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NO. 51901-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KALI A. ETPISON,

Appellant.

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

The Honorable Jeffrey Bassett, Judge

OPENING BRIEF OF APPELLANT

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## **A. ASSIGNMENTS OF ERROR**

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

2. In violation of the right to a fair trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 3, 21-22 of the Washington Constitution, the jury received extrinsic evidence.

3. The trial court erred when it granted the prosecutor's motion in limine and ruled that the defendant could not examine the defendant regarding his military service.

4. Insufficient evidence supports the appellant's conviction for witness intimidation.

## **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 by failing to (1) object to ER 404(b) evidence of a bruise that the appellant allegedly inflicted on his wife Jasmine Etpison during a previous incident, and (2) by failing to offer a limiting jury instruction to prevent the jury from considering the ER 404(b) evidence as evidence of Mr. Etpison's propensity to assault his wife? Assignment of Error 1.

2. Defendants have a constitutional right to have the jury decide their case based only on the admitted evidence. The jury's receipt of extrinsic evidence is improper. Were Mr. Etpison's constitutional rights violated because the jury received unadmitted, extrinsic evidence during deliberation that Mr. Etpison remained in custody after he was initially charged? Assignment of Error 2.

3. General information about an accused's "background" is admissible in a criminal trial. Did the trial court abuse its discretion when it granted the prosecutor's motion in limine and ruled that the defense could not elicit testimony regarding Mr. Etpison's 17-year career in the United States Army and his position in the U.S. Army Reserve? Assignment of Error 3.

4. Did the State present insufficient evidence to support the conviction for intimidating a witness? Assignment of Error 4.

## **C. STATEMENT OF THE CASE**

### **1. Statement of testimony and prior proceedings**

Kali and Jasmine Etpison, both of whom are from Palau, an island nation located in the western Pacific Ocean, had been married for almost ten years in November, 2016. 4Report of Proceedings (RP)<sup>1</sup> at 437, 5RP at 475,

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<sup>1</sup>The Verbatim Report of Proceedings consists of the following volumes

640, 6RP at 691. They lived together in an apartment in Bremerton, Washington with their two children, K.A.E., age four, and J.N.E., age two. 5RP at 474, 475.

Ms. Etpison was the primary income provider at the time of the incident, and much of the household money was allocated for Mr. Etpison's father's medical expenses. 6RP at 691-92.

Shortly before midnight on November 29, 2017, police dispatch received a report of a disturbance at the Etpison's apartment. The report was made following a call to police from Jasmine Etpison's employer, who had received a text from Ms. Etpison. 5RP at 640. Ms. Etpison testified that her husband was drinking and yelling at their children, hitting objects in the apartment with a baseball bat and telling the children to stop crying. 5RP at 479. She stated that he used the bat to beat closet doors, a coffee table, and a storage bin, and that she had texted her employer for help. 5RP at 480-85, 490.

She stated that the couple had fought at Thanksgiving that she had a large bruise on her right arm when he hit her three to four times during an

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designated as follows: RP (11/30/17, arraignment); RP (12/22/17, motion regarding probable cause); RP (1/16/18); RP (3/16/18, modification of no contact order to permit telephonic contact); 1RP (1/16/18, motions in limine); 2RP (1/17/18, voir dire, jury trial); 3RP (1/18/18, jury trial); 4RP (1/19/18, jury trial); 5RP (1/22/18, jury trial); 6RP (1/23/18, jury trial); 7RP (1/25/18, jury trial), (1/26/18, verdict); and RP (2/9/18, sentencing).

argument. 5RP at 497-99.

Officer Bryan Hall and Officer Joshua Stottlemeyer arrived at the apartment building, but could not enter because the entrance door was locked. 4RP at 438, 5RP at 641. After knocking on the door for several minutes, a woman — identified as Ms. Etpison — came out from the building and talked with police. 4RP at 438, 5RP at 622, 641. The officers testified that Ms. Etpison appeared to be scared, frantic, and nervous. 4RP at 439, 5RP at 641. While she talked with police she kept looking around and looking in a window next to the apartment building entrance. 5RP at 641-42. Officer Stottlemeyer stated that she appeared to be panicked or frightened and looked back inside the building through a window next to the entrance door. 4RP at 439. Ms. Etpison told police that Mr. Etpison was inside their apartment with their children, and that he was drunk and that he had a baseball bat and was hitting the walls with it and destroying property. 4RP at 445, 446, 5RP at 642.

Officer Alexander George arrived at the apartment building while Ms. Etpison was talking with Officers Hall and Stottlemeyer. 5RP at 620-21. Officer George stated that after Ms. Etpison was finished talking with the other officers, she walked past him and stated words to the effect that “if he sees me he’s going to kill me.” 5RP at 621.

After Ms. Etpison came out of the building the entry door closed and locked behind her, and the officers were locked out of the building until they were let in by a neighbor who lived adjacent to the building door. 4RP at 439, 5RP at 622, 642. After being admitted into the building by the neighbor at about 1:00 a.m., the officers went to the Etpison's apartment and knocked on the door and announced their presence. 4RP at 440, 5RP at 623, 643. Officer Hall stated that initially there was no response, and then a man inside the apartment opened the door a few inches, but he was not able to see anyone in the apartment entrance. 4RP at 440, 5RP at 644. Officer Hall could see that there was a male hiding behind the door and gave directions for that person to show himself. 4RP at 440. The officers repeatedly ordered him to come out from behind the door and the man, identified as Kali Etpison, moved into the doorway of the apartment and glared at them without speaking. 5RP at 624. Officer Hall stated that it appeared that Mr. Etpison was going to try to slam the door shut, and he put his foot against the bottom of the door to prevent Mr. Etpison from closing it, and then again ordered him to step out into the hallway. 5RP at 647-48. Officer Hall repeatedly ordered him to show his hands and move into the hallway or that he would be Tased, but Mr. Etpison continued to stare at him and did not comply with the officers' orders. 4RP at

441. After being told again to move into the hallway and then being given a “countdown,” Mr. Etpison still failed to comply with the officers’ commands and Officer Hall Tased him. 5RP at 648. After being Tased he was placed in handcuffs. 5RP at 626-27.

After Mr. Etpison was taken into custody, police entered the apartment and observed a considerable amount of damage. 5RP at 672. Officer George saw multiple holes punched in a wall, “seemingly through the use of baseball bat.” 5RP at 628. Officer Hall noted that a closet door was off its rails and “completely destroyed,” a basket in another room was broken, and there was broken tile on a coffee table in the living room. 5RP at 628, 672. Exhibits 5, 8 and 9. Officer Hall found a baseball bat behind the front door near where Mr. Etpison had been standing when police arrived. 4RP at 444, 5RP at 628, 629.

After being booked into the jail, Mr. Etpison called Ms. Etpison from a holding cell at about 1:00 a.m., and in their native Palauan language, asked her if she called the police and told her that “if he gets out, he’s going to do something” to her. 5RP at 502. Ms. Etpison stated that she “felt threatened a little bit” by the call from her husband and feared for her safety and the safety of the children, and thought that he may harm her. 5RP at 502.

An interpreter prepared a translation of the recorded call from the

holding cell. 5RP at 565. Outside the presence of the jury, the court and counsel for both parties questioned the interpreter regarding her qualification to translate the telephone call from Palauan to English and ruled that she was qualified to do so. 5RP at 587. The State played the phone call while the interpreter, Imelda Nakamura, provided a translation or interpretation of the phone call. 5RP at 600. Ms. Nakamura stated that Mr. Etpison asked in Palauan “[d]id you call the police?” 5RP at 601. The interpreter also stated that Mr. Etpison said in Palauan, if interpreted word for word into English, the phrase “low tide is my heart” or “low tide is my spirit.” 5RP at 605. Ms. Nakamura, testified that she interpreted the phrase to mean “I’m telling you when I get out” and “[y]ou better run. When I get out you will feel the consequences.” 5RP at 602-03, 605-06.

Mr. Etpison acknowledged that he hit the closet door, coffee table, and laundry bin with the bat. 7RP at 708-09. He put the children in their bedroom and was walking back toward the living room when the police arrived. 7RP at 711. He denied hitting the children or hitting his wife. 7RP at 713. Defense counsel stipulated that Mr. Etpison called Ms. Etpison from the jail after he was booked. 4RP at 462.

Mr. Etpison was charged by the Kitsap County Prosecutor’s Office with

third degree assault (count 1); fourth degree assault against K.A.E. (count 2); fourth degree assault against J.N.E. (count 3); third degree malicious mischief (count 4); obstructing a law enforcement officer (count 5); intimidating a witness (count 6); and misdemeanor harassment (count 7). Clerk's Papers (CP) 1-10. An amended information was filed January 16, 2018. CP 82-89.

The matter came on for jury trial on January 17, 18, 19, 22, 23, and 25, 2018, the Honorable Jeffrey Bassett presiding. 2RP at 36-235, 3RP at 237-346, 4RP at 349-464, 5RP at 467-679, 6RP at 682-903; 7RP at 905-999.

Mr. Etpison, a career member of the United States Army for 17 years, was in the Army Reserves at the time of the incident on November 29, 2017. 1RP at 7, RP (2/9/18) at 19. Before trial started, the State moved for an order prohibiting Mr. Etpison from wearing his uniform during trial and prohibiting witnesses from referring to his "military honors and/or accomplishment." Prosecution's Motions in Limine, CP 24-28. Defense counsel did not challenge the motion to prevent Mr. Etpison from wearing his uniform, but argued against the motion precluding testimony about his military service, honors and accomplishments. 1RP at 11-21. The court granted the motion but broadened the state's initial motion by excluding all mention of Mr. Etpison's military career. 1RP at 6-35, 2RP at 37-38.

After the State rested, defense counsel moved to dismiss Count 1 (third degree assault) and Count 3.<sup>2</sup> 5RP at 673-74, 6RP at 685. The court granted the motion regarding Count 1 and the charge was later amended to fourth degree assault. 5RP at 677.

*a. Introduction of extrinsic evidence by a juror*

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

As we were deliberating yesterday, one of the jurors informed us that she had gone on the court website to look at the charges again.

And then she made a statement that she knew that the defendant was still in—was still in jail. And so, we're thinking that—well, she mentioned that she thinks that he has been in jail from the time he got arrested. And that was information that was not privy to us.

So regardless it didn't matter—we didn't think it mattered. But another juror has an issue with that.

7RP at 910.

The juror stated that the juror who had an issue with the extrinsic information was not the same juror who looked up the information from the

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<sup>2</sup> The court denied the motion regarding Count 3, and Mr. Etpison was subsequently acquitted of that count. 6RP at 687.

court website. 7RP at 910. The juror stated:

It is an issue because—the—Your Honor has always told us or asked the question has anyone been on the website. Has anybody looked up any information?

So what the real problem is, is that the juror that has the issue, it's—it makes her---I mean, it's a determining factor on how she decides. And to me, like I said, that shouldn't make a difference. It shouldn't make a difference in if he was in jail for six months while he was waiting to come here, that know what the issue is, and that know why we're here.

THE COURT: But one of the jurors—not the one that looked it up. But a different juror is giving some indication that if he's been in jail all this time, that means something.

THE JUROR: Yes. She is implying or she says, well, nobody sits in jail that long. And that—I'm just---like that shouldn't play an issue and that's anything that was presented in court.

So who cares how long he's been sitting in jail for? But it makes a difference to her.

7RP at 911.

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

THE COURT: What we need to figure out is—we were trying to look logistically at how this impacts thing. What I would like to know is if you can tell us—when did you come across this information? I understand that the jury may have heard something yesterday.

[Juror 5]: Yeah.

THE COURT: So when did you learn this information?

[JUROR 5]: The day—the day—the day that they said there was a big trial that we should get here early because there's going to be a parking problem.

7RP at 922-23.

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

Mr. Etpison waived his right a twelve-member jury and agreed to continue with eleven jurors. 7RP at 940. The remaining jurors were questioned individually regarding his or her ability to set aside the information learned from the excused juror. 7RP at 940-61.

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

*b. Verdict and sentencing*

The eleven-member jury found Mr. Etpison guilty of fourth degree assault (count 1), malicious mischief in the third degree (count 4), obstructing a law enforcement officer (count 5), intimidating a witness (count 6), and

harassment (count 7). 7RP at 991; CP188-89. He was acquitted of fourth degree assault regarding the children in Counts 2 and 3. 7RP at 991. The jury found by special verdict that Kali and Jasmine Etpison are members of the same family or household. 7RP at 992; CP 190-93.

At sentencing, the State requested 20 months followed by 12 months of community custody, a chemical dependency evaluation, and that a no contact order be entered regarding Mr. Etpison's children. RP (2/9/18) at 8-10.

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

The court imposed a standard range sentence of 15 months regarding Count 6, followed by 12 months of community custody, and ordered a no contact order between Mr. Etpison and Ms. Etpison, but permitted telephonic contact in order for them to discuss their children. RP (2/9/18) at 31. The court imposed 364 days for Counts 1, 4, 5, and 7, to be served concurrently with the felony conviction. CP 206-16. The court ordered legal financial

obligations of \$500.00 crime victim assessment, \$200.00 court costs, and a \$100.00 DNA fee. CP 212.

Timely notice of appeal was filed February 9, 2018. CP 220. This appeal follows.

**D. ARGUMENT**

**1. TRIAL COUNSEL'S FAILURE TO OBJECT TO PROPENSITY EVIDENCE AND HIS FURTHER FAILURE TO PROPOSE A LIMITING INSTRUCTION TO MITIGATE THE DAMAGING TESTIMONY, DENIED MR. ETPISON HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL**

*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.

In Mr. Etpison's case, trial counsel's representation fell below that of a reasonable prudent attorney when he failed to object to Ms. Etpison's testimony that her arm was bruised as the result of an assault by her husband at Thanksgiving. SRP at 497. Ms. Etpison's testimony was objectionable propensity evidence. Trial counsel aggravated his error by failing to request a limiting jury instruction telling the jury that they could not consider the alleged prior assault by Mr. Etpison on wife at Thanksgiving as evidence that he had a propensity to assault his wife.

*b. The prior assault history only came into evidence as evidence of Mr. Etpison's propensity to assault his wife.*

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. *State v. Cook*, 131 Wn. App. 845, 849, 129 P.3d 834 (2006). Evidence of prior acts may be admitted for other limited purposes, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” See ER 404(b). The test for admitting prior acts under ER 404(b) is whether the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and, on balance, the probative value of the evidence outweighs its prejudicial effect. *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003). Appellate courts review a trial court's decision to admit 404(b) evidence for abuse of discretion. *Cook*, 131 Wn.App. 850.

Here, because trial counsel failed to object to the evidence, the State was not put to the test of having to justify its admissibility. Without any effort to challenge the admission of the evidence, or limit the jury's consideration of it, the prior assault testimony came into evidence for the single reason for which it is not admissible - to prove that Mr. Etpison had a propensity to assault his wife.

The alleged prior instance of assault by Mr. Etpison should not have been admitted because it was propensity evidence. Mr. Etpison acknowledged that he hit objects in the apartment, but denied assaulting his wife. It is likely that the highly damaging, improper evidence tipped the balance of the evidence against Mr. Etpison; the jury was free to surmise that if he had assaulted his wife at Thanksgiving, he probably did that and on November 29.

As such, it was prejudicial error for trial counsel to fail to challenge the admission of the hearsay propensity evidence and fail to limit the jury's consideration of it through a limiting instruction.

**2. JUROR MISCONDUCT PRECLUDED MR. ETPISON FROM RECEIVING A FAIR TRIAL**

***a. Mr. Etpison Was Denied A Fair Trial When Extrinsic Evidence Was Introduced During Jury Deliberations.***

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. Due process requires that a person accused of a crime be tried only by a jury willing to decide the case solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1981). "[I]t is error to submit evidence to the jury that has not been admitted at trial." *In re Pers. Restraint of Glassman*, 175 Wn.2d 695, 705, 286 P.3d 673 (2012); *State v.*

*Pete*, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004). Failure to provide a fair and impartial jury violates minimal standards of due process. *State v. Jackson*, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), review denied, 126 Wn.2d 1003 (1995). A constitutionally valid jury trial is "a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989)), review denied 118 Wn.2d 1021 (1992).

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

A juror who introduces extrinsic evidence into jury deliberations commits misconduct. *Allyn v. Boe*, 87 Wash.App. 722, 729, 943 P.2d 364 (1997); *Richards v. Overlake Hospital Med. Ctr.*, 59 Wn. App. 266, 270-71, 796 P.2d 737 (1990). A jury's consideration of evidence that was not developed at trial jeopardizes the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466,

472, 133 L.Ed.2d 424, 86 S.Ct. 546 (1965). Reliance on extrinsic evidence is improper because it is not subject to objection, cross examination, explanation, or rebuttal. *State v. Brown*, 139 Wn.2d 20, 24, 983 P.2d 608 (1999). Such misconduct entitles a defendant to a new trial when there are reasonable grounds to believe that the defendant has been prejudiced. *State v. Briggs*, 55 Wash.App. 44, 55, 776 P.2d 1347 (1989) (citing *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)).

When a defendant alleges juror misconduct involving extrinsic evidence, the court must make an objective inquiry into whether that evidence could have affected the jury's verdict, not whether it actually did. *Briggs*, 55 Wn. App. at 55. A subjective inquiry is improper because the actual effect of the evidence upon the jurors inheres in the verdict. *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). Thus, "a defendant is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980).

Here, the jury was exposed to evidence that Mr. Etpison remained in custody beyond his initial arrest on November 30, 2017 and was in custody at the time of trial. This information is prejudicial because it was not introduced

subject to objection, cross examination, explanation or rebuttal. In fact, such evidence would have been inadmissible at trial.

*b. Jury Misconduct Occurs When The Jury Considers Facts Not In Evidence.*

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.

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 *State v. Caliguri*, 99 Wash.2d 501, 509, 664 P.2d 466 (1983)). The court properly looks at the purpose for which the extraneous evidence was injected into the deliberations. *Id.*

Here, the case turned on the credibility of Mr. Etpison. The case was

submitted to the jury, and after admonitions by the court to not conduct independent search, but a juror who had previously researched Mr. Etpison's release status on the internet told other jurors that Mr. Etpison had remained in custody following arrest, and shared that information with other jurors even though the court had instructed the jury not to consult outside sources or conduct their own research. Another juror told the court that Juror 9 was disturbed that he remained in custody. This conduct 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, despite the court's inquiry regarding the remaining jurors. There is every likelihood that the juror's misconduct contributed to the verdict in that other jurors were apprised of information regarding the appellant's custody status.

The juror's misconduct cannot be considered harmless beyond a reasonable doubt. Any doubt that consideration of extrinsic evidence affected a verdict must be resolved against the verdict. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); *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. This Court should therefore reverse Mr. Etpison's convictions 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).

**3. THE TRIAL COURT ERRED WHEN IT GRANTED THE PROSECUTOR'S MOTION TO EXCLUDE TESTIMONY REGARDING MR. ETPISON'S MILITARY CAREER**

*a. Mr. Etpison's substantial military career was admissible as "background" information*

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

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

CP 24-28.

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

by the State by ordering that any testimony regarding Mr. Etpison's military service was prohibited. 2RP at 37.

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

*a. Standard of review*

A trial court's decision on a motion in limine is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion occurs when the court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Quaale*, 182 Wn.2d 191, 197, 340 P.3d 213, review granted, 179 Wn. App. 1022 (2014). The court necessarily abuses its discretion if its decision is based on an erroneous view of the law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

In a criminal trial, it is generally acceptable for the accused to introduce evidence concerning his background, such as about his education and employment. *Government of Virgin Islands v. Grant*, 775 F.2d 508, 513 (3d Cir. 1985). Such background information is routinely admitted without objection. *Id.* "[E]vidence which is essentially background in nature can

scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.” *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988).

Washington courts permit the accused in a criminal trial to present information about his or her background, even when that information could be characterized as “character evidence.” E.g., *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974); *State v. Brush*, 32 Wn. App. 445, 648 P.2d 897 (1982). In *Renneberg*, the defendant was permitted to testify about her past good behavior, including her work experience, that she had attended college, and that she had participated in a glee club, drill team, and pep club, and was the treasurer of a science club. *Renneberg*, 83 Wn.2d at 738.

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

Here, the State argued that it would be prejudicial to the State because “anybody who has had military service or who has had relations or friends that have been in the military would understand that, you know, especially if they know a domestic violence conviction means a person can’t have firearms they’re going to know that is going to cost that person their military career.” IRP at 12. The State’s argument that mention of the defendant’s military career, however, is without merit because the jury may very well not have had a positive view of the military. Even if the members of the jury did hold the military in high esteem, it does not necessarily mean that the jury would accord a member of the military a greater degree of credibility than a nonmilitary witness. *People v. Lane* (Ill.Ct.App.2010) 922 N.E .2d 575, 585. Thus, even if it could be reasonably argued that the jury would give greater credibility to Mr. Etpison due to his military record, it does not follow that the jury would then have emotional bias in favor of Mr. Etpison.

Moreover, the jury was properly instructed that jurors “are the sole judges of the credibility of witnesses.” Court’s Instruction 1, CP 151-53. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. *State v. Davenport*, 100 Wash.2d 757, 763, 675 P.2d 1213 (1984); *State v. Cerny*, 78 Wash.2d 845, 850, 480 P.2d 199 (1971),

vacated on other grounds, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

In making its ruling granting the state's motion, the court made no finding that the jury would have been unfairly influenced by Mr. Etpison's military record or his current position in the Army Reserve, only that there is nothing probative or relevant regarding his military career. 2RP at 37. A reviewing court is required to presume that the jury followed the court's instructions. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008).

Mr. Etpison should have been permitted to tell the jury his occupation for 17 years as well as his current occupation in the Army Reserve. It was purely speculative to believe that a jury would be unduly swayed by Mr. Etpison's service record. A blanket prohibition against "anything related to the military" (2RP at 37) constitutes an abuse of discretion and the convictions should be reversed.

**4. INSUFFICIENT EVIDENCE SUPPORTS MR. ETPISON'S WITNESS INTIMIDATION CONVICTION**

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the

State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9A.72.110 provides in part that (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

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

“Current or prospective witness” means a person endorsed as a witness in an official proceeding or a person whom the actor believes may be called as a witness in any official proceeding. RCW 9A.72.110(3)(b).

Subsections (a) through (d) describe alternative means of committing the crime. *State v. Boiko*, 131 Wn. App. 595, 599, 128 P.3d 143 (2006); *State v. Chino*, 117 Wn. App. 531, 539, 72 P.3d 256 (2003).

Here, Mr. Etpison insufficient evidence supports the conviction for

witness intimidation. The Supreme Court's decision in *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007) is on point. In *Brown*, the defendant committed a burglary. *Id.* at 426. He told a woman who overheard him discussing the burglary that she would " 'pay' " if she spoke to police. *Id.* The defendant was subsequently convicted of intimidating a witness under the theory that his threat was made to a person he believed would be called as a witness against him. *Id.* at 427. The Supreme Court concluded insufficient evidence supported his conviction because the evidence only proved the defendant intended to prevent the witness from providing information to the police; the evidence did not show the defendant intended to influence the witness' testimony. *Id.* at 430.

The present case is similar to *Brown*. No evidence shows Mr. Etpison wanted his wife to change her testimony. Here, Mr. Etpison is accused of saying in Palauan, literally, "low tide is my heart" or "low tide is my spirit." 5RP at 605. The record, even taken in a light most favorable to the State, does not show that Mr. Etpison's statement was an attempt to change his wife's testimony or otherwise not cooperate with the legal system by failing to appear at trial. Rather, in the light most favorable to the State, his statement could be interpreted as anything from regretting his action to anguish over being in jail.

This is insufficient to meet the requirements of the alternative prongs of RCW 9A.72.110.

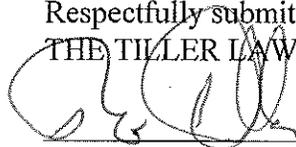
As in *Brown*, the connection between the statement to her in Palauan and any later court proceeding is simply too tenuous to support a conviction under the statute. Because insufficient evidence supports the conviction, the conviction should be reversed and dismissed with prejudice. *Brown*, 162 Wn.2d at 430.

**E. CONCLUSION**

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

DATED: September 6, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on September 6, 2018 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, Mr. Randall Sutton and copies were sent by first class mail, postage prepaid to the following:

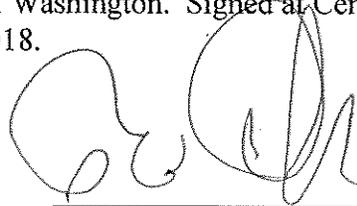
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 6, 2018.



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