

Original

NO. 34425-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMAL PAYTON,

Appellant.

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MAY 23  
FILED

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

The Honorable John A. McCarthy, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in allowing the state to introduce evidence that Mr. Payton wept during a custodial interview, in which he repeatedly denied hitting the complaining witness and said that his life was out of control because of his use of methamphetamine.

2. The trial court erred in admitting the 911 tape under the excited utterance exception to the hearsay rule.

3. The trial court erred in denying Mr. Payton's motion for new trial based on the introduction of extrinsic evidence to the jury during deliberations.

4. Cumulative error denied Mr. Payton a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where Mr. Payton was charged with assault with a baseball bat and the motive for the assault was not alleged to be related to drugs, did the trial court err in allowing the state to introduce evidence that Mr. Payton wept during a custodial interview and said his life was out of control because of using methamphetamine?

2. Where the complaining witness seemed calm and collected on the 911 tape and where it was known by the time of trial that he had been untruthful in reporting that people were taking a television out of his house at the time, did the trial court err in ruling that the tape was admissible as an excited utterance?

3. Where the state had to prove that the assault took place because Mr. Payton hit the complaining witness with a baseball bat, and a deliberating juror believed erroneously that an excused juror who worked for the Pierce County property room said she had seen the bat in the evidence room and the bat was never introduced at trial, and where defense counsel learned of the juror's mistaken belief from another juror, did the trial court err in denying the defense motion for new trial based on the jury's consideration of extrinsic evidence?

4. Did the cumulative impact of the evidentiary errors and the introduction of extrinsic evidence into the jury deliberations deny Mr. Payton a fair trial?

**C. STATEMENT OF THE CASE**

**1. Procedural history**

The Pierce County Prosecutor's Office charged Jamal Payton with assault in the second degree, alleging that he "did intentionally assault another with a deadly weapon, to-wit: a baseball bat" and that the use of the deadly weapon, if proven, should result in a sentence enhancement. CP 1-2.

The jury convicted Mr. Payton as charged after trial before the Honorable John A. McCarthy, and entered a special verdict finding that he was armed with a deadly weapon during the commission of the crime. CP 26, 27.

On February 10, 2006, Judge McCarthy imposed judgment and sentence, sentencing Mr. Payton to a term within the standard range. CP 93-105. Mr. Payton subsequently filed a timely notice of appeal. CP 73-90.

**2. Pretrial rulings**

Prior to trial the court ruled that Mr. Payton's custodial statement denying that he threatened or assaulted Mr. Patrick Olson, the complaining witness, was made after proper Miranda warnings and admissible at trial. RP 1-19. The

defense did not contest that Mr. Payton was properly given his warnings, but moved in limine to exclude testimony that he wept several times during the interview and said that he believed his life was out of control because of his use of methamphetamine. RP 11-13. Defense objected to the admission of this statement on the grounds that there was no allegation that Mr. Payton was under the influence or that the drugs were relevant to the case and that therefore introduction of the statement was irrelevant, unfairly prejudicial and apt to confuse the jurors. RP 13-14.

The trial court found that the statement was relevant to Mr. Payton's state of mind, or, even though he persistently denied assaulting Mr. Olson, possibly relevant to his trying to excuse or justify his actions. RP 19.

### **3. Trial testimony**

Patrick Olson testified at trial that on October 2004, he was living in a two-bedroom house located in the Mount Tacoma Trailer Park. RP 79-80. He testified that during this time Mr. Payton broke his cheek bone, but that he did not know if he did so with his fist, a baseball bat or the end of a

knife. RP 81. According to Mr. Olson, Mr. Payton had a bat and another person, a man called Youngster, had a knife. RP 81. There were three people at Mr. Olson's house -- Mr. Payton, Youngster and a man named Joe -- and it happened "so fast." RP 81-82. Mr. Olson insisted that he did not see any of the blows land and could not tell if Mr. Payton had been successful in hitting him with the bat. RP 92. The incident occurred sometime between 6:00 and 8:00 p.m. in his living room. RP 82-84.

Initially, Mr. Olson said that "these people" said that they needed to talk to him, and pushed their way inside. RP 83-84. He was struck about ten minutes later, after Mr. Payton gave him a "sermon for about ten minutes." RP 84. Later in his testimony, Mr. Olson explained that the person named Joe had actually spent the night at his house and was there when Mr. Payton and Youngster arrived. RP 118-119. Although Mr. Olson told the 911 operator that there were three men, and gave descriptions of all three of them, at trial he explained that Joe did not participate in the incident. RP 119.

Mr. Olson was also unclear on how well he knew Mr. Payton. He first said that he had met Mr.

Payton and Youngster each on a prior occasion. RP 85-86. He also said that they were "just always chasing one of the girls that would come by the house." RP 86. Later, during cross-examination, he testified about three specific times when he had been with Mr. Payton. RP 116.

Mr. Olson described the problem Mr. Payton had with him as arising from the fact that some months earlier in July or August, Mr. Payton's girlfriend had been caught joyriding in Olson's car "and there just happened to be dope in the car and everything else, and I could never understand why it was my fault that his old lady got caught in my car." RP 86-87. Mr. Olson's car had been returned to him in July or August, and he no longer owned the car in October 2004. RP 88, 117. The only thing that Mr. Olson could recall Mr. Payton saying during the incident was that he should not "talk to the law enforcement at all about the car." RP 89. Mr. Olson also felt that there were "three or four or five, the click that they were in, all hung out together and they were all conspiring, you know, playing games with my gears." RP 89-90.

According to Mr. Olson, the incident may have

become violent because he "might have gotten lippy with them, rude to them." RP 90.

Although Mr. Payton and Youngster came and left on foot and took nothing, Mr. Olson reported the incident as a strong-arm robbery to the 911 dispatcher. RP 94, 97-98, 121. At trial, he testified that Mr. Payton said that his TV would look nice in his own house, and that he believed that Youngster left to go get a truck so that they could steal his belongings. RP 93, 99. Mr. Olson admitted that he watched from his uncle's house and no one ever returned. RP 99.

Mr. Olson had gone to his uncle's house nearby to call 911.<sup>1</sup> RP 95. He told the 911 operator that people weretaking his television out of his house, although it was not taken. RP 120.

Mr. Olson went to the doctor the following morning and learned that his cheekbone had been broken. RP 100-102.

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<sup>1</sup> The trial court admitted the 911 tape as an excited utterance because the responding police officer testified that Mr. Olson was very emotional and crying when he arrived after the 911 call. RP 68, 107. Defense counsel argued that it was not an excited utterance because Mr. Olson was very calm and collected throughout the call. RP 106-107.

On cross-examination, Mr. Olson described the bat as short and "like boy bat or something," but also as about four feet long. RP 111-112. Mr. Olson admitted that he had drunk two 24-ounce cans of beer on the evening of the incident. RP 114.

Officer Shawn Noble responded to the 911 call at 7:10 p.m. RP 63-65. Officer Noble noticed a small cut and some bruising on Mr. Olson's face and called the fire department to check the injuries. RP 69-70. The fire department concluded that Mr. Olson did not need to go to the hospital. RP 74. Noble wrote in his report that Mr. Olson was treated for "minor scrapes and bruises." RP 76.

Detective Jeff Paynter testified that when he interviewed Mr. Payton after his arrest, Mr. Payton repeatedly denied hitting Mr. Olson, although he agreed that he went to see Olson to discuss his complaint to the police about his car. RP 35-40, 42. Paynter was permitted to testify that Mr. Payton cried several times during the interview and said that he believed his life was out of control because of using methamphetamine. RP 38.

Detective Paynter agreed that when he talked to Mr. Olson in person, during his investigation, Mr.

Olson told him that the incident occurred because he was making inquiries about a stolen vehicle or trying to locate a stolen vehicle. RP 44-46.

#### **4. Juror questions**

During the course of deliberations, the jurors sent out a number of questions indicating that one juror whose primary language was not English had questions about the meaning of the terms "readily available" and "easily accessible" in the jury instruction defining deadly weapon for purposes of the special weapon verdict. RP 181-182, 202, 208-211; CP 1-9. In each instance, the court responded, with the agreement of the parties, "you have your instructions." RP 192, 205, 213.

#### **5. Post-trial motions**

As a result of the juror questions, defense counsel obtained permission to contact the juror, Ugur Koku, who was apparently having difficulty understanding the court's deadly weapon enhancement special verdict instruction. RP(6/24) 2-3.

Defense counsel explained that he contacted Mr. Koku and that, after a cordial interview, Mr. Koku became concerned and uncooperative when counsel proposed that the juror sign an affidavit explaining

his confusion over the jury instructions. RP(6/24) 5-9. Defense counsel further explained that during the course of the conversation with Mr. Koksu, he learned that another juror had possibly introduced extrinsic evidence into the deliberations:

a pivotal part of the jury deliberation centered on whether or not there was a baseball bat involved in the assault that took place on the victim in this case . . .

Your Honor will recall that during our general voir dire of the jury panel, there was a member of the jury panel who was an officer in the Pierce County property room; then in response to Your Honor's question, "Is there anyone who is familiar with this case or with the evidence of this case?" she raised her hand and identified herself and said, "I am an officer of the Pierce County property room and all of the evidence in the case that come through here and I may be familiar with it." Ultimately, she was excused for cause, not for that statement.

. . . . In the course of deliberation, apparently this Juror No. 10, Kathryn Gustafson, introduced to the jury, "Well, we know there was a bat because the property room evidence officer saw it. Everyone recalled when the judge asked the questions and she said she was familiar with the evidence in the case."

RP(6/24) 9-10.

Based on this information, defense counsel was permitted to contact Ms. Gustafson. RP(6/24) 11.

After contacting Ms. Gustafson, defense counsel moved for a new trial. RP(2/10) 2. At the hearing on the motion for new trial, Ms. Gustafson testified that she recalled the judge asking during voir dire if anyone was familiar with the case or the evidence in the case and that a juror "said that she had seen the weapon in the evidence room." RP(2/10) 7-8. Ms. Gustafson initially denied that these comments became a topic of conversation among the jurors, but conceded that the jurors were very curious about why no bat was introduced into evidence. RP(2/10) 9. During the examination by the prosecutor, however, she indicated that she was not certain whether the belief that there was a weapon in the property room was or was not expressed during deliberations, but that the jurors assumed there was a bat. RP(2/10) 10-12.

In her taped statement, Ms. Gustafson said, "She said that she worked in the Evidence Room for the Pierce County Sheriff's Department, and that she was familiar with the weapon and had indeed seen the weapon. So at that point, *that's why we all figured that there was a weapon.*" CP 62 (emphasis added). She was very definite in the interview that she

"certainly" believed there was a weapon in the custody of the property room. CP 63.

Based on this testimony, defense counsel argued that the jury's consideration of extrinsic evidence required granting Mr. Payton a new trial. RP(2/10) 11-12. For purposes of the motion, the parties agreed that the property room officer who had been excused during voir dire had not actually said that she had seen the weapon, only that she was familiar with the evidence. RP(2/10) 12. Defense counsel identified the problem as that Ms. Gustafson believed that the excused juror had seen the bat even though she had not said she had seen it. RP(2/10) 13.

Counsel argued that the jury, as instructed, clearly had to find in both the "to-convict" and "definition of assault" instructions that the state bore the burden of proving an actual offensive touching with a baseball bat. CP 17, 20. Ms. Gustafson said she and others assumed that there was a baseball bat because the police had taken it into evidence. RP(2/10) 13-14. In this way, Ms. Gustafson's testimony established that extrinsic

evidence that was considered by the jury during their deliberations. RP(2/10) 15.

The trial court denied the motion for new trial, ruling that the excused juror did not mention a weapon, that whatever the person said was not so prejudicial that either counsel asked for a curative instruction or a new jury panel, and that there was no evidence that this juror or any other juror brought extrinsic evidence into the jury room which should result in a new trial. RP(2/10) 21.

**D. ARGUMENT**

**1. THE TRIAL COURT ERRED IN ADMITTING MR. PAYTON'S STATEMENT THAT HIS LIFE WAS OUT OF CONTROL BECAUSE OF HIS DRUG USE.**

The trial court erred in allowing the state to introduce evidence that Mr. Payton told Detective Payntor, when Payntor interviewed him in jail, that his life was out of control because of his use of methamphetamine. The evidence was admissible neither as a prior bad act nor to impeach Mr. Pyaton's general credibility. The court found that the statement was relevant to Mr. Payton's state of mind, but never identified why his state of mind nearly three months after the alleged incident was relevant to any issue at trial. RP 19. Although

the court also found that the evidence was possibly relevant to Mr. Payton's trying to excuse or justify his actions, Mr. Payton repeatedly denied hitting Mr. Olson at all. RP 19. The evidence was not relevant and any remote relevance was greatly outweighed by the potential for unfair prejudice and confusion of the issues before the jury.

The rules on impeachment with evidence of drug use are well established. Such evidence is admissible only if:

(1) there is a showing that the witness is using or is influenced by the drugs at the time of testifying; (2) if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony; or (3) when a defendant puts his own character in issue.

State v. Dault, 19 Wn. App. 709, 719, 578 P.2d 43 (1978) (citing State v. Renneberg, 83 Wn.2d 735, 738, 522 P.2d 835 (1974); annot., Use of Drugs as Affecting Competency or Credibility of Witness, 65 A.L.R.3d 705, §§ 5(a), 6 (1975); 50 Wash. L. Rev. 106 (1975)); State v. Russell, 125 Wn.2d 24, 113-114, 882 P.2d 747 (1994). "Absent a showing of such events, however, evidence of drug use by a witness is inadmissible to show a general lack of veracity in the absence of medical or scientific proof

associating that drug with a general lack of veracity." Dault, at 710. This rule recognizes that evidence of drug use is of little probative value unless the witness was under the influence at the critical time at issue at trial.

The only inferences from the testimony were (1) that Mr. Payton was a drug user and therefore more likely to have committed the charged crime, the inference forbidden by ER 404(b); or (2) that Mr. Payton was actually confessing that he committed the crime. Since he was not confessing, the evidence was apt to confuse the jury and was substantially more prejudicial than probative and subject to exclusion under ER 403.

The evidence that Mr. Payton admitted to drug use did not make any fact at issue at trial more or less likely and therefore was not relevant or admissible. ER 401, 402. It was not relevant because it was not tied to the time of the incident or even the time that the statement was made. It improperly invited the jury to find that it was consistent with Mr. Payton's character as a drug user to have committed the crime and likely confused the jury by the implication that it constituted

evidence of guilt. For all of these reasons the trial court erred in admitting the evidence. Because the evidence was unfairly prejudicial in the extreme, the wrongful admission of the evidence should require reversal of Mr. Payton's conviction on appeal.

**2. THE TRIAL COURT ERRED IN ADMITTING THE 911 TAPE AS AN EXCITED UTTERANCE; MR. OLSON WAS CALM AND COLLECTED DURING THE CALL AND HAD TIME TO REFLECT AND EXAGGERATE THE TRUTH.**

The trial court erred in admitting the 911 tape under the excited utterance exception to the rule excluding hearsay evidence. Mr. Olson appeared to be calm and collected when he spoke with the 911 operator, not excited. From his trial testimony, it was also apparent that Mr. Olson was not being candid or entirely truthful with the operator. He was reflecting and making conscious decisions about what to say during the call.

Mr. Olson, by his own admission, was improvising rather than accurately reporting during his 911 call. Mr. Olson said during the call that people were taking his television from his home. This was untruthful since the television was not taken. RP 129. Further, when Mr. Olson reported

what he described as a strong arm robbery, he said that there were three people involved and gave descriptions of his friend Joe, as well as Mr. Payton and Youngster, even though Mr. Olson testified that Joe had not participated at all in the incident. RP 119. At trial, Mr. Olson explained that he did this "[b]ecause I was starting to get paranoid and shady about everybody in there. I couldn't trust anybody." RP 119. Thus, Mr. Olson was reporting things he feared were true, not what actually happened.

ER 803(a)(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" need not be excluded as hearsay. The exception is based on the rationale that an event may be so startling that any statements made while still under the influence of the event are spontaneous, without reflection and truthful:

'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.'

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976)). As a result, the "key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting Johnson v. Ohls, 76 Wn.2d 398, 405, 457 P.2d 194 (1969)); State v. Brown, 127 Wn.2d 749, 758-759, 903 P.2d 459 (1995).

Accordingly, three conditions must be met: "(1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was still under the stress of the startling event or condition; and (3) the statement must relate to the startling event or condition." State v. Lawrence, 108 Wn. App. 226, 31 P.3d 1198 (2001) (citing State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)). "The second element 'constitutes the essence of the rule' and '[t]he key to the second element is spontaneity.'"

Lawrence 108 Wn. App. at 234 (quoting Chapin, 118 Wn.2d at 688).

In Brown, the Supreme Court held that the trial testimony of the victim that she decided not to tell the truth in a portion of her 911 call defeated a finding that her call was an excited utterance. Brown, 127 Wn.2d at 757-759. The victim testified that she had discussed with her boyfriend the fact that the police might not believe her because she had gone willingly with the defendant and because she was a prostitute and, for this reason, she decided to tell the police that the defendant had abducted her and threatened her with a knife and gun. Brown, 127 Wn.2d at 752. The court held that, by the victim's own testimony, "she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call." Brown, at 759.

Here, as in Brown, Mr. Olson reflected sufficiently to decide to label his friend Joe as one of the assailants, even though Joe had spent the night with him and did not participate in the incident, because Mr. Olson had suspicions about what was happening to him. He reported that the

television was being taken from his home even though he did not know that to be true and even though it was not true. Under these circumstances, and particularly in light of the fact that he did not appear to be excited during the call, the trial court erred in allowing the state to introduce the 911 call. It was hearsay -- an out-of-court statement introduced to prove the truth of the matter asserted -- for which there was no exception justifying its admission. ER 801, ER 802.

The erroneous admission of the 911 tape should require reversal of Mr. Payton's convictions. Within reasonable probabilities, the outcome of the trial would have been different had the court not admitted the evidence. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

**3. THE TRIAL COURT ERRED IN DENYING MR. PAYTON'S MOTION FOR NEW TRIAL BASED ON THE JURY'S CONSIDERATION OF EXTRINSIC EVIDENCE.**

As Mr. Payton was charged and the jury instructed, the state had to prove that Mr. Payton actually hit Mr. Olson with the baseball bat during the assault. Assault was defined as "an intentional touching or striking of another person that is harmful or offensive." CP 17. The "to-convict"

instruction required the state to prove that, based on this definition of assault, Mr. Payton "assaulted Patrick Olson with a deadly weapon." CP 20. The baseball bat was the only weapon Mr. Payton was accused of using during the incident.

The bat was not introduced as evidence at trial. Mr. Olson was clear that he could not tell if he was hit with the bat or not. RP 81-82. He was unclear about what the bat looked like; he described it both as a short bat for a boy and as four feet long. RP 111-112. Under these circumstances it was unfairly prejudicial that jurors erroneously believed that a prospective juror who worked in the evidence room said that she had seen the bat. RP(6/24) 9-10; RP(2/10) 7-12; CP 62-63.

Juror Gustafson clearly believed that the property room officer had seen the bat. RP(2/10) 7-12; CP 62-63. Although Ms. Gustafson was less certain about whether this fact was discussed during deliberations, she was clear that she thought others assumed with her that the excused juror had seen it. RP(2.10) 7-10; CP 63. Moreover, it must have been discussed among all of the jurors because defense

counsel was alerted to the whole issue by another juror, Mr. Koku. RP(6/24) 9-10. Mr. Koku could not have reported the conversation during deliberations if Ms. Gustafson had not made statements in his presence.

In State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004), the Washington Supreme Court reversed a conviction where two documents were inadvertently given to the jury during deliberations, a police report recounting statements made by Pete and his written statement. Pete, 152 Wn.2d at 550. Neither the documents nor Pete's statement had been introduced at trial. The robbery charge in Pete arose from an incident in which a motorist alerted the police to "two guys beating up another guy" nearby. Pete, at 548. The officers arrived to see co-defendant Herman Longtimesleeping kicking the victim and Pete attempting to take a case of beer from the victim. Pete at 548. The victim's trial testimony -- that he had given the two men beer and that he hit his head when he fell and could not remember if either man hit him after that -- differed from his initial report that the men struck him after asking for more beer. Pete, at 549.

Moreover, the victim had initially told the officer that Longtimesleeping hit him and Pete tried to take the case of beer from his hands. Pete, at 549.

Pete's statements to the officers that he took some beer and that Longtimesleeping was the one who actually assaulted the victim and that the victim had injured himself when he fell while he wrestled with Longtimesleeping were found to be admissible, but were not introduced at trial. Pete, at 550. Pete had also given a written statement to the police indicating that the victim handed him the rest of the beer, a statement which was similarly not admitted at trial. Pete at 550.

The jurors acquitted Pete and Longtimesleeping of first degree robbery, but convicted them of second degree robbery. Pete, at 551. The Supreme Court reversed the convictions because the jurors erroneously viewed, although briefly, the report of Pete's statement and his written statement. Pete, at 555. The Supreme Court held that Pete, for his defense of general denial, relied on the testimony of the victim that Pete did not speak to or touch him the night of the incident and that he voluntarily gave the beer to Pete. Pete, at 554.

The Court found that, under these circumstances, the erroneous introduction of the documents seriously undermined Pete's defense and only a new trial could correct the error. Pete, at 555. The court noted that the officers' testimony that they saw Pete and Longtimesleeping robbing the victim was somewhat refuted by the victim's testimony at trial and that Pete's statements were not entirely exculpatory. Pete at 554.

Similarly, in State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989), a juror's providing information during deliberations from his prior experience with and knowledge of speech disorders constituted extrinsic evidence and reversible error. The evidence for conviction in Briggs was mostly eyewitness identification, and Briggs' defense was that none of these witnesses noticed that he stuttered. The juror told other jurors that a stutter can be controlled and does not occur in all situations. Briggs, 55 Wn. App. 55. The introduction of this extrinsic evidence required a new trial.

CrR 7.5(a)(1) authorizes the trial court to grant a new trial if it "affirmatively appears that

a substantial right of the defendant was materially affected" by the jury's receipt of "any evidence, paper, document or book not allowed by the court." As explained in Pete, it is "misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial." Pete, at 552 (citing State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994)). "'Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document.'" Pete, at 552; Balisok, 123 Wn.2d at 117 (quoting Richards v. Overlake Hosp.Med.Ctr., 59 Wn. App, 266, 270, 796 P.2d 737 (1990)). It is improper to consider such evidence because it was never tested at trial, "not subject to objection, cross examination, explanation or rebuttal." Pete at 553; Balisok at 117.

Here, it was undisputed that Ms. Gustafson accepted as true during deliberations that the excused juror had seen the baseball bat in evidence in the property room of the Pierce County Sheriff. It was further undisputed that this evidence was outside any evidence admitted at trial and, in fact, untrue. Although Ms. Gustafson believed that she

did not share her belief about the bat with other jurors, she must have done so. If she had not shared her belief with the entire jury during deliberations, the juror who had trouble with English, Mr. Koksü, would not have know her undisclosed thoughts. RP(6/24) 7-10. Ms. Gustafson also was clear that she felt everyone on the jury assumed that the bat had been found and taken into evidence.

The extrinsic but false evidence about the bat could not have been more unfairly prejudicial. The bat was *not* taken into evidence. Mr. Olson described it very inconsistently and was unclear whether he had been actually hit by a bat or not. RP 81082, 111-112; RP(6/24) 9-10; RP(2/10) 7-12. As in Pete and Briggs, under these circumstances, Mr. Payton was so prejudiced that nothing short of a new trial can insure that he had a fair trial. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court erred in denying his motion for new trial and therefore his conviction should now be reversed on appeal.

**4. CUMULATIVE ERROR DENIED MR. PAYTON A FAIR TRIAL.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); United States v. Troy, 52 F.3d 207, 211 (9th Cir. 1995); United States v. Pearson, 746 F.2d 789, 796 (11th Cir. 1984).

In this case all of the errors combined to enhance the unfair prejudice to Mr. Payton, and his conviction should be reversed because of the cumulative impact of the errors. The cumulative impact of the introduction of Mr. Payton's unfairly prejudicial statements about drug use, the introduction of the 911 tape which was not demonstrated to be reliable and the introduction of extrinsic evidence during deliberations should

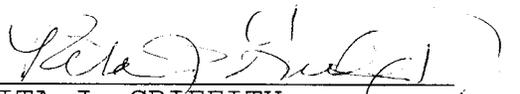
require reversal of Mr. Payton's conviction and a remand for retrial.

**E. CONCLUSION**

Appellant respectfully submits that his conviction for second degree assault should be reversed and remanded for retrial. At the retrial, the court should exclude the portion of Mr. Payton's custodial statement referring to his drug use and should exclude the 911 tape.

DATED this 6<sup>th</sup> day of July, 2006

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I certify that on the 6<sup>th</sup> day of July, 2006, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

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