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APR 28, 2017

Court of Appeals
Division III
State of Washington

No. 34523-8-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Appellant,

vs.

STEVEN PAUL WHITE,
Respondent.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Maryann C. Moreno, Judge

BRIEF OF RESPONDENT - AMENDED

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A. ISSUE IN RESPONSE

The trial court did not abuse its discretion in granting the motion for new trial, as it is reasonable to conclude the erroneous introduction of an unadmitted surveillance video undermining Mr. White’s defense may have affected the jury’s verdict and thereby prejudiced him.

B. COUNTERSTATEMENT OF THE CASE

The Subway sandwich store at 1103 West Northwest Boulevard, Spokane, Washington, was robbed in the early evening of December 2015. RP 110, 146–47, 205. The sole eyewitness was employee Ian Lovell. RP 109, 119. He described the robber as a 28-year-old white male wearing a green hoodie and a red mask covering all but his eyes, and not wearing gloves. RP 112, 121, 127–28, 132, 188. The robber instructed the employee to “give [him] everything out of the till.” RP 113. The suspect kept one hand in his pocket suggesting he had a weapon, which panicked the employee. RP 113–15, 118. The suspect touched the cash drawer when he took money out of it. RP 129.

Finding the north door locked, the suspect left out the west entrance, which opens out into the west parking lot of the store. The parking lot connects to the alley, which runs east and west. RP 116, 122, 147–48, 290–91. The employee didn’t know how the suspect arrived at

the store or in what direction he went once outside the door; or whether he left to the alley, to a car; or whether the robber was on foot or in a vehicle or with anyone else. RP 111, 132.

The employee's co-worker, Lauren Clausen, immediately locked the Subway doors, as was company protocol following a robbery. RP 122, 136, 138. When police arrived, at least the west side door was unlocked. RP 236.

Law enforcement focused their search north of the Subway store. RP 148. A few minutes later, Mr. White was picked up by police about five blocks away. RP 149–51, 163, 292, 297. They thought he was the suspect because of proximity to the store, he wore a hoodie, and attempted to hide his face. RP 149, 152–53. Within ten minutes of the theft, the employee was brought to the location to view Mr. White, who was standing in the car headlights. RP 130, 153, 186–87, 208–10. The employee said the man was not the robber and also that the robber was wearing a green hoodie, not a black one as Mr. White was wearing. RP 125, 131–32, 164, 175, 189–90, 210, 230. Mr. White is a 39-year-old male. RP 20, 188.

Officer David Stone, when asked if witnesses ever get descriptions right, answered, “never.” He indicated it is just as likely they’d get all the details wrong as maybe just one detail wrong. RP 193–95.

The eyewitness employee also testified the color on the video is not accurate and thus, while it may look dark in the video, he was very confident the suspect was wearing a green flannel hoodie and a red mask. RP 128.

Police found \$39.50 on Mr. White, including a roll of pennies in a wrapper. RP 183–84. The employee and his co-worker, who’d been in the back room on a break during the incident, were uncertain whether there had been rolls of coins in the till. RP 114, 120, 130, 133–34, 136–37, 140–43. The amount taken from the store was \$36.22, give or take a few pennies. RP 139–40. Law enforcement did not check fingerprints from the money till. The prints taken from one Subway door did not match those of Mr. White. RP 238–41, 242, 279.

The alley is located 100 feet away from the Subway store. 100 feet down into the alley from the parking lot’s west border, police found shoe prints in the snow similar to a name brand of shoes worn by Mr. White. RP 159, 161, 164, 167–68, 175–76, 214, 293. Officer Kurt Vigessaa, who voiced no training to determine which footprints in the snow are more

fresh than others in 30-degree weather, said these prints were “fresh” because he touched the snow. RP 151, 296–97. A number of police cars responding to the scene had travelled upon the first 100 feet of the alleyway. RP 292. Police did not check down the alley to the east of the Subway for any shoe prints that matched Mr. White’s prints. RP 164–65

Officer Nate Donaldson initially said the prints suggested someone was running because the gait length was “over four feet,” but admitted on cross-examination that if measured differently the gait length was only twenty-nine-“ish” inches, the distance of a walking gait. RP 215, 218, 225–26. On recall, Officer Vigesaa, again admitting he had no training, asserted, “No, that [twenty-nine inch distance is] a running gait.” RP 298–301.

The State presented no evidence of shoe size or whether Mt. White’s shoes matched the actual prints in the snow. There was conflicting evidence whether there was snow, ice or slush covering the store parking lot. RP 166, 214, 291. There was no evidence Mr. White’s shoe prints came away from the Subway store to the location where shoe prints similar to his were first found in the alley. This is a heavily-travelled alley and it contains hundreds of footprints. RP 213, 218–19, 227.

A discarded jacket that appeared to match one worn by the robber as observed in the store video was found about four blocks from the Subway in a yard waste container at 1524 West Indiana , but no weapon, coins, or the red mask were found in the alley. RP 179–80, 189, 219–20, 227, 262. No pictures were taken to document witnesses’ testimony the found shoe prints appeared to veer toward the container, and the pictures introduced as evidence show no veering towards the bin. RP 223, 225, 233; Exhibits P-16, P-17, P-18, P-20.

Officer Stone said the patch on the hood Mr. White was wearing when found was an exact match to the one visible in the surveillance video. RP 175, 179. During cross-examination, Officer Matthew Stewart stated the patch visible on the hoodie in the video instead “could be” a different patch, such as the one being shown to him by defense counsel. RP 257–59, 262–63.

The jury heard evidence the Subway store had been robbed earlier in the week and again after this incident. RP 112–13, 128–29, 143–44.

At the time of trial, Officer Stone stated he had not been told early in the investigation there was a surveillance camera that faced the west parking lot and alley.

Q: And how many videos were there?

A. I'm not 100 percent positive. We just saw one, and then Corporal Spiering took care of putting the rest of the videos onto property.

Q. Did you watch a video from -- that faces outside the store?

A. No, sir.

Q. Were you told that there was one that was facing outside the store?

A. Not at that time, sir.

Q. You were told later that there was one that was outside the store?

A. I don't know if there was. I know they had security footage all over, sir. The one I just viewed was the one of the -- looking towards the customer.

Q. So you don't know whether or not they have a surveillance camera that points to the west parking lot and the alley?

A. No, sir.

RP 192. Corporal Nathan Spiering acknowledged during cross-examination there was a surveillance video which captured the parking lot area.

Q. What videos did you review with the store manager?

A. The surveillance videos. There were several different angles: over the till, behind the till, from behind the -- or in front of the counter area. So there's several different angles.

Q. There's those three. Is there one more --

A. And then outside. There's an outside parking lot one as well.

RP 243.

Procedural history.

Trial began April 26, 2016. RP 86, 91. During pre-trial motions in limine, the trial court and the parties discussed four surveillance videos from the Subway store: three angles which depicted the robbery from

inside the store and a fourth camera angle which depicted the exterior of the Subway and its parking lot during and after the robbery. RP 31–35. Defense counsel objected on authentication and chain of custody grounds, and asserted particularly with respect to the fourth video that the Subway employee as the proposed chain of custody witness had no particular knowledge of the contents of that video. RP 33–35.

After further argument, the deputy prosecutor advised the court he did not intend to show the contents of the exterior video. RP 35. Relying on this representation, defense counsel withdrew his objection to the three inside video angles provided the State set a proper foundation for their admission during trial. RP 35.

During trial, a DVD disc (Exhibit P-22) was admitted without objection, depicting the three different camera angles of the robbery from within the Subway restaurant. According to a witness the three angles depicted (1) looking at the front counter where the till is; (2) looking from the camera over the entrance toward the cash register; and (3) looking out over the counter from behind the food “line” (bar). The three video tracks were played and were introduced to the jury as “first track,” “next view,” and “third view,” respectively. RP 119–24.

The defense theory was general lack of identification and it encompassed lack of good investigative work, including the state's failure to produce an outside video that could show where the robber went after leaving the store. During closing argument and regarding the Subway surveillance video, the defense attorney asserted in part:

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 the DVD-disc (Exhibit P-22) inadvertently also contained the fourth view of the restaurant exterior/parking lot, which was not admitted at trial. As summarized by the court,

The jury requested to -- to watch P-22. Gina, the J[udicial] A[ssistant], 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.

RP 371–72. The jurors asked the judicial assistant if they would be able to view the exhibit again. RP 378.

Defense counsel made a motion for dismissal, alleging the State was negligent in providing unadmitted evidence that unfairly and directly conflicted with counsel’s theory of the case or, alternatively, because a limiting instruction would call attention to prejudicial evidence whether viewed or not. RP 372–74. The State reversed its initial opposition to a limiting instruction. RP 372, 374–75.

The court noted that to address this particular problem in a limiting instruction, “I’d have to specifically tell them what I’m talking about. So I’d have to be telling them it’s P-22, it’s a DVD, and it had four tracks on it.” RP 375. Ultimately, the court instructed the jury as follows:

THE COURT: It’s also 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 379.¹

During deliberations, the jury asked the court to “reword or clarify the meaning ... in more layman’s terms” of the elements listed in the “to convict” instruction for second degree robbery. RP 369. The jury also asked to “view a transcript” of the eyewitness employee’s testimony. RP 382. The jury subsequently convicted Mr. White of second degree robbery. RP 383.

Before sentencing, Mr. White renewed the motion to dismiss and also filed a motion for new trial. CP 58–61; RP 390–91.

During discussion, “[t]he 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.”

Brief of Appellant, p. 13.

Defense counsel stated, “ultimately it’s just about whether ... Mr. White received a fair trial.” RP 391. Actually viewing the unadmitted evidence undermines and is “directly adverse to the theory ... we’ve ...

offered to the jury, that my client was in fact not in that alley [by] show[ing] an individual going to the alley about the same time that perhaps the perpetrator would” have gone. RP 391. The prejudice arises because “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 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, he did provide it; here it is; we’ve seen it; and there he is walking back in the alley.’ It undermines ... the arguments that we made based on the theory that we had.” RP 393.

In response to the court’s query as to content of the unadmitted track, defense counsel responded, “You could see the side of the defendant. [I]t’s no less unidentifiable than the video that [the jury] ended up identifying him on, which were the other three. He’s not identifiable in

¹ “D-101,” which was substituted for P-22 and provided to the jury after the court’s instruction, contained the previously admitted videos from within the store.

those either. But if someone were to actually look at the times as the video was going – and they’re on there. So ... if someone ... is aware of that they should be looking for, they can see someone come in ... 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.” RP 394.

The State agreed that the unadmitted video has a date/time stamp on it. RP 396.

The court asked whether the unadmitted video was identifiable on the laptop as portraying the parking lot of the Subway. The State responded it “[d]idn’t say like ‘parking lot’ or anything like that.” Defense counsel thought it said, “Outside.” CP 396–97. When the actual exhibit is opened on a laptop, the fourth track is labeled on the computer screen as, “Outside back door 7658 Outside 1.” *See* P-22.

After hearing argument, the trial court granted Mr. White’s motion for a new trial, 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 Vigesaa 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 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. The State appealed. CP 88–89.

C. ARGUMENT IN RESPONSE

The trial court did not abuse its discretion in granting the motion for new trial, as it is reasonable to conclude the erroneous introduction of an unadmitted surveillance video undermining Mr. White's defense may have affected the jury's verdict and thereby prejudiced him.

1. Standard of review.

The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion.

State v. Hager, 171 Wn.2d 151, 156, 248 P.3d 512 (2011).

A trial court's wide discretion in deciding whether or not to grant a new trial stems from “the oft repeated observation that the trial judge who

has seen and heard the witnesses is in a better position to evaluate and adjudicate than can we from a cold, printed record.” *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). Washington courts have given even greater discretion to decisions to grant a new trial. *State v. Brent*, 30 Wn.2d 286, 290, 191 P.2d 682 (1948) (“[A] much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial.”). “This policy makes sense, as trial courts have a strong interest in preserving the finality of their judgments as well as preventing their dockets from becoming overcrowded with meritless retrials.” *State v. Hawkins*, 181 Wn.2d 170, 180, 332 P.3d 408, 412 (2014), *as amended* (Sept. 30, 2014).

Whether jurors are guilty of misconduct is a factual question; the trial court's finding will not be disturbed except for an abuse of discretion clearly shown. *State v. Young*, 89 Wn.2d 613, 630, 574 P.2d 1171, *cert. denied* 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). Thus, in order for this court to reverse the trial court's order for a new trial, the State must convince this court that no other judge would have ruled as the trial court ruled.

2. A jury's consideration of prejudicial evidence not admitted at trial violates a criminal defendant's constitutional right to trial by a fair

and impartial jury.

A criminal defendant's right to trial by an impartial jury is guaranteed by federal² and state³ constitutional provisions as well as Washington statutory law⁴ and court rule.⁵ A criminal defendant's federal and state constitutional right to due process also ensures the right to a fair trial.⁶ The constitutional right to trial by impartial jury includes the right to an unbiased and unprejudiced jury. *State v. Stiltner*, 80 Wn.2d 47, 53, 491 P.2d 1043 (1971).

“[A jury's] verdict must be based upon the evidence developed at the trial.” *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). This requirement “goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” *Id.* Thus “[i]t is error to submit evidence to the jury that has not been admitted

² Article III, section 2 of the United States Constitution provides, “The Trial of all Crimes . . . shall be by jury . . .” The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .” See *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment right to jury trial is incorporated into Fourteenth Amendment and, consequently, is applicable in state criminal prosecutions).

³ Article 1, section 21 of the Washington Constitution provides, “The right of trial by jury shall remain inviolate . . .” Article 1, section 22 of the Washington Constitution provides, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . .”

⁴ RCW 10.01.060 (right to jury trial, which may be waived).

⁵ CrR 6.1(a) (right to trial by jury, unless waived).

⁶ U.S. Const. amend. 14; Const. art. 1, §§ 3, 22.

at trial.” *In re Pers. Restraint Petition of Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012); *see also State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (where the jury considers material extrinsic evidence during the deliberation process, the jury commits misconduct and the defendant’s constitutional right to trial by a fair and impartial jury is compromised). Extrinsic evidence is "information that is outside all the evidence admitted at trial." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014 (1991). Extrinsic evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); *Pete*, 152 Wn.2d at 553. It is also improper because it bypasses the rules of evidence.

The surveillance video of the exterior of the Subway store was improperly submitted to the jury. Track 4 on Exhibit P-22 was never offered or admitted. The video was not subjected to the rules of evidence or objection by Mr. White. The item was extrinsic evidence and it was error to submit it to the jury. *PRP of Glasmann*, 175 Wn.2d at 705. *See Pete*, 152 Wn.2d at 544-55 (receipt of unadmitted written statement by defendant and police report improper); *State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (receipt of unadmitted newspaper editorial and

cartoon improper); *State v. Smith*, 55 Wn.2d 482, 484, 348 P.2d 417 (1960) (receipt of alias on jury instructions and forms improper as alias deemed inadmissible); *State v. Boggs*, 33 Wn.2d 921, 925–26, 207 P.2d 743 (1949) (receipt of unadmitted gun and bullets improper) (*overruled on other grounds* by *State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980)).

3. It is reasonable to believe Mr. White may have been prejudiced by the jury's consideration of inadmissible extrinsic evidence; thus, a new trial is required.

Once juror misconduct is established, prejudice to Mr. White is presumed. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740. *review denied*, 158 Wn.2d 1011 (2006). To overcome this presumption, the State must satisfy the trial court that it is unreasonable to believe the misconduct could have affected the verdict. *Boling*, 131 Wn. App. at 332. A new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. *State v. Briggs*, 55 Wn. App. 44, 55–56, 776 P.2d 1347 (1989). The court must make an objective inquiry, asking whether the evidence could have affected the jury's decision, not whether the evidence did in fact affect the decision; the actual effect of the extrinsic evidence on the jurors' decision inheres in the verdict. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. at 273. The

effect of the extrinsic evidence should be evaluated in light of all the facts and circumstances of the trial. *State v. Tigano*. 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). Any doubt that the misconduct affected the verdict must be resolved against the verdict. *Briggs*, 55 Wn. App. at 55.

The State claims the jury's consideration of the outside video 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." Brief of Appellant, p. 20. "Cumulative evidence" has been defined as: "additional or corroborative evidence to the same point. That which goes to prove what has already been established by other evidence." Black's Law Dictionary 343 (5th ed.1979). The appearance of the robber inside the store was but one component of the charge presented to the jury for resolution, and the outside video was not cumulative evidence.

The defense theory was general lack of identification, based in part on lack of evidence including no eyewitness identification or matching finger prints on several Subway doors or on a container in the alley with discarded clothing or shoe prints attributable only to Mr. White, or any trail of shoe prints leading from the Subway store through the parking lot

and then 100 feet into the alley to a location where Mr. White's alleged shoe prints first appeared. The theory encompassed lack of good investigative work, including the state's failure to search the alley in the opposite direction or to produce an outside video that could show where the robber went after leaving the store. Defense counsel vigorously asserted this theory throughout closing argument, based on the evidence developed at trial that did *not* include the outside video. RP 336–60. *See Turner v. Louisiana*, 379 U.S. at 472; *see also State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576, 580 (2010) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.”) (citation omitted).

In her oral ruling on the motion for new trial, the trial judge considered the evidence and theories presented at trial. RP 399–401. The court particularly noted inconclusiveness of the inside videos to establish identity, jury awareness that an outside video existed but it wasn't shown to them, the proffered argument there was no evidence to show what happened when the robbery suspect went out the door and which direction he went, and the gap in evidence from that point to where Mr. White was ultimately seen in the alley. *Id.* In discussion, the parties had agreed the unadmitted video had a date/time stamp on it (RP 394, 396); defense

counsel believed comparison of the date/time stamps would indicate the person on the unadmitted video was the same suspect shown on the inside videos (RP 394); and the court correctly recalled that Exhibit P-22 labels the unadmitted video, Track 4, as depicting the outside area of the Subway store. RP 396–97; *see* P-22.

The trial court’s inquiry was objective, asking whether the outside video *could* have affected the jury’s decision, not whether the evidence did in fact affect the decision. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. at 273. Extrinsic evidence is evaluated in light of all the facts and circumstances of the trial. *Tigano*, 63 Wn. App. at 342. The State argues the outside video establishes the suspect “exited into the alleyway”—an alley which the record instead puts well beyond the door leading outside—and at the same time claims the video indicates no direction of travel or location of any parking lot or any vehicles. Brief of Appellant, pp. 21–22. The State disregards that defense counsel developed and pursued a theory there was a gap in evidence connecting events depicted inside the Subway store to physical evidence found a distance away in the alley. The court correctly understood it was the jury’s role to determine what the video depicted or whether or not whoever was in the outside video fit the description of the person later arrested. RP 401. The trial judge, who saw

and heard the witnesses and evidence or lack of evidence and was in a better position to evaluate and adjudge than a reviewing court, determined the unadmitted outside video was in sharp contrast with the theory developed by the defense theory and reasonably may have contributed to the verdict.

Broadly speaking, the rule of lenity is based on some measure of doubt. Trial courts have a strong interest in preserving the finality of their judgments as well as preventing their dockets from becoming overcrowded with meritless retrials.” *Hawkins*, 181 Wn.2d at 180. To overcome the presumption of prejudice, the State must satisfy the trial court that it is unreasonable to believe the misconduct could have affected the verdict. *Boling*, 131 Wn. App. at 332. The State failed to do so. The trial court could not conclude beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict and stated it “prefer[red] to err on the side of caution and do this [trial] over again.” RP 401; *Briggs*, 55 Wn. App. at 55–56. Based on its evaluation of the facts and circumstances of Mr. White’s trial, the court did not abuse its wide discretion. The order granting a new trial should be affirmed.

4. No curative instruction could have dispelled the taint from the improper submission of prejudicial evidence.

In *Pete*, a curative instruction was given to the jury by the bailiff, who “instructed the jurors to disregard the unadmitted documents during their deliberations.” *Pete*, 152 Wn.2d at 551. The Supreme Court held that this did not “mitigate the harmfulness of the error,” and further commented, “[e]ven if the trial court had given the instruction, which would be the appropriate practice, the same can be said.” *Id.* at 555.

Here, likewise, this Court should hold that the curative instruction given by the trial court could not have dispelled the taint from the unadmitted evidence. The Supreme Court recognizes that in some instances, a curative instruction is incapable of dispelling the taint from improper remarks and evidence. *PRP of Glasmann*, 175 Wn.2d at 707.

While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

As the Fifth Circuit colorfully analogized, “one ‘cannot un-ring a bell’; ‘after the thrust of the saber it is difficult to say forget the wound’; and finally, ‘if you throw a skunk into the jury box, you can’t instruct the

jury not to smell it’.” *United States v. Dunn*, 307 F.3d 883, 886 (5th Cir. 1962) (citations omitted).

Equally disconcerting, under the circumstances of the case the court’s instruction was meaningless. The court stated, “this DVD contained a track that was not admitted at trial. So your instructions are to disregard from your consideration and deliberation that track that was not admitted at trial.” RP 379.

The jury would have had no idea which track the court was referring to. The jury was not privy to the pre-trial discussion about three inside videos and one outside video. Admission of the DVD followed foundational questions indicating only one video: “Have you had a chance to review the video surveillance before testifying today;” Did that accurately reflect what you saw that evening at the Subway store;” and “Sir, how do you know that’s the video that you reviewed prior to testifying today?” RP 120. The three videos played for the jury were introduced simply as “first track,” “next view,” and “third view,” respectively. RP 119–24. The situation here is far different than a witness testifying to something that the court later excludes or an unadmitted gun being sent back to the jury and later retrieved, followed by instructions to disregard the identified testimony or physical object. Under the

circumstance of this case, one cannot reasonably conclude telling the jurors to disregard an “unadmitted track” mitigated the harmfulness of the error. *Pete*, 152 Wn.2d at 551.

5. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have similar broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s

age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. White is 40 years old and has an eleventh grade education. CP 14, 15. The court found Mr. White indigent for purposes of responding to this appeal. Suppl CP 93—____.⁷ In light of Mr. White’s indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”⁸ this

⁷ Counsel is filing a supplemental designation of clerk’s papers and anticipates the numbering of the motion and order of indigency will begin with “CP 93.

⁸ *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

court should exercise its discretion to waive appellate costs.⁹ RCW 10.73.160(1).

D. CONCLUSION

For the reasons stated, Mr. White requests this Court to affirm the trial court's order granting a new trial.

Respectfully submitted on April 27, 2017.

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⁹ Appellate counsel anticipates filing a report as to Mr. White's continued indigency no later than 60 days following the filing of this brief.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 27, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of respondent - amended:

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GASCH LAW OFFICE
April 27, 2017 - 6:20 PM
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Comments:

amended to add last issue

Proof of service is attached and an email service by agreement has been made to SCPAAppeals@spokanecounty.org.

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