No. 46352-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Devennice Gaines,

Appellant.

Pierce County Superior Court Cause No. 12-1-01384-7

The Honorable Judge Thomas Felnagle

Appellant's Reply Brief

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I. THE CONVICTIONS VIOLATED MR. GAINES'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

A. Extrinsic information injected into the jury's deliberations prejudiced Mr. Gaines.

As they were deliberating, jurors heard that Mr. Gaines had two prior strikes,[1] and at least one juror learned that he had a prior manslaughter conviction. RP (4/10/14) 1718-1726, 1734-1771. Subsequent questioning by the judge erroneously implied that Mr. Gaines did indeed have two prior strikes. RP (4/10/14) 1741-1771. The judge did not give a curative instruction, did not tell jurors that the information was incorrect, and did not admonish jurors that they could not consider the extrinsic information for any purpose. RP (4/10/14) 1710-1787.

These errors require reversal. Applying an objective standard and resolving any doubts against the verdict, "there are reasonable grounds to believe [the] defendant has been prejudiced." *State v. Johnson*, 137 Wn. App. 862, 869, 155 P.3d 183 (2007); *see also State v. Pete*, 152 Wn.2d 546, 555 n. 4, 98 P.3d 803 (2004) (referring to the "long standing rule that consideration of [extrinsic information] vitiates a verdict when there is a *reasonable ground to believe that the defendant may have been*

[1] This information was incorrect, and stemmed from an erroneous newspaper article. RP (4/10/14) 1713, 1715.

prejudiced") (emphasis in *Pete*) (internal quotation marks and citations omitted).

Thus Mr. Gaines must be granted a new trial.

1. Respondent fails to address the relevant standard.

The objective standard requires determining "whether the extraneous evidence *could have affected* the jury's determination." *Johnson,* 137 Wn. App. at 870 (emphasis added). It is "not a subjective inquiry into the actual effect of the evidence." *Id.* Respondent erroneously and irrelevantly focuses on the trial judge's subjective inquiry into the actual effect of the misconduct. Brief of Respondent, p. 37, 39-40.

Prejudice is presumed, and the burden is on the state to show harmlessness beyond a reasonable doubt. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). A new trial must be granted "unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" *Id.* (quoting *State v. Briggs,* 55 Wn. App. 44, 53, 776 P.2d 1347 (1989)).

Here, under the objective standard outlined in *Johnson* and *Boling,* the erroneous extrinsic information "could have affected" one or more jurors' verdicts. *Johnson,* 137 Wn. App. at 870. The state has not shown

"beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict." *Boling*, 131 Wn. App. at 333.

Respondent does not address the objective standard. *See* Brief of Respondent, pp. 34-42. This failure can be treated as a concession that application of the correct standard requires reversal. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead of addressing the correct standard, Respondent apparently seeks to divert attention by citing authority wholly unrelated to the introduction of extrinsic information to a deliberating jury.[2] Most egregiously, Respondent suggests that the trial court decision should be affirmed unless "very clearly erroneous." Brief of Respondent, p. 37 (misquoting[3] *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). *Noltie* involved a trial judge's resolution of challenges for cause. *Id.* It does not bear on the injection of extrinsic information into the jury room during deliberations. *Id.*

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[2] The authority cited by Respondent includes, for example, cases relating to freedom of expression and prior restraint of the press (Brief of Respondent, p. 34 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)), pretrial publicity and jury selection (Brief of Respondent, p. 34 (citing *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) and *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)), and a juror's application to work for the prosecutor's office (Brief of Respondent, p. 35 (citing *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)).

[3] In fact, the *Noltie* court quotes the following passage from a trial practice manual: "Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained." *Noltie*, 116 Wn.2d at 839 (quoting 14 L. Orland & K. Tegland, Wash.Prac., *Trial Practice* § 202, at 332 (4th ed. 1986)).

In fact, "[a] court's determination of whether a [defendant] was prejudiced by a jury's consideration of extra-record information is clearly a mixed question of law and fact." *Loliscio v. Goord*, 263 F.3d 178, 187 n. 4 (2d Cir. 2001); *see also Vigil v. Zavaras*, 298 F.3d 935, 941 (10th Cir. 2002). In Washington, the "'process of applying the law to the facts ... is a question of law and is subject to de novo review.'" *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004) (quoting *Tapper v. Employment Sec. Dep't.* 122 Wn.2d 397, 403, 858 P.2d 494 (1993)).

Because it involves a mixed question of law and fact, the issue of prejudice in a juror misconduct case should be reviewed *de novo*, just as it is (for example) with *Brady* questions and ineffective assistance claims. *See State v. Davilla*, No. 90839-7, 2015 WL 5076293, at *11 (Wash. Aug. 27, 2015) (*Brady* claims) *and State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015) (ineffective assistance).[4]

This case involves a straightforward application of *Johnson* and *Boling*. When viewed objectively, the injection of (incorrect) extrinsic

[4] Without deciding the appropriate standard of review, the Supreme Court has found an abuse of discretion where the trial judge refused to grant a new trial based on the jury's receipt of extrinsic evidence. *Pete*, 152 Wn.2d at 555. Likewise, it does not appear that the *Johnson* or *Boling* courts were asked to determine the correct standard of review in juror misconduct cases. Both courts applied an abuse-of-discretion standard to the trial court's decision on a motion for a new trial. *See Johnson*, 137 Wn. App. at 870; *Boling*, 131 Wn. App. at 332.

evidence of Mr. Gaines's two strikes and manslaughter conviction could have affected the verdict. *Johnson*, 137 Wn. App. at 869-870. This is especially true when doubts are resolved against the verdict, as required. *Id.*

The state has failed to show beyond a reasonable doubt that the misconduct could not have affected the verdict. *Boling*, 131 Wn. App. at 333. Mr. Gaines's convictions must be reversed and the case remanded for a new trial. *Id.*

2. Respondent mischaracterizes the record.

Without citation to the record, Respondent claims that the court "took swift remedial action by recalling the jurors to their duty to impartially decide the case based on the evidence admitted at trial." Brief of Respondent, p. 39. This is incorrect.

The judge did not instruct the jurors, individually or collectively, to disregard the extrinsic information. Instead, the record shows that the trial judge *questioned* individual jurors but did not provide instructions. RP (4/10/14) 1713-1787. In addition, some of the court's questions erroneously implied that Mr. Gaines did, in fact, have two prior strikes. RP (4/10/14) 1713-1787.

Furthermore, even if the court *had* instructed jurors to disregard the extrinsic information, this would not necessarily have cured the

prejudice. *See Pete*, 152 Wn.2d at 555 (noting that "[e]ven if the trial court had given the instruction," the error would not have been mitigated.")

The injection of extrinsic information prejudiced Mr. Gaines because it could have affected the verdict. *Johnson*, 137 Wn. App. at 869-870. This violated Mr. Gaines's right to a fair trial by an impartial jury. *Id.* His convictions must be reversed. *Id.*

B. The trial judge erroneously dismissed Juror No. 2 without affording Mr. Gaines the heightened protections required under *Depaz*.

1. Respondent relies on authority unrelated to removal of a juror during deliberations where the judge has information relating to the juror's position.

The judge had information suggesting that Juror No. 2 was leaning toward acquittal during deliberations.[5] The judge excused Juror No. 2 without questioning him and without providing Mr. Gaines an opportunity to object.[6] RP (4/10/14) 1710-1787. Dismissal of Juror No. 2 without questioning violated Mr. Gaines's right to a fair trial by an impartial jury and his right to jury unanimity. *State v. Depaz*, 165 Wn.2d 842, 852-853, 204 P.3d 217 (2009).

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[5] Respondent's speculation that Juror No. 2 may have been playing devil's advocate has no support in the record. Brief of Respondent, p. 44.

[6] The judge questioned and retained all of the other jurors. RP (4/10/14) 1718-1726, 1734-1771.

A judge who knows that a juror favors the defense may not dismiss that juror for misconduct without determining that the juror has been prejudiced in fact. *Id.*, at 857. If "the juror can still deliberate fairly despite the misconduct, the court should not excuse the juror." *Id.* On its own, the juror's "bare misconduct" is insufficient to justify removal. *Id.*, at 858.

Under *Depaz* and like cases, this heightened standard applies after deliberations have begun when the judge has information regarding the juror's position. *Id.* The *Depaz* standard controls in this case.

In its effort to circumvent *Depaz*, Respondent erroneously relies on cases involving removal of jurors prior to the start of deliberations. *See* Brief of Respondent, p. 43-44 (citing *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012) and *State v. Jorden*, 103 Wn. App. 221, 11 P.3d 866 (2000)). Respondent also cites a case in which "no juror misconduct is alleged and the trial court has no knowledge of the juror's opinion about the case." *State v. Hopkins*, 156 Wn. App. 468, 474, 232 P.3d 597 (2010) (cited at Brief of Respondent, p. 43).

These cases have no applicability here. The removal of Juror No. 2 occurred after deliberations commenced and after the judge gained information about the juror's opinion about the case. RP (4/10/14) 1718.

Likewise unpersuasive is Respondent's argument regarding *Depaz*. Mr. Gaines does not suggest that *Depaz* "left the court powerless;" nor does he claim it "extend[ed] an irrevocable license to commit egregious misconduct." Brief of Respondent, p. 44. *Depaz* outlines the appropriate course of action when a trial judge is confronted with misconduct by a juror whose position is known.[7] *Depaz*, 165 Wn.2d at 857-858.

The judge here dismissed Juror No. 2 without questioning and without determining whether or not he could fairly continue to deliberate. Under the circumstances, this violated *Depaz*.

Given its refusal to declare a mistrial, the court should have questioned Juror No. 2, just as it did with the other eleven jurors. RP (4/10/14) 1718-1726, 1734-1771. By removing Juror No. 2 on a showing of "bare misconduct," the trial judge violated Mr. Gaines's right to a fair trial by an impartial jury and his right to juror unanimity. *Depaz*, 165 Wn.2d at 857-858.

2. This structural error may be raised for the first time on review.

Improper dismissal of a deliberating juror is structural error. *State v. Berniard*, 182 Wn. App. 106, 123, 327 P.3d 1290 (2014). RAP

[7] Respondent contends that *Depaz* does not apply unless a juror "clearly articulate[s]" an opinion. Brief of Respondent, p. 44. *Depaz* does not impose such a requirement. Instead, the *Depaz* rule applies "where the trial court *has knowledge* of a deliberating juror's substantive opinion of the case." *Depaz*, 165 Wn. 2d at 857 (emphasis added).

2.5(a)(3) always allows review of structural error. This is so because structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'")

Because the error here is structural, it may be reviewed for the first time on appeal. *Id.* Again, Respondent erroneously relies on cases wholly unrelated to the structural error here.[8] Brief of Respondent, p. 43 (citing cases). Without briefing the issue, Respondent also asserts in passing that Mr. Gaines invited the error and was somehow "complicit[ ] in the decision." Brief of Respondent, p. 43.

It is impossible to determine why Respondent believes Mr. Gaines may have invited the error. Appellate courts "will not reach arguments unsupported by adequate argument and authority." *Cornelius v. Washington Dep't of Ecology*, 182 Wn.2d 574, 593, 344 P.3d 199 (2015). This court should decline to address Respondent's invited error claim. *Id.*

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[8] For example, Respondent cites (without remark) to the concurrence in *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 176, 89 P.3d 250 (2004). Brief of Respondent, p. 43. The case involves challenges for cause, not removal of a juror during deliberations. *Id.* The other cases cited by Respondent are similarly irrelevant to the issue here.

II. THE PROSECUTOR'S MISCONDUCT REQUIRES REVERSAL.

1. Respondent attempts to misrepresent Mr. Gaines's argument by quoting only part of the prosecutor's misconduct.

Respondent erroneously claims that "Defendant assigns error to... the following argument" and then quotes a statement other than that identified by Mr. Gaines as egregious misconduct. Brief of Respondent, p. 30.[9] Like the offending passage, the passage quoted by Respondent falsely attributes the statement "it's about to go down" to Mr. Gaines. RP (4/9/14) 1642.

However, the passage quoted by Respondent does not mention the other problematic sentence, wholly fabricated by the prosecutor and also falsely attributed to Mr. Gaines: "Get the car started, I got this, I'll be there in a second." RP (4/9/14) 1642.

This second sentence is as much misconduct as the first sentence. The phrase "[I]t's about to go down" is predictive, but does not necessarily imply personal involvement. On the other hand, by claiming that Mr. Gaines said "I got this, I'll be there in a second," the prosecutor implied that Mr. Gaines announced his own intention to start shooting and that he would be at the car as soon as he'd shot the decedent. RP (4/9/14) 1642.

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[9] Respondent erroneously cites "13RP 1462." The correct citation is RP (4/9/14) 1642. Furthermore, as there are two volumes labeled "13," Respondent's inconsistent use of this numbering system is less than helpful.

Whether intentional or not, Respondent's failure to quote the correct passage is misleading.

2. Respondent fails to address a portion of Mr. Gaines's argument.

It is misconduct for a prosecutor to fabricate statements and attribute them to the accused in closing argument. *State v. Pierce*, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012).

Here, the prosecutor told jurors that Mr. Gaines said, just before the shooting, "[I]t's about to go down. Get the car started, I got this, I'll be there in a second." RP (4/9/14) 1642. No one testified that Mr. Gaines actually said any of those words.

Respondent addresses only the first sentence ("it's about to go down"), but says nothing about the second ("Get the car started, I got this, I'll be there in a second.") Brief of Respondent, pp. 29-34.[10] Respondent's failure to present argument regarding the second sentence may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

The prosecutor's misconduct resolved the primary factual dispute for the jury; accordingly, there is a "substantial likelihood" that the misconduct affected the outcome of Mr. Gaines's case. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012). The misconduct was

[10] This may be because Respondent focuses on another portion of the prosecutor's

particularly prejudicial because it came during closing. *Id.*, at 706 (quoting Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8)

Given the "fact-finding facilities presumably available" to the prosecutor and the length and complexity of the evidence, jurors likely took the prosecutor's statements at face value. *Glasmann*, 175 Wn.2d at 706. The first sentence ("it's about to go down") was also projected visually for the jury. CP 378. There is a reasonable probability the jury believed that Mr. Gaines actually said "it's about to go down. Get the car started, I got this," and that the improper argument affected the jury's verdict. RP (4/9/14) 1642; *Glasmann*, 175 Wn.2d at 704.

The prosecutor's flagrant, ill-intentioned, prejudicial misconduct distorted the evidence by putting words into Mr. Gaines's mouth that made him appear guilty. *Glasmann*, 175 Wn.2d at705; *Pierce*, 169 Wn. App. at 553. Mr. Gaines's conviction must be reversed. *Id.*

III. THE COURT SHOULD HAVE ALLOWED MR. GAINES TO SHOW BIAS THROUGH CROSS-EXAMINATION OF THOMAS AND MCVEA.

A. Mr. Gaines should have been permitted to cross-examine Thomas about dismissal of her murder charge.

The court refused to let Mr. Gaines cross-examine Thomas about the dismissal of her murder charge the day after she had a closed-door meeting with the prosecution. RP (10/9/13) 726. This denied Mr. Gaines a

"meaningful opportunity to challenge the state's witnesses for 'prototypical form[s] of bias.'" *Blackston v. Rapelje*, 780 F.3d 340, 349 (6th Cir. 2015) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

The confrontation right protects the accused person's right to expose "a witness' motivation in testifying." *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The "timing, nature and status" of an investigation may be sufficiently probative of bias that the defense must be permitted "to explore it fully and allow the jury to draw its own conclusions." *United States v. Martin*, 618 F.3d 705, 730 (7th Cir. 2010), *as amended* (Sept. 1, 2010).

Here, the judge should have allowed Mr. Gaines to ask Thomas about the dismissal of her murder charge following her closed-door meeting with the prosecution team. *Id.* The timing of events strongly suggests bias both in her statements to the prosecutor and her subsequent testimony. Mr. Gaines had the right to present this evidence to the jury, notwithstanding the prosecutor's explanations. *Id.*

Mr. Gaines does not claim that the confrontation clause entitled him to impeach "the State with its internal charging decisions." Brief of Respondent, p. 14. Rather, Mr. Gaines argues he should have been allowed to impeach Thomas with evidence of bias. *See* Appellant's

Opening Brief, pp. 36-42. Respondent's arguments and authority regarding prosecutorial discretion have no bearing on this issue. Brief of Respondent, pp. 14-15, 17-19.

Nor is the issue waived. Mr. Gaines raised the confrontation issue below,[11] thus preserving it for review.[12] RP (10/9/13) 715-727, 766-770; RP (10/10/13) 878-898. Contrary to Respondent's assertion,[13] Judge Felnagle did not invite the parties to revisit all prior rulings; instead, he made it clear that prior rulings would be treated as what he called "the rule of the case," with only limited exceptions. RP (3/6/14) 23. Respondent's waiver argument would require a defendant to relitigate every adverse ruling. Brief of Respondent, p. 16-17. It would also place the defendant who does not object to constitutional error in a better position on review than the defendant who does object. Brief of Respondent, p. 16-17.

Because the trial court prohibited Mr. Gaines from eliciting evidence relevant to Thomas's bias, prejudice is presumed. *State v.*

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[11] Respondent's claim that Mr. Gaines also made other arguments below is irrelevant. Brief of Respondent, pp. 15-16.

[12] Furthermore, to raise an issue for the first time on appeal under RAP 2.5(a)(3), an appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Even if not preserved, the error here can be raised for the first tim con appeal under RAP 2.5(a)(3).

[13] *See* Brief of Respondent, pp. 16-17.

Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). The burden is on the state to show harmlessness beyond a reasonable doubt. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Reversal is required unless the state proves that no rational jury could have a reasonable doubt as to guilt had the omitted evidence been introduced at trial. *Spencer*, 111 Wn. App. at 408.

Respondent's harmless error section does not address the proper standard. Instead, Respondent cites the rule applicable to "evidentiary error which is not of constitutional magnitude." *State v. Everybodytalksabout*, 145 Wn.2d 456, 468, 39 P.3d 294 (2002) (cited by Respondent at Brief of Respondent, p. 19).

Here, a rational jury could have acquitted Mr. Gaines. *See* Appellant's Opening Brief, pp. 41-42. The state cannot show that the error was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117. Mr. Gaines's convictions must be reversed and the case remanded for a new trial. *Id.*

B. The court should have allowed Mr. Gaines to cross-examine McVea regarding his motive to lie about being armed.

Mr. Gaines sought to introduce McVea's prior felony conviction, in part to show that he had reason to lie about being armed. RP (10/15/13) 1466-1772; *see also* RP (10/15/13) 1315-1316 (addressing the same

argument with respect to Jesse Williams). *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). It exposed McVea's "motivation in testifying" falsely, as well as his motivation for lying in any prior statements.[14] *Davis*, 415 U.S. at 316-17.

Respondent does not address Mr. Gaines's bias argument on its merits. Brief of Respondent, pp. 25-28. Instead, Respondent argues that the argument is not properly preserved.[15] Brief of Respondent, pp. 25-26.

Respondent is incorrect. Mr. Gaines raised the bias issue regarding Mr. McVea's prior convictions, reminding the court that "Bias is never collateral, Your Honor. His credibility is at issue." RP (10/15/14) 1471.[16] Instead of addressing the bias argument on its merits, Respondent discusses alternative theories for admission, wholly irrelevant to Mr. Gaines's confrontation claim. Brief of Respondent, pp. 26-27.

McVea was likely one of the shooters at the scene. He denied having a firearm, and initially identified Mr. Gaines as the shooter. RP

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[14] McVea's illegal firearm possession *also* explained his reason to flee the scene, as defense counsel pointed out. However, this was not the only basis for counsel's argument.

[15] Respondent erroneously claims that Mr. Gaines's *sole* argument below was that the prior conviction explained McVea's reason for fleeing the scene. Brief of Respondent, p. 25.

[16] Mr. Gaines first made his bias argument with respect to Jesse Williams' illegal firearm possession. RP (10/15/13) 1315-1316. The court refused to allow the impeachment. RP (10/15/13) 1315-1316. When arguing the same point regarding McVea's prior convictions, defense counsel said "I understand the Court's ruling earlier that the timing of the convictions" made them irrelevant. RP (10/15/13) 1467. This, combined with counsel's statement that "[b]ias is never collateral" is sufficient to preserve the error. RP (10/15/14) 1471.

(4/8/14) 1433, 1475. His motive in denying involvement was undoubtedly tied to his prior felony convictions. Mr. Gaines should have been allowed to explore this on cross-examination. *Davis*, 415 U.S. at 316-17.

In its harmless error argument, the state once again fails to cite the proper standard for constitutional harmless error. Brief of Respondent, p. 28. The state is obligated to show harmlessness beyond a reasonable doubt, and must prove that any rational jury would have convicted. *Jasper*, 174 Wn.2d at 117; *Spencer*, 111 Wn. App. at 408.

The state cannot meet this burden. McVea provided damaging testimony, and initially identified Mr. Gaines as the shooter. RP (4/8/14) 1475, 1484, 1506, 1512. Furthermore, the prosecution explained McVea's reluctance to repeat that accusation on the stand, suggesting that the identification remained correct. *See* Brief of Respondent, p. 24.

Respondent cannot show harmlessness beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117. A rational jury could have acquitted. *Spencer*, 111 Wn. App. at 408. Mr. Gaines's convictions must be reversed. *Id.*

IV. THE COURT VIOLATED MR. GAINES'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING HIM FROM INTRODUCING GREEN'S HABIT OF CARRYING A SMALL GUN IN HER PURSE.

Mr. Gaines relies on the argument set forth in Appellant's Opening Brief.

V. THE COURT ERRED BY DENYING MR. GAINES'S MOTION TO DISMISS BASED ON GOVERNMENTAL MISMANAGEMENT.

Mr. Gaines relies on the argument set forth in Appellant's Opening Brief.

VI. THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. GAINES'S ABILITY TO PAY DISCRETIONARY LFOS FOLLOWING CONVICTION AND IMPOSITION OF A 38-YEAR SENTENCE.

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted,* (Wash. Aug. 5, 2015).

Furthermore, a defendant's silence or a pre-imposition statement regarding employment should not be taken as proof of ability to pay. *Cf. Duncan,* 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes a term of incarceration that an offender can make a meaningful

presentation on likely future ability to pay, since the offense of conviction and the length of incarceration will affect that ability.

Following *Blazina,* the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Leonard,* ---Wn.2d---, ---P.3d ---, No. 90897-4 (Oct. 8, 2015); *see also State v. Rivas*, 355 P.3d 1117 (Wash. 2015).[17]

For all these reasons, the court should vacate the trial court's imposition of discretionary LFOs. The case must be remanded for the trial court to make the individualized inquiry required under *Blazina.*

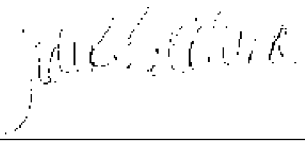
CONCLUSION

Mr. Gaines's convictions must be reversed. The case must either be dismissed with prejudice or remanded for a new trial. In the alternative, the imposition of discretionary legal financial obligations must be vacated and the case remanded for a new hearing on Mr. Gaines's ability to pay.

[17] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

Respectfully submitted on October 13, 2015,

BACKLUND AND MISTRY



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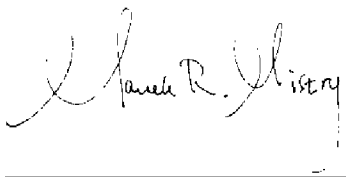

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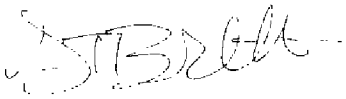

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
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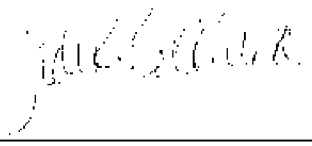
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on October 13, 2015.



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BACKLUND & MISTRY

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