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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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Sebastian Levy-Aldrete was wrongfully convicted of killing his mother. He is innocent. While this Court does not sit as a second jury and is not in a position to adjudicate a new verdict, this Court is in a position to declare that Mr. Levy-Aldrete did not receive a fair trial. In violation of his right to a fair jury trial under the Washington Constitution, Mr. Levy-Aldrete was forced to use one of his invaluable peremptories to remove a manifestly biased juror who should have been stricken for cause and expended the rest of his peremptories in an effort to obtain a fair jury. Not content to rely on the evidence and seeking to diminish its burden to prove guilt beyond a reasonable doubt, the Pierce County deputy prosecutor resorted to misconduct to persuade the jury to convict Mr. Levy-Aldrete. And rather than consider only the admitted evidence, the jury may have considered extrinsic evidence. This Court should reverse and remand for a new trial where the jury can render the proper verdict—not guilty.

In response to Mr. Levy-Aldrete's arguments, the prosecution misrepresents the record and the precedents. For example, notwithstanding the uncontroverted evidence that Mr. Levy-Aldrete had enough funds to complete the home purchase, the prosecution asserts otherwise. And the prosecution misstates much of precedent. Thus, the prosecution's arguments in support of affirmance should be rejected.

B. ARGUMENT IN REPLY

1. **The denial of Mr. Levy-Aldrete’s request to strike a biased juror for cause requires reversal because this necessitated use of one of his invaluable peremptories to remove the juror and he used all of his peremptories.**

a. Under the right to a jury trial under the Washington Constitution, the wrongful denial of a request to strike a juror for cause is prejudicial when the party uses all of their peremptory challenges, including one to strike the juror who should have been removed for cause.

The Washington Constitution, enacted in 1889, guarantees the right to a jury trial. Const. art. I, §§ 21, 22. This right is “inviolable.” Const. art. I, § 21. The purpose of this provision was “more than the preservation of the mere form of trial by jury.” State v. Strasburg, 60 Wash. 106, 116, 110 P. 1020 (1910). Rather, the “purpose of article I, section 21 was to preserve inviolate the right to a trial by jury as it existed at the time of the adoption of the constitution.” State v. Smith, 150 Wn.2d 135, 150-51, 75 P.3d 934 (2003) (citing Brandon v. Webb, 23 Wn.2d 155, 159, 160 P.2d 529 (1945)); Strasburg, 60 Wash. at 115. Thus, the meaning and scope of this state constitutional right is “determined from the law and practice that existed in Washington at the time of our constitution’s adoption in 1889.” Smith, 150 Wn.2d at 135 (citing City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)).

When the state constitution was adopted in 1889, the law and

practice provided for peremptory challenges. Br. of App. at 38-39. This was established since Washington was a territory. Br. of App. at 39. This history establishes that peremptory challenges are part and parcel of the “inviolable” jury trial right. See Strasburg, 60 Wash. at 121-24 (legislature could not abolish the insanity doctrine because doctrine existed at time of adoption of the constitution and was thus enshrined in jury trial right).

As early Washington cases establish, peremptory challenges were an integral part of how jurors were selected and were linked to the express right in criminal cases to an impartial jury under article I, section 22, along with the corollary implicit right in civil jury cases. E.g., State v. Rutten, 13 Wash. 203, 208, 43 P. 30 (1895) (criminal); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 28-31, 236 P. 797 (1925) (civil). As explained by the Supreme Court, “the right to peremptory challenges” are an essential means to ensure “fair jurors” are selected “even though nothing is disclosed on the voir dire” to establish bias. McMahon, 135 Wash. at 30. In other words, peremptory challenges are part of the constitutionally prescribed method of securing a fair jury trial. Cf. Crawford v. Washington, 541 U.S. 36, 61-62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (confrontation clause’s “ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee” and requires “not that evidence be reliable, but that reliability be assessed in a

particular manner”). Therefore, when the trial court errs in denying a party’s request to strike a juror for cause, necessitating a peremptory challenge to remove the juror, and that party exhausts all their peremptory challenges, this party has not received a fair jury trial within the meaning of the Washington Constitution. State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969); State v. Patterson, 183 Wash. 239, 244, 48 P.2d 193 (1935); State v. Stentz, 30 Wash. 134, 147, 70 P. 241 (1902); McMahon, 135 Wash. at 30; Rutten, 13 Wash. at 204.

In opposing this argument, the prosecution relies on our Supreme Court’s fractured decision in State v. Fire, 145 Wn.2d 152, 168, 34 P.3d 1218 (2001). Br. of Resp’t at 9-11. Over a vigorous dissent signed by four justices, five justices in two different opinions reached a result that is inconsistent with the constitutional rule advocated for by Mr. Levy-Aldrete. Fire, 145 Wn.2d at 153-65 (plurality); 145 Wn.2d at 165-68 (Alexander, J., concurring); 145 Wn.2d at 168-78 (Sanders, J., dissenting). As a fractured plurality decision lacking a single *ratio decidendi*, however, the precedential value of Fire is lacking. State v. Clark-El, 196 Wn. App. 614, 619, 384 P.3d 627 (2016) (“a plurality opinion ‘has limited precedential value and is not binding on the courts’”) (quoting In re Pers. Restraint of Isodore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)); see Ramos v. Louisiana, __ U.S. __, 140 S. Ct. 1390, 1402-04, __ L. Ed. 2d

___ (2020) (Gorsuch, J., plurality) (reasoning that a previous decision was not precedent because no single rationale in earlier decision spoke for a five-justice majority).¹

The prosecution highlights dicta from the four-member plurality decision in Fire that states “Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United States Constitution.” Fire, 145 Wn.2d at 163 (plurality). Subsequent caselaw shows this is patently false. State v. Martin, 171 Wn.2d 521, 526-33, 252 P.3d 872 (2011) (holding that bundle of rights in article I, section 22 should be interpreted independently from the analogous Sixth Amendment rights); State v. Williams-Walker, 167 Wn.2d 889, 900-01, 225 P.3d 913 (2010) (unlike under federal constitution, sentencing defendant based on a sentencing enhancement not found by jury can never be harmless under state constitutional right to a jury trial). And in any event, it is undisputed that article I, section 21 provides greater jury trial rights. Br. of App. at 37.

Setting all this aside, Fire is not controlling because it did not address Mr. Levy-Aldrete’s state constitutional argument. Br. of App. at

¹ In Ramos, the United States Supreme Court held that the Sixth Amendment right to a jury trial, incorporated against the states under the Fourteenth Amendment, guarantees unanimous jury verdicts in state criminal proceedings. 140 S. Ct. at 1397. This has always been the rule in Washington. State v. Lamar, 180 Wn.2d 576, 583 & 584 n.3, 327 P.3d 46 (2014).

32-33; In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014); State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405 (2017), affirmed, 190 Wn.2d 548, 415 P.3d 1179 (2018). Thus, Fire does not resolve Mr. Aldrete-Levy's claim.

On the merits, the prosecution contends that the meaning of Washington's constitutional guarantee of trial by jury is to be interpreted based on how the United States Supreme Court has interpreted the analogous jury trial right in the Sixth Amendment. Br. of Resp't at 10-11. This is not the proper analysis. The analysis turns on an historical examination of the jury trial right when our state constitution was adopted in 1889. Smith, 150 Wn.2d at 150-51; Clark-El, 196 Wn. App. at 621. Under this analysis, Washington decisions have reached different results than the United States Supreme Court in its interpretation of analogous federal constitutional provisions. Compare City of Pasco v. Mace, 98 Wn.2d 87, 98-101, 653 P.2d 618 (1982) (right under state constitution to jury trial in all criminal cases, including misdemeanors) with D.C. v. Clawans, 300 U.S. 617, 624, 57 S. Ct. 660, 81 L. Ed. 843 (1937) (no categorical right under federal constitution to a jury trial in all criminal cases); see Br. of App. at 38-40.

In characterizing the cases relied upon by Mr. Levy-Aldrete as "inapposite," the prosecution incorrectly states that all the cases address

whether the state constitutional jury trial right “requires certain factual findings to be made by the jury.” Br. of Resp’t at 11. The prosecution ignores Strasburg, which held that abolishing the insanity defense violated the inviolate jury trial right under our state constitution because the insanity doctrine “was in full force” when our Constitution was adopted. 60 Wash. 123-25. And in any event, the prosecution does not explain why its purported distinction is material. Unsurprisingly, most of the cases concern whether “certain factual findings” must be made by a jury. This is because it is *the function of the jury* to determine whether all the elements of a criminal offense are proved beyond a reasonable doubt. That the current issue concerns jury selection does not mean article I, sections 21 and 22 have nothing to say. See State v. Milroy, 71 Wash. 592, 596, 129 P. 384 (1913) (absent express legislative sanction, defendant’s state constitutional right to “impartial jury of the county in which the offense is alleged to have been committed” was violated in restricting jury pool to portion of county rather than whole county).

In further support of its contention that “binding precedent” precludes Mr. Levy-Aldrete’s state constitutional argument, the prosecution cites State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000). Br. of Resp’t at 12. Like Fire, Roberts did not consider Mr. Levy-Aldrete’s specific argument. Therefore, it is not controlling. Stockwell, 179 Wn.2d

at 600; Granath, 200 Wn. App. at 35. Further, Roberts is materially distinguishable because, as explained by the dissent in Fire, the defendant was “given extra peremptory challenges which he declined to exercise” and “he also never established the challenged jurors should have been removed for cause.” Fire, 145 Wn.2d at 175 (Sanders, J., dissenting).

The decisions in Fire and Roberts rest on United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). But that case did not dictate the result in Fire or Roberts because states remain free to decide whether reversal is warranted when a party is deprived of a peremptory challenge. Shane v. Com., 243 S.W.3d 336, 341 (Ky. 2007). As subsequently stated by the United States Supreme Court in the related context of where a peremptory challenge is improperly denied, states remain free to hold under state law that this “is reversible error *per se*” even if it is not error under the federal constitution.² Rivera v. Illinois, 556 U.S. 148, 162, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009). Thus, this Court should reject the prosecution’s argument.

Under the state constitutional right to a jury trial, when a party’s challenge for cause is erroneously denied, necessitating the use of a

² Prior to Rivera, our Supreme Court held that the denial of a peremptory challenge was necessarily prejudicial if that juror sat on the jury (even if the juror was not shown to be actually biased). State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). Whether that decision remains good law as a matter of state law remains undetermined.

party's peremptory challenge to remove the juror, and that party uses all of their peremptories, that party has been deprived of their right to a jury trial under the Washington Constitution. This Court should so hold.

b. The trial court erred by denying Mr. Levy-Aldrete's motion to strike juror 8, who candidly admitted that his background as a former Pierce County deputy prosecutor prevented him from trying the case impartially and without prejudice to Mr. Levy-Aldrete. This error requires reversal.

A court should grant a party's request to strike a potential juror for cause if it is shown that the juror has "actual bias." RCW 4.44.150, .170; CrR 6.4(c). "A juror demonstrates actual bias when she exhibits 'a state of mind . . . in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.'" State v. Guevara Diaz, 11 Wn. App. 2d 843, 855, 456 P.3d 869 (2020) (quoting RCW 4.44.170(2)). "If the court has only a statement of partiality without a subsequent assurance of impartiality, a court should *always* presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855 (internal quotation omitted) (emphasis added). If upon questioning, it is not shown that the juror can set aside their preconceived ideas and decide the case based on the evidence presented at trial and the law as provided by the court, the juror should must be stricken. Id. at 855-56. While appellate review is for

an abuse of discretion, the trial court's discretion "is nevertheless subject to essential demands of fairness." Id. at 856 (internal quotation omitted).

In this case, the trial court erred by denying Mr. Levy-Aldrete's request to strike juror 8 for cause because it was established that juror 8 was actually biased and juror 8 never stated that he could set aside these biases and follow the court's instructions. Juror 8 affirmatively stated in his juror questionnaire that his background as a former Pierce County deputy prosecutor would interfere with his ability to be fair and impartial if selected as a juror. CP 205. Based on his experience, juror 8 stated that he had a "prosecutorial mindset" and knew that for a prosecution to be brought to trial, "the evidence is strongly in favor of a guilty verdict" and that he did not know if he could put this out of his mind. RP 153-54. Upon questioning by the court on whether he could follow the court's instructions, including on the presumption of innocence and proof beyond a reasonable doubt, juror 8 stated "*I can't answer that,*" reiterating "that before you get to trial *there's pretty heavy evidence of guilt*" and that all he could say was that he would try to put this aside. RP 154 (emphasis added). On further questioning, juror 8 *never* said he could set aside his biases and follow the court's instructions. RP 154-58. Rather, juror 8 reiterated his biases upon questioning by defense counsel, stating it was likely Mr. Levy-Aldrete was guilty and that it was "an impossible question

to answer” whether he could put aside his belief that there must be “heavy evidence of guilt” against Mr. Levy-Aldrete. RP 157-58.

This record establishes actual bias by juror 8. And questioning of juror 8 by the court and the parties did not show rehabilitation. Juror 8 did not state that he could set aside his preconceptions and follow the court’s instructions. Under precedent, the trial court was obliged to grant Mr. Levy-Aldrete’s motion to strike juror 8 for cause. Br. of App. at 29-31; State v. Gonzales, 111 Wn. App. 276, 281-82, 45 P.3d 205 (2002); City of Cheney v. Grunewald, 55 Wn. App. 807, 811, 780 P.2d 1332 (1989).

The prosecution emphasizes the trial court was in the best position to observe juror 8’s verbal and non-verbal communication. Br. of Resp’t at 18-19. But juror 8’s credibility was not in dispute. And juror 8 *never* said he could abide by the court’s instructions. Any advantage by the trial court in observing juror’s 8 demeanor is simply not relevant in these circumstances. See State v. Irby, 187 Wn. App. 183, 197, 347 P.3d 1103 (2015) (rejecting State’s argument that something about juror’s demeanor permitted the trial court to overlook the plain meaning of the juror’s words, which showed actual bias).

Misrepresenting the record, the prosecution asserts that juror 8 “reiterated that the defendant has a presumption of innocence and that there was a difference between probable cause and beyond a reasonable

doubt.” Br. of Resp’t at 19 (citing RP 157-58). This is fiction. While juror 8 acknowledged the presumption of innocence, he made no assertions about “probable cause,” let alone contrasted it with proof beyond a reasonable doubt. And given that probable cause is *a low standard*, it is unlikely that this is what juror 8 was referring to when spoke he spoke about his understanding that only cases with “heavy evidence” of guilt come for trial. State v. Cotton, 673 A.2d 1317, 1321 (Me. 1996) (“the quantum of proof necessary to establish probable cause is less than the level of fair preponderance of the evidence”) (quotation omitted).

More than “express[ing] sentiments that are common among jurors in criminal cases,” Br. of Resp’t at 20, juror 8 unequivocally expressed that his background as former prosecutor and his personal beliefs made him biased. He was unable to say whether he could abide by the court’s instructions. For these reasons, the trial court erred by denying Mr. Levy-Aldrete’s motion to strike juror 8 for cause.

Because Mr. Levy-Aldrete was improperly forced to use one of his peremptory challenges to remove juror 8 and he used all his other peremptories, he was deprived of his state constitutional right to trial by jury under article I, sections 21 and 22. This Court should reverse.

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

a. The prosecutor’s analogy likening its burden to prove guilt beyond a reasonable doubt to being able to conclude what picture is depicted in an incomplete jigsaw puzzle was misconduct.

A prosecutor commits misconduct³ by misstating or trivializing its burden to prove guilt beyond a reasonable doubt. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). In this case, over Mr. Levy-Aldrete’s objection, the prosecutor analogized proof beyond a reasonable doubt to an incomplete jigsaw puzzle. RP 2572-74, 2689. The prosecutor argued that just as the jury could be confident about what image is depicted in a jigsaw puzzle with missing pieces, the jury could be confident of guilt beyond a reasonable doubt “even though pieces of evidence, like pieces of the puzzle, . . . were [absent and] never presented. RP 2572-74. The prosecutor contended “the question is what you have in front of you, is that enough to create the image,” and that an absent piece of evidence did not create a reasonable doubt. RP 2689.

³ The prosecution states the standard for prosecutorial misconduct requires a defendant to prove that the prosecutor’s action was in bad faith. Br. of Resp’t at 20. This is false. State v. Ish, 170 Wn.2d 189, 196 n.6, 241 P.3d 389 (2010) (plurality) (rejecting invitation to adopt term “prosecutorial error” rather than “prosecutorial misconduct” and refusing to distinguish between unintentional errors versus intentional violations). Were it otherwise, novice or incompetent prosecutors would have license to “accidentally” trample on a person’s constitutional right to a fair trial.

This was misconduct. The analogy misstated and trivialized the prosecution’s burden of proof. By contending that proof beyond a reasonable doubt is equivalent to being confident about what is depicted in an incomplete jigsaw puzzle—which could be true for a puzzle with only half of its pieces assembled—“jurors could understand the metaphor to describe a far less demanding standard of proof than true proof beyond a reasonable doubt.” United States v. Bradley, 917 F.3d 493, 507-08 (6th Cir. 2019). It also invited the jurors to presume guilt (rather than innocence) and to confirm this presumption of guilt by seeing if there was enough pieces of evidence to confirm guilt. See State v. Sherman, 305 Kan. 88, 115-16, 378 P.3d 1060 (2016). It further trivialized the jury’s serious task by turning it “into a game.” People v. Centeno, 60 Cal. 4th 659, 669-70, 338 P.3d 938, 180 Cal. Rptr. 3d 649 (2014).

In arguing otherwise, the prosecution inaccurately represents what our Supreme Court’s decision in State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) holds. Lindsay held a specific puzzle analogy, which explicitly quantified the burden of proof by stating the jury could be confident that a puzzle depicted Seattle even if half the pieces were missing, was misconduct. 180 Wn.2d at 434-36. Contrary to the prosecution’s contention, the Lindsay Court did *not* hold that prosecutors may properly use puzzle analogies so long as they do not explicitly

quantify the burden of proof. Id. Nor could the Court so hold because that fact-pattern was not before the Court, which would make any such language dicta. State v. Burch, 197 Wn. App. 382, 403, 389 P.3d 685 (2016) (“A statement is dicta when it is not necessary to the court’s decision in a case”). Moreover, there is no dicta in Lindsay approving of the decisions in State v. Fuller, 169 Wn. App. 797, 282 P.3d 126 (2012) and State v. Curtiss, 161 Wn. App. 673, 700, 250 P.3d 496 (2011).

Here, while the prosecutor did not explicitly place a percentage on how many puzzle pieces (evidence) was necessary for a juror to be confident about the picture (guilt beyond a reasonable doubt), the argument implied that as little as 50 percent of pieces could be enough. That the prosecutor stated it was “subjective” for each juror how many pieces were necessary only proves the point. Br. of Resp’t at 26. A juror could understand the analogy as meaning the beyond a reasonable doubt standard imposed a far lesser standard. Instead of a juror needing to reach “a subjective state of near certitude of the guilt,”⁴ the juror could mistakenly think a mere preponderance of the evidence was enough.

This Court is not obliged to follow either Curtiss or Fuller, and should not do so. In Pers. Restraint Pet. of Arnold, 190 Wn.2d 136, 154,

⁴ Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

410 P.3d 1133 (2018) (Court of Appeals is not bound to follow a previous decision by the Court of Appeals); Grisby v. Herzog, 190 Wn. App. 786, 811, 362 P.3d 763 (2015) (same).

Curtiss is materially distinguishable because while the prosecutor analogized a jigsaw puzzle to its burden of proof, it was cursory and not so flagrant and ill-intentioned that an objection would not have cured the misconduct. 161 Wn. App. at 700. Here, there was an objection.

In Fuller, the prosecution analogized its burden to being confident that a jigsaw puzzle depicted Tacoma. The prosecution displayed a series of slides adding pieces to a jigsaw puzzle depicting the Tacoma Dome. Fuller, 169 Wn. App. 797, 823-24 & n.9. Still, this Court concluded this did not improperly misstate or quantify the burden of proof. Id. at 827-28. While the prosecutor in Fuller did not state that one could be confident the puzzle depicted Tacoma with only 50 percent of the pieces, this unstated premise is obvious. Moreover, Fuller predates precedent explaining how improper arguments can be conveyed through images. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 708-10, 286 P.3d 673 (2012); State v. Salas, 1 Wn. App. 2d 931, 945-46, 408 P.3d 383 (2018). Because Fuller has been eclipsed by precedent and did not address the specific arguments made by Mr. Levy-Aldrete on why puzzle analogies are improper, this Court should not follow it. Based on more recent precedent, including

persuasive precedent from other jurisdictions, this Court should hold that the prosecutor's puzzle analogy was improper.

b. The prosecutor committed further misconduct by (1) expressing his personal opinion that it was "ridiculous" to believe a "boogeyman" committed the murder; (2) making arguments outside the evidence, including one about a fictionalized narrative between Mr. Levy-Aldrete and his mother; and (3) inviting the jury to return a verdict that reflected or spoke the "truth."

On top of the improper puzzle analogy, the prosecutor committed further misconduct during closing argument by making many other improper arguments. The prosecutor repeatedly expressed his personal opinion on guilt by arguing that the notion of a "boogeyman" entering Mr. Levy-Aldrete's home and killing Mr. Levy-Aldrete's mother was "ridiculous." The prosecutor made arguments outside the evidence by (1) creating a fictionalized narrative between Mr. Levy-Aldrete and his mother, (2) arguing that One St. Helens apartment was in a very safe neighborhood, and (3) asserting that infliction of injuries upon oneself is a common plot-point in television dramas when a character wants to fool others about being attacked. And the prosecutor twice invited the jury to render a verdict that reflected or spoke the "truth," rather than a verdict based on whether the prosecution had met its burden. Br. of App. at 55-61.

Starting with the prosecutor's improper expression of his personal opinion, the prosecutor argues it was appropriate to call Mr. Levy-

Aldrete's theory of the case "ridiculous" and the "boogeyman" defense, asserting "[t]his was an appropriate argument given the ludicrous nature of the defense theory." Br. of Resp't at 31-32. The prosecutor contends it is "ludicrous" (i.e., "ridiculous") that a deranged person could have gained entry to the apartment, killed Ms. Aldrete, and escaped.

Contrary to the prosecutor's one-sided view of the evidence, the evidence showed the apartment building had lax security and that people had gained unauthorized entry before. Br. of App. at 9. Sadly, that a deranged person may enter a person's home and kill an occupant is a reality and (as Pierce County prosecutors are well aware) has happened before. See, e.g., State v. Davis, 141 Wn.2d 798, 808-23, 10 P.3d 977 (2000) (describing murder of a 65-year-old woman perpetrated in Pierce County by a man who broke into her home for apparently no reason other than to kill a person). As for the boys who slept through the events in the nearby room, their computer was emitting white-noise and they did not wake even when the police arrived. RP 1512, 1544, 1128, 1534. And, contrary to what the prosecution implies, the surveillance footage from other buildings in the area was very limited. RP 1178-79, 1182, 1204-06. And even some of that limited video showed a few people out and about early in the morning, including one unidentified individual heading in the direction of One St. Helens' apartment at about 4:17 a.m. RP 1219.

This Court should hold that the prosecutor's expression of a personal opinion on guilt and denigration of Mr. Levy-Aldrete's defense was misconduct.

Next, the prosecution addresses strawman arguments of its own creation. Br. of Resp't at 33-35. These arguments are a distraction.

On Mr. Levy-Aldrete's actual arguments, the prosecution does *not* contend that the prosecutor's statements about the apartment being in a safe gentrified community was supported by the evidence. Br. of Resp't at 33-34. Neither does the prosecution contend that the television trope about characters injuring themselves was supported by the evidence. Br. of Resp't at 34-35. "By its failure to address [Mr. Levy-Aldrete's] contention[s] . . . the State apparently concedes the issue[s]." State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003).

As for the fictionalized narrative invented by the prosecutor during closing argument, the prosecution contends it is not misconduct to invent "hypothetical dialogue that can be rationally inferred from the evidence." Br. of Resp't at 35 (citing State v. McKenzie, 157 Wn.2d 44, 55, 134 P.3d 221 (2006)). McKenzie does not support the prosecution's contention. Unlike in this case, in McKenzie, the prosecutor *responded* to the defense's closing argument. 157 Wn.2d at 54-55. In response to defense counsel's argument that the defendant would not be satisfied with

the words “not guilty” rather than “innocent,” the prosecutor in McKenzie retorted that the victim would only be satisfied by an apology by the defendant and a confession of guilt. Id. This did not concern a fictional narrative between the victim and defendant that had occurred in the past. Id. Rather it was rhetoric that responded to the defendant’s closing argument. Id. Here, the prosecutor invented a fictionalized narrative between Mr. Levy-Aldrete and his mother prior to her death. This narrative was not in response to the defense’s closing argument. It was misconduct. State v. Pierce, 169 Wn. App. 533, 553-55, 280 P.3d 1158 (2012).

Finally, the prosecution agrees that “[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. Here, the prosecutor ended the first part of its closing argument by telling the jury “through this evidence you know that he did it, and it is time that your verdict *reflects that truth.*” RP 2618 (emphasis added). The prosecutor also ended its rebuttal by arguing “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.*” RP 2693 (emphasis added). Rather than concede this was misconduct, the prosecution incomprehensibly asserts these arguments “were appropriate” given “the incredulous nature of the

defense theory.” Br. of Resp’t at 38. The prosecution cites no authority in support of its purported exception. Its argument should be rejected.

c. The misconduct deprived Mr. Levy-Aldrete of his right to a fair trial, requiring reversal.

The prosecution argues this Court should excuse all of the foregoing misconduct because (except as to the puzzle analogy) Mr. Levy-Aldrete did not object. Br. of Resp’t at 38. While Mr. Levy-Aldrete did not object, this is immaterial because the prosecutor’s arguments were so “flagrant and ill-intentioned” that no set of instructions could have cured the resulting prejudice. Glasmann, 175 Wn.2d at 707. An argument is “flagrant and ill-intentioned” if “a Washington court previously recognized the same argument as improper in a published opinion.” State v. Jones, No. 36795-9-III, slip op. 2020 WL 2530261, at *9 (Wash. Ct. App. May 19, 2020).

A published case arising out of Pierce County recognizes it is improper to express a personal opinion on guilt by calling a defense “ridiculous” or a “crock.” Lindsay, 180 Wn.2d at 437-38. The same case, along with a previous case that also arose from Peirce County, makes plain that “speak the truth” arguments are improper. Id. at 437; State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). It is also well established that matters outside the evidence, such as fabricated accounts

or fictionalized narratives about what a decedent said, constitute misconduct. Pierce, 169 Wn. App. at 553-55. Thus, the Pierce County deputy prosecutor was on notice that his arguments were improper. Still, he engaged in misconduct. This Court should hold his improper arguments were “flagrant and ill-intentioned.” Jones, No. 36795-9-III, slip op. 2020 WL 2530261, at *9.

As for prejudice, the prosecution fails to view its misconduct in total and instead addresses each act of misconduct in isolation. Misconduct must be viewed together. Glasmann, 175 Wn.2d at 707. As explained, no set of curative instructions could have cured the resulting prejudice to Mr. Levy-Aldrete. Br. of App. at 61-62.

The prosecution (oddly) claims “[e]rrors that individually are not prejudicial can never add up to cumulative error that mandates reversal.” Br. of Resp’t at 39. This is incorrect. “Cumulative error may call for reversal, even if each error standing alone would be considered harmless.” State v. Thorgerson, 172 Wn.2d 438, 454, 258 P.3d 43 (2011). Further, review is not for sufficiency of the evidence and even where the prosecution has a strong case (unlike here), misconduct may warrant reversal. State v. Walker, 182 Wn.2d 463, 479, 341 P.3d 976 (2015).

As explained, the improper puzzle analogy alone requires reversal because it diminished the prosecution’s burden to prove guilt beyond a

reasonable doubt and there is a substantial likelihood this affected the jury's verdict, particularly given the prosecutor's emphasis on it and the prosecution's weak case. Br. of App. at 53-55.

Contrary the prosecution's contention of "overwhelming" evidence of guilt, the evidence in support of the prosecution was weak. See Br. of App. at 5-19. The prosecution failed to offer compelling evidence to support its unsubstantiated theory on why Mr. Levy-Aldrete would have killed his mother. This is likely why the prosecutor resorted to misconduct. On appeal, the prosecutor doubles down on assertions that are not supported by the evidence. For example, the prosecutor asserts that Mr. Levy-Aldrete "spent nearly all of the \$20,000 in the months leading up to October 17, 2017, leaving them unable to purchase the home." Br. of Resp' at 5 (citing RP 1969). This is patently false. Elizabeth Schiefer testified "there was just enough to cover the closing costs and then there would have been about \$2,000 left over." RP 1969. She confirmed there was "over \$10,000 in the savings account and the closing costs would have been about \$8,000, so, yes, there was enough" to close on the house. RP 2030. Mr. Levy-Aldrete had not blown the money. Rather, the money was spent on everyday living expenses, the largest expense being the children's schooling. RP 1962, 2025-26, 2040.

The effect of the prosecutor's misconduct was to (1) diminish its

burden of proof (through its puzzle analogy); (2) focus the jury on irrelevant and inflammatory matters outside the evidence (including through the prosecutor's personal opinions of guilt and invented narrative between Mr. Levy-Aldrete and his mother); and (3) distract the jury from its role of adjudicating whether the prosecution had met its burden to prove guilt beyond a reasonable doubt (through its invitation that the verdict "speak" or "reflect" the truth). There is a substantial probability that the misconduct affected the verdict. This Court should reverse and remand for a fair trial.

3. Evidence showed that the jurors may have engaged in misconduct by considering extrinsic evidence. Because this necessitated an investigation into the alleged misconduct, remand for an evidentiary hearing is requiring.

It is serious misconduct for a jury to consider extrinsic evidence. Gibson v. Clanon, 633 F.2d 851, 854-55 (9th Cir. 1980). When there is evidence that a jury has considered extrinsic evidence during its deliberations, due process requires the trial court to investigate the matter and hold a hearing. Remmer v. United States, 347 U.S. 227, 230, 74 S. Ct. 450, 98 L. Ed. 654 (1954); State v. Cummings, 31 Wn. App. 427, 429-32, 642 P.2d 415 (1982); see also State v. Berhe, 193 Wn.2d 647, 660-61, 444 P.3d 1172 (2019) (trial court must hold an evidentiary hearing when there are allegations of racial bias by a juror during deliberations).

In this case, Mr. Levy-Aldrete alleged that jurors committed misconduct by considering extrinsic evidence, including extrinsic evidence that the cell phones possessed by Mr. Levy-Aldrete and his mother had emergency buttons to call 911 without entering a passcode or swiping. 12/7/18RP 29-30, 35. Rather than order an investigation or hold a hearing on the issue, the trial court denied Mr. Levy-Aldrete's motion for a new trial. 12/7/18RP 41. This was constitutional error, requiring remand for a hearing to investigate the allegations of jury misconduct. Cummings, 31 Wn. App. at 432.

The prosecution agrees that a jury's consideration of extrinsic evidence is misconduct and that this may be grounds for a new trial. Br. of Resp't at 40. But rather than focus on Mr. Levy-Aldrete's argument, the prosecution provides boilerplate law to the court about how other actions by a jury "inhere in the verdict." Br. of Resp't at 40-41, 45-46.

Without acknowledging Remmer or Cummings, the prosecution cursorily asserts the information about the jury considering extrinsic evidence "does not amount to juror misconduct warranting a hearing." Br. of Resp't at 45. In support, the prosecution cites no authority. The prosecution merely asserts it is "a logical inference that a touch screen cell phone has an emergency swipe function." Br. of Resp't at 45. This is only a "logical inference" if one is aware of evidence that such phones

generally have an emergency button to dial 911. But such evidence is extrinsic evidence because no evidence was introduced at trial to show that phones generally have this feature. Neither was there evidence that the *actual cell phones* at issue had this feature. The jury's apparent determination that these phones did have this feature was based on extrinsic evidence. See Matter of Det. of T.C., 11 Wn. App. 2d 51, 58-59, 450 P.3d 1230 (2019) (judge in bench trial improperly relied on his own personal knowledge outside the evidence about the non-existence of a courthouse in order to find the respondent not credible).

The prosecution implies that because the information about the jury's consideration of extrinsic evidence was recounted by Mr. Levy-Aldrete himself rather than his attorney, it is not reliable. Br. of Resp't at 45. Mr. Levy-Aldrete's counsel did not contradict her client when Mr. Levy-Aldrete represented what his understanding was about what the jury considered. 12/7/18RP 29-30, 35. This indicates that it was truthful information. See RPC 3.3(a)(2) (attorney may not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by the client). Regardless, the prosecution did not object below, and the court ruled on the merits of Mr. Levy-Aldrete's motion.

Accordingly, this Court should reject the prosecution's arguments and remand for an evidentiary hearing to determine whether the jury

considered extrinsic, and if so, whether this misconduct warrants a new trial. Cummings, 31 Wn. App. at 431-32; see also Berhe, 193 Wn.2d at 669 (remanding for evidentiary hearing to determine racial bias was a factor that led to the verdict).

4. Both the interest accrual provision and the requirement that Mr. Levy-Aldrete pay the costs of supervision fees should be stricken.

The prosecution concedes that the provision imposing interest on non-restitution legal financial obligations should be reformed to state that interest does not accrue. Br. of Resp't at 47. This concession should be accepted. State v. Dillon, 12 Wn. App. 2d 133, 153, 456 P.3d 1199 (2020).

The prosecution, however, fails to concede that supervision fees should be stricken. Regardless of whether the trial court was or was not required to waive supervision fees, the record shows that the trial court intended only to impose mandatory fees or costs. 12/7/18 RP 43; CP 144. Given this record, remand to strike the requirement of supervision fees is appropriate because "it appears that the trial court intended to waive all discretionary [legal financial obligations], but inadvertently imposed supervision fees because of its location in the judgment and sentence." Dillon, 12 Wn. App. 2d at 152. Thus, the provision should be stricken. Id.

C. CONCLUSION

Mr. Levy-Aldrete did not receive the fair jury trial he was entitled

to under our state and federal constitutions. Remand for a new trial is required. Alternatively, remand is required for an evidentiary hearing to determine if the jury engaged in misconduct by considering extrinsic evidence, and if so, whether the misconduct warrants a new trial.

Respectfully submitted this 12th day of June 2019.

A handwritten signature in blue ink, appearing to read "Richard W. Lechich".

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

**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.)	

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