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Court of Appeals
Division I
State of Washington

COA NO. 74028-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEJON PAYNE,

Appellant.

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in preventing appellant from cross-examining a government witness with evidence of bias, in violation of the right to present a defense and the right to confrontation.

2. The court erred in admitting evidence of flight to show consciousness of guilt.

3. The court erred in denying appellant's motion for a new trial based on juror misconduct.

4. Cumulative error deprived appellant of his due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Whether the court committed constitutional error in ruling appellant could not impeach a State's witness, who placed appellant at the scene of the shooting, with evidence that he faced a pending criminal charge and expressed a willingness to lie on the stand?

2. Whether the court erred in admitting evidence that appellant was arrested in California to show consciousness of guilt, considering the passage of time between the crime and his presence in California, the existence of another reason for being there, and lack of evidence showing he left for California shortly after the shooting?

3. Whether the court wrongfully denied appellant's motion for a new trial based on juror misconduct, where it was revealed that two jurors recognized witnesses at trial and injected that information into deliberations while discussing witness credibility?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Dejon Payne with first degree attempted murder and first degree assault committed against Terrence Nicholson, with firearm enhancements. CP 10-11. A jury found Payne guilty. CP 58-59. The court vacated the assault conviction to avoid double jeopardy. CP 79. It sentenced Payne, who had a zero offender score, to the maximum standard range sentence of 240 months for the attempted murder conviction plus 60 months for the firearm enhancement, for a total of 300 months in prison. CP 82, 84. Payne appeals. CP 89-98.

2. Trial

Ballinger Homes is a housing project in Shoreline. 6RP¹ 290. The witnesses against Payne all lived or hung out there, and had relationships

¹ The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 2/4/15, 4/28/15, 5/7/15; 2RP - four consecutively paginated volumes consisting of 3/30/15, 3/31/15, 4/1/15, 4/2/15; 3RP - 4/27/15; 4RP 4/27/15 (voir dire); 5RP - 4/29/15; 6RP - six consecutively paginated volumes consisting of 4/30/15, 5/4/15, 5/5/15, 5/6/15, 7/24/15, 9/18/15; 7RP - 6/26/15.

with one another. Romell Liddell often stayed with a woman named Vi Le and their two children in her apartment. 1RP 36-37, 61. Terrence Nicholson, known as "T," had been friends with Liddell for a long time. 1RP 38; 5RP 163-64. Nicholson regularly spent time at the apartment shared by Liddell and Le, playing video games, smoking weed, and drinking. 5RP 164-66. Liddell had other friends over, including Kevin Nguyen, known as "Little Kevin." 1RP 63-64, 167, 262-63. Another neighbor, Patric Heisser, did not hang out with the others "all the time," but sometimes came over when they grilled. 1RP 63-64; 5RP 7-8, 168. His child played with Liddell's and Le's kids. 5RP 10-11.

During the summer of 2013, Nicholson met "Young" at Liddell's residence. 5RP 169. In court, Nicholson identified Payne as the man he knew as Young. 5RP 194. Young was from California but stayed in the complex with a woman named Danielle and another woman. 5RP 172-73; 6RP 12. Nicholson was dating Danielle. 5RP 168; 6RP 11.

Nicholson and his friends, including Liddell, talked about stealing from Young, who had talked about money he had. 5RP 171-74; 6RP 16. Nicholson initially testified Little Kevin was not among this group. 6RP 16-18. But he told a detective otherwise. 6RP 17. They talked about how Young was an easy target because he was far from home, without any friends, and without anywhere to really stay. 6RP 13. Nicholson told a

detective that he actively tried to convince people to help him rob Young. 6RP 15. On the stand, he waffled on whether he did so. 6RP 15. He initially denied saying "What better way to get rich? This is like the golden goose, it's like somebody just handed us the world's biggest idiot?" 6RP 15. He then admitted he said this when confronted with the prior statement. 6RP 15-16. He told a detective that he did not know who committed the theft, even though he did. 6RP 19. Nicholson testified he came home in early October 2013 and saw Young's electronics, cell phones and about \$10,000 in his bedroom. 5RP 175-76. Liddell told him how they obtained these things. 5RP 176. Nicholson was not upset: "I didn't see nothing wrong with it." 5RP 179-80. He received some of the money. 5RP 176; 6RP 21.

A few days later, Nicholson encountered Young at the Ballinger Homes complex. 5RP 181-82. According to Nicholson's trial testimony, Young angrily accused Nicholson of taking his money, using profanity. 5RP 182-83. Nicholson said he didn't take it and didn't know what happened to it. 5RP 182. After the theft, Nicholson would see Young about but did not hang out with him.² 5RP 183-85. He told a different story to a detective. Nicholson told the detective that he had no hostile

² Kevin Nguyen testified that at some point Payne told him "Whoever took the money, you know, can keep some of it and give it back to me, most of it, you know, and everything will be fine." 6RP 267-68.

interactions with Young after his money was stolen and that Young did not use profanity. 6RP 22. He also told the detective that he saw Young all the time and Young called him all the time. 6RP 22-23. Young seemed to let the matter go. 6RP 23. Young still hung out with Liddell, and never said anything about getting robbed while there. 6RP 23-24. If Young wanted to find Nicholson, he knew where he lived. 6RP 24.

In October 2013, Payne reported to a Shoreline police officer that "T" and another man took his money and belongings. 6RP 179-80, 182, 184-85. Payne told the officer that he was supposed to be going back home to Los Angeles. 6RP 188.

The shooting at issue took place on January 1, 2014. 5RP 66-67. The day before, Liddell's "baby" 9 mm gun was in Nicholson's car. 5RP 187-88. On New Year's Eve, Liddell, who had just got out of jail, called Nicholson and said he needed the gun, but did not explain why. 5RP 188; 6RP 27. Nicholson gave it to him. 5RP 188; 6RP 26. Nicholson did not see the gun again "Until I thought I got shot with it." 5RP 189.³

On New Year's Day, Nicholson went over to Liddell's residence at around 1:30 or 2 p.m. to get some weed. 5RP 190; 6RP 24. Nicholson

³ Nicholson testified that he never owned a gun. 6RP 28. He told a detective that he always had a gun. 6RP 28. He disavowed this statement at trial. 6RP 28.

called Liddell beforehand to let him know he was coming over. 5RP 190.⁴ Liddell told him "okay, cool." 5RP 191. Aside from Liddell, the only people who knew Nicholson was heading over to Liddell's house were Nicholson's mom, sister, and girlfriend. 6RP 25. He never told Young he was going to be there that morning. 6RP 25.

Nicholson testified he arrived about 10 or 15 minutes later, parked in the lot, and knocked on Liddell's door. 5RP 191; 6RP 24. There was no answer. 5RP 191. He soon noticed Young standing behind him, asking where his money was. 5RP 192-93.⁵ Nicholson said he didn't know and had nothing to do with it. 5RP 192. Young said "yeah, all right" and shot him in the gut. 5RP 192. The two wrestled for the gun, and another gunshot hit him in the thigh. 5RP 192. Nicholson collapsed to the ground, where Young "kept shooting me." 5RP 192. When he was done, Young ran off. 5RP 192. Nicholson identified the gun used to shoot him as Liddell's "baby" 9 millimeter. 5RP 194; 6RP 26-27.

According to Nicholson, Liddell showed up a few minutes after the shooting. 5RP 196. Liddell asked "Young shot you? I said, yeah." 5RP

⁴ Nicholson told the detective that Liddell did not know he was coming over. 6RP 25.

⁵ Nicholson elsewhere testified he did not think the theft had anything to do with him being shot. 6RP 35. In a pre-trial interview, Nicholson maintained that Payne said "what's up?" and that if he said anything else he didn't hear it. 6RP 29.

196.⁶ Before police arrived, Liddell told Little Kevin "Get that gun out of here." 6RP 30. At trial, Nicholson denied getting family pressure to not blame Liddell. 6RP 30, 36. In a pre-trial interview, he said people were telling him not to blame Liddell.⁷ 6RP 31. Based on what he knew, "It doesn't make sense, it doesn't add up." 6RP 31. He thought Liddell might have set him up, and no longer had a relationship with him. 6RP 5-6, 32.

Several other people, testifying for the State, gave their versions of what happened. Patric Heisser testified that sometime before noon on January 1 he saw a man he identified in court as Payne standing and looking in a northerly direction, in the line of sight of the building where Liddell and Le lived.⁸ 5RP 25-28, 43, 48. Heisser did not identify Payne in a pre-trial photomontage as the man standing outside on January 1. 5RP 52; 6RP 305, 320-21. After he noticed the man standing there, Heisser saw Liddell come out and walk past on the sidewalk, 10 minutes before hearing gunshots.⁹ 5RP 32-36, 40, 54. He saw Liddell with Kevin a few minutes before the shooting. 5RP 51, 56-57.

⁶ Before this, Nicholson did not tell Liddell that Young had shot him. 6RP 38. Liddell "already knew." 6RP 38.

⁷ Nicholson gave inconsistent statements on whether Liddell contacted him on Facebook the day Nicholson was to be interviewed by defense counsel. 6RP 6-10.

⁸ Payne was the only black man sitting at counsel's table. 5RP 48.

⁹ Heisser's timeline was muddled. In a police interview he said he saw the man there about an hour before the shooting. 5RP 56. At trial, he said he

Le testified Liddell left the house with Kevin Nguyen about 10 or 15 minutes before the shooting happened. 1RP 48, 72-73. She denied hearing a knock on her door and denied knowing Nicholson was coming over. 1RP 49, 73. She heard a popping noise and Nicholson yell for help. 1RP 49. She looked out and saw Nicholson lying in front of her house. 1RP 51. Le asked who shot him. 1RP 57. Nicholson said "Young." 1RP 57. She did not see any guns. 1RP 60. Le called Liddell, who returned 15 minutes later. 1RP 56. Le identified Payne as the man she knew as Young from a photomontage. 1RP 59-60; 6RP 302-05, 320-21; Ex. 5.

Little Kevin's brother, Hoang Nguyen, exchanged greetings with Nicholson when the latter arrived at the housing complex on January 1. 6RP 208-10. Nicholson disappeared around a corner. 6RP 210. Hoang heard someone say "What's up man," then gunshots. 6RP 201-11. Hoang ran toward the gunshots and saw Nicholson on the ground. 6RP 211. He saw a black male running around the other side of the house. 6RP 212. Nicholson said he'd been shot by "Young." 6RP 212, 218. Hoang acknowledged Kevin left the house around 2 p.m., right before the shooting. 6RP 220. Hoang did not know where Kevin went. 6RP 220. Kevin showed back up when Le came out. 6RP 218-20.

saw the man standing there for five or ten minutes. 5RP 49. The shooting happened around 1:30 p.m. 5RP 53-54. But he also said he saw the man sometime before noon. 5RP 25-26.

Kevin Nguyen testified he invited Liddell and Liddell's brother to hang out at a friend's house on the morning of January 1. 6RP 268-69. On the way to his car, Nguyen saw Young. 6RP 269. Nguyen and Liddell left sometime between 10 and noon. 6RP 269-70. They stayed at the friend's house for about 15 minutes. 6RP 269-70. Liddell then got a call from Le, saying somebody got shot, and they rushed home. 6RP 270. Nguyen saw Nicholson on the ground. 6RP 271. Liddell asked "Who did this," "What happened? Why didn't you call me before you come." 6RP 272. Nguyen denied seeing any firearm and maintained no one said anything about moving a firearm. 6RP 272-73.

Police were dispatched at about 2:15 p.m. in response to the 911 calls. 1RP 31, 5RP 68. Nicholson was treated for bullet wounds to the leg and torso, including a wound to the back. 6RP 116-19. Six 9 mm shell casings were found on the sidewalk. 5RP 102, 106-07. A forensic examiner testified they were all fired from the same 9 mm firearm. 6RP 146. No fingerprints were found on the casings. 6RP 60. No DNA comparisons could be made. 6RP 86. Detective Bartlett, the lead detective, did not know where Payne was and tried to track him down. 6RP 292, 308-09, 314, 317. Payne was arrested on May 30, 2014 in California. 6RP 317-18, 322. The defense theory was that the State could

not prove beyond a reasonable doubt that Payne was the shooter, and that Liddell may have been the real shooter. 6RP 363-64, 368-70, 377.

C. **ARGUMENT**

1. **THE COURT VIOLATED PAYNE'S RIGHT TO CONFRONTATION AND RIGHT TO PRESENT A DEFENSE BY PREVENTING HIM FROM CROSS-EXAMINING THE STATE'S WITNESS ABOUT A PENDING CRIMINAL CHARGE AND WILLINGNESS TO LIE ON THE STAND.**

The trial court did not allow the defense to cross-examine Kevin Nguyen to show bias. The exclusion of bias evidence violated Payne's right to present a defense and to confront the witnesses against him. A government witness's pending criminal charge is evidence of bias subject to cross-examination, regardless of any actual agreement between the witness and the State to testify against the accused in exchange for lenient treatment. Further, Nguyen's express willingness to fabricate on the stand by itself constitutes an example of corruption subject to impeachment. The convictions must be reversed because this constitutional error is not harmless beyond a reasonable doubt.

a. **The court denied Payne the opportunity to cross-examine Kevin Nguyen about a pending burglary charge and willingness to make up his testimony.**

Before Kevin Nguyen took the stand, the prosecutor told the court that defense counsel should have an opportunity to ask any follow-up

questions before he testified, "given that he has told Detective Bartlett that he has more helpful information for our case in the context of he has got pending charges." 6RP 194. Later that day, defense counsel informed the court that Nguyen had a pending residential burglary charge. 6RP 244. Nguyen told Detective Bartlett "that he would give her helpful information if she would give him a deal on the charge. And Detective Bartlett and I believe Ms. Voorhees told him that wasn't going to happen. So I intend to question him about that." 6RP 244.

The court wondered about the basis for doing so: "If he is not getting any kind of offer from the State, I don't see how it is relevant that he has a charge." 6RP 244-45. The court thought the predicate for showing bias was missing. 6RP 245. Counsel responded "he told us in our interview that if they gave him a deal, he would give some helpful information, and I don't believe a deal has been given to him, but he told us he would have just made something up" if she had agreed to a deal. 6RP 245. That went to Nguyen's bias and credibility. 6RP 245.

The court disagreed because there was no prospect for a deal. 6RP 245. "It is only pertinent if there is a basis for him to think, 'Wow, maybe something helpful to the State, they will give me something.'" 6RP 245. Counsel argued the area of inquiry was relevant because "he is clearly making statements saying that he will make up facts about this case in any

way that's helpful to him." 6RP 245-46. The court continued to disagree: "I'm not hearing there is any deal on the offering, or any hope for a deal, was there?" 6RP 246. Counsel responded "Not that I know of." 6RP 246. The court precluded the defense from making inquiry because without a "predicate" to do so, it was distracting and irrelevant. 6RP 246.

b. The pendency of a criminal charge and expressed willingness to lie are relevant to show bias, regardless of whether the witness has a deal with the government, and is subject to cross-examination as demanded by the right to confrontation.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. In conjunction with the right to present a defense, defendants have the constitutional right to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Defense counsel exercises the right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). An important function of the

constitutional right to cross-examination is to expose a witness's motivation for testifying. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). But constitutional issues, such as claimed violations of a defendant's Sixth Amendment right to present a defense and confront witnesses, are reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Dobbs, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). That right requires a defendant be given wide latitude to impeach a State's witness. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Davis, 415 U.S. at 316.

The "searching cross-examination of witnesses who have substantial incentive to cooperate with the prosecution" is of particular importance. United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992) (quoting Jenkins v. Wainwright, 763 F.2d 1390, 1392 (11th Cir.

1985), cert. denied, 476 U.S. 1164, 106 S. Ct. 2290, 90 L. Ed. 2d 730 (1986)). "The importance of such cross-examination does not depend upon whether or not some deal in fact exists between the witness and the government." Lankford, 955 F.2d at 1548 (trial court violated right to confrontation in refusing to allow cross-examination concerning drug arrest of witness's son, which provided possible motive for witness's cooperation with the prosecution). "What counts is whether the witness may be shading his testimony in an effort to please the prosecution." Greene v. Wainwright, 634 F.2d 272, 276 (5th Cir. 1981). "A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception." Greene, 634 F.2d at 276 (quoting Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980)). Accordingly, "the crucial factor is whether the jury might have been persuaded that [the witness's] vulnerability to prosecution made him wish to assist the state and that this motivation compromised his credibility." Carrillo v. Perkins, 723 F.2d 1165, 1170 (5th Cir. 1984).

The crux of the trial court's ruling is that it believed an agreement between the State and the witness was the predicate needed to show bias. 6RP 244-46. The record shows no deal was offered to Nguyen in exchange for his testimony. But contrary to the trial court's understanding,

a deal between the State and its witness is not a necessary predicate to showing bias. The existence of an unresolved criminal charge is enough to show bias. Lankford, 955 F.2d at 1548; Greene, 634 F.2d at 276. In light of the constitutional right to confrontation, the defense should have been permitted to explore Nguyen's pending criminal matter and cross-examine Nguyen regarding any *motivation* he might have in testifying against Payne as result of seeking to curry favor with the prosecution. As long as the pending criminal charge loomed over his head like a Sword of Damocles, Nguyen had reason to please the prosecutor's office. The record affirmatively shows he hoped to be treated leniently in connection with his own pending criminal charge in exchange for testifying against Payne. And although no deal was presently on the table, minds can change, especially if the prosecution proves successful. Nguyen may have hoped he could encourage a deal or some form of lenient treatment if he testified in a manner that pleased the State. Whether Nguyen had reason to lie or shade the truth in testifying against Payne was for the jury to decide.

Further, the "law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption." State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965) (citing 3 Wigmore on Evidence § 943, et seq. (3d ed. 1940)). One form of

corruption is "a statement by the witness of a general willingness to lie upon the stand." Matter of C.B.N., 499 A.2d 1215, 1219 (D.C. 1985) (citing 3A Wigmore, Evidence §§ 956-58 (Chadbourn ed. 1970)).

The offer of proof shows Nguyen said in his interview that "he would have just made something up" if the prosecutor had agreed to a deal. 6RP 245. Defense counsel correctly pointed out this admission went to Nguyen's bias and credibility, as "he is clearly making statements saying that he will make up facts about this case in any way that's helpful to him." 6RP 245-46. "The willingness to testify falsely goes to the core of the witness' credibility, regardless of his personal or pecuniary relationship with the defendant." C.B.N., 499 A.2d at 1219 (citing 3A Wigmore § 957, at 803 (willingness to swear falsely negates presence of moral duty to speak the truth that is at the foundation of the theory of testimonial evidence)). "[T]he essential discrediting element" of this kind of impeachment is its relevance to proving the witness's willingness to corrupt the legal process — the witness's "willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony." 3A Wigmore, Evidence § 956 at 802-03.

It is the expressed willingness to lie under oath that itself constitutes relevant impeachment evidence. Nguyen's statement to that effect is core impeachment material. The trial court, in ruling on the issue,

never explained why it was not admissible, quite apart from whether there was any deal worked out between Nguyen and the State.

It is of some interest that the State expressed no opposition to inquiry into the matter. In fact, the State brought it to the court's attention, "given that he has told Detective Bartlett that he has more helpful information for our case in the context of he has got pending charges." 6RP 194. The existence of a pending charge is Brady¹⁰ evidence, as is Nguyen's statement about being willing to lie.¹¹

The State did its job by disclosing impeachment evidence favorable to Payne. But then the trial court impermissibly shut down the area of inquiry in violation of Payne's right to confront the witnesses against him and present a defense. "Cross examination to show bias,

¹⁰ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (government must disclose exculpatory evidence to the defense).

¹¹ See People v Torrez, 90 Mich. App. 120, 124, 282 N.W.2d 252 (Mich. Ct. App. 1975) (reversing conviction due to Brady violation in failing to disclose pending criminal charge, evidence of which could have been admissible: "Although the record does not support the conclusion that any promises regarding these charges were made to Velasquez in return for his testimony against defendant, defense counsel is permitted to use evidence of pending charges to bring out the witness's bias or interest, if any, affecting the outcome of the case."); Benn v. Lambert, 283 F.3d 1040, 1056 (9th Cir. 2002) (failure to disclose that government witness approached the police a week before trial falsely claiming that he had a videotape showing defendant was involved in a killing constituted a Brady violation, as it could have been used to show the witness "was willing to lie" about the defendant "and even to accuse him falsely of *murder*, if doing so would result in even a minimal benefit to him.").

prejudice or interest is a matter of right." State v. Buss, 76 Wn. App. 780, 787, 887 P.2d 920 (1995), abrogated on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999). A jury is entitled to know a witness is biased so it can make an informed judgment about credibility. Thus, the right to cross-examine is satisfied when counsel is permitted to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Davis, 415 U.S. at 318.

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Id.; Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

The State did not identify a compelling interest in preventing cross-examination of Nguyen's bias. The trial court believed inquiry would be distracting and irrelevant in the absence of a deal between Nguyen and the State, which it viewed as the necessary "predicate" to

showing Nguyen's bias. 6RP 246. This is an erroneous view of the law. Evidence of Nguyen's bias was clearly relevant, as the defense theory of the case was that Payne was not the shooter. A fact of consequence was the identity of the shooter. Nguyen's credibility was in play because he put Payne at the scene shortly before the shooting occurred. 6RP 269-70; see Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978) (all facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant).

The trial court, acting as evidentiary gatekeeper, deprived the jury of fairly judging the credibility of Nguyen's testimony. The State did not have a compelling reason to prevent admission of evidence relevant to Payne's defense. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Darden, 145 Wn.2d at 620. The court erred in excluding probative defense evidence without a compelling interest.

c. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt.

Violation of the right to present a defense and to confront witnesses is constitutional error. Jones, 168 Wn.2d at 724; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied,

131 Wn.2d 1011, 932 P.2d 1255 (1997). "[A]ny error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." Johnson, 90 Wn. App. at 69. For confrontation errors, the reviewing court must assess whether the error is harmless beyond a reasonable doubt by "assuming the damaging potential of the cross-examination were fully realized." Van Arsdall, 475 U.S. at 684. The State bears the burden of overcoming the presumption of prejudice and proving harmlessness beyond a reasonable doubt. State v. Maupin, 128 Wn. 2d 918, 928-29, 913 P.2d 808 (1996).

The State cannot meet its burden here. Assuming as we must that "the damaging potential of the cross-examination" regarding the pending charge and willingness to lie were "fully realized," the result is that Nguyen's credibility is destroyed. Van Arsdall, 475 U.S. at 684. Nguyen's testimony placing Payne as the scene shortly before the shooting occurred was an important piece of the State's case. In closing argument, the prosecutor emphasized that two witnesses put Payne at the scene. 6RP 350, 354. Nguyen was one of them. Patric Heisser was the other. But Heisser was unable to identify Payne as the person he saw from a photomontage, so his in-court identification of Payne as the shooter some 15 months later was subject to doubt. 5RP 52. Had Payne been allowed

to discredit Nguyen's testimony through cross-examination showing bias, the jury may have rejected Nguyen's testimony as well.

The evidence was not otherwise so overwhelming that it necessarily led to a conclusion of Payne's guilt beyond a reasonable doubt. Nicholson's testimony identifying Payne as the shooter was subject to doubt because there was evidence that Liddell, not Payne, was the shooter. Liddell's gun was used in the shooting. 5RP 189, 194; 6RP 26-27. Nicholson called Liddell to let him know he was coming over. 5RP 190. Liddell left Le's residence right before the shooting happened. 5RP 32-36, 40, 54. As Nicholson lay on the ground shot, Liddell told Kevin Nguyen to get rid of the gun.¹² 6RP 30.

Le's denial that Nicholson called before he came over or knocked on the door upon arrival, in contradiction to Nicholson's testimony, raises the inference that Le was trying to cover up for Liddell, the father of her children and the person she relied on to care for them while she worked. 1RP 36-37, 49, 73, 80-81. Casting a pall over the entire proceeding was the fact that all of the key State witnesses knew one another, with the potential of aligning their interests in a manner that caused them to point a

¹² In a pre-trial hearing, Liddell pled the Fifth Amendment to questions about his involvement in stealing from Payne and the shooting. The court found he had a valid Fifth Amendment claim as to those issues. 2RP 257-96. Liddell was not called as a witness at trial.

finger at the outsider — Payne, the easy target without any friends — rather than one amongst the insider group. In a pre-trial interview, Nicholson acknowledged people were telling him not to blame Liddell. 6RP 31. Had Nicholson pointed his finger at Liddell as the shooter, Nicholson would have exposed himself to possible violent reprisal either from Liddell himself or someone associated with him. Nicholson had a reason to falsely accuse Payne because he did not present the same type of threat of retaliation. Such considerations are those of a reasonable juror.

Nicholson gave conflicting stories of the tenor of Payne's interactions with Nicholson in connection with the theft and before the shooting to place, leading to an inference that he was embellishing Payne's anger towards him. 5RP 182-83; 6RP 22-23. He'd earlier told a detective that he had no hostile interactions with Payne after the theft, they continued to hang out all the time, and Payne seemed to let the matter go. 6RP 22-23. Nicholson also gave a number of inconsistent statements on a variety of other topics. 6RP 15-19, 28, 30-31. Moreover, the jury learned that Nicholson had prior convictions for crimes of dishonesty (attempted second degree theft, possession of stolen property and making a false statement). 5RP 162. This provided a basis to question Nicholson's credibility on the key issue of the shooter's identity. See State v. Alexis,

95 Wn.2d 15, 19, 621 P.2d 1269 (1980) (impeachment evidence under ER 609 aids the jury in evaluating witness credibility).

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). As sole judges of witness credibility, jurors were entitled to have the benefit of the bias evidence before them so that they could make an informed judgment regarding Nguyen's testimony, which placed Payne at the scene shortly before Nicholson was shot. Davis, 415 U.S. at 317. Instead of constricting the scope of Payne's cross-examination, the trial court should have allowed the wide latitude mandated by due process and the right to confrontation. The denial of these constitutional rights corrupted and distorted the fact-finding process, requiring reversal of the convictions.

2. THE COURT ERRED IN ADMITTING EVIDENCE THAT PAYNE WAS ARRESTED IN CALIFORNIA AFTER THE SHOOTING BECAUSE IT DID NOT SHOW CONSCIOUSNESS OF GUILT.

The trial court committed reversible error in admitting evidence that police found Payne in California to show consciousness of guilt. Evidence that Payne was arrested in California over four months after the shooting did not show consciousness of guilt, considering that no evidence was admitted showing he went to California shortly after the shooting.

Further, Payne was from California, he has family and children living there, and there is a lack of other evidence tying Payne's relocation to California to the crime. Evidence that Payne was arrested in California was irrelevant, or whatever marginal relevance the evidence had was outweighed by its unfair prejudicial effect under ER 403.

a. The court ruled "flight" evidence was admissible, subject to foundation being established.

Defense counsel moved in limine to exclude testimony that Payne was arrested in California, citing State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). CP 22-23; 2RP 41. Counsel argued the arrest evidence could not be used as evidence of flight showing consciousness of guilt. CP 22-23. Payne was arrested in his hometown in California months after the shooting. CP 22. Payne's family and children live in Los Angeles. CP 22. While temporarily living in Seattle, he frequently returned home to spend time with his family. CP 22. Payne did not make efforts to change his identity or conceal his location. CP 23.

The State argued Payne fled the scene and promptly left for California. 2RP 41-42. According to the State's offer of proof, the EBT (Electronic Benefit Transfer) card of Payne's girlfriend, Angel (Miranda) Olson, was used in California days after the shooting. 2RP 42, 46-47.

The judge believed evidence that Payne ran from the scene and "very shortly thereafter" relocated to California "could be" viewed as a deliberate effort to avoid arrest and prosecution. 2RP 43. Based on the premise that the girlfriend with whom Payne was living in Washington was using her EBT card in California, the court thought the jury could infer Payne was in California as well. 2RP 45-47.

Defense counsel pointed out the girlfriend who used the EBT card, Ms. Olson, had not been living in Washington for some time. 2RP 47. The State maintained Olson was in town at the time of the shooting based on two motel registrations in her name. 2RP 47-48. Defense counsel said no evidence showed Payne was with her at the time. 2RP 48.

The judge said "the fact that they had a romantic relationship close in time is good enough to tie them up," and then asked the prosecutor if she could tie the two together. 2RP 48. The prosecutor said Olson is the mother of Payne's children, the child was in Washington through the summer and would frequently play with Le and Liddell's children in the time leading up to the shooting, and witnesses could tie them together. 2RP 48-49. Defense counsel anticipated no witness would be able to testify to this information. 2RP 48.

The court required the State to show the relationship between Payne and Olson and the child and if the link could be established, the

following evidence would be admissible: (1) the shooter fled the scene; (2) Olson's location via the motel registration records; (3) Olson's location after the shooting via business records showing her EBT activity; and (4) where Payne was located. 2RP 49-50.

b. The necessary link between the shooting and Payne's arrest in California nearly months later is missing to show consciousness of guilt.

"[W]hile the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful." Freeburg, 105 Wn. App. at 498. The probative value of flight evidence as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. Id. (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)).

Courts "will not accept '[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.'" State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting State v.

Bruton, 66 Wn.2d 111, 113, 401 P.2d 340 (1965)). Instead, "the government must make certain that each link in the chain of inferences that concludes with a consciousness of guilt of the crime charged is sturdily supported." United States v. Wright, 392 F.3d 1269, 1278 (11th Cir. 2004) (citing Myers, 550 F.2d at 1049).

In this case, it was established at trial that Payne was arrested in California over four months after the shooting. That is not enough to show consciousness of guilt because it relies on the pyramiding of vague inferences to arrive at the conclusion that Payne fled to California because he knew he was guilty of the charges crimes. There was zero evidence of what he was doing between the time of the shooting in Washington and his arrest in California. There is no evidence that he left for California shortly after the shooting, an alleged fact relied on by the trial court in its admission of this evidence. 2RP 43. "The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense." Myers, 550 F.2d at 1051. The passage of time between the shooting and the police arrest does not support the conclusion that Payne's behavior in returning to California showed consciousness of guilt for the charged crimes.

The evidence admitted at trial fell far short of what the State presented in its offer of proof. The State did not present any evidence that Olson (Payne's girlfriend) used an EBT card in California shortly after the shooting, or at any time for that matter. Without that evidence, the State could not even begin to establish when Payne returned to California.

The State made some aborted efforts to trace Payne's movements through his connection with Olson, but they never reached fruition. 5RP 133-40, 153-54. Toward the end of trial, defense counsel said the State had not established a nexus between Payne and Olson, and so Detective Bartlett and Sergeant McSwain should not testify about the motels. 6RP 197. The court said "We're getting there, okay, we don't have a nexus yet." 6RP 197. The prosecutor then acknowledged she was not going to be able to make the nexus. 6RP 197.

Without that nexus, the State could not establish Payne was staying with Olson around the time of the shooting and then promptly left for California. This left a gaping hole in the timing of when Payne went back to California in relation to the shooting, which is crucial to establishing a foundation for consciousness of guilt. The State's offer of proof did not materialize at trial. See State v. Scott, 151 Wn. App. 520, 528, 213 P.3d 71 (2009) (reversing conviction due to erroneous admission of ER 404(b)

gang evidence where State's offer of proof tying gang affiliation to the crime did not materialize at trial).

To be clear, even the State's offer of proof was insufficient to justify admission of evidence that Payne was found in California. Proffered evidence that Payne's girlfriend was in Washington around the time of the shooting and then in California shortly after the shooting does not show Payne was in California at that time as well. More than a vague inference is needed to forge the link between flight evidence and consciousness of guilt. A sufficient foundation must be laid, and part of that foundation is evidence showing the defendant, not someone merely who has a relationship with the defendant, fled the state.

The trial court recognized Payne had family and children in California and so had a reason apart from flight from the crime to be in California. 2RP 43-44. When there are other reasons why a person might leave the area of the crime, the inference that flight shows consciousness of guilt for the charged crime loses its footing. Myers, 550 F.2d at 1050.

Evidence of flight is inherently unreliable. Id. Such evidence tends to be only "marginally probative." Freeburg, 105 Wn. App. at 498. So there needs to be a strong evidentiary link to allow for the consciousness of guilt inference. That link is missing here. Not only was this evidence irrelevant under ER 401, it was unduly prejudicial. This

evidence permitted jurors to conclude Payne was a criminal-type person who evaded police and therefore was consciously guilty of the charged crimes. Given that the flight evidence was at best weakly probative of guilt and any probative value was substantially outweighed by unfair prejudice, the flight evidence should have been excluded under ER 403.¹³

Evidentiary error requires reversal if there is a reasonable probability the error affected the outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). In assessing whether an error is harmless, admissible evidence of guilt is measured against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Harmless error occurs only when the evidence is of "minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403. As argued in section C.1, supra, the evidence against Payne was not overwhelming. For this reason, the flight evidence error cannot be considered insignificant. The jury heard evidence that Payne was eventually arrested in California in May 2014, leaving an available inference that he ran to California to avoid arrest for a

¹³ ER 403 provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

crime he knew he committed. 6RP 317-18, 322. Evidence that Payne fled from arrest was damaging because it portrayed him as a guilty fugitive. There is a reasonable probability this improper evidence influenced the jury to find guilt.

3. THE COURT ERRED IN DENYING A NEW TRIAL BASED ON JUROR MISCONDUCT, AS IT MISAPPREHENDED THE EVIDENCE AND THE APPLICABLE LAW.

Juror Cheung's failure to disclose that she recognized Nicholson and subsequent injection of her knowledge into deliberations constitutes misconduct. Juror Woods' failure to disclose he recognized Heisser and subsequent injection of his knowledge into deliberations also constitutes misconduct. There is a reasonable basis to believe the misconduct prejudiced Payne, requiring a new trial.

a. After hearing juror testimony, the court denied the motion for new trial, finding no misconduct occurred and there was no effect on deliberations.

During the beginning of voir dire, the names of the witnesses, including Terrence Nicholson and Patric Heisser, were read to prospective jurors. 4RP 99-100. The court asked jurors to put up their card if anyone recognized a name. 4RP 99-100. Neither juror Cheung nor juror Woods acknowledged any recognition of the witnesses. 4RP 100-01. Another prospective juror, however, asked "If the names don't ring a bell, but when

these people begin to testify, if we would recognize someone, what is the course of protocol?" 4RP 101. The court responded "Just let us know. That rarely happens, though. Usually if you know somebody well enough to recognize them, you normally know their name too. But I will tell you that if you spot someone that you know when they come in to testify, just let us know right away." 4RP 101.

Nicholson began his testimony on April 29. 5RP 158-59. The following day, this exchange occurred:

THE COURT: A couple things I want to raise with you. Ms. Chun [sic], No. 13, recognized Mr. Nicholson's high school, it's the high school she attended. She didn't recognize Mr. Nicholson, didn't know Mr. Nicholson. Her worry is if other people who attended her high school show up, that she might recognize them. I don't feel concerned about this and I'm not inclined to question her. I don't know what she said to Ms. Harris, which is what I just told you, but if you want me to, I will.

MS. VOORHEES: I don't think we need to at this point. I think if, it is obvious she's aware that she brought it to Brittany's attention, I think if someone else surfaces that she does recognize, I suspect she would tell Brittany.

THE COURT: I think the best thing to do is notify her that you told us, okay, and that if she thinks she recognizes anyone else, she should inform you privately and promptly about that, okay? Also, if she develops any concerns about her ability to be fair, she should inform you privately and promptly about that. 6RP 2-3.

After the verdict, defense counsel moved for new trial under CrR 7.5 based on juror misconduct. CP 63-70. In support, counsel submitted a declaration from the defense investigator, which relayed what juror Massie

told him. CP 69-70. According to Massie, one of the jurors recognized the witness "Patric" as someone with whom he had played basketball. CP 69. A second juror, juror 13, knew "Terrence" from high school, and remembered him as a star basketball player. CP 69. Counsel argued the juror who knew Patric Heisser committed misconduct in failing to disclose this fact during voir dire and his acquaintance with Heisser was injected into deliberations. CP 65-66. Further, juror 13's knowledge of Terrence Nicholson as a basketball player was injected into deliberations. CP 66-67.

A hearing was held on June 26, 2015. The court said "with regard to the allegations about a juror knowing Mr. Nicholson, this is not news for any of us, because during trial juror number 13, Ms. Chung [sic], disclosed that she knew Mr. Nicholson from high school. And my memory is that we specifically asked her about that outside the presence of the other jurors. She indicated it wouldn't affect her, and we agreed we were going to keep her. So I'm not planning on inquiring more into that issue. It was explored during trial." 7RP 3-4. The court wanted to inquire further about the other juror knowing Heisser. 7 RP 4.

Massie, having been called into court, was questioned. 7RP 4-13. Massie testified one juror, Ms. Cheung, said she knew Nicholson from high school. 7RP 7. Another juror, who was a basketball coach, remembered seeing Patric at a basketball game as a coach or player. 7RP

8, 12. Both jurors stated they didn't think it played into their judgment. 7RP 9, 12. The jurors revealed this information on the last day of deliberations, an hour or two before the jury reached a verdict. 7RP 11.

Massie continued:

The conversations that we were having at the time when that statement came up was whether or not we could or couldn't want to take their statements of their character, their faith, off of their testimonies, and that's when that came up was whether or not we felt they were trustworthy in what they were saying. And that was kind of the conversations that came up is that the individual that had known the victim from school was like he was, you know, a super athlete, that she was kind of surprised that this would happen to him, that she kind of knew him as being this star, up and rising athlete person.

And then the individual that was the coach had also kind of made that same statement of, you know, if he was a coach and a basketball coach, then he's kind of in his mind was it has to be somewhat of a trustworthy person, like why would they lie, why would they not have the right based off of the --" 7RP 16.

At this point the judge cut Massie off, asking "but he wasn't sure he actually knew whether Mr. Hessler was or not?" 7RP 16. Massie answered "Yes." 7RP 16. Massie agreed both of the jurors felt their knowledge had not affected them. 7RP 16-17.

The second juror at issue was identified as Mr. Woods. 7RP 14, 17-18. The court agreed that if Woods recognized Heisser during trial,

"he should have told us." 7RP 19. The court wanted to find out when Woods recognized Heisser. 7RP 19.¹⁴

On July 24, Woods was questioned in court. 6RP 410-14. Woods confirmed he had worked as a basketball coach. 6RP 410-11. He did not recognize a witness from his coaching experience. 6RP 411. He thought he recognized a witness on the stand: "We all grew up in the Central District, so he was younger than me and I don't know him personally." 6RP 411. Woods recognized him when he came on the stand. 6RP 411. In response to the court's question of whether it played any part in his discussions with other jurors, Woods answered "No." 6RP 411-12. But he did share information that he thought he recognized the witness with other jurors. 6RP 412. He made the disclosure after one of the other jurors said she knew somebody from high school. 6RP 412. When it came up that the other juror recognized Nicholson, Woods recalled "we were talking -- I think his credibility, and we were talking about his credibility." 6RP 413. Woods denied his recognition affected his assessment of credibility or his verdict. 6RP 412-13.

Defense counsel maintained her motion for a new trial, arguing "the two most important witnesses that were recognized by the jurors, had knowledge that was interjected into the jury while they were deliberating."

¹⁴ Defense counsel filed further briefing on the issue. CP 71-74.

6RP 415-19. According to Massie, Woods indicated Heisser must be trustworthy if he is a basketball coach. 6RP 419. Although the jurors said this information did not affect their judgment, the standard for assessing prejudice is an objective one, not a subjective one. 6RP 419.

The court had a different recall of the testimony. 6RP 419. Woods did not testify that he recognized Heisser as a basketball coach but rather from seeing him in the community. 6RP 420. The two were not acquainted with one another. 6RP 420. Further, "it was very much disputed whether anything was said about Mr. Heiser's [sic] credibility during deliberations." 6RP 421. Woods disputed that he said that Heisser had to be trustworthy, and said "he never talked about Mr. Heiser's [sic] credibility in the context of potentially recognizing him." 6RP 421. Massie was inconsistent while being questioned: "she said this wasn't part of the discussion of credibility." 6RP 421. The court thought it unclear whether Woods engaged in any misconduct. 6RP 421-22.

Additionally, the court did not think there was any evidence of juror misconduct involving use of extraneous evidence. 6RP 422. "There is no indication here that Mr. Woods, for example, brought a knowledge that Mr. Heiser [sic] or some acquaintanceship with him into deliberations and shared that with other jurors, which I would agree would be definite evidence of misconduct, but we don't have anything like that here." 6RP

422. To the extent Woods and Cheung knew the witnesses, "it had no impact on their assessment; that apparently is the statement they made [to] the other jurors." 6RP 422-23.

The court again rejected the argument that a new trial was required in regard to juror Cheung based on the premise that they "talked to her about the need to make sure, in fact, that she was able to remain fair and impartial, despite her recognition of Mr. Nicholson. And we all were satisfied with retaining her once we had probed her." 6RP 423. Neither did the court see anything wrong in Woods recognizing someone from the community 20 years before and indicating to other jurors that it did not affect his assessment of credibility. 6RP 423-24. The court did not credit Massie's statement she made to the defense investigator that Woods said something different, a statement she did not repeat in court. 6RP 424.

Counsel argued Massie's statement about the basketball coach being trustworthy was made in court. 6RP 424. The court recalled the testimony differently and reiterated Woods' recognition did not play a part in his conclusions according to Massie. 6RP 424-25. Counsel said it didn't matter because it is not a subjective standard. 6RP 425. The court said Massie had not been entirely consistent, and "[t]o the extent she's discrepant with Mr. Woods, I credit Mr. Woods, okay? In any event, I think, even from Ms. Massie's testimony, Mr. Woods said that this was not

part of his consideration of credibility or something the jury considered as part of credibility, end of story, okay?" 6RP 425. The court denied the motion for a new trial. CP 76; 6RP 424.

b. Overview of the law on motions for new trial based on juror misconduct.

Both the Washington and United States constitutions guarantee the right to a fair and impartial jury trial. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, §§ 3, 22. A constitutionally valid jury trial must be free of disqualifying jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). "One touchstone of a fair trial is an impartial trier of fact — 'a jury capable and willing to decide the case solely on the evidence before it.'" McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

A trial court's decision to deny a motion for new trial based upon alleged juror misconduct is generally reviewed for abuse of discretion, although more deference is given to a decision granting a new trial than a decision denying one. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 158, 776 P.2d 676 (1989). "This principle is subject to the limitation that, when an order granting or denying a motion for a mistrial is predicated

upon rulings as to the law, no element of discretion is involved." Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 136, 750 P.2d 1257 (1988). A trial court's decision denying a new trial is subject to reversal "when it is predicated on an erroneous interpretation of the law." Dalton v. State, 115 Wn. App. 703, 713, 63 P.3d 847 (2003) (quoting State v. Cho, 108 Wn. App. 315, 320, 30 P.3d 496 (2001)). "If juror misconduct can be demonstrated with objective proof without probing the jurors' mental processes, and if the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial." Chiappetta v. Bahr, 111 Wn. App. 536, 540-41, 46 P.3d 797 (2002).

c. Juror Cheung committed misconduct in failing to disclose her recognition of Nicholson and injecting that knowledge into deliberations.

"A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact can amount to juror misconduct." Allyn v. Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997). "Furthermore, a juror who brings to the jury deliberations information outside the record commits misconduct." Allyn, 87 Wn. App. at 729.

Juror Cheung committed two closely related acts of misconduct — material nondisclosure and the use of the undisclosed information during jury deliberations. This misconduct translated into two closely related types of prejudice: (1) Payne was denied the opportunity to detect, and to

prevent from being used during deliberations, juror Cheung's knowledge of Nicholson as a star basketball player; and (2) Payne was prejudiced by having the undisclosed information interjected into the jury's deliberations in the context of assessing Nicholson's credibility.

The trial court denied the motion for new trial in regard to juror Cheung on the ground that she disclosed "she knew Mr. Nicholson from high school" and, when questioned, "[s]he indicated it wouldn't affect her, and we agreed we were going to keep her." 7RP 3-4. The record shows otherwise. When the issue came up during trial, the court reported that Cheung "recognized Mr. Nicholson's high school, it's the high school she attended. She didn't recognize Mr. Nicholson, didn't know Mr. Nicholson." 6RP 2. Cheung affirmatively represented that she did not recognize Nicholson. She only recognized the high school he went to.¹⁵ But during deliberations, she told other jurors that she knew Nicholson from high school, describing him as "a super athlete, that she was kind of surprised that this would happen to him, that she kind of knew him as being this star, up and rising athlete person." 7RP 7, 16. The court's decision denying a new trial in relation to juror Cheung is based on untenable grounds because its factual finding that Cheung disclosed she knew Nicholson is unsupported by the record. See In re Marriage of

¹⁵ Nicholson had testified to the name of his high school. 5RP 160.

Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) ("A court's decision . . . is based on untenable grounds if the factual findings are unsupported by the record").

Cheung's misrepresentation that she did not recognize Nicholson is misconduct. Allyn, 87 Wn. App. at 729. During voir dire, the court specifically directed jurors who did not recognize the name of a witness to promptly notify the court if a juror recognized the witness on the stand. 4RP 101. "If a juror knows that disclosure is the appropriate response to the court's and/or counsels' questions, then bias is conclusively presumed." Dalton, 115 Wn. App. at 713-14.

Furthermore, a jury commits misconduct by considering extrinsic evidence. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence is "information that is *outside all the evidence* admitted at trial." State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). Cheung's recognition of Nicholson constitutes extrinsic evidence because that fact was not admitted at trial. See Allyn, 87 Wn. App. at 730 (affirming grant of new trial where juror disclosed in voir dire he knew an expert witness, said nothing when asked if that would prevent her from giving both sides a fair trial, but then attacked the expert's credibility based on that knowledge ("he would testify to anything"), which was "information outside the trial record").

Cheung injected that information into deliberations by commenting Nicholson was a star basketball player in the context of a discussion on Nicholson's credibility. 7RP 7, 16. Jurors knew from Nicholson's background testimony that he had played basketball before. 5RP 160-61. But there was no testimony that he was "a super athlete" and an up and rising "star," which connotes a degree of admirable celebrity. 7RP 16. Cheung was impressed enough by Nicholson's unusual athletic prowess to connect it with a determination of his credibility. Id.

"The injection of information by a juror to fellow jurors, which is outside the recorded evidence of the trial . . . constitutes juror misconduct." Bourgeois, 133 Wn.2d at 410 (quoting Richards v. Overlake Hosp. 59 Wn. App. 266, 270, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991)). "When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct." State v. Johnson, 137 Wn. App. 862, 869, 155 P.3d 183 (2007). The trial court failed to follow this governing legal standard based on its mistaken belief that Cheung had disclosed her recognition of Nicholson.

According to the trial court, juror Massie "said this wasn't part of the discussion of credibility." 6RP 421. The record shows the opposite.

It was part of the discussion on credibility. 7RP 7, 16. This is not just a case of a juror's material nondisclosure. Cheung's nondisclosure is inseparably involved with her discussion of the undisclosed information during the jury's deliberations. Thus, even if the undisclosed information alone would not have entitled Payne to challenge juror Cheung for cause based on the existing record, the nondisclosure, coupled with the later misconduct in deliberations amounts to actual prejudice entitling him to a new trial. State v. Briggs, 55 Wn. App. 44, 52, 776 P.2d 1347 (1989).

Had juror Cheung followed the court order to promptly notify the court if a witness was recognized at trial, Payne "could have pursued the matter to determine whether the juror should be excused for cause." Briggs, 55 Wn. App. at 54-55. Cheung's affirmative misrepresentation that she did not know Nicholson deprived Payne of this opportunity. See Johnson, 137 Wn. App. at 869 ("Had juror B answered truthfully to the relevant voir dire questions, Johnson could have pursued the matter to examine whether to excuse her for cause, or at least to ask her whether she could refrain from discussing her personal experiences during deliberations."). Cheung's misrepresentation that she did not know Nicholson, coupled with her injection of her personal knowledge of Nicholson as a star basketball player into deliberations, shows her lack of objectivity. See id. ("Juror B's injection of nondisclosed information into

deliberations illustrated that she could not be objective about the case at hand — the precise danger that voir dire is designed to prevent.").

d. Jurors Woods committed misconduct in failing to disclose his recognition of witness Heisser and injecting that knowledge into deliberations.

At the first hearing, the court agreed that if Woods recognized Heisser during trial, "he should have told us." 7RP 19. But the court flip flopped at the second hearing, saying it did not know how Woods could have acted differently because jurors were asked if they recognized any witness by name and "[r]ecognizing somebody you think is from your community, it seems to me, doesn't fall within the scope of our questions. So I also am not clear that Mr. Woods engaged in any misconduct at all by not revealing information that we asked him for." 6RP 421-22. The court overlooked the fact that it had directed jurors during voir dire to notify the court "right away" if a juror recognized a witness on the stand. 4RP 101. Woods' testimony shows that he recognized Heisser when he took the stand, but Woods never notified the court that he had. 6RP 411. In light of the court's directive, it was misconduct not to disclose this recognition upon its realization. His failure to disclose this material fact when called upon to do so is misconduct. Allyn, 87 Wn. App. at 729.

The court stated "There is no indication here that Mr. Woods . . . brought a knowledge that Mr. Heiser [sic] or some acquaintanceship with

him into deliberations and shared that with other jurors, which I would agree would be definite evidence of misconduct, but we don't have anything like that here." 6RP 422. This finding is unsupported by the record. Woods acknowledged he shared information that he thought he recognized the witness with other jurors. 6RP 412.

According to the court, "it was very much disputed whether anything was said about Mr. Heiser's [sic] credibility during deliberations." 6RP 421. The court found that Woods "never talked about Mr. Heiser's [sic] credibility in the context of potentially recognizing him." 6RP 421. But when asked "do you remember what you were discussing when it came up that that juror recognized Mr. Nicholson and you recognized one of the witnesses?", Woods responded "I think we were talking -- I think his credibility, we were talking about his credibility." 6RP 413. Woods acknowledged raising his recognition of Heisser in the context of discussing credibility. Its decision denying a new trial in relation to juror Woods is based on untenable grounds because its finding that Woods did not discuss his recognition in connection with credibility is unsupported by the record. Littlefield, 133 Wn.2d at 47. Woods injected his undisclosed recognition of Heisser into deliberations. That was misconduct. Johnson, 137 Wn. App. at 869.

- e. **Misconduct having been established, prejudice is presumed, and a new trial must follow because the State cannot meet its burden to show the absence of prejudice beyond a reasonable doubt.**

"Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe a defendant has been prejudiced." Johnson, 137 Wn. App. at 869. Prejudice is presumed once juror misconduct is established, and the State bears the burden of overcoming this presumption beyond a reasonable doubt. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). Thus, "[a] new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'" Johnson, 137 Wn. App. at 870 (quoting Briggs, 55 Wn. App. at 56). Prejudice is determined "by asking whether the withheld or extraneous information could have affected the jury's deliberations." State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997). The question is whether the misconduct could have affected the jury's determinations, not whether it actually did. Briggs, 55 Wn. App. at 55.

Massie testified both of the jurors who recognized a witness felt their knowledge did not affect them. 7RP 16-17. Woods testified his recognition of Heisser did not affect his credibility determination. 6RP

413.¹⁶ Relying on the testimony of Massie and Woods, the court emphasized recognition of the witnesses had no actual impact on deliberations. 6RP 423-25. The court necessarily abused its discretion because it applied the wrong legal standard and based its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The court made a subjective inquiry into the actual affect of the information injected into deliberations, which impermissibly delved into the thought processes of the jury inhering in the verdict. That was error. "The court must make an objective inquiry into whether the extraneous evidence *could* have affected the jury's verdict, not a subjective inquiry into the *actual* effect." Allyn, 87 Wn. App. at 730.

Further, "[t]his inquiry necessarily involves consideration of the purpose for which the extraneous evidence was interjected into the jury's deliberations." Briggs, 55 Wn. App. at 55-56. Here, the purpose of injecting Cheung's knowledge of Nicholson as a star basketball player was to aid in the assessment of Nicholson's credibility, which was a material fact at trial. Whether Nicholson was credible in identifying Payne as the man who shot him was a critical feature of the State's case. Juror Cheung's use in deliberations of the very information she failed to disclose

¹⁶ No other jurors were questioned on whether their personal credibility determinations were affected by what they heard.

prejudiced Payne. That prejudice is presumed, and the State cannot prove beyond a reasonable doubt that no prejudice could have resulted.

Moreover, Woods injected his recognition of Heisser into deliberations when witness credibility was being discussed. Heisser's credibility was a material fact at trial. His testimony put Payne at the scene before the shooting took place, looking in the direction of Le's residence as if he were lying in wait for Nicholson. 5RP 25-28, 43, 48. Whether that testimony was worthy of belief was a significant question.

Trial courts have been reversed for failing to grant a new trial where they applied the wrong legal standard or an erroneous interpretation of the law. Johnson, 137 Wn. App. at 871; Dalton, 115 Wn. App. at 715. Such is the case here. Juror misconduct is established. Prejudice is presumed. The nondisclosure of what should have been disclosed and its subsequent injection into deliberations could have affected the verdict from an objective standpoint. "Any doubt that the misconduct affected the verdict must be resolved against the verdict." Johnson, 137 Wn. App. at 869. Reversal of the convictions is required.

4. CUMULATIVE ERROR DEPRIVED PAYNE OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Payne has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const.

Amend. V, XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a new trial is required when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). An accumulation of errors affected the outcome in Payne's case. These errors include (1) exclusion of impeachment evidence (section C.1., supra); (2) admission of evidence to show flight (section C.2., supra); and (3) juror misconduct (section C.3., supra).

5. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoument of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Those concerns are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

The trial court waived all discretionary costs because Payne did not have the ability to pay them. 6RP 482; CP 83. Payne qualified for indigent defense services on appeal. CP 117-18. He has no sources of income. CP 114-15. There is a presumption of continued indigency. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). He received a 25-year sentence. CP 82, 84. Payne asks this Court to soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, 194 Wn. App. 496, 374 P.3d 1217, 1230 (2016) (waiving appellate costs in light of defendant's indigent status and presumption of continued indigency under RAP 15.2(f)).

D. CONCLUSION

For the reasons stated, Payne requests reversal of the convictions.

DATED this 26th day of September 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant