SUPREME COURT NO. 93464-9

COA NO. 46352-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEVENNICE GAINES,
Appellant.

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

The Honorable Thomas Felnagle, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Devennice Gaines, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Devennice Gaines seeks review of the Court of Appeals part published opinion entered on July 6, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: When extrinsic information injected into a jury's deliberations could impact the verdict, the trial court must declare a mistrial. Here, the trial court denied Mr. Gaines's mistrial motion when jurors heard that a conviction would be Mr. Gaines's "third strike" (which was not accurate), and at least one juror also heard that Mr. Gaines had a prior manslaughter conviction. Should this Court grant review when the Court of Appeals decision conflicts with prior precedent and, for the first time, creates a lower standard for a post-trial motion than for a timely one?

ISSUE 2: An accused person must be permitted to cross-examine the state's witnesses regarding bias and matters affecting credibility. Here, the court prohibited Mr. Gaines from asking questions about the timing of Thomas's statements to the prosecutor, which she made while charged with Price's murder. Should this Court grant review when the Court of Appeals' summary rejection of this issue is based solely on a misreading of the record?

IV. STATEMENT OF THE CASE[1]

1. The Global Grinders motorcycle club hosted an after-hours party in Tacoma.

Devennice Gaines went with two friends, Lakhea Thomas and Denise Green, to an after-hours party at the Global Grinders motorcycle club in Tacoma. RP (3/27/14) 653-655; RP (3/31/14) 930-931. Mr. Gaines was not a member of the club. RP (4/8/14) 1444. He was not from the area. RP (3/27/14) 645, 654.

Once he got to the club's headquarters, he was "wanded" with a metal detector, which found no weapons. RP (3/27/14) 663, 777; RP (3/31/14) 939. Security also patted him down and found nothing. RP (3/27/14) 777; RP (3/31/14) 939.

The members of Global Grinders were not checked for weapons. RP (4/8/14) 1433, 1489. Several club members carried guns inside the party. RP (3/27/14) 675-676, 682; RP (3/31/14) 950-951.

Inside the club, a man in a wheelchair – Dashe Tate – started harassing Thomas and Green. RP (3/31/14) 941-942. Tate ran over Thomas's feet with his chair. RP (3/31/14) 942.

Later, Mr. Gaines had an altercation with Tate as well. RP (3/24/14) 413-414; RP (3/27/14) 670; RP (3/31/14) 946-947. It is not clear

[1] The Statement of Facts and Prior Proceedings from Mr. Gaines's briefing in the Court of Appeals is incorporated by reference. Only the most significant facts are restated herein.

whether Tate lunged at Mr. Gaines or whether Mr. Gaines grabbed at him, but Tate ended up out of his chair and on the floor. RP (3/27/14) 670; RP (3/31/14) 946-937.

Immediately, several motorcycle club members swarmed Mr. Gaines. RP (3/27/14) 672-675; RP (3/31/14) 948-949. They dragged him away from the dance floor in a chokehold. RP (3/31/14) 950, 997-998. They held him up against a wall. RP (3/24/14) 417-420, 478-479; RP (3/27/14) 676; RP (3/31/14) 950-951.

The motorcycle club president and at least one other club member had guns drawn.[2] RP (3/27/14) 675-677, 682, 784-785; RP (3/31/14) 951.

Mr. Gaines did not fight back. RP (3/27/14) 674; RP (4/8/14) 1437. He just shook his head and said, "don't do me like that." RP (3/27/14) 674.

The lights came up and the party was over. RP (3/24/14) 484; RP (3/27/14) 673; RP (3/31/14) 953; RP (4/1/14) 1101. Almost everyone from inside, including Mr. Gaines, Thomas, and Green, went out into the adjacent alley to their cars. RP (3/24/14) 421.

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[2] Some Global Grinders members testified that no one had guns drawn. *See e.g.* RP (4/1/14) 1104-1105; RP (4/8/14) 1433, 1560. McVea, a convicted felon, claimed that he didn't touch a gun that evening. RP (4/8/14) 1433.

2. Someone shot Bruce Price, shortly after Green told him to back up while holding her hand in her purse as though she had a gun.

It was very dark in the alley. RP (3/24/14) 429; RP (4/8/14) 1499-1500. A man named Bruce Price confronted Mr. Gaines about fighting with a man in a wheelchair. RP (3/24/14) 430; RP (3/27/14) 692-693.

Mr. Gaines did not engage with Price. RP (3/24/14) 485; RP (3/27/14) 692, 789-790. Instead, he walked toward the car he had come in. RP (3/24/14) 485-486; RP (3/27/14) 694, 789-790.

Green, however, walked toward the fracas. RP (3/27/14) 694, 699. She told Price and his friend, Williams, to back up. RP (3/27/14) 695; RP (3/31/14) 1007, 1078.

Both Thomas and Mr. Gaines implored Green to just get in the car, but she didn't listen. RP (3/27/14) 694, 697, 793; RP (3/31/14) 1007, 1080-1081. Green put her hand in her purse and waved it at Williams as though she had a gun. RP (3/24/14) 433; RP (3/27/14) 694, 792-793. She was acting like there was going to be a fight. RP (3/24/14) 432.

Then, several gunshots were fired. RP (3/24/14) 433. The only argument going on immediately beforehand was between Green and Williams. RP (3/27/14) 699-700; RP (3/31/14) 1004, 1015, 1030-1031; RP (4/1/14) 1081.

When the shots fired, Mr. Gaines, Green, and Thomas all ran to their car. RP (3/24/14) 435; RP (3/27/14) 698. Because they ran, Williams assumed that the shots had come from one of them. RP (3/24/14) 435. Otherwise, he could not tell where the shots came from. Nor could he tell how far away the shooter was. RP (3/24/14) 436, 519.

Price was hit with multiple bullets – at least one .38 and one 9 mm. Ex. 11, 12; RP (4/1/14) 1135, 1173, 1175, 1178; RP (4/8/14) 1309-1321. He died shortly thereafter. RP (3/19/14) 41.

Almost everyone in the alley fled before the police arrived. RP (3/19/14); 57; RP (3/24/14) 448, 537; RP (4/1/14) 1110-1111, 1242; RP (4/8/14) 1460; RP (4/8/14) 1566. Mr. Gaines, Green, and Thomas all got into Thomas's car and left at the same time as everyone else. RP (3/24/14) 537; RP (3/27/14), 703, 707.

When the police got there a few minutes later, they found only Williams, Price, and a few people who were trying to help. RP (3/24/14) 448-449.

3. Williams and McVea both assumed that Mr. Gaines had shot Price, because Price was addressing Mr. Gaines at the time of the shooting.

Williams admitted that he had not actually seen Mr. Gaines with a gun. RP (3/20/14) 296; RP (3/24/14) 466. Nor did he see any flashes coming from Mr. Gaines's direction when the shots were fired. RP

(3/24/14) 435. In spite of this, he told the police that Mr. Gaines was the shooter. RP (3/20/14) 270. He believed that the shots came from Thomas, Green, or Mr. Gaines because the three of them ran after the shooting. RP (3/24/14) 435.

McVea also identified Mr. Gaines as the shooter. RP (4/8/14) 1475. He later admitted, though, that he had not seen the actual shooting. RP (4/8/14) 1484. He had just assumed it was Mr. Gaines because Mr. Gaines had fought with Tate and been thrown out of the club.[3] RP (4/8/14) 1506, 1512.

The medical examiner was unable to determine the direction from which Price had been shot. RP (4/2/14) 1316.

No other witnesses claimed to have seen the shooting. No guns were ever recovered. *See* RP *generally*.

4. Green and Thomas decided to put the shooting on Mr. Gaines, and both lied to police.

Green and Thomas both lied during their initial interviews with police. RP (3/27/14) 718, 720-721, 741, 804; RP (3/31/14) 981-982, 985. After Thomas spoke with police, she told Green what she had said so they

[3] At trial, McVea testified that he saw "muzzle flashes" coming from near where Mr. Gaines had been. RP (4/8/14) 1451.

could coordinate their stories. RP (3/27/14) 721-722, 739-740, 804; RP (3/31/14) 981-982.

Thomas and Green decided to put the shooting on Mr. Gaines. RP (3/27/14) 742, 804. They distanced themselves from him and said that they had not gone to the party together. RP (3/17/14) 718, 720-721, 741-742, 803; RP (3/31/14) 985.

The state charged Mr. Gaines and Thomas with Price's murder. CP 1-2. Green pled guilty to rendering criminal assistance. RP (10/7/13) 374. The state also charged Mr. Gaines with unlawful possession of a firearm. CP 1-2.

5. Mr. Gaines' first trial ended in a mistrial after the prosecutor dismissed murder charges against Thomas following a closed-door meeting with her.

Mr. Gaines and Thomas completed jury selection in a joint trial. RP (9/16/13) 108. After the jury was sworn in, the prosecutor decided to dismiss Thomas's murder charge with prejudice and proceed only against Mr. Gaines. RP (9/9/13) 35; RP (9/12/13) 81.

The prosecutor made this decision after meeting with Thomas when a "new" report surfaced, memorializing a much earlier police interview with her.[4]

[4] The lead detective on the case had failed until that point to write a report memorializing a much earlier interview with Thomas. RP (9/16/13) 104. The missing report came to light

The prosecutor told the judge that he did not believe he had enough evidence to proceed against Thomas. RP (9/12/13) 83. He also said that the decision was made because of Thomas's "willingness to talk." RP (9/12/13) 83.

The court found that the lead detective had engaged in mismanagement by failing to write a report about her interview with Thomas until after trial had begun. RP (9/16/13) 120-121. Mr. Gaines moved for a mistrial, which the court granted. RP (9/16/13) 123, 127.

6. The second trial ended in a mistrial when the jury could not reach a unanimous verdict.

The case proceeded to a second trial with Mr. Gaines as the only defendant. *See* RP (9/30/13) – RP (10/30/13). After fourteen days of testimony, the second trial resulted in a hung jury. RP (10/30/13) 2704-2717. With Mr. Gaines's consent, the court declared a mistrial. RP (10/30/13) 2715-2716, 2720.

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only after the trial had begun. RP (9/16/13) 104. Once the report surfaced, Thomas agreed to give a new "proffer" statement to the prosecutor. RP (9/12/13) 87. The prosecutors held a closed-door meeting with Thomas and conducted an interview. RP (9/12/13) 83-84. Thomas also drew a diagram of the scene in the alley at the time of the shooting. RP (3/27/14) 743; Ex. 76. The next day, the prosecutor moved to dismiss Thomas's murder charge. RP (9/12/13) 81.

7. At trial, the court barred inquiry into the connection between Thomas's decision to cooperate and the dismissal of the murder charge against her.[5]

At trial, Mr. Gaines sought to cross-examine Thomas regarding the dismissal of her murder charge. RP (10/9/13); 715-727, 766-770; RP (10/10/13) 878-898. He sought to show that she gave her most recent statement to the prosecution while the murder charge was still hanging over her head. RP (10/9/13) 718-720. He argued that the evidence was relevant to bias and credibility. RP (10/9/13) 719-720.

The court denied Mr. Gaines's motion. RP (10/9/13) 726. The court only let Mr. Gaines bring out that Thomas was once charged with Price's murder and that the charge was dismissed. RP (10/10/13) 893; RP (3/27/14) 805. The judge did not allow Mr. Gaines to draw any connection between her statement and the dismissal. RP (10/10/13) 896-898.

8. During deliberations, one juror told the others that Mr. Gaines had two prior strikes, referring to a newspaper article that had made that inaccurate claim.

Long before the third trial, the Tacoma Tribune published a story about the case. RP (4/10/14) 1713. The article said that Mr. Gaines had a prior conviction for manslaughter and was registered as a sex offender. RP (4/10/14) 1715. The article said that Mr. Gaines was in a gang in Seattle.

[5] Some of the evidentiary rulings discussed in this section were made during Mr. Gaines's second trial. The parties agreed, however, that those rulings would carry over to the third trial under the law of the case doctrine. RP (3/17/14) 23; RP (3/24/14) 510.

RP (4/10/14) 1715. It also claimed that a conviction for Price's murder would be Mr. Gaines's "third strike."[6] RP (4/10/14) 1714.

During deliberations, Juror 2 told the other jurors about the article. CP 411. He alluded to the information while arguing that Mr. Gaines did not have any reason to shoot Price: "Why would he do it? He has two strikes against him already. I don't see why he would do it." RP (4/10/14) 1718.

All of the other jurors heard that this would have been Mr. Gaines's third strike. RP (4/10/14, 2) 1718-1726, 1734-1771. At least one juror also heard that he may have had a prior conviction for manslaughter. RP (4/10/14) 1735.

The court questioned all of the jurors except Juror 2. RP (4/10/14) 1718-1726, 1734-1771. All eleven of the jurors questioned said they could still be fair, and they would follow any instruction to decide the case based only on the evidence in court. RP (4/10/14) 1718-1726, 1734-1771.

Mr. Gaines moved for a mistrial. RP (4/10/14) 1712. He argued that the extrinsic information was an "atomic bomb" because the three strikes law is reserved for the "worst of the worst" and made Mr. Gaines appear very violent. RP (4/10/14) 1772.

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[6] Mr. Gaines was not really a third strike candidate. Apparently there was some confusion regarding his status, however, at the beginning of the case. RP (4/10/14) 1714.

The court reserved ruling on the mistrial motion, brought in an alternate juror, and told the jury to start deliberations anew. RP (4/10/14) 1783-1786.

The court never gave a curative instruction relating to the extrinsic information. RP (4/10/14) 1710-1787.

Mr. Gaines renewed his motion for a mistrial before the verdict was read. RP (4/14/14) 5-6. The court denied the motion. RP (4/14/14) 9.

The jury convicted Mr. Gaines of second-degree murder and unlawful possession of a firearm. RP (4/14/14) 10-11.

Mr. Gaines timely appealed. CP 499. The Court of Appeals confirmed his convictions. Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the trial court should have granted a mistrial because jurors heard highly prejudicial extrinsic information during their deliberations. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4). The Court of Appeals' published opinion also conflicts with its prior decision in *Johnson*. RAP 13.4(b)(2).

During deliberations, Juror 2 announced—incorrectly—that Mr. Gaines had two prior strikes.[7] RP (4/10/14) 1718. All the other jurors

[7] Before the trial, the Tacoma Tribune mistakenly reported that a conviction in this case would be Mr. Gaines's third strike. RP (4/10/14) 1713. The article also mentioned his juvenile manslaughter adjudication. RP (4/10/14) 1715.

heard this, either from him or during the ensuing discussion. RP (4/10/14) 1718-1726, 1734-1771. At least one other juror also heard that Mr. Gaines had a prior manslaughter conviction. RP (4/10/14) 1735.

Despite the jury's exposure to highly prejudicial and misleading extrinsic information, the court denied Mr. Gaines's motion for a mistrial. RP (4/14/14) 9.

The court denied the mistrial motion based on the jurors' assurances that they would be able to follow an instruction to disregard the information, but then did not give them such an instruction. RP (4/14/14).[8]

Due process and the right to a jury trial guarantee accused persons a fair trial by an impartial jury. *State v. Berniard*, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22. A mistrial was necessary in this case to ensure that Mr. Gaines received a fair trial by an impartial jury.

The introduction of extrinsic evidence into jury deliberations entitles the accused to a new trial if there are reasonable grounds to believe that it was prejudicial. *State v. Johnson*, 137 Wn. App. 862, 869-70, 155 P.3d 183 (2007). Any doubt that the verdict was affected must be resolved in favor of a new trial. *Id.*

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[8] The judge opined that jurors could disregard such information just as easily as judges routinely do in bench trials. RP (6/5/14) 1799. The judge also said that having another trial would not be an efficient use of judicial resources. RP (4/14/14) 8-9.

The inquiry is objective. *Id.* The court must look to whether the extra-evidentiary allegations *could have* affected the jury. *Id.* The court errs by looking subjectively to the actual effect. *Id.* A new trial must be granted unless the court can determine beyond a reasonable doubt that the extrinsic evidence could not have impacted the verdict. *Id.; See also State v. Boling*, 131 Wn. App. 329, 332-33, 127 P.3d 740 (2006).

Here, the court failed to apply the required objective standard. RP (4/14/14) 8-9. Indeed, the court's reasoning was based almost exclusively on the extent to which the jurors were "adamant" that they could still be fair and impartial. (4/14/14) 8-9. But the jurors' subjective beliefs were inapposite to the analysis. *Johnson*, 137 Wn. App. at 871.

The court erred by failing to objectively consider the impact on the jury. Here, the extrinsic information about Mr. Gaines's alleged three strikes and prior manslaughter conviction was highly prejudicial. Under an objective standard, it could not have been harmless beyond a reasonable doubt. *Johnson*, 137 Wn. App. at 871. The trial court abused its discretion and applied the wrong legal standard.[9] *Id.*

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[9] Extrinsic evidence regarding an accused person's prior convictions can be particularly damaging. *See e.g. Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998); *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988).

The state cannot establish beyond a reasonable doubt that the extrinsic information about two supposed prior strikes did not affect Mr. Gaines's trial. There was no direct evidence implicating Mr. Gaines. No one saw him with a gun. He was walking away from Price when Price was shot. RP (3/24/14) 485-486; RP (3/27/14) 694, 789-790.

Still, the Court of Appeals rejects this argument in the published portion of its opinion. Opinion, pp. 5-7. The court reasons that the objective standard does not apply in Mr. Gaines's case because he made his motion for a mistrial before the jury rendered its verdict. Opinion, pp. 5-7. Accordingly, the court holds, the jurors' subjective representations do not inhere in the verdict and are an appropriate area of inquiry for the court. Opinion, pp. 5-7.

In short, the Court of Appeals anomalously creates a lower standard for a post-verdict motion for a mistrial based on the interjection of extrinsic information into a jury's deliberations than for a timely motion. Opinion, pp. 5-7. As such, the court creates a perverse incentive for the defense to delay raising such an issue until after the jury has been dismissed.

The Court of Appeals is unable to point to any prior case applying this significantly lowered standard to a motion for a mistrial based on the introduction of intrinsic, highly prejudicial evidence into a jury's deliberations. Opinion, pp. 5-7. This court should grant review because

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The state's theory was, basically, that Mr. Gaines must have been the shooter because it could not have been anyone else. With such a dearth of reliable evidence, there is a reasonable probability that the jury improperly used Mr. Gaines's alleged history of serious, violent crime as a tiebreaker in finding him guilty.

this significant question of constitutional law is of substantial public interested under RAP 13.4(b)(3) and (4).

Review is also appropriate under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with its prior holding in *Johnson*.

B. The Supreme Court should accept review and hold that The court violated Mr. Gaines's confrontation right by prohibiting him from eliciting that Thomas made her statements to the prosecutor and agreed to cooperate at a time when she still had a murder charge hanging over her head. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

Thomas was originally charged with Price's murder as Mr. Gaines's co-defendant. But the state dismissed the murder charge against Thomas after she provided a statement to the prosecutor behind closed doors. RP (9/12/13) 81.

The prosecutor said that the dismissal was because of Thomas's statement, in conjunction with her "willingness to talk." RP (9/12/13) 83.

Thomas testified for the state at Mr. Gaines's trial. RP (3/27/14) 644-829. But the court refused to let Mr. Gaines cross-examine her about the dismissal of her murder charge the day after she had a closed-door meeting with the prosecution. RP (10/9/13) 726.

Mr. Gaines was not allowed to elicit that Thomas was still under the shadow of the charge when she met with the prosecutor and provided the information necessary to persuade him to proceed against Mr. Gaines

alone. RP (10/9/13) 718-720; RP (10/10/13) 893-898. He was not allowed to point out that her "willingness to talk" led to the dismissal of a murder charge against her. RP (10/9/13) 726. Instead, he was only permitted to bring out that Thomas had originally been charged and that the charge had been dropped. RP (10/9/13) 726.

The court violated Mr. Gaines's right to confront Thomas by limiting his cross-examination into her potential bias. This requires reversal and remand for a new trial.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. *State v. Darden*, 145 Wn.2d 612, 620, 26 P.3d 308 (2002) (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)); U.S. Const. Amend. VI; art. I, § 22.

Confrontation helps assure the accuracy of the fact-finding process. *Darden*, 145 Wn.2d at 620 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to confront adverse witnesses must be "zealously guarded." *Darden,* 145 Wn.2d at 620.

The *Darden* court set out a three-part test for when cross-examination may be limited. *Darden*, 145 Wn.2d at 612. First, cross-examination that is even minimally relevant must be permitted under most

circumstances. Second, the state must demonstrate that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process." Finally, the state's interest in excluding the evidence must be balanced against the accused person's need for the information sought. *Id.*

Exposure of witness bias is "a core value of the Sixth Amendment." *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), *as amended* (Sept. 1, 2010). A witness's bias or possible incentive to lie is a "quintessentially appropriate topic for cross-examination." *Id.*

When a trial court prohibits an accused person from eliciting evidence relevant to bias of the state's witnesses, prejudice is presumed. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Reversal is required unless the state proves that no rational jury could have a reasonable doubt as to guilt even with the omitted evidence. *Id.*

Bias evidence is always relevant. *Spencer*, 111 Wn. App. at 408 (citing *Davis*, 415 U.S. at 316-18). An accused person must be allowed to cross-examine a witness regarding any expectation that his/her testimony might affect the resolution of other charges. *Martin*, 618 F.3d at 727.

A witness with such expectations may have "a desire to curry favorable treatment." *Martin,* 618 F.3d at 727. The exposure of such a motivation for testifying "is a proper and important function of the

constitutionally protected right of cross examination." *Davis*, 415 U.S. at 316-17.

This is particularly true when the timing, nature, and status of the witness's charges permit an inference by which the jury could conclude that the witness is biased. *Martin*, 618 F.3d at 730.

The absence of an explicit agreement "does not end the matter." *Martin,* 618 F.3d at 728. Indeed, the witness need not even be aware of her or his own bias; the exposure of a witness's unconscious bias is a proper object of cross-examination. *See, e.g., United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

In *Davis*, the United States Supreme Court reversed a conviction because the trial court prohibited the accused from cross-examining a key state witness about his status as a juvenile probationer. *Davis*, 415 U.S. at 311-13. The accused in *Davis* also sought to introduce evidence of the juvenile's prior burglary adjudication to demonstrate that he may have been concerned that he would be suspected of the burglary crime at issue if he did not testify favorably for the state. *Id.*

The inference of Thomas's bias was much stronger than that in *Davis*. Thomas was not on probation for some un-related prior offense. She was originally charged with the same murder for which Mr. Gaines was on trial. It was only after the jury was selected in her joint trial with

Mr. Gaines that Thomas provided the state with whatever information caused the prosecutor to dismiss the charge against her. RP (9/12/13) 81. She was still under the shadow of the murder charge when she gave the new statement.

The sequence of events permits a direct inference that Thomas's charge was dismissed in exchange for incriminating testimony against Mr. Gaines. Or, at the very least, that she made statements against Mr. Gaines while under the pressure of a pending murder charge and thereby saved herself from conviction in the same case.

Mr. Gaines's cross-examination of Thomas regarding the mere fact that she had once been charged in the case did not make that inference of bias clear for the jury. *See e.g. Davis*, 415 U.S. at 318. The court violated Mr. Gaines's right to confront adverse witnesses by impermissibly prohibiting him from cross-examining Thomas about a major potential source of bias.[10] *Id.*

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[10] The state cannot demonstrate beyond a reasonable doubt that any rational jury would have convicted Mr. Gaines even if they had known of Thomas's potential bias. *Spencer*, 111 Wn. App. at 408.

No witness saw Mr. Gaines with a gun or explained how he would have gotten one. He was walking away from the tussle when the shooting happened. He had not responded violently despite repeated confrontations and threats from numerous people in the club. The evidence against Mr. Gaines was far from overwhelming.

Thomas's testimony supported the state's trial theory. According to Thomas, Mr. Gaines stood in the spot where the prosecutor claimed the fatal shots originated. The state introduced the diagram Thomas had drawn during her closed-door session with the prosecutor, in which she illustrated the location of each person in the alley. RP (3/27/14) 743-48; Ex. 76. The state relied on that diagram in closing argument. RP (3/27/14) 1670.

Even so, the Court of Appeals found no error, reasoning that Mr. Gaines was permitted to ask Thomas about "whether she was charged with murder when she gave her statement to the police. Opinion, p. 18. But Mr. Gaines was actually prohibited from eliciting that crucial information. RP (10/10/13) 893-898. The Court of Appeals' holding is based on a mis-reading of the record.

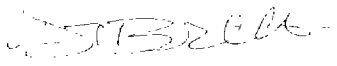
The court violated Mr. Gaines's right to confrontation by preventing him from cross-examining Thomas regarding a key source of bias. *Davis*, 415 U.S. at 318. Mr. Gaines's convictions must be reversed. *Id.*

This significant question of constitutional law is of substantial public interest and should be reviewed by the Supreme Court. RAP 13.4(b)(3), (4).

VI. CONCLUSION

The Supreme Court should accept review of this case pursuant to RAP 13.4(b)(2), (3), and (4).

Respectfully submitted August 5, 2016.



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Devennice Gaines/DOC#729910
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and I sent an electronic copy to

Pierce County Prosecuting Attorney
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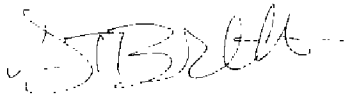
through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on August 5, 2016.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

July 6, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEVENNICE ANTOINE GAINES, Appellant.	No. 46352-1-II PART PUBLISHED OPINION

WORSWICK, P.J. — Devennice Gaines appeals his convictions and sentence for the second degree murder of Bruce Price and for unlawful possession of a firearm. In the published portion of this opinion we hold that (1) the trial court did not deny Gaines's right to a fair and impartial jury when it denied his motion for a mistrial after jurors heard extrinsic information. In the unpublished portion of this opinion we hold that (2) the trial court did not deny Gaines's right to a unanimous verdict when it dismissed a juror without examining his ability to be fair, (3) the prosecutor did not commit misconduct by attributing a statement to Gaines during closing argument, (4) the trial court did not violate Gaines's right to confront witnesses or his right to present a defense by limiting his cross-examination of three witnesses, (5) the trial court did not err by denying his motion to dismiss the case with prejudice due to governmental misconduct, but that (6) the trial court erred by failing to conduct an individualized inquiry into his ability to pay his legal financial obligations (LFOs). Consequently, we affirm Gaines's convictions, but we remand to the trial court to consider Gaines's ability to pay discretionary LFOs. Finally, we exercise our discretion and waive appellate costs.

FACTS

Gaines went to an after-hours party at a motorcycle club in Tacoma, accompanied by two female friends: Lakheea Thomas and Denise Green. During the party, Gaines had an altercation with Dashe Tate, who was in a wheelchair. Gaines knocked Tate out of his wheelchair. Several men then surrounded Gaines, shouting at him.

Thomas and Green left the club during the altercation, followed by Gaines. Outside, Price confronted Gaines for knocking Tate out of his wheelchair. Green heard Gaines tell her: "[B]itch, get to the car." 9 Verbatim Report of Proceedings (VRP) (Mar. 31, 2014) at 1025. She also remembered someone instructing her to "get in the car, something's about to go down," but she was not sure if it was Gaines who said this entire statement to her. 9 VRP (Mar. 31, 2014) at 1026. Witnesses then heard several gunshots. Price was shot multiple times and died. Soon after the shooting, two witnesses identified Gaines as the shooter.

The State charged Gaines with one count of second degree murder with a firearm enhancement,[1] one count of second degree felony murder committed in the course of second degree assault with a firearm enhancement,[2] and one count of first degree unlawful possession of a firearm.[3]

After all the evidence and arguments were presented, and a few hours into jury deliberations, the presiding juror sent the following note to the trial court: "One juror said out

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[1] RCW 9A.32.050(1)(a); former RCW 9.94A.533(3) (2011).

[2] RCW 9A.32.050(1)(b); former RCW 9.94A.533(3) (2011).

[3] RCW 9.41.040(1)(a). Gaines stipulated that he had a prior felony for purposes of this charge.

loud that he read in the newspaper 2 years ago, the 'defendant has 2 priors.' Eight jurors heard this. We heard during the trial of [one felony]—it was stipulated. All have said this would not give prejudice. Is this a problem?" Clerk's Papers (CP) at 411. Gaines then moved for a mistrial.

The trial court decided to question the jurors. The court questioned each of the eight affected jurors individually, warning each juror not to mention their impressions of the case or their likely vote. Juror 11 told the court that juror 2 had said something like: "'Why would he do it? He has two strikes against him already. Why would he do it. I don't see why he would do it.'" 14 VRP (Apr. 10, 2014) at 1718. Other jurors said variously that juror 2 said something about Gaines's multiple felonies, "two strikes," or "three strikes." 14 VRP (Apr. 10, 2014) at 1735, 1743. The jurors satisfied the court that they had quickly recognized the problem in hearing the statement and had avoided further tainting deliberations because of it. Some jurors reported that other jurors chastised juror 2 for bringing extraneous facts into the case.

In considering whether to declare a mistrial, the trial court said: "I got the feeling that [the jurors] were very adamant . . . that they could follow [the instructions] that they would be impartial." 14 VRP (Apr. 10, 2014) at 1778. The court deferred ruling on Gaines's motion for a mistrial.

The trial court dismissed juror 2, then impaneled the alternate juror and instructed the entire reconstituted jury to begin deliberating afresh. Specifically, it instructed the jury that "[d]uring this trial juror number 13 was an alternate juror. Juror number 13 has now been seated as a juror in this case. You must disregard all previous deliberations and begin deliberations anew." CP at 473. The trial court then denied Gaines's motion for a mistrial.

The jury found Gaines guilty of second degree murder and second degree felony murder. These charges merged. The jury also found him guilty of first degree unlawful possession of a firearm. It further found the aggravating factor that Gaines was armed with a firearm. Gaines appeals.

ANALYSIS

Gaines argues that the trial court abused its discretion and denied his constitutional right to a jury trial when it denied his motion for a mistrial based on juror misconduct. We disagree.

A. *Standard of Review*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a fair trial by an impartial jury. "The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

We review a trial court's investigation of juror misconduct for abuse of discretion. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Similarly, we review a trial court's decision denying a motion for a mistrial based on juror misconduct for an abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable. *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669 (1997).

"As a general rule, the trial courts have wide discretionary powers in conducting a trial and dealing with irregularities which arise." *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). "A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly." *Gilcrist*, 91 Wn.2d at

612. Only errors that may have affected the outcome of the trial are prejudicial. *Gilcrist*, 91 Wn.2d at 612.

B. *Extrinsic Evidence*

Gaines argues that the trial court erred by denying his motion for a mistrial after the jury heard extrinsic information. Specifically, Gaines argues that the trial court abused its discretion by applying the wrong legal standard: it subjectively investigated the jurors' ability to be fair, rather than objectively inquiring into whether any prejudice could result. The State argues that Gaines draws this objective standard from an inapplicable line of cases, and therefore, the trial court did not err. We agree with the State.

Consideration of novel or extrinsic evidence constitutes juror misconduct and can require a new trial. *Balisok*, 123 Wn.2d at 118. Extrinsic evidence is information outside what is admitted at trial. *Balisok*, 123 Wn.2d at 118. We may presume prejudice on a showing of misconduct. *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). But that "presumption can be overcome by an adequate showing that the misconduct did not affect the deliberations." 165 Wn.2d at 856.

Gaines relies on cases which involve a key factual distinction from this case. In all the case law Gaines cites on this point, the trial court was ruling on a postverdict motion.[4] By

[4] *See, e.g.*, *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 205 n.13, 75 P.3d 944 (2003); *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962); *Turner v. Stime*, 153 Wn. App. 581, 589-90, 222 P.3d 1243 (2009); *State v. Johnson*, 137 Wn. App. 862, 870, 155 P.3d 183 (2007); *State v. Boling*, 131 Wn. App. 329, 331-32, 127 P.3d 740 (2006); *State v. Tigano*, 63 Wn. App. 336, 338, 818 P.2d 1369 (1991).

contrast, here the jury notified the trial court of a potential issue on the first day of deliberations, before reaching a verdict.

When a jury hears extrinsic information and where that extrinsic information *inheres in the verdict*, the trial court must make an objective inquiry, asking whether the evidence could have affected the jury's verdict. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003); *State v. Johnson*, 137 Wn. App. 862, 870, 155 P.3d 183 (2007). This objective test exists because trial courts are not allowed to impeach a jury's verdict by probing into the subjective mental processes of the jurors. *Gardner v. Malone*, 60 Wn.2d 836, 840-41, 376 P.2d 651 (1962). After a jury renders a verdict, it is improper for a trial court to ask jurors about their subjective reasoning—thus, the trial court may not ask whether the extrinsic evidence subjectively influenced the jury's verdict, and it must instead apply the objective test. *Gardner*, 60 Wn.2d at 840-41.

This objective standard applies only after a verdict has been rendered. A "trial court may not consider *postverdict* juror statements that inhere in the verdict when ruling on a new trial motion." *Breckenridge*, 150 Wn.2d at 204 (emphasis added). The logic underlying the objective test does not apply before the jury reaches a verdict, such as here, because there is no verdict to impeach. In other words, a trial court may ask questions of the jurors' subjective ability to disregard extrinsic information before there is a verdict to potentially impeach. Nor is there a reason the trial court must rely on the objective standard of whether the information could have impacted the verdict, because there is not yet a verdict. Neither case law nor logic requires us to apply the objective test where, as here, there is no verdict to impeach.

Gaines argues only that the trial court erred by failing to inquire objectively into the potential prejudice resulting from the extrinsic information. He does not otherwise argue that the trial court abused its discretion when it denied him a mistrial after determining that each juror could be fair. He provides no argument or authority for the proposition that the trial court abused its discretion, apart from arguing that it applied the wrong legal standard. Thus, his argument fails.

Gaines also argues that the trial court never instructed the jurors to disregard extrinsic information, but this is inaccurate. The jurors were instructed to consider only the evidence in the case. Moreover, when the trial court replaced juror 2 with the alternate juror, it instructed the newly constituted jury to "disregard all previous deliberations and begin deliberations anew." CP at 473. Thus, taking the instructions as a whole, the trial court instructed the jury to consider only the evidence admitted at trial, and to disregard their deliberations that had been tainted by extrinsic information. Gaines's argument fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

During the police investigation of the shooting, Detective Vickie Chittick interviewed witnesses. Thomas's accounts were inconsistent. In an April 17 interview with Detective Chittick, Thomas said she attended the party at the club with Green and Gaines, all three were present when the shooting occurred, Gaines was wearing a long sleeve gray shirt, and she did not see who the shooter was. But in a July 17 interview, Thomas told Detective Chittick that she and

Gaines did not come to the club together, she heard a disturbance in the club and started running, she ran outside not knowing where Gaines was, she ran to her car and heard gunshots from behind her, and then left with Green. Thomas claimed Price's friends shot Price. Conversely, Green consistently told detectives that she arrived at and left the party with both Gaines and Thomas.

After the State charged Gaines with his crimes, the State charged Thomas with second degree murder with a firearm enhancement, second degree felony murder while committing second degree assault, and unlawful possession of a firearm. Thomas and Gaines were joined as codefendants.

On September 10, 2013, before any witnesses were called in Gaines and Thomas's joint trial, Detective Chittick told prosecutors that she had failed to include certain details from her handwritten notes in her official report from her first interview with Thomas. These details included that Thomas appeared to "shak[e her] head yes" when police named Gaines as the shooter. CP at 146.

Prosecutors immediately disclosed this information to the trial court. The trial court called a six-day recess to allow time for Gaines's counsel to conduct additional discovery. Meanwhile, Thomas voluntarily provided a proffer statement to the State, describing her testimony. In this proffer, she admitted that both Gaines and Green went to the party with her.

On September 12, 2013, the State moved to dismiss Thomas's charges, claiming that on Tuesday, September 10, 2013, the State received new information from law enforcement that would prevent the State from proving its case against Thomas. The trial court granted this motion.

Gaines then moved to dismiss his case with prejudice under CrR 8.3. Gaines argued that proceeding with trial after Thomas's dismissal and proffer would force him to choose between his rights to speedy trial and adequately prepared counsel. Gaines's argument about why the proffer made him unprepared was not specific. He argued that the proffer contained "significant information that changes the aspects of our case," and that counsel thought it would be "necessary to go back and interview Ms. Green, as well as [two other witnesses]. . . . Ms. Thomas'[s] information completely changes and puts a new dynamic on their observations at the time." VRP (Sept. 16, 2013) at 105. He also speculated that the proffer statement must have been important because it induced the State to dismiss Thomas's case. But Gaines identified no new facts in the statement, nor did he say why it would alter other witnesses' testimony.

In denying Gaines's motion to dismiss under CrR 8.3, the trial court stated:

> I find that mismanagement did occur. I think the mismanagement was in the failure to disclose the notes and do that in a timely manner. I don't find it was ill will or intentional, and I am aware of the case law that says that you don't have to make a finding that it was intentional or in bad faith in order to dismiss under 8.3, but I think it's an important factor for the Court to consider. . . .
>
> But I don't find that this mismanagement at this stage of the trial is of such a severe consequence that it would prejudice the defense counsel in terms of preparing his case and presenting it to the jury or that it . . . would have affected the outcome of the trial with a juror because, again, the . . . jurors have heard absolutely no evidence in this case.
>
> And, two, because the mismanagement was discovered before the first witness was called, the Court has already started the remedial process in giving additional time for defense counsel to prepare for his defense with that knowledge before even the first witness is called.
>
> Therefore, I do not find that the remedy in this case is to dismiss the case but to grant defense additional time to adjust his defense with this knowledge as being disclosed in this recent proffer by Ms. Thomas and through the notes that were not given to defense. But I don't believe irreparable harm has occurred that

> would affect the outcome of the trial because the Court has, under these fact patterns, an opportunity to cure that prejudice without dismissing the case.

VRP (Sept. 16, 2013) at 120-22.

Immediately after this ruling, Gaines moved for a mistrial, citing the need to reinterview witnesses. The trial court granted this motion.[5]

After the mistrial, Gaines's case proceeded to a second jury trial. The trial court ruled that Gaines would not be permitted to (1) cross-examine Thomas about the dismissal of her case, (2) impeach witness Victor McVea about his 13-year-old felony conviction for forgery, or (3) elicit the fact that Green tended to carry a gun. This case ended in a mistrial when the jury could not reach a unanimous verdict.

A different judge presided over Gaines's next jury trial. In preparation for the new jury trial, the following colloquy occurred:

> [Gaines's Attorney]: [M]y understanding is on a retrial, that the motions in limine, that were argued and ruled on in the prior case kind of become law of the case, and I just wanted to—
>
> [THE COURT]: I think that's true. The exception is if either side wants to review them because they didn't play out the way it was anticipated or something has come up since, or this trial has gone in a different direction. I think there's reasons you can revisit, but for the most part, I think the best mechanism is to have [the rulings] be the rule of the case.
>
> [Gaines's Attorney]: We have transcripts, I think, of three or four of the witnesses, and there were several issues that popped up during their testimonies. And I will try to figure out those and reduce them to writing.

[5] Neither party elicited testimony about Thomas's head shake at trial.

1 VRP (Mar. 17, 2014) at 23. Gaines did not request that the trial court revisit any evidentiary rulings. Later in the trial, Gaines said: "[M]y understanding is we are adhering to those rulings that [the other judge] made . . . and that's fine." 7 VRP (Mar. 26, 2014) at 607.

At Gaines's second jury trial, witnesses testified to the above facts. In closing argument, the prosecutor emphasized to the jury that many witnesses had conflicting stories. He said:

> Denise Green, she says, just before the shooting, she hears Mr. Price say, you think it's cool to hit a dude in a wheelchair, and then we get to this, *bitch, get in the car, it's about to go down. That's what the defendant says.* Then she turns to go to the car and gunfire. . . . But then here's the defendant who [Green] knows saying, bitch, get to the car. And then there's gunfire. Why is he saying that? Who drove? Not him. [Thomas] drove. *Get to the car, it's about to go down.* Get the car started, I got this, I'll be there in a second.

13 VRP (Apr. 9, 2014) at 1642 (emphasis added).

The jury was instructed, in part, that the "evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted . . . , then you are not to consider it in reaching your verdict." CP at 413. The jury was also instructed that the "lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. . . . You must disregard any remark, statement, or argument that is not supported by the evidence." CP at 414.

After the trial court learned of juror 2's inappropriate comments, it considered whether to question him or simply dismiss him. The trial court said: "I don't know that at this point with every juror having confirmed what went on that there's really any need to talk" to that juror. 14 VRP (Apr. 10, 2014) at 1778. The court noted that juror 2 "has clearly demonstrated that they

are unable or unwilling to follow the Court's instructions and have gone way deep into jury misconduct as far as the Court's concerned." 14 VRP (Apr. 10, 2014) at 1778. The court then expressly asked the parties if they saw a need to examine juror 2 on the record, and the parties told the court they did not. The court then dismissed juror 2 without questioning him.

At sentencing, the trial court included a boilerplate finding that Gaines was able to pay his LFOs. It made no individualized inquiry into Gaines's ability to pay. The court imposed LFO's consisting of restitution, a crime victim assessment, deoxyribonucleic acid database fee, criminal filing fee, and court-appointed attorney fees.

ADDITIONAL ANALYSIS

I. Dismissal of Juror for Misconduct Without Inquiring into His Ability To Be Fair

Gaines argues that the trial court denied his right to a jury trial when it dismissed juror 2 for misconduct without inquiring into his ability to be fair. Specifically, Gaines argues that the trial court knew that juror 2 favored acquittal, and therefore it was unfair to dismiss him.[6] We disagree.

RCW 2.36.110 governs the dismissal of an unfit juror. It provides that the trial court "shall . . . excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror" due to "bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. Under CrR 6.5, the trial court may call an alternate juror to deliberate

[6] The State argues that Gaines is precluded from arguing this issue because he waived it and because invited error bars review. We do not address whether Gaines waived his right to an impartial jury or whether counsel's conduct constituted invited error; instead we exercise our discretion to consider the merits of this argument. RAP 2.5(a).

when a juror is dismissed. "If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." CrR 6.5.

We review the trial court's decision to dismiss an unfit juror for an abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 768, 123 P.3d 72 (2005). At the same time, defendants have a constitutional right to a unanimous jury verdict and to an impartial jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. To protect these rights, trial courts must not dismiss a juror for misconduct alone where the dismissal "will have a direct and foreseeable effect on the outcome of the case," such as where the trial court knows that the juror is a "holdout" who will not vote to convict. *Depaz*, 165 Wn.2d at 857.

In cases where the trial court knows the juror's opinion, misconduct alone does not permit dismissal "because the court cannot avoid considering the effect of the removal on the jury's deliberations." *Depaz*, 165 Wn.2d at 857. "[W]here the trial court has knowledge of a deliberating juror's substantive opinion of the case, trial courts must make a determination regarding" whether any misconduct committed by the juror has affected the juror's ability to deliberate. 165 Wn.2d at 857. The trial court can replace such a juror if it determines that the misconduct reasonably would have altered the juror's opinion in the case. 165 Wn.2d at 857.

Gaines's argument fails for two reasons. First, the *Depaz* analysis was not necessary because the statements attributed to juror 2 did not give the trial court knowledge of juror 2's substantive opinion of the case. 165 Wn.2d at 857. Instead, his comments (as recalled by other jurors) were generally that he thought Gaines had two prior felonies. One juror recalled him

asking rhetorically why Gaines would commit the murder in this case, knowing that it would be his "third strike." Even if this juror correctly recalled juror 2's words, the question did not give the trial court knowledge of juror 2's substantive opinion of the case. The question was ambiguous: it could have meant either that juror 2 was convinced of Gaines's guilt and stating his opinion that it was foolish for someone with that history to commit a third felony, or that juror 2 thought Gaines's two prior felonies would have made him less likely to commit a "third strike." This ambiguity prevented the trial court from knowing juror 2's substantive opinion of the case. *See State v. Hopkins*, 156 Wn. App. 468, 477, 232 P.3d 597 (2010).

Second, even assuming that juror 2's statements did imply that he favored acquittal, the trial court did not err in replacing juror 2. *Depaz* allows a trial court to replace a deliberating juror when "the misconduct reasonably would have altered the juror's formulated opinion." *Depaz*, 165 Wn.2d at 857. Here, to the extent we assume juror 2 favored acquittal, the juror's misconduct—namely, the extrinsic evidence he considered—clearly altered his opinion of the case. If we take the juror's statement to mean, "I don't believe Gaines is guilty because he already had two prior strike offenses," then clearly his opinion was based on the extrinsic evidence, and thus, the opinion was formulated *because* of the misconduct. Therefore, under *Depaz*, the trial court could excuse the juror because the misconduct clearly altered the juror's opinion. The trial court did not err by removing juror 2 without inquiring into his ability to be fair.

II. PROSECUTORIAL MISCONDUCT

Gaines argues that the prosecutor committed misconduct by attributing a statement to Gaines in closing argument. We disagree.

A. *Standard of Review*

Gaines argues the prosecutor committed misconduct; thus, he is required to show that the conduct was both improper and prejudicial.[7] *State v. Emery*, 174 Wn. 2d 741, 756, 278 P.3d 653 (2012). When a claim is made that the prosecutor committed misconduct during closing argument, we review the prosecutor's statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

B. *Closing Argument*

A prosecutor is allowed wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 765, 336 P.3d 1134 (2014). However, the record must support the prosecutor's statements. *State v. Ramos*, 164 Wn. App. 327, 341, 263 P.3d 1268 (2011). It is misconduct for a prosecutor to submit extrinsic evidence to a jury. *State v. Vassar*, 188 Wn. App. 251, 259, 352 P.3d 856 (2015). Extrinsic evidence is information outside what is presented at trial. *Vassar*, 188 Wn. App. at 259.

Here, the prosecutor emphasized to the jury that many witnesses had conflicting stories. He said:

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[7] Where, as here, the defendant did not object at trial, any alleged misconduct is waived unless the appellant shows that it was "so flagrant and ill[-]intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Because we hold that the prosecutor committed no misconduct, we do not reach the issue of whether any alleged misconduct was waived.

> Denise Green, she says, just before the shooting, she hears Mr. Price say, you think it's cool to hit a dude in a wheelchair, and then we get to this, *bitch, get in the car, it's about to go down. That's what the defendant says.* . . . But then here's the defendant who she knows saying, bitch, get to the car. And then there's gunfire. Why is he saying that? Who drove? Not him. [Thomas] drove. *Get to the car, it's about to go down.* Get the car started, I got this, I'll be there in a second.

13 VRP (Apr. 9, 2014) at 1642 (emphasis added).

Green testified that she wasn't sure if Gaines was the one who said, "[S]omething's about to go down." 9 VRP at 1026. A prosecutor is permitted to make arguments based on reasonable inferences from the evidence. *Gregory*, 158 Wn.2d at 860. Here, the prosecutor drew on the evidence in the record to support the State's theory of the case that Gaines intentionally shot Price. Green testified that Gaines said, "[B]itch, get to the car." 9 VRP (Mar 31, 2014) at 1025. She also testified that someone instructed her to "get in the car, something's about to go down." 9 VRP (Mar 31, 2014) at 1026. Her testimony showed that she had attributed the entire statement (the instruction to get to the car, and the warning that something was "about to go down") to a single person, and she testified that Gaines said at least the first half of that sentence. The prosecutor's argument drew the inference that Gaines had, in fact, said both halves of the sentence. The prosecutor did not mislead the jury about the evidence; instead, he argued reasonable inferences based on the testimony. Thus, Gaines has failed to show that the prosecutor's statements were misconduct.

III. CONFRONTATION CLAUSE

Gaines argues that the trial court violated his right to confront witnesses by restricting his cross-examination of Thomas about the dismissal of her case and by preventing him from impeaching McVea based on a 13-year-old felony conviction. We disagree.

A. *Standard of Review*

We review alleged confrontation clause violations de novo. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 361, 225 P.3d 396 (2010). Where the trial court properly interprets evidentiary rules, we review a trial court's decision on the admissibility of evidence for an abuse of discretion. *Alvarez-Abrego*, 154 Wn. App. at 362. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Alvarez-Abrego*, 154 Wn. App. at 362.

B. *Confrontation Clause Principles*

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. CONST. amends. VI, XIV; WASH. CONST. art. 1, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The primary and most important interest protected by the Confrontation Clause is the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998).

The right to cross-examine an adverse witness is not absolute, however. *Darden*, 145 Wn.2d at 620. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 620-21. And the ability to cross-examine is limited by general considerations of relevance. *Darden*, 145 Wn.2d at 621; *see* ER 401, 403. A defendant's right to introduce relevant evidence must also be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. *Darden*, 145 Wn.2d at 621. The trial court should exclude impeachment evidence if it is only marginally relevant and its probative value is outweighed by the potential for prejudice. *See State v. Carlson*, 61 Wn. App. 865, 875-76, 812 P.2d 536 (1991). We presume that any error in

excluding admissible impeachment evidence is prejudicial and requires reversal unless we are convinced beyond a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

C. *Thomas's Dismissal*

Gaines did not make an offer of proof that Thomas's statements about Gaines changed with the threat of prosecution. Instead, Gaines argued that the dismissed case against Thomas was relevant to the integrity of the State's investigation—that is, that the State initially believed Thomas was culpable, but later changed course. Believing that the details of the State's prosecution of Thomas were irrelevant, the trial court limited Gaines's cross-examination of Thomas about her case's dismissal to the following points: (1) whether she was charged with murder when she gave her statement to police, and (2) whether the murder charges were later dismissed.

The trial court did not abuse its discretion by excluding Thomas's testimony about the details of the State's case against her and its dismissal. When Gaines requested to cross-examine Thomas further than the court allowed, he focused on his desire to show that the State's investigation had lacked integrity, not that Thomas's testimony against Gaines was impacted by the dismissal. Gaines did not give an offer of proof that Thomas knew about the integrity of the State's investigation. The State argued that evidence about the State's decisions to file, and then dismiss, charges against Thomas was speculative and would confuse the jury. The trial court had tenable grounds and reasons to find that further cross-examination would be irrelevant and speculative and, therefore, inadmissible. *Darden*, 145 Wn.2d at 620-21. Thus, we hold that the

trial court did not abuse its discretion or violate Gaines's confrontation rights by limiting the scope of Thomas's cross-examination.

D. *McVea's Felony*

ER 609(b) generally prohibits impeachment based on felonies more than 10 years old unless the court determines "that the probative value of the conviction . . . substantially outweighs its prejudicial effect." Here, McVea's felony conviction was 13 years old. The trial court did not abuse its discretion by excluding cross-examination about the conviction because Gaines did not prove that its probative value substantially outweighed its prejudicial effect.

Gaines argued that evidence of McVea's previous felony would elucidate a possible motive to flee the scene of the murder, because he risked a charge of unlawful possession of a firearm if he were possessing a firearm. This argument was highly speculative. Gaines made no offer of proof that McVea possessed a weapon or was armed with one on the night in question. The proposed cross-examination had very little probative value; it was based purely on speculation that McVea might have possessed a firearm and might have fled the scene because of it. Because the felony fell well outside the 10-year limit and because it was not substantially more probative than prejudicial, the trial court did not abuse its discretion by excluding it. Therefore, because the evidence was inadmissible, Gaines had no confrontation clause right to elicit it. *Darden*, 145 Wn.2d at 621.

IV. Right To Present A Defense

Gaines argues that the trial court violated his right to present a defense by preventing him from eliciting testimony about Green's habit for carrying a gun. The State argues that Gaines

waived this argument because he raised only a different theory of the admissibility of this evidence in the trial court. We agree with the State.

Generally, on appeal from an evidentiary decision, the appellant cannot assign error based on evidentiary theories not presented below. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). Gaines argued below only that evidence of Green's tendency to carry a gun was admissible under ER 404(b) to prove her opportunity to be the shooter on the night in question. Accordingly, the trial court denied his motion to present this evidence, ruling that it was "pure propensity evidence" and inadmissible under ER 404(b). VRP (Oct. 10, 2013) at 902. Gaines did not argue that the evidence was admissible as habit evidence under ER 406—but that is his sole argument on appeal for why the evidence was admissible. The trial court made no ruling on the admissibility of the evidence under ER 406 because Gaines did not argue that theory. We hold that this argument is not preserved.

V. MOTION TO DISMISS FOR MISCONDUCT

Gaines argues that the trial court erred by denying his motion to dismiss his case with prejudice due to governmental misconduct. We disagree.

A. *Standard of Review*

CrR 8.3(b) governs a trial court's dismissal of criminal charges due to governmental misconduct. That rule provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Under CrR 8.3(b), a trial court may dismiss a defendant's charges if the defendant makes two showings. First, the defendant must show arbitrary action or governmental misconduct. *State v.*

Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Such governmental misconduct "need not be of an evil or dishonest nature," rather, "simple mismanagement is sufficient." *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980).

Second, a defendant seeking dismissal under CrR 8.3(b) must also show by a preponderance of the evidence that such governmental misconduct prejudiced his or her right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *Michielli*, 132 Wn.2d at 240. Prevailing on a motion under CrR 8.3(b) requires a showing of actual prejudice; the mere possibility or speculation of prejudice will not suffice. *Rohrich*, 149 Wn.2d at 657-58. "[I]n order to show prejudice justifying dismissal, the defendant must establish 'by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose'" between the right to a speedy trial or effective assistance of counsel. *State v. Cannon*, 130 Wn.2d 313, 328-29, 922 P.2d 1293 (1996) (quoting *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Dismissal under CrR 8.3 is an extraordinary remedy and, thus, a trial court should consider alternative remedies before resorting to dismissal. *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Dismissal is limited to those "'truly egregious cases of mismanagement or misconduct.'" *Wilson*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441 (1993)). We review the denial of a motion made under CrR 8.3 for abuse of discretion and overturn the decision only if the trial court's decision was manifestly unreasonable or based on untenable grounds. *Wilson*, 149 Wn.2d at 9.

B. *No Proof of Prejudice*

Gaines argues that the government's mismanagement of Thomas's case, which led to a mistrial in his case, prejudiced him because it impacted his rights to a speedy trial, forced him to choose between adequately prepared counsel and a speedy trial, and impacted his double jeopardy rights.[8] We disagree.

When Gaines moved to dismiss his case with prejudice under CrR 8.3, he never specified what new facts the State had interjected into the case that prejudiced him. Gaines argued that proceeding with trial would force him to choose between his speedy trial rights and adequately prepared counsel, but he never specified what facts in the proffer statement were new to him. Nor did he provide support for the assertion that the proffer must have included new facts because it induced the State to dismiss Thomas's case. The trial court noted its willingness to provide him with more time to prepare, and then granted his motion for a mistrial.

Here, the trial court did not abuse its discretion in finding that Gaines's right to a fair trial would not be prejudiced without a dismissal. Gaines bore the burden of proving by a preponderance of the evidence that new facts compelled him to choose between his rights to a speedy trial and effective assistance of counsel. *Cannon*, 130 Wn.2d at 328-29. But Gaines never identified any new facts; he merely argued in a conclusory fashion that there were many

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[8] Gaines also appears to argue that the trial court should have found not only that the detective mismanaged the case by delaying her report of the interview, but also that the prosecutor mismanaged the case by proceeding with the charges against Thomas with insufficient evidence. We decline to review this argument, raised for the first time on appeal. Below, Gaines specified that he believed the prosecutor to be blameless.

The trial court found that there was governmental mismanagement by the detective. We accept that finding, and proceed to inquire whether the trial court abused its discretion by finding that prejudice to Gaines did not require dismissal.

new facts or speculated that new facts must exist to explain the State's dismissal. In fact, aside from Thomas's nodding, the only new fact appeared to be Thomas's admission that she came to the party with Gaines and left with him. Gaines was already aware of this inconsequential fact from Green's statements. Thus, Gaines did not prove that new facts compelled him to choose between his speedy trial right and the right to effective assistance of counsel. In other words, he did not prove actual prejudice. The trial court did not abuse its discretion by not resorting to the last resort of dismissal. *Wilson*, 149 Wn.2d at 12. Instead, it offered Gaines's counsel more time to prepare, and it granted his request for a mistrial. Gaines's argument fails.

VI. LEGAL FINANCIAL OBLIGATIONS

Gaines argues that the trial court erred by ordering him to pay LFOs without inquiring into his ability to pay. Gaines concedes that he did not object to this finding at sentencing, but he argues that he may raise it for the first time on appeal under *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). We use our discretion to reach the merits of this argument. We agree with Gaines, and we remand for the trial court to consider Gaines's ability to pay discretionary LFOs.

RCW 10.01.160(3) provides that the trial court (1) "shall not order a defendant to pay costs unless the defendant is or will be able to pay them," and (2) shall take account of the defendant's financial resources and the nature of the burden that payment of costs will impose in determining the amount and method of payment of costs. "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those [discretionary] LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834.

We agree with Gaines that the trial court erred. The trial court imposed $1,500 in discretionary court-appointed attorney fees. There was no discussion of Gaines's ability to pay these fees on the record. Accordingly, we remand to the sentencing court for an inquiry into Gaines's ability to pay his discretionary LFOs. *Blazina*, 182 Wn.2d at 834.

VII. Appellate Costs

Gaines filed a supplemental brief opposing appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016), arguing that he does not have the ability to pay. In light of Gaines's indigent status, and our presumption under RAP 15.2(f) that he remains indigent "throughout the review" unless the trial court finds that his financial condition has improved, we exercise our discretion to waive appellate costs. RCW 10.73.160(1).

In conclusion, we affirm Gaines's convictions. We remand to the trial court for consideration of his ability to pay discretionary LFOs. We exercise our discretion to waive appellate costs.

Worswick, P.J.

We concur:

Lee, J.

Melnick, J.

ELLNER LAW OFFICE

August 05, 2016 - 10:43 AM

Transmittal Letter

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