

65934-1

65934-1

NO. 65934-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHAWN A. REID,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

CHARLES F. BLACKMAN
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. In this prosecution for assault and attempted rape, witnesses testified that the defendant had been drinking off and on at various pubs since the late afternoon of the date in question. After verdict, a juror told counsel that he drew on his experience as a recovering alcoholic, and another juror on her experience as a bartender, in assessing the defendant's moods and what may have set him off that night. Can the defendant cite these jurors' thought processes as a basis for a new trial, or do they inhere in the verdict?

2. The deputy prosecutor correctly cited the State's burden of proof twice in closing argument, and twice again in rebuttal. He then stated, improperly, that the presumption of innocence ended when argument concluded. An objection was immediately sustained; the prosecutor again cited the burden and who bore it; and the jury was properly instructed that the presumption continued into deliberations unless and until overcome by the evidence. No other trial error in this 8-day, 22-witness trial is cited. Does the lone improper comment require reversal for a new trial, given that it was immediately cured by objection and was not part of a trial strategy to trivialize or shift the burden of proof?

3. The defendant's sentence included community custody. Certain unchallenged conditions of community custody required substance-abuse and sexual deviancy treatment. Three other conditions prohibited the possession of sexually explicit and sexual stimulus materials, and the frequenting of establishments whose primary business pertained to such materials. Were the latter three conditions properly imposed as crime-related, given the defendant was convicted of a "sex offense"?

II. STATEMENT OF THE CASE

A. TRIAL TESTIMONY.

At 11:19 p.m. on the night of July 14, 2009, the night manager at the Smokey Point Motor Inn in Arlington got a call from room 46, saying someone had gotten hurt and to call 911. He did so. RP 156. He saw someone run by with socks and no shoes. He thought the person running by was the defendant, Shawn Reid, who had been staying at the motel for several weeks. RP 157.

Upstairs in room 47, Micah Knowlton had heard a commotion, looked outside, and saw a woman running along the hallway-balcony from the direction of room 49 bleeding and screaming wearing only her panties. RP 85. Debbie Killgo, in room

46, opened her door to the same the same thing, recalling the woman was screaming, "He's going to kill me." RP 103.

The injured woman was M.B. RP 214-17. Neither Killgo nor Knowlton knew her. RP 85, 105-06. Each recalled one of M.B.'s eyes was swollen shut and her face was bleeding. RP 85, 86, 104.

The defendant had been staying two doors down from Knowlton in room 49. RP 77; see RP 158. Knowlton had met him two days earlier while having a smoke on the balcony. RP 76-77. After he saw M.B. run by, he looked down the hallway and saw the defendant come out of his room, look over at him, and then turn the opposite direction and go down the stairs. RP 87, 88, 91. The defendant was wearing jeans and socks. RP 91. M.B. saw him come out, too – coming after her, she thought – and then turn and run the other way. RP 216, 217.

Killgo, a nursing assistant, tried to help M.B. RP 104, 216. M.B. was embarrassed at being mostly naked. Accompanied by Killgo and Knowlton, she briefly went back to room 49 to gather her things. RP 93-94, 104, 217, 370. Back in room 46, Killgo applied wet rags and told M.B. to wait for the police to come.

M.B. knew her assailant. RP 214-17, 315, 327. It was the defendant. Id. They were both part of a larger circle of real-estate-

agent friends. RP 44, 117-19, 142-43, 172-73. Some of these agents had fallen on hard times after the 2008 recession began, M.B. in particular. RP 47, 121-22, 134, 151, 176, 178. M.B. and her romantic partner, Paulina Decker, had lost their home to foreclosure, and parted ways. RP 44-46, 121, 144-45, 174-75, 180. M.B. had not wanted the relationship to end. Id.; see also RP 63.

M.B., increasingly destitute, started “couch-surfing” among friends. RP 47, 146, 150, 176, 178. This included an approximately four-month amicable stint with the defendant, in a condo he was living in rent-free while he remodeled it. RP 48, 51, 120, 179-80. . M.B. had introduced him to her circle of realtor friends, thinking they would all get along and could do real estate deals together. RP 47, 119, 145, 176-77, 181-82.

The defendant was staying at the Smokey Point Motor Inn while working on a real estate project with Robert Stannik. RP 53, 122, 124, 149. He was using one of Stannik’s trucks, too. Id. M.B. had introduced the two. RP 119, 145, 182.

On the afternoon of the date in question, the defendant had gone across the street to the Buzz Inn with his new acquaintance Micah Knowlton, where Knowlton recalled the defendant had “about” three drinks. RP 54, 77-79. The defendant’s sometime

girlfriend Deanna Hayes – the sister of Paulina Decker – met them there. RP 48, 53, 181-82. They left after the bartender told the defendant he was not welcome unless he apologized to one of the waitresses. RP 55, 56. The three went to a cardroom, Ace's Casino (known at the time as Shotze's) where they had more drinks. Knowlton and Hayes left, leaving the defendant playing at a poker table, but returned to pick him up when he called and asked why they'd left him. RP 55-57, 79-82, 822; see RP 367. Knowlton and Hayes went in for more drinks at the Buzz Inn while the defendant walked across the street to the motel. RP 55-58, 84; see RP 367.

Sometime later that afternoon Hayes called the defendant. He said he was going to go down to Puyallup to see his young daughters. Hayes told him that was a bad idea because he'd had too much to drink. RP 58-59; see RP 192.

The defendant called Stannik and asked him about getting his weekly draw – part of their business arrangement – prior to his going to Puyallup to see his daughters. RP 125-26, 129. He drove over to the Stanniks to get it. When he got there, M.B. had preceded him, showing up unannounced and hoping to spend the night. RP 126-28, 146, 185-87. Neither Stannik nor his wife

Barbara were particularly happy at the prospect. RP 129, 137. As the four of them – the Stanniks, the defendant, and M.B. – chatted, the topic of the defendant's planning to go to Puyallup came up. RP 129-30, 132, 187, 188. That left the paid-for motel room empty. Robert Stannik and the defendant suggested that M.B. could sleep there. RP 130-32, 137, 148-49, 187-89. M.B. agreed and she and the defendant left. RP 132, 148, 189. The Stanniks understood the plan was for the defendant to drop M.B. off at the motel and then drive to Puyallup. RP 132, 149.

The defendant first took M.B. for drinks and a meal at Danny's, a pub and grill. He had two more drinks there. RP 189-90. When no pool table opened up, they went to the Stump, another pub and grill, where the defendant had one or two more drinks and ordered an appetizer plate to share. RP 190-91, 194, 437-38. The bartender recalled the defendant and M.B. were having a friendly conversation. RP 441. But the defendant became unhappy with another customer: he thought he had a pool table set up, and she had taken it while he answered a phone call. RP 193-94, 438-39. (He told M.B. the phone call had been from Hayes. RP 192.) The bartender had to tell the defendant to calm down or he'd have to leave. RP 193-94, 438-39. She recalled the

defendant was “bummed,” sat back down, and “sulked.” RP 439, 444. The defendant and M.B. left soon afterwards, going back to the motel. RP 193-94, 439.

M.B. thought at this point she’d better call the Stanniks to come pick her up, since it looked like the defendant wasn’t going to be driving to Puyallup, and M.B. thought he’d had too much to drink anyway. RP 194-95. The defendant still seemed unhappy about the pool table incident. M.B., in the motel room now, told him it was no big deal and to go to sleep, and that she would call the Stanniks. RP 196-97. The defendant grabbed her wrists and told her she wasn’t going anywhere – she was staying and having sex with him. RP 197. M.B. protested that they were just friends. RP 197-98. (M.B. is a lifelong lesbian, and said the defendant knew this. RP 181.) The defendant responded that the Stanniks didn’t want her over there anyhow. RP 197-98. He grabbed her and threw her against the wall. She ended up landing on the bed, and he got on top of her, holding her hands back over her head. RP 198-201. He told her she was having sex with him no matter what, and pulled her shirt over her head. RP 201, 202. He tried to take her bra off but couldn’t. RP 201, 203. He told her to get her pants off, and the longer she took the more punishment she’d receive. RP 202. He

started to choke her with the bra, then tried pulling it off to the side; eventually it just gave way. RP 203; see RP 708, 710, 754, 756 (defense expert confirmed bra clasp missing). The defendant started pinching her nipples, then started kissing and licking her on the mouth and ear. RP 203, 208.

M.B. screamed for help. The defendant said she shouldn't have done that, and punched her in the face. RP 203. They grappled as he tried to get her pants off and she squirmed sideways. RP 203-04. He punched her in the stomach and chest, telling her the more she fought the more she'd get hit. Id. They ended up wrestling on the floor. M.B. tried to throw a lamp against the wall to make noise. RP 204-06. The defendant continued to punch her. RP 205-07. He eventually got her pants off. RP 204, 207, 209. Finally M.B. said if he was going to do it, it didn't need to be this way, and that she needed to go to the bathroom to take her tampon out. RP 209-10. The defendant stopped hitting her and told her to hurry up. RP 211. From the bathroom mirror she saw him stoop down to adjust the mattress and saw her opportunity to run. She ran out, screaming he was trying to rape and kill her. RP 212-14. She ran towards the people she saw on the balcony

(Knowlton and Killgo) and recalled the woman in room 46 (Killgo) trying to help her. RP 215-16.

Police arrived within 8 minutes. RP 299-300, 312-13. They described M.B. as shaking, hysterical and crying, with her left eye swollen shut, blood around her nose, and a lot of redness around her face. RP 303, 315, 342-43346-46, 350. Her nose continued to bleed as she talked to officers. RP 346-47. Officers also observed bruises on her back, a scratch on her arm, and (later) bruising in her hip area. RP 342, 584-86, 592. M.B. looked "beaten up." RP 288, 342. She was so frightened she had soiled herself. RP 105, 110, 209, 216, 218-19, 705, 710, 722.

M.B. was taken to Providence Medical Center/Colby Campus. ER doctors and a sexual-assault nurse examiner noted M.B.'s swollen-shut left eye, redness to the right side of her face, and blood in her nose. RP 397, 400, 603-04. She had a chipped front tooth, RP 400-01, 604-05, and scratches on an arm and wrist, RP 402. M.B. complained of pain in her neck area and jaw. RP 396, 399, 615, 621. The examining physician noted tenderness and pain in the mid-chest and right flank area. RP 604-05, 608.

A CT scan revealed a "left medial orbital wall blow-out fracture." RP 610, 878, 886-87, 1 CP 103-08. The injury, involves

the bone around the eye. RP 620. Fairly moderate force is required to produce it. RP 610. The examining physician testified that while the facial injuries could all have been caused by one blow, there were other injuries as well, which could not have been. RP 616, 617, 620.

Back at the Smokey Point Motor Inn, police set up containment and brought over a K-9 unit. RP 305-06, 316. The dog got a good track to a nearby Safeway. Id.

Shortly before, Robert Burrell was making a late-night stop at Safeway when he was approached by a shoeless individual who said bikers were chasing him and he needed a ride out of there. Burrell took the individual to Island Crossing, the next exit north on the freeway. RP 162-65. Daniel Bourland, a cab driver, picked up a fare at a gas station at Island Crossing. The individual said he'd been chased by a jealous boyfriend and lost his shoes. Bourland took him to an address north of Mt. Vernon. RP 166-70.

Officers ran the registration of the truck associated with room 49 and talked to Stannik, the registered owner. RP 313-14. They obtained an address in Lyman¹ where the defendant might be. RP 317. Skagit County deputies responded, found the defendant, and

arrested him. RP 295-97, 320. The address was that of his parents.
RP 824.

Forensic analysis of a swab from M.B.'s right ear revealed the presence of the defendant's DNA. RP 384, 404-05, 408, 490-92.

M.B. is described as "petite" and "short-statured." RP 385, 441-42. The defendant is 6'2" and weighs in excess of 220 lbs. RP 856.

The defense case sought to depict M.B. as a desperate, destitute couch-surfing "drama queen," who hoped to gain financially from this incident. RP 133-34, 136-40, 150-51, 268-71, 771, 773, 776. As for the attempted rape and assault, the defendant testified that at the end of the evening M.B. started arguing she was owed money for real estate referrals, and that the defendant and the Stanniks were "raping [her] financially." RP 802-04. M.B., he said, continued to complain and argue as they got up to the motel room. RP 799, 802-04, 834, 836. It was late, and the plan, he said, was for M.B. to sleep on the couch, and for him to sleep on the bed. RP 799, 834, 836. He testified M.B. took her

¹ Lyman is NE of Mt. Vernon and E of Sedro Woolley, on the Skagit River. See ER 201.

pants off to get ready for bed, and took off her bra by pulling it through her shirt sleeve. RP 804. She was now wearing two shirts and her panties. She continued to argue with him. RP 804. She then said “you f**kers,” and started hitting him in the face, knocking his glasses off. As he came up after stooping to retrieve them, his elbow hit her in the eye and flung her towards the bed. He said she glanced off the TV and armoire before landing by the bed. He had not meant to hurt her and apologized, but M.B. wouldn’t let him help. Instead she took her shirt off, told him to stay away, and ran out of the room screaming. He asserted the injury on her face was from the one-time elbow strike. Any other injuries, he said, she got from hitting the furniture. RP 794-95, 802-11, 815-16, 838-41, 843-53, 864-65.

B. CLOSING ARGUMENT.

In his initial closing, the prosecutor twice spoke of the burden of proof and who bore it. RP 882, 890-91. There was no objection throughout. See RP 881-910. During the defense closing, on the other hand, the State had to twice object to statements of personal belief, RP 915-16, 935, and once when defense counsel characterized the State’s presentation of evidence as a “trick.” RP

952. In his rebuttal, the prosecutor again, twice, asked the jury to hold the State to its burden. RP 957, 963. He then stated:

The presumption of innocence ends after my argument.

RP 972. Defense counsel objected, "That's not the law," and the objection was sustained. Id. The prosecutor then concluded by urging jurors to go into the jury room, apply their common sense, hold the State to its burden, and if convinced by the evidence, to return verdicts of guilty. Id.

C. CHARGES AND VERDICTS; DISCUSSION WITH PRESIDING JUROR; AND MOTION FOR NEW TRIAL.

The defendant was charged by second amended information with one count of attempted first-degree rape; one count of second-degree assault with a sexual motivation; and one count of unlawful imprisonment. 1 CP 153-54. The jury convicted the defendant on all three counts and answered "yes" to the special interrogatory on the assault charge. 1 CP 58-61.

After the verdict, the presiding juror stayed and talked with both counsel and Detective Barrett, the State's managing witness. The juror said: 1) female jurors were of the mind that M.B. could not have removed her bra in the manner described by the defendant (through the sleeve of two shirts). 2) Jurors attempted to re-enact

the assault as described by the defendant, and concluded it would have been difficult to cause M.B.'s eye injury in that manner. 3) Jurors did not believe M.B.'s injuries could have been caused by a single blow and then her hitting furniture, based, among on other things, on jurors' own experience in fights. 4) The defendant did not particularly help himself by testifying. 5) The presiding juror is a recovering alcoholic and knows how alcohol can affect one's moods. It appeared to him that the defendant had had more to drink earlier in the evening, and less to drink later. Coming down from such a drinking spree can make one irritable. Another juror used to be a bartender and had seen people in such a state. The juror surmised the defendant had been set off earlier in the evening during a conversation with Deanna Hayes; that he had been further set off by the conversation with the woman patron at the pool table; and the M.B. may have said something, either during the car ride back, or at the motel itself, that still further set the defendant off. 1 CP 2-3, 35-38; see 1 CP 24.

The defendant brought a motion for new trial, alleging that jurors considered extrinsic evidence – personal experiences with alcoholism and fighting – in assessing the defendant's emotional state on the evening in question, and in discounting his account of

how M.B.'s injuries occurred. 1 CP 23-33; New Trial Mtn. & Sent'g RP 2-5. The State responded that all of this inhered in the verdict and thus could not be considered to impeach it. 1 CP 34-48; New Trial Mtn. & Sent'g RP 5-9. The trial court agreed with the State, finding the juror's comments involved lay opinions and experiences that inhered in the verdict. New Trial Mtn. & Sent'g RP 9-12.

D. SENTENCING.

At sentencing the State asserted, and opposing counsel and the trial court agreed, that the charge of second-degree assault merged into the charge of attempted first-degree rape, and that the remaining counts, of attempted rape 1^o and unlawful imprisonment, comprised the same criminal conduct. New Trial & Sent'g RP 12-13; 1 CP 7-9; 2 CP 169. With these adjustments, the defendant was sentenced within the standard range. 1 CP 7-22; 2 CP 168-183. The court imposed community custody, 1 CP 11, 2 CP 172, with certain conditions, 1 CP 19-20, 2 CP 180-81.

III. ARGUMENT

A. THE PRESIDING JUROR'S COMMENTS REFLECTED EVERYDAY COMMON EXPERIENCE AND INHERE IN THE VERDICT.

As he did below, the defendant argues that the presiding juror disclosed misconduct in his discussions with counsel after the

verdict. BOA 15-23. On appeal he complains only of the jury's considering their own life experiences involving the effects of alcohol consumption. BOA 2-3, 19. Because the alleged misconduct involved what he characterizes as specialized knowledge, he argues it does not inhere in the verdict. Id.

The right of jury trial includes 'the right to have each juror reach [a] verdict uninfluenced by factors outside the evidence' State v. McCullum, 28 Wn. App. 145, 149, 622 P.2d 873 (1981), rev'd on other grounds, 98 Wn.2d 484, 656 P.2d 1064 (1983); State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). At the same time, a strong showing of "misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence of the jury." State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994); Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271-72, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991).

The standard of review of this issue is deferential. A trial court's refusal to grant a mistrial based on alleged juror misconduct is reviewed for abuse of discretion. In re Broten, 130 Wn. App. 326, 336, 122 P.3d 942 (2005); State v. Briggs, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989); accord, State v. Havens, 70 Wn. App.

251, 255-56, 851 P.2d 1120 (1993); State v. Rempel, 53 Wn. App. 799, 801-02, 770 P.2d 1058 (1989), rev'd on other grounds, 114 Wn.2d 77, 785 P.2d 1134 (1990). A trial court's decision on a motion for new trial based on juror misconduct will not be disturbed on appeal unless the ruling is based on an erroneous interpretation of the law or constitutes an abuse of discretion. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

In evaluating a claim of juror misconduct, the trial court may not consider matters which inhere in the verdict, including the effect of or weight accorded to the evidence by individual jurors or the jurors' intentions and beliefs. Jackman, 113 Wn.2d at 777-78, (citing Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)); Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962); State v. Rooth, 129 Wn. App. 761, 771-72, 121 P.3d 755 (2005). The mental processes, both individual and collective, by which jurors reach their conclusion are all factors inhering in the verdict. Havens, 70 Wn. App. at 255-56; Jackman, 113 Wn.2d at 777-78; State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988); see generally K. Tegland, 14 Wash. Practice: Civil Procedure § 32:29 at 382-86 (2d ed. 2009). A juror's statements inhere in the verdict if the alleged facts of misconduct are linked to

the juror's motive, intent, or belief, or describe effect upon him or her. Gardner, 60 Wn.2d at 841.

A juror's complaint that she was ill and this left her vulnerable to being bullied into reaching a guilty verdict inhered in the verdict. State v. Forsyth, 13 Wn. App. 133, 138, 533 P.2d 847 (1975). A juror's statement that he had made up his mind before trial inhered in the verdict. State v. Hatley, 41 Wn. App. 789, 706 P.2d 1083 (1985). Certain jurors' mistaken belief that any amount of alcohol in the defendant's system rendered her guilty of DUI could not be used to impeach their verdict. State v. Motzko, 710 N.W.2d 433, 439-40 (S.D. 2006).

Jurors' reliance on personal experiences can inhere in their verdicts as well. In Breckenridge, the Court held that a juror's comments about his personal experiences visiting an emergency room, to determine whether a certain test (CT scan) should have been administered as part of the standard of care, did not constitute impermissible extrinsic evidence. Breckenridge v. Valley General Hospital, 150 Wn.2d 197, 204, 75 P.3d 944 (2003). In Barker, jurors looked at photographs with a magnifying glass, were influenced by the defendant's not testifying, considered certain evidence despite having been told not to, and re-enacted the crime.

The court held that all but the last matter inhered in the verdict, and that the crime scene re-enactment was not novel and extrinsic. State v. Barker, 103 Wn. App. 893, 904, 14 P.3d 863 (2000).

It does not matter whether it is the government or the defense that wishes to inquire. In Rooth, the jury acquitted on the “wrong” count, and the remaining count, on which it convicted, lacked sufficient evidence to support it. The mix-up seemed clear, but the State was not permitted to impeach the “wrong” verdict. Rooth, 129 Wn. App. at 764, 771-72.

It is, however, misconduct for a juror to introduce novel or extrinsic evidence into deliberations. Richards v. Overlake Hosp., 59 Wn. App. at 270. “[E]xtrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document.” Id.; e.g., Lockwood v. A C & S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987) (juror independently investigated defendants’ financial resources); Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 668 P.2d 571 (1983) (juror made unauthorized visit to accident scene); Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973) (juror interjected outside evidence on typical earnings for airline pilots and surveyors); State v. Boling, 131 Wn. App. 329, 127 P.3d 740 (2006) (juror did internet research on

possible alternative causes of death). Extrinsic evidence includes highly specialized information that is “outside the realm of a typical juror's general life experience.” Richards v. Overlake Hosp., at 274.

Relying heavily on this court's decision in Briggs, the defendant asserts that is what happened here. He is wrong.

In Briggs, the defendant had a profound stutter, yet none of the witnesses of multiple robberies, assaults, and attempted rapes reported their assailant stuttered. After the verdict, it was learned that one of the jurors had related in deliberations that he had a stutter-like speech disorder himself; that, under certain circumstances, he could control it; and that he opined the defendant could have used the same techniques. Prospective jurors had been asked explicitly about speech disorders in voir dire and the juror had not disclosed his own impediment. This court found this was misconduct bearing on the central issue at trial (identification); that it comprised highly specialized knowledge outside the realm of a typical juror's life experiences; and that it prejudiced the defendant. State v. Briggs, 55 Wn. App. 44, 59, 776 P.2d 1347 (1989).

The defendant argues that “[t]he jurors’ opinions and experiences here regarding their professional/occupational

knowledge of the effects of alcohol on a person were the same type of 'highly specialized' information found offensive in Briggs[" BOA 19. But, unlike techniques to control speech impediments, the effects of alcohol intoxication and alcoholism are within the common knowledge and experience of jurors. State v. Hicks, 133 Ariz. 64, 71, 649 P.2d 267, 274 (AZ. 1982); State v. Herrera, 176 Ariz. 21, 32, 859 P.2d 131, 142 (AZ. 1993); State v. Hatfield, 121 Ohio St.3d 1201, 901 N.E.2d 813, 814 (OH. 2009); State v. Heinz, 3 Conn. App. 80, 86, 485 A.2d 1321, 1325 (CT. 1984). And the holding in Briggs was uniquely dependant on the fact that the same juror failed to disclose his experience with a speech disorder when asked about it in voir dire.

Here, no such claim is made; indeed, the trial judge, in denying the motion for new trial, noted neither side had inquired about alcohol consumption or alcoholism in voir dire. New Trial Mtn. & Sent'g RP 10. Counsel could have: The "bio form" for the presiding juror (Juror #5, W.H.) revealed a prior DUI, while that for Juror #9, J.E., disclosed she was a server at Olive Garden. Ex. 163. Where the juror's background is known to the parties, who then allow the juror to serve on the jury, and the juror imparts even specialized information in evaluating the evidence introduced at

trial, there is no misconduct. Richards v. Overlake Hosp., 59 Wn. App. at 273-74.

B. THE PROSECUTOR'S LONE MISSTATEMENT DOES NOT MERIT A NEW TRIAL.

On appeal, the defendant argues the prosecutor's lone objectionable comment in closing comprises misconduct so grievous that it, by itself, merits reversal and a new trial.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of establishing the impropriety of the prosecutor's actions as well as their prejudicial effect. State v. Coleman, 152 Wn. App. 552, 570, 216 P.3d 479 (2009); State v. Schlichtmann, 114 Wn. App. 162, 167, 58 P.3d 901 (2002). This burden requires establishing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record, the issues and the evidence, and the instructions given. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); Coleman, 152 Wn. App. at 571. To establish prejudice, a defendant must show

that there is a substantial likelihood that the jury would not have convicted absent the misconduct. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000); State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995); In re Sease, 149 Wn. App. 66, 81, 201 P.3d 1078 (2009).

Respondent concedes the remark was improper. By saying that the presumption of innocence ended at the conclusion of argument, the prosecutor appeared to be inartfully referencing the pattern instruction's language, that states "[t]his presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt." 1 CP 77 (Court's Instruction No. 6); WPIC 4.01. Since deliberations are hidden and conducted out of sight, one can commonly (but incorrectly) think of "trial" as concluding with testimony and argument, which are out in the open. However, "the deliberative process by which the verdict is reached necessarily is a component of the trial." State v. Crane, 260 Kan. 208, 220, 918 P.2d 1256, 1265 (KS. 1996). And the language of the WPIC itself speaks of the presumption's being overcome, if at all, *during* deliberations, not before. 1 CP 77; WPIC 4.01. Thus, to say that the presumption of innocence ends at the conclusion of

argument is, as defense counsel said when objecting, “not the law.”

See RP 972.

But, while improper, the comment was hardly part of a pattern to trivialize the burden of proof, or to shift it to the defendant. In his initial closing, the prosecutor twice spoke of the burden of proof and who bore it. RP 882, 890-91. He spoke of it twice again in rebuttal, before the objected-to comment, RP 957, 963, and once again afterwards, RP 972.

This was a hard-fought eight-day trial, with twenty-two witnesses. 2 CP 187-209. A review of the record shows the case was hotly but fairly tried. See “Statement of the Case,” above. Throughout this long trial the defendant can point to only one lone statement, to which an objection was *sustained*, as comprising misconduct by the prosecutor. The comment was admittedly improper. But the defendant cannot establish a substantial likelihood that, but for the one comment, the jury would not have convicted. See State v. Roberts, 142 Wn.2d at 533; In re Sease, 149 Wn. App. at 81.

M.B. came running and screaming out of a motel room in nothing but her panties. RP 85-86, 103-06, 214-17. She was described by witnesses as bleeding and “beat up.” RP 288, 342.

She had sustained multiple injuries. RP 342, 396, 399-402, 584-86, 592, 603-05, 608, 615, 621. The defendant, for his part, had fled in his stocking feet, telling false stories to the driver and the cabbie he encountered to explain his condition. RP 157, 162-70. His explanation of how the assault occurred – a one-time strike to M.B.'s eye with his elbow, followed by her bouncing off furniture – did not comport with the physical evidence. See RP 794-95, 802-11, 815-16, 838-41, 843-53, 864-65. And his DNA was found on M.B.'s ear, where she said he had licked her during his attempt to rape her. RP 203, 208, 384, 404-05, 408, 490-92.

The defendant argues that all of this was negated by a single improper comment in closing. But an objection was raised and immediately sustained. RP 972. And the jury was correctly instructed on the law. 1 CP 77; WPIC 4.01 (court's instruction No. 6). Reid does not argue that the trial court's "reasonable doubt" instruction was defective. And indeed it was not. The reviewing court presumes that jurors followed the trial court's instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007); State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). A trial court's swift and "unequivocal response" to defense counsel's objection, as

here, can cure an improper remark made by the prosecution. State v. Yates, 161 Wn.2d 714, 780, 168 P.3d 359 (2007).

The defendant disagrees, asserting that the comment here was flagrant and ill-intentioned. Comments are "flagrant and ill-intentioned" when they evince an "enduring and resulting prejudice" that could not have been neutralized by an admonition to the jury. State v. Stenson, 132 Wn.2d at 718; State v. Gentry, 125 Wn.2d at 596. When misconduct is so flagrant that no instruction can cure it, a new trial is the only, and mandatory, remedy. State v. Belgrade, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

The single comment here, however, does not compare to conduct and comments in the cases identifying truly flagrant and ill-intentioned argument. In Belgrade, the defendant had testified to some affiliation with the American Indian Movement ("AIM"). In closing the prosecutor characterized the AIM as "butchers" and a "deadly group of madmen." State v. Belgrade, 110 Wn.2d at 506-08. In Rivers, the prosecutor described the defendant and his defense witnesses as "vicious rockers," "predators," "jackals," and "nothing more than hyenas," and referred to defendant's jailhouse witnesses as the "pajama crowd." State v. Rivers, 96 Wn. App. 672, 673-74, 981 P.2d 16 (1999). In Reed, the prosecutor mocked

defense counsel, repeatedly called the defendant a liar, and derided defense experts as city doctors driving fancy cars. State v. Reed, 102 Wn.2d 140, 143-44, 684 P.2d 699 (1984).

In Monday, a recent case, a prosecutor “injected racial prejudice” into the trial by inferring in cross-examination that witnesses were uncooperative with police because of their ethnic background. He then explicitly argued the same (a race-based code of silence) in closing, and asserted his personal belief in the defendant’s guilt. State v. Monday, __ Wn.2d __, __ P.3d __, Slip Opin. of June 9, 2011 at 1-4. The Supreme Court held this was flagrant and ill-intentioned misconduct that “tainted nearly every lay witness’s testimony.” Monday, Slip Opin. at 7-8.

These cases are characterized by appeals to passion and prejudice, personal insults, statements of personal belief, and racial stereotypes. And they all involved *multiple* improper statements, in some cases comprising an entire theme or theory of the case. Contrast these with the lone statement here, an error which hardly represented the tenor and thrust of the prosecutor’s otherwise completely proper argument and conduct of trial. The comment in rebuttal was improper, but it was not flagrant and ill-intentioned.

The defendant disagrees, citing a Div. II case. In Johnson, a drug-case prosecution, the prosecutor argued that the jury needed specific reasons or facts in order to find the defendant not guilty. Because this “fill-in-the-blank” argument undermined the “bedrock” presumption of innocence enjoyed by a defendant, Div. II found it flagrant and ill-intentioned, and that it could not conclude the misstatements (which had not been objected to) did not affect the verdict. State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). Relying on Johnson, the defendant argues a per se rule: that even a single improper comment about the presumption of innocence automatically garners one a new trial. But like the other case examples already cited above, the improper comments in Johnson comprised a theory or theme of the case and of argument. See Johnson, 158 Wn. App. at 682. The isolated statement here did not.

Moreover, Johnson’s alternate holding – that it trivialized the burden to analogize reasonable doubt to putting together pieces of a puzzle, where some pieces are far more informative than others – was later rejected by the same Division in State v. Curtiss, ___ Wn. App. ___, 250 P.3d 496, 509, Slip Opinion of May 6, 2011 at ¶¶ 56-58; compare Johnson, 158 Wn. App. at 682, 685-86. Thus,

Johnson's continued viability is in question. Its holding is not reflected in Supreme Court precedent. And as a decision of another Division, this Court is not bound by it. Marley v. Dep't of Labor & Industries, 72 Wn. App. 326, 330, 864 P.2d 960 (1993). To the extent Johnson posits a per se rule, even for a single statement, this Court should reject it.

Lastly, the Supreme Court in Monday articulated a new standard when a prosecutor's actions are "flagrant and ill-intentioned" specifically for having employed racial stereotypes. State v. Monday, Slip Opin. Of June 9, 2011 at 7-8, ¶¶ 24, 25. The Supreme Court held the comments and examination there so flagrant and ill-intentioned, and so corrosive to a fair trial, that the burden shifted to the State to show any error was constitutionally harmless, that is, harmless beyond a reasonable doubt. Monday, Slip Opin. at 7-8, ¶¶ 24, 25. That standard does not apply here, for the prosecutor's comment was not flagrant and ill-intentioned, nor did it employ racial stereotypes, nor did it reflect an entire theory of, or strategy for, the case. But even if the stricter standard did apply, for the reasons and from the facts cited above, weighing the compelling evidence at trial against the one improper comment in

closing also establishes that the error was harmless beyond a reasonable doubt.

C. WITH TWO EXCEPTIONS, CONDITIONS OF COMMUNITY CUSTODY WERE PROPER.

The defendant was sentenced under RCW 9.94A.507(1)(a)(iii) (indeterminate sentence for attempted first-degree rape). A sentence under RCW 9.94A.507 includes a term of community custody. RCW 9.94A.507(5). Conditions of community custody, subdivided into those that are “mandatory,” “waivable,” and “discretionary,” are at RCW 9.94A.703. Discretionary conditions include those that are crime-related prohibitions. RCW 9.94A.703(3)(f). (Still other conditions can be imposed by DOC pursuant to RCW 9.94A.704.)

At sentencing, the trial court imposed community custody, 1 CP 11, 2 CP 172, with a number of conditions sought by the Department of Corrections, 1 CP 19-20, 2 CP 180-81. These included sexual deviancy treatment and following all conditions and testing outlined therein (conditions # 4, 5, and 21); substance-abuse treatment, and compliance with all conditions and testing outlined therein (conditions # 17 and 18); and no purchase, possession or consumption of alcohol, or of controlled substances

without prescription, nor the frequenting of establishments where alcohol is the chief commodity for sale (conditions # 9, 10, and 11).

Id. The defendant raised no objections to these conditions below, and does not assign error to them now. He does, however, assign error to six other conditions:

6. Do not possess or access sexually explicit materials, as defined by the supervising CCO and therapist.

7. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

8. Do not possess or control sexual stimulus material as defined by the supervising CCO and therapist except as provided for therapeutic purposes.

* * *

12. Do not associate with known users or sellers of illegal drugs.

13. Do not possess drug paraphernalia.

14. Stay out of drug areas as defined by the supervising CCO.

1 CP 19, 2 CP 180. The defendant did not object to these conditions below, but respondent agrees he can raise these for the first time on appeal if, in imposing them, the trial court exceeded its statutory authority under the Sentencing Reform Act. See BOA 25.

None of the challenged conditions are specifically listed in RCW 9.94A.703 (although geographical restrictions generally may be imposed, RCW 9.94A.703(3)(a)). As stated above, the legislature also has authorized the trial court in its discretion to impose other crime-related prohibitions. RCW 9.94A.703(3)(f). However, the imposition of a condition not otherwise authorized, and that is not a crime-related prohibition, is an abuse of discretion. State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008).

Respondent concedes that, since drugs were not a factor in these crimes, the imposition of condition # 12 (no association with known users & sellers) was improper and it should be stricken. See id. But since geographical restrictions are expressly authorized, imposing condition #14 (stay out of drug areas) did not exceed the court's authority and its imposition was not an abuse of discretion, even though it is admittedly not crime-related. The bare possession of drug paraphernalia (condition #13) is not a crime, the condition not expressly authorized by statute, and the prohibition not crime-related; however, possession of drug paraphernalia with intent to use *is* a crime under State law. RCW 69.50.412(1). A trial court can certainly impose a condition that an offender "obey all laws." State v. Jones, 118 Wn. App. 199, 204-05, 76 P.3d 258

(2003); RCW 9.94A.704(4). Consequently, on remand the trial court should be given leave, if it wishes, to either strike this condition or amend it to prohibit the possession of drug paraphernalia “with intent to use.”

That leaves the three provisions dealing with the possession of sexual explicit materials and sexual stimulus material, and with frequenting establishments whose primary business pertains to such material. Conditions # 6-8, 1 CP 19, 2 CP 180. The defendant argues that since the presence and perusal of such materials were not part of his crimes, these conditions are not “crime-related prohibitions” and cannot stand. BOA 27. *But the convictions here were for sex offenses.* E.g., definitions at RCW 9.94A.030(45)(a)(iv) (attempted rape) and ~.030(45)(c) (felony with sexual motivation).

The community custody statutes authorize the imposition of rehabilitative conditions related to the offender’s risk of reoffending or the safety of the community, RCW 9.94A.703(3)(d). And if the conviction is for a sex offense, as here, the community custody statutes require DOC assess the defendant’s risk of recidivism. RCW 9.94A.704(9)(a). There is nothing to suggest the imposition of conditions # 6-8 cannot further these goals.

The defendant cites no authority purporting to hold that such prohibitions – provided they are constitutionally clear – cannot be imposed as part of community custody for a “sex offense.” A reviewing court should decline to address an argument unsupported by any cited legal authority. RAP 10.3(a)(5); State v. McNally, 125 Wn. App. 854, 865, 867 n.19, 106 P.3d 793 (2005).

Lastly, unchallenged conditions # 4, 5, and 21 require the defendant enter sexual deviancy treatment and follow all conditions imposed by the CCO or therapist pursuant thereto. A therapist could impose the identical conditions of which the defendant complains here.

Because the challenged conditions are part of the terms of community custody for a sex offense, they were lawfully imposed.

IV. CONCLUSION

The conviction should be affirmed. The judgment and sentence should be affirmed in all aspects, except community-custody condition # 12 should be stricken and condition # 13 stricken or revised.

Respectfully submitted on July 6, 2011.

MARK K. ROE
Snohomish County Prosecutor

by: 
CHARLES FRANKLIN BLACKMAN, #19354
Deputy Prosecuting Attorney
Attorney for Respondent