreed J.D.'s maximum BAC would have been only about .165. RP 670. There was no ethanol present in J.D.'s urine at the time she produced a sample at the hospital shortly after the incident. RP 631. Only trace, inactive, amounts of Zoplicone and Oxazepam were found in her urine, which would have had no effect on her behavior at that time. RP 644-45, 1307-08. There was no evidence that J.D. ingested those drugs near the time of the incident. RP 928-30.

Dr. Julien further testified that J.D.'s reported behavior of being unable to move while still being conscious and able to form new memories, and her intermittent loss of consciousness, could not be caused by the ingestion of any substance. RP 1297-98. Dr. McNeal further opined that J.D.'s behavior was likely caused by her mental health problems and not by the ingestion of alcohol. Sub 90B. Yet Mr. Chenault was not permitted to present evidence about the nature of J.D.'s mental health issues or how they could have influenced her behavior and mental capacity.

In maintaining its decision to exclude evidence of J.D.'s mental health problems, the trial court reasoned that whether J.D. was incapacitated due to intoxication or mental illness was not relevant. RP 1006. This Court should reject that reasoning. To prove the crime of second degree rape as charged in this case, the State was required to prove beyond a reasonable doubt that J.D. was unable to consent "by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b); CP 56. To prove mental incapacity, the State was required to prove J.D. suffered from a condition that prevented her "from understanding the nature or consequences of the act of sexual intercourse." CP 55; RCW 9A.44.010(4). A jury may find an individual is "mentally incapacitated" for purposes of the statute if it finds she "was incapable of appraising the nature of 'sexual intercourse' specifically." State v. Ortega-Martinez, 124 Wn.2d 702, 710, 881 P.2d 231 (1994). "A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse." Id. at 711.

The nature of the alleged victim's "condition" that supposedly caused the "mental incapacity" is relevant to the determination of whether the condition in fact resulted in a lack of capacity to meaningfully understand the nature or consequences of sexual intercourse. Given the equivocal evidence of J.D.'s level of intoxication and whether it led to an incapacity to consent, Mr. Chenault should have been permitted to present evidence to the jury regarding the nature of her mental health condition and whether it was sufficient to affect her ability to consent. If J.D.'s behavior was caused principally by her mental health disorder, but that disorder was not sufficient to affect her ability to consent, the evidence was highly probative.

Likewise, J.D.'s mental health condition was relevant to Mr. Chenault's defense that he reasonably believed she had the capacity to consent. To establish the defense, Mr. Chenault was required to show by a preponderance of the evidence that he "reasonably believed that [J.D.] was not mentally incapacitated or physically helpless." CP 60; RCW 9A.44.030(1). Again, the experts opined that J.D.'s behavior could not be fully explained by alcohol intoxication. RP 1297-98; Sub 90B. Therefore, it is reasonable to conclude that J.D. did not appear to

be mentally incapacitated due to intoxication. Whether or not she was suffering from some other "condition" is relevant to the determination of whether she reasonably *appeared to be* incapacitated.

In sum, evidence of J.D.'s mental health condition was relevant to help explain her behavior and whether she was actually mentally incompetent or appeared to be mentally incompetent. Because the evidence was relevant to Mr. Chenault's defense and was not so prejudicial that it would disrupt the fairness of the fact-finding process at trial, exclusion of the evidence was error. Jones, 168 Wn.2d at 720.

As an error of constitutional magnitude, the trial court's decision to exclude evidence of J.D.'s mental health disorder is harmless only if the State proves it is harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State cannot meet that burden. The principal issues in the case were whether J.D. was actually mentally incapacitated and whether she reasonably appeared to be mentally incapacitated. The evidence supporting the State's theory that she was mentally incapacitated due to alcohol intoxication was equivocal. Evidence of J.D.'s mental health disorder would have helped to explain her behavior and could have undermined the State's theory that she was

not capable of understanding the nature or consequences of sexual intercourse. Exclusion of the evidence was not harmless error and requires reversal of the conviction.

2. The trial court abused its discretion in denying the motion for new trial, and in refusing to replace juror number 12, based on the juror's plain misconduct

During trial, Juror 12 approached the clerk/bailiff and told her that he had conducted research about the role of a jury foreman on the internet, contrary to the trial court's instructions that the jury not conduct any outside research. RP 1125. The juror showed the clerk/bailiff a web page he had printed out about the responsibilities of the jury foreman. Sub 116. The juror asked whether the jury would be receiving instructions, as indicated on the web page, about how to conduct jury deliberations. RP 1125. The clerk/bailiff informed the juror he was not supposed to conduct such outside research and told the court about the juror's misconduct. RP 1125-26. The court discussed the matter with the attorneys. RP 1125-34.

Defense counsel moved for a mistrial, as this was a direct violation of the court's repeated admonishments to the jury not to conduct outside research. RP 1127. In the alternative, counsel

requested that the juror be replaced with the alternate juror. RP 1127-28.

The court engaged in a colloquy with the juror. RP 1129. The juror said he had not looked up anything else on the internet directly or indirectly about the trial. RP 1130. He researched the role of a jury foreman because he had never been on a jury before and did not know what the foreman's duty was. RP 1130. The court instructed him not to conduct any additional research and not to share the information he had learned with the other jurors. RP 1131.

The court acknowledged the juror had disregarded the court's instructions. RP 1133. But the court denied the motion for mistrial, finding the juror's misconduct was "harmless." RP 1134. The court also refused to replace juror 12 with the alternate. RP 1413.

A trial court's decision denying a new trial motion based on jury misconduct is reviewed on appeal under the abuse of discretion standard. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). An abuse of discretion occurs when the court reaches its conclusion on untenable grounds. Pete, 152 Wn.2d at 552. Additionally, a trial court abuses its discretion by applying an incorrect legal analysis, or committing other

error of law. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); see, e.g., State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (trial court abuses its discretion when it applies the wrong legal standard).

A criminal defendant's right to trial by an impartial jury is guaranteed the by the federal and state constitutions. U.S. Const. amend. VI;[7] Wash. Const. art I, §§ 21, 22.[8] In addition, a criminal defendant's right to due process also guarantees the right to a fundamentally fair jury trial. U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 22; Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (the right to due process encompasses the right to a jury capable and willing to decide the case solely on the evidence before it).

Where, as here, a juror considers extrinsic evidence during the deliberation process, the juror commits misconduct and the defendant's

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[7] The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (Sixth Amendment right to jury trial is incorporated to the states by the Fourteenth Amendment).

[8] Article I, section 21 of the Washington Constitution provides, "The right of trial by jury shall remain inviolate[.]" Article I, section 22 provides, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]"

constitutional right to trial by a fair and impartial jury is compromised. Pete, 152 Wn.2d at 552. Extrinsic evidence is "information that is outside all the evidence admitted at trial." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990).

Such information should not have been interjected into Mr. Chenault's trial because it was not subject to objection and argument by Mr. Chenault's counsel. Pete, 152 Wn.2d at 553; Marshall v. United States, 360 U.S. 310, 312-13, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959).

It is not required that multiple jurors be exposed to the extrinsic evidence before the constitutional protections at issue are infringed. Parker v. Gladden, 385 U.S. 363, 366, 87 S. Ct. 468, 471, 17 L. Ed. 2d 420 (1966) (A defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.").[9]

A trial court abuses its discretion when it applies an incorrect legal standard. Tobin, 161 Wn.2d at 523. The long-standing rule is

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[9] To the same effect are Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.1998) ("The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer's right to a fair trial"); Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) ("If only one juror was unduly biased or improperly influenced, Dickson was deprived of his Sixth Amendment right to an impartial panel"); United States v. Gonzalez, 214 F.3d 1109 (9th Cir.2000); Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir.1990) (even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury).

that consideration of any material by a jury not properly admitted as evidence vitiates a verdict

> when there is a reasonable ground to believe
> that the defendant may have been prejudiced.

Pete, 152 Wn.2d at 555 n. 4 (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967); see also State v. Burke, 124 Wash. 632, 215 P. 31 (1923). Crucially, it is the State's burden to prove, beyond a reasonable doubt, that there is no reasonable ground to believe the verdict was affected. State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989). Under that standard, once misconduct is established (as here), and there is a reasonable doubt as to its effect, the doubt must be resolved against the verdict. State v. Cummings, 31 Wn. App. 427, 430, 642 P.2d 415 (1982); Briggs, 55 Wn. App. at 55-56 (any reasonable doubt must be resolved against the verdict).

In addition, a trial judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. CrR 6.5 enables the court to seat alternate jurors when the jury is selected. Further, CrR 6.5 states that: "If at any time before

submission of the case to the jury a juror is found unable to perform the duties *the court shall order the juror discharged,* and the clerk shall draw the name of an alternate who shall take the juror's place on the jury." (emphasis added). Together, RCW 2.36 .110 and CrR 6.5 "place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). A trial court has discretion to excuse a juror and replace him with an alternate if the record establishes that the juror engaged in misconduct. Id. at 229.

Here, juror number 12 unequivocally engaged in misconduct. The juror ignored the court's repeated instructions not to engage in outside research. The State cannot prove beyond a reasonable doubt that the juror's consideration of extrinsic evidence, and his demonstrated inability to follow the court's instructions, did not affect the verdict. The conviction must be reversed.

3. The prosecutor engaged in prejudicial misconduct by referring to facts not in evidence during closing argument, over defense objection.

In closing argument, the deputy prosecutor referred to facts not in evidence and misstated the testimony when she asserted that Cameron had testified he saw a "black man" walk through the area that

day, "drinking the exact beer the Defendant said he was drinking on the stand." RP 1440. The prosecutor stated

> I would like you to note that. He said he saw him, he had an Earthquake beer in his hand, which is exactly what the Defendant said he had. And he said that he, he walked over to [J.D.], who was passed out on this chair, and put it up to her mouth and tried to give it to her, even though this girl was basically unresponsive, and he [Cameron] said, "Hey, dude, get out of here."

RP 1440.

Defense counsel objected that the prosecutor referred to facts not in evidence when she stated that Mr. Chenault gave J.D. alcohol and when she stated that Mr. Chenault testified he was drinking "Earthquake" beer. RP 1463-65, 1470. In fact, although Mr. Chenault testified he was drinking beer, he never mentioned the brand of beer. See RP 1157-1274. Counsel argued the prosecutor committed blatant misconduct by suggesting Mr. Chenault gave J.D. beer because the State never alleged Mr. Chenault provided J.D. with any kind of intoxicating substance. RP 1471. Counsel moved for a mistrial, which the court denied. RP 1471-72.

Although a prosecutor has wide latitude to argue inferences from the evidence, a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.

State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). This rule is closely related to the rule against pure appeals to passion and prejudice because appeals to the jury's passion and prejudice are often based on matters outside the record. Id.

To establish reversible prosecutorial misconduct, the defendant first bears the burden to establish that a prosecutor's conduct was improper. State v. Emery, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012). The defendant must then show that the improper comments resulted in prejudice that had a substantial likelihood of affecting the verdict. Id.

The Court reviews a prosecutor's purportedly improper remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Where defense counsel objected to a prosecutor's remarks at trial, the Court reviews the trial court's rulings for abuse of discretion. Id. at 809.

Here, the prosecutor's remarks were plainly improper. Contrary to the prosecutor's assertions, Mr. Chenault never testified he was drinking "Earthquake" beer. Much more troubling, however, was the prosecutor's statement that Mr. Chenault tried to provide J.D. with

alcohol. From the beginning of the police investigation until the end of trial, the State repeatedly assured the defense that it was not alleging that Mr. Chenault ever supplied any intoxicating substance to J.D. See RP 313-14, 210, 265, 355. The prosecutor's suggestion that Mr. Chenault indeed provided J.D. with alcohol not only improperly injected facts not in evidence, it suggested to the jury that J.D. might have ingested more than the nearly 40 ounces of "Steel Reserve" that the other witnesses, and J.D. herself, testified about. As stated, the experts opined that, if J.D. had drunk only most of the contents of a 40-ounce bottle of Steel Reserve, her BAC would have been, at most, .17. RP 670, 1306. By the time she encountered Mr. Chenault, her BAC was probably around .08. RP 1331. Her behavior could not be explained by alcohol intoxication alone. RP 1297-98; Sub 90B.

By suggesting Mr. Chenault provided J.D. with *additional* alcohol, the prosecutor in effect tried to fill a hole in the State's case without having to present the evidence to prove it. The prosecutor's comments improperly suggested to the jury that, contrary to the expert testimony, J.D. was incapable of consenting due to the ingestion of alcohol alone, and that her level of intoxication was directly due to Mr. Chenault's actions. This argument was based on facts not in evidence

and was therefore improper. It was unfairly prejudicial and likely affected the outcome of the case. For these reasons, and in light of defense counsel's objection, the misconduct requires reversal of the conviction. Emery, 174 Wn.2d 741, 759-61

4. **The cumulative effect of several trial errors deprived Mr. Chenault of a fair trial.**

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of the testimony of the

defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

Here, even if the above several trial errors do not individually require reversal, when combined, they cumulatively denied Mr. Chenault a fair trial and reversal is therefore warranted.

5. The record does not support the court's finding that Mr. Chenault had the ability to pay court costs

Without inquiring into Mr. Chenault's present or future ability to pay court costs, or his actual financial condition, the court imposed the following discretionary costs, which became part of his judgment and sentence: $450 in court costs; $2,250 for court-appointed counsel; $3,600 trial per diem; and $6,558.50 for court-appointed defense expert. CP 69. The judgment and sentence included the following boilerplate finding:

> The court has considered the total amount owing, the defendant's past, 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.

CP 66. The court's finding, and the imposition of non-mandatory costs, must be stricken because the record does not support the finding that Mr. Chenault had the ability to pay them.

Courts are authorized by statute to order convicted defendants to pay costs. RCW 10.01.160(1). Costs are limited to "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). But a court may not order an offender to pay costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). In determining the amount of costs to impose, "the court shall take account of the financial resources of the defendant and the nature and burden that payment of costs will impose." Id.

It is constitutionally permissible to order a convicted defendant to pay the costs of court-appointed counsel only if: (1) repayment is not mandatory; (2) the defendant has the present or future ability to pay; (3) the financial resources of the defendant are taken into account; and (4) repayment is not ordered if it appears there is no likelihood that the defendant's indigency will end. State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

When ordering discretionary costs, the court need not enter a formal finding that the defendant has the ability to pay. Id. at 916. But if the court *does* enter such a finding, it must be supported by evidence. State v. Calvin, __ Wn. App. __, 302 P.3d 509, 521 (2013).

In Calvin, after the defendant was convicted of third degree assault and resisting arrest, the court imposed a total of $1,300 in mandatory and discretionary costs. 302 P.3d at 521. The court also entered the following boilerplate finding on the judgment and sentence:

> The court has considered the total amount owing, the defendant's past, 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. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Id.

Despite the trial court's finding, the record did not show that Calvin had the present or future ability to pay the costs, or that the court actually took his financial resources or ability to pay into account. Id. at 521-22. The only evidence of past employment was Calvin's testimony at trial that he used to be a carpenter. Id. The only evidence of his financial resources was his testimony that he lived in a mobile home that did not have running water. Id. At sentencing, the court made no inquiry into Calvin's resources or employability. Id. Thus, the record did not support the court's finding that Calvin had the ability to pay, or that the court took his financial resources into account. Id. at

522. The Court of Appeals therefore remanded for the trial court to strike the finding and the imposition of court costs. Id.

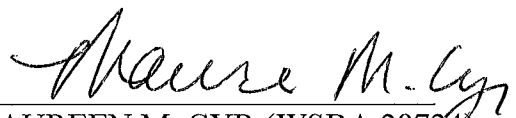
Calvin requires this Court impose the same remedy in Mr. Chenault's case. The trial court made a boilerplate finding that Mr. Chenault had the ability to pay the costs imposed and that the court took his financial resources into account. CP 66. But there is no evidence in the record to support the court's finding. There is no information about Mr. Chenault's financial resources. At sentencing, the court asked no questions about his financial circumstances and made no inquiry into his employability. Therefore, the record does not support the court's finding that Mr. Chenault had the ability to pay, or that the court took his financial resources into account. This Court must remand the case for the trial court to strike the finding and the imposition of court costs. Calvin, 302 P.3d at 522.

E. CONCLUSION

Mr. Chenault's constitutional rights to present a defense and confront the complaining witness were violated when the trial court excluded evidence about her mental health condition that was relevant to Mr. Chenault's defense. In addition, juror 12 committed misconduct by considering information not presented at trial, and the prosecutor

committed prejudicial misconduct by referring to facts not in evidence during closing argument. These errors, individually and in combination, deprived Mr. Chenault of a fair trial and require reversal of his conviction. In the alternative, this Court should strike the requirement that Mr. Chenault pay discretionary costs, because the record does not support the court's finding that he had the ability to pay them or that the court took his financial situation into account.

Respectfully submitted this 26th day of August, 2013.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. TIMOTHY CHENAULT, Appellant.	)))))))))	NO. 44203-5-II

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