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Court of Appeals
Division III
State of Washington

34523-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

STEVEN P. WHITE, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF APPELLANT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred when it entered an order granting Mr. White's motion for a new trial based upon a claim that extrinsic evidence was given to the jury during deliberations. CP 90-91.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it granted Mr. White's motion for a new trial based upon a claim that extrinsic evidence was introduced to the jury during deliberations?

2. Did Mr. White affirmatively establish that the "outside" Subway video that was not admitted at trial and inadvertently given to the jury was new or novel evidence?

3. Did Mr. White affirmatively establish that he was so prejudiced that nothing short of a new trial would ensure he would be treated fairly even though the trial court admonished the jury to disregard the fourth Subway surveillance video?

III. STATEMENT OF THE CASE

The defendant/respondent, Steven White, was charged by amended information in the Spokane Superior Court with one count of second degree robbery and one count of possession of a controlled substance - methamphetamine. CP 14. Mr. White pleaded guilty to the possession of a

controlled substance charge before the commencement of trial. Mr. White was convicted by a jury of the second degree robbery. RP 383.

Substantive facts.

On December 18, 2015, around 5:15 p.m., officers responded to a robbery-in-progress call at a Subway restaurant located on the north side of Spokane. RP 204-06. The robber entered the business wearing a green hoodie and mask and instructed an employee to “give [him] everything out of the till.” RP 111-12. Except for his eyes, the remainder of the robber’s face was covered by a mask. RP 113, 132. The robber kept one hand in his pocket suggesting he was armed, which panicked the employee. RP 113-15, 126. The robber left the business through the west door of the restaurant leading into the parking lot, which connects to the alleyway. RP 116, 236, 239, 243, 290-91.

Officer Kurt Vigessa responded to the robbery and observed Mr. White exit some shrubbery in the area of Indiana and Maple, looking to his left and right. RP 149, 151.¹ Mr. White was wearing a dark colored

¹ The Officer immediately believed Mr. White was the robbery suspect because of the location where Mr. White was initially observed by the officer, the Officer arrived in the area within several minutes of the robbery, allowing that amount of time necessary to travel to Mr. White’s location, Mr. White’s suspicious behavior, and Mr. White’s attempt to mask his face when the patrol car arrived in the area. RP 152.

sweatshirt at the time, and he placed the hood over his face after the officer's arrival. RP 149. Mr. White hurriedly walked away from the area of the officer's patrol car. RP 150, 154. When ordered to stop, Mr. White refused to obey and ran. RP 150. Mr. White was eventually tackled by Officer Vigessa. RP 150. Mr. White was observed by police within approximately three minutes of the robbery and about five blocks from the Subway. RP 292, 297.²

A "wad" of cash and a roll of pennies was found in Mr. White's front left jean pocket after being arrested.³ RP 183-84, 251-53, 263-64. This money was consistent with the amount of money reportedly taken during the robbery. RP 260; Ex. D-101.

After Mr. White was taken into custody, Officer Viagessa looked at the sole of Mr. White's shoes. RP 159. He then walked back to the Subway and checked the west alley looking for Mr. White's distinctive shoe pattern. RP 159. Mr. White was wearing Nike Shox brand tennis shoes, which have

² Officer Nate Donaldson transported a Subway employee to the area where Mr. White had been detained by several officers, approximately seven to eight minutes after the robbery. RP 130, 186-87, 206, 208. The witness was unable to identify Mr. White. RP 210.

³ The amount taken from the Subway was approximately \$36.22, consisting of five-dollar and one-dollar bills. RP 116, 139, 264-65. Officers collected 14 one-dollar bills and 5 five-dollar bills, and a roll of 50 pennies from the defendant, for a total of \$39.00. RP 185, 265.

a unique “plunger” style pattern on the sole. RP 159-60; Ex. 5.⁴ Officer Vigessa located the pattern of the shoe prints in the snow approximately 100 feet west of Subway parking lot in the alley.⁵ RP 159, 167, 293. The shoeprints appeared to be fresh and had a runner’s gait. RP 296-97. The first 100 feet of the alleyway from the Subway had been travelled on by several police cars looking for the robber. RP 292.

Additionally, other officers located the specific Nike Shox shoe footprints⁶ in the snow and slush in the alleyway, just west of the Subway to approximately the 1500 block of Indiana (Indiana and Maple). RP 210-16, 218. The Nike shoe footprint was observed leading up to the discarded clothing. RP 223. The long stride of the footprints suggested the person had been running. RP 218. Officers located a discarded insulated flannel black-red-gray plaid jacket in a trash bin at 1524 West Indiana, just south of the Subway. RP 180, 190, 219-20; Ex. 18. It was a match to the plaid jacket worn by the robber as observed in the store video. RP 180.

⁴ Another Officer described the pattern as four distinct circles, with the front tread having “tiny little circles” which are distinct to the Nike Shox shoe. RP 176, 178; Ex. 7.

⁵ There was no snow in the parking lot surrounding the Subway parking lot. RP 167.

⁶ The heel plate of the shoe sole has four distinct shocks with a round pattern with two parallel circles. RP 213-14, 217.

At the time of trial, jurors were shown Officer David Stone's body camera video which captured the aftermath of the north alley of Indiana and the footprints leading up to yard waste bin containing the discarded clothing. RP 223-24. The alleyway was heavily travelled. RP 227. On cross-examination, the Officer stated he was not aware of whether a camera faced to the outside of the Subway.

A Subway employee testified he reviewed three different camera viewpoints from the surveillance video; namely, the front counter, over the entrance to the restaurant, and the customer area. RP 121-24. The videos captured the suspect and robbery in progress.

Corporal Nathan Spiering also reviewed the store videos after the incident. RP 238-39. During direct examination, he stated the store videos depicted several different angles, including over the till, behind the till, and the counter area. RP 243. During cross-examination, the Officer also stated there was a surveillance video which captured the parking lot area. RP 243.

After his apprehension, officers observed Mr. White wearing a black hoodie, with a "baseball size" white emblem, enclosing a red cross, in the middle of the hood. RP 175, 250-51, 253, 257, 263. Officers also reviewed the Subway surveillance tape and observed the robber had a distinctive white emblem encircling a red cross on the top of the hoodie, which matched the emblem on Mr. White's hoodie. RP 179, 258-60.

Officers also found significant that the robber was wearing a plaid jacket and black hoodie in the store video which was consistent with the plaid jacket and hoodie later collected in the green trash bin shortly after the robbery. RP 179, 260-61.

Procedural history.

Prior to the commencement of trial, there was a discussion with the trial court and the parties regarding the surveillance video at the Subway restaurant. The deputy prosecutor advised the court it was going to move to admit three different angles from within the restaurant which captured the robbery. RP 32-33. The defense objected on chain of custody grounds, particularly with respect to a fourth surveillance camera which depicted the exterior of the Subway during and after the robbery, asserting the proposed Subway chain of custody witness had no particular knowledge of the contents of that video. RP 33-35. Thereafter, the deputy prosecutor advised the court he did not intend on showing the contents of the exterior camera. RP 33-35. The defense advised that if the foundation was met during trial, it would have no objection. RP 35.

At the time of trial, a DVD (Ex. 22) was admitted, without objection, depicting the three different views from within the Subway restaurant, which captured the robbery in progress. RP 119-24. It inadvertently also

contained a fourth view of the exterior of the restaurant that was not admitted at trial.

During closing argument and regarding the Subway surveillance video, the defense attorney claimed the following:

There's a video of the parking lot to the west, right?

Everybody says that. No one bothered to look at it. That is significant, okay? That will tell you whether the suspect went to the alley to the west. It'll tell you if they got in a car and left. It'll tell you if they went this way or that way, right? So they're talking about one six blocks in one direction, but really we should be talking a six-block radius, should we not? because no one knows how that person left, no one. That's a missing piece of evidence. That's a reason to doubt, okay? So that's just one. So he gives you the wrong -- he gives you the information that he doesn't know where they went, right? Doesn't know how they arrived, don't know how they left, don't know which direction, don't know whether they were alone.

RP 339-40.

During jury deliberations, it was discovered a video of the exterior of the restaurant had been included in Ex. 22. The trial court made a record, outside the presence of the jury.

[THE COURT]: ... I'll try to lay this out as concisely as I can. All of the exhibits went back to the jury except for the illustrative. And one of the exhibits was the surveillance DVD, and that would have been P-22. It says on the exhibit list that there's four tracks. There were only three tracks admitted into evidence, and they were scenes from within the interior of the Subway. The fourth track was not offered. Or actually it was withdrawn -- it wasn't offered. At the beginning of -- before trial started we had motions in limine;

Mr. Marsalis objected to the video of the outside of the store because there was not going to be anybody who could basically lay a foundation for it. The state then withdrew the request for the outside track but neglected, I guess, to remove it from the DVD. So the whole DVD went back to the jury.

The jury requested to -- to watch P-22. Gina, the JA, loaded it up -- brought the jury in, loaded it up, showed them how to work it, and left. We don't know if they looked at the fourth track. I'm going to presume that -- that they did.

I think Mr. Nagy remembered there was an issue somewhere in there and contacted the JA about it. Mr. Marsalis and Mr. Nagy came over. And by that time Gina had withdrawn the DVD from the jury and taken the jury back into the jury deliberation room.

So I wanted to make a record of that and ask what you folks want to do. There's options. One option is to give them an instruction to disregard Track 4. That's the first thing that comes to my mind, but there's other options as well.

RP 371-72

Thereafter, the defense attorney made the following remarks:

[DEFENSE ATTORNEY]: ...My -- my concern obviously is -- obviously is two-fold. And -- and to try to memorialize the conversation we had earlier, my -- my position would be that the jury was submitted evidence that, number one, was not admitted, was not offered into evidence, and a step further, I believe, is inadmissible evidence, which obviously was why I objected to it to begin with.

I believe that that evidence directly conflicts with my theory of the case that we've spent three days discussing with the jury. I believe it can very well support the state's theory of the case; that the fact that they may or may not have, I don't think, is necessarily relevant, the fact -- looked at it, I mean. Just the fact that they were given evidence that was not

admitted is certainly an error, is the state's sole error. I don't have any belief that it was intentional in any way.

But I believe that it is certainly negligent, and I believe it's negligent to the point that it would support a dismissal of the charge. That would be my motion, your Honor.

In the alternative, I'm also concerned that -- because I believe it is damaging evidence to my client, prejudicial to my client, I also don't want to call attention to it in the event that they didn't view it. So I'm stuck in a spot where I have to choose between two evils from a problem that my client and I did not create and was created by the state through its own negligence.

I don't believe that's tantamount to a fair trial for Mr. White, so I'm requesting that the Court consider dismissing on that basis. And I suppose I am strategically prevented, really, from agreeing to the instruction only because I don't know whether they've seen it or not and I don't think it's fair to force us to presume one way or the other and I don't want to bring attention to it if they haven't. The very fact that it was not provided was specifically argued by me in closing and addressed by me with several witnesses. To now mention it may actually exist, I believe, is -- is prejudicial to Mr. White as well.

RP 372-74

Ultimately, the Court instructed the jury as follows:

THE COURT: It's come to my attention that we have one of the exhibits, it's actually P-22 that you folks may or may not have come out and looked at.

SEVERAL JURORS ANSWERING IN UNISON: Mm-hm.

THE COURT: It's also come to our attention that -- that this DVD contained a track that was not admitted at trial. So your instructions are to disregard from your consideration and deliberation the track that was not admitted at trial. If you

wanted to look at that DVD again, we have the correct one for you. Okay?

(Several jurors moved their heads up and down.)

THE COURT: All right. Go on back.

RP 379.⁷

Waiting until after the verdict, but before sentencing, Mr. White renewed his motion to dismiss. RP 391.

[DEFENSE ATTORNEY]: But Judge, you know, ultimately it's just about whether or not Mr. White received a fair trial. And -- and if there is an oddity or a irregularity like this -- and I understand that it's -- that it's rare, Judge, I -- *we're making a presumption that the jury saw something that they just weren't supposed to see.* And I understand that -- that it happens occasionally maybe in testimony that there's an objection and it's sustained and they're, you know, asked to ignore that evidence. But actually seeing something that in my opinion goes directly adverse to the theory that we've -- we've, you know, offered to the jury, that my client was in fact not in that alley and then it shows an individual going to the alley about the same time that perhaps the perpetrator would, I believe it's adverse to our theory and I think the fact that they saw it undermines some of my arguments. So I would ask the Court to consider granting Mr. White a new trial.

THE COURT: Can you be more specific?

[DEFENSE ATTORNEY]: More specific --

THE COURT: And you understand what -- what the burden is here. It's not just -- and you know what the case law says.

⁷ "D-101" was substituted for Ex. 22 and provided to the jury after the court's instruction which contained the previously admitted videos from within the store.

[DEFENSE ATTORNEY]: I do.

THE COURT: It's not just something that the jury wasn't supposed to see. It's something that is -- and I'm not quoting exactly, but it's something that is totally extrinsic to the testimony and evidence. So, for example, in *State v. Pete*, what went back to the jury, of course, was police reports or some reports; and I think they contained admissions by the defendant that were totally contrary to what the position was at trial. And so the jury was allowed to -- to see that by accident. I'm not sure if that ruling also turned on the fact that the judge didn't bring them back out and caution them; there wasn't any cautionary instruction given. I think the judge told the bailiff to go in and tell them not to consider it or something like that. I don't think the case really opined on that. But it was really the fact that it was totally extrinsic to the evidence and it was very detrimental to that particular defendant.

And in my mind, here we have -- there's a couple questions I have, and I'll just put it out there. First of all, we looked -- when we discovered that Mr. -- when we discovered that the jury had received Track 4 by accident, we re-looked at it. And I don't know that we ever really made a record as to what we saw or what was on that, on Track 4. So that's -- that's number one.

And then secondly, I guess depending upon what's on Track 4, how -- how does that prejudice -- how -- what's the prejudice? That's the bottom line for me.

[DEFENSE ATTORNEY]: Sure, understood, your Honor. I -- in my mind, your Honor, the prejudice is that I -- I made a case; I believe the focus of our case was the fact that the state did not provide all of the evidence that they should have provided. Whether that was because they chose not to offer it or because the police didn't provide it to them or law enforcement didn't do a proper investigation, a big piece of my case was that they just didn't do it properly. And I think a large piece of that was demonstrating that there was a video

out there that – that could show that my client did or did not go into the alley and they didn't provide it and that should be held against them.

And in my mind, once they see that video, now they're assuming, "Oh, okay, well, they did provide it; here it is; we've seen it; and there he is walking back in the alley." It undermines virtually everything that I argued on my defense. So just -- just seeing it and making assumptions that -- that I'm -- I would assume that they're going to make by watching it prejudices Mr. White, because it really negates the theory of our case. That was really the only defense we had available to us, or at least the most effective. And -- and I -- that's our position, Judge, is that it undermines the arguments that we made based on the theory that we had.

THE COURT: But -- well, hang on. But was --

[DEFENSE ATTORNEY]: Yeah.

THE COURT: -- your client identifiable in that video? That's a question that -- I don't even know that there was a way to identify him. It was a video of some feet, some shoes and some feet walking, and legs. You could see the -- you could see the side of -- of the individual.

[DEFENSE ATTORNEY]: You could see the side of the defendant. Judge, I would argue that it's -- it's no less unidentifiable than the video that they ended up identifying him on, which were the other three. He's not identifiable in those either. But if someone were to actually look at the times as the video was going -- and they're on there. So if -- if someone is --is aware of what they should be looking for, they can see someone come in and in the -- on the inside video and see the time stamp on it and then they can look at the video from the outside and the time stamp is the same. So whether they look the same or not, the times on those videos are going to indicate that that's the person that was the perpetrator. So it's not just what they see; it's also the timing that's on that video.

THE COURT: All right, thanks.

RP 391-94 (emphasis added).

The deputy prosecutor argued that the defense had not established any prejudice and the video only showed the lower portion of the robber. RP 394-96. He argued that the video was but one of many areas of the investigation discussed by the defense. RP 396.

The trial court granted Mr. White's motion stating:

THE COURT: Well, so the basic -- the basic premise is as to whether or not a substantial right of the defendant was materially affected. And this -- of course, I think we all -- we all know, we all agree, that Track 4 was not admitted into evidence. And my recollection is that Mr. Marsalis objected to that particular track at the beginning of trial. I didn't make a ruling on that, and the state did not offer it.

So it came in inadvertently. I don't have any question in my mind, and I don't think it's contended by Mr. Marsalis, that there was anything other than negligence here in -- in not realizing till after the disk went back to the jury that Track 4 was still on there.

It's misconduct if the jury considers extrinsic evidence. And that in and of itself is not the end of the story. It has to be something that is extrinsic and prejudicial. And if you -- and the *Pete* case defines *extrinsic evidence* as "information that is outside all the evidence admitted at trial." In *Pete*, of course, not only was the statement of the defendant erroneously admitted, but that statement totally contravened the position that Mr. *Pete* had taken at trial. And I don't remember the particulars of it, but -- and again, on top of that there was no instruction to the jury by the court or on the record.

Here, the basic defense was: "It wasn't me. It was someone else." And Mr. White obviously agrees he was in the general vicinity at the time of this robbery but basically claimed it wasn't him and the case was really all about identification. There were three videos inside the store, and none of those videos really identified Mr. White because of the fact that he was covered up, his face was covered up and he was wearing different clothing later on. There was much discussion of the fingerprints, the running pattern, the fact that Mr. White was seen coming down an alley that is frequently, unfortunately, used for robberies of this particular Subway store.

Sergeant Vigessaa apparently was very experienced with that store and knew exactly where to look. And on top of that, Mr. White had, as I recall, some bills in his pockets and rolls of -- rolls of coins that are not typically carried around by folks and may have been inside the Subway store.

I went back and looked through the testimony, and my recollection was that Mr. Marsalis did argue to the jury with regard to the lack of good investigative work, just very generally. I'll leave it at that. One of those arguments was that the state did not produce the outside video.

I also went back and looked at the testimony of Officer Spiering, Nathan Spiering. And I believe it was on cross by Mr. Marsalis, Mr. Marsalis asked, "What videos did you review with the store manager?" And Officer Spiering said, "The surveillance videos, there were several different angles: over the till, behind the till, from behind the -- or in front of the counter. And there's several different angles." And then Mr. Marsalis said, "There's those three? Is there one more?" And Officer Spiering said, "Outside. There's an outside parking lot one as well." And then the discussion went into the fingerprints. "You printed the exit door, but the video shows him going to the east doors. Is there some reason you didn't check that?" "Because it was locked."

So the suggestion is that there is a video of the outside going out the east door, because the west door was locked. So that -- that causes me to wonder, does this video fit the definition

of truly extrinsic evidence? And I don't know, Mr. Marsalis, if you were privy to -- or to remembering this testimony. But it seems to me that the -- the jury understood that that video existed; however, they weren't shown it. Whether or not they recognized it as a video is a whole another story.

I'm struggling with this, as you can see, because on the one hand it doesn't rise to the *Pete* level. On the other hand, the jury -- the argument was that there's no proof, there's no evidence, there's nothing to show what happened when whoever went out the door and which direction they went. I -- it's not for me to say. I don't think it's for any of us to say. It's for the jury to determine whether or not whoever was in that video fit the description of the person later arrested.

There's -- there's a lot of things swirling around my head here. And I'm struggling with this, because, again, it seems to me that it's not totally extrinsic; however, it really is in sharp contrast with what the defendant was arguing.

I also know that when I flip back and forth here, I really simply need to consider the rule of lenity. And so I am going to grant the defendant a new trial. And I -- I don't do this lightly. Even as I came out here, I hadn't made up my mind what I was going to do. But I think this is a significant amount of time for Mr. White. I'd prefer to err on the side of caution and do this over again and we'll go from there.

RP 398-401 (emphasis in the original).

Thereafter, the trial court entered an order granting Mr. White's motion for a new trial, incorporating its oral findings of fact and conclusions of law. CP 86-87.

IV. ARGUMENT

MR. WHITE DID NOT MEET HIS BURDEN TO ESTABLISH THAT THE JURY VIEWED ANY EXTRINSIC EVIDENCE BECAUSE THE INADVERTENT ADMISSION OF AN EXTERIOR VIDEO OF THE SUBWAY WAS NOT NOVEL OR NEW EVIDENCE. MOREOVER, MR. WHITE WAS NOT PREJUDICED BY ITS INTRODUCTION BECAUSE IT WAS CUMULATIVE AND OF SCANT EVIDENTIARY VALUE. FINALLY, THERE IS NO EVIDENCE THE JURY DID NOT ADHERE TO THE COURT'S ADMONITION NOT TO CONSIDER THE FOURTH VIDEO DURING DELIBERATIONS.

Summary of argument.

Here, the trial court erred for several reasons. Although the trial court could not find that the jury viewed the fourth video, and even if the jury had viewed the video, Mr. White did not establish that the fourth video was truly extrinsic: namely; that it was outside all the evidence admitted at trial. Indeed, the trial court was skeptical that the fourth video constituted extrinsic evidence and it did not make a finding that Mr. White was materially affected by the jury's receipt of that evidence. In fact, the trial court indicated it was going back and forth as to whether the fourth video even constituted extrinsic evidence, and it did not make finding that the defendant had been prejudiced, but rather relied on the "rule of lenity" to grant a new trial. Furthermore, there is no evidence the jury did not follow the trial court's admonishment not to consider the video during its deliberations.

Standard of review.

An appellate court reviews a trial court's decision to grant a new trial for abuse of discretion. *State v. Hawkins*, 181 Wn.2d 170, 179, 332 P.3d 408 (2014). Generally, an appellate court requires a much stronger showing of an untenable basis to set aside an order granting a new trial than one denying a new trial. *Id.* at 179–80. A court abuses its discretion when the decision is manifestly unreasonable, or is based on untenable grounds or reasons. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). If there is an inadequate legal basis for granting a new trial, it must be considered an abuse of discretion. *State v. Hoff*, 31 Wn. App. 809, 814, 644 P.2d 763, *review denied*, 97 Wn.2d 1031 (1982).

Under CrR 7.5(a)(1),⁸ a trial court may grant a defendant's motion for a new trial if it "affirmatively appears that a substantial right of the defendant was materially affected by the jury's receipt of any evidence, paper, document or book not allowed by the court. In such circumstances, a

⁸ CrR 7.5(a)(1) states:

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

trial court should only grant a new trial when a defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (internal quotation marks and citations omitted).⁹

Generally, an appellate court is reluctant to inquire how a jury arrived at its verdict. *Id.* There must be a strong, affirmative showing of misconduct in order to overcome the longstanding policy in favor of “stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *Id.* (citation omitted). A defendant alleging juror misconduct has the burden to show misconduct occurred. *State v. Reynoldson*, 168 Wn. App. 543, 547, 277 P.3d 700 (2012); *State v. Hawkins*, 72 Wn.2d 565, 568, 434 P.2d 584 (1967).

⁹ *Pete* involved a defendant accused of joining in a robbery outside a convenience store. The jury inadvertently received two documents. The first was the defendant’s sworn statement to police in which he admitted being at the scene and interacting with the victim, but denied any wrongdoing. The second was a police report of the victim’s statement soon after the robbery in which he identified Pete as the suspect. The State did not present either document, although the court had ruled them admissible.

At trial, Pete’s defense was a general denial of involvement. The victim’s testimony was equivocal: he did not clearly recall the events of that night. Our Supreme Court held that the jury’s consideration of the extrinsic evidence prejudiced Pete by undermining his defense, requiring a new trial. The court held that whether the evidence was admissible was irrelevant, because the defendant had no opportunity to challenge it through objection, cross-examination, rebuttal, or explanation. *Pete*, 152 Wn.2d at 555.

“Novel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document.” *Pete*, 152 Wn.2d at 552 (emphasis in the original).¹⁰ This type of evidence is improper because it is not subject to objection, cross-examination, rebuttal, or explanation. *Id.* at 553.

An appellate court’s inquiry is objective as to whether the extrinsic evidence could have affected the jury deliberations. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). A court need not explore the actual effect of the evidence. *State v. Jackman*, 113 Wn.2d 772, 777–78, 783 P.2d 580 (1989). If there is evidence that a jury used extraneous evidence and if the defendant has been prejudiced, it entitles the defendant to a new trial. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740, *review denied*, 158 Wn.2d 1011 (2006); *State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (if an appellate court determines the jury considered novel or extrinsic evidence, a new trial must be granted unless it can be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict).

¹⁰ The evidence is deemed improper because “it is not subject to objection, cross examination, explanation or rebuttal.” *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994).

1. *The “fourth video” was not new or novel evidence.*

Even if the jury viewed the fourth video, it did not prejudice Mr. White because it was cumulative of the properly admitted evidence of the entry and exit of the robbery suspect and his appearance at that time.¹¹ The admitted evidence at trial established the robber entered the restaurant from the door leading to the alley (as all other doors were locked); the robber was described by witnesses as wearing a dark hoodie and a plaid flannel jacket, with a mask covering the lower portion of his face; and, the robber exited the Subway out of the same door into the alleyway. Furthermore, there was evidence the suspect ran to the west of the Subway in the alley, and subsequently discarded clothing items in a nearby garbage receptacle. In addition, a store employee was unable to identify the suspect because his face was masked at the time of the robbery.

¹¹ See *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 198, 668 P.2d 571 (1983) (juror’s improper visit to the accident scene did not require reversal where the juror’s personal observations were cumulative of numerous photographic exhibits properly admitted into evidence); *State v. Lemieux*, 75 Wn.2d 89, 90–91, 448 P.2d 943 (1968) (witness’s improper ex parte comments to the jury that he was the one who gave the police key evidence did not require a new trial because it was cumulative of his testimony).

Objectively viewed, the suspect's description remained the same before, during, and after the robbery when he entered the restaurant and exited into the alleyway to effectuate his escape.

The three interior videos of the Subway are clearer and much more particular than the fourth video. With regard to the three interior videos, one can draw a conclusion on jacket color and type, the robber's mask, collection of paper money and coins, the robber had on blue jeans, and the tennis shoes appeared to be a dark gray with red stripes. Ex. 22.¹² However, the fourth view of the robbery of the exterior of the Subway is of lesser quality, much more distant, and fails to establish more than the facts presented to the jury in the form of testimony and other admitted evidence. At the time of the motion for a new trial, the trial court remarked about the fourth video: "I don't even know that there was a way to identify [Mr. White]. It was a video of some feet, some shoes and some feet walking, and legs. You could see the -- you could see the side of -- of the individual." RP 394.

In particular, the fourth video shows approximately three seconds of an individual walking from afar in the dark. It does not show with any clarity the color or make of clothing other than the clothing is darker and the shoes

¹² Ex. 22 and D-101 have been designated for this Court's review.

appear white. Ex. 22. Moreover, it does not show the face of the individual, a mask, or the type or make of shoes. Ex. 22. In addition, the video does not display any facial features, hair or skin color, or like from which the individual could be identified. Finally, it does not establish the time or day when the video was taken and there is no indication of direction of travel or the location of any parking lot or vehicles. Ex. 22. In short, the fourth video offered nothing to the determination of Mr. White's culpability and there is nothing to support an assertion that he was prejudiced by it.

Notwithstanding that the trial court was unconvinced that the fourth video constituted new or novel evidence or whether the defendant was prejudiced; when viewed objectively, the defendant did not meet his burden to establish that the fourth video constitutes extrinsic evidence and that he was prejudiced. There was no strong, affirmative showing of jury misconduct by the introduction of a three second video comprised of inadequate detail and quality. The trial court's inability to so find was best expressed by its reliance on the rule of lenity.¹³

A discretionary decision is "manifestly unreasonable" or "based on untenable grounds" if it results from applying the wrong legal standard or

¹³ The rule of lenity is applicable to the rules of statutory construction. If a statute is ambiguous, the rule of lenity requires an appellate court to interpret the statute in favor of the defendant. *State v. Baker*, 194 Wn. App. 678, 684, 378 P.3d 243 (2016).

is unsupported by the record. *State v. Hampton*, 184 Wn.2d 656, 670, 361 P.3d 734 (2015), *cert. denied*, 136 S. Ct. 1718 (2016). Thus, application of the wrong legal standard equals an abuse of discretion. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). The trial court erred in granting a new trial.

2. *There was no evidence presented at the time of motion that the jury had even considered the fourth video. Even if it had, there is no evidence the jury did not follow the court's admonition not to consider it during deliberations.*

The jury was instructed during deliberations that if it had viewed the fourth video to disregard it and consider only the substituted D101 containing only footage from within the Subway store. There is no evidence to suggest the jury violated the court's instruction. An appellate court presumes jurors follow the trial court's instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

The court remarked it had no knowledge whether the jury watched the video. Even if the jury had watched the video, there is no evidence it did not follow the trial court's admonition not to consider the fourth video during deliberations. The defendant did not meet his burden to establish that he was so prejudiced that nothing short of a new trial would have preserved his right to a fair trial.

V. CONCLUSION

The State requests this Court reverse the order granting Mr. White a new trial and remand the case to the trial court for sentencing.

Dated this 20 day of January, 2017.

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

STATE OF WASHINGTON,

Appellant,

v.

STEVEN P. WHITE,

Respondent,

NO. 34523-8-III

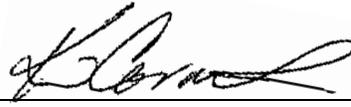
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 20, 2017, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

Susan M. Gasch
gaschlaw@msn.com

1/20/2017
(Date)

Spokane, WA
(Place)



(Signature)