Supreme Court No. 97774-7
Court of Appeals No. 80103-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KALI A. ETPISON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Kali Etpison, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in Part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Etpison seeks review of the unpublished opinion of the Court of Appeals in cause number 80103-1-I, 2019 WL 4415209, filed September 16, 2019. A copy of the decision is in Appendix A at pages A-1 through A-14.

C. ISSUES PRESENTED FOR REVIEW

1. Defendants have a constitutional right to have the jury decide their case based only on the admitted evidence. The jury's receipt of extrinsic evidence is improper. Should this Court accept review where the jury received unadmitted, extrinsic evidence during deliberation that Etpison remained in custody after he was initially charged?

2. General information about an accused's "background" is admissible in a criminal trial. Should this Court accept review where the trial court granted the prosecutor's motion in limine and ruled that the defense could not elicit testimony regarding Etpison's 17-year career in the United States Army and his position in the U.S. Army Reserve?

D. STATEMENT OF THE CASE

1. Procedural history:

Kali Etpison was charged by the Kitsap County Prosecutor's Office with third degree assault (count 1); two counts of fourth degree assault (counts 2 and 3); third degree malicious mischief (count 4); obstructing a law enforcement officer (count 5); intimidating a witness (count 6); and misdemeanor harassment (count 7). Clerk's Papers (CP) 1-10. Etpison, a career member of the United States Army for 17 years, was in the Army Reserves at the time of the incident on November 29, 2017. 1RP at 7, RP (2/9/18) at 19.

Before trial started, the State moved for an order prohibiting Etpison from wearing his uniform during trial and prohibiting witnesses from referring to his "military honors and/or accomplishment." (Prosecution's Motions in Limine), CP 24-28. Defense counsel did not challenge the motion to prevent Etpison from wearing his uniform, but argued against the motion precluding testimony about his military service, honors and accomplishments. 1RP at 11-21. The court granted the motion but broadened the State's initial motion by excluding all mention of Etpison's military career. 1RP at 6-35, 2RP at 37-38.

During deliberation on January 25, 2018, the jury submitted a juror note to the court indicating that a juror had disclosed information about Etpison that was not presented as evidence at trial. 7RP at 905; CP 150.

After discussion with counsel the court questioned the juror, who told the court:

> As we were deliberating yesterday, one of the jurors informed us that she had gone on the court website to look at the charges again.
>
> And then she made a statement that she knew that the defendant was still in—was still in jail. And so, we're thinking that—well, she mentioned that she thinks that he has been in jail from the time he got arrested. And that was information that was not privy to us.
>
> So irregardless it didn't matter—we didn't think it mattered. But another juror has an issue with that.
>
> 7RP at 910.

The juror stated that the juror who had an issue with the extrinsic information was not the same juror who looked up the information from the court website. 7RP at 910. The juror stated:

> It is an issue because—the—Your Honor has always told us or asked the question has anyone been on the website. Has anybody looked up any information?
> So what the real problem is, is that the juror that has the issue, it's—it makes her—I mean, it's a determining factor on how she decides. And to me, like I said, that shouldn't make a difference. It shouldn't make a difference in if he was in jail for six months while he was waiting to come here, that know what the issue is, and that know why we're here.
>
> THE COURT: But one of the jurors—not the one that looked it up. But a different juror is giving some indication that if he's been in jail all this time, that means something.
>
> THE JUROR: Yes. She is implying or she says, well, nobody sits in jail that long. And that—I'm just---like that shouldn't play an issue and that's anything that was presented in court.
> So who cares how long he's been sitting in jail for? But it makes a

difference to her.

7RP at 911.

The court then questioned Juror 9, and then questioned Juror 5, both individually. The following exchange took place:

> THE COURT: What we need to figure out is—we were trying to look logistically at how this impacts thing. What I would like to know is if you can tell us—when did you come across this information? I understand that the jury may have heard something yesterday.
>
> [Juror 5]: Yeah.
>
> THE COURT: So when did you learn this information?
>
> [JUROR 5]: The day—the day—the day that they said there was a big trial that we should get here early because there's going to be a parking problem.

7RP at 922-23.

The trial court inquired if Juror 5 read the charges from the jail webpage before the jury was selected. 7RP at 924. The juror stated that she determined what charges Etpison faced and that he was still in jail, and that she learned this information from the jail website. 7RP at 925. The court excused Juror 9. 7RP at 929. Following discussion, the court also excused Juror 5 due to the juror's action of looking up the charges and sharing the information with the other jurors. 7RP at 936.

Etpison waived his right a twelve-member jury and agreed to continue with eleven jurors. 7RP at 940. The remaining jurors were questioned individually regarding his or her ability to set aside the

information learned from the excused juror. 7RP at 940-61.

The alternate juror was seated and the eleven-member jury was instructed to begin deliberations anew. 7RP at 977-78.

The jury convicted Etpison of fourth degree assault, malicious mischief, obstructing a law enforcement officer, intimidating a witness, and harassment. 7RP at 991; CP188-89. He was acquitted of fourth degree assault regarding the children in Counts 2 and 3. 7RP at 991.

At sentencing, defense counsel argued that Etpison had no criminal history prior to the current convictions, was in the U.S. Army for 17 years and served in Afghanistan following the 9/11 attack in 2001, and also completed four tours of duty in Iraq, achieved the rank of sergeant, and had an E-5 status. RP (2/9/18) at 19, 24.

The court imposed a standard range sentence of 15 months regarding Count 6, followed by 12 months of community custody. RP (2/9/18) at 31. The court imposed 364 days for Counts 1, 4, 5, and 7, to be served concurrently with the felony conviction. CP 206-16.

Etpison appealed his convictions on the basis that (1) he received ineffective assistance of counsel in connection with propensity evidence, (2) juror misconduct in deliberations prejudiced him and denied him his constitutional right to a fair trial, (3) the trial court erred in excluding evidence of his 17-year military career as background evidence, (4) insufficient evidence supports his conviction for intimidation of a witness,

and (5) the trial court erred in imposed legal financial obligations. By unpublished opinion filed September 16, 2019, the Court of Appeals, Division II, remanded to the trial court to strike the legal financial obligations except for the $100 DNA sample fee, but otherwise affirmed the convictions. See unpublished opinion, Appendix A.

Etpison now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE A JUROR INTRODUCED EXTRINSIC EVIDENCE THAT ETPISON HAD BEEN IN CUSTODY, PREVENTING ETPISON FROM RECEIVING A FAIR TRIAL

Both the Washington and United States guarantee a defendant the right to a fair trial by an "impartial jury." U.S. Const. amends. 5, 6; Const. art. 1, §§ 3, 22. ***State v. Slert***, 186 Wn.2d 869, 874-75, 383 P.3d 466 (2016). Due process requires that a person accused of a crime be tried only by a jury willing to decide the case solely on the evidence presented. ***Smith v. Phillips***, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1981). "[I]t is error to submit evidence to the jury

that has not been admitted at trial." ***In re Pers. Restraint of Glassman***, 175 Wn.2d 695, 705, 286 P.3d 673 (2012); ***State v. Pete***, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004).

Failure to provide a fair and impartial jury violates minimal standards of due process. ***State v. Jackson***, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), review denied, 126 Wn.2d 1003 (1995). A constitutionally valid jury trial is "a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." ***State v. Tigano***, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (quoting ***Robinson v. Safeway Stores, Inc.***, 113 Wn.2d 154, 159, 776 P.2d 676 (1989)), review denied 118 Wn.2d 1021 (1992).

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

"Juror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced." ***State v. Boling***, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). The court need not delve into the actual effect of the evidence, "[b]ut any doubts must be resolved against the verdict." ***Boling***, 131 Wn. App. at 332-33, 127 P.3d 740. "The subjective thought process

of the jurors inheres in the verdict." ***Boling***, 131 Wn. App. at 333.

If even one juror is unduly biased or improperly influenced, the defendant is denied a fair trial. ***State v. Parnell***, 77 Wn.2d 503, 507-08, 463 P.2d 134 (1969), overruled on other grounds by ***State v. Fire***, Wn.2d 152, 34 P.3d 1218 (2001); ***State v. Stackhouse***, 90 Wn. App. 344, 350, 957 P.2d 218, review denied, 136 Wn.2d 1002 (1998).

A juror who introduces extrinsic evidence into jury deliberations commits misconduct. ***Allyn v. Boe***, 87 Wash.App. 722, 729, 943 P.2d 364 (1997); ***Richards v. Overlake Hospital Med. Ctr.***, 59 Wn. App. 266, 270-71, 796 P.2d 737 (1990). A jury's consideration of evidence that was not developed at trial jeopardizes the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." ***Turner v. Louisiana***, 379 U.S. 466, 472, 133 L.Ed.2d 424, 86 S.Ct. 546 (1965). Reliance on extrinsic evidence is improper because it is not subject to objection, cross examination, explanation, or rebuttal. ***State v. Brown***, 139 Wn.2d 20, 24, 983 P.2d 608 (1999). Such misconduct entitles a defendant to a new trial when there are reasonable grounds to believe that the defendant has been prejudiced. ***Briggs***, 55 Wn.App. at 55 (citing ***State v. Lemieux***, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)).

When a defendant alleges juror misconduct involving extrinsic evidence, the court must make an objective inquiry into whether that evidence could have affected the jury's verdict, not whether it actually did. ***Briggs***, 55 Wn. App. at 55. A subjective inquiry is improper because the actual effect of the evidence

upon the jurors inheres in the verdict. ***Gardner v. Malone***, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). Thus, "a defendant is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." ***Llewellyn v. Stynchcombe***, 609 F.2d 194, 195 (5th Cir. 1980).

Here, the jury was exposed to evidence that Etpison remained in custody beyond his initial arrest on November 30, 2017 and was in custody at the time of trial. This information is prejudicial because it was not introduced subject to objection, cross examination, explanation or rebuttal. In fact, such evidence would have been inadmissible at trial. Citing ***State v. Gaines***, 194 Wn.App. 892, 380 P.3d 540 (2016), the lower court found that the trial court's action of questioning the remaining jurors and removing the juror and adding an alternate juror was sufficient to re-affirm the jury's subjective ability to disregard the extrinsic evidence. *State v. Etpison*, slip. op. at *7.

In ***Gaines***, a juror told eight other jurors during deliberation that " 'he read in the newspaper 2 years ago, the "defendant has 2 priors." ' " ***Gaines***, 194 Wn. App. at 895. The court excused the juror and interviewed "each of the eight affected jurors individually." ***Gaines***, 194 Wn. App. at 895. The court found those jurors " 'could follow [the instructions] that they would be impartial.' " ***Gaines***, 194 Wn. App. at 895. The defendant argued the trial court erred by asking "questions of the jurors' subjective ability to disregard extrinsic information before there is a verdict." ***Gaines***, 194 Wn. App. at 898.

The ***Gaines*** court drew a distinction between the inquiry for juror misconduct in a motion for a new trial and juror misconduct before there is a verdict. ***Gaines***, 194 Wn. App. at 897-98. "When a jury hears extrinsic information and where that information inheres in the verdict, the trial court must make an objective inquiry, asking whether the evidence could have affected the jury's verdict." ***Gaines***, 194 Wn. App. at 8988 (citing ***Breckenridge v. Valley Gen. Hosp.***, 150 Wn.2d 197, 204, 75 P.3d 944 (2003)). Where a court considers juror consideration of extrinsic evidence during deliberations, instead of an objective inquiry, the court "may ask questions of the jurors' subjective ability to disregard extrinsic information." ***Gaines***, 194 Wn. App. at 898.

Here, the extrinsic information was too powerful for the jury to disregard under either a subjective or objective standard, and irreparably tainted the jury. *See* ***Marshall v. U.S.***, 360 U.S. 310, 312-13, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

The case turned on the credibility of Etpison. The case was submitted to the jury, and admonitions were given by the court to not conduct independent research. One juror, it was revealed, had previously researched Etpison's release status on the internet told other jurors that Etpison had remained in custody following arrest, and shared that information with other jurors even though the court had instructed the jury not to consult outside sources or conduct their own research. Another juror told the trial court that Juror 9 was disturbed that Etpison remained in custody. The information made enough of an impact

on at least two jurors. This is understandable; a juror could reasonably be expected to wonder why a defendant remained in custody after being initially charged and then draw conclusions, unsupported by evidence adduced at trial, about the seriousness of the charges, whether the defendant was considered a flight risk, or had prior criminal convictions, or was facing other, uncharged matters. Based on these considerations, it is impossible to be satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict, despite the court's inquiry regarding the extrinsic information known to the remaining jurors.

Moreover, the juror's misconduct cannot be considered harmless beyond a reasonable doubt. Any doubt that consideration of extrinsic evidence affected a verdict must be resolved against the verdict. ***Halverson v. Anderson***, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE TRIAL COURT ERRED WHEN IT GRANTED THE PROSECUTOR'S MOTION TO EXCLUDE TESTIMONY REGARDING ETPISON'S MILITARY CAREER

Etpison was a seventeen year career solider in the United States army, served in Afghanistan and Iraq and achieved the rank of sergeant. RP (2/9/18) at 19. He was in the Army Reserves at the time of the incident. The prosecutor filed its motions in limine , which included the following:

> 13. No reference to the Defendant's military honors and/or accomplishments. ER 401, 402, 403.

CP 24-28.

The trial court initially indicated that the State's motion was granted, but only regarding Etpison's honors and accomplishments. 1RP at 13. After deferring its ruling on the motion, however, the court ruled that the motion would be granted, but made more expansive than originally requested by the State by ordering that any testimony regarding Etpison's military service was prohibited. 2RP at 37.

The trial court erred by denying the defendant's motion in limine by excluding testimony regarding Etpison's military career and status in army reserves.

In a criminal trial, it is generally acceptable for the accused to introduce evidence concerning his background, such as about his education and employment. ***Government of Virgin Islands v. Grant***, 775 F.2d 508, 513 (3d Cir. 1985). Such background information is routinely admitted without objection. Id. "[E]vidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding." ***United States v. Blackwell***, 853 F.2d 86, 88 (2d Cir. 1988).

Washington courts permit the accused in a criminal trial to present information about his or her background, even when that information could be characterized as "character evidence." E.g., ***State v. Renneberg***, 83 Wn.2d 735, 522 P.2d 835 (1974); ***State v. Brush***, 32 Wn. App. 445, 648 P.2d 897 (1982). In ***Renneberg***, the defendant was permitted to testify about her past good behavior,

including her work experience, that she had attended college, and that she had participated in a glee club, drill team, and pep club, and was the treasurer of a science club. ***Renneberg***, 83 Wn.2d at 738.

In ***Brush***, *supra*, the defendant testified to his educational, employment, and military history, and discussed his goal to become a teacher. ***Brush***, 32 Wn.App. at 447-48. ***Brush*** was also permitted to relate a personal history supportive of good character, including his duties and responsibilities as the county fire marshal and building inspector, his extensive property dealings, his involvement in the construction industry, and his financial dealings including salary, debts, prior bankruptcy and credit history. ***Brush***, 32 Wn. App. at 451-52.

Here, the State argued that it would be prejudicial to the State because "anybody who has had military service or who has had relations or friends that have been in the military would understand that, you know, especially if they know a domestic violence conviction means a person can't have firearms they're going to know that is going to cost that person their military career." 1RP at 12. The State's argument that any mention of the defendant's military career, however, is without merit because some jurors may very well not have had a positive view of the military, or surmise that a member of the military tended to be more violent and have a proclivity to fight. Even if the members of the jury did hold the military in high esteem, it does not necessarily mean that the jury would accord a member of the military a greater degree of credibility than a nonmilitary witness. ***People v. Lane*** (Ill.Ct.App.2010) 922 N.E .2d 575, 585.

Thus, even if it could be reasonably argued that the jury would give greater credibility to Etpison due to his military record, it does not follow that the jury would then have emotional bias in favor of the defendant.

Moreover, the jury was properly instructed that jurors "are the sole judges of the credibility of witnesses." Court's Instruction 1, CP 151-53. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. ***State v. Davenport***, 100 Wash.2d 757, 763, 675 P.2d 1213 (1984); ***State v. Cerny***, 78 Wash.2d 845, 850, 480 P.2d 199 (1971), vacated on other grounds, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972). In making its ruling granting the state's motion, the court made no finding that the jury would have been unfairly influenced by Etpison's military record or his current position in the Army Reserve, only that there is nothing probative or relevant regarding his military career. 2RP at 37.

The lower court found that his military background was not a pertinent character trait and was not relevant to the proceedings. *Etpison*, slip op. at 9. The court evaluated the relevance of his military service relating to his relationship to the victim, whom he met while stationed on a military base. *Etpison*, slip op. at 2-3. The court, however, did not address the relevance of his military career in light of the defendant's knowledge of the impact a conviction would have on his career, and how that may have affected his behavior during the incident, his training in the military, whether his military background made him more less aggressive than a civilian, whether there was a tradition of alcohol

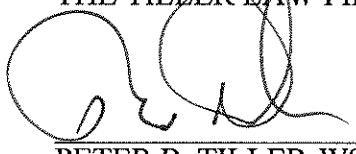
use or abuse in the military and whether that impacted the incident, as well as a plethora of other factors and considerations involved in a long-term military background. Etpison's career was not of a short duration; it was a career and he was in active duty for seventeen years. His background presumably inured into his daily life, his decisions, and undoubtedly played a role in the incident itself. Etpison should have been permitted to tell the jury his occupation for seventeen years as well as his current occupation in the Army Reserve.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: October 16, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 16, 2019, that this Appellant's Petition for Review was sent by the JIS link to Richard Johnson, Clerk of the Court, Court of Appeals, Division I, One Union Square 600 University Street, Seattle, WA 98101-4170 and copies were mailed by U.S. mail, postage prepaid, to the following:

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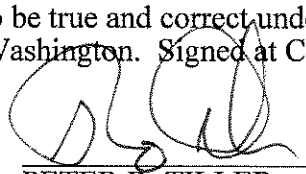
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 16, 2019.



PETER B. TILLER

APPENDIX A

FILED
9/16/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KALI ADELBAI ETPISON, Appellant.	No. 80103-1 DIVISION ONE UNPUBLISHED OPINION FILED: September 16, 2019

CHUN, J. — A jury convicted Kali Adelbai Etpison of fourth degree assault, malicious mischief, obstructing a law enforcement officer, intimidating a witness, and harassment. On appeal, Etpison claims that (1) he received ineffective assistance of counsel in connection with propensity evidence, (2) juror misconduct in deliberations prejudiced him and denied him his constitutional right to a fair trial, (3) the trial court erred in excluding evidence of his 17-year military career as background evidence, (4) insufficient evidence supports his conviction for intimidation of a witness, and (5) the trial court erred in imposing a $200 criminal filing fee, a Department of Corrections monthly supervision assessment fee, a 12 percent interest provision in the Judgment and Sentence, and a $100 DNA sample fee. We remand the Judgment and Sentence for the trial court to strike the legal financial obligations except for the $100 DNA sample fee. We affirm in all other respects.

I.
BACKGROUND

On November 29, 2017, the Bremerton Police Department arrested Etpison after he broke objects and a door inside his home with a baseball bat. Etpison had also allegedly pushed and slapped his two sons.

Etpison did not comply with the police's commands as they tried to enter his home. They ultimately used a Taser device to subdue him. After police detained Etpison, Etpison's wife, Jasmine Etpison,[1] told police that Etpison had hit her several days prior, leaving bruises that were still visible.

From jail, Etpison made a recorded telephone call to Jasmine. He asked her if she had called the police, spoke a phrase to her in Palauan[2] (translated by the State's interpreter as, "You better run. When I get out you will feel the consequences"), and then hung up.

The State charged Etpison with assault in the third degree for hitting Jasmine several days prior to his arrest, two counts of assault in the fourth degree for slapping and pushing his two sons, malicious mischief in the third degree, obstructing a law enforcement officer, intimidating a witness, and harassment. A second amended information added an alternative charge of assault in the fourth degree relating to Jasmine.

Pretrial, the State moved to exclude any reference to Etpison's military service. In opposition, Etpison argued the evidence served as background information relating to his relationship with his wife, because the two met while he

[1] For clarity, below, we refer to Jasmine Etpison by her first name. We intend no disrespect.

[2] Etpison and his wife speak Palauan fluently.

was stationed at a military base. The trial judge granted the State's motion, deeming the evidence irrelevant because it did not relate to the charges or the defense's case.

At trial, Jasmine testified that on Thanksgiving Day, November 23, 2017, Etpison hit her on her right arm three or four times, which left the bruising that officers saw when they arrived at Etpison's home several days later.

Jasmine also testified that Etpison's telephone call from jail caused her to fear for her physical safety and gave her concerns about cooperating with law enforcement because of what he had said to her in Palauan. The State's interpreter testified that speakers usually use the Palauan phrase at issue threateningly, and that it means the receiving person will feel the consequences physically, mentally, or emotionally.

During deliberations, the jury submitted the following question to the court:

> It came to our attention that one of the jurors looked at the court docket to see what charges he (the defendant) was being charged with. Is the [sic] a problem for us or can we proceed[?] It was during jury selection and it was shared he was still in jail[.]

After conducting an inquiry, the trial court determined one juror had looked at the court docket and shared information that Etpison remained in jail pending trial. The trial court dismissed the juror who looked at the court docket and shared the information, and dismissed an additional juror who said they could not ignore the fact that Etpison remained in jail. The court then individually questioned the remaining jurors, asking them if they could disregard the improperly introduced information, if they understood Etpison remains innocent

until proven guilty, and if they believed the jury as a whole could move forward. All the remaining jurors answered in the affirmative. The trial court added the alternate juror and ordered the jurors to begin deliberations anew.

The jury convicted Etpison of fourth degree assault, malicious mischief, obstructing a law enforcement officer, intimidating a witness and harassment. The jury found Etpison not guilty of the two charges of fourth degree assault against his sons. The trial court imposed a $200 criminal filing fee, community supervision fees, a 12 percent interest provision, and a $100 DNA sampling fee in the Judgment and Sentence. Etpison appeals.

II.
ANALYSIS

A. Ineffective Assistance of Counsel

Etpison argues that, in violation of ER 404(b), the trial court admitted evidence that he hit Jasmine on November 23, 2017, resulting in bruising on her right arm. He characterizes this information as propensity evidence and claims that his lawyer's failure to object to it and failure to propose a limiting instruction constituted ineffective assistance. But the State correctly explains that the evidence of the bruising constitutes direct evidence relating to the assault charge for the date range of November 21 to November 28, 2017. And given the admissibility of the evidence, trial counsel did not perform ineffectively.

The United States and Washington Constitutions guarantee criminal defendants effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. I, § 22. Under Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052

(1984), a defense lawyer's deficient performance resulting in prejudice entitles a defendant to reversal of their conviction.

Evidence must be relevant to be admissible; evidence is relevant where it makes the existence of a fact of consequence in an action more or less likely. ER 401. But evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person to show action in conformity with those previous acts. ER 404(b).

Etpison argues that the evidence of the assault on Thanksgiving Day constitutes improper propensity evidence supporting the conviction of fourth degree assault. But this argument confuses the charges against Etpison. The State did not charge Etpison with assault against Jasmine for his actions taken on the night of November 29, 2017. Instead, the State charged Etpison with third degree assault over a date range of November 21-28, 2017, and in the alternative, charged him with fourth degree assault over the same date range. The court instructed the jury to consider the fourth degree assault charge against Jasmine for the date range of November 21-28, 2017, and not for November 29, 2017. Thus, Jasmine's testimony that Etpison hit her three or four times on the back of the arm on Thanksgiving Day, November 23, 2017, was direct evidence to support the fourth degree assault charge. Given the admissibility of the evidence, the lack of an objection on propensity grounds or a proposed limiting instruction does not constitute ineffective assistance of counsel.

B. Juror Misconduct

Etpison argues that juror misconduct denied him of his right to a fair trial. The State asserts that Etpison waived this argument by agreeing to proceed after witnessing the jury affirm that extrinsic evidence would not affect their deliberations or his presumption of innocence. Assuming, without deciding, that Etpison did not waive the issue, we conclude that the trial court did not abuse its discretion by allowing trial to proceed after the juror misconduct; it dismissed the juror who committed misconduct and the juror who could not ignore extrinsic information, conducted a proper inquiry of the jury's ability to disregard extrinsic information, and ordered that deliberations begin anew.

The law guarantees a criminal defendant to a fair trial by an impartial jury. U.S. CONST. amend. VI; CONST. art. I § 22. A jury must be unbiased, unprejudiced, and free of disqualifying jury misconduct for a defendant to receive a constitutionally sufficient jury trial. State v. Gaines, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). Where a juror considers information outside of properly admitted evidence, jury misconduct occurs. Gaines, 194 Wn. App. at 897.

A court presumes prejudice upon a showing of misconduct, but "that presumption can be overcome by an adequate showing that the misconduct did not affect the deliberations." Gaines, 194 Wn. App. at 897 (internal quotations and citation omitted). Before a jury enters a verdict, "a trial court may ask questions of the jurors' subjective ability to disregard extrinsic information," and instruct the jury to consider only evidence admitted at trial and not any previously entered extrinsic information. Gaines, 194 Wn. App. at 898-899. In Gaines, the

court concluded that this procedure could properly cure prejudice after a juror introduced extrinsic information in the middle of deliberations. 194 Wn. App. at 895, 898.

We review a trial court's investigation of juror misconduct for an abuse of discretion. Gaines, 194 Wn. App. at 896. "A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable." Gaines, 194 Wn. App. at 896. We similarly review the conclusions from an investigation of juror misconduct, and a trial court's decision to excuse or not excuse jurors, for abuse of discretion. State v. Earl, 142 Wn. App. 768, 776, 177 P.3d 132 (2008).

Here, during deliberations, a juror introduced extrinsic facts by informing the rest of the jury that Etpison remained in jail during trial. That juror was dismissed. The court individually questioned the other jurors and dismissed another juror who indicated they could not ignore that Etpison remained in jail. The remaining jurors all assured the court that the extrinsic information would not affect their deliberations. The trial court added the alternate juror and then ordered the jurors to disregard all previous deliberations and begin deliberating anew. The court then reasoned that no independent grounds for a mistrial remained.

By conducting this inquiry, the trial court reaffirmed the jury's subjective ability to disregard extrinsic information, as the court did in Gaines. 194 Wn. App. at 898. Because this questioning took place before the jury reached its verdict but after deliberations began, a subjective inquiry sufficed. Gaines, 194

Wn. App. at 898. Further, as in Gaines, the trial court ordered the jury to begin deliberations anew, ignoring any extrinsic information. 194 Wn. App. at 899. Thus, the trial court acted within its discretion in conducting its investigation and reaching the conclusion that there were no grounds for mistrial after taking such action.

C. Background Evidence

Etpison claims the trial court improperly excluded evidence of his 17-year military career. He characterizes the information as proper background evidence. The State claims the court did not abuse its discretion because the evidence was not probative. We agree with the State.

A defendant may, in some instances, introduce information about their pertinent character traits in a criminal trial. ER 404(a). But evidence must be relevant to be admissible, meaning it must make the existence of a fact of consequence to the action more or less likely. ER 401. And this court has previously held that a defendant may not introduce background evidence when it does not speak to a defendant's pertinent character trait. State v. O'Neill, 58 Wn. App. 367, 369-370, 793 P.2d 245 (1996) (disallowing a defendant from introducing their lack of prior convictions as a means of bolstering credibility against a driving while intoxicated charge).

We review evidentiary rulings for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

Etpison argues that his military history provides background information relating to how he and Jasmine initially met ten years ago – on a military base. But Etpison does not connect their meeting to a fact at issue in the case. Nor does Etpison demonstrate how his military history might relate to a pertinent character trait. Given this failure to establish the relevance of the military history, the trial court did not abuse its discretion by excluding it.[3]

Assuming the court erred by excluding the evidence, the error was harmless. "[E]rror is harmless unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012) (internal quotations omitted). Information regarding Etpison's military career did not make any fact at issue in the case more or less probable. Etpison has not demonstrated how introduction of the background evidence regarding his meeting Jasmine at a military base would have assisted the jury in weighing the charges against him.

D. Insufficient Evidence of Witness Intimidation

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[3] Defense counsel invokes State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974), and State v. Brush, 32 Wn. App. 445, 648 P.2d 897 (1982), as examples supporting their position that background evidence of Etpison's military career should be admissible. Both cases are inapposite. In Renneberg, the defendant introduced evidence of her work experience, college education, and participation in a glee club, drill team, and pep club as a means of painting a picture of herself as a person unlikely to commit grand larceny. 83 Wn.2d at 738. Here, trial counsel's stated purpose for introducing evidence of Etpison's military career had no bearing on his likelihood to have committed the accused crimes; indeed, trial counsel conceded a jury might properly find the history had no such bearing on their determination of guilt. In Brush, the defendant was charged with arson of his own home. 32 Wn. App. at 446-447. Brush introduced evidence of his employment history, salary, and financial dealings as a means of rebutting the State's theory that he had a financial motive for arson. Brush, 32 Wn. App. at 451-452. While this information might be characterized as background evidence, it was probative in rebutting the State's theory that Brush had a financial motive to burn down his own home. By contrast, Etpison advances no similar argument that his military history makes his commission of the crimes charged against him less likely.

Etpison argues that insufficient evidence supports his conviction of witness intimidation, defined by RCW 9A.72.110. The State argues sufficient evidence supports the conviction. We agree with the State.

In determining whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the jury on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

Here, we view the evidence in the light most favorable to the State and ask whether a rational trier of fact could have found beyond a reasonable doubt that Etpison (1) made a threat, (2) to a current or prospective witness, and (3) by use of a threat, attempted to:

> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning [them] to testify;
>
> (c) Induce that person to absent [themselves] from such proceedings, or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

RCW 9A.72.110(1). Etpison argues the insufficiency only of the State's demonstration he made a threat and that the threat was an attempt to induce or

influence Jasmine in connection with the case. Etpison does not dispute that Jasmine was a current or prospective witness.

1. Threat

Viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have found that Etpison's telephone call from jail constituted a threat.

A "threat" within the meaning of RCW 9A.72.110(1) is a direct or indirect communication of the intent to: Immediately use force against any person who is present at the time; to cause bodily injury in the future to the person threatened; to cause physical damage to the property of a person other than the actor, or; to do any other act which is intended to harm substantially the person threatened or another with respect to her health, safety, business, financial condition, or personal relationships. RCW 9A.72.110(3)(a), RCW 9A.04.110(28)(a), (b), (j).[4]

Shortly after the police arrested Etpison and took him to jail, Etpison made a recorded telephone call to Jasmine. On the call, Etpison asked if she had called the police. Next, Etpison spoke a phrase in Palauan to Jasmine. According to the State's interpreter, Etpison told his wife, "You better run. When I get out you will feel the consequences." Etpison disputed this characterization at trial, but we must view the facts in the light most favorable to the State.

The State's interpreter also testified that speakers usually use the statement threateningly, and that it means the receiving person will feel the

[4] RCW 9A.72.110(3)(a)(ii) incorporates by reference RCW 9A.04.110(27), which was amended by 2011 c 166 c § 2, changing subsection (27) to (28).

consequences physically, mentally, psychologically, or emotionally. Given this testimony, a reasonable trier of fact could find beyond a reasonable doubt that by his statement, Etpison communicated an intent to substantially harm Jasmine sufficient to constitute a threat.

2. RCW 9A.72.110(1)

The State must also have demonstrated that by use of a threat, Etpison attempted to achieve one of the four outcomes listed in RCW 9A.72.110(1). Viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have found that Etpison attempted to influence Jasmine's testimony or induce her not to testify against him, participate in legal proceedings, or report information relevant to a criminal investigation, satisfying any of RCW 9A.72.110(1)(a)-(d).[5]

After asking whether she had called the police, Etpison told Jasmine that she "better run." He also said, "When I get out you will feel the consequences." This can reasonably be interpreted as an attempt to influence or induce Jasmine not to testify against him, participate in legal proceedings, or report information relevant to the criminal investigation. First, the threatening statement was made in the context of Etpison asking whether Jasmine had called the police. Second,

[5] In support of his argument, Etpison cites State v. Brown, 162 Wn.2d 422, 430, 173 P.3d 245 (2007). But in that case, the court found there was insufficient evidence that the defendant had violated RCW 9A.72.110(1)(a), because the defendant's threat to a third-party victim that she would "pay" if she went to the police was an attempt to prevent her from providing information to the police and not an attempt to influence testimony. Here, however, Etpison threatened Jasmine without specifying that he would hurt her if she went to the *police*, so viewing the evidence in the light most favorable to the State, his statement can be interpreted as attempting to induce her not to testify, participate in legal proceedings, or report information relevant to a criminal investigation.

if Jasmine "ran," she would potentially be unavailable to so testify, participate, or report information. And third, the "consequences" provided an incentive not to so testify, participate, or report information. From this, a jury could reasonably infer that Etpison, by use of a threat, attempted to achieve any one of the four outcomes listed in RCW 9A.72.110(1).

Because a rational trier of fact could have found the foregoing elements beyond a reasonable doubt, Etpison's claim of insufficiency fails.

E. Legal Financial Obligations

Etpison claims that, in the Judgment and Sentence, the trial court erred in imposing a $200 criminal filing fee, a Department of Corrections monthly supervision assessment fee, and by including a 12 percent interest provision in the Judgment and Sentence. The State concedes error on these. We agree.

Under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), discretionary costs may not be imposed on indigent defendants. A defendant's indigence is determined at the time of sentencing. RCW 10.01.160(3). The trial court recognized Etpison's indigence when it allowed him to pursue his appeal at public expense.

The $200 criminal filing fee is discretionary. Ramirez, 191 Wn.2d at 748. The community supervision fees are also discretionary. State v. Lundstrom, 6 Wn. App.2d, 388, note 3, 429 P.3d 1116 (2018). The interest accrual provision of the Judgment and Sentence pertaining to non-restitution legal financial obligations are also discretionary. RCW 10.82.090 disallows accrual of interest on non-restitution legal financial obligations imposed as of June 7, 2018, and

subsection (2)(a) allows the court to waive interest on the portions of non-restitution legal financial obligations imposed before June 7, 2018.

Finally, Etpison argues that we should strike the $100 DNA sample fee. However, the $100 DNA sampling fee is mandatory for offenders whose DNA has not been previously collected as a result of a prior conviction. RCW 43.43.7541. Etpison has no prior convictions. Hence, the trial court properly imposed the DNA sampling fee

Affirmed and remanded to strike the criminal filing fee, community supervision fees, and interest accrual provision.

WE CONCUR:

THE TILLER LAW FIRM

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