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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT J. HILL,

Appellant.

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BRIEF OF APPELLANT,  
ROBERT J. HILL

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
THE HONORABLE FRANK E. CUTHBERTSON, JUDGE

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## I. INTRODUCTION

In August 2019, Robert J. Hill was involved in an altercation with a security guard at a retail marijuana store. Mr. Hill was tackled, pinned to the ground, and choked. He screamed for help and shouted that he could not breathe. He finally bit his attacker in desperation and damaged some property in the store. A jury convicted Mr. Hill of second-degree malicious mischief, felony harassment, and first-degree burglary. The jury could not reach a decision on a charge of assault.

This Court must reverse because pervasive errors impacted every stage of this trial. During deliberations, one juror threatened another with physical harm because she disagreed about the merits of the case. The trial court denied Mr. Hill's motion for a mistrial and did not even interview the threatening juror. The state failed to present any evidence that Mr. Hill entered the store "unlawfully," an alternative means of committing burglary. During rebuttal closing arguments, the prosecutor argued facts not in evidence and attempted to shift the burden of production to Mr. Hill. Finally, at sentencing, the judge failed to even consider a mitigating circumstance repeatedly raised by Mr. Hill. Individually and cumulatively, these errors denied Mr. Hill a fair trial and require reversal.

## II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by refusing to declare a mistrial, or interview anyone besides the complaining juror, after one juror threatened another with physical harm based on the merits of the case.

Assignment of Error 2: The state failed to prove both alternative means of committing burglary because no evidence supported the allegation that Mr. Hill entered the store unlawfully.

Assignment of Error 3: The prosecutor committed misconduct by urging the jury to speculate about evidence outside the record and by arguing that Mr. Hill had the burden of disproving the state's evidence.

Assignment of Error 4: The trial court erred by failing to consider the mitigating circumstance raised by Mr. Hill.

Assignment of Error 5: Cumulative error denied Mr. Hill a fair trial.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did juror misconduct violate Mr. Hill's right to a fair and impartial jury when one juror threatened another, and the trial court failed to grant a mistrial or even question anyone besides the complaining juror?

Issue 2: Did the state prove that Mr. Hill "unlawfully entered" the store, an alternative means of committing burglary, when he walked through the front door of a business open to the general public?

Issue 3: Did the prosecuting attorney commit prejudicial misconduct by

relying on facts not in evidence and by arguing that Mr. Hill had the burden of disproving the state's evidence?

Issue 4: Did the trial court err by failing to even consider a mitigating circumstance raised by Mr. Hill?

Issue 5: Considering the errors above, did cumulative error deny Mr. Hill a fair trial?

#### **IV. STATEMENT OF THE CASE**

On August 31, 2019, Robert J. Hill visited Urban Bud, a marijuana retail store in Tacoma, WA. RP 410, 412. While at the store, an altercation occurred that resulted in Mr. Hill being tackled, pinned to the ground, and choked by a security guard. RP 416-17, 421. Mr. Hill also damaged property in the store. RP 422. The altercation was captured on the store's security cameras. RP 211-14; Ex. 31.

Before getting to Urban Bud, Mr. Hill stopped at a few bars and drank some alcoholic beverages. RP 411. He got to Urban Bud around 8PM and walked inside. *Id.* He saw a podium or table inside the front door with a clipboard on it. RP 413. Mr. Hill assumed that this was a sign-in sheet and started to write down his name. RP 413-14.

At this point, Mr. Hill was approached by Alvaro Salaverry, a security guard who worked at Urban Bud. RP 376, 414. Mr. Salaverry was a large and muscular man, trained in martial arts. RP 230, 242, 288, 317.

He fought in mixed martial arts (MMA) matches at a semi-professional level, starting about 20 years ago. *Id.* According to Mr. Salaverry, his job was to check IDs at the front door. RP 267. Both the managers and the other store employees considered him security. RP 202, 311, 376. He had no formal law enforcement or security training and he was not a licensed security guard. RP 312, 317-19.

Mr. Salaverry came up to Mr. Hill and asked him why he was writing on the clipboard. RP 268-69. He did not identify himself as security or as an employee of the store. RP 415. He and Mr. Hill got into an argument. RP 415-16. According to Mr. Hill, he asked to speak with a manager. RP 414. According to Mr. Salaverry, Mr. Hill was not coherent and appeared drunk. RP 272. Mr. Salaverry repeatedly asked Mr. Hill to leave the store. RP 272-73, 303, 415. Mr. Hill refused to leave and started walking further into the store to look for a manager. RP 415-16.

At this point, Mr. Salaverry tackled Mr. Hill and brought him to the ground. RP 273-74, 416. Mr. Salaverry dug his knee into Mr. Hill's shoulder. RP 247, 417. Mr. Hill called out for help repeatedly. RP 262, 357, 421. Eventually, Mr. Salaverry got up off of Mr. Hill and dropped Mr. Hill's belongings outside the store. RP 315. He stood between Mr. Hill and the front door. RP 419, 443. Fearing Mr. Salaverry, Mr. Hill went to the back of the store to look for a back exit. RP 419, 443-44. There were no

other exits to the store, and Mr. Hill instead opened the door to the employee breakroom. RP 322, 345, 449. The breakroom was not identified as employees only. *Id.*

In the breakroom doorway, Mr. Salaverry again tackled Mr. Hill. RP 274-76, 420. This time, Mr. Salaverry put Mr. Hill in a chokehold, applying pressure to his neck. RP 276, 421. Mr. Hill repeatedly said, “I can’t breathe,” but Mr. Salaverry continued to maintain pressure. RP 277, 421. Eventually, Mr. Hill was able to wriggle free enough to bite Mr. Salaverry on the arm. RP 278, 422. Mr. Salaverry released him. RP 422. Mr. Hill testified that he bit Mr. Salaverry because “he was hurting me, he was taking my breath away, and I was worried about being killed or at least being made unconscious.” RP 459.

During this altercation, Mr. Salaverry reported that Mr. Hill kicked him, grazing his nose but not otherwise harming him. RP 219, 278, 284. Mr. Salaverry also testified that Mr. Hill yelled at him and threatened to kill him. RP 283. He said that he took these statements seriously because Mr. Hill bit his arm. *Id.* Mr. Hill denied making these threatening statements. RP 451. The security footage did not contain audio and could not corroborate Mr. Salaverry’s claim. RP 319-20. No other witness testified that Mr. Hill made this threat. RP 241-42, 346, 357.

After escaping Mr. Salaverry, Mr. Hill was stuck. RP 443. He could not leave through the breakroom because the store had only one exit. RP 253, 345. He did not want to leave through the front because Mr. Salaverry was between him and the door. RP 443-44. He believed that Mr. Salaverry had a hammer or other weapon because Mr. Salaverry was holding an item in his hand. RP 217, 424. Cornered and scared, Mr. Hill started throwing nearby items, including a water cooler and its base. RP 422. He then started kicking display cases containing paraphernalia for sale. RP 422-24. Mr. Hill described this as an “emotional outburst.” RP 422.

Meanwhile, there were other individuals in the store during this altercation, including a manager, an employee, and customers. RP 202, 205, 345. The manager, Christian Muridan, tried to verbally intervene, but Mr. Hill did not hear him in the commotion. RP 203, 437-38. Mr. Muridan called 911. RP 202, 220. Mr. Muridan reported to police that Mr. Hill was “screaming ‘help’ as loud as he could.” RP 262. The store employee was Ashlyn Thomas. RP 344. She remembered Mr. Hill saying that someone was going to hurt him and calling out for someone to call the police. RP 346, 357. Ms. Thomas called 911. RP 387. After Mr. Hill got away from Mr. Salaverry, Mr. Hill also called 911. RP 387. Police officers arrived at the scene and arrested Mr. Hill. RP 341.

Mr. Hill was initially charged with assault in the second degree, malicious mischief in the first degree, felony harassment, and burglary in the second degree. CP 3-4. Those charges were amended just before trial. CP 39-41. The malicious mischief charge was reduced to second degree, and the burglary charge was changed to first degree. *Id.* Both the original and the amended information define burglary as when a person “enter[s] *or* remain[s] unlawfully” in a building. CP 4, 40 (emphasis added). The jury was instructed with this same “enters or remains unlawfully” language. CP 164.

This case proceeded to trial in November 2019. RP 22. Mr. Hill and Mr. Salaverry testified about their versions of events. RP 265, 409. The other employees present at the time, Mr. Muridan and Ms. Thomas, also testified; as did police officers; a 911 dispatcher; and Errol Franada, the general manager at Urban Bud. RP 200, 336, 343, 359, 383, 392.

Mr. Franada was not present at the store on August 31, 2019. RP 360. He testified that he was in charge of day-to-day operations at the store, and he hired Mr. Salaverry as security. RP 360, 376. Mr. Franada also testified about the monetary damage to merchandise in the store. 361-64, 371-73; Ex.s 40, 41. First, the glass display cases were damaged. RP 364. Mr. Franada testified that the cost to replace the lighting in the display cases was \$603.23 and the cost of the glass was \$740. RP 364; Ex. 40. Second,

the items for sale within the glass display cases were damaged. RP 371-73. These included paraphernalia used to consume marijuana. *Id.* Mr. Franada testified that the total wholesale value of these items (the cost to replace them) was \$460, and the retail value (the amount the store intended to price the items) was \$920. RP 371-73; Ex. 41. He did not have any original receipts for the property damage. RP 376.

During closing arguments, the parties disputed the value of the property damaged during this altercation. Mr. Hill's attorney pointed out that the list of damaged items provided by Mr. Franada was unclear. RP 512. The items were not brought in or matched to the list. *Id.* The state presented pictures of myriad broken items but did not present pictures of the broken lights in the display cases. RP 512-13. Mr. Hill's attorney argued that it was unclear from this evidence whether the damages exceeded \$750. RP 513.

In rebuttal closing argument, the prosecutor argued that it was Mr. Hill's responsibility to present evidence to refute the state's alleged damages. RP 515. The prosecutor stated, "I would submit to you there's no evidence, other evidence, as to the value of the property" other than the state's witness, Mr. Franada. *Id.* He argued that the lists from Mr. Franada "establish[] the loss and the amounts" and "there's no evidence to contradict

that except for defense saying you should not take him [Mr. Franada] as credible, and I submit that is not sufficient.” *Id.*

Mr. Hill also pointed out in closing that Urban Bud did not have audio recordings; it only had security footage without audio. RP 499, 503, 507, 511, 513. His attorney argued that the only evidence to support the felony harassment charge was Mr. Salaverry’s word. RP 513-14. In rebuttal closing, the prosecutor implied that the lack of audio was explained by “regulations”:

And I would submit to you that no audio in the video, there’s lots of explanations. I mean, nothing was brought out as testimony. Who knows what the regulations are.

RP 516. No witness testified about the regulations governing security footage in marijuana retail stores. Mr. Hill objected, but the court overruled his objection. RP 516-17.

After closings, the jury started deliberating. RP 525. During deliberations, things became heated. RP 534. Juror 2 reported to the court clerk that an unidentified juror (hereinafter “Juror X”) threatened her. *Id.* Juror 2 said that “she had a problem and she wanted to leave because she did not want to be talked to like that” and she “was getting threats.” *Id.* The jury also indicated that it was deadlocked. RP 533-34.

The trial court judge approached the situation in two steps. First, the judge polled the jury to verify that they were deadlocked on one count. RP 536. The jury confirmed that they were deadlocked. RP 537-39.

Second, the judge questioned Juror 2, separate from the rest of the jury. RP 536, 541. Juror 2 confirmed that she was threatened during deliberations by Juror X. RP 542. The trial court judge carefully avoided discussing the substance of deliberations and asked Juror 2 just about the nature of the threats. *Id.* According to Juror 2, Juror X threatened her with physical harm and wished someone would break into her house to hurt her:

That it – karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that that happens to if I don't agree with her.

RP 542. Despite these threats, Juror 2 felt that she could continue deliberating. RP 543. The trial court judge did not question any other jurors, including Juror X. RP 542-47.

Mr. Hill moved for a mistrial. RP 545. The prosecutor was initially inclined to agree, but he opposed the motion after consulting with his appellate unit. RP 546-47. The trial court judge did not believe that the threats “tainted the deliberations,” and stated, “I don't think that it is that unusual for deliberations to get heated and people to say untoward things.”

RP 546. The trial court denied the motion for a mistrial because Juror 2 “indicated she can continue” deliberating. RP 547.

The jury then announced its verdict. RP 548. The jury did not reach a verdict and was deadlocked on the assault charge. *Id.* The jury convicted Mr. Hill on the remaining charges of second-degree malicious mischief, felony harassment, and first-degree burglary. RP 548-49.

Before the sentencing hearing, Mr. Hill filed a request for an exception sentence below the standard range. CP 242. He argued pursuant to RCW 9.94A 535(1)(a) that the “evidence presented at trial shows that to a significant degree, Mr. Salaverry was a willing participant or aggressor.” *Id.* At the sentencing hearing, Mr. Hill renewed his request for an exceptional sentence, arguing that “the physical contact was initiated by Mr. Salaverry.” RP 561.

The court did not consider or acknowledge Mr. Hill’s request for an exceptional sentence. RP 564-68. The court entered a standard range sentence of a total of 87 months incarceration and 18 months community custody. RP 567-68. At a restitution hearing, the court ordered Mr. Hill to pay \$1,803.23. RP 578. The court calculated this amount based on: “\$500 for the glass for the display case; \$460 for the broken paraphernalia; \$603.23 for the lights and the display case; and \$240 for the doors that were destroyed.” *Id.* Mr. Hill appeals. CP 266.

## V. ARGUMENT

Numerous significant errors in this case deprived Mr. Hill of his constitutional right to a fair trial. A juror threatened and intimidated another juror, burdening Mr. Hill's right to an impartial jury. The state failed to present sufficient evidence to support an alternative means of committing burglary because there was no evidence that Mr. Hill entered the store unlawfully. The prosecutor committed misconduct by arguing facts not in evidence and by shifting the burden of production to Mr. Hill. The judge also abused his discretion by failing to even consider the mitigating circumstance raised by Mr. Hill. Any of these errors justify reversal, but their cumulative effect tainted this entire proceeding. This Court must reverse.

### A. **Juror Misconduct Deprived Mr. Hill of his Constitutional Right to Due Process.**

During deliberations, an unknown juror (Juror X) threatened Juror 2. Juror X wished her physical harm and told her that she hoped she was attacked in her home. RP 542. This Court must reverse, for three reasons. First, Juror X committed misconduct that burdened Mr. Hill's right to a fair trial by an impartial jury. Second, the trial court erred by failing to grant a mistrial, or at the very least question anyone besides Juror 2. Third, this error was structural, but even analyzed under the harmless error framework, it was not harmless.

**1. Juror X committed misconduct by threatening another juror during deliberations.**

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a fair trial by an impartial jury. “The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

Jury deliberations are generally secret, but they are not immune from review. *Matter of Lui*, 188 Wn.2d 525, 567-68, 397 P.3d 90 (2017). Juror misconduct can include, for example, considering extrinsic evidence, *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); failing to disclose pertinent information during voir dire, *State v. Johnson*, 137 Wn. App. 862, 868, 155 P.3d 183 (2007); falling asleep during trial, *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); and relying on racist stereotypes, *State v. Berhe*, 193 Wn.2d 647, 658-59, 444 P.3d 1172 (2019).

Here, during deliberations, Juror X threatened and wished harm on Juror 2. RP 542. Juror 2 characterized the threats as follows:

That it – karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that that happens to if I don’t agree with her.

*Id.* Juror 2 felt that she could continue deliberating but was concerned enough to report the comment to the court clerk. RP 534, 543. She said that she considered the comment a threat. *Id.*

Washington courts do not appear to have squarely addressed whether threatening a fellow juror constitutes misconduct. In *State v. Earl*, the Court of Appeals held that “[a] personal remark, even a derogatory one, between jurors during a deliberation break, is not juror misconduct if it does not involve the substance of the jury’s deliberations.” 142 Wn. App. 768, 775-76, 177 P.3d 132 (2008). However, *Earl* is distinguishable from this case for two reasons. First, the comment here was a threat, not a mere insult. *See State v. Kilburn*, 151 Wn.2d 36, 46, 48, 84 P.3d 1215 (2004) (threats can be made “directly or indirectly”). Second, the threat apparently occurred during deliberations, not during a break, and involved the substance of the jury’s deliberations: Mr. Hill’s alleged conduct. *See United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir.2004), *cert. denied*, 544 U.S. 990, 125 S.Ct. 1878, 161 L.Ed.2d 751 (2005) (juror discussions during a break that do not involve a review of the evidence or debate culpability of the defendant are not jury misconduct).

Courts in other jurisdictions have routinely held that threatening another juror amounts to misconduct. For example, in *Avila v. City of New York*, a juror reported that her fellow juror was “intimidating and

threatening” and had “physically threatened another juror.” 73 A.D.3d 444, 445, 901 N.Y.S.2d 23 (2010). Without investigating or interviewing any jurors, the trial court dismissed the complaining juror. *Id.* at 445-46. On appeal, the Court held that the trial court should have “conducted an inquiry” into the juror’s complaint before dismissing her. *Id.* at 446. The Court emphasized that the complaining juror “did not simply report a ‘spirited dispute’ or ‘belligerent conduct’ but instead alleged that one jury member had physically threatened another.” *Id.* (internal citations omitted).

The D.C. Court of Appeals addressed a similar issue in *Shotikare v. United States*, 779 A.2d 335 (D.C. Cir. 2001). In that case, a juror threatened her fellow jurors with physical harm. *Shotikare*, 779 A.2d at 340-41. The Court held that the juror’s “threat of physical violence and intimidation of her fellow jurors” constituted “extraordinary circumstances” and “just cause” to excuse her. *Id.* at 346 (internal quotations omitted). The Court noted that “the juror misconduct found in this case was not trivial”; it arguably amounted to “the criminal offense of threats to do bodily harm.” *Id.*; see also *United States v. Thomas*, 116 F.3d 606, 624 (2d Cir.1997) (“we do not suggest, much less hold, that a juror’s disruptive behavior—his reported ‘hollering,’ threatening to strike a fellow juror, or feigned vomiting—could not serve as grounds for dismissal”); *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir.1998) (just cause existed to excuse two

feuding, distraught jurors whose conflict was “a major distraction to the deliberations of the jury and seriously distracted their attention from consideration of the case before them”).

The Eleventh Circuit reached a similar conclusion in *Bostick v. State Farm Mut. Auto. Ins. Co.*, 774 Fed. Appx. 600 (11th Cir.2019). In that case, jurors reported that another juror “intimidated them,” “threaten[ed] to use physical violence against them,” “confront[ed] one juror,” and “belittled them using gender-specific and racial epithets.” *Bostick*, 774 Fed. Appx. at 604. Under these circumstances, the trial court properly dismissed the threatening juror for misconduct. *Id.* The Court held that a mistrial was not necessary because the threatening juror was removed. *Id.* at 605.

Here, like in *Avila*, *Shotikare*, and *Bostick*, Juror X committed misconduct by threatening and intimidating another juror. To a certain extent, disagreement is a normal part of jury deliberations. However, Juror X took things a step further by adding violence and intimidation. She made specific and violent threats, stating that someone should “come to [Juror 2’s] house” and harm her. RP 542. The fact that these threats are indirect is irrelevant—everyone knows what it means to say, “I hope someone comes to your house and does this to you.”

Juror X also used these threats to try to intimidate Juror 2 and get her to change her mind about the merits of the case. According to Juror 2,

Juror X stated that she “hopes that I am the next person that that happens to *if I don’t agree with her.*” RP 542 (emphasis added). The threats were not based on a personal disagreement or general antipathy—they were based on Juror 2’s opinions about the case itself.

Mr. Hill was entitled to a fair and impartial jury. An impartial jury is one 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.” *Oswald v. Bertrand*, 374 F.3d 475, 477 (7th Cir.2004). A jury cannot be impartial if one juror threatens another to get them to change their minds. Juror X committed misconduct, burdening Mr. Hill’s right to an impartial jury. *See Avila*, 73 A.D.3d at 446; *Shotikare*, 779 A.2d at 346; *Bostick*, 774 Fed. Appx. at 604-05.

**2. The trial court’s response to the juror misconduct amounted to abuse of discretion.**

After this misconduct came to light, the trial court erred by denying Mr. Hill’s motion for a mistrial. At the very least, the court was obligated to investigate further by interviewing the jurors, particularly Juror X. Without further investigation, we cannot know whether other jurors felt intimidated or unsafe during deliberations. We also have no assurances that Juror X refrained from continuing to threaten and intimidate her fellow

jurors. This Court must reverse because the trial court abused its discretion in this case.

Trial court judges have an affirmative duty to remove unfit or biased jurors:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of ***conduct or practices incompatible with proper and efficient jury service.***

RCW 2.36.110 (emphasis added). The court rules set out a similar obligation:

If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

CrR 6.4(c)(1). Together, RCW 2.36.110 and CrR 6.4 “place a ‘continuous obligation’ on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating.” *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (quoting *State v. Jordan*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)). Trial courts must excuse a juror for cause, even if neither party challenges that juror. *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016).

Trial courts generally have discretion to investigate potential juror misconduct in the manner most appropriate for a particular case. *Elmore*,

155 Wn.2d at 773-75. Appellate courts review both a trial court's investigation of juror misconduct, *Earl*, 142 Wn. App. at 774, and a trial court's decision to deny a motion for a mistrial based on juror misconduct, *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994), for an abuse of discretion. A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable. *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669 (1997).

The trial court abused its discretion in this case. The court properly questioned Juror 2 and ascertained that she could continue deliberating. *See State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290 (2014) (courts should not dismiss jurors based on the "emotional stress" of deliberations when that stress could arise from a disagreement on the merits). However, Juror 2 was not the issue. *Juror X* was unfit because she committed "conduct or practices incompatible with proper and efficient jury service"—threatening and intimidating another juror. RCW 2.36.110. As defense counsel noted, "we can't unring that bell." RP at 545. The trial court should have either removed Juror X or granted Mr. Hill's motion for a mistrial. *See Bostick*, 774 Fed. Appx. at 605 (mistrial was not necessary because the threatening juror was removed).

At the very least, the court should have questioned the other jurors, particularly Juror X. Threats of violence and home invasion are not made

or taken lightly. These statements appear to have occurred during deliberations and were thus heard by all of the jurors. The trial court had an obligation to investigate the full impact of these statements. *See Elmore*, 155 Wn.2d at 776 (an investigation into misconduct “should reflect an attempt to gain a balanced picture of the situation” thus “it may be necessary to question the complaining juror or jurors, the accused juror, and all or some of the other members of the jury”).

Questioning only Juror 2 amounted to an abuse of discretion. Juror X committed misconduct in this case, yet the court took no steps to ascertain whether she could be impartial. *See Oswald*, 374 F.3d at 481 (trial court’s investigation must be “reasonably calculated to resolve the doubts raised about the juror’s impartiality”). The court took did nothing to ensure that Juror X would refrain from threatening her fellow jurors going forward, such as by reinstructing the jury. *See Elmore*, 155 Wn.2d at 774 (faced with a potential instance of juror misconduct, “the trial court should first attempt to resolve the problem by reinstructing the jury”). The court did not attempt to determine whether other jurors felt threatened or intimidated during deliberations.

The judge had an ongoing duty to investigate Juror X’s misconduct and ascertain that she and all of the jurors were fit to serve on this jury. Judges properly investigate juror misconduct by, for example, “ask[ing]

questions of the jurors' subjective ability to disregard" misconduct and by "instruct[ing] the jury to consider only the evidence admitted at trial, and to disregard their deliberations that had been tainted by" the misconduct. *State v. Gaines*, 194 Wn. App. 892, 898-99, 380 P.3d 540 (2016). The court did not take these steps in this case. By failing to take adequate action to investigate Juror X, the trial court abused its discretion, requiring reversal.

**3. Denial of a fair and impartial jury was structural error, requiring reversal.**

"Denial of the right to an impartial trier of fact is a classic structural error, requiring reversal without a showing of prejudice." *Berniard*, 182 Wn. App. at 123-24 (citing *Chapman v. California*, 386 U.S. 18, 24 n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (reversing the defendant's conviction despite clear evidence of guilt because "[n]o matter what the evidence was against him, he had the right to have an impartial judge")). Structural error includes error that denies a defendant his "right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed. 2d 923 (1989) (internal quotations omitted).

By resorting to threats of physical violence, Juror X was neither fair nor impartial. Threatening physical harm on a fellow juror—*in order to intimidate that juror into changing her mind*—is a "structural error"

because “it taints the entire proceeding.” *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). It is thus not subject to harmless error analysis and requires “automatic reversal.” *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999)).

Even if this Court applies harmless error analysis, the error here was not harmless. Washington courts “may presume prejudice on a showing of misconduct.” *State v. Fry*, 153 Wn. App. 235, 239, 220 P.3d 1245 (2009) (citing *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009)). This “presumption can be overcome by an adequate showing that the misconduct did not affect the deliberations.” *Depaz*, 165 Wn.2d at 856.

Here, we have ample evidence that the misconduct did affect the deliberations. Juror 2 said that she felt threatened and wanted to leave due to Juror X’s actions. RP 534, 543. She reported that Juror X threatened her based on the merits of the case, because “I don’t agree with her.” RP 542. Although Juror 2 felt she could continue deliberating, Juror X’s actions clearly affected her enough to report the incident and take it seriously. RP 542-43. Additionally, because the trial court failed to question Juror X or anyone besides Juror 2, we have no idea whether the other jurors in this case could deliberate impartially. Juror X committed egregious misconduct, but the court took no steps to ensure she could be fair or impartial going

forward. Her actions were presumptively prejudicial, and there is no evidence that “this misconduct did not affect the deliberations,” requiring reversal. *Depaz*, 165 Wn.2d at 856.

**B. The State Failed to Prove that Mr. Hill Committed Burglary by the Alternative Means of “Unlawfully Entering” the Store.**

The state failed to meet its burden of proving that Mr. Hill committed burglary. To convict Mr. Hill of burglary in the first degree, the state had the burden of proving beyond a reasonable doubt that he (1) unlawfully entered *or* remained in a building; (2) with the intent to commit a crime against a person or property; and (3) while entering, remaining, or in flight, that he assaulted a person. RCW 9A.52.020(1)(b). However, insufficient evidence supported the conclusion that Mr. Hill entered the store unlawfully, requiring reversal.

Sufficiency of the evidence is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict. Wash. Const. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Some crimes “may be committed in different ways (i.e., via alternative means).” *State v. Woodlyn*, 188 Wn.2d 157, 163, 392 P.3d 1062, 1066 (2017). In these cases, a guilty verdict will be upheld “only if sufficient evidence supports each alternative

means.” *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing *Ortega-Martinez*, 124 Wn.2d at 708). Evidence is sufficient if, viewed in the light most favorable to the state, “any rational trier of fact could have found guilt beyond a reasonable doubt.” *Id.* at 551.

Burglary is an alternative means crime. *State v. Klimes*, 117 Wn. App. 758, 768, 73 P.3d 416 (2003); *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). Specifically, “enters unlawfully” and “remains unlawfully” describe separate acts and are “alternate means of committing burglary.” *Klimes*, 117 Wn. App. at 768; *Allen*, 127 Wn. App. at 131.<sup>1</sup> The state pled both alternative means, and the jury did not specify which means it found to convict Mr. Hill. CP 4, 40, 164, 192. Thus, Mr. Hill’s burglary conviction can only be upheld if both alternatives are supported by sufficient evidence. *Kintz*, 169 Wn.2d at 552.

The state failed to prove both alternative means in this case because Mr. Hill did not *enter* the store unlawfully. He entered a store that was open

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<sup>1</sup> *Allen* abrogated in part the holding in *Klimes*, but not in a way that impacts this case. *Allen*, 127 Wn. App. at 132. Both cases concluded that “entering unlawfully” and “remaining unlawfully” are alternative means of committing burglary. *Id.* at 131-32; *Klimes*, 117 Wn. App. at 768. However, *Klimes* also concluded that these two alternative means were “repugnant” to one another, meaning that “proof of one will disprove the other.” *Allen*, 127 Wn. App. at 132 (citing *Klimes*, 117 Wn. App. at 760). The Court in *Allen* disapproved of this holding and concluded that these alternative means are not repugnant. *Id.* Mr. Hill does not argue that the alternative means in this case are repugnant to one another and does not rely on that portion of the holding in *Klimes*.

for business through the front door, just like any other customer. *See Klimes*, 117 Wn. App. at 771 (defendant did not enter junkyard unlawfully because “the junkyard was a business that was open to the public at the time of the charged offense” and he “entered the junkyard through the front gate”). It was only after Mr. Hill was inside the store, when employees told him to leave, that he allegedly remained unlawfully.

Even if Mr. Hill entered the store with intent to commit a crime, this does not mean that he entered “unlawfully.” *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998) (reversing burglary conviction and holding that it was “immaterial” whether the defendant “formulated the intent to steal” before or after entering a car wash). “Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant’s intent to commit a crime,” otherwise all shoplifting convictions could be elevated to burglary. *Id.*

Sufficient evidence does not support the conclusion that Mr. Hill entered unlawfully just by walking through the door of a business open to the public. *Klimes*, 117 Wn. App. at 771. The state elected to charge both alternative means of committing burglary: entering *and* remaining unlawfully. CP 4, 40. Because sufficient evidence does not support one of these means, this Court must reverse Mr. Hill’s conviction for burglary. *Kintz*, 169 Wn.2d at 552.

**C. The Prosecutor Committed Prejudicial Misconduct During Rebuttal Closing Argument.**

This Court also must reverse due to prosecutorial misconduct. The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In order to prevail, a defendant must show that the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Both requirements are met here. The prosecutor committed prejudicial misconduct during rebuttal closing argument, in two ways. First, he encouraged the jury to speculate about why there was no audio in the security videos. Second, he reversed the burden of proof by arguing that Mr. Hill was required to disprove the value of the property damaged.

**1. The prosecutor committed prejudicial misconduct by encouraging the jury to speculate about why the store video lacked audio.**

During rebuttal closing argument, the prosecutor addressed the lack of audio in the security video. He implied that this deficit was explained by “regulations”:

And I would submit to you that no audio in the video, there's lots of explanations. I mean, nothing was brought out as testimony. Who knows what the regulations are.

RP 516. No evidence was presented to support this argument. Mr. Hill promptly objected, but the trial court overruled this objection. RP 516-17.

In closing, attorneys have wide latitude to argue inferences from the evidence. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). However, “a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.” *Id.*; see also *State v. Vassar*, 188 Wn. App. 251, 259, 352 P.3d 856 (2015) (“It is misconduct for a prosecutor to submit extrinsic evidence to a jury.”); *State v. Davis*, 175 Wn.2d 287, 330-31, 290 P.3d 43 (2012) (“Conduct is improper if, for example, . . . it refers to matters outside the record.”). The rule is that “consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” *State v. Rinkes*, 70 Wn.2d 854, 862-63, 425 P.2d 658 (1967).

Here, the prosecutor committed misconduct by encouraging the jury to speculate about why the security video lacked audio. During trial, there was no evidence presented about the regulations governing marijuana stores. There was no evidence about why the video lacked audio. Despite this, the prosecutor stated that there were “lots of explanations” for the lack

of audio, including unspecified “regulations.” This speculation was entirely outside the record—and not even an inference from anything in the record—amounting to misconduct. *See Pierce*, 169 Wn. App. at 553.

This misconduct also prejudiced Mr. Hill. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). This case largely came down to a credibility determination between Mr. Hill and Mr. Salaverry. Only one witness testified that Mr. Hill threatened to kill Mr. Salaverry: Mr. Salaverry himself. RP 283. The other store employees heard Mr. Hill yelling but did not testify about any specific threat. RP 242, 346. Mr. Hill flatly denied making this statement. RP 451.

Mr. Hill and Mr. Salaverry also disagreed about the nature of their conversation before Mr. Salaverry tackled Mr. Hill. RP 268-74, 415-16, 430, 432. The video recording shows the incident but lacks context without audio. Ex.s 31, 32. Mr. Hill was entitled to explain why he was credible, and question the state’s video evidence, without the prosecutor implying there was a legal explanation for the lack of audio. This bolstering and speculation prejudiced Mr. Hill.

**2. The prosecutor committed prejudicial misconduct by reversing the burden of proof in closing argument.**

The prosecutor also committed misconduct in this case by implying that Mr. Hill had a burden to produce evidence to counter the state's charges. RP at 515. Specifically, the prosecutor argued that there was "no evidence to contradict" the state's evidence about the cost of the property damaged:

I would submit to you *there's no evidence, other evidence, as to the value of the property* or that these bongos were sold anywhere else. Certainly, they've all been damaged. The receipt shows with some – specifically shows the numbers, and Mr. Franada went through them in establishing the loss and the amounts. *And there's no evidence to contradict that except for defense saying you should not take him as credible, and I submit that is not sufficient.*

*Id.* (emphasis added). These statements amounted to misconduct because they reversed the burden of proof and violated Mr. Hill's right to due process.

Due process requires the state to bear the burden of proof beyond a reasonable doubt. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)). The defense has no obligation to produce evidence and no obligation to articulate reasons to doubt the state's case. *State v. Kalebaugh*, 183 Wn.2d 578, 585, 355 P.3d 253 (2015) ("[T]he law does not require that a reason be given for a juror's doubt."); *State v. Emery*,

174 Wn.2d 741, 760, 278 P.3d 653 (2012) (“[T]he State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.”). A prosecutor commits misconduct by shifting the burden of proof to the accused. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125, 127 (2014).

In *State v. Fleming*, Division 1 addressed a similar issue. 83 Wn. App. 209, 921 P.2d 1076 (1996). In that case, the defendants were accused of rape. *Id.* at 210. The prosecutor made numerous inappropriate arguments during closing, including pointing out that there was “no evidence” to support the defendants’ theory of the case:

[T]here is absolutely no evidence . . . that [D.S., the victim] has fabricated any of this or that in any way she’s confused about the fundamental acts that occurred upon her back in that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.*

*Id.* at 214 (emphasis in original). The Court of Appeals reversed, holding that this argument “improperly shifted the burden to the defendants to disprove the State’s case.” *Id.*

Here, like in *Fleming*, Mr. Hill did not have the burden of proving his innocence. He did not bear the burden of producing evidence to contradict the state’s estimates of the property damage. Mr. Hill was entitled to point out flaws in this evidence, without the prosecutor arguing

“there is no evidence” to support his theory. *See Fleming*, 83 Wn. App. at 214. By implying otherwise, the prosecutor committed misconduct in this case. *Id.*

Mr. Hill did not object to the prosecutor’s statements. RP 515. Reversal is required, even without defense objection, when a prosecutor’s misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). “In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In *Fleming*, the defendants’ trial attorneys did not object to the prosecutor’s inappropriate statements. 83 Wn. App. at 210-11. Despite this failing, the Court still reversed, holding that “[t]he State must convict on the merits,” and not by “improperly shifting the burden of proof to the defense.” *Id.* at 216.

Here, the only evidence about the value of the property damaged came from lists and documents presented by the state’s witness, Mr. Franada, the general manager. RP 360-62, 371-73; Ex.s 40, 41. Mr. Franada did not have original receipts to verify these numbers, and his record keeping was confusing at times. RP 376. Without the prosecutor

arguing that Mr. Hill had the burden of disproving this evidence, it is not clear whether the jury would have been persuaded by the state's case. Mr. Hill was thus prejudiced, and an instruction would have not cured this constitutional error. *See Fleming*, 83 Wn. App. at 216.

**D. The Trial Court Failed to Even Consider the Mitigating Circumstance Raised by Mr. Hill.**

This Court should also reverse and remand for resentencing because the trial court failed to consider the mitigating circumstance raised by Mr. Hill. Trial judges have “considerable discretion under the [Sentencing Reform Act]” but are still “required to act within its strictures and principles of due process of law.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). No defendant is entitled to an exceptional sentence below the standard range, but every defendant is entitled to “ask the trial court to consider such a sentence *and to have the alternative actually considered.*” *Id.* (emphasis added). Failing to consider an exceptional sentence is abuse of discretion and reversible error. *Id.*

Here, Mr. Hill raised a mitigating circumstance justifying a sentence below the standard range. In written notice and at the sentencing hearing, he argued that the victim, Mr. Salaverry, was, “[t]o a significant degree,” an “initiator, willing participant, aggressor, or provoker of the incident.” CP

242 (citing RCW 9.94A.535(1)(a)); RP 561. The trial court did not address Mr. Hill's request at all. RP 564-68. The court issued a standard range sentence without even mentioning this or any mitigating circumstance. *Id.* The court abused its discretion by failing to even consider this mitigating circumstance, requiring resentencing. *Grayson*, 154 Wn.2d at 342.

**E. Cumulative Error Denied Mr. Hill Due Process.**

Each of the errors described above are sufficient for reversal. Additionally, their cumulative effect denied Mr. Hill a fair trial and due process. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor

repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, the errors made by the trial court each warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Hill of a fair trial. *See Coe*, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

## VI. CONCLUSION

For the foregoing reasons, Mr. Hill respectfully requests that this Court reverse his conviction and remand for a new trial.

RESPECTFULLY SUBMITTED this 29th day of June, 2020.



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No. 54335-4-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On June 29, 2020, I electronically filed a true and correct copy of the Brief of Appellant, Robert J. Hill, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Kristie Barham, Pierce County Prosecuting Attorney's Office	( X ) via email to: kristie.barham@piercecountywa.gov, PCpatcecf@piercecountywa.gov
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Robert J. Hill DOC #359440 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362	( X ) via U.S. mail
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SIGNED in Tacoma, Washington, this 29th day of June, 2020.



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