

NO. 49289-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KAMERON ALEXANDER ROSENGREN,

Appellant.

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

The Honorable Mary Sue Wilson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

2. Trial counsel was ineffective in failing to request a limiting instruction for ER 404(b) evidence.

3. Trial counsel was ineffective in failing to authenticate extrinsic impeachment evidence.

4. The trial court violated the appellant's right to present a defense when it excluded the testimony of a defense witness endorsed for the first time on the second day of trial.

5. The trial court abused its discretion by refusing to grant the appellant's motions for a new trial based on jury misconduct where extrinsic evidence was introduced by a juror and where the juror expressed the opinion that the appellant was "guilty, that's it" after obtaining the extrinsic evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Did defense counsel provide ineffective assistance in failing to request a limiting instruction for ER 404(b) evidence? Assignments of Error No. 1 and 2.

2. Did defense counsel provide ineffective assistance where he failed

to secure a witness capable of authenticating a Facebook post intended to impeach the complaining witness? Assignments of Error No. 1 and 3.

3. The appellant was denied his right to due process when the trial court excluded the testimony of a late-endorsed defense witness, and failed to consider alternatives to the sanction of exclusion? Assignment of Error No. 4.

4. Did the trial court err in denying appellant's motion for a new trial based on juror misconduct, when prior to ruling it failed to conduct a sufficient inquiry to determine whether a) the misconduct occurred, and b) if it did, whether it prejudiced the defendant. Assignment of Error No. 4.

C. STATEMENT OF THE CASE

1. Trial testimony:

J.F.-P.¹ is the daughter of Larissa Fia. J.F.-P. lived with her mother and brother, B.C., who was eight years old at the time of trial, and her younger sister E., who was four years old at the time. Report of Proceedings (RP)² at 315, 316.

¹J.F.-P. was born July 14, 2001. 2RP at 132, 315.

²The Verbatim Report of Proceedings consists of the following volumes designated as follows: RP (8/4/15); RP (12/16/15); 1RP (4/11/16, jury trial, day 1); (4/12/16, day 2, morning session); 2RP (4/12/16, jury trial, day 2, afternoon session); (4/13/16, day 3); RP 5/4/16 (CrR 7.5 motion for new trial); RP 5/18/16; RP 6/2/16; RP 6/23/16 (renewed motion for new trial); RP (6/29/16); and RP (7/29/16) (sentencing).

Ms. Fia had known Kameron Rosengren³ since he was in high school, and he had babysat for her children in the past. 2RP at 317. Ms. Fia stated that Kameron's older brother, Joshua Davis, had been her boyfriend since the beginning of 2015. 2RP at 319. When Ms. Fia started to date Mr. Davis, J.F.-P. said that she and Kameron Rosengren started to "hang out" with each other. 1RP at 135.

Ms. Fia and her children lived with her mother, but she and J.F.-P. would occasionally stay in a hotel with Mr. Davis and Kameron beginning in February, 2015. 2RP at 319. They would stay in a hotel during times that her mother was away overnight from her house receiving hospital treatment, and she did not like visitors at their house when she gone. 2RP at 319. This occurred five or six times. On these occasions, Ms. Fia and Mr. Davis stayed at a Motel 6 located in Tumwater, Washington, usually on weekends. 2RP at 320. J.F.-P., B.C., and Kameron Rosengren would usually stay at the motel with Mr. Davis and Ms. Fia, but at other times the children did not stay with them. 2RP at 321. Ms. Fia stated that she, Mr. Davis and B.C. would sleep in one bed and J.F.-P. and Kameron would sleep in the other bed. 2RP at 323.

Tumwater police officer Jennifer Kolb met with J.F.-P. on February 25, 2015 and a second time on March 5, 2015. 1RP at 351. On March 5, 2015,

³Kameron Rosengren was born August 2, 1996. 1RP at 107.

Officer Kolb interviewed J. F.-P. at the Chinook Middle School, where she attended school. 1RP at 96, 100, 118, 124. Officer Kolb had previously met with J.F.-P. on February 25, 2015 regarding a report of abuse against J.F.-P.'s younger brother, B.C. 1RP at 111. Following the first interview, Officer Kolb received a call from Child Protective Services and met with her a second time on March 5.

J.F.-P. testified that on February 25, 2015, Officer Kolb came to her school and told her that her mother, Kameron Rosengren, and his brother Joshua Davis were in jail after having been arrested for abuse of B.C. 1RP at 137-38. She stated that B.C. was covered with bruises, and all had been arrested for allegedly assaulting B.C. 1RP at 138. When told that Mr. Rosengren had been arrested for abuse, J.F.-P. told Officer Kolb that she did not think he would do anything like that. 1RP at 114.

During the first time that she was interviewed by Officer Kolb, she said that she did not have a relationship with Kameron and that nothing happened between them. 1RP at 141. After she talked with Officer Kolb she talked with her school counselor, who arranged for her to be interviewed again by Officer Kolb. 1RP at 143. During the second interview with Officer Kolb, she alleged that Kameron had molested her. 1RP at 143.

Mr. Rosengren was charged by the Thurston County Prosecutor's

Office with two counts of child molestation in the second degree. Clerk's Papers (CP) 7; RCW 9A.44.086.

The matter came on for jury trial on April 11, 12 and 13, 2016, the Honorable Mary Sue Wilson presiding. 1RP at 5-200, 2RP at 206-433.

J.F.-P. said that on two occasions Kameron touched her body inappropriately. 1RP at 147. She testified that this occurred during the time that she, her mother, Kameron, Mr. Davis, and her younger brother and sister would go to stay at Motel 6 in Tumwater because her grandmother was in a hospital and did not want Kameron and Mr. Davis in her house when she was gone. 1RP at 144, 145. This practice started in February, 2015, and would take place very week for approximately a month. 1RP at 145. J.F.-P. said that Kameron would sleep in one bed and that Mr. Davis and her mother would sleep in another bed, and that E. and B.C. would sleep in blankets on the floor. 1RP at 146. J.F.-P. stated the first time that they stayed at the Motel 6, she was sleeping in the same bed with Kameron. 1RP at 148.

J.F.-P. testified that on February 18, 2015, at the Motel 6 she was molested by Kameron. In the shared motel room bed, while she was wearing a hoodie sweatshirt and shorts that went to her upper thigh, she woke up and felt a hand on her thigh or upper leg. 1RP at 149. She stated when she felt the hand he opened her eyes and Kameron was looking at her. 1RP at 150. She

stated that she ignored his hand which moved near her vaginal area over her clothes. 1RP at 151. She stated that as the hand was getting close to her vagina she removed it and then it went back to her leg. 1RP at 151. She stated that the hand did not touch her vaginal area. She stated that after he moved his hand, it was on her leg and went up her stomach to her chest. 1RP at 152. The hand was under her shirt and under her bra and touched her breast. 1RP at 155. She said that at that time her mother came through the hotel door and told her that it was time for school. 1RP at 157.

J.F.-P. testified that they all stayed together in at the Motel 6 two more times without incident, and that she did not confront Kameron about the alleged incident. 1RP at 160. One or two weeks later, while staying at the Motel 6, Kameron touched her again in bed, this time putting his hand on her vagina above her clothing. 1RP at 162-64. She said that she was lying on her left side and he used his hand to open her legs and touched her vagina above her clothing. 1RP at 165. She said that this continued until the alarm went off for school and he removed his hand. 1RP at 167.

J.F.-P. said that she initially did not tell anyone what happened, but then she became angry following the allegation that her brother B.C. was abused and that she "wanted to see all of them get in trouble." 1RP at 169, 2RP at 215-26.

Kameron Rosengren was subsequently arrested for assault of B.C. and

she talked with Officer Kolb the following day, March 5. 1RP at 170. She stated that she did not tell Officer Kolb about the alleged molestation by Kameron because at that time she considered him to be her best friend. 1RP at 171.

At trial, J.F.-P. denied that she was angry at Kameron and denied that she had stated that she was “getting ready for a death.” 2RP at 212.

a. Exclusion of testimony regarding Facebook posts

Defense counsel attempted to introduce impeachment testimony from Kameron’s sister Kaitlyn Rosengren that J.F.-P. posted Facebook messages that she was “planning a death,” showing that she was extremely angry with Kameron. 2RP at 268-73. J.F.-P. denied that she had made the statement. 2RP at 212. Following an objection by the State, defense counsel conducted *voir dire* of Ms. Rosengren. 2RP at 274-89. Ms. Rosengren testified that her brother was charged with assaulting B.C. and that he went to jail on February 25, 2015. 2RP at 275. She stated that she had communicated with J.F.-P. via Facebook following the assault of B.C., and that she had seen other messages posted by J.F.-P. on Facebook. 2RP at 277. She testified that the Facebook post she identified as written by J.F.-P. stated: “I’ve literally planned out someone’s death” and that the post was signed “strawberry drizzle,” which is a name that Ms. Rosengren knew that J.F.-P. used. 2RP at 278, 285. She stated

that Facebook posters sometimes “are able to put their actual real name and it says [J.F.-P.] in parenthesis. And that I knew it was her because she added me on Facebook” 2RP at 278. She also stated J.F.-P. would always post pictures of Ms. Rosengren’s brothers Kameron and Joshua Davis, and of J.F.-P. and her brother. 2RP at 278. She noted that in the comments to the post about planning a murder, someone wrote that “you can go to jail for that,” to which the original poster responded: “If you know what happened to my little brother you would understand.” 2RP at 279. Ms. Rosengren also testified that the post referred to “my brother” and “Kam.” 2RP at 278, 282, 285-86. She said that she took screen shots of the Facebook post and e-mailed them to the defense counsel and to defense investigator Dave Mathews. 2RP at 286.

Despite this testimony, the court ruled that Ms. Rosengren could not testify regarding the Facebook post attributed to J.F.-P., which defense sought to introduce as impeachment testimony. 2RP at 288-89. The court ruled “[g]iven the testimony I have heard, I am not going to allow this testimony in this case in terms of her offering a statement that she attributes to [J.F.-P.] without the verification that it is authentically [J.F.-P.]’s post.” 2RP at 288.

b. ER 404(b) evidence regarding prior assault investigation of appellant

The court heard motions *in limine* the morning of trial. 1RP at 27-33.

The defense sought admission of evidence regarding investigation and subsequent convictions of Joshua Davis and Kameron Rosengren for assault of B.C. During the ER 404(b) hearing, the parties were in an atypical legal configuration in which their usual roles were reversed: the State argued the court should exclude testimony regarding charging the appellant or his brother Joshua Davis with physical abuse of B.C. 1RP at 24. The defense, on the other hand, requested to elicit testimony regarding the investigation of the assault of B.C. which resulted in the investigation of Mr. Rosengren and Mr. Davis, and ultimately led to Mr. Rosengren pleading guilty to a gross misdemeanor. 1RP at 25. Defense argued in its briefing and during the hearing that the prior investigation for assault was necessary because it created a motive for J.F.-P. to falsely accuse him as “punishment” for beating her younger brother. 1RP at 26, 28-30. The court denied the State’s motion and permitted the defense to elicit testimony regarding the prior investigation, with the understanding that the defense was not objecting to potential prejudice to the defendant. 1RP at 32-33.

Defense counsel failed to request a limiting instruction, propose his own, or explain he did not want an instruction, and in fact presented no proposed instructions whatsoever. 2RP at 375-76.

c. *Exclusion of defense witness Gary Rosengren due to tardy disclosure*

The morning of the second day of trial defense counsel gave notice of a potential witness identified by the defense investigator the previous night. 1RP at 83-84. Counsel stated that Mr. Rosengren's testimony would be that he had had contact with J.F.-P. and that she made statements "very indicative of her motivations and intent," and that "the timing of which was right about the time that my client was first arrested on the alleged child abuse charge." 1RP at 81. The State argued that Gary Rosengren was present in the courtroom the previous day for *voir dire* and motions in limine. 1RP at 82-83. Defense counsel acknowledged that Gary Rosengren was present "for part of the day" and that during a break he learned about his potential testimony involving J. F.-P. and her motivation to falsely accused the defendant. 1RP at 83. After hearing argument, the court denied the defense request due to the late disclosure of the witness. 1RP at 84. The court stated:

I am finding that we are partway through trial; and defense's failure to work on this or prep on this has led the defense to the position of, after trial started and after witnesses were identified late—two witnesses identified yesterday late, not having previously been disclosed, and the court providing some latitude in that regard, and now a third name has been provided, a name that wasn't able to be described to the jury panel, and now also learning that this witness was in the courtroom after the court had ordered an exclusion of witnesses.

1RP at 84.

2. *Verdict and CrR 7.5 motions for new trial*

The jury found Mr. Rosengren guilty of second degree child molestation in both counts as charged in the information. 3RP at 435; CP 54, 106.

Following the verdict, defense counsel moved for new trial pursuant to CrR 7.5(a)(1), (2), and (3). The defense motion stated that in a declaration by David Wiggins (Juror No. 1), that during deliberations a then- unidentified juror, later identified as Kathleen Stephens, “conducted independent research outside the scope of evidence admitted at trial by looking up defendant, Kameron Rosengren, on the internet and reading about him.” CP 77. The motion also stated that the juror “shared that she conducted extracurricular research on Mr. Rosengren with other jurors” and that she told the other jurors that she was “livid” and that he was “guilty, that’s it.” CP 77. Mr. Wiggins filed a declaration regarding the statements made by the juror during deliberation. CP 73-75.

Counsel filed a memorandum in support of motion for new trial on April 29, 2016. CP 86-87.

The court heard a motion for new trial on May 4, RP (5/4/16) at 4-24. The court granted 30 days for the defense to file a supplemental motion with

additional factual support regarding the juror's statement. RP (5/4/16) at 20.

On June 2, 2016, the court heard testimony from jurors David Wiggins and Kathleen Stephens. Ms. Stephens testified that she did not obtain extrinsic information related to the case and denied stating that she had looked up information about Mr. Rosengren on the internet and denied that she was "livid" toward him and that she said that he was "guilty, that's it" to the jurors. RP (6/2/16) at 16-21. Mr. Wiggins's testimony, however, was directly contrary to that of Ms. Stephens. After being sworn, he stated that that he had seen Ms. Stephens in the hallway earlier that day and confirmed that she was the juror that made the statements he described in his declaration. RP (6/2/16) at 33. He stated that at the beginning of deliberations she said that she obtained information after doing internet research, that she was very upset, that she "got right up in my face and said he is guilty because I researched it on the internet. RP (6/2/16) at 35.

Following argument from counsel and noting that Mr. Wiggins did not indicate the content of the extraneous information he described, the court, without explaining the basis for making a determination of credibility of either juror, denied the motion for a new trial, finding no prejudice to the verdict. Regarding the two jurors, the judge stated that she found Ms. Stephens credible, but cited no basis for making the determination of why she

believed her testimony over that of Mr. Wiggins:

I find that she is credible. I don't think Mr. Wiggins is misrepresenting what he perceived, but I think the most likely scenario, based upon the evidence I have now in front of me, is that he misunderstood, that perhaps a statement was made that was not as definitive about, I bet it we looked on the Internet, this is what we would learn.

I think they are both credible, and I think with the evidence I have, that the more likely scenario is that Mr. Wiggins misunderstood what occurred. I find Ms. Stephens' statements credible. And I observed her demeanor, and I do not find her to be mischaracterizing. I understand the arguments about motive. But based upon the evidence we have now, I'm not finding that there is proof that there was a use of extraneous evidence.

RP (6/2/16) at 50.

The court granted additional time to the defense to determine if the defense could identify jurors who could corroborate the statement attributed to Ms. Stephens, and granted additional time to attempt to contact other jurors.

The court scheduled further hearing on the renewed motion for new trial on June 23, 2016, and authorized the disclosure of names and contact information for the jurors. RP (6/23/16) at 20. No additional hearings on the renewed motion for new trial took place, however, and the matter proceeded to sentencing on July 28, 2016.

3. Sentencing

The court imposed a standard range sentence of 40 months followed by 36 months of community custody and sex offender registration. RP (7/29/16) at 21; CP 106-18. The court ordered legal financial obligations of \$500.00 crime victim assessment, \$200.00 court costs, and a \$100.00 DNA fee. RP (7/28/16) at 21.

Timely notice of appeal was filed August 5, 2016. CP 122-35. This appeal follows.

D. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A LIMITING INSTRUCTION FOR ER 404(B) PRIOR MISCONDUCT EVIDENCE AND BY FAILING TO AUTHENTICATE EXTRINSIC IMPEACHMENT EVIDENCE

At defense request, the trial court admitted this ER 404(b) testimony regarding assault of J.F.P.'s younger brother B.C. However, given the fact that in the absence of additional witnesses or forensic evidence, the evidence consisted of J.F.-P.'s word against that of Mr. Rosengren; proof of Mr. Rosengren's guilt was not overwhelming. Defense counsel's failure to request a limiting instruction constituted ineffective assistance resulting in prejudice to the appellant, and this Court should reverse.

ER 404(b) bars admission of "[e]vidence of other crimes, wrongs,

or acts . . . to prove the character of a person in order to show action in conformity therewith.” This rule applies to evidence of other acts regardless of whether they occurred before or after the charged crime. *State v. Bradford*, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989). However, such evidence may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

Here the defense sought to admit testimony of the investigation for assault against her brother B.C. to explain the defense theory that J.F.-P.’s accusation was revenge for the assault against her brother. 1RP at 27-28.

Trial counsel was correct in his unorthodox request for admission of the potentially prejudicial testimony in order to present the defense theory that J.F.-P. was making a false allegation as retaliation. 1RP at 28. However, in doing so defense counsel deprived Mr. Rosengren of his rights to effective representation and a fair trial by failing to simultaneously request an instruction directing jurors to consider the ER 404(b) evidence solely to assess J.F.-P.’s motive to falsely accuse him of molestation as revenge for beating her brother.

a. The State and Federal constitutions guarantee an accused person the effective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective

assistance of counsel under the U.S. Const. amend. VI; and Article I, § 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability the result of the proceeding would have been different. Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. *Thomas*, 109 Wn.2d at 226.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Thomas*, 109 Wn.2d at 226.

b. Counsel's failure to propose a limiting instruction was deficient performance

An accused is entitled to a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447, rev. denied, 121 Wn.2d 1024 (1993). A limiting instruction must be provided if evidence of other crimes, wrongs, or acts is admitted. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury. *State v. Gresham*, 173 Wn.2d 405, 424, 269 P.3d 207 (2012). Counsel must nevertheless request the instruction and the failure to do so generally waives the error. *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011); *State v. Athan*, 160 Wn.2d 354, 383, 158 P.3d 27 (2007).

Moreover, there was no legitimate reason not to propose a limiting instruction given the prejudicial nature of this evidence. Failure to propose a limiting instruction is only a legitimate trial tactic if there is reason to believe it was done for a strategic reason. In this case, there was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of the abuse of J.F.-P's brother. Mr. Rosengren had a right to such an instruction if his attorney had only requested it. ER 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for

another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”).

The defense, by taking the bold but logical step of requesting admission of normally damaging evidence without simultaneously requesting a corresponding limiting instruction was to use a sledgehammer where a scalpel was required. Courts have held the decision not to request a limiting instruction may be legitimate trial strategy because such an instruction can highlight damaging evidence. See, e.g., *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). However, the desire to deemphasize testimony is inapplicable here. Evidence that Mr. Rosengren assaulted B.C. was not the type of evidence the jury could be expected to forget or minimize. J.F.-P. repeatedly mentioned B.C.’s assault during her testimony and it was a critical part of the case. Defense counsel argued that revenge for the assault of her younger brother was the motive for J.F.-P. to make up an accusation against Mr. Rosengren. Counsel argued:

Talk about prejudice or motive to lie, good heavens. Could you possibly have more? [J.F.-P.] made no bones about the fact that she got angry before the March 5th interview with Detective Kolb. I got angry before that, because I believed Kameron had abused by little brother. She’s just flat out told you.

2RP at 414-15. In short, this is not a case where a limiting instruction raised

the spectre of “reminding” the jury of briefly referenced evidence, the evidence formed the core of J.F.-P’s testimony.

Trial counsel’s performance was deficient when he failed to request a limiting instruction that would have prevented the jury from considering Mr. Rosengren’s alleged assault of B.C. as evidence of his propensity to commit crimes.

Without a limiting instruction, the jury was free to use the 404(b) evidence as proof of Mr. Rosengren’s evil nature and propensity to commit crimes. Given the fact that the other evidence against Mr. Rosengren was not overwhelming, there is a reasonable probability that without the jury’s use of the ER 404(b) evidence to show criminal propensity, Mr. Rosengren would not have been convicted.

Absent a limiting instruction, jurors were free to consider the evidence for whatever purpose they wished, including as proof that Mr. Rosengren was a violent person and capable of molesting J.F.-P. if he had already beat B.C. A jury is naturally inclined to treat evidence of other bad acts in this manner. *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) rev. denied, 116 Wn.2d 1020 (1991).

Although the evidence was necessary for the defense theory, the risk that a jury uncertain of guilt will convict simply because a bad person deserves

punishment “creates a prejudicial effect that outweighs ordinary relevance.” *Old Chief v. United States*, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). For all these reasons, trial counsel’s performance was deficient and this Court should reverse Mr. Rosengren’s convictions.

c. *Counsel’s failure to secure a witness capable authenticating the Facebook post by J.F.-P. constituted deficient performance*

Defense counsel attempted to impeach J.F.-P.’s credibility with a Facebook post that directly contradicted her testimony that she did not tell Kaitlyn Rosengren that she was “getting ready for a death.” 2RP at 212. Following her clear denial of making the statement, defense counsel attempted to show by an extrinsic Facebook post purportedly by J.F.-P. that she posted that she was “planning a death.” 2RP at 284-86. However, counsel failed to obtain a witness who could authenticate the Facebook post. 2RP at 289. This amounted to ineffective assistance of counsel and reversal is required.

Any party to an action may attack a witness’s credibility. ER 607. Evidence offered to impeach a witness is relevant if “(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action.” *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

ER 613(b) allows witnesses to be impeached with extrinsic

evidence of a prior inconsistent statement. The proper procedure is to first ask the witness whether she made the prior statement. *State v. Babich*, 68 Wn. App. 438, 443, 842 P.2d 1053 (1993). If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. *Id.* “[I]t is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence.” *State v. Horton*, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003)(quoting *State v. Johnson*, 90 Wn. App. 54, 70, 950 P.2d 981 (1998).

Trial counsel’s performance falls below an objective standard of reasonableness when he or she seeks to admit relevant impeachment evidence but fails to take the necessary procedural steps for admission.

J.F.-P. clearly denied telling Kaitlyn Rosengren that she was “getting ready for a death.” 2RP at 212. Defense counsel was aware of the Facebook post and had been provided a screen shot of the post purportedly by J.F.-P., stating “I’ve literally planned someone’s death.” 2RP at 277. Defense counsel wanted to impeach J.F.-P.’s testimony with this evidence because it directly contradicted several of her statements, casting doubt on her credibility, and also demonstrated her anger at Kameron Rosengren for abusing her brother. The Facebook post demonstrated her denial of the statement was

false, making it admissible under ER 613(b).

However, defense counsel unsuccessfully attempted to introduce the statement through Kaitlyn Rosengren, but did not ever produce a witness to authenticate the Facebook post, and so J.F.-P.'s false statement was never contradicted.

Pursuant to ER 901(a), “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” This requirement is met “if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification.” *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d 736 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 494 (2014)(citing *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984)).

Although this case involves a Facebook post, it is useful to note that ER 901(b) was amended to add a specific section illustrating some methods for authenticating e-mail:

Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a

finding that the e-mail in question is what the proponent claims. *State v. Young*, 192 Wn.App. 850, 855, 369 P.3d 205 (2016).

Authentication is particularly important in connection with electronically stored evidence, since these items regularly present as pieces of evidence or potential evidence in criminal cases, and may find it hard to identify the sender.

The bar for authentication is very low: “evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a). Indeed, in this case the trial court made it clear to defense counsel that in order to introduce the Facebook post, he “may have considered having a case shot screen and asking her whether or not that was her screen or doing some additional information or examination.” 2RP at 289.

Any person with the most casual familiarity with Facebook could obtain a screenshot and testify to the creation of posts and indications of authorship. If the page was missing, a Facebook—which has an office in Seattle⁴—could have been produced, but defense counsel never attempted to subpoena anyone from that office.

Nothing in the record shows defense counsel’s failure to call an authenticating witness was a strategic decision. “Generally, the decision to call

a witness will not support a claim of ineffective assistance of counsel.” *Thomas*, 109 Wn.2d at 230. But the presumption of competence does not apply when defense counsel clearly wanted to introduce certain evidence but erred in doing so.

Defense counsel’s failure to produce an authenticating witness was entirely to Mr. Rosengren’s detriment. The Facebook post directly contradicted J.F.P.’s testimony and would have only benefited the defendant.

Defense counsel’s inexplicable failure to take the necessary procedural steps for admission “could not have been a strategy or tactic designed to further his interests.” *Horton*, 116 Wn. App. at 916. Because defense counsel could have impeached J.F.-P.’s testimony had he produced an appropriate witness, his failure to do so constitutes deficient performance. See, *id.* at 920.

d. Defense counsel’s failure to introduce key impeachment evidence prejudiced Mr. Rosengren

Trial counsel’s deficient performance prejudiced Mr. Rosengren. The opportunity to challenge the credibility of an accuser “is of great importance,” particularly when the charged crime is a sex offense. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). “In the prosecution

⁴<https://www.facebook.com/fbseattle/>

of sex crimes, the right of cross-examination often determines the outcome.”

Id. This is so because, “owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness’[s] testimony.”

State v. Peterson, 2 Wn. App. 464, 467, 469 P.2d 980 (1970).

Mr. Rosengren was accused and convicted of assaulting J.F.-P.’s younger brother. Her anger at Mr. Rosengren was critical to the defense, which took the unusual step of ensuring that the jury was aware of the prior assault in support of the defense theory that J.F.-P. was making a false accusation in retaliation for abusing her brother. The Facebook post served the two-fold purpose of impeaching her credibility and also showing that she was indeed angry about the assault. This called into question J.F.-P.’s entire accusation against the defendant.

The State’s case was characterized by a paucity of evidence. The defense needed the opportunity to undermine J.F.-P.’s credibility by demonstrating she made a false statement on the stand. But the defense snatched defeat from the jaws of victory by failing to produce a relatively straightforward piece of evidence by failing to produce a witness to

authenticate the Facebook post, despite the trial court's clear instruction on how to do so. There is a significant probability the outcome of the trial would have been different had that evidence been admitted. This Court should reverse and remand for a new trial because Mr. Rosengren was denied effective assistance of counsel. *Thomas*, 109 Wn.2d at 232; *Horton*, 116 Wn. App. at 924.

2. MR. ROSENGREN WAS DENIED DUE PROCESS OF WHEN THE TRIAL COURT REFUSED TO CONSIDER LESSER SANCTIONS FOR LATE DISCLOSURE OF A DEFENSE WITNESS AND BY REFUSING TO ALLOW THE WITNESS TO TESTIFY

The defense sought to call Gary Rosengren as an impeachment witness to statements by J.F.-P. regarding her motivation and intent to make an allegation against the defendant. 1RP at 81. Counsel explained to the court that it was not until the evening of April 11, 2016 that defense investigator Dave Mathews made contact and interviewed Gary Rosengren. 1RP at 82. The State objected that the witness was not dismissed and that Gary Rosengren was present in the courtroom on April 11 during the motions in limine and jury selection. 1RP at 82. Defendant counsel argued that it was not evident until the middle the previous day—April 11— that it became evident that Gary Rosengren was contacted by J.F.-P. and that he was then asked to leave the

courtroom. 1RP at 83. The court refused to let Mr. Rosengren testify due to late disclosure by the defense. 1RP at 84.

No compelling interest is present in the case that warranted limiting Mr. Rosengren's due process right to defend against the State's accusations.

Therefore, Reversal is required because, by excluding this evidence, the trial court denied Mr. Rosengren's constitutional right to present his defense.

a. Mr. Rosengren has a constitutional right to witnesses in his defense.

Criminal defendants have the constitutional right to present evidence in their own defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI, XIV. The right to call witnesses for one's own defense has long been recognized as essential to due process. *Chambers*, 410 U.S. at 294. In *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the United States Supreme Court explained a defendant's right to compel the attendance of witnesses is "in plain terms the right to present a defense." This right to present witnesses to establish a defense is "a fundamental element of due process of law." *Id.* a criminal defendant's right to present witnesses is an "essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

Thus, a trial court order entirely excluding the testimony of a material defense witness directly implicates not only the defendant's constitutional right to offer testimony on his own behalf, but also the integrity of the adversary system itself. Thus, courts must jealously guard a criminal defendant's right to present witnesses in his defense. *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Discovery issues are governed under CrR 4.7. While CrR 4.7(h)(7)(i) permits the superior court to exclude a defense witness whose identity was not timely disclosed to the State, the court does not have carte blanche to do so.

State v. Hutchinson, 135 Wn. 2d 863, 881-83, 959 P.2d 1061 (1998). CrR 4.7

(h) (7) (i) reads:

(h) Regulation of Discovery.

....

(7) (i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Typically, sanctions for discovery violations do not include exclusion of

evidence. *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). However, evidence may be excluded when that is the only effective remedy. *Hutchinson*, 135 Wn.2d at 881-83. Courts review de novo whether exclusion of defense evidence violated the right to present a defense. *Jones*, 168 Wn.2d at 719-20.

The “deems just” language in CrR 4.7 (h)(7)(i) gives a trial court limited discretion to exclude a defense witness as a sanction for a discovery violation. *Hutchinson*, 135 Wn.2d at 881-84, quoting CrR 4.7(h)(7)(i). Exclusion is an “extraordinary remedy” under CrR 4.7(h) that “should be applied narrowly.” *Hutchinson*, 135 Wn.2d at 882

b. Late disclosure of a witness does not warrant denial of the right to present a specific witness.

To protect the right of accused persons to defend themselves, relevant defense evidence must be admitted unless the State can show a compelling interest to exclude it. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). If the court believes defense evidence is barred by evidentiary rules, “the court must evaluate whether the interests served by the rule justify the limitation.” *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct.2704, 97 L. Ed. 2d 37 (1987). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. *Id.* Once it is shown that the evidence is even minimally relevant, the

jury must be allowed to hear it unless the State can show it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Darden*, 145 Wn.2d at 622.

Gary Rosengren’s testimony was relevant for impeachment of the timing of J.’s allegation, which denfes ocuesnel stated occurred “right about the time that [Kameron Rosengren] was first aarrested on the alleged child abuse case.” IRP at 81.

Late disclosure is not a compelling interest that could justify depriving Mr. Rosengren of his fundamental due process right to call witnesses for his defense. Even in civil cases, well-established Washington case law strictly limits the court’s ability to exclude witnesses as a sanction for late disclosure *Jones v. City of Seattle*, 179 Wn.2d 322, 343, 314 P.3d 380,391 (2013), (discussing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484,494, 933 P.2d 1036 (1997)). “A trial judge must perform a specific, on-the-record analysis before excluding witnesses for late disclosure.” *Jones*, 179 Wn.2d at 337. Late disclosed testimony is presumptively admissible unless the court finds 1) violation of the discovery rules was willful, 2) there would be substantial prejudice to the other party, and 3) other sanctions less drastic than exclusion would be insufficient. *Id.* at 343. The trial court must explicitly consider these factors and the record must show they exist. *Id.* at 338 (citing *Burnet*, 131

Wn.2d at 494 and *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006)). See also, *Hutchinson*, 135 Wn.2d at 882-83; setting out four similar factors that a trial court should consider when determining whether to exclude evidence as a sanction for a discovery violation.⁵

Under these facts, the trial court abused its discretion by opting not to use its discretion at all in its failure to consider the above-noted factors. IRP at 82-85.

i. Willful violation

The discovery violation was neither willful nor in bad faith. As defense counsel explained, that the defense investigation report did not arrive until late on April 11. When it became clear that Gary Rosengren was a potential rebuttal witness, counsel excluded him from the courtroom on April 12. IRP at 83.

ii. Remedy other than witness exclusion

A less severe sanction would have been effective particularly as suppression of evidence is an extraordinary remedy that should be applied

⁵When determining if a witness should be excluded, a trial court should weigh: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the State; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 882-83.

narrowly. The defense disclosed its new witness, Gary Rosengren, at the beginning of the second day of a two-day trial. The court failed to consider other remedies such as a short recess to interview the witness. Instead the court---apparently irritated at the second late disclosure of a defense witness---made a very quick ruling without consideration of the relevant factors and without consideration of the alternative of allowing the prosecution a short recess to interview the witness. IRP at 84-85. The trial court could have and should have granted a brief recess in order to give the prosecutor time to interview the witness.

iii. Prejudice to the State

Permitting the witness to testify would not have prejudiced the State. A short delay would, likely, have sufficed to permit the State a chance to interview the witness and prepare for cross-examination.

The trial court erred in excluding Mr. Rosengren's testimony as a penalty for late disclosure without conducting an inquiry required. *Jones*, 179 Wn.2d at 340-41.

The trial court failed to apply the requisite evaluation and Mr. Rosengren's right to present his defense was violated. Error in excluding relevant defense evidence is presumed prejudicial unless no rational juror could have a reasonable doubt as to guilt. *State v. Johnson*, 90 Wn. App. 54, 69, 950

P.2d 981 (1998). That is not the case here and Mr. Rosengren's convictions should be reversed.

3. THE TRIAL COURT'S DENIAL OF THE APPELLANT'S CRR 7.5 MOTIONS FOR NEW TRIAL BASED ON JUROR MISCONDUCT DENIED MR. ROSENGREN HIS RIGHT TO AN IMPARTIAL JURY

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. 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).

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. Standard of review

Constitutional errors are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Denial of a motion for a new trial is reviewed for abuse of discretion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or basing a ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

When ruling on a motion for a new trial due to juror irregularity, the question is whether, under the facts and circumstances, the juror is biased, and whether the litigant has been prejudiced. *State v. Rempel*, 53 Wn. App. 799, 802, 770 P.2d 1058 (1989), reversed on other grounds, 114 Wn. 2d 77 (1990).

b. Mr. Rosengren's convictions must be reversed because a juror's introduction of extrinsic evidence and her resulting contention that Mr. Rosengrue was "guilty" could have affected the verdicts

A trial court may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected. CrR 7.5(a).

The grounds for a new trial include, in relevant part:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;

...
(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial[.]

CrR 7.5(a).

A new trial may be required when the jury considers extrinsic evidence, which is defined as information outside the evidence admitted at trial. *Pete*, at 553. Such evidence is improper because it is not subject to objection, cross-examination, explanation, or rebuttal. *Id.*

The jury's consideration of extraneous evidence entitles a defendant to a new trial if there are reasonable grounds to believe a defendant has been prejudiced. *State v. Johnson*, 137 Wn.App. 862, 870, 155 P.3d 183 (2007); see also *Pete*, at 555 n. 4. Any doubts must be resolved against the verdict. *Johnson*, at 870. The test is an objective one: "[t]he question is whether the extrinsic evidence could have affected the jury's determinations. *State v. Boling*, 131 Wash.App. 329, 333, 127 P.3d 740 (2006). A new trial must be granted unless the court can conclude beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. *Johnson*, at 870.

In this case, a new trial is warranted CrR 7.5(a)(1), (2), and (5).

This Court will reverse a trial court's order granting or denying a motion for a new trial if the order constitutes a manifest abuse of discretion. *State v. Boling*,

131 Wn.App. 329, 332, 127 P.3d 740 (2006) (citing *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994); *State v. Marks*, 71 Wash.2d 295, 302, 427 P.2d 1008 (1967)). Juror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced. *Id.* (citing *State v. Briggs*, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989)). The court's inquiry is an objective one. The question is whether the extrinsic evidence could have affected the jury's determinations. *Id.* (citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)). The court need not delve into the actual effect of the evidence. *Boling*, 131 Wn.App. at 332-33, 127 P.3d 740 (citing *State v. Jackman*, 113 Wash.2d 772, 777-78, 783 P.2d 580 (1989)). But any doubts must be resolved against the verdict. *Briggs*, 55 Wash.App. at 55, 776 P.2d 1347. The subjective thought process of the jurors inheres in the verdict. *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

Once juror misconduct is established, prejudice is presumed. *Boling*, 131 Wn.App. at 333. To overcome this presumption, the State must satisfy the trial court that, viewed objectively, it is unreasonable to believe the misconduct could have affected the verdict. *Id.* (citing *Caliguri*, 99 Wash.2d at 509, 664 P.2d 466). The court properly looks at the purpose for which the extraneous evidence was injected into the deliberations. *Id.* The court must grant a new trial unless it is satisfied beyond a reasonable doubt that the extrinsic evidence

did not contribute to the verdict. *Id.*; *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981).

Here, Mr. Rosengren was charged with two counts of child molestation in the second degree. CP 7. The critical evidence presented at trial was the testimony of the victim, J.F.-P., accusing Mr. Rosengren of the offense. The case turned on credibility—that of J.F.-P. The case was submitted to the jury, and after admonitions⁶ by the court to not conduct independent search, Juror Stephens took it upon herself to research Mr. Rosengren on the internet. Juror Wiggins told defense counsel that another juror was “livid” after having gone on the internet and found information about Mr. Rosengren, and shared that information with other jurors by loudly stating that he was “guilty, that’s it,” even though the court had instructed the jury not to consult outside sources or conduct their own research. 2RP at 299; CP 73-75. This conduct by Juror Stephens is clearly juror misconduct, so prejudice is presumed. Based on these considerations, it is impossible to be satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict.

c. Juror Stephens was unfit due to her stated contention that Mr. Rosengren was “guilty, that’s it” after she said that she researched Mr. Rosengren on the internet

A juror is unfit if he or she exhibits bias, prejudice, or conduct

incompatible with proper jury service. See RCW 2.36.110. Thus, although the trial court has discretion how to proceed, it has a duty to investigate allegations of juror misconduct. See *Elmore*, 155 Wn.2d at 773 (court had duty to investigate allegations that deliberating juror was attempting nullification). Even where the misconduct is not obvious, the court should at least initiate an inquiry or hearing before ruling. *United States v. Barrett*, 703 F.2d 1076, 1082-83, 13 Fed. Rules Evid. Serv. 276 (9th Cir. 1983); *United States v. Thompson*, 744 F.2d 1065 (4th Cir. 1984) (where there is a question as to whether juror can fulfill duties with an open mind, the court must determine if the juror is competent before proceeding with trial).

A juror's ability to remain impartial and keep an open mind throughout the presentation of evidence is a fundamental qualification for jury service. A juror who is so affected by some evidence that he cannot listen to the remaining evidence with an open mind is not an impartial juror. See *Thompson*, 744 F.2d at 1068-69.

In *Thompson*, the defendants were charged with murdering their four-month-old son by starvation and gross neglect. In its case-in-chief, the government presented a photograph of the child taken three days after his death. After viewing the photograph, one of the jurors reported that it had upset

⁶1RP at 88, 2RP 299.

him. The judge then asked the juror whether he would be able to keep an open mind until he had heard all of the evidence in the case. The juror responded that he did not think he would be able to do so and that he was not sure he could be totally fair. *Thompson*, 744 F.2d at 1067. When the judge reminded the juror of the presumption of innocence and the government's burden of proof and asked if he could resume his duties, the juror said he was not sure, but he would try. *Id.* at 1068.

The appellate court held that it was an abuse of discretion to proceed with trial with a juror who could not state unhesitatingly that he could keep an open mind. Where a juror is prematurely convinced of the defendant's guilt, the right to an impartial jury is compromised. *Id.* at 1069. The court reversed the convictions. *Id.*

In this case, as in *Thompson*, the circumstances suggested that Juror Stephens had become convinced of Mr. Rosengren's guilt through extrinsic evidence obtained from the internet. Juror Wiggins testified Ms. Stephens said that she researched Mr. Rosengren on the internet, that she was "livid" and that she loudly said that Mr. Rosengren was "guilty, that's it." RP (6/2/16) at 35; CP 73-75 (Declaration of David Wiggins, filed April 22, 2016).

The court below heard testimony from each juror that was directly contradictory, and, without explanation of the court's reasoning, simply elected

to find Ms. Stephens credible. RP (6/2/16) at 50-51. The court surmised that Mr. Wiggins “misunderstood what occurred.” RP (6/2/16) at 50. Rather than recognizing that Ms. Stephen’s stataemtents unquestionably incidated that she had not only consulted extrinsic information, but was relying on it to prematurely judge Mr. Rosengren, and also to use the serruptiously obtained extrinsic information to convince other jurors of Mr. Rosengren’s guilt, the court simply dismissed his concerns as a “misunderstanding.” RP (6/2/16) at 50-51. There is every likelihood that the juror’s misconduct contributed to the verdict in that other jurors, including Mr. Wiggins, who heard her admission of consulting outside evidence and reached the conclusion that he was guilty, and not just guilty, but that she was angry about it. This case turned on the credibility of J.P-F. Any improper information injected into the deliberation process tending to influence the determination of credibility calls into doubt the verdicts found by the jury.

Juror Stephen’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); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962).

Based on the foregoing, it is impossible to be satisfied beyond a

reasonable doubt that the extrinsic information did not contribute to the verdict. Therefore, the trial court should have granted a new trial.

In addition, it is unlikely, given the passage of time, that the juror would be able to give an accurate description of her then ability to remain impartial if questioned at this point. This Court should therefore reverse Mr. Rosengren's conviction and remand for a new trial. See *United States v. Resko*, 3 F.3d 684, 688, 695 (3rd Cir. 1993) (remanding for new trial rather than further investigation into potential juror misconduct).

**4. THIS COURT SHOULD EXERCISE ITS
DISCRETION AND DENY ANY REQUEST FOR
COSTS**

If Mr. Rosengren does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. See RAP 14.2. The record does not show that he had any assets, although the court found that did have the ability to pay legal financial obligations. RP at 402. At sentencing, the court imposed legal financial obligations including \$500.00 victim assessment, \$200.00 court costs, and \$100.00 felony DNA collection fee. RP (7/29/16) at 21; CP 108-09.

The trial court, however, found him indigent for purposes of this appeal. CP 120. There has been no order finding Mr. Rosengren's financial

condition has improved or is likely to improve since that finding.

Under RAP 15.2(f), “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” This Court has discretion to deny the State’s request for appellate costs in the event this appeal is unsuccessful. Under RCW 10.73.160(1), appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, Division One concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192

Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Mr. Rosengren's continuing indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

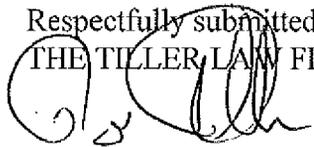
E. CONCLUSION

For the reasons discussed above, this Court should reverse Mr. Rosengren's convictions and remand for a new trial.

This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Rosengren not prevail in his appeal.

DATED: March 7, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

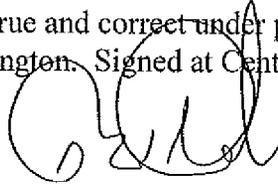
The undersigned certifies that on March 7, 2017, that this Appellant's Opening Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Prosecuting attorney, Ms. Carol La Verne and copies were sent by first class mail, postage 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 March 7, 2017.



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