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COA No. 69022-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LAVELLE JOHNSON,

Appellant.

COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JUN -3 PM 4:50

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Michael Hayden
The Honorable Michael Heavey

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF APPEAL 1

B. REPLY ARGUMENT 2

1. THE STATE CONCEDES THAT THE TRIAL COURT APPLIED THE WRONG LEGAL ANALYSIS, RELYING ON MATTERS THAT INHERE IN THE VERDICT. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL. 2

a. The State concedes the court should not have decided the new trial motion by relying on a subjective inquiry into how the misconduct affected this jury’s mental decision-making, a matter which inheres in the verdict. 2

b. The State failed to prove beyond a reasonable doubt that the misconduct could have had no affect on the verdicts. 6

2. THE SPECIAL VERDICT LANGUAGE AND THE INFORMATION EXPRESSLY DISREGARDED THE LANGUAGE THE LEGISLATURE HAS STATED MUST BE USED TO CHARGE, AND THE FINDING THAT MUST BE FOUND IN ORDER TO PUNISH. 7

C. CONCLUSION. 10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 10

State v. Cummings, 31 Wn. App. 427, 642 P.2d 415
(1982) 6

In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 177 P.3d 675
(2008) 9

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) 9

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995) 6

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 9

State v. Willis, 153 W.2d 366, 103 P.3d 1213 (2005) 7

STATUTES AND COURT RULES

RCW 9.94A.834 passim

RCW 9.94A.533(11). passim

CrR 2.1(a)(1) 9

CONSTITUTIONAL PROVISIONS

Wash. Const. art 1, § 22 9

U.S. Const. amend. 6 9

UNITED STATES SUPREME COURT CASES

Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d
35 (1999) 10

UNITED STATES COURT OF APPEALS CASES

Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988) 6

A. SUMMARY OF APPEAL

Juror 12 searched the internet and located juvenile criminal background information about the defendant Lavelle Johnson. In denying a new trial, the trial court employed a subjective inquiry into the mental processes inhering in the jury verdict, when it decided that the juror was believable in his affidavit stating that his misconduct did not affect his deliberations or decision.

The court continued to employ the subjective standard when it concluded that the extrinsic information about Lavelle's juvenile history did not affect the verdict since this jury had *already* heard evidence of the defendant's three adult felony convictions (which were admitted for impeachment), and, although in violation of the court's own limiting instruction, would have considered it as substantive evidence of the defendant's criminal past, thus rendering the improper further substantive extrinsic information of his criminal past of no material significance.

On review, the State concedes that the trial court incorrectly employed a subjective analysis, but argues that the court employed an objective inquiry "as well," because a person having three adult felony convictions is an 'objective' fact. Is the Respondent's reasoning erroneous and contrary to law?

As to the enhancement, the language of the special verdict form specifically disregarded the statutory requirement setting forth the mandated jury finding of the “endangerment” element of the RCW 9.94A.834 enhancement. Similarly, the information entirely failed to include the essential “endangerment” element, a deficiency that is not cured by noting the citation and statutory title of the enhancement.

B. REPLY ARGUMENT

1. **THE STATE CONCEDES THAT THE TRIAL COURT APPLIED THE WRONG LEGAL ANALYSIS, RELYING ON MATTERS THAT INHERE IN THE VERDICT. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. JOHNSON’S MOTION FOR NEW TRIAL.**

a. The State concedes the court should not have decided the new trial motion by relying on a subjective inquiry into how the misconduct affected this jury’s mental decision-making, a matter which inheres in the verdict. Juror 12 violated the trial court’s emphatic pre-trial warning, and located internet information about the defendant’s past juvenile history, and reports of him having a sexual relationship with a juvenile facility guard. The trial court rejected the defense new trial motion, by finding the juror credible in his assurances that the extrinsic evidence did not affect his verdict, which the juror stated by affidavit that he had

already decided, and had already expressed to the others the previous day (before his misconduct). 12/30/11RP at 42-44; CP 97, CP 121-23.

The appellate prosecutor concedes Mr. Johnson's argument that the trial court improperly used the wrong legal standard when, as shown throughout its ruling, the court engaged in a subjective inquiry about whether and how this misconduct and extrinsic evidence was used and how it particularly affected this jury's ultimate decision. BOR at pp. 13-14. As argued, it is shown in the record that the trial court erred when it relied for its decision on Juror 12's promise that the extrinsic evidence did not affect his thinking or decision, because the affect of jury misconduct and extrinsic evidence must be assessed objectively, and not subjectively according to inquiry into the jury thought processes, which inhere in the verdict. See Appellant's Opening Brief, Part D.1(a) to (b).

However, in a cursory argument, the prosecutor contends that the trial court, after all, did use the correct, objective standard "as well," because the existence of Mr. Johnson's three impeachment convictions from the trial are an "objective fact," in that they were introduced. BOR, at p. 14.

To the contrary, this does not indicate the court used the correct legal standard. Rather, the court partly rested its decision, which it reached using the incorrect subjective inquiry, on the fact that the jury would already have understood Lavelle Johnson to be a convicted felon, and the court then reasoned that therefore the internet information made no difference here. The court's reasoning above, as was discussed in the Opening Brief, may address a fact of the trial, but it commits itself to an incorrect, subjective inquiry into the decision-making process in this very case. See Appellant's Opening Brief, Part D.1(d).

The State's argument that this shows the State used the correct legal standard must be rejected. The State's argument only amplifies the identification of error in the trial court's analysis. The defendant's 3 convictions were admitted as impeachment. They were admitted at trial under a limiting instruction telling the jury not to consider them as substantive evidence. Therefore, when the trial court, and now the State, uses these convictions to reason that the defendant's internet background information would not have made a difference, this contradicts the extensive appellate case law stating that jurors are presumed to follow the court's limiting instructions and consider evidence only in the permitted manner.

Ultimately, regardless of the error in reasoning, at a minimum it can be said that the trial court's analysis is thus deeply infused with the improper subjective inquiry, because the court inquired how a limiting jury instruction did -- or did not, because disobeyed -- affect this trial on the basis of how it modified this jury's consideration of the improper extrinsic evidence.

Relatedly, the appellate prosecutor fails to acknowledge that the trial court, in an error magnifying use of the wrong legal standard, abused its discretion when it ruled that the extrinsic evidence did not become a "part of jury deliberations," because of the fact that only a single juror located it, when the inquiry into how few or many jurors considered extrinsic evidence in the case is a subjective -- i.e. -- improper -- inquiry, and irrelevant to the question of constitutional error. See Appellant's Opening Brief , Part D.1(a) to (e). Indeed, the State in its appellate briefing makes the very same error again, when it repeatedly asserts that this fact shows there was probably no prejudice. BOR, at pp. 1, 3, 10-11, 12, 15.

Finally, the trial court similarly abused its discretion by relying on unsupported facts and ruling that this jury likely assumed that the defendant was the victim in any sexual relationship with a guard, and that he was, therefore, not prejudiced by the extrinsic

evidence. The Respondent offers no response to this argument.

b. The State failed to prove beyond a reasonable doubt that the misconduct could have had no affect on the verdicts.

The improper extrinsic evidence in this case interjected matters which objectively would make an accused defendant appear to be a lifelong offender, one who had in fact commenced a criminal career, as a juvenile. See State v. Cummings, supra, 31 Wn. App. 427, 430, 642 P.2d 415 (1982) (extrinsic evidence of defendant previously being in jail required new trial); Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) (sheriff's comment to two jurors that defendant "had done something like this before" required new trial).

Furthermore, the extrinsic evidence portrayed the accused as a person of poor or at least dubious moral or sexual character. Evidence that suggests moral depravity always prejudices a defendant and certainly had no place in this case in the form of extrinsic evidence located by a juror committing misconduct. See State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995); and cases cited in Opening Brief.

The State's evidence at trial was far from strong. In the same way as the improper evidence of gang association required a mistrial in a close State's case in the defendant's first trial, Juror

12's 'independent investigation' into Lavelle Johnson's criminal and sexual conduct history cannot be said to have had no possible affect on the verdict. See 6/13/11RP at 86 (granting mistrial in first trial because improper mention of possible gang association cast Mr. Johnson as a person who "engaged in unlawful conduct on a regular basis.").

The important jury function of *all 12 jurors* unanimously deciding whether or not Mr. Johnson was guilty should not have been sullied and impaired by Juror 12's independent internet investigation. Reversal is required as argued in the Appellant's Opening Brief.

2. THE SPECIAL VERDICT LANGUAGE AND THE INFORMATION EXPRESSLY DISREGARDED THE LANGUAGE THE LEGISLATURE HAS STATED MUST BE USED TO CHARGE, AND THE FINDING THAT MUST BE FOUND IN ORDER TO PUNISH.

The State's cited case of State v. Willis involves a jury that should, by *developed case law*, have been instructed that there had to be a "nexus" between the gun and the crime, but was instructed instead that the gun had to be available for offense or defensive use in the crime. State v. Willis, 153 W.2d 366, 368-70, 103 P.3d 1213 (2005).

That case has no application to this one, which involves the use of language in both the information and the instructions which specifically uses the terms the *Legislature* said not to use, and uses the expressly wrong language. The State, with regard to this issue and the issue of the charging document, has no argument in response to the fact that the enhancement statute specifically and expressly states how a defendant may be charged with the enhancement, and what the jury must specifically find in order for the trial court to impose the enhancement.

In essence the State's response is that "endangered" and "threatened" are basically the same thing. This is contrary to law. The Legislature has stated otherwise, and has set out a charging and jury finding statute which could not be more clear to a person who would have taken the trouble to read the statute.

Contrary to the Respondent's arguments, Due Process and RCW 9.94A.533(1) authorize additional incarceration as an enhancement under RCW 9.94A.834 only where there has been a finding of endangerment beyond a reasonable doubt, pursuant to the requirements of the latter statute. RCW 9.94A.834.

Respondent does not cite a case in which a "to-convict" instruction that fails outright to list the *statutorily*-required element of

an allegation can be deemed non-erroneous under the theory that the words used in lieu of the element “fairly” mean the same thing as the element that the statute says “shall” be found by the jury. RCW 9.94A.834(2). The present case does not hinge on this Court concluding by complex statutory interpretation that these are different things. The Legislature has chosen to use different words, and thus on the face of the statute, different these things are. See, e.g., In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 820, 177 P.3d 675 (2008) (“When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”). The assigned error occurred.

The error is manifest and thus appealable because it is very much “plausible” that completely leaving out the element of a criminal charge had an identifiable consequence in the case which was tried to a jury that was told to use the instructions as a yardstick for what must be proved. See BOR, at p. 17; AOB, at p. 6 (citing State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005)).

Therefore, first, all the essential elements of the sentencing enhancement were not alleged in the information. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CrR 2.1(a)(1); U.S. Const. amend. 6; Wash. Const. art. I, § 22. The Respondent fails to cite a

case in which the deficiency in an information in failing to state the elements is cured by citing the citation and statutory title of the enhancement. BOR, at pp. 23-25.

Second, under Neder and Brown, constitutional instructional error as to the same essential element requires reversal unless it affirmatively appears that the error was harmless, beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

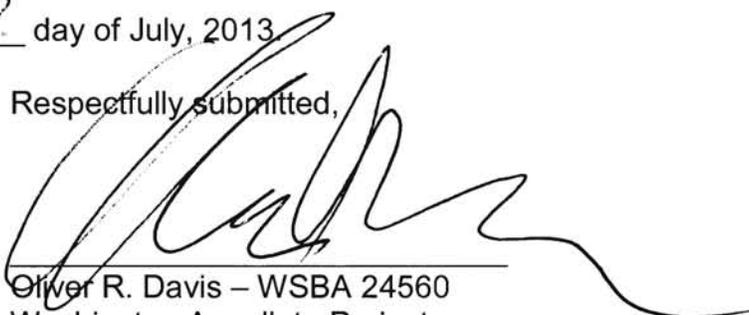
Reversal is required here under both doctrines, pursuant to the authorities cited and the argument in the Opening Brief.

C. CONCLUSION.

Based on the foregoing and on the Opening Brief, Lavelle Johnson respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 7 day of July, 2013.

Respectfully submitted,



Oliver R. Davis – WSBA 24560
Washington Appellate Project
Attorney for Appellant

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Respondent,)	
)	NO. 69022-1-I
v.)	
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LAVELLE JOHNSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JULY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF JULY, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710