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No. 52733-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN LEVY-ALDRETE,

Appellant.

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

BRIEF OF APPELLANT

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

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A. INTRODUCTION

Sebastian Levy-Aldrete and his mother, Maria Aldrete, were best friends. Following a separation from his wife, Mr. Levy-Aldrete feared that she would receive primary custodial care of their two sons. His mother moved to Washington to help, and they both moved into an apartment. With his mother's help, he was able to obtain joint custodial care. As the apartment was cramped, they planned to buy a house.

But tragedy struck. Early the morning of the day they were set to close on a house, a man entered their apartment. The man murdered Ms. Aldrete in her bed and then assaulted Mr. Levy-Aldrete when he came out into the hallway. Mr. Levy-Aldrete chased the man, but he escaped.

The tragedy then became a true nightmare. Although it did not make sense that that Mr. Levy-Aldrete would harm his mother—everyone agreed they got along very well and were excited to be moving to a new home—Mr. Levy-Aldrete was charged with the murder. Despite the lack of a motive and forensic evidence casting doubt on the prosecution's case, the prosecution convinced the jury to convict Mr. Levy-Aldrete.

The conviction must be reversed. Constitutional error during jury selection requires a new trial. And prosecutorial misconduct deprived Mr. Levy-Aldrete of a fair trial. If not reversed, remand is required for a hearing to address Mr. Levy-Aldrete's claim of juror misconduct.

B. ASSIGNMENTS OF ERROR

1. The court erred in denying Mr. Levy-Aldrete's motion to strike for cause juror 8 from the jury pool. Because Mr. Levy-Aldrete exhausted his peremptory challenges and used one to strike juror 8, the error deprived Mr. Levy-Aldrete of his jury trial rights under article I, sections 21 and 22 of the Washington Constitution.

2. The court erred by overruling Mr. Levy-Aldrete's objection to the prosecutor's argument to the jury equating the beyond a reasonable doubt standard to an incomplete jigsaw puzzle. This and other prosecutorial misconduct deprived Mr. Levy-Aldrete of his right to a fair trial, as guaranteed by due process under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution.

3. In violation of due process, as guaranteed by article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the court erred by denying Mr. Levy-Aldrete's motion for a mistrial and by failing to hold an investigation into alleged juror misconduct.

4. The court erred in ordering that non-restitution legal financial obligations accrue interest.

5. The court erred in ordering Mr. Levy-Aldrete pay the costs of

supervision as determined by the Department of Corrections.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court should grant a motion to strike a juror for cause when the juror is biased. A former prosecutor for Pierce County, Juror 8 represented he had a “prosecutorial mindset.” He stated there must be “heavy evidence of guilt” for the case to be brought to trial and, notwithstanding the presumption of innocence, Mr. Levy-Aldrete was likely guilty. He said it was “impossible” to know if he could set aside his bias and apply the law. Did the court err in denying Mr. Levy-Aldrete’s motion to strike juror 8?

2. The right to trial by jury under the Washington Constitution provides greater protection than its federal analog. The right is interpreted in light of the law existing when the state constitution was adopted in 1889. Peremptory challenges were provided for by law in 1889 and existed since the first territorial laws of 1854. For over a century since Washington became a state, the rule was that when a party uses a peremptory challenge to remove a juror who should have been removed on the party’s motion for cause, reversal is required if the party exhausted all their peremptories. Is this rule required under the Washington Constitution? Is Mr. Levy-Aldrete entitled to a new trial because he exhausted all his peremptories, one of which was used to strike a juror

who should have been removed for cause?

3. It is misconduct for a prosecutor to misstate or trivialize its burden. Over Mr. Levy-Aldrete's objection, the prosecutor equated its burden to prove guilt beyond a reasonable doubt to being confident about what image is depicted in an incomplete jigsaw puzzle. Jurors could misunderstand this analogy to describe a lesser standard of proof. It improperly implied that a lack of evidence (missing pieces) do not constitute a reasonable doubt. And it trivialized the jury's role by turning the process into a game. Did prosecutorial misconduct deprive Mr. Levy-Aldrete of a fair trial?

4. It is misconduct for a prosecutor to express personal opinions, make arguments outside the evidence, or tell the jury that its verdict should declare the truth. The prosecutor expressed his personal opinions that Mr. Levy-Aldrete's story was "ridiculous," that he lied, and that the defense theory was that "the boogeyman did it." Making arguments outside the evidence, he asserted Mr. Levy-Aldrete lived in a very safe area, invoked a trope from television dramas, and created a fictionalized narrative between Mr. Levy-Aldrete and his mother. He twice invited the jury to "speak the truth" through its verdict. Did prosecutorial misconduct cumulatively deprive Mr. Levy-Aldrete of a fair trial?

5. When the trial court hears a motion for a new trial and denies

the motion based on a failure to recognize that the asserted facts constitute juror misconduct, the appellate court should remand for a hearing. A juror's consideration of extrinsic evidence is misconduct that may justify a new trial. Alleging the jurors had committed misconduct by not following their instructions and considering extrinsic evidence—including unadmitted evidence that Mr. Levy-Aldrete's phone had an emergency button to call 911—Mr. Levy-Aldrete moved for a new trial. The court rejected the request, finding as a matter of law the allegations did not constitute misconduct. Is remand for a hearing required because the court failed to recognize that the jury's consideration of extrinsic evidence constituted misconduct?

6. Interest does not accrue on non-restitution legal financial obligations. The judgment and sentence orders that interest accrue on legal financial obligations. Must this provision be stricken or reformed?

7. As part of community custody, a trial court may waive the requirement that a defendant pay supervision fees. Before imposing discretionary fees, the court must analyze the defendant's ability to pay. The court found Mr. Levy-Aldrete indigent and waived other discretionary fees, but ordered he pay supervision fees. Did the court err?

D. STATEMENT OF THE CASE

Sebastian Levy-Aldrete is the father of two boys. RP 1506, 1539.

He separated from the boys' mother around 2008 and later divorced. Ex. 425 at 6. Around 2010, Sebastian's mother, Maria Aldrete, moved to Washington to support her son and grandsons. RP 2422. Ms. Aldrete settled in an apartment in Tacoma. RP 1617. Mr. Levy-Aldrete and the boys later moved into the two-bedroom apartment. RP 1510, 1616-17. With his mother's help, Mr. Levy-Aldrete obtained joint custodial care of his sons, and was able to work more while still being there for his sons. RP 1508-09; Ex. 425 at 23. The boys alternated weekly between their father's and mother's care. RP 1523, 1540.

Ms. Aldrete worked for the Tacoma Opera. RP 658, 1978. Mr. Levy-Aldrete worked as the manager at the University Bookstore in Tacoma. RP 2450. He gained a positive reputation in the local business community, joining the Downtown Merchants group. RP 2384, 2380. He was a very active parent and participated in school activities. RP 2381. He had a reputation in the community of having a peaceful disposition. RP 2382, 2387.

Mr. Levy-Aldrete and his mother had a positive relationship. Lori Aldrete, who was Ms. Aldrete's sister-in-law and best friend, testified:

They had a wonderful relationship, very mutually respectful of each other. They respected each other as individuals. Sebastian had his life; Maria had her life, yet they joined together as a family unit for the boys and for a home that they provided. They had a very good

relationship. They have the same sense of humor, share the same political viewpoints. I think they enjoyed talking to each other a lot.

RP 2423. They even planned to start a business venture together, a podcast related to the arts. RP 2426-28.

The boys, Jonathan and Ryan, who were about 13 and 10 when they testified in 2018, shared their aunt's opinion. RP 1506, 1539. They both testified that their father and their "Abuela"—Spanish for grandmother—got along very well. RP 1518, 1554. In the five or so years living together, there was no fighting or yelling between their father and their Abuela. RP 1521, 1554. Consistent with their testimony, the tenant in the unit below their unit, who moved in July 2017, never heard any arguments or yelling above. RP 1734-35.

The apartment, however, was cramped with the four of them (Mr. Levy-Aldrete shared a bedroom with the boys), so Mr. Levy-Aldrete and his mother began thinking about buying a house. RP 1510, 1515. In 2017, they began to seriously look for a home to buy. Mr. Levy-Aldrete applied for a hardship withdrawal from his retirement account, requesting \$7,471.56. Ex. 530. Ms. Aldrete wrote her son a check for \$20,000 as a deposit for a home, which Mr. Levy-Aldrete deposited into his bank account. RP 1943-44.

In the summer, they were in the process of purchasing a home. RP

1964, 2432. But the inspection report came back with problems and they decided to not go through with the purchase. RP 1964-65, 2432.

After looking at more homes in the Tacoma area, they found one. RP 2557-58. They did a final walk-through on October 13. RP 2558. The real estate agent testified Mr. Levy-Aldrete and Ms. Aldrete were excited about closing and there were no disagreements. RP 2559. Closing was set for Monday, October 16. RP 2558.

Nothing unusual occurred in the days leading up to October 16 and there was no change of heart about the house. RP 2395, 2411, 2560. Over the weekend, the boys got to see the house from the outside and were excited about having a yard. RP 1515-16. Ms. Aldrete spoke to her sister-in-law, Lori Aldrete, for about 45 minutes on Saturday. RP 2428. Ms. Aldrete was excited about the house and spoke of her plans for it. RP 2428-29. Ms. Aldrete did not indicate she was upset with her son or that anything was amiss. RP 2429. In fact, Mr. Levy-Aldrete had bought his mother Dan Brown's new novel. RP 2453; Ex. 425 at 84. He regularly pulled copies of books by authors that his mother liked. RP 2453. The boys testified nothing was unusual with their father. RP 1527, 1561.

The apartment building that the family was moving from was One St. Helens, located in north Tacoma. RP 721-22; Ex. 426. The family resided in a unit on the fifth floor. RP 1616. There were about 20 units in

the building on five floors. RP 1616. In addition to an elevator, the building had two stairwells. RP 1531, 1622. One went down to the garage, located on two floors below the first floor. RP 1633. Another stairwell led to an exit to Division Street. RP 1622, 1633.

The building's security was not ideal. RP 1624. Nothing stopped tenants from giving their codes for the main entrance to others. RP 1627-29. The pedestrian doors in the garage and the stairwell were often propped open with rocks or other objects by tenants, who might take a walk around the block with their dog. RP 1247-50, 1492-93, 1496, 1531, 1625; Exs. 711-16, 718. The pedestrian door in the garage leading to Broadway Street did not close firmly. Ex. 425 at 28; RP 1633. The doors for the cars in the two garages also opened and closed slowly. RP 1638, 2404.

Once a person got into the building, either in the garage or the front door, they had complete access to the building. RP 1287, 2400. No key or code was needed to use the elevator or to open the doors into and out of the stairwells onto any floor. RP 1287, 2400.

Due to lax security, Ms. Aldrete's car was broken into three times. RP 1530. Bikes had been stolen from the garage. RP 1628. There were reports of vehicle prowls. RP 2255. A homeless person once got in and slept in the building. RP 1629, 1646, 2225. There was a homeless

population in the area that had grown. RP 1317, 1585, 1646.

Sunday was typical, although Mr. Levy-Aldrete had to go to work for a few hours. RP 1509, 1553-54. Jonathan and Ryan went to bed around 8 or 9 p.m. in their bunkbed. RP 1510-11, 1543. Mr. Levy-Aldrete had a cot in the room. RP 1510. To help them sleep, the boys used a laptop to play relaxing ocean sounds. RP 1512, 1544.

Jonathan recalled waking around 4:00 to 4:30 a.m. to use the bathroom, which was common for him. RP 1513, 1529. His Dad was asleep in the room. RP 1513-14. Ryan recalled waking up around 12:00 to 2:00 a.m. to use the bathroom. RP 1545, 1555. When he woke up, he recalled seeing his Dad sleeping. RP 1652.

Before going to bed, Mr. Levy-Aldrete preloaded the coffee maker for the next day. RP 994-95, 2398; Ex. 425 at 190; Ex. 503. His typical routine is to brew the coffee and make sandwiches around 5:30 a.m. Ex. 425 at 190. He recalled waking up at 5:21 a.m. and getting up briefly to change his clothes before lying back down to snooze. Ex. 425 at 121-23. A short time later, he heard odd noises and thought his mother was having a nightmare. Ex. 425 at 126.

Mr. Levy-Aldrete got up. Ex. 425 at 127. When he stepped into the hallway, which was dark, a man cut him in his face with something. Ex. 425 at 127-30. He grabbed the man's arm, and in the struggle his thumb

was fractured. Ex. 425 at 127; CP 61. The man dropped the object and fled. Ex. 425 at 140. He thought he felt gloves on the man's hands. Ex. 425 at 137.

Mr. Levy-Aldrete picked up the object, which was a broken off portion of glass from the top of a Maker's Mark liquor bottle. Ex. 425 at 128, 137, 140. There had been a partially consumed Maker's Mark bottle in the dining room. Ex. 425 at 96, 230-31.¹ Carrying the broken piece, he went to his mother's room. Ex. 425 at 190. He found his mother lying in the bed the opposite way with a pillow on her head. Ex. 425 at 145. The bed was soaked with blood. Ex. 425 at 148. After removing the pillow from her head, he noticed she was bleeding heavily from what he thought was her neck. Ex. 425 at 148-49. He got some towels and used them to try to stop the bleeding. Ex. 425 at 149-51. As he held his mother's hand, she grasped him, resulting in scratches on his arm. Ex. 425 at 147, 218.

Mr. Levy-Aldrete recalled that he chased after the man, who he believed to have fled down the stairwell leading to the garage.² Ex. 425 at 153-58. In the garage, he looked for the man, but did not find him. Ex. 425

¹ Mr. Levy-Aldrete had purchased a bottle of Maker's Mark on October 6. RP 861, 949.

² Due to the stress, Mr. Levy-Aldrete may have misremembered or misstated the order of events during his interview, and may have in fact unsuccessfully tried to call 911 before pursuing the man or during the pursuit in the stairwell and the garage. See RP 2665.

at 158-165. He ran back up to his apartment. Ex. 425 at 165.

Mr. Levy-Aldrete returned to his mother's room. Ex. 425 at 28, 167. He tried to call 911 using his iPhone, but was unable to swipe the screen properly due to the blood on his hands. Ex. 425 at 28, 167. He went to the bathroom and got a disinfectant wipe to clean his hands and the screen. Ex. 425 at 167-68. He briefly rinsed his hands. Ex. 425 at 168-69. He was able to swipe the screen and enter his passcode. Ex. 425 at 169. He tried to call 911 twice, but it did not work. Ex. 425 at 169, 171. He got his mother's phone in the dining room, but after swiping, he realized he did not know his mother's pass code. Ex. 425 at 172. He then tried his phone again, and this time the 911 call went through at 5:35 a.m. RP 550-52; Ex. 419.

In the 911 call, which is about 12 minutes long, Mr. Levy-Aldrete told the operator what happened and pleaded for an ambulance. Ex. 419. He was plainly distressed and upset. Ex. 419. The call ended when he let Officers James Pincham and Steven Woodard in. RP 557, 648-49; Ex. 419. Officer Wade White arrived shortly thereafter. RP 1126.

Mr. Levy-Aldrete told the officers what happened. RP 576. The police and a paramedic determined that Ms. Aldrete was deceased. RP 650.

A paramedic who spoke with Mr. Levy-Aldrete did not detect an

odor of alcohol or suspect that he was under the influence of any substances. RP 546-48. Officers Pincham and Woodard also did not smell alcohol and did not believe Mr. Levy-Aldrete exhibited signs of intoxication. RP 630-31, 668.

About 20 to 30 minutes after he arrived, Officer White woke the boys. RP 1128, 1534. Jonathan briefly spoke to his father. RP 1533-34. Jonathan testified that his Dad looked “shell-shocked.” RP 1534-35. He was crying, breaking down, and looked like he had been in a fight. RP 1534. He had never seen his Dad like this. RP 1534.

Mr. Levy-Aldrete agreed to a recorded interview, which began at the police station at about 8:30 a.m. Exs. 423, 425. Mr. Levy-Aldrete again explained what happened and answered questions. Exs. 423, 425. Including the breaks, which included one lasting about two hours, the recording is about six hours. Ex. 423. Mr. Levy-Aldrete stated that he generally did not leave his door unlocked, but that it occasionally happened. Ex. 425 at 110. He described the man who had murdered his mother and attacked him as being about his size. Ex. 425 at 188. Due to how dark it was in the hallway, he was unsure about the person’s face and thought the man could have been wearing a mask. Ex. 425 at 187-88. The detective’s investigation later that evening confirmed that the hallway was pitch black at night. RP 1441, 1597. The boys similarly testified about the

hallway being dark. RP 1535-36, 1549.

Other evidence corroborated Mr. Levy-Aldrete's story. A rug in the hallway appeared to have been moved during the fight as it was curled on one side against a wall. RP 1574-75.

Mr. Levy-Aldrete's neighbor on the floor directly below his unit testified that around 5:20 to 5:25 a.m., he had heard stomping, rushing around, and yelling by a male voice above. RP 1730, 1746. It sounded like more than one person. RP 1740.

Another tenant in the building, whose unit was on the first floor next to the stairwell that leads to the garage, testified that between about 5:00 to 5:30 a.m., he was disturbed from sleep by what sounded like multiple persons running up or down the stairwell. RP 932-33, 935, 940. This was unusual. RP 933-34.

An employee at a construction firm doing work at a nearby Walgreen's, testified that he had heard a loud scream that morning between 4:15 and 6:00 a.m. RP 1306-07, 1320. It sounded like it was from a man, as it was deep and angry. RP 1321.

In the stairwell to the garage and in the garage, law enforcement found blood. RP 1773-81. Excluding a trace component from floor two of the stairwell, the samples collected for DNA matched Mr. Levy-Aldrete. RP 1773-81.

Police did not find anything of evidentiary value in the large garbage dumpster filled with trash. RP 1342-44. In a recycle bin they opened, police smelled alcohol and saw a pair of gloves at the bottom. RP 698, 1421-22. Mr. Levy-Aldrete had a pair of gloves that he often kept by the entry of the apartment on a table. Ex. 423 at 46, 87-88. He later stated these gloves were likely his. Ex. 704.

In the left interior glove, a mixed DNA profile, meaning more than one person's DNA, was recovered. RP 1768. Two of the profiles matched Mr. Levy-Aldrete and Ms. Aldrete. RP 1768-70. Another profile from a third contributor was also present (meaning it belonged to neither Mr. Levy-Aldrete nor his mother), but it was a trace profile, meaning there was not enough to get a full profile. RP 1769-70, 1846. In the interior of the right glove, a DNA profile matched Ms. Aldrete. RP 1771. There was a trace profile as well, but it could not be determined who it belonged to. RP 1773.

Samples from what may have been blood from the strap of the left glove and the knuckles of the right glove were taken. RP 1765, 1783. Both samples had profiles that matched Ms. Aldrete along with a second trace component. RP 1784.

Police found a disinfectant wipe with a blood stain on the landing of the stairwell outside the lower level parking garage. RP 697, 723, 1271.

The DNA profile obtained matched Mr. Levy-Aldrete. RP 1882.

The broken glass bottle was collected. RP 1043-44, 1416. The stained portions, likely blood, were not tested. RP 1801-02. The unstained portion that was swabbed returned a DNA profile of Ms. Aldrete's. There were at least two other minor profiles on the bottle, identity unknown. RP 1803, 1847-50, 1890.

The Pierce County Medical Examiner, Thomas Clark, opined that Ms. Aldrete had likely died from manual strangulation by the neck with a pair of hands. RP 2177. While he did not say so in his report, he testified that significant blood loss from being struck in the head by a bottle was a contributing factor to the death. RP 2212-13, 2233-34. Ms. Aldrete's injuries to her face were consistent with blunt force injury and sharp force injury from being beaten with a broken bottle or bottle that broke during the assault. RP 2188-90.

A neurologist testified that a person may regain consciousness if not strangled for longer than three minutes. RP 1667. He testified that it was possible Ms. Aldrete moved as Mr. Levy-Aldrete told the police and scratched him due to a seizure. RP 1692, 1702-03. He also testified that it was possible that during a seizure following a strangulation there can be an epileptic cry. RP 1703.

A hair was found in Ms. Aldrete's hand. RP 155-56, 992, 1876,

2220. The hair was placed in an envelope and sent to the crime laboratory, but when it was opened for testing, the hair was missing. RP 1877.

Mr. Levy-Aldrete's clothing was examined. RP 2067. He had been wearing a white t-shirt, a blue sweatshirt that was inside out, and jeans. RP 1114-17, 2068. Blood spatter experts called by both the prosecution and the defense testified they would have expected Mr. Levy-Aldrete to have impact spatter stains on his clothing had he been the one who had wielded the bottle. RP 2093-94; 2493. Impact spatter is produced from a forceful impact. RP 2468. There was evidence of impact spatter on the walls abutting the mattress where Ms. Aldrete was found. RP 2476. But no evidence of impact spatter was found on Mr. Levy-Aldrete's sweatshirt or jeans. RP 2093-94, 2143, 2469, 2476. Blood found on Mr. Levy-Aldrete's clothing and in other areas of the apartment, including the hallway bathroom, came from either drip transfers or possibly cast-off from an object. RP 2470, 2503-05, 2526-27.

The State charged Mr. Levy-Aldrete with first degree premeditated murder (count one) and second degree felony murder predicated on assault (count two), each with a deadly weapon enhancement. CP 15.

Trial began in October 2018. During jury selection, Mr. Levy-Aldrete moved to dismiss juror 8—a former Pierce County prosecutor who stated that he believed Mr. Levy-Aldrete was likely guilty—for cause, but

the court denied his motion. RP 159-61. Mr. Levy-Aldrete used all his peremptories, including one to remove juror 8. RP 436-37; Supp. CP __.³

The prosecution's theory at trial was that Mr. Levy-Aldrete had stolen the money his mother had given to him for a down payment on a house, and had killed her because they were about to close on a house and would have found out about the "theft." RP 448, 2613-17.

As defense counsel explained during closing argument, the prosecution's theory was not borne out by the evidence and did not make sense. RP 2657-60. Mr. Levy-Aldrete had not blown the money on gambling or drugs, and there had been no big expenditure by him except for contributing to his children's private school. RP 1962, 2025-26, 2040. He had over \$10,000 in his bank account, more than enough for the closing costs. RP 1960-61, 2030. Moreover, as Ms. Aldrete's sister-in-law testified, Ms. Aldrete was generous with her money and did not keep it a secret that she was paying for food and rent almost exclusively. RP 2438-39. Ms. Aldrete was very supportive of her son, including financially. RP 2435. Along with a steady income from the Tacoma Opera and social security, she had about around \$300,000 in two investment retirement accounts, for which there were no penalties for withdrawing. RP 1978-80,

³ Peremptory challenge sheet (10/11/18); Jury Panel (10/11/18); Jury Panel Selection list (11/09/18).

2031. Following probate, there was about \$300,00 in her estate, half of which went to her eldest son (Mr. Levy-Aldrete's older brother). RP 2421, 2430-31.

Following 15 days of testimony and arguments, deliberations began. RP 434-2701. A week after deliberations began, the jury returned a verdict finding Mr. Levy-Aldrete guilty of second degree murder. CP 134; RP 2703-04. The jurors were unable to agree on the charge of first degree murder, count one, and the court declared a mistrial on that charge. CP 136, 138; RP 2703, 2710-11.

Maintaining his innocence, Mr. Levy-Aldrete himself moved for a new trial based on juror misconduct. 12/7/18RP 35-37. The court denied the motion. 12/7/18RP 41.

At sentencing, the court received over a dozen letters in support of Mr. Levy-Aldrete, stating they believed he was innocent. These included letters from Ms. Aldrete's brother and sister-in-law, Mr. Levy-Aldrete's father, friends, co-workers, former co-workers, and former employers. Supp. CP __.⁴ The court remarked, "I have never seen so many letters from people in the community who fervently support a criminal case defendant and who adamantly contend that he was wrongly convicted."

⁴ Letter from Bilingual Books Inc. (11/30/18); Letter in/for support (12/05/18).

12/7/18RP 45. The court sentenced Mr. Levy-Aldrete, who had no criminal history, to 244 months in prison. CP 147.

E. ARGUMENT

1. Mr. Levy-Aldrete’s motion to strike a manifestly biased juror was improperly denied. As he was forced to use one of his peremptory challenges on this juror and exhausted all his peremptories, reversal is required.

a. Defendants have a right to a fair trial by an impartial jury.

Criminal defendants have a federal and state constitutional right to a fair and impartial trial by jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015); United States v. Kechedzian, 902 F.3d 1023, 1027 (9th Cir. 2018). A party may move to excuse a juror for cause, which includes actual bias. RCW 4.44.150, .170; CrR 6.4(c).

“Actual bias” means that the juror’s state of mind is such that the “person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). If “a juror has formed an opinion that could prevent impartial judgment of the facts, the trial judge should excuse that juror.” State v. Slert, 186 Wn.2d 869, 877-78, 383 P.3d 466 (2016). Although review is for an abuse of discretion, “appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp.” State v.

Fire, 100 Wn. App. 722, 729, 998 P.2d 362 (2000) (reversed on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001)). Any doubts about bias must resolved in favor of striking the juror. Kechedzian, 902 F.3d at 1027.

b. The court denied Mr. Levy-Aldrete's motion to excuse a manifestly biased juror for cause, forcing him to use one of his invaluable peremptories, all of which were exhausted.

As part of jury selection, the potential jurors filled out a questionnaire. Supp. CP __ (jury questionnaires) ("JQ"). One question asked if there was anything in the potential juror's history or background that would interfere with their ability to be fair and impartial. Supp. CP __ (JQ). Juror 8 answered yes, explaining he was a former Pierce County prosecutor:

3. Is there anything in your history or background that would interfere with your ability to be fair and impartial? yes no (please check one)
If yes, please explain: deputy P.C. prosecutor (1970's)

Supp. CP __ (JQ at 30). In answering a separate question and in a conflict slip, juror 8 also represented that he had an "insurmountable" hardship that prevented him serving, identifying that he was a private practice attorney working on a case with fast approaching deadlines:

4. This case is expected to last approximately 4 weeks. Trials are held Monday through Thursday (no trial on Fridays). Do you have an insurmountable problem or hardship that would prohibit you from serving as a juror in this case? yes no (please check one).
If yes, please explain: private practice attorney

...

JUROR CONFLICT SLIP
Superior Court Cases ONLY

SECOND COLORED BADGE # 8

REASON Private practice attorney
Case deadlines October 24 (C) 29.

Please give this to the Judicial Assistant in court.

Supp. CP __ (JQ at 30).

Based on these answers, the court questioned juror 8 outside the presence of other jurors. Juror 8 stated that it would be challenging to work and be on the jury; he also noted that he was a former prosecutor and that his firm had represented Mark Lindquist, the then-elected Pierce County Prosecutor:

THE COURT: All right. Would I be correct in inferring that although it would be challenging for you, do you think you could make this work if you ended up on this jury?

PROSPECTIVE JUROR NO. 8: There is little that can't be made to work. It is challenging, but is it possible? Yes. By the way, I should mention that I listed that I was a prosecutor years ago, but the firm has represented prosecutor -- Pierce County Prosecutor Lindquist the last three years.

RP 152-53. This elicited further questioning, where juror 8 candidly identified as having a "prosecutorial mindset:"

THE COURT: All right. Have you personally been involved with any of those issues or do you have specific information about it that could influence your view of deputy prosecutors or the State's case?

PROSPECTIVE JUROR NO. 8: Representing Mr. Lindquist would not create any issues. I think I've always had kind of a *prosecutorial mindset*, is all I would say.

RP 153 (emphasis added). Following up, the court asked juror 8 if being a prosecutor would interfere with his ability to be impartial. Juror 8 expressed doubt, admitting he did not know if he could be impartial. He explained he understood that to bring a case to trial, the prosecutor must be positive that the evidence strongly supports a guilty verdict:

THE COURT: Well, that's the next question because you mentioned that you were a deputy prosecutor. Of course, it was a long time ago, in the 1970s, I think, you indicated. Well, please tell us candidly if you feel that your past experiences representing the State of Washington might cloud your ability to be impartial.

PROSPECTIVE JUROR NO. 8: You know, Judge, *I don't know*. I've been called for jury duty three or four times in the last five years. I've yet to sit on a jury, and while I would find it fascinating, it looks like there are no other jurors present, so I can say, you know, *I know what it takes before you bring a case to trial, would be pretty positive that the evidence is strongly in favor of a guilty verdict. Can I put that out of my mind? I don't know.*

RP 153-54 (emphases added).

The court next asked if juror 8 could follow the court's instructions regarding the presumption of innocence and the requirement of proof

beyond a reasonable doubt. Juror 8 stated he could not answer, reasoning that there must be “heavy evidence of guilt” for a case to be brought to trial:

THE COURT: Well, you’ve been a trial attorney and, of course, you recognize that a jury has a duty to follow the Court’s instructions on the law, and in a criminal case, as you know, an instruction is presumption of innocence and proof beyond a reasonable doubt. Do you think you can follow those instructions?

PROSPECTIVE JUROR NO. 8: Judge, as I say, *honestly, I can’t answer that. You know, you come in with a mindset.* Even though I believe in the presumption of innocence until proven guilty, I have a little trouble with balancing those two out. *I know that before you get to trial there’s pretty heavy evidence of guilt.* Could I ignore it? All I can do is say I’ll do my best.

THE COURT: Well, your comment leaves me to ask, do you feel that you could concentrate only on the evidence properly admitted and actually admit it?

PROSPECTIVE JUROR NO. 8: I believe I could. Again, you were asking mind questions. One would hope so.

RP 154 (emphases added).

Following the court’s questions, defense counsel questioned juror 8. In answering defense counsel’s questions, juror 8 readily confirmed he had a “prosecutorial mindset” and believed there was “heavy evidence of guilt”:

MS. KO: All right. Thank you. I have little more concern about a comment that you’ve made that you have, sitting here without hearing any evidence and you’ve just heard

what the charge is in this case, but *you believe that there is pretty heavy evidence of guilt at this time. Is that a fair statement?*

PROSPECTIVE JUROR NO. 8: I believe *that is correct.*

MS. KO: And that's because, as you put it, you have a *prosecutorial mindset?*

PROSPECTIVE JUROR NO. 8: I think that is an accurate -
- one, I said it, and, two, *I think it's accurate.*

RP 156-57 (emphases added). Juror 8 further stated that notwithstanding his understanding of the presumption of innocence, he believed it was likely that Mr. Levy-Aldrete was guilty and that it was "impossible to answer" whether he could put his preconceptions aside:

MS. KO: When I hear words like "prosecutorial mindset," what I hear is that you believe just the fact that he, Mr. Levy, is sitting at counsel table and is the defendant in this case, that *you believe that he must be guilty of something.*

PROSPECTIVE JUROR NO. 8: *I believe it's likely.* Now, having said that, I understand there's a presumption of innocence and *would try to put that out of the mind* and just listen to the evidence, but *the fact is, yes.*

MS. KO: And though you may try to put that out of your mind, you can't tell us for sure that you will be able to; is that right?

PROSPECTIVE JUROR NO. 8: That's *an impossible question to answer.* All I can say is I will do my best.

MS. KO: When there's a presumption of innocence, you're supposed to, sitting here right now, feel as though this person here is absolutely innocent because you have heard no evidence, but you're telling us that although you've

heard nothing, you believe that Mr. Levy is guilty?

PROSPECTIVE JUROR NO. 8: *I believe it is probable.*

Whether or not it's provable beyond a reasonable doubt is a very different question.

RP 157-58 (emphases added).

Defense counsel moved to strike juror 8 for cause, citing juror 8's statements along with the fact that juror 8's law firm had represented the elected prosecutor, who had brought the case against Mr. Levy-Aldrete:

MS. KO: And I respect the juror saying that he will try to put aside his own biases that he has, but he says it's impossible for him to say whether or not he will be able to put aside those biases. He could not guarantee that he will hold the State to its burden and the presumption of innocence. He certainly will try and he hopes he will, but as he sits here today he believes that there is heavy evidence of guilt, that he knows how much evidence there must be to bring a case together. Those were his words, not mine. I understand him having a prosecutorial mindset, but he did agree that to him what that means is he must be guilty of something or otherwise he wouldn't be here. He's also represented the elected prosecutor, his firm has, represented the elected prosecutor in this case, and based on everything that he has stated, I am asking that he be excused for cause.

RP 159.

Ignoring juror 8's own admissions, the prosecution opposed striking juror 8, arguing "nothing that he said indicated that he could be unfair or could not follow the law as instructed, so I would ask the Court to deny the defense motion to excuse him for cause." RP 159.

The court denied the motion for cause, reasoning that juror 8's

statement about there being heavy evidence of guilt did not mean he was presuming guilt and that he understood the presumption of innocence:

THE COURT: I think this potential juror is in a unique position of understanding that probable cause is necessary, that there's going to be evidence at least passing that threshold before a case is going to get in front of a jury. I did not understand his comment about there being, quote, heavy evidence or likelihood of evidence proving guilt to mean in the juror's mind that he presumed the defendant guilty at this point in time. He's also in a unique position to understand, and I believe he does fully understand what the presumption of innocence means and the duty to follow the Court's instructions on the law. I don't believe that it's been demonstrated that he's biased at this point in time such that he cannot serve on this jury, that there's good cause to excuse him, so I'm going to deny the challenge for cause.

RP 160-61.⁵

Mr. Levy-Aldrete exhausted all six of his peremptory challenges,

⁵ During later voir dire, juror 8 reiterated his beliefs, acknowledging that he had difficulty imagining an innocent person ever being wrongfully charged, let alone wrongfully convicted:

MS. KO: . . . Do we have anyone who has a hard time imagining any person who is innocent ever being charged, ever being even convicted; it just doesn't happen, not in our judicial system, not when we have police officers who are so diligent and work so hard; when we have such a good judicial system it's just, in our criminal justice system, you know what, things like that just don't happen; it's very hard to imagine? Do we have anyone who thinks that, anyone at all? *Juror No. 8*; *Juror No. 10*. Anyone else? Hard to imagine anyone being convicted who is innocent; it just doesn't happen in our system because we have the best system in the world? Anyone else?

RP 365 (emphasis added).

using one to remove juror 8. RP 9-12, 436-37; Supp. CP __.⁶

c. Juror 8 candidly admitted his bias in favor of the prosecution, acknowledging he believed Mr. Levy-Aldrete to be guilty, and was unable to answer whether he could follow the law—including applying the presumption of innocence. The court should have granted Mr. Levy-Aldrete’s motion to strike juror 8 for cause.

The court erred by not excusing juror 8. Mr. Levy-Aldrete had a right to a jury that was impartial, would presume him innocent, and only convict with proof beyond a reasonable doubt. Juror 8, a former Pierce County prosecutor, recognized his bias in favor of the prosecution (“a prosecutorial mindset”) and candidly admitted it. RP 153-57. When asked if he could follow the court’s instructions on the presumption of innocence and proof beyond a reasonable doubt, he stated, “honestly, I can’t answer that” and that it was “an impossible question to answer.” RP 154, 157; cf. Fire, 100 Wn. App. at 728 (“few will fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions”). Although knowing about the presumption of innocence, he said it was likely Mr. Levy-Aldrete was guilty because cases do not go to trial unless there is “heavy evidence of guilt.” RP 154, 156-57. Because juror 8 was actually biased, the court erred in denying Mr. Levy-Aldrete’s motion to strike.

⁶ Peremptory challenge sheet (10/11/18); Jury Panel (10/11/18); Jury Panel Selection list (11/09/18).

This conclusion is supported by this Court's decision in State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002). There, a potential juror stated she would presume that the police were telling the truth. Id. at 278-79. She "candidly admitted she did not know if she could presume [the defendant] innocent in the face of officer testimony indicating guilt." Id. at 281. She never stated confidently that she could deliberate fairly or abide by the presumption of innocence. Id. at 282. This Court reasoned this established actual bias and that the trial court erred by denying the defendant's challenge for cause. Id. at 281-82.

As in Gonzales, there was no rehabilitation of juror 8. The closest juror 8 ever came was, in response to the court's last question, that he believed he could concentrate on the admitted evidence. RP 154. But in the same breath, he told the court it had been "asking mind questions," and clarified "[o]ne would hope so." RP 154. And when defense counsel followed up, he stated it was "impossible" to answer whether he could put aside his preconception that Mr. Levy-Aldrete was likely guilty and abide by the presumption of innocence. RP 157-58.

This Court's opinion in Fire also supports the conclusion that juror 8 should have been excused. There, the judge failed to recognize that a juror's initial responses to questions showed actual bias. Fire, 100 Wn. App. at 728. That the juror later affirmatively answered that she accepted

that the State had to prove the charges beyond a reasonable doubt and that she would follow the law was insufficient to show that she could set aside her bias. Id. at 724-25, 728-29; accord); see also State v. Rutten, 13 Wash. 203, 207, 43 P. 30 (1895) (“notwithstanding the subsequent assertion of the juror that he could try the defendant, and accord to him the presumption of innocence he was entitled to under law, he had already stated in plain terms that he would not go into the jury box with a presumption that the defendant was innocent until the state had proven him guilty”); State v. Good, 309 Mont. 113, 126, 43 P.3d 948 (2002) (trial court “abused its discretion when it chose to ignore prospective jurors’ spontaneous and honest statements indicating they could not be impartial in favor of its own attempt to rehabilitate the jurors”).

Similarly, juror 8’s belief about there already being “heavy evidence of guilt” and Mr. Levy-Aldrete was likely guilty, was a presumption of guilt, not innocence. RP 160-61. Regardless, “a reasonable suspicion of bias” remained because juror 8 could not answer whether he could set aside his preconceptions. City of Cheney v. Grunewald, 55 Wn. App. 807, 811, 780 P.2d 1332 (1989). Thus, juror 8 should have been dismissed. See id. (holding that there was a reasonable suspicion of bias due to juror’s contradictory answers and therefore it was error to deny challenge for cause); Kechedzian, 902 F.3d at 1029-31 (error to deny

challenge for cause where juror never unequivocally stated she could be fair and impartial, and only gave equivocal answers).

d. Under the Washington Constitution, the wrongful denial of a challenge for cause requires reversal when the defendant exhausts all their peremptories.

Due to the court's error, Mr. Levy-Aldrete was effectively forced to expend one of his invaluable peremptories on juror 8. Supp CP __.⁷ He used all his peremptories. Supp. CP __.⁸ As a result, Mr. Levy-Aldrete was deprived of a substantial right and he did not receive the trial he was entitled to. The remedy is reversal and a new trial.

Since the founding of this state and for over a century, this was the rule in Washington. State v. Fire, 145 Wn.2d 152, 168, 34 P.3d 1218 (2001) (Sanders, J, dissenting); State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969) (abrogated by Fire); State v. Patterson, 183 Wash. 239, 244, 48 P.2d 193 (1935); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 30, 236 P. 797 (1925); State v. Stentz, 30 Wash. 134, 147, 70 P. 241 (1902); Rutten, 13 Wash. at 204 (“if the court wrongfully compelled him to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted.”); see

⁷ Peremptory challenge sheet (10/11/18); Jury Panel (10/11/18); Jury Panel Selection list (11/09/18).

⁸ Peremptory challenge sheet (10/11/18).

State v. Moody, 7 Wash. 395, 396-97, 35 P. 132 (1893) (defendant not harmed by use of peremptory on juror who was not struck for cause because he did not use all his peremptories). The rule is firmly set out in Parnell. Parnell, 77 Wn.2d at 508.

In 2001, however, five justices refused to apply the Parnell rule. Fire, 145 Wn.2d at 165. The basis for this decision was United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). There, the United States Supreme Court held that due process under the Fifth Amendment and a right to an impartial jury under the Sixth Amendment did not require such a rule. Martinez-Salazar, 528 U.S. at 780-82. The leading opinion in Fire reasoned the Parnell rule had been constitutionally based and, because there was no showing that our state constitution was more protective than the federal constitution, Martinez-Salazar controlled. Fire, 145 Wn.2d at 163. The defendant had not argued the Washington Constitution was more protective. Id. at 163-64. Justice Alexander concurred, reasoning the rule was not constitutionally based, but that Martinez-Salazar set forth a better rule. Id. at 163 (Alexander, J., concurring).

“An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory.” State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405

(2017) (internal quotation omitted), affirmed, 190 Wn.2d 548, 415 P.3d

1179 (2018). Relatedly,

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007

(2014) (internal quotation omitted). Therefore, Fire does not address what rule is required under the Washington Constitution.

This Court should hold that the Parnell rule is required under the Washington Constitution. The “nonexclusive” factors set out in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986) support this conclusion.⁹ These factors are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the two constitutions, and (6) matters of particular state interest and local concern. Gunwall, 106 Wn.2d at 61-62.

⁹ A Gunwall analysis is not necessary for a court to address a state constitutional claim. As our Supreme Court has recognized, “Gunwall is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue.” City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009).

“The purpose of these factors is not to presumptively adhere to federal constitutional analysis.” State v. Silva, 107 Wn. App. 605, 614, 27 P.3d 663 (2001). Rather, the purpose is to provide a “process that is at once articulable, reasonable and reasoned.” Gunwall, 106 Wn.2d at 63.

i. The text of Washington’s jury trial right is different than the federal guarantee, lending itself to independent interpretation.

Under our state constitution, adopted in 1889, the “right of trial by jury shall remain inviolate.” Const. art. I, § 21.¹⁰ This right encompasses a right to an impartial jury. Alexson v. Pierce Cty., 186 Wash. 188, 193, 57 P.2d 318 (1936) (“The right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial.”). This right is reinforced in the section of the state constitution addressing the rights of criminal defendants, which provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.” Const. art. I, § 22.

The jury trial rights under the federal constitution are set forth in

¹⁰ In full, article I, section 21 reads: “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.”

the Sixth and Seventh Amendments. In guaranteeing an impartial jury in criminal cases, the Sixth Amendment has language similar to article I, section 22: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .” U.S. Const. amend. VI. But there is no provision similar to the “inviolable” jury trial right set out in article I, section 21. The other federal provision on jury trials, the Seventh Amendment, only applies in civil cases and is dissimilar. U.S. Const. amend. VII.¹¹

That there is no provision comparable to article I, section 21 supports independent interpretation. In any event, that the text of a state constitutional provision is identical or similarly worded to a federal constitutional provision does not mean the two must be interpreted the same. See Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984) (arguing provisions should always be interpreted independently); *Gunwall*, 106 Wn.2d at 61 (language or text is not decisive); see, e.g., *State v.*

¹¹ “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

Bartholomew 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984).

This makes sense, particularly given that the United States Supreme Court did not hold that the Sixth Amendment right to a jury trial was incorporated¹² against the States until about 50 years ago. Duncan v. Louisiana, 391 U.S. 145, 149-50, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Before then, both the United States Supreme Court and the Washington Supreme Court ruled that the Sixth Amendment was inapplicable to the States. Palko v. Connecticut, 302 U.S. 319, 324, 58 S. Ct. 149, 82 L. Ed. 288 (1937), overruled by Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); Howard v. Kentucky, 200 U.S. 164, 172, 26 S. Ct. 189, 190, 50 L. Ed. 421 (1906); Gensburg v. Smith, 35 Wn.2d 849, 855, 215 P.2d 880 (1950). Even today, the Sixth Amendment right to a jury trial does not require jury unanimity in state criminal proceedings.¹³ Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972). Neither does it require a jury of 12. Williams v. Florida, 399 U.S. 78, 86, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). And the civil jury trial

¹² The United States Constitution was adopted without a Bill of Rights. The guarantee of rights subsequently adopted were also enforceable only against the federal government. Timbs v. Indiana, ___ U.S. ___, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019). Today, most of the rights contained in the federal bill of rights are enforceable against the states under the Fourteenth Amendment's guarantee of substantive due process. See McDonald v. City of Chicago, Ill., 561 U.S. 742, 764-65 n. 12 & 13, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). This project of incorporation by the United States Supreme Court largely postdated the adoption of the Washington Constitution in 1889. See id. at n.12.

¹³ The United States Supreme Court is revisiting this issue and heard argument in October 2019. <https://www.scotusblog.com/case-files/cases/ramos-v-louisiana/>.

right set out in the Seventh Amendment remains unincorporated and does not apply against the States. McDonald v. City of Chicago, Ill., 561 U.S. 742, 765 n.13, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); Gonzalez-Oyarzun v. Caribbean City Builders, Inc., 798 F.3d 26, 29 (1st Cir. 2015) (“The Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases”).

In contrast, the state constitutional right to a jury trial requires jury unanimity. State v. Lamar, 180 Wn.2d 576, 583 & 584 n.3, 327 P.3d 46 (2014) (citing article I, sections 21 and 22). It also provides a right to a jury of 12 in criminal cases. State v. Stegall, 124 Wn.2d 719, 728-29, 881 P.2d 979 (1994). And the right to jury trials in civil cases is protected by article I, section 21. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 644, 771 P.2d 711 (1989).

ii. State constitutional history and pre-existing state law strongly supports independent interpretation of Washington’s jury trial right and retention of the Parnell rule.

History and pre-existing state law strongly supports retention of the Parnell rule under our state constitutional jury trial right. Precedent establishes that Washington’s jury trial right is greater than that provided under the federal constitution. State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010); State v. Smith, 150 Wn.2d 135, 151, 75

P.3d 934 (2003); City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (“the right to trial by jury which was kept ‘inviolable’ by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789”). The issue is the meaning of the jury right and what it entails. State v. Clark-El, 196 Wn. App. 614, 621, 384 P.3d 627 (2016). This meaning “‘must be determined from the law and practice that existed in Washington at the time of our constitution’s adoption in 1889.’” Id. (quoting Smith, 150 Wn.2d at 151); accord Sofie, 112 Wn.2d at 645.

Applying this analysis, our Supreme Court in City of Pasco v. Mace held that the right to trial by jury under the state constitution extended to every criminal case, including misdemeanors. Mace, 98 Wn.2d at 101. When the state constitution was adopted in 1889, the code of 1881 was in effect and provided a right to jury trials for misdemeanors and municipal violations. Id. at 98-100. Accordingly, given the “treasured” right to trial by jury and the territorial laws, the constitution preserved the right to jury trials for misdemeanors. Id. at 100. This result was different from how the United States Supreme Court interpreted the federal constitution. D.C. v. Clawans, 300 U.S. 617, 624, 57 S. Ct. 660, 81 L. Ed. 843 (1937).

A similar analysis indicates that the Parnell rule is constitutionally

mandated. Peremptory challenges were provided in both civil and criminal cases when the state constitution was adopted. Code 1881 §§ 207, 208, 1079.¹⁴ Indeed, they were provided for in the first statutes passed in 1854 when Washington was a territory. Laws of 1854, p. 118 § 102; p. 165 § 186.¹⁵ Subsequent territorial laws reaffirmed Washington’s commitment to providing peremptory challenges. Laws of 1877, p. 43, §§ 211-212; Laws of 1873, p. 236 § 240; Laws of 1869, p. 51 § 212.¹⁶ Given this history and the essential role peremptory challenges have played in selecting juries, the right to peremptory challenges is preserved under our state constitution as part of the jury right in article I, sections 21 and 22. Cf. State v. Strasburg, 60 Wash. 106, 123-24, 110 P. 1020 (1910) (statute providing that insanity is no defense to criminal charge violated jury right because insanity doctrine “was in full force” “at the time of the adoption of our Constitution”); Smith, 150 Wn.2d at 154 (in light of statute abolishing jury’s role in sentencing, state constitution did not preserve right to have jury determination on fact of prior convictions at sentencing); see State v. Saintcalle, 178 Wn.2d 34, 66-67, 309 P.3d 326 (2013) (Stephens J., concurring) (recognizing that there may be a “valid argument . . . that the

¹⁴ Copies of these and the surrounding sections are attached in the appendix.

¹⁵ Available at:

<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1854pam1.pdf>.

¹⁶ These session laws and others can be accessed at:

http://leg.wa.gov/CodeReviser/Pages/session_laws.aspx.

state jury trial right enshrines peremptory challenges”).

In Martinez-Salazar, the United States Supreme Court reasoned that peremptory challenges are not mandated under the federal constitution. Id. at 311. This makes sense because the legislation authorizing peremptory challenges in federal cases was enacted in 1790, a year after the federal constitution was ratified. Id. at 311-12. In contrast, peremptory challenges were provided by Washington territorial laws when Washington adopted its constitution. Thus, a different result is warranted. See Mace, 98 Wn.2d 97-98 (noting that when the United States Constitution was adopted, “there was no statute to guide the [United States Supreme Court] in determining what offenses were triable by jury at that time”).

Peremptory challenges and the Parnell rule are part of the jury trial right in the state constitution. When Washington courts were applying this rule for over a century, the foundation was the state constitutional right to trial by jury. Five years after the adoption of the state constitution, our Supreme Court connected the state constitutional right to an impartial jury to the error in denying a challenge for cause:

The second assignment, however, viz. that the court erred in denying defendant’s challenge for cause to Juror Kile, is, in our minds, a more serious one, as it seems to us that a substantial right was denied to the defendant, *namely, the right to be tried by an impartial jury.*

State v. Murphy, 9 Wash. 204, 205, 37 P. 420 (1894) (emphasis added).

The Court recounted that “Section 22 of article 1 of the constitution of this state guaranties to every person defendant in a criminal prosecution the right to a trial by an impartial jury of the county in which the offense is alleged to have been committed.” Id. at 214. A year later, the Court followed Murphy in State v. Wilcox, 11 Wash. 215, 220, 39 P. 368, 370 (1895). The same year, the Court in Rutten, citing Murphy and Wilcox, extended the constitutional rule to apply when a potential juror is removed by a peremptory and all the defendant’s peremptories were exhausted. Rutten, 13 Wash. at 204. And the state constitutional rule was born, applied for over century in both criminal and civil cases. Parnell, 77 Wn.2d at 508; Patterson, 183 Wash. at 244; McMahon, 135 Wash. at 30; Stentz, 30 Wash. at 147.

iii. The structure of the Washington constitution, along with state and local concerns, supports an independent interpretation of Washington’s jury trial right.

The fifth factor, differences in structure between the state and federal constitutions, always supports an independent analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation on the State. State v. Bassett, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). As for the sixth factor, state and local

concerns, this factor also favors independent interpretation because there is no need for national uniformity in whether a jurisdiction must or must not follow the Parnell rule. See Rivera v. Illinois, 556 U.S. 148, 162, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (“States are free to decide, as a matter of state law, that a trial court’s mistaken denial of a peremptory challenge is reversible error *per se*”).

This makes sense because ours is a system of federalism, with power divided between the federal government and the states. The purpose of this division is to protect the individual. New York v. United States, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

Given the structure of our government and its history, it does not make sense to assume the meaning of state constitutional provisions depends on what a federal court says the federal constitution means. As one federal appellate judge argued, even when state and federal provisions have similar or identical language, there is no reason to think provisions from different sovereigns would mean the same thing, especially if the guarantee is highly generalized:

There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same. Still less is there reason to think that a highly generalized guarantee, such as prohibition on “unreasonable” searches, would have just one meaning for a range of differently situated sovereigns.

Jeffrey S. Sutton, What Does—and Does Not—Ail State Constitutional Law, 59 U. Kan. L. Rev. 687, 707 (2011).¹⁷ It is particularly important to remember this “whenever the United States Supreme Court’s decisions dilute or underenforce important individual rights and protections.” State v. Mole, 149 Ohio St. 3d 215, 221, 74 N.E.3d 368 (2016) (interpreting equal protection provision in Ohio Constitution independently of Fourteenth Amendment in light of Ohio’s conditions and traditions); see State v. Gregory, 192 Wn.2d 1, 42-43, 427 P.3d 621 (2018) (Johnson, J., concurring) (unlike United State Supreme Court when interpreting federal provision that applies nationwide, interpretation of state provision is not constrained by principles of federalism).

In short, the meaning of a state constitutional provision does not change whenever the United States Supreme Court interprets an analogous federal provision. See Penick v. State, 440 So.2d 547, 552 (Miss. 1983) (“The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail”).

¹⁷ See also Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018) (arguing that state constitutional law is underappreciated and state courts should independently interpret their state constitutions); Ilya Somin, Interview with Judge Jeffrey Sutton About his New Book “51 Imperfect Solutions: States and the Making of American Constitutional Law”—Part I, (May 21, 2018), <https://reason.com/2018/05/21/interview-with-judge-jeffrey-sutton-abou-2>.

iv. *The Parnell rule is required under article I, sections 21 and 22.*

Under a state constitutional analysis, the Parnell rule is a constitutional rule compelled by article I, sections 21 and 22 of the Washington Constitution.

This constitutional rule is fair and sensible. As explained by the Kentucky Supreme Court, which returned to a similar rule after abandoning it in light of Martinez-Salazar:

the correct inquiry is not whether using a peremptory strike for a juror who should have been excused for cause had a reasonable probability of affecting the verdict (harmless error), but whether the trial court who abused its discretion by not striking that juror for reasonable cause deprived the defendant of a substantial right. Harmless error analysis is simply not appropriate where a substantial right is involved, and is indeed logically best suited to the effect of evidence on a verdict, though some procedural errors may also be reviewed in this light. Here, the defendant did not get the trial he was entitled to get.

Shane v. Com., 243 S.W.3d 336, 341 (Ky. 2007). Similarly, the Montana Supreme Court has explained the rule is sound because otherwise the State is afforded an unfair advantage:

when jurors who should have been removed for cause are not removed, they must be removed by peremptory challenge, thereby effectively reducing that party's number of peremptory challenges. When the State has more peremptory challenges than the accused, the State has an unmistakable tactical advantage and the impartiality of the jury is compromised. Errors which affect the impartiality of the jury are, by definition, structural and require reversal.

Good, 43 P.3d at 961 (2002).¹⁸

e. Because Mr. Levy-Aldrete's challenge for cause was improperly denied and he exhausted all his peremptories, reversal is required.

Because Mr. Levy-Aldrete's challenge for cause was erroneously denied as to juror 8, he was forced to use a peremptory to remove that juror. He exhausted all his peremptories. Under our state constitution, he did not receive the jury trial he was entitled to. This Court should reverse the conviction and remand for a new trial.

2. Prosecutorial misconduct deprived Mr. Levy-Aldrete of his constitutional right to a fair trial.

a. Improper and prejudicial argument during closing summations by the prosecutor is misconduct that deprives a defendant of their right to a fair trial.

“Closing argument provides an opportunity for counsel to summarize and highlight relevant evidence and argue reasonable inferences from the evidence.” State v. Salas, 1 Wn. App. 2d 931, 940, 408 P.3d 383 (2018). When a prosecutor makes improper and prejudicial arguments during closing, this misconduct deprives the defendant of a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). The right to a fair trial is a fundamental liberty secured by the

¹⁸ The prosecution used all its peremptories. Supp. CP __ (Peremptory challenge sheet) (10/11/18).

state and federal constitutions. Id. at 703-04; U.S. Const. amend. XIV; Const. art. I, § 3.

b. The prosecutor's argument equating confidence about what is depicted in an incomplete jigsaw puzzle to being satisfied of guilt beyond a reasonable was improper. The court erred in overruling Mr. Levy-Aldrete's objection.

i. The prosecution has the burden to prove guilt beyond a reasonable doubt and it is misconduct for the prosecutor to misstate or trivialize its burden.

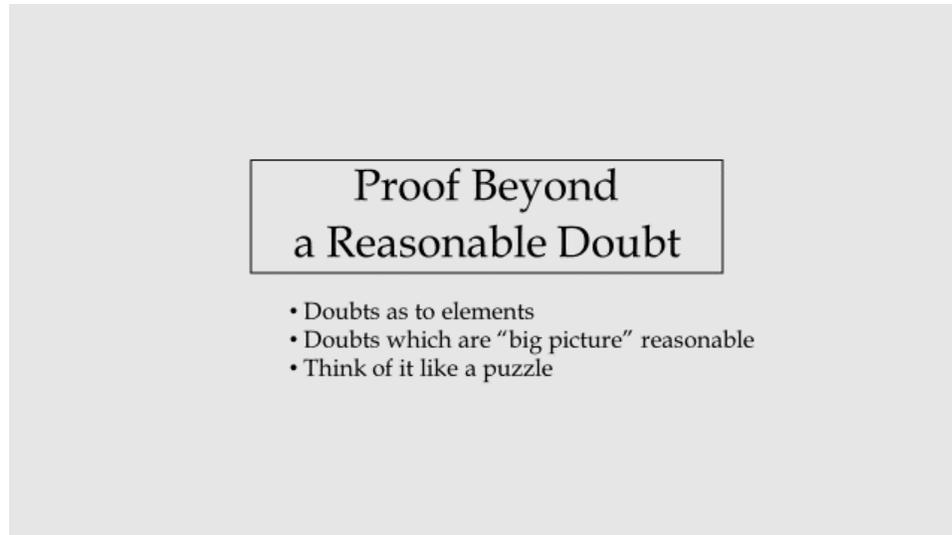
It is fundamental that the prosecution must prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The beyond a reasonable doubt “standard provides concrete substance for the presumption of innocence.” Id. at 363. That presumption is “the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). “[B]y impressing upon the factfinder the need to reach a subjective state of *near certitude of the guilt* of the accused, the [beyond a reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis added).

It is misconduct for a prosecutor to make an argument that misstates or trivializes the prosecution's burden to prove guilt beyond a

reasonable doubt. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010). Arguments that analogize the beyond a reasonable doubt standard to being confident about what is depicted in a jigsaw puzzle may be improper. E.g., Lindsay, 180 Wn.2d at 434-36.

ii. The prosecution misstated and trivialized its burden of proof through a false puzzle analogy.

Shortly after the prosecutor began his closing argument, the prosecutor began to discuss its burden of proof and displayed a PowerPoint slide in his presentation, telling the jury to think of “proof beyond a reasonable doubt” “like a puzzle”:



Supp. CP __ (State’s PowerPoint presentation) (slide 6). Just as the prosecutor was beginning to analogize its burden of proof to a jigsaw puzzle, Mr. Levy-Aldrete objected, but the court overruled his objection:

When you think about the proof or *the burden of proof in this case, consider it in the way you would a puzzle*. If you've ever taken a ferry in this state, you may sit down –

MS. KO: Objection to the puzzle analogy.

THE COURT: Overruled.

RP 2572.¹⁹

The prosecutor immediately continued, arguing that determining guilt beyond a reasonable doubt in a criminal trial is akin to confidence about what image is depicted in an incomplete jigsaw puzzle:

MR. WILLIAMS: You may sit down at the table and you may find a pile of puzzle pieces, and maybe the box isn't there so you don't know what the image is, and *with enough time you're able to put the pieces into place that you know beyond a reasonable doubt as to what the image is*.

You may reach that -- and it's subjective for each of you -- you may reach that conclusion even though there are pieces of the puzzle you don't ever have; they were lost before you even sat down. You may reach that point even though there are pieces of the puzzle that you just don't know what to make of. You can't seem to find a spot for them and so you set them aside.

You may reach that point even though pieces of the puzzle are broken, torn, ripped, or frayed. But *there's going to be a point at which you have enough pieces that you have an image that you are confident of*.

Consider a trial in much the same way. The State has the burden of presenting you evidence, enough pieces of evidence that tell you the defendant is guilty beyond a

¹⁹ It is common to find incomplete jigsaw puzzles on Washington State ferries. See <https://www.nytimes.com/2011/09/11/us/11jigsaw.html>.

reasonable doubt, and *you may reach that conclusion even though there are pieces of evidence, like pieces of the puzzle, that were never presented.* They're out there somewhere in the ether; they were gone before you even sat down. You may reach that conclusion even though there are pieces of evidence that you just don't know what to make of, and so you set that piece of evidence aside. You may reach that conclusion even though there are pieces of evidence like pieces of the puzzle that have warts and flaws.

The point is, when you view all the evidence in total, warts and all, *if what you have in place tells you beyond a reasonable doubt that the defendant is guilty of the crime, warts and all, holes and all, then the defendant is guilty and your verdict reflects that.*

2572-74 (emphases added).

During rebuttal, the prosecutor again analogized proof beyond a reasonable doubt to confidence about what image is depicted in an incomplete puzzle:

If you go back to my discussion about proof beyond a reasonable doubt and the idea of the puzzle, remember, when you sit down to do the puzzle, sometimes pieces are just gone before you even got there and *yet the question is what you have in front of you, is that enough to create the image.* This is a missing puzzle piece, a missing piece of evidence that you never had at the start.

The question isn't whether there's going to be a missing piece of evidence. The question isn't whether with the benefit of hindsight things could have been done. *The question is what you have in front of you, what image does that paint for you.*

RP 2689 (emphases added).

The prosecutor's analogy misstated and trivialized the prosecution's burden to prove guilt beyond a reasonable doubt, along with the presumption of innocence. A federal appellate court recently held a very similar puzzle analogy argument by a prosecutor to be misconduct. United States v. Bradley, 917 F.3d 493, 507-08 (6th Cir. 2019). As in this case, the prosecutor had argued that just as one could be confident of the image depicted in a jigsaw puzzle even if pieces are missing, one could be confident beyond a reasonable doubt that the defendant was guilty if enough parts of the puzzle had been assembled. Id. The court held this was improper because jurors could misunderstand the prosecution's burden to be less than it truly is:

The use of this metaphor for the beyond-a-reasonable-doubt standard was also improper. One can easily imagine trying to put together a 1000-piece jigsaw puzzle based on the picture on the box that the puzzle came in. Whether half of the puzzle pieces are missing or only ten of them are missing, one could still piece together enough of the puzzle to be able to recognize that it resembled the picture on the box. Accordingly, jurors could understand the metaphor to describe a far less demanding standard of proof than true proof beyond a reasonable doubt.

Id. at 508.

The Kansas Supreme Court has provided another reason why analogies to incomplete puzzles or images are inappropriate, explaining:

Such illustrations are inappropriate because they foster the illusion that the jurors already know the full picture of the

case they are hearing and are simply looking for pieces of evidence to match it. In fact, we insist that jurors have minimal to no prior knowledge of a case precisely to prevent them from seeking evidence to confirm a preconceived narrative and conclusion.

State v. Sherman, 305 Kan. 88, 115-16, 378 P.3d 1060 (2016). In other words, the analogy tells the jury that (contrary to the presumption of innocence) they know the defendant is guilty and they just need enough pieces of evidence to support their conclusion.

Other courts have found puzzle type analogies to be improper because they mislead jurors and trivialize the prosecution's burden of proof. For example, the California Court of Appeals has reasoned it is "misleading to analogize a jury's task to solving a picture puzzle" and that such arguments "trivialize the deliberative process, essentially turning it into a game that encourages the juror to guess or jump to a conclusion." People v. Centeno, 60 Cal. 4th 659, 669-70, 338 P.3d 938, 180 Cal. Rptr. 3d 649 (2014); see also People v. Otero, 210 Cal. App. 4th 865, 148 Cal. Rptr. 3d 812 (2012); People v. Katzenberger, 178 Cal. App. 4th 1260, 1266-68, 101 Cal. Rptr. 3d 122 (2009).

Our Supreme Court in Lindsay held a puzzle argument improper. The prosecutor argued that the jury could be confident beyond a reasonable doubt that a jigsaw puzzle depicted Seattle even if 50 percent of the pieces were missing. Lindsay, 180 Wn.2d at 434. Our Supreme

Court concluded that “quantifying the standard of proof by means of this jigsaw puzzle analogy [was] improper.” Id. at 436; accord Johnson, 158 Wn. App. at 685 (puzzle analogy trivialized the burden of proof and the degree of certainty necessary for the jurors to convict).

A couple of cases from this Court *preceding Lindsay* concluded that some puzzle analogies by prosecutors were not improper because they did not explicitly quantify the standard of proof. State v. Fuller, 169 Wn. App. 797, 828, 282 P.3d 126 (2012); State v. Curtiss, 161 Wn. App. 673, 700, 250 P.3d 496 (2011). But as other courts have recognized, no explicit quantification is necessary for a puzzle analogy to be improper. Bradley, 917 F.3d at 507-08. Similarly, the Colorado Court of Appeals recognized that the display of a two-thirds completed puzzle of a space shuttle in an analogy about reasonable doubt “improperly quantified the burden of proof, even where the prosecutor did not undertake to quantify the number or percentage of missing pieces.” People v. Van Meter, 421 P.3d 1222, 1230 (Colo. App. 2018). This makes sense, because improper arguments can be conveyed even if not explicitly stated, such as by the use of images. Glasmann, 175 Wn.2d at 708-10; see also Salas, 1 Wn. App. 2d at 945-46 (“PowerPoint slides should not be used to communicate to the jury a covert message that would be improper if spoken aloud.”).

The analogy of a puzzle with missing pieces is improper for

another reason. By analogizing missing pieces to evidence not supplied by the prosecution, it implies that a reasonable doubt may not arise from a lack of evidence. But the standard instruction on reasonable doubt—used in this case and mandated by our Supreme Court—states that a “reasonable doubt is one for which a reason exists and may arise from the evidence *or lack of evidence*.” CP 108; Bennett, 161 Wn.2d at 318 (emphasis added).

The prosecutor’s puzzle analogy was misleading and trivialized the prosecution’s burden. The Court should hold it was improper and that Mr. Levy-Aldrete’s objection should have been sustained.²⁰

iii. There is a substantial likelihood that the misconduct affected the jury’s verdict, requiring reversal.

If a defendant objects to misconduct but is improperly overruled, the question becomes whether there is a substantial likelihood that the misconduct affected the jury’s verdict. State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). The focus is on the impact of the misconduct and whether it affected the jury’s verdict, not on the sufficiency of the evidence. Id. at 376.

²⁰ Mr. Levy-Aldrete was not required to renew his objection when the prosecutor made the improper argument again during rebuttal. “If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial.” State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984) (overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).

There is a substantial likelihood that the improper argument affected the jury's verdict. The jurors likely misunderstood the burden of proof to be far less than what the constitution requires. Like when solving a jigsaw puzzle, they could have decided it was okay to guess or jump to conclusions without supporting evidence. Notwithstanding their instructions, the jurors may have thought that a lack of evidence is not a basis for a reasonable doubt.

This is especially likely because the court's overruling of the objection compounded the likelihood of prejudice, creating "an aura of legitimacy" to the improper argument. Allen, 182 Wn.2d at 378 (quoting State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)); see Gonzales, 111 Wn. App. at 283-84 (court's overruling of objection to misconduct compounded effect of improper argument by giving it credence). The jurors likely believed the prosecutor's false analogy that proof beyond a reasonable doubt in a criminal trial is akin to determining what image is depicted in an incomplete jigsaw puzzle (all while taking a leisurely ride on a state ferry).

Further, while the focus of the analysis is not on the evidence, the evidence supporting the prosecution's case was weak and flawed. The jury deliberated for a significant time, returning its verdict a week after closing arguments. The jury also did not convict Mr. Levy-Aldrete of first degree

(premeditated) murder, instead returning a verdict on second degree (felony) murder. This indicates that at least some jurors had serious doubts about the prosecution's primary theory.

Because the misconduct likely affected the jury's verdict, this Court should reverse.

c. Other prosecutorial misconduct, not objected to, deprived Mr. Levy-Aldrete of his right to a fair trial.

While this Court may reverse solely based on the improper puzzle argument by the prosecutor, other misconduct by the prosecutor, not objected to, deprived Mr. Levy-Aldrete of his right to a fair trial.

Prosecutorial appeals to the passions and prejudices of the jury are misconduct. State v. Belgarde, 110 Wn.2d 504, 506-08, 755 P.2d 174 (1988). A "prosecutor's duty is to ensure a verdict free of prejudice and based on reason." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). To ensure defendants receive a fair trial, prosecutors must "subdue courtroom zeal," not increase it. State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (internal quotation omitted). It is misconduct for a prosecutor to express personal opinions, make arguments outside the evidence, or tell the jury that its verdict should declare the truth. Lindsay, 180 Wn.2d at 437-38; State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984).

i. The prosecutor committed misconduct by expressing his personal opinion that the defense's theory of the case was ridiculous and by labeling Mr. Levy-Aldrete's other suspects defense the "boogeyman did it" defense.

It is misconduct for a prosecutor to express a personal opinion, including on the credibility of witnesses or the guilt of the defendant. Lindsay, 180 Wn.2d at 437. For example, in Lindsay, the prosecutor called the defense theory a "crock," asserted the defendant had lied, and opined that defendant's story was "ridiculous." Id. at 429, 433. All this was an impermissible expression of the prosecutor's personal opinion on the defendant's credibility and guilt. Id. at 438. The "crock" comment also improperly denigrated the defense. Id. at 433-34.

During closing argument, the prosecutor repeatedly argued that Mr. Levy-Aldrete's story was "ridiculous," that Mr. Levy-Aldrete lied, and characterized the defense as being "the boogeyman did it." For emphasis, the prosecutor displayed the following slide:

The Boogeyman Did It:
An Unreasonable, Improbable,
Ridiculous Story

Supp. CP __ (slide 7).

Consistent with this and other slides, the prosecutor argued or implied repeatedly that the defense theory was that a “boogeyman” murdered his mother. RP 2565, 2574-75, 2618-19; Supp. CP __ (slide 73) (“Mom killed by boogeyman the day they are closing”). He commented that Mr. Levy-Aldrete’s whole story was “ridiculous.” RP 2574. He commented three other times that the defense theory or story on particular points was “ridiculous.” RP 2588, 2591, 2662. He repeatedly spoke of Mr. Levy-Aldrete’s “lies” and displayed slides commenting that particular statements by Mr. Levy-Aldrete were lies. RP 2606-07, 2611; Supp. CP __ (slide 21) (“‘I heard her scream’ is a lie”); (slide 64) (“Lies about clothing”); (slide 67) (“No innocent reason to lie”); (slide 69) (“He’s Lying About Chasing the ‘Real’ Killer”); (slide 70) (“Lie regarding

chasing ‘real’ killer”).

The prosecutor improperly expressed a personal opinion about Mr. Levy-Aldrete’s guilt and credibility. He did this by calling Mr. Levy-Aldrete’s story and defense “ridiculous” and by asserting his statements were lies. Lindsay, 180 Wn.2d at 437-38. And similar to calling a defense a “crock,” the prosecutor impermissibly commented on Mr. Levy-Aldrete’s credibility and denigrated his other suspects defense by labeling it a “boogeyman” defense. See id. at 438.

ii. The prosecutor committed misconduct by making arguments outside the evidence.

It is misconduct for a prosecutor to argue facts not in evidence. Belgarde, 110 Wn.2d at 507-08. “[A] prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.” State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). For example, a prosecutor’s statements during closing that the defendant had threatened a person with a gun despite there being no such evidence required reversal. State v. Reeder, 46 Wn.2d 888, 892-94, 285 P.2d 884 (1955).

The prosecutor attempted to bolster its contention that no one had entered Mr. Levy-Aldrete’s apartment and murdered his mother by asserting that the apartment was in a very safe neighborhood, not a crime-

ridden area. “[U]nlike what [defense counsel] would suggest to you, this not a referendum on the homeless, nor is One St. Helens the nexus of crime in the city of Tacoma. It is still a very safe, gentrified community.” RP 2574. The statement was not in response to defense counsel. Defense counsel had not made her closing argument yet. The argument was outside the evidence. It was misconduct.

The prosecutor committed further misconduct by arguing not merely that Mr. Levy-Aldrete’s injuries were consistent with being self-inflicted, but that what had happened was similar to a trope used in television dramas:

If you’ve ever watched TV and one person kills another, that person needs to make it look like an act of self-defense and so they have to harm themselves, or five people; one’s involved in killing all the others, wants to make it look like an ambush where they survive and so they have to harm themselves to kind of deflect suspicion, and however it happens, the mechanism of injury is always the same. It’s “I’m going to shoot myself in the arm” or “I’m going to punch myself in the face.” It’s never a serious injury. The would-be culprit doesn’t shoot themselves in the chest. They harm themselves in some superficial way that they’ll survive. And that happened here.

RP 2578. This was all outside the evidence. And real life is not a television drama. This was misconduct.

The prosecutor also committed misconduct by creating a fictionalized narrative between Mr. Levy-Aldrete and his mother. The

evidence showed that Mr. Levy-Aldrete had enough money for the down payment on the home he was purchasing with his mother. RP 1960-61, 2030. Still, based on its unproved theory that Mr. Levy-Aldrete had “stolen” the money given to him by his mother for a down payment, the prosecutor invented a conversation between Mr. Levy-Aldrete and his mother: “He’s stolen \$10,000 from her that she did not allow him to do. How do you think that conversation went? It wasn’t pretty. It wasn’t just a, Well, that’s fine, son.” RP 2617. This argument was outside the evidence and the prosecutor’s fictionalized conversation about what Mr. Levy-Aldrete’s mother thought or said was misconduct. See Pierce, 169 Wn. App. at 554-55 (fabricated account of what defendant and victims thought or said was misconduct).

iii. The prosecutor committed misconduct by arguing the jury’s verdict should reflect or speak the truth.

Finally, the prosecutor improperly ended both his closing argument and rebuttal by telling the jury its verdict should “reflect” or “speak” the “truth.” RP 2618 (“through this evidence you know that he did it, and it is time that your verdict reflects that truth.”), 2693 (“the evidence before you tells you in no uncertain terms that the defendant murdered his mom, and the time has come for your verdict to speak that truth.”). This was misconduct. “The jury’s job is not to determine the truth of what

happened; a jury therefore does not ‘speak the truth or ‘declare the truth.’” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The “jury’s job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” Id. Thus, “[t]elling the jury that its job is to ‘speak the truth,’ or some variation thereof, misstates the burden of proof and is improper.” Lindsay, 180 Wn.2d at 437.

d. The cumulative effect of the misconduct requires reversal.

Except for the puzzle analogy, Mr. Levy-Aldrete did not object to the misconduct. Nevertheless, because the unobjected to misconduct was flagrant and ill-intentioned, this Court may properly analyze whether there is a substantial likelihood the misconduct affected the verdict. Belgarde, 110 Wn.2d at 507-08. Misconduct may cumulatively deprive a defendant of a fair trial if no instruction or series of instruction would have been sufficient to cure the resulting prejudice. Glasmann, 175 Wn.2d at 707.

Here, when viewed cumulatively, no set of instructions could have cured the resulting prejudice, particularly when viewed with the prejudice caused by the improper puzzle analogy. The puzzle analogy diminished the prosecutor’s burden and trivialized it. By calling Mr. Levy-Aldrete’s defense “ridiculous” and equating it with a “boogeyman” defense, the prosecutor improperly struck at the heart of Mr. Levy-Aldrete’s defense that another person was responsible for his mother’s murder. The

prejudice was compounded by arguments based on matters outside the evidence and through the prosecutor's improper demand that the jury speak the truth through its verdict. This Court should reverse. See Lindsay, 180 Wn.2d at 433 (reversal would be required even if more stringent standard for prejudice applied because no set of instructions would have cured prejudice).

3. Mr. Levy-Aldrete moved for a mistrial based on juror misconduct. Without conducting a hearing, the court denied the motion. This Court should remand for a hearing to determine whether in fact jurors engaged in misconduct requiring a new trial.

a. A juror's consideration of extrinsic evidence is misconduct entitling a defendant to a new trial. The appellate court should remand for a hearing when the trial court fails to recognize that alleged facts constitute juror misconduct.

Criminal defendants have a federal and state constitutional right to a fair and impartial trial by jury. U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 21-22. “[A jury’s] verdict must be based upon the evidence developed at the trial.” Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). This requirement “goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” Id. Further, due process “includes a jury that determines guilt on the basis of the judge’s instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision.”

State v. Winborne, 4 Wn. App. 2d 147, 161, 420 P.3d 707 (2018).

A jury's consideration of extrinsic evidence is misconduct and may warrant a new trial. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). "Extrinsic evidence" is "information that is outside all the evidence admitted at trial." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Extrinsic evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal. Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). When juries consider extrinsic evidence, defendants are deprived of many of their constitutional rights:

[W]hen a jury considers facts that have not been introduced in evidence, a defendant has effectively lost the rights of confrontation, cross-examination, and the assistance of counsel with regard to jury consideration of the extraneous evidence. In one sense the violation may be more serious than where these rights are denied at some other stage of the proceedings because the defendant may have no idea what new evidence has been considered. It is impossible to offer evidence to rebut it, to offer a curative instruction, to discuss its significance in argument to the jury, or to take other tactical steps that might ameliorate its impact.

Gibson v. Clanon, 633 F.2d 851, 854-55 (9th Cir. 1980).

Trial courts have authority to investigate allegations of juror misconduct, including when jurors allegedly consider extrinsic evidence. State v. Hawkins, 72 Wn.2d 565, 570-71, 434 P.2d 584 (1967). In fact, due process requires courts to investigate allegations of juror misconduct

by holding a hearing. Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”); Remmer v. United States, 347 U.S. 227, 230, 74 S. Ct. 450, 98 L. Ed. 654 (1954) (“due process requires the trial judge, if he or she becomes aware of a possible source of bias, to determine the circumstances, the impact thereof on the juror, and whether or not the accused suffers prejudice”). When the trial court hears a motion for a new trial and denies the motion based on a failure to recognize that the complained facts constitute juror misconduct, the appellate court should remand for a hearing. State v. Cummings, 31 Wn. App. 427, 429-32, 642 P.2d 415 (1982); see State v. Jackson, 75 Wn. App. 537, 544, 879 P.2d 307 (1994); Remmer, 347 U.S. at 230.

b. The court failed to recognize that Mr. Levy-Aldrete’s allegations that the juror considered unadmitted evidence constituted juror misconduct.

After the verdict, defense counsel spoke to some of the jurors.

12/7/18RP 9-10. Defense counsel learned that the jury had made conclusions not supported by the evidence. 12/7/18RP 9. For example, to explain away the lack of blood impact spatter on Mr. Levy-Aldrete’s clothing, the jury concluded he must have hid his clothes outside the

building and changed. To explain why Mr. Levy-Aldrete had not smelled like alcohol, the jury decided he must have showered to get rid of the odor. 12/7/18RP 9. The prosecution had never argued either theory, as neither was supported by evidence. 12/7/18RP 16.

Still, defense counsel did not move for a new trial. 12/7/18RP 22. Mr. Levy-Aldrete himself then addressed the court, exclaiming his innocence. 12/7/18RP 23. He told the court that defense counsel had told him the jury had rejected what he had told police about having difficulty calling 911 because his phone had a special button to call 911:

the final straw that finally convinced the last holdouts was that *apparently my phone does not require me to swipe it to call 911, that there is an emergency button or icon* that I've never known about or tried and that all you have to do is push that button.

12/7/18RP 29-30 (emphasis added). Mr. Levy-Aldrete further stated:

I don't understand how convicting me of this crime because I don't know that there's *an emergency button on my phone* and because good people don't want to believe that people walk through in unlocked doors and do this. *That's not evidence*. I am innocent. I have never feared any fact that could be found with good reason.

12/7/18RP 35 (emphases added).

Mr. Levy-Aldrete himself moved for a mistrial, arguing the jury had not followed their instructions. 12/7/18RP 37. One instruction told the

jury that “[t]he evidence is the testimony and the exhibits.” CP 106. There was no evidence that either Mr. Levy-Aldrete’s phone or his mother’s had emergency buttons, let alone that Mr. Levy-Aldrete knew that. Neither phone was admitted into evidence. Supp. CP ___ (exhibit list).

The court, while finding Mr. Levy-Aldrete’s motion irregular because it was not brought by counsel or with notice, addressed it. 12/7/18RP 41. The court denied the motion, reasoning that what Mr. Levy-Aldrete had told him did not establish a basis for a new trial:

I do not see the irregularities, the flaws, the failure of the jury to follow the Court’s instructions on the law as you are now perceiving it. *I see no basis to declare a mistrial at this point.* The trial is over, but I’m not going to order a new trial, which is what I hear you asking me, so your motion is denied.

12/7/18RP 41 (emphasis added).

The court erred in denying Mr. Levy-Aldrete’s motion without ordering a hearing. In Cummings, without conducting a hearing, the trial court ruled that allegations jurors had considered the defendant’s prior criminal record did not constitute juror misconduct even though the defendant’s criminal history had not been admitted into evidence. Cummings, 31 Wn. App. at 429-30. This Court held this was legal error because, if factually true, jurors had considered extrinsic evidence. Id. Because there was a question of fact about whether the juror misconduct

actually occurred, this Court remanded “for a hearing to determine whether in fact jurors engaged in misconduct requiring a new trial.” Id. at 432.

The same reasoning applies in this case. The court erred by failing to recognize that the evidence about Mr. Levy-Aldrete’s phone having an emergency button was extrinsic evidence, which the jury should not have considered under its instructions.

If true, Mr. Levy-Aldrete would be entitled to a new trial. “Where the question concerns consideration by the jury of matters not properly admitted into evidence, a new trial should be granted when there is reasonable ground to believe the defendant may have been prejudiced.” Id. at 430. The inquiry is objective and once juror misconduct is established, prejudice is presumed. State v. Boling, 131 Wn. App. 329, 332-33, 127 P.3d 740 (2006). Here, one or more jurors may have rejected Mr. Levy-Aldrete’s account about having problems calling 911 based on the extrinsic evidence. It may have eliminated a reasonable doubt where one had existed before.

c. The remedy is remand for a hearing to determine whether in fact jurors engaged in misconduct requiring a new trial.

The remedy is remand for a hearing to determine if the jurors considered extrinsic evidence. Cummings, 31 Wn. App. at 431-32. The

Court should accordingly remand for a hearing with instruction to grant Mr. Levy-Aldrete a new trial if the jurors in fact considered extrinsic that prejudiced him. Id.; Remmer, 347 U.S. at 430.

4. Remand is necessary to strike improperly imposed provisions in the judgment and sentence related to legal financial obligations.

a. Interest does not accrue on non-restitution legal financial obligations. The interest accrual provision in the judgment and sentence must be stricken.

Financial obligations excluding restitution do not accrue interest. RCW 3.50.100(4)(b); State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). The judgment and sentence incorrectly states that legal financial obligations shall accrue interest. CP 146. If this Court does not reverse, this Court should remand to strike the interest provision. See Ramirez, 191 Wn.2d at 749-50.

b. Mr. Levy-Aldrete is indigent. Remand is necessary to strike the requirement that he pay supervision fees.

The court found Mr. Levy-Aldrete indigent and waived imposition of all discretionary legal financial obligations. 12/7/18 RP 43; CP 144. Still, the court ordered him to pay supervision fees. CP 148. The relevant statute provides that this is discretionary: “Unless *waived* by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.” RCW 9.94A.703(2)(d) (emphasis added).

For this reason, supervision fees are discretionary and subject to an ability to pay inquiry. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). The court did not inquire into Mr. Levy-Aldrete's ability to pay supervision fees. Because Mr. Levy-Aldrete is indigent, this Court should remand to strike this condition. See Ramirez, 191 Wn.2d at 742-46.

F. CONCLUSION

Mr. Levy-Aldrete's jury trial rights were violated and prosecutorial misconduct deprived him of a fair trial. For either reason, this Court should reverse the conviction. Alternatively, the Court should remand for a hearing into the alleged juror misconduct and to grant Mr. Levy-Aldrete a new trial if the jury considered extrinsic evidence that was prejudicial.

Respectfully submitted this 25th day of October 2019.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project - #91052
Attorney for Appellant

Appendix

CHAPTER XV.

OF THE TRIAL OF CIVIL ACTIONS.

SECTION	SECTION
204. By the court, jury or referee.	223. Law to be decided by the court.
205. Continuance when to be allowed.	224. The jury to decide the facts.
206. Jury, how empaneled.	225. Court may order jury to view.
207. Challenge of jurors.	226. Admonition to jury on separation.
208. Peremptory challenge defined.	227. Of the withdrawal of a juror.
209. Challenges for cause.	228. Juror may be a witness.
210. Of general causes of challenge.	229. Of the retirements of jury to deliberate.
211. Particular causes of challenge; two kinds of.	230. Jury to be provided with food.
212. Implied bias defined.	231. What papers, etc., jury take with them.
213. Actual bias defined.	232. Jury may ask for further instruction after.
214. Exemption, no cause of challenge.	233. For what causes jury may be discharged.
215. Peremptory challenges, method.	234. If so discharged, case continued.
216. Challenges, how taken.	235. Adjournments from day to day and end of term, effect upon jury.
217. " may be excepted.	236. Full jury required to return verdict.
218. How tried.	237. Mode of taking verdict.
219. Challenges may be made orally.	238. Jury may be polled.
220. Oath of jurors.	239. Verdict, when complete and entry.
221. Order of proceeding in trial.	
222. Conclusions of law or fact may be submitted	

SEC. 204. An issue of law shall be tried by the court, unless referred as provided in this chapter. An issue of fact shall be tried by a jury, unless a jury trial be waived, or a reference be ordered, as provided in this chapter. The waiver of a jury, or agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records: *Provided*, That nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand made by the pleadings in the action.

SEC. 205. A motion to continue a trial on the ground of the absence of evidence, shall only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit the evidence which he expects to obtain; and if the adverse party admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

SEC. 206. When the action is called for trial, the clerk shall prepare separate ballots, containing the names of the jurors summoned, who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted, before the jury is complete, or if from any cause, a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders, citizens of the county or district, as many qualified persons as may be necessary to complete the jury. Whenever it shall be requisite for the sheriff to summon more than one person at a time from the bystanders or body of the district or county, the names of the talesmen shall be returned to the clerk, who shall thereupon write the names upon separate ballots and deposit the same in the trial jury box, and draw such ballots separately therefrom, as in the case of the regular panel. The jury shall consist of twelve persons, unless the parties con-

sent to a less number. The parties may consent to any number not less than three, and such consent shall be entered by the clerk on the minutes of the trial.

SEC. 207. Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges.

SEC. 208. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

SEC. 209. A challenge for cause is an objection to a juror, and may be either:

1. General; that the juror is disqualified from serving in any action; or
2. Particular; that he is disqualified from serving in the action on trial.

SEC. 210. General causes of challenge are:

1. A conviction for a felony.
2. A want of any of the qualifications prescribed by law for a juror.
3. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror.

SEC. 211. Particular causes of challenge are of two kinds:

1. For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
2. For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

SEC. 212. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

1. Consanguinity or affinity within the fourth degree to either party.
2. Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages, of the adverse party, or being surety or bail in the action called for trial, or otherwise, for the adverse party.
3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the territory against either party, upon substantially the same facts or transaction.

4. Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

SEC. 213. A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section two hundred and eleven. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the

challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

SEC. 214. An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

SEC. 215. The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to-wit:

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation, shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn, shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only.

SEC. 216. The challenges of either party shall be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. For general disqualification.
2. For implied bias.
3. For actual bias.
4. Peremptory.

SEC. 217. The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue and determine the law and the facts.

SEC. 218. Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded: but if determined or found otherwise, it shall be disallowed.

SEC. 219. The challenge, the exception and the denial may be made orally. The judge of the court shall note the same upon his minutes, and the substance of the testimony on either side.

SEC. 220. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them, will well, and truly try the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial.

SEC. 221. When the jury has been sworn, the trial shall proceed in the following order:

1. The plaintiff must briefly state the cause of action and the evidence by which he expects to sustain it. The defendant may in like manner state the defense and the evidence he expects to offer in support thereof, but nothing in the nature of comments or argument shall be allowed in opening the case. It shall be optional with the defendant whether he

states his case before or after the close of the plaintiff's testimony.

2. The plaintiff or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence.

3. The parties will then be confined to rebutting evidence, unless the court for good reasons, in furtherance of justice, permits them to offer evidence in their original case.

4. When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; or either party may request instructions to the jury on points of law, and if the court refuse to give the same, the party requesting may except. Either party shall also be entitled to require of the judge that all interlocutory orders, instructions or rulings upon the evidence during the progress of the trial of a cause, shall be reduced to writing, together with any exceptions that may be made thereto, and the same shall be made a part of the record of the case, and any refusal on the part of the judge trying the cause or making the order to comply with all or any of the provisions of this section shall be regarded error, and entitle the party whose request shall have been refused to a reversal of the judgment on a writ of error: *Provided, always,* That the instruction or ruling so requested is pertinent and consistent with the law and evidence of the case, and that such refusal has worked an injury to the party requesting the same.

5. After the conclusion of the evidence and the filing of request for charge in writing or instructions, the plaintiff or party having the burden of proof may, by himself or one counsel, address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel of the party first addressing the court. No more than two speeches on behalf of plaintiff or defendant shall be allowed.

6. The court shall then charge the jury upon the law in the case. If no request has been made for said charge to be in writing, or if no instructions have been requested, said charge may be oral; but either party at any time before the jury return their verdict, may except to the same or any part thereof; but no exception shall be regarded by the supreme court, unless the same shall embody the specific parts of said charge to which exception is taken. In charging the jury, the court shall state to them all matters of law necessary for the information of the jury in finding a verdict; and if it become necessary to allude to the evidence, it shall also inform the jury that they are the exclusive judges of all questions of fact.

SEC. 222. Any party may, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written and handed to the court, or at the option of the court, oral, and entered in the judge's minutes.

SEC. 223. All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes

and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.

SEC. 224. All questions of fact other than those mentioned in the section preceding, shall be decided by the jury, and all evidence thereon addressed to them.

SEC. 225. Whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place which shall be shown to them by the judge or by a person appointed by the court for that purpose. While the jury are thus absent no person other than the judge, or person so appointed, shall speak to them on any subject connected with the trial.

SEC. 226. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

SEC. 227. If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards formed.

SEC. 228. A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy, to his fellow jurors, nor be governed by the same in giving his verdict.

SEC. 229. After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

SEC. 230. If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

SEC. 231. Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers which have been received as evidence on the trial, (except depositions,) or copies of such parts of public records or private documents given in evidence, as ought not,

in the opinion of the court, to be taken from the person having them in possession.

SEC. 232. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court the information required shall be given in the presence of or after notice to the parties, or their attorneys.

SEC. 233. The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

SEC. 234. In all cases where a jury are discharged or prevented from giving a verdict by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action shall be continued to the next term, unless both parties demand an immediate trial, in which case it shall go to the foot of the trial list.

SEC. 235. While the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury.

SEC. 236. When the jury have agreed upon their verdict they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict.

SEC. 237. If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the foreman answer in the affirmative, he shall on being required declare the same.

SEC. 238. When a verdict is given and before it is filed, the jury may be polled at the request of either party, for which purpose each shall be asked whether it is his verdict; if any juror answer in the negative the jury shall be sent out for further deliberation. If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may again be sent out.

SEC. 239. When the verdict is given and is such as the court may receive, and if no juror disagree or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given.

CHAPTER XVI.

THE VERDICT.

SECTION	SECTION
240. General and special verdicts defined.	243. Special shall control general verdict; when.
241. When and how jury may assess value of property, and damages.	244. When jury may assess amount of verdict.
242. When verdict general or special at discre-	

SEC. 240. The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or

defendant, the court may, in its discretion, grant a change of venue to the most convenient county or district. The clerk must thereupon make a transcript of the proceedings and order of court, and having sealed up the same with the original papers, deliver them to the sheriff, who must without delay deposit them in the clerk's office of the proper county, and make his return accordingly.

SEC. 1074. No change of venue from the district shall be allowed on account of the prejudice of the inhabitants of any particular county, but where a party or his attorney shall make his affidavit, and prove to the satisfaction of the court, or judge, that the inhabitants of any particular county are so prejudiced or excited, or so particularly interested in the cause or question, that he believes the party cannot have justice done by a jury of that county, then no juror for that particular case shall be taken from that county, unless by consent of the party making the objection, but the case shall be tried by the jurors from the other counties who may be in attendance as grand and petit jurors, and if, from challenges or any other cause, there shall not remain twelve competent jurors, then the case may be tried by a number less than twelve: *Provided*, That the defendant and prosecuting attorney consent to so try the case.

SEC. 1075. The court may at its discretion at any time order a change of venue or place of trial to any county or district in the territory, upon the written consent or agreement of the prosecuting attorney and the defendant.

SEC. 1076. When a change of venue is ordered, if the offense be bailable, the court shall recognize the defendant, and, in all cases, the witnesses to appear at the term of the court to which the change of venue was granted.

CHAPTER LXXXVII.

OF TRIALS.

SECTION	SECTION
1077. Continuance; grounds for.	1093. When improper offense charged, defendant shall answer offense shown.
1078. Issues of fact tried by jury.	1094. In prosecution in improper county, court may change venue.
1079. Challenging by defendant.	1095. Juries in cases in two preceding sections discharged without prejudice.
1080. Challenges by prosecution.	1096. Conviction or acquittal of an offense embracing several degrees, shall be a bar to prosecution for an offense included in the former.
1081. Challenges to panel allowed, when.	1097-8. When an indictment consists of several degrees, jury may convict of a lesser one.
1082. Challenges for cause.	1099. When jury disagree on a joint indictment, they may find as to those regarding whom they can agree.
1083. Person opposed to death penalty shall not serve in capital cases.	1100. If jury mistake the law, the court may direct them to reconsider.
1084. Jury; how sworn.	1101. When defendant is acquitted on grounds of insanity.
1085. May be submitted to court, except in capital cases.	1102. Return of verdict; proceeding.
1086. No person shall be prosecuted for felony unless personally present.	1103. Court to affix penalty.
1087. Misdemeanor may be tried in absence of defendant.	1103. Form of verdict.
1088. Court decides all questions of law.	1104. Court must render judgment.
1089. Juries not allowed to separate except by consent.	
1090. The court may order a view.	
1091. Defendants indicted jointly may be tried separately.	
1092. Any one of joint defendants may be discharged when.	

SEC. 1077. A continuance may be granted in any case on the ground of the absence of evidence on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney ad-

mit that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper the continuance shall not be granted.

SEC. 1078. Issues of fact joined upon an indictment shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases.

SEC. 1079. In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges.

SEC. 1080. The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors.

SEC. 1081. Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law, for the drawing and return of the jury, and shall be in writing, sworn to and proved to the satisfaction of the court.

SEC. 1082. Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant.

SEC. 1083. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.

SEC. 1084. The jury shall be sworn or affirmed to well and truly try the issue between the territory and the defendant, according to the evidence; and, in capital cases, to well and truly try, and true deliverance make between the territory and the prisoner at the bar, whom they shall have in charge, according to the evidence.

SEC. 1085. The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases.

SEC. 1086. No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial.

SEC. 1087. No person prosecuted for an offense punishable by a fine only, shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution and payment of the fine and costs that may be assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered into after judgment.

SEC. 1088. The court shall decide all questions of law which shall arise in the course of the trial. The same laws in relation to giving instructions to the jury by the court, and the argument of counsel and taking exceptions, as is now provided in the civil practice act, shall also govern in criminal cases, except as herein specially provided.

SEC. 1089. Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county.

SEC. 1090. The court may order a view by any jury impaneled to try a criminal case.

SEC. 1091. When two or more defendants are indicted jointly, any defendant requiring it shall be tried separately.

SEC. 1092. When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the territory. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court, for the purpose of giving evidence for a co-defendant. The order of discharge is a bar to another prosecution for the same offense.

SEC. 1093. When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged if there appear to be good cause to detain him in custody; but the court must recognize him to answer the offense shown, and if necessary, recognize the witnesses to appear and testify.

SEC. 1094. When it appears at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment to be corrected, and direct that all the papers and proceedings be certified to the proper court of the [proper] county, and recognize the defendant and witnesses to appear at such court on the first day of the next term thereof, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced.

SEC. 1095. When a jury has been empaneled in either case contemplated in the two last preceding sections, such jury may be discharged without prejudice to the prosecution.

SEC. 1096. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

SEC. 1097. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

SEC. 1098. In all other cases, the defendant may be found guilty of an offense, the commission of which is necessarily included within that with which he is charged in the indictment.

SEC. 1099. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly.

SEC. 1100. When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to re-consider the verdict; and if after such re-consideration they return the same verdict, it must be entered, but it shall be good cause for new trial; but where there is a verdict of acquittal, the court cannot require the jury to re-consider it.

SEC. 1101. When any person indicted for an offense shall, on trial, be

acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge, or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged.

SEC. 1102. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court; and if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term.

SEC. 1103. When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted. The verdict of the jury may be substantially in the following form:

"We, the jury, in the case of the territory of Washington, plaintiff, against —, defendant, find the defendant (guilty or not guilty, as the case may be.) (Signed,) A B, foreman."

SEC. 1104. When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise.

CHAPTER LXXXVIII.

OF NEW TRIALS AND ARREST OF JUDGMENT.

SECTION
1103. Application must be made before judgment.
1105. Causes for which may be granted.
1106. In certain cases affidavit required.
1107. Arrest of judgment; ground for motion.

SECTION
1108. Court may arrest judgment without motion.
1109. Defendant may be recommitted or admitted to bail.
1110. Exceptions may be taken as in civil cases.

SEC. 1105. An application for a new trial must be made before judgment, and may be granted for the following causes:

1. When the jury has received any evidence, paper, document or book not allowed by the court, to the prejudice of the substantial rights of the defendant.

2. Misconduct of the jury.

3. For newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at the trial.

4. Accident or surprise.

5. Admission of illegal testimony and misdirection of the jury by the court, in a material matter of law, excepted to at the time.

6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone.

SEC. 1106. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit.

SEC. 1107. Judgment may be arrested on the motion of the defendant for the following causes:

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52733-2-II
v.)	
)	
SEBASTIAN LEVY-ALDRETE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF OCTOBER, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> SEBASTIAN LEVY-ALDRETE 412774 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY ABERDEEN, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF OCTOBER, 2019.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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