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NO. 54335-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JESSE HILL,

Appellant.

REPLY BRIEF OF APPELLANT,
ROBERT JESSE HILL

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

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

TABLE OF CONTENTS

I. ARGUMENT IN REPLY 1

 A. Mr. Hill Entered Urban Bud Lawfully..... 1

 B. Juror X Committed Misconduct by Threatening
 Another Juror with Violence..... 4

 1. Juror X’s misconduct did not inhere in the verdict..... 4

 2. Mr. Hill was prejudiced by the trial court’s refusal
 to grant a mistrial, remove Juror X, or further
 investigate this misconduct..... 7

 C. The Trial Court Did Not “Consider” the Mitigating
 Circumstance Raised by Mr. Hill..... 9

II. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

<i>Gardner v. Malone</i> , 60 Wn.2d 836, 376 P.2d 651 (1962).....	5, 6
<i>Matter of Lui</i> , 188 Wn.2d 525, 397 P.3d 90 (2017).....	5, 6
<i>State v. A.M.</i> , 194 Wn.2d 33, 448 P.3d 35 (2019).....	8, 10
<i>State v. Berhe</i> , 193 Wn.2d 647, 444 P.3d 1172 (2019).....	6
<i>State v. Collins</i> , 110 Wn.2d 253, 751 P.2d 837 (1988).....	3, 4
<i>State v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005).....	8
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	9
<i>State v. Klimes</i> , 117 Wn. App. 758, 73 P.3d 416 (2003).....	1, 4
<i>State v. Lawler</i> , 194 Wn. App. 275, 374 P.3d 278 (2016).....	8
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	8
<i>State v. Pete</i> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	6
<i>State v. Wirth</i> , 121 Wn. App. 8, 85 P.3d 922 (2004).....	7, 8

Court Rules

CrR 6.5 7, 8

RAP 2.5 8, 10

Statutes and Regulations

RCW 2.36.110 8

RCW 9.94A.535 10

RCW 9A.52.070 2

RCW 69.50.4013 2, 3

WAC 314-55-079 2, 3

WAC 314-55-150 2

I. ARGUMENT IN REPLY

Robert Jesse Hill entered a marijuana store that was open for business. He was involved in an altercation with a security guard in this store. Mr. Hill was tackled, pinned to the ground, and choked, and he bit the security guard. A jury convicted him of second-degree malicious mischief, felony harassment, and first-degree burglary, but could not reach a decision on assault. This Court should reverse Mr. Hill's convictions because the state failed to prove an alternative means of committing burglary, jury misconduct denied him a fair trial, and the trial court failed to consider a mitigating factor at sentencing.

A. Mr. Hill Entered Urban Bud Lawfully.

The state failed to prove an alternative means of committing burglary in this case because Mr. Hill entered Urban Bud lawfully. *See State v. Klimes*, 117 Wn. App. 758, 768, 73 P.3d 416 (2003) (“enters unlawfully” and “remains unlawfully” are alternative means of committing burglary). In its response, the state conflates the store's responsibility to check IDs with a customer entering an open business through the front door. Under the state's reasoning, anyone over age 21 who enters a cannabis store without ID could be guilty of criminal trespass. This Court should reject the state's broad interpretation.

In this case, Mr. Hill lawfully entered the store by walking through the front door of an open business. He then unlawfully remained in the store by refusing to leave when asked by employees, pushing past Mr. Salaverry, and running through the back door into the employee breakroom. The breakroom was not identified as employees only. RP 322, 345, 449.

First, the state argues that Mr. Hill unlawfully entered the store because he walked through the front door without valid identification on his person. Respondent's Brief at 31. However, this is not unlawful. Persons must be over 21 in order to purchase marijuana, and Mr. Hill is over 21. *See* RCW 69.50.4013(3)(a) (persons must be over 21 to possess marijuana); RP 434. Stores must check identification. WAC 314-55-079 ("marijuana retailer license allows the licensee to sell only [marijuana] to persons twenty-one years of age and older"); WAC 314-55-150 (listing the "forms of identification that are acceptable to verify a person's age for the purpose of purchasing marijuana"). Entering without a valid ID is not unlawful because Washington law places the obligation to check IDs on the store, not the customer. WACs 314-55-079, -150.

Under the state's reasoning, a 40-year-old person who enters a cannabis or liquor store without their ID has automatically "entered unlawfully" and thus committed the crime of criminal trespass. *See* RCW 9A.52.070(1) ("A person is guilty of criminal trespass in the first degree if

he or she knowingly enters or remains unlawfully in a building.”). This Court should reject this interpretation because it conflicts with Washington law governing cannabis. The legislature intended to place the burden of checking identification on stores, not on customers. *Compare* RCW 69.50.4013(3)(a) (person must be over 21 to possess marijuana) *with* WAC 314-55-079 (retail store may only sell marijuana to someone over age 21).

Second, the state argues that Mr. Hill “unlawfully entered” when he pushed further into the store, past the security desk and into the employee breakroom. Respondent’s Brief at 32-33. This argument fails because it falls squarely into *remaining* unlawfully in a building, not *entering* unlawfully, especially considering the breakroom was not labelled employees only.

For example, in *State v. Collins*, the Washington Supreme Court concluded that the defendant “remained unlawfully on the premises, because he exceeded the scope of his invitation.” 110 Wn.2d 253, 255, 751 P.2d 837 (1988). Collins was invited into the home to use the telephone, then attacked and sexually assaulted two women in the home. *Id.* at 254-55. Both the trial court and the Court of Appeals “rejected the contention that Collins had gained entry by fraud, thereby vitiating the consent to his entry.” *Id.* at 256 n.1. Instead, the issue was “whether he remained unlawfully, rather than whether he entered the house unlawfully.” *Id.*

Collins presumably did not have permission to push through the house and into the bedroom, but this was considered unlawfully remaining in the home, not unlawfully entering the bedroom. *Id.*

Here, like in *Collins*, Mr. Hill lawfully entered, but remained in the building unlawfully. The state thus failed to prove an alternate means of establishing burglary. *See Klimes*, 117 Wn. App. at 768. This Court must reverse.

B. Juror X Committed Misconduct by Threatening Another Juror with Violence.

During deliberations, Juror X threatened another juror with physical violence because she disagreed with this juror about the outcome of the case. The state argues that this egregious misconduct inheres in the verdict. Respondent's Brief at 15. The state takes the reason this threat was improper—that it undermines confidence in the verdict—and argues that this is why the Court cannot consider Juror X's conduct. *Id.* at 15-16. This Court should reject this argument and hold that threatening another juror is misconduct that does not inhere in the verdict, and this misconduct prejudiced Mr. Hill.

1. Juror X's misconduct did not inhere in the verdict.

By threatening another juror, Juror X committed misconduct regardless of the effect that threat had on deliberations. Juror 2 reported the threat by Juror X and characterized it 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.

RP 542. 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.*

The state argues that this threat inheres in the verdict. Respondent's Brief at 15. "Matters that inhere in the verdict include [1] facts linked to the juror's motive, intent, or belief, or describing their effect upon the jury or [2] facts that cannot be rebutted by other testimony without probing any juror's mental processes." *Matter of Lui*, 188 Wn.2d 525, 568, 397 P.3d 90 (2017) (internal quotations omitted).

The state's argument fails because it "make no distinction between affidavits of jurors as to the *fact* of misconduct and affidavits as to the *effect* of that misconduct upon their deliberation," arguing that "both are things which inhere in the verdict and that jurors' affidavits or statements as to either the fact or its effect are inadmissible because tending to impeach the verdict. In this state we have applied the rule less drastically." *Gardner v. Malone*, 60 Wn.2d 836, 842, 376 P.2d 651 (1962) (internal quotations omitted) (emphasis in original). Juror statements can be "considered in so

far as they stated the facts showing misconduct but not as showing the effect of such misconduct on the verdict”. *Id.*

The distinction between the fact of misconduct and the effect of misconduct is one still made by Washington courts today. For example, if a juror votes to convict based on racial animus against this accused, this fact shows the juror’s “mental processes” and is clearly “linked to the juror’s motive, intent, or belief.” *Lui*, 188 Wn.2d at 568. Despite this, the Washington Supreme Court has held that “[r]acial bias by a juror does not inhere in the verdict or impeach it”. *State v. Berhe*, 193 Wn.2d 647, 658-59, 444 P.3d 1172 (2019) (internal citations omitted). Courts distinguish between the fact of the misconduct (the racial bias) and the effect that this misconduct had on the verdict (leading the biased juror to convict). Similarly, when the jury receives extrinsic evidence, this misconduct does not inhere in the verdict even though it affected the jury’s mental processes and decision. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

The state’s argument would allow any misconduct that impacted a juror’s mental processes to inhere in the verdict and be insulated from review. For example, if a juror was bribed, receiving that bribe would impact the juror’s motives, intent, and beliefs about the case. Under the state’s rule, that egregious misconduct would be immune from review. This

Court should reject the state's argument and hold that threatening violence on another juror is misconduct that does not inhere in the verdict.

2. Mr. Hill was prejudiced by the trial court's refusal to grant a mistrial, remove Juror X, or further investigate this misconduct.

After learning about the threats in this case, the trial court only interviewed Juror 2. The court denied Mr. Hill's motion for a new trial, did not interview Juror X (who made the threat), and did not interview any other jurors. These actions amounted to abuse of discretion and prejudiced Mr. Hill.

The state argues that Mr. Hill was not prejudiced because, when Juror 2 was questioned, the jury had already agreed on three counts and was deadlocked on the final count. Respondent's Brief at 17. The state's argument fails because, had the trial court replaced Juror X with an alternate, the reconstituted jury would have been "instructed to disregard all previous deliberations and begin deliberations anew." CrR 6.5; *see also State v. Wirth*, 121 Wn. App. 8, 13, 85 P.3d 922 (2004) (trial court properly replaced a juror with an alternate and instructed the reconstituted jury to begin deliberations anew, even though the replacement occurred after the jury had declared that it reached a verdict). Here, a reconstituted jury, without Juror X, would have had to deliberate the case again and may have reached a different verdict.

The trial court's decision not to remove Juror X or interview any other jurors was also a manifest error affecting Mr. Hill's constitutional right to a fair and impartial jury. RAP 2.5(a)(3). An error is manifest if it "had practical and identifiable consequences in the trial of the case." *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (internal quotations omitted). It requires only "a plausible showing that the error resulted in actual prejudice" to the accused. *State v. A.M.*, 194 Wn.2d 33, 39, 448 P.3d 35 (2019).

Judges have a "continuous obligation" 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) (internal quotations omitted) (citing RCW 2.36.110 and CrR 6.5). 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).

In this case, the trial court had an ongoing duty under RCW 2.36.110 and CrR 6.5 to investigate and remove Juror X for misconduct. The court's failure to do so resulted in actual prejudice, and thus manifest error, because replacing Juror X with an alternate would have required the reconstituted jury to begin deliberations anew. *See* CrR 6.5; *Wirth*, 121 Wn. App. at 13. These new deliberations very well could have led to a different result, such as acquittal. This Court should reverse.

C. The Trial Court Did Not “Consider” the Mitigating Circumstance Raised by Mr. Hill.

At the sentencing hearing, Mr. Hill raised a mitigating circumstance and argued that it justified a sentence below the standard range. CP 242; RP 561. The trial court did not mention, address, or acknowledge this mitigating circumstance. RP 564-68. The court abused its discretion because, although no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to “ask the trial court to consider such a sentence and to have the alternative *actually considered*.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis added).

The state argues that the trial court impliedly considered the mitigating circumstance by entering a sentence within the standard range. Respondent’s Brief at 43. However, a court cannot “actually consider” something without remarking on it in any way. *See Grayson*, 154 Wn.2d at 342. Additionally, the state argues that Mr. Hill waived his right to challenge this error by not objecting at the sentencing hearing. Respondent’s Brief at 42. This argument fails because Mr. Hill repeatedly raised this mitigating circumstance, thus preserving it for review. CP 242; RP 561.

Regardless, this Court should reverse because the trial court's error was manifest and affected Mr. Hill's constitutional right to due process. RAP 2.5(a)(3). An error is manifest if there is "a plausible showing that the error resulted in actual prejudice" to the accused. *A.M.*, 194 Wn.2d at 39. Here, actual prejudice resulted because Mr. Salaverry escalated the violent altercation with Mr. Hill. *See* RCW 9.94A.535(1)(a) (mitigating circumstance if "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident"). Had the trial court considered this mitigating circumstance, the court likely would have entered a sentence below the standard range.

II. CONCLUSION

Robert Jesse Hill respectfully requests that this Court reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 2nd day of October, 2020.



STEPHANIE TAPLIN

WSBA No. 47850

Attorney for Appellant, Robert Jesse Hill

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 October 2, 2020, I electronically filed a true and correct copy of the Reply Brief of Appellant, Robert Jesse 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:

Zachary Wiley Dillon, Pierce County Prosecuting Attorney's Office	(X) via email to: zachary.dillon@piercecountywa.gov, PCpatcecf@piercecountywa.gov
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Robert Jesse 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 2nd day of October, 2020.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Robert Jesse Hill

NEWBRY LAW OFFICE

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