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NO. 36406-2-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

JESSE LEE CRISWELL, APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRANT COUNTY

Superior Court Cause No. 16-1-00326-8

The Honorable John M. Antosz, Judge

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR¹

- A. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO ADMIT AS SUBSTANTIVE EVIDENCE UNDER THE RECORDED RECOLLECTION EXCEPTION TO THE HEARSAY RULE THE TRANSCRIPT OF A DEFENSE INTERVIEW WITH A JUROR HELD TEN MONTHS AFTER TRIAL AND AFTER THE APPELLANT'S MOTHER DISCUSSED THE CASE WITH THE JUROR, WHEN THE JUROR'S ASSERTIONS IN THE DEFENSE INTERVIEW WERE INTERNALLY INCONSISTENT AND VARIED SIGNIFICANTLY FROM CLAIMS IN THE JUROR'S AFFIDAVIT FILED THREE WEEKS EARLIER AND WHEN THE JUROR'S TESTIMONY AT A REFERENCE HEARING HELD FOUR MONTHS AFTER THE INTERVIEW DIFFERED SIGNIFICANTLY FROM BOTH THE INTERVIEW AND THE AFFIDAVIT? (Assignment of Error No. 1).
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¹ Appellant identifies four issues at the beginning of his brief but conflates issues three and four in his argument. For consistency, the State follows the organizational structure of the body of the brief and combines issues three and four in its statement of issues.

II. STATEMENT OF THE CASE²

On July 27, 2017, a Grant County jury found Jesse Lee Criswell guilty of two counts of forgery, RCW 9A.60.020, and one count of theft in the third degree, RCW 9A.56.050. CP at 11. Criswell had been charged with possessing or putting off as true ten \$50 bills known to be forged. CP at 001. Trial evidence included surveillance video of Criswell purchasing various items from a local business with ten \$50 bills and testimony that the business had taken in ten counterfeit \$50 bills during the time in which Criswell made his purchases. *State v. Criswell*, 6 Wn. App. 2d 1043, 1, 35581-1-III (2018).³

Trial was before the Honorable John M. Antosz, who sentenced Criswell on September 18, 2017. CP at 25. Criswell filed a notice of appeal that day, CP at 32, and on December 18, 2018, this Court rejected his challenge to the jury's verdict based on juror bias. *Ibid*. In his Statement of Additional Grounds in that appeal, Criswell alleged a juror knew him, had "engaged in an intimate relationship with Criswell's

² The record in this case consists of a single, sequentially paginated Verbatim Transcript of Proceedings from Electronic Recording of four brief hearings in this matter, prepared by Kenneth C. Beck and cited as TP (Hearing Date) ____; a Verbatim Report of Proceedings of the September 19, 2018 reference hearing prepared by Tom R. Bartunek, cited as RP ____; and Clerks Papers, cited as CP at ____.

³ The State cites to this unpublished case, not as legal authority, but as evidence of the facts in this case. *Cf. Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wash.2d 835, 839 & n. 4, 64 P.3d 15 (2003) (citing to unpublished opinion not as precedent but instead because it had influenced the proceedings below).

girlfriend and the two men [had] suffered uncordial interactions since.” *Id.* at 2. This Court noted there were no facts in the record supporting Criswell’s allegation and suggested Criswell bring the matter back in a personal restraint petition after supplementing the record. *Id.*

Criswell had brought the matter back before the Grant County Superior Court before this Court issued its opinion on direct appeal. On May 8, 2018, Criswell filed in Grant County Superior Court the notarized Affidavit of Melvin Harrell, the juror with whom Criswell had a relationship prior to trial. CP at 53–54. Three weeks later, on May 30, 2018, Criswell filed a motion for relief from judgment under CrR 7.8, combined with a motion for new trial under CrR 7.5. CP at 55–62. The pleadings appended Harrell’s affidavit as Appendix A. CP at 63–65.

Appendix B to Criswell’s motion was the transcript of a May 25, 2018 interview of Harrell conducted at a Union 76 gas station in Grand Coulee, Washington by defense investigator Ellyn Berg (the Berg-Harrell interview). CP at 66–80. Berg’s first question after obtaining Harrell’s permission to record was whether Harrell personally knew Criswell, referring to him as “Jesse.” CP at 69. Harrell told Berg he did not know Criswell at all. CP at 69–70. He said during a lunch break on the first day of trial he got a call from someone seeking a ride and had told the caller he was in court in Ephrata. CP at 70. The caller then told Harrell the

defendant “must be Jenny’s boyfriend, Jesse.” CP at 70. Harrell replied to the caller there was a guy by the name of Jesse, explaining to Berg “I didn’t know who he was, you know?” CP at 70.

Harrell told Berg Jenny complained she and Criswell “were always arguing and fighting among themselves[.]” CP at 71. Harrell then repeated: “I didn’t know who he was, you know.” CP at 70. Berg asked whether knowing Jenny or knowing about Criswell impacted Harrell as a juror and whether it made him think any differently. CP at 71. Harrell answered he did not like the idea because of Jenny’s complaining, but because he had hung up after learning Criswell’s identity, he did not know anything more. CP at 72.

When Berg followed up asking whether he maybe had a mental picture of Criswell that was not favorable, Harrell said he did not really care about that. CP at 72. He then volunteered that during deliberations he had questioned the State’s evidence, implying he stood up for Criswell at some point, then told Berg he found some of the State’s evidence questionable. CP at 72–73. Berg asked whether he thought at the time of deliberations the State gave enough evidence to convict, and Harrell said: “No, no.” CP at 73. He told Berg about how he did not agree with the rest of the jurors about the strength of the State’s case and went into some detail on issues that had bothered him during deliberations. CP at 72–73.

Harrell denied that knowing who Criswell was played any part in his assessment of the State's case. CP at 74.

Berg asked whether Harrell still had doubts about Jesse's guilt, asking: "Did knowing Jesse or knowing who Jesse was, did that play any part into your thought that the State's case wasn't very good?" CP at 74. Harrell replied: "No, I didn't know him." CP at 74. He said he had never seen Criswell before and "didn't know who the hell he was." CP at 74.

Berg continued to push: "So, did knowing Jenny and what she'd said about Jesse, did that have any impact on the way you voted in the jury room?" CP at 75. Harrell equivocated: "Well, in a way. From what Jenny had mentioned about he's or the arguing going on all the time, I said he's kind of an asshole, you know, but I didn't really care about that much of it, you know." CP at 75. Berg pressed: "So, it sounds like it did sway you a little bit?" and Harrell said: "Yeah, it did." CP at 75.

When Berg asked about the affidavit Criswell filed, Harrell told her Criswell's mother contacted him but that he did not know her relationship to Criswell at the time. CP at 76. He said the person who contacted him told him "about what was going on" and he subsequently volunteered to make a statement. CP at 76. Berg asked, and he agreed, that the statement contained his words and his thoughts and that nobody influenced him to make the statement. CP at 76.

Berg asked whether there was a lot of pressure in the jury room to “just to get this thing done and get out of there”, and Harrell replied: “No, no pressure. It was just sittin’ there listening to what, you know, make up your mind what’s right or what’s wrong, you know.” CP at 77. Berg responded by asking whether he wished he had voted differently and Harrell said he thought he would have held out, that he “wouldn’t have went along with them.” CP at 77. He went on, telling Berg why he thought the clerk who took the phony bills did not undertake a proper examination of the currency, and Berg interrupted: “Yeah, yeah. I’ve always wondered about being on a jury how many, how some people are so easily persuaded, like I know I can be easily persuaded. I probably wouldn’t make a good juror, so.” CP at 78. After discussing a recent, unrelated, spate of phony bills, Harrell again criticized the store clerk’s bill-checking failures in Criswell’s case, and the conversation ended. CP at 79.

During an August 14, 2018 hearing before Judge Antosz, TP (8/14/18) 8, addressing issues anticipated in the upcoming reference hearing, defense counsel conceded the court was not to consider a juror’s own affidavit concerning the effect any irregularity may have had on the verdict. TP (8/14/18) 10. During that hearing, Judge Antosz confirmed Criswell’s request for a reference hearing was to determine whether Harrell’s position on the jury created a situation whereby the trial was

unfair, and was not to explore Harrell's specific thought processes during deliberations. TP (8/14/18) 19. The court agreed with the State that the real question was how biased Harrell may have been against Criswell, and whether, when viewed objectively, Criswell was denied a fair trial. TP (8/14/18) 21.

After further discussion, and to assist counsel for both sides in preparing for the reference hearing, Judge Antosz raised concerns about Berg's interview. TP (8/14/18) 27. It was the court's impression Harrell "was saying whatever the questioner wanted to hear - - at different points." TP (8/14/18) 28. The court noted Harrell twice denied he was affected by knowing Criswell, "and then the third time, 'Well, yeah, it did.' And - - maybe - - some people just try to give answers just to please whoever's asking the question." TP (8/14/18) 28. The court also took note that after trial Harrell had read something in a newspaper about counterfeit bills and wondered whether Harrell's statement about bias was that after learning certain things after trial, "he had some remorse, maybe, over his verdict based on what he found out afterwards." TP (8/14/18) 27-28. The court also observed Criswell's mother may have contacted Harrell before the Berg interview. TP (8/14/18) 28. Defense counsel admitted it was improbable that Harrell had looked him up and made contact without some type of request or nudge from somebody else. TP (8/14/18) 28.

Counsel told the court Harrell claimed “Criswell’s mother somehow prompted him to do the original affidavit.” TP (8/14/18) 29.

The reference hearing, again before Judge Antosz, was September 19, 2018, almost 14 months after trial. RP 1. Harrell was 77 years old. RP 18. Before testifying, Harrell told the court he was in pain from a recently cracked rib he suffered after falling over a stool in the middle of the night. RP 5. He assured the court he had not taken any pain medication that day and was relying on ice packs so he could “just come down here and get this over with and get back home . . .”. He said the pain did not impair his memory, his ability to understand, or his ability to talk to the court. RP 6. He told the court he had trouble remembering things, like where he put his keys and papers, and about having forgotten two checks from Bank of America he received four or five years earlier and only recently rediscovered. RP 19.

Harrell explained how it was he failed to realize during voir dire that he knew who Criswell was. RP 8. He could not, however, remember a number of significant details, including whether Criswell had ever been at his house. RP 8. He explained people visited all the time and, while visiting, talked about other people, with names being “thrown around” as he sat at his chair “watching TV about half drunk,” only halfway paying attention to what was going on. RP 8–9. He said at trial he heard

Criswell's name again and "kind of remembered that I heard that name before." RP 9. He did not remember where he heard it. RP 9. He did not remember receiving a call from someone on the first day of trial. RP 9. He did not remember writing and signing an affidavit, although he did acknowledge he had done so. RP 9. He told the court he did not remember what the affidavit was about, except that he "was telling exactly the way I thought, what I remember when the case was going on." RP 9.

Shown a copy of the affidavit, Harrell denied he had ever seen it before, although he recognized his signature. RP 12. He did not remember signing anything in front of a notary. RP 13. He had no recollection of anyone coming to him to discuss preparing an affidavit about what happened at trial. RP 13. When asked whether he was "quite sure" the signature on the affidavit was his, all Harrell could say was: "Yeah, it looks like mine." RP 13. Harrell did not remember whether he was the person who typed the affidavit and repeated he did not remember signing it. RP 14. He said again he did not remember ever having seen the affidavit. RP 14.

Noting the arguable relevance conferred by Harrell's recognition of his signature, the court still found the affidavit's relevance questionable. RP 15. The court provisionally admitted the affidavit, RP 17, based on defense counsel's assertion he might later call the notary or some other

witness able to confirm Harrell signed it. RP 16.

Defense counsel asked Harrell whether he knew Criswell, who was seated in the courtroom during the reference hearing. RP 17–18. Harrell answered he did, but could not remember whether he had met Criswell before trial. RP 18.

Harrell did remember talking to a lady in Grand Coulee but did not remember her name or where they met until defense counsel said her name and mentioned the Union 76 gas station. RP 20–21. Harrell did not remember the conversation. RP 21. Defense counsel then said: “so by the end of the trial, you realized that you did know who Mr. Criswell was?” and Harrell responded: “Yeah, at the end of the day, it kind of came back to my mind and I kind of remembered.” RP 21. He said he did not think about telling the court and did not understand at the time that he should have. RP 22. He could not remember whether his relationship with Criswell was good or bad. RP 22. He could not remember “negative impressions.” RP 22.

Defense counsel asked whether Harrell’s friendship with Criswell’s girlfriend, Jenny, prevented him from being able to reach a fair and impartial decision at trial and Harrell replied his friendship with Jenny had nothing to do with his decision, as best he could remember. RP 22–23. He then said he could not remember whether the friendship had affected

his decision. RP 23.

Harrell's recollection at the reference hearing of how he realized during trial that he knew Criswell differed from his earlier statement to Berg. At the reference hearing, he recalled that towards the end of the trial, after it was all over,

that in the back of my mind, I remember hearing the name, and I kind of put two and two together, and I said, well, that's who - - that's Jenny's old boyfriend. I remember that. I remember thinking that. But I didn't think nothing else about it after that. It didn't make what I thought about during trial, it didn't make any difference to me.

RP 24. Harrell testified he did not feel he was influenced in any way by anything outside the trial. RP 28. "The only thing that influenced me, what was going on in there [the jury room]." RP 28.

In response to a question from the court, Harrell confirmed he was able to read and understand what was on the May 7 affidavit. RP 29. He then volunteered to the court that he lived in Grand Coulee all his life, that everybody there knows him, and that he sees "thousands of people" and cannot remember who they are. RP 31.

Ellyn Berg testified Harrell had no difficulty remembering his service as a juror when she met with him four months earlier. RP 33. She recounted, over the State's hearsay objection, the ease with which Harrell had recalled the events of the day of trial, how he had figured out Criswell

was Jenny's boyfriend from putting two and two together after a call he received during trial from another Grand Coulee resident, and how he had no difficulty answering her questions promptly. RP 41. Berg said Harrell recognized and acknowledged his affidavit. RP 45.

Criswell testified that before the trial, he had never met Harrell in person but that about eight months earlier he had seen him and, in Criswell's opinion, Harrell was the source of problems between Criswell and Jenny. RP 48. He said he and Harrell had argued over the telephone a couple of times because Jenny frequently went to Harrell's house with a girlfriend to get drunk. RP 48. He said the conversations were not hostile, but they were not friendly. RP 49. They were argumentative. RP 49. Criswell had not recognized Harrell at trial. RP 50. The court admitted Criswell's Statement of Additional Grounds (SAG) filed with this Court, then questioned Criswell concerning assertions made in that document. RP 51-52. Criswell said his appellate attorney told him he would need evidence to support the allegations in his SAG and that it would be okay for Criswell to send someone to ask Harrell to make a statement. RP 52-53. Criswell did not know who wrote Harrell's affidavit. RP 53.

Before closing argument, the court admitted the transcript of the Berg-Harrell interview for impeachment only, and not for substantive purposes. RP 54. Criswell asserted it should be admitted as a recorded

recollection under ER 803(a)(5), based on Berg's testimony that Harrell had no difficulty four months earlier remembering trial events. RP 57. Criswell argued either Harrell was lying earlier that day in court or that he really did not remember, noting a failure to remember was plausible because Harrell had no motive to lie. RP 58. Criswell reminded the court Harrell was in a lot of pain during the reference hearing. RP 58.

The State countered that the Berg-Harrell transcript failed to meet two of the four of the foundation requirements of ER 803(a)(5), that the record was made or adopted when the matter was still fresh in the witness' memory and that it accurately reflected the witness' prior knowledge. RP 61. The May 25, 2018 interview took place ten months after the July 2017 trial, after Harrell had been "infected" by outside influences, including having seen a newspaper article. RP 61. The court agreed that the last two foundational requirements were lacking, pointing out there was no testimony from Harrell that the facts of what happened at trial were fresh in his memory when Berg interviewed him. RP 62–63.

In closing, the State argued the affidavit should be afforded very light weight, having been prepared and shepherded by Criswell's allies. RP 66. The State argued Harrell appeared vulnerable to outside influence and that the court had not heard from whomever prepared the affidavit. RP 66. The affidavit itself was contradicted and impeached by the Berg

interview, in which Harrell said he did not really care about the negative things Jenny said about Criswell. RP 66. Harrell also said during the Berg interview that knowing who Criswell was had not played any part in his assessment of the evidence, and that Harrell stated: “No, I didn’t know him.” RP 66.

Agreeing Harrell should have notified the court during trial that he knew who Criswell was, the State summarized: (1) there was no evidence Harrell had ever believed in his own mind he could not set the relationship aside and be a fair juror; (2) had Harrell disclosed his relationship with Criswell during voir dire, his stated belief that he could still be fair would have precluded dismissal for cause and that nothing presented in the hearing changed that; (3) someone, probably Criswell’s mother, had clearly influenced the facts recited in Harrell’s affidavit, facts contradicted by Harrell in his interview with Berg less than three weeks later; and (4) Harrell had just testified his relationship with Criswell did not have an effect on his verdict. RP 67–68.

Before announcing its ruling, the court distinguished a motion for relief from judgment under CrR 7.8 from a motion for new trial under CrR 7.5(a)(2), noting that the term “juror misconduct” is mentioned only in the latter as grounds for relief. RP 69. The court cited a number of cases it reviewed for various points of law when making its determination. Among

these were: *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 806–07, 425 P.3d 807 (2018) (on the question of whether dismissing a juror provides grounds for appeal); *State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2001) (where a juror deliberately withheld information during voir dire); *State v. Boiko*, 138 Wn. App. 257, 156 P.3d 934 (2014) (concerning implied bias warranting new trial from juror’s various relationships with the prosecuting attorney’s office); *State v. Magney*, 186 Wn. App. 1016, unpublished, (2015) (court’s investigation into possible juror bias was adequate); *State v. Balisok*, 123 Wn.2d 114, 866 P.2d 631 (2012) (a strong affirmative showing of juror misconduct is required to overcome policy favoring stable, certain verdicts); *State v. Perez*, 166 Wn. App. 55, 269 P.3d 372 (2012) (76 year old Grant County juror’s failure to disclose possible knowledge of defendant and scant information juror did have about defendant insufficient to influence juror or warrant new trial); and *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1997) (no reversible error when regular juror mistakenly replaced with alternate). RP 70–72.

The court also quoted RCW 4.44.170, describing bias as “a state of mind on the part of the juror in reference to the action . . . which satisfies the court that the challenged person cannot try the issue impartially and without prejudice[;]” and RCW 4.44.190, providing that in challenges for

actual cause “the court has to be satisfied that the juror cannot disregard an opinion that they might have and try the case impartially.” RP 72–73.

The court explained the circumstances here fit within the category of misconduct and that implied bias did not apply, so what remained was whether Criswell had demonstrated actual bias. RP 74. Before addressing actual bias, the court found this case unique in that no one alleged Harrell was dishonest in voir dire, only that “when he found out that he might have known of the defendant, then he should have spoken up.” RP 75. Court then asked “is there any actual bias on behalf of Mr. Harrell or would he have been able to set aside any potential bias.” RP 75.

Judge Antosz stated the standard for his analysis was whether he would have excused Harrell for cause had Harrell divulged his relationship with Criswell during voir dire. RP 75. Before answering that question, the court recognized “someone in the defendant’s camp” presented Harrell’s affidavit to him. RP 76. The court found the affidavit stark, without a lot of detail: “It doesn’t have a lot of meat on its bones.” RP 76. Reading portions of the Berg-Harrell interview transcript, the court observed one might argue Berg was pressing Harrell or asking leading questions. RP 77. The court also remarked Harrell’s response about the impact of Jenny’s statements on Harrell’s verdict differed from what he initially said. RP 78. The court found it interesting that during the hearing, Harrell could

remember specific detail about jury deliberations but not about other matters. RP 79. The court also considered that, despite having been asked repeatedly whether he had a negative impression of Criswell during trial, Harrell responded either that he did not have such an impression or that he could not remember. RP 79. Noting a lack of specific facts about the nature of the relationship, the court concluded Harrell and Criswell did not “know each other all that well.” RP 79.

Coming back to the critical question of whether Harrell would have been dismissed for cause had he disclosed the relationship during voir dire, Judge Antosz, the trial judge, concluded: “I don’t think so.” RP 80. The facts in this case fell within the group of cases the court reviewed where jurors were held either to have been properly retained or who should have been retained. RP 80.

Ultimately, Judge Antosz found “an inadequate amount of evidence to conclude that [Harrell] had actual bias.” RP 80. He denied Criswell’s motions for relief from judgment and new trial. RP 80.

Written Findings of Fact and Conclusions of Law entered October 9, 2018, TP (10/9/18) 34, reiterated the findings and conclusions recited at the end of the reference hearing. The written findings of fact are:

- 2.1 Mr. Harrell was not dishonest during voir dire, and simply did not recognize Mr. Criswell.

- 2.2 Mr. Harrell was selected as an alternate juror, and was later seated on the panel to replace a juror who was unable to continue.
- 2.3 During a break in the trial, Mr. Harrell talked to a friend, and he realized he might know Mr. Criswell.
- 2.4 Mr. Harrell did not inform anyone of this acquaintance.
- 2.5 The declaration [sic] Mr. Harrell signed was presented to him by someone in Mr. Criswell's camp, potentially Mr. Criswell's mother.
- 2.6 The declaration is not credible in light of the interview conducted with defense investigator Ellyn Berg and Mr. Harrell's testimony during the hearing.
- 2.7 Mr. Harrell and Mr. Criswell do not know each other that well.
- 2.8 There is inadequate evidence to conclude that Mr. Harrell had an actual bias.
- 2.9 Mr. Harrell's 3 statements (declaration, interview, and testimony) varied significantly.

CP at 87–88. The court's relevant conclusions of law are:

- 3.4 The standard the court is to apply in this case is "had the court had the information it has now during trial, would Mr. Harrell [have] been excused for cause"?
- 3.5 The Court cannot consider Mr. Harrell's testimony of his thought process during deliberation.
- 3.6 Mr. Harrell would not have been excused for cause based on the evidence before the court. CP at 88.

CP at 88. At the October 9, 2018 presentment hearing, the court responded to Criswell's assertion that the Berg-Harrell transcript should have been

admitted as substantive evidence of implied bias, TP (10/9/18) 36, 37, by reiterating the court’s recollection that Harrell’s three statements—the declaration, the interview, and his testimony at the reference hearing—conflicted with each other, observing “maybe the word “wildly” is too strong, but they - - they conflicted with each other.” TP (10/9/18) 38.

III. ARGUMENT⁴

A. HEARSAY IS ADMISSIBLE AS A RECORDED RECOLLECTION ONLY IF THE RECORD WAS BOTH MADE OR ADOPTED BY THE WITNESS WHEN THE MATTER WAS FRESH IN THE WITNESS’ MEMORY AND CORRECTLY REFLECTS THE WITNESS’ KNOWLEDGE OF THE MATTER AT ISSUE. THE BERG-HARRELL INTERVIEW WAS TEN MONTHS AFTER TRIAL AND ALMOST THREE WEEKS AFTER CRISWELL’S MOTHER PROCURED HARRELL’S AFFIDAVIT STATING HE WAS BIASED AT TRIAL. HARRELL’S STATEMENTS IN THE BERG INTERVIEW TRANSCRIPT ARE SELF-CONTRADICTORY AND APPEAR TO HAVE BEEN GIVEN IN RESPONSE TO LEADING SUGGESTIONS FROM BERG. AT THE SUBSEQUENT REFERENCE HEARING, HARRELL WAS UNABLE TO RECALL ANY OF THE EVENTS CONCERNING THE TRIAL, THE AFFIDAVIT, OR THE BERG INTERVIEW. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO ADMIT THE TRANSCRIPT AS A RECORDED RECOLLECTION UNDER ER 803(A)(5).

1. *Standard of review and relevant legal principles*

Whether a hearsay statement is admissible as substantive evidence under the recorded recollection exception of ER 803(a)(5) is left to the

⁴ Criswell assigns error to findings of fact 2.5, 2.6, and 2.8, and conclusions of law 3.3, 3.4, and 3.6 but does not discuss his those findings and conclusions within his brief. Correspondingly, the State does not speculate on what specific objections Criswell may have. RAP 10.3(a)(6). This Court should decline to consider undeveloped arguments. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

sound discretion of the trial court. *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); 5B Karl B. Tegland, WASH. PRACTICE § 368 at 186 (3rd ed.1989)). A trial court abuses its discretion if it improperly applies an evidence rule. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). Here, the trial court properly applied the relevant evidence rules.

Hearsay is an out-of-court statement offered for the truth of the matter asserted and is inadmissible unless an established exception applies. Evidence Rules (ER) 801, 802. One such exception authorizes admission of a “recorded recollection,” defined as

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.

ER 803(a)(5). Trial courts examine the totality of the circumstances to determine whether the recorded statement accurately reflects a witness’s prior knowledge. *State v. Alvarado*, 89 Wn. App. 543, 551–52, 949 P.2d 831 (1998) (citing *State v. Mathes*, 47 Wn. App. 863, 867–68, 737 P.2d 700 (1987); ER 803(a)(5)). This totality includes whether the witness asserts the recorded statement is accurate, both at the time of its making and at the time it is sought to be admitted, whether the recording process

was reliable, and whether there are other indicia of reliability establishing its trustworthiness. *Id.* at 552. The question is not whether the declarant is credible, but whether the recorded recollection accurately reflects the witness's prior knowledge. *In re Detention of Peterson*, 197 Wn. App. 722, 728, 389 P.3d 780, review denied sub nom. *In re Det. of Peterson*, 188 Wn.2d 1016, 396 P.3d 348 (2017).

2. *The trial court correctly concluded the transcript of the May 25, 2018 Berg-Harrell interview does not meet admissibility requirements for a recorded recollection under ER 803(a)(5).*

The question is whether the May 25, 2018 Berg-Harrell interview accurately reflected what Harrell knew during the trial that concluded on July 27, 2017. CP at 11. On May 8, 2018, little over nine months after jury deliberations, Criswell filed an affidavit Harrell executed May 7 in front of a Grand Coulee, Washington notary. CP at 53–54. Someone other than Harrell wrote the affidavit following Harrell's conversation with Criswell's mother, whom Criswell sent to Harrell on advice of appellate counsel. RP 52–53. Harrell's interview with Berg was about three weeks later. CP at 66. He told Berg he volunteered to make the statement after he discussed the case with Criswell's mother and she "told him about what was going on." CP at 76. Harrell was not aware the woman was Criswell's mother when they met. CP at 76.

Harrell told Berg a number of things about his relationship with Criswell. He said he did not know Criswell at all, having become aware of who he was only after someone from Grand Coulee told him during a trial break that Criswell was the boyfriend of a woman named Jenny who frequently visited Harrell's house. CP at 69–72. Harrell told Berg Jenny complained about always arguing and fighting with Criswell, but he denied this caused him to have an unfavorable opinion of Criswell because he did not really care about Jenny's complaints. CP at 72. In response to a question from Berg, Harrell denied that knowing Criswell's identity had any effect on his opinion of the State's case, saying again: "No, I didn't know him." CP at 74. Harrell then repeated he "didn't know who the hell he was." CP at 74.

These statements contradicted the assertion in Harrell's affidavit that his friendship with Jenny prevented him from being able to reach a fair and impartial decision based on the evidence, CP at 53 ¶ 7, and that his "verdict was based on [his] personal feelings involving their relationship instead of the evidence in this case." CP at 53 ¶ 8.

Perhaps because of this contradiction, Berg continued to push, asking: "So, did knowing Jenny and what she'd said about Jesse, did that have any impact on the way you voted in the jury room?" CP at 75. Harrell equivocated: "Well, in a way. From what Jenny had mentioned

about he's or the arguing going on all the time, I said he's kind of an asshole, you know, but I didn't really care about that much of it, you know." CP at 75. Berg suggested: "So, it sounds like it did sway you a little bit?" and Harrell replied: "Yeah, it did." CP at 75.

The purpose of the reference hearing was to answer the critical question of how biased Harrell may have been against Criswell and whether, when viewed objectively, Criswell was denied a fair trial. RP (8/14/18) 21. Judge Antosz first raised his concerns about Berg's interview at an earlier hearing, having gotten the impression Harrell "was saying whatever the questioner wanted to hear - - at different points." RP (8/14/18) 28. The court noted Harrell twice denied he was affected by knowing Criswell, "and then the third time, 'Well, yeah, it did.' And - - maybe - - some people just try to give answers just to please whoever's asking the question." RP (8/14/18) 28. At the reference hearing, Judge Antosz observed one might argue Berg was pressing Harrell or asking leading questions. RP 77.

The interval between trial and the Berg-Harrell interview was almost exactly ten months, while the interval between that interview and the September 19, 2018 reference hearing was just under four months. Before either of these events, and before signing the May 7, 2019 affidavit, Harrell heard Criswell's mother's version of "what was going

on” which, presumably, was recited in a light favoring Criswell’s point of view. It is also reasonable to presume Harrell and Criswell’s mother discussed the guilty verdict and Harrell’s participation in it.

On September 29, Harrell was 77 years old. RP 18. He told the court he was in pain from a rib he cracked after falling over a stool in the middle of the night, although he assured the court he had not taken pain medication and that the pain did not impair his memory. RP 6. He told the court he did have trouble remembering things, like where he put his keys and papers, and that he had forgotten about two checks from Bank of America he received four or five years earlier. RP 19. From his testimony that all kinds of people frequently came to his house to visit while he sat “watching TV about half drunk,” RP 8–9, it is reasonable to infer he regularly enjoyed alcohol and that this may have affected his memory.

Harrell testified he could not remember whether Criswell had been one of the many people who came to his house. RP 9. He said when he heard the name at trial, he “kind of remembered” he had heard the name before but could not remember where. RP 9. He apparently did not remember he told Berg four months earlier that he learned who Criswell was on the first day of trial from someone who called him from Grand Coulee. RP 9. He did not remember anything about having written and signed the May 7 affidavit in front of a notary, or what the affidavit was

about. RP 9. He denied ever having seen the affidavit before the day of the reference hearing, did not recall or anyone coming to see him to discuss its preparation, although he said he recognized his signature. RP 9. Despite this, he assured the court the affidavit stated exactly what he had thought and what he remembered about “when the case was going on.” RP 9. The trial court pointedly commented the affidavit did not “have a lot of meat on its bones” and had been presented by “someone in the defendant’s camp.” RP 76.

Harrell’s testimony about the Berg interview and his relationship with Criswell proceeded in fits and starts. Defense counsel had to remind him of Berg’s identity and that they had met at a gas station in Grand Coulee, though Harrell continued to claim he did not remember their conversation. RP 21. Harrell told the court he knew Criswell but could not remember whether he had met him before trial. RP 21. He could not remember whether his relationship with Criswell was good or bad. RP 22. He could not remember “negative impressions.” RP 22. In response to counsel asking whether his friendship with Jenny prevented him from reaching a fair and impartial trial verdict, Harrell responded that, as best he could remember, the friendship had nothing to do with his decision, directly contradicting the statement Berg had skillfully elicited four months earlier. RP 22–23. Harrell also contradicted his other two versions

of how and when he realized he knew Criswell, testifying he “put two and two together” about Criswell’s identity only after trial was all over. RP 24. He told the court this realization had not made any difference to his thoughts during trial. RP 24. He clearly stated he did not feel he was influenced in any way by anything outside the trial. RP 28. “The only thing that influenced me, what was going on in there [the jury room].” RP 28.

Berg then testified that four months earlier Harrell had no difficulty remembering his jury service and recounted the ease with which he recalled what happened on the day of trial and the details of how he figured out who Criswell was. RP 33, 41. She said Harrell had recognized and acknowledged his affidavit. RP 45.

Criswell testified he and Harrell had a contentious relationship and, although they had never met face to face, they had argued over the telephone. RP 48. He admitted sending someone to ask Harrell to make a statement but did not know who wrote the affidavit. RP 52–53.

The Berg-Harrell interview transcript is indisputably a record concerning a matter about which Harrell once had knowledge but had insufficient recollection at the reference hearing to testify fully and accurately. ER 803(a)(5). Criswell’s insurmountable barrier is that there is no reliable evidence of when Harrell lost an accurate recollection of what

he knew and was thinking fourteen months before the reference hearing. There is no evidence the interview transcript correctly reflected what Harrell thought about Criswell during trial or whether Harrell's feelings about Criswell had an effect on the verdict.

Criswell cannot show the interview occurred when the trial events were fresh in Harrell's memory and that what Harrell told Berg correctly reflected what he was thinking at trial. ER 803(a)(5). From the facts, this Court, like the trial court, can find no assurances this is remotely possible.

First, the affidavit was executed only after Criswell's mother met with Harrell to discuss her son's case. The trial court correctly noted Harrell's susceptibility to suggestion. There is no reason to conclude a heart-to-heart with the mother of a man he helped convict would not have influenced Harrell's memory of events occurring over nine months earlier.

Second, three weeks after signing an affidavit avowing his bias prevented a fair trial, Harrell had to be led by a skilled investigator through a series of outright denials that he was biased to a final, grudging agreement the relationship might have affected his verdict. At this point, trial events were ten months in the past.

Third, the interview contained numerous additional inconsistencies and contradictions, made more puzzling and unreliable by Harrell's testimony at the reference hearing four months later. If Harrell testified

truthfully, he had been unable to hold consistent memories for the four months between the interview and the reference hearing. This casts serious doubt on the quality and accuracy of the memories he expressed to Berg ten months after trial. It is implausible that Harrell's memory was reliable right up until the interview, then seriously and mysteriously declined within four months thereafter.

It is possible Harrell's hearing testimony under oath was disingenuous and he truly did remember more than he was willing to admit. This, however, should also create doubt concerning the accuracy of what he told Berg, especially in light of his susceptibility to suggestive leading questions.

Finally, there are simply *no* other indicia of reliability surrounding the Berg-Harrell interview transcript that would support its admissibility as a recorded recollection under ER 803(a)(5).

The trial court did not err in refusing to admit unreliable statements from a people-pleasing witness elicited by a skillful investigator working on Criswell's behalf.

3. *While hearsay statements may be admissible to demonstrate juror bias or misconduct, Washington law does not authorize a hearsay exception for self-contradictory statements lacking any indicia of reliability. The trial court did not abuse its discretion by rejecting the Berg-Harrell transcript as substantive evidence.*

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion and "will be reversed only if no reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970, 988 (2004) (citing *Castellanos, supra*, 132 Wn.2d at 97).

Although hearsay may be admissible to bring to a court's attention the concealment of juror bias, as in *State v. Dalton*, 115 Wn. App. 703, 716, 63 P.3d 847 (2003) (*Dalton I*), Washington case law does not support admission of hearsay containing unreliable assertions of fact. This Court took pains in *Dalton I* to point out the allegedly biased juror had declined an opportunity to respond to the hearsay statement at issue and that he neither denied nor explained the statement he allegedly made. *Id.* at 716–17 (citing *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 93, 507 P.2d 1165 (1973) for the proposition that remand for findings is not needed if the facts are not disputed). None of the cases cited in *Dalton I* as supporting admission of hearsay in juror bias cases⁵ questioned the reliability of the statement admitted.

This Court subsequently vacated its opinion in *Dalton I* after the hearsay witness convinced the trial court on remand that her statement had

⁵ *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 156, 776 P.2d 676 (1989); *State v. Cho, supra*, 108 Wn. App. at 329; *Allyn v. Boe*, 87 Wn. App. 722, 728, 943 P.2d 364 (1997).

been altered after she signed it and the trial court struck the statement.

Dalton v. State, 130 Wn. App. 653, 671, 124 P.3d 305 (2005).

The trial court here did not abuse its discretion by refusing to admit the Berg-Harrell transcript as substantive evidence of juror bias or misconduct because no reasonable person would have ruled any differently. Reasonable people would conclude, as the trial court must have, that Harrell's hearsay statements in the interview transcript were self-contradictory and lacked any indicia of reliability.

B. NOTHING IN THE RECORD INDICATES HARRELL MENTIONED HIS RELATIONSHIP WITH CRISWELL TO ANY OF THE OTHER JURORS OR THAT HE TOLD THE OTHER JURORS HE THOUGHT ILL OF CRISWELL. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED TIMELY DISCLOSURE WOULD NOT HAVE CAUSED HARRELL TO BE EXCUSED FOR CAUSE AND THAT CRISWELL FAILED TO ESTABLISH PREJUDICE FROM BIAS.

1. Standard of review

Here, again, abuse of discretion is the standard under which this Court reviews the trial court's denial of a new trial for asserted juror misconduct. *Balisok, supra*, 123 Wn.2d at 117. A trial court abuses its discretion when it denies acts on untenable grounds or its ruling is manifestly unreasonable. *In re Det. of Broten*, 130 Wn. App. 326, 336, 122 P.3d 942 (2005) (citing *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669, review denied, 133 Wn.2d 1021, 948 P.2d 389 (1997)).

2. *Disclosure of the relationship between Criswell and Harrell during voir dire would not have provided a valid basis for a challenge for cause.*

“ ‘[L]itigants are entitled to a fair trial, not a perfect one.’ ” *Brotan*, 130 Wn. App. 336 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)). While a juror’s failure to speak during voir dire regarding a material fact can amount to juror misconduct, a new trial is not warranted unless the trial court determines “(1) that ‘a juror *failed to answer honestly* a material question on *voir dire* ” and (2) that ‘a correct response would have provided a valid basis for a challenge for cause.’ ” *Id.* at 336–37 (quoting *McDonough*, 464 U.S. at 556, 104 S.Ct. 845) (emphasis added in *Brotan*).

Harrell did not give a dishonest answer to a material question during voir dire and Criswell cannot establish this prong of the *McDonough* test, although Judge Antosz correctly noted Harrell’s subsequent failure to inform the court brought these facts into the misconduct arena. Division Two commented in *Brotan* that “unintentional failure to disclose information not directly related to the case does not necessarily show a juror’s prejudice sufficient to require a new trial[.]” *Brotan*, 130 Wn. App. at 338 (citing *State v. Rempel*, 53 Wn. App. 799, 803, 770 P.2d 1058, (1989), *rev’d on other grounds*, 114 Wn.2d 77, 785 P.2d 1134 (1990)).

It is uncontested Harrell did not realize his connection to Criswell until after voir dire, learning only later that the man on trial was “Jenny’s boyfriend.” Judge Antosz recognized this distinction when he found the circumstances fit within the category of misconduct. RP 74. He agreed Harrell “should have spoken up” and stated his standard in deciding the issue was whether Harrell demonstrated actual bias or “would he have been able to set aside any potential bias?” RP 75.

Whether a trial irregularity warrants a new trial is best left, as here, to the discretion of the trial judge, because the trial judge is in the best position to assess what harm, if any, was caused by the irregularity. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The question before Judge Antosz, as in *Broton* and *McDonough*, was whether timely disclosure of Harrell’s relationship with Criswell would have provided a valid basis for a challenge for cause. RP 75. Judge Antosz concluded: “I don’t think so[,]” based Harrell’s varying statements made long after trial, the facts from trial with which the court was familiar, and the numerous cases the court reviewed. The court found that the facts in this case fell within the cases where jurors were held to have been properly retained or who should have been retained and that Harrell would not have been excused. RP 80.

The events at trial support the reasonableness of the trial court's conclusion over a year later. While Harrell's varying recollections concerning what happened at trial and what he thought at the time are reasonably suspect, the fact remains that during trial he did not think his discovery of the defendant's identity worth mentioning to the court nor to the other jurors.⁶ The court expressly found Harrell did not inform anyone of the acquaintance. CP at 88. The court also found Harrell and Criswell did not know one another well. CP at 88. Further, it is reasonable to assume at least one juror would have brought to the bailiff's attention any comments concerning Harrell's opinion of Criswell, an adverse relationship with Criswell, or any relationship at all.

3. *Harrell's misconduct was not sufficient to warrant a new trial and the trial court correctly determined the record yielded insufficient evidence of bias sufficient to prejudice Criswell's right to a fair and impartial jury.*

The trial court correctly concluded Harrell's failure to notify the court he had learned who Criswell was improper and fit within the ambit

⁶ Harrell's testimony and affidavit may not be used to impeach his own verdict. *Gardner v. Malone*, 60 Wn.2d 836, 840, 376 P.2d 651, 654 (1962), *amended*, 60 Wn.2d 836, 379 P.2d 918 (1963). The trial court may not consider information to which a juror testifies in support of a motion for new trial if that information inheres in the verdict. *Id.* at 841. The trial court properly ignored Harrell's attempts to discuss his thoughts about the strength of the State's case and events occurring during deliberations, none of which had anything to do with his acquaintance with Criswell. Further, although Washington courts may consider juror affidavits demonstrating misconduct, they may not consider the statements in an affidavit showing effect of that misconduct on the verdict. *Id.* at 842.

of juror misconduct. However, “a trial judge has broad discretion to conduct an investigation of jury problems and may investigate accusations of juror misconduct in the manner most appropriate for a particular case.” *State v. Mares*, 190 Wn. App. 343, 356, 361 P.3d 158 (2015) (citing *State v. Elmore*, 155 Wn.2d 758, 773–75, 123 P.3d 72 (2005); *State v. Earl*, 142 Wn. App. 768, 775, 177 P.3d 132 (2008)). “Not all instances of jury misconduct warrant a new trial. Those causing prejudice do; those not causing prejudice do not.” *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (citing, among other cases, *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). “A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *Balisok*, 123 Wn.2d 114, 117–18, 866 P.2d 631 (1994)). Ultimately, Judge Antosz found “an inadequate amount of evidence to conclude that [Harrell] had actual bias.” RP 80.

The trial court correctly assessed the record before it. The record indicates only that Harrell told the caller from Grand Coulee he could not provide transportation because he was in a trial in Ephrata. CP at 70. Harrell told Berg he hung up after learning the defendant was “Jenny’s boyfriend” and did not know anything more. CP at 72. These facts do not

support a finding that Harrell carried on a discussion with the caller about Criswell or about the case.

This case is similar to *Rempel* in that in neither case did anyone claim the juror imparted any extraneous evidence to any of the other jurors. *Rempel*, 53 Wn. App. at 803. Because nothing in the *Rempel* record established the juror had any bias against the defendant, the *Rempel* trial court did not abuse its discretion by denying a motion for mistrial. *Id.* at 803–04. It appears Harrell, too, placed no importance during trial on the fact he knew who Criswell was. It did not cross his mind to mention it to the bailiff nor, apparently, to the other jurors.

More significantly, although Harrell told Berg ten months later he thought Criswell was an “asshole,” there is no evidence he imparted that opinion to his fellow jurors, assuming he even thought that at the time of trial. It is reasonable to conclude at least one juror would have brought the issue to the bailiff’s attention had Harrell said anything negative about Criswell or otherwise discussed their relationship.

There is nothing in the record from which to conclude Harrell’s knowledge or opinion of Criswell prejudiced Criswell’s right to an impartial jury. Courts determine prejudice by asking whether withheld or extraneous information could have affected the jury’s deliberations and reviewing courts “afford great deference to the trial court’s determination

that no prejudice resulted.” *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 897, 1 P.3d 587, 594 (2000) (citations omitted). “The mere possibility or remote possibility of prejudice, without more, is not enough to set aside the verdict.” *Id.* (citation omitted).

As in its other rulings on Criswell’s motion for a new trial, the trial court reasonably determined the evidence was insufficient to establish actual bias or that Criswell was entitled to a new trial.

IV. CONCLUSION

This Court should affirm the trial court’s evidentiary rulings and its ultimate decision to deny Criswell’s motions for relief from judgment and a new trial.

DATED this 27th day of August, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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GRANT COUNTY PROSECUTOR'S OFFICE

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