

63544-1

63544-1

NO. 63544-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDGAR DARIO AMAYA ROCHEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY V. WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the closing argument of the State constitute prosecutorial misconduct?
 - a. Was the reference to an individual the jury didn't hear from, in context, prosecutorial misconduct or improper shifting of the burden of proof?
 - b. Was the error, if any, harmless?
2. Did the trial court properly deny the defendant's motion to interview jurors and for a new trial for alleged juror misconduct?
 - a. Do the statements made by jurors to defense counsel inhere in the verdict?
 - b. Were the juror's comments an irregularity in the proceeding requiring a new trial?
3. Do the documents forwarded to the defendant while he was in custody constitute "Brady Material"?
 - a. Did the prosecutor possess the mail prior to and during trial and suppress its discovery?

- b. Could the defendant have discovered the documents with a reasonable amount of diligence?
- c. Was the evidence exculpatory?

B. STATEMENT OF THE CASE

1. PROCEDURAL BACKGROUND.

Edgar Amaya Rochez was charged with burglary in the first degree. The victim of this crime was Paula Smith, Amaya Rochez's ex-girlfriend and mother of his child. CP 1-4, 13, 72. Amaya Rochez was convicted by a jury as charged and received a standard range sentence. CP 47, 116-123.

2. FACTUAL BACKGROUND.

Paula Smith had lived at 12210 Southeast Petrovitsky Road in Renton WA for three and a half years.¹ 5RP 56-58. Smith was

¹ The Verbatim Report of Proceedings consists of eight separately paginated sections that will be referred to as follows: (1) 1RP refers to the verbatim report of the proceedings for March 2, 2009; (2) 2RP refers to the verbatim report of Proceedings for March 3, 2009; (3) 3RP refers to the Verbatim Report of Proceedings for March 19, 2009; (4) 4RP refers to the Verbatim Report of proceedings for March 23, 2009; (5) 5RP refers to the Verbatim report of proceedings for March 24, 2009; (6) 6RP refers to the Verbatim Report of Proceedings for March 25, 2009; (7) 7RP refers to the Verbatim Report of Proceedings for March 26, 2009; (8) 8RP refers to the Verbatim Report of Proceedings for May 15, 2009.

working at a grocery store when she met the defendant during the summer of 2005. 5RP 59-60. Within a couple of months the two began a dating relationship and at some point the defendant moved into Ms. Smith's apartment. 5RP 59. Smith became pregnant and by April, 2008 gave birth to their daughter. 5RP 58. At approximately that same time Smith became concerned about the defendant's controlling nature and his lack of control over his own anger. 5RP 61, 65. By the summer of 2008, she had wanted to stop spending time with him and in August of 2008 had broken the relationship off and Amaya Rochez moved out. 5RP 61, 92-93. However, Smith still invited the defendant to come over and spend time with their daughter and he even spent the night in the apartment on occasion. 5RP 93.

Smith recalls meeting Shaun Hurd in approximately July of 2008. 5RP 63. She gravitated to him because he would listen when she confided in him about her hardships with Amaya Rochez. 5RP 63. At some point they became romantically involved. RP 63. Hurd's account is that the two began a dating relationship around May that ended and became a friendship in late June or early July. RP 5 26-27. In any case, they maintained a relationship through August of 2008. 5RP 63, 27.

On the evening of August 26, 2008, Smith called Shaun Hurd and invited him over to her apartment. 5RP 65. Her recollection is that he came over at about 1:00 a.m. 5RP 65. At approximately 2:00 a.m. the two were in the bedroom attending to Smith's then four-month-old daughter when they heard a knock on the door. 5RP 66, 68. Smith then heard the defendant say, "Paula, I know you're in there. I heard your phone. You got to open this door right now." 5RP 66-67. The defendant, demanding to be let in, sounded angry and aggravated. 5RP 12. Smith told Hurd that it was Rochez outside the door. 5RP 12. Although Hurd, told her they had nothing to hide, Smith was nervous about what the defendant would do if he found out that another male was in the house and she told Hurd not to open the door. 5RP 12. Rochez was not living at the apartment at the time and so didn't have a key. 5RP 10-11, 68.

The defendant continued to knock at the door as Smith and Hurd made their way from the bedroom to the living room. 5RP 68. Despite Smith's command to the contrary, Hurd began to open the door, and when Smith saw Amaya Rochez outside she quickly closed and locked it, scared of what he would do. 5RP 68-69, 89.

From Smith's perspective, Amaya Rochez saw that Hurd was inside the apartment with her when the door was briefly opened. 5RP 73.

After closing the door Smith was standing approximately seven to eight feet away when the defendant began kicking the door and yelling to be let in and becoming more enraged. 5RP 70-72. Hurd was standing near Smith approximately ten feet from the door, and became scared for Smith and her child and felt the need to protect them. 5RP 12-13. The defendant eventually kicked the door in and came into the apartment. 5RP 13, 70-71. As soon as Rochez came through the door he went directly for Hurd, unprovoked, and Smith ran in fear. 5RP 13, 73, 92. According to Smith, Rochez is normally calm but becomes a different person when he is mad and when he came through the door he was upset and had a look of anger on his face. 5RP 14, 74. As Amaya Rochez was coming at him, Hurd tried to persuade him to stop and listen and then put his hands in front of his own face to defend himself from being hit. 5RP 11, 14-15, 75. The defendant yelled at Hurd, called him a nigger and started swinging his fists at Hurd's face. 5RP 14-15, 74-75. Hurd was able to block some of the punches, but at least one landed on the right side of Hurd's

forehead leaving a bruise. 5RP 11, 15. Rochez immediately started pushing Hurd to the back of the apartment toward the bedroom while Hurd tried to talk him down saying, "just listen to me, just listen to me." 5RP 15-16, 29. When Amaya Rochez pushed Hurd to the back bedroom Smith was yelling at him to stop and Amaya Rochez continued yelling at Hurd. 5RP 16, 18.

At some point Smith ran from the apartment and told her neighbor that Amaya Rochez was beating up Hurd and that she needed help. 5RP 76-77. The neighbor went into the apartment and took the baby outside and held the baby until the police arrived. 5RP 20-21, 76-77. The defendant fled from the apartment and ran away through the parking lot. 5RP 21. Meanwhile, Smith who had gotten safely away from the apartment called 911 and the police arrived approximately five minutes later. 5RP 78. Hurd stood by until the police arrived and cooperated while they did their investigation. 5RP 23. Smith returned to the apartment and gave an oral statement but did not want to "press charges" both because she was scared of what Amaya Rochez would do if he found out and because she blamed herself for Amaya Rochez's actions. 5RP 94-95.

The 911 call made by Smith was dispatched to Renton Police Officer Jason Brunner at approximately 2:18 a.m. 6RP 14. Officer Brunner received information about an assault in progress at Smith's address and responded as quickly as possible with his lights and siren on. 6RP 15. He arrived at 2:20 a.m. 6RP 15.

Officer Daniel Kang was also dispatched but did not testify at trial because he had been deployed by the National Guard for military service. 6RP 16.

When Officer Brunner got to Smith's apartment he saw both the neighbor holding Smith's daughter and Hurd standing outside of the opened door of the apartment. 6RP 19. Smith was not present when the officers first arrived. 6RP 21. Officer Brunner noticed that the front door to the apartment had obvious damage and took pictures. 6RP 24. The metal door was dented around the handle and the dead-bolt and there was a foot print near the middle. 6RP 25. The wood around the door frame was also broken out. 6RP 26. Officer Kang took photos of Hurd's injuries documenting a swollen and bleeding lip in addition to a bruised forehead. 6RP 27-28. When Smith came back to the apartment she was moving around frantically and appeared to Officer Brunner to be distraught

about what had just happened. 6RP 28. Officers conducted an area check to find Amaya Rochez but were unsuccessful. 6RP 32-33.

Amaya Rochez testified at trial and maintained that he was living with Smith at the time of August 26, 2008. 6RP 42-43. He was working as a janitor and testified that he usually got off at approximately 3:30 a.m., but on August 26, 2008, got off early at just after 1:00 a.m. 6RP 42-43. When Amaya Rochez got home he knocked on the door and no one answered, so he went around the side and threw rocks at the window to get Smith's attention. 6RP 43-44. Rochez went back to the front door and heard a man's voice coming from inside of the apartment. 6RP 44. Amaya Rochez testified that he thought his family was in trouble and broke down the door to come to their aid, and when he come through the door, an unknown man (Hurd) hit him on the left side of his head. 6RP 44. Amaya Rochez hit Hurd back and then grabbed onto Hurd's shirt. 6RP 58. According to Amaya Rochez he was scared of getting hit by Hurd a second time but as he grabbed Hurd's shirt, they nevertheless moved in the opposite direction from the apartment door and further into the apartment toward the back bedroom. 6RP 58-65. Smith was telling Rochez not to hurt Hurd

because he was her friend and Amaya Rochez responded by demanding of Hurd, "what the hell are you doing in my house." 6RP 45-46. According to Rochez, after Smith told him that Hurd was a friend she ran out of the door and he was confused and began walking to his cousin's apartment to tell him what had happened. 6RP 46.

Despite his testimony that he was very concerned for the safety of Paula Smith and his child, Amaya Rochez admitted that he never called 911. 6RP 65. He also admitted that he never found Smith to make sure that she was safe and that he had left his child alone in the apartment after his altercation with Hurd. 6RP 71. When confronted with this apparent inconsistency, Amaya Rochez said his reason for leaving his daughter in the apartment and failing to make sure that Smith was safe was that Hurd was following him through the parking lot saying, "Nigger, I'm gonna, I'm gonna whip your butt now." 6RP 71. Rochez added that he was scared of Hurd because he was a stranger and had no idea what he was capable of. 6RP 72. Nevertheless, he admitted again that he still did not call 911 and did not make sure that Smith was safe and that his child was cared for.

Amaya Rochez denied that there was ever a time that Smith had ended the relationship and made him live elsewhere. 6RP 48. Amaya Rochez admitted that he did not have a key on August 26, 2008, but said that he was just in the habit of not taking his key with him when he went to work. 6RP 49-50. Amaya Rochez denied that he was ever angry about Smith being in her apartment with another man or that he yelled at any time prior to kicking in the door. 6RP 54. He denied that he ever demanded to be let inside. 6RP 54.

Amaya Rochez said that he only stayed with his cousin a few times during the summer of 2008 and that he was actually living with Smith. 6RP 50-51. He stated that both he and Smith wanted to reconcile after the incident and pursue a long term relationship but denied that he had ever talked with Smith after the incident and while the case was pending. 6RP 52. When pressed on whether he ever talked with Smith during the pendency of the case he again denied talking to Smith and said it was only his cousin that he had talked with. 66RP 52. When the State produced jail recordings of Amaya Rochez talking with Smith, he

admitted on the stand that he had in fact talked with Smith several times since August 26, 2008. 6RP 83-85. Amaya Rochez never gave his cousin's name.

C. ARGUMENT

1. THE CLOSING ARGUMENT OF THE STATE DOES NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

During closing argument the prosecutor said, "We haven't heard from his cousin who he said he didn't live with but who he wouldn't talk about." 6RP 121. The Appellant argues that the prosecutor thereby committed misconduct by improperly shifting the burden of proof in closing argument, saying that "...the prosecutor's argument improperly suggested Mr. Rochez had a duty to present evidence to corroborate his testimony." Appellant's Opening Brief, 11. This argument is incorrect. The prosecutor never argued that the defendant failed to call witness or present evidence. In any case, the error is harmless.

- a. The Passing Reference By The Prosecutor To Evidence The Jury Had Not Heard, When Considered In Its Entire Context Does Not Impermissibly Shift The Burden Of Proof.

In presenting closing arguments to a jury, prosecutors have wide latitude to draw and express reasonable inferences from the evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (citations omitted); State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993). To establish prosecutorial misconduct, a defendant has the burden to establish that the prosecutor's conduct was both improper and prejudicial. Dhaliwal, 150 Wn.2d at 578, 79 P.3d 432. However, if Constitutional error is shown, it is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

It is overly broad to assert that any comment referring to a defendant's failure to produce witnesses is an impermissible shifting of the burden of proof. State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718, 724 – 725 (1991). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence presented at trial and the jury instructions. Id. (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997));

State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221, 226 (2006) (citations omitted); State v. Anderson, ___ Wn. App. ___, 220 P.3d 1273, 1280 (2009).

Appellant largely relies upon State v. Toth, 152 Wn. App. 610, 217 P.3d 377 (2009). In Toth the prosecutor said in closing:

He didn't provide you with anything to back his story up. Not one single iota of evidence.... where's his brother? Where are any of the other people who were at the party? Why hasn't any of them come here to testify on his behalf? We don't even know that he was even at his brother's house. That's just his story. Maybe he was there. We don't know for sure whether or not [he] was there. But, what we don't have is any definitive evidence that he was there at all. And, he claims all he drank there was two beers and a swig of whiskey. We don't have anybody here to support that statement. Not one person.

Id. at 614.

This case is not analogous to Toth. Here, the prosecutor argued that the only evidence before the jury suggesting that Amaya Rochez lived with Paula Smith and not his cousin was by

Amaya Rochez himself and no one else. The thrust of the argument was that since Amaya Rochez's testimony was not credible as a whole, this assertion could not be believed and therefore did not create a reasonable doubt. The prosecutor did not however, as in Toth, tell the jury that the Defendant should have presented more evidence. The argument in the present case, from beginning to end, highlighted the origin of the assertion that Amaya Rochez lived with Paula Smith and not his cousin (i.e. from Mr. Rochez's own testimony and no one else's), and the weight or credibility that should be attached to that assertion.

At no time did the prosecutor tell the jury that the defendant's alleged living arrangement was not supported by the evidence *because* the defendant did not present any evidence. In fact, the prosecutor was careful to remind the jury of the State's burden just prior to making the statement saying that "...the State has to prove to you beyond a reasonable doubt that the evidence you have heard from the two eyewitnesses in Court, is correct and that you should convict." 6RP 120; See, State v. Anderson, ___ Wn. App. ___, 220 P.3d 1273, 1280 (2009) (in a case involving an allegation of burden shifting, approving of prosecutor's reminder to the jury

that the State's burden is beyond a reasonable doubt); State v. McKenzie, 157 Wn.2d 44, 57 134 P.3d 221 (2006) (any prejudicial effect of prosecutor's alleged misconduct by stating her opinion minimized by prosecutor's reminder to the jury that the attorney's remarks are not evidence).

The comments regarding the defendant's testimony about his living arrangements were made unambiguously in the context of evaluating the credibility of the defendant's testimony. The prosecutor highlighted the defendant's testimony about his cousin for the express purpose of evaluating the credibility of his statements. The context of that argument is clear when the prosecutor is quoted at length. The argument is as follows:

I am just going to conclude by talking just briefly about Mr. Amaya Rochez and his testimony on the stand. He has testified in a way that when you evaluate him according to those credibility standards I have already looked back to [in] the jury instructions that shows that he does have a bias and he has everything to gain by telling a story that is not true.

6RP 119.

The prosecutor then went on to say:

The question we are here to answer is just that. Is this reasonable? And the State has to prove to you beyond a reasonable doubt that the evidence you have heard from the two eyewitnesses in Court, is correct and that you should convict. When you

analyze the defendant's testimony, and I can't – I just do not have the time to submit every single part of that testimony that was unreasonable; that you didn't call 911, we haven't heard from his cousin who he said he didn't live with, but who he wouldn't talk about. When he told a falsehood, apparently, to the Court, or to the jury when he said, "no, I haven't talked to her at all", and then he had to come back and say, yeah, I talked to her a week later. I had actually talked to her several times. I talked to her as late as March. When you look at all those things together the reality is that that's unreasonable and that is not a [doubt] for which there is a reason ... I am asking you to evaluate the credibility by the standards that are given [in] the jury instructions and when you assess that credibility to find the defendant guilty of burglary in the first degree.

6RP 120-121.

Defense argues that the prosecutor's cursory comment in the present case should be construed in exactly the same manner as the extended invective in Toth that contained what appears to be a deliberate and inflammatory remark that the defendant had not presented the jury with "one iota" of evidence.²

Here, enjoying the wide latitude in closing argument to draw reasonable inferences from the evidence, the prosecutor pointed

² The trial judge noted the passing nature of these remarks at the hearing dated May 15, 2009. 8RP 25.

out three things to the jury, all of which are clearly permissible. First, the only evidence heard at trial that the defendant lived with his cousin was from the defendant who is biased and not credible. Second, despite the defendant's denial that he lived with his cousin during the time period in question, the defendant, oddly, did not talk about his cousin in detail or even use his name, implying the defendant had something to hide. Finally, the cousin was used cryptically in other testimony that proved to be false in order to skew facts in his favor (i.e. stating that he never had telephone conversations with Paula Smith—they were with his cousin).³

In short, Toth is a case in which the prosecutor argued that the defendant couldn't be believed because he didn't produce evidence *external* to his testimony. But in the present case, the prosecutor argued that the defendant couldn't be believed because of the evidence *internal* to his testimony.

³ It should be noted here that the context of the comment regarding the defendant's cousin was a lead-in to the discussion of the disputed jail telephone conversation with Smith and which Amaya Rochez testified was just his cousin. 6RP 52, 8RP 121.

b. Any Error Regarding The Prosecutor's Comment Was Harmless Beyond A Reasonable Doubt.

"A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Guloy, 104 Wn.2d at 425; State v. Wicker, 66 Wn. App. 409, 414, 832 P.2d 127 (1992). The "query is whether any reasonable jury would have reached the same result in the absence of the tainted evidence." State v. Benn, 161 Wn.2d 256, 266, 165 P.3d 1232 (2007) (quoting Guloy, 104 Wn.2d at 425). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Guloy, 104 Wn.2d at 425.

Here, a reasonable jury would have reached the same result beyond a reasonable doubt even without considering the alleged improper statement by the Prosecutor. First, the comment that Amaya Rochez didn't talk about his cousin "who we have not heard from" has remarkably little significance in the context of his guilt to the charge of Burglary. Regardless of the defendant's living situation at the time, Paula Smith testified unequivocally that the defendant was not invited in when Amaya Rochez was pounding on

the door in the early morning hours of August 26, 2008, and that she even took affirmative steps to keep him out, at the time that he broke down her door. 5RP 68-69, 93.

Second, both Hurd and Smith said that Amaya Rochez knew he was not invited inside evidenced by his extreme anger after he was refused entry. 5RP 70-72. They both testified that Hurd never hit the defendant and that Hurd was trying to talk him down the entire time he was in the apartment. 5RP 11, 14-15, 74-75.

Smith's utter lack of bias or motive to fabricate her testimony was extremely evident at trial. She testified that she was worried about what Amaya Rochez would do if she reported the incident, blamed herself for what he had done and still wanted to have a long-term relationship with him regardless of the outcome of the case. 5RP 94-95. The jury also had a full and fair opportunity to evaluate Hurd, Smith and Amaya Rochez during the extensive direct and cross examinations. The jury assessed the witnesses' credibility and determined that the State's witnesses were more credible than Amaya Rochez. See, State v. Anderson, 220 P.3d 1273, 1282 (2009) (in the context of evaluating constitutional harmless error and whether a jury would have reached the same result absent tainted evidence, the court should defer to the jury's credibility

determination which is not subject to review on appeal) citing State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).⁴

Third, the evidence given by Smith and Hurd was corroborated during the testimony of Officer Brunner. Smith was the only one to call 911 in response to the defendant's actions. Hurd and Smith were the only ones that remained, while the defendant fled from the apartment shortly after the burglary. The physical evidence documented by the investigation corroborated the manner in which the defendant broke in the door and the assault on Shaun Hurd.

Finally, the jury was instructed by the court that the defendant had no burden to call witnesses neutralizing the affect of any alleged misconduct. Even if a Prosecutor's comments during closing arguments are improper the jury is presumed to have disregarded it when given a proper instruction from the trial judge. State v. Stenson, 132 Wn.2d 668, 729-730, 940 P.2d 1239, 1270 (1997); State v. Anderson, 220 P.3d 1273, 1281 (2009) citing State v. Hopson, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

⁴ The Court in Anderson included its reasoning regarding jury credibility determinations and constitutional harmless error in footnote eight.

Here Amaya Rochez objected to the prosecutor's comment and moved for either dismissal or a mistrial asserting that the comment shifted the burden of proof. 6RP 122. The trial judge declined to grant either a dismissal or mistrial and instead instructed the Jury saying, "...the State does have the burden of proof in this matter and that the defendant does not have any obligation to bring witnesses to Court." 6RP 123. The jury therefore disregarded any alleged burden shifting and nevertheless convicted Amaya Rochez based on the ample evidence presented at trial.

The Appellant seems to argue that this Court should presume the opposite (i.e. that the jury did not follow the trial judge's instruction). Appellant's Opening Brief, 11. For this argument Appellant cites defense counsel's certification where it says, "In addition, several jurors asked counsel why the defense had not called Mr. Amaya Rochez's cousin to testify, and some jurors asked counsel why the defense did not produce Mr. Amaya Rochez's cell phone records." CP76, (Certification of Defense Counsel). The Appellant provides no authority supporting its contention that the court should consider informal statements to

defendant's counsel post-trial as evidence that the jury committed misconduct by not following the court's explicit instruction.⁵ Jurors are routinely afforded the opportunity to ask questions of the attorneys after they have completed their service. Their questions should not then be used to generate speculation about a nefarious motive during deliberations or a failure to follow the trial court's instructions.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO INTERVIEW JURORS AND FOR NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT.

Appellant argues that the trial court erred in denying further interviews of the jurors based on the certification of defense counsel. Ap. Br. At 12. The certification reads in relevant part:

Counsel spoke with some of the jurors after the verdict. Two of the jurors (Juror No. ___ and Juror No. ___) stated that they "believed" Mr. Amaya Rochez. They further indicated that they regretted their verdict. As she was leaving, Juror No. ___ stated that her decision was going to "haunt" her."

CP 76. The certification does not identify the jurors and includes only direct quotations of the words believed and haunt.

⁵ The legal standard that jurors' post-verdict statements may not be used to attack the verdict of the jury is found in subsection B below.

Generally, Washington courts are reluctant to inquire how a jury arrives at its verdict. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). A trial court's decision to deny a motion for a new trial will be reversed only where there is a clear showing of abuse of discretion. Id. at 552. There must be a strong, affirmative showing of misconduct in order to overcome the longstanding policy in favor of "stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." Id. (quoting State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 301 (1994)). The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632, 638 (1988) citing State v. Crowell, 92 Wn.2d 143, 594 P.2d 905 (1979); State v. McKenzie, 56 Wn.2d 897, 355 P.2d 834 (1960); Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962). The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's process in arriving at its verdict, and, therefore,

inhere in the verdict itself. State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006) (quoting Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 75 P.3d 944 (2003)). A Jury verdict may not be challenged based on statements made by a juror regarding the mental process (including any “second thoughts”) by which a juror reached his or her verdict. Id.; State v. Standifer, 48 Wn. App. 121, 127, 737 P.2d 1308 (1987) (abuse of discretion for trial judge to grant a new trial based on receiving a letter from one juror the day after trial saying that juror had a reasonable doubt and only temporarily overcame the doubt at the time of arriving at guilty verdict); State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632, 638 (1988). Whether a juror’s statement inheres in the verdict is a question of “whether the facts alleged are linked to the juror’s motive, intent or belief, or describe their affect on him...” Breckenridge, 150 Wn.2d at 205.

The trial court may receive and consider the affidavit of any person who is competent to make an affidavit in support of or against a motion for a new trial insofar as such affidavit shows facts in relation to misconduct of a juror; *but the court may not consider such affidavits as to those things which inhere in the verdict.* State v. McKenzie, 56 Wn.2d 897, 900, 355 P.2d 834, 836 (1960).

Consideration of juror statements that probes a juror's mental process is impermissible consideration of statements that inhere in the verdict. State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905, 907 (1979) citing Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 654 (1962).

The argument by the appellant that the trial court should have considered the statements of the jurors and ordered further interviews is incorrect. First, the statements attributed to unknown jurors that they believed the defendant and felt regret about their decision does not indicate that they wanted to take their verdict back or arrived at the wrong verdict. Defense counsel provides no further information about what portions of the defendant's testimony they believed. Every juror on the panel would likely admit that they believed parts of the defendant's testimony but still found that the State had met its burden. For example, the jurors could have believed the defendant when he testified that he was concerned for his wife and child but concluded that he was not legally within his rights to kick down Ms. Smith's door nor was he reasonable in acting in self defense when he assaulted Mr. Hurd inside the apartment. The statements regarding belief of the defendant is not the basis for further interview or a new trial. On the contrary, both

jurors were polled by the court approximately fifteen minutes prior and, still under oath, stated that the verdict was theirs individually and was the verdict of the jury. 8RP 4-8.

Second, the statements of juror numbers 4 and 5 are purely subjective to their own thought processes during deliberations and their reflective feelings after the verdict. These are not facts regarding misconduct but rather subjective feelings and thought processes that are intrinsic to the deliberation process and inherent in the verdict.

Finally, the jurors that asked defendant's counsel why the defendant did not call his cousin or produce cell phone records are not a basis for further interview or a new trial. There is no indication that the jurors, whoever they were, impermissibly rejected the Court's instruction that the State had the burden of proof. It is within a juror's right to ask questions about certain items of evidence that either did or did not come out during the course of trial when invited to discuss the case with the attorneys.

The Appellant cites State v. Cummings, 31 Wn. App. 427, 432, 642 P.2d 415 (1982) arguing that a party's motion for a new trial should be granted upon a *prima facie* showing of misconduct. If, for example, the jurors had said that they were pressured to a verdict against their will, this would be *prima facie* evidence that a court should consider in granting the motion because that sort of statement has nothing whatever to do with the thought process involved in arriving at a verdict – just coercion. See Cummings, at 428 (court cannot consider matters that inhere in the verdict); see also United States v. Resko, 3 F.3d 684, 695 (3rd Cir. 1993) (trial court should have ordered further inquiry of jurors only because the alleged misconduct was not related to the deliberative process, i.e. improperly discussing the case before deliberations began). Suggesting that the statements here are the basis for further interview is based on the erroneous conclusion that such statements are evidence of bad faith or juror misconduct, when in fact they are merely statements regarding the individual jurors' thought processes and therefore cannot be considered.

3. THE MAIL FORWARDED TO THE DEFENDANT WHILE IN CUSTODY WAS NOT IN THE PROSECUTOR'S POSSESSION AND THEREFORE IS NOT "BRADY MATERIAL".

The Appellant's trial counsel informed the court just prior to the sentencing hearing that she had mail in the defendant's name that listed Paula Smith's address and dated during the charging period for the incident.⁶ 8RP 7.

It is well established that the prosecution has an obligation to turn over evidence in its possession or knowledge which is both favorable to the defendant and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L.Ed.2d 215 (1963); United States v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 3379, 87 L.Ed.2d 481 (1985); Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L.Ed.2d 40 (1987).

Brady holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

⁶ Counsel seemed to speculate that the mail was delivered to the jail by Paula Smith, but did not give further detail about that information.

prosecution.” Brady, 373 U.S. at 87. The three essential components of a Brady violation are: (1) the evidence at issue must be favorable to the accused because it is either exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have occurred. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999).

First, regardless of the materiality of the evidence or alleged prejudice to the defendant, the State did not suppress the evidence. The prosecutor never knew of the documents, nor were they ever in the possession of the prosecution. 8RP 7, 23-24. Therefore, since no state agent ever possessed the mail that was delivered to Amaya Rochez while in custody, it is not “Brady material.” In re Personal Restraint of Gentry, 137 Wn.2d 378, 399-400, 972 P.2d 1250, 1262 (1999).

The Appellant does not explicitly argue that the State possessed the evidence in question through Paula Smith. However, the Appellant does insinuate that Paula Smith possessed the evidence as an agent of the State. See App. Br. at 14, (citing Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)). The brief of the Appellant quotes the United States

Supreme Court as saying, “[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf.” It is telling that the quote omits the Court’s final words in that sentence which read, “...including the police”. Those words highlight that Whitley deal with State agents like police officers and has no application to private citizen like Paula Smith. Id. see also, In re Personal Restraint of Gentry, 137 Wn.2d 378, 399-400, 972 P.2d 1250, 1262 (1999) (citing Whitley to define “acting on the government’s behalf” to include police officers and the like). Contrary to the Appellant’s intimation by citing Whitley, the State has no duty to search for any potentially exculpatory evidence that may exist. State v. Judge, 100 Wn.2d 706, 717, 675 P.2d 219 (1984).

Second, there is no Brady violation, “if the defendant, using reasonable diligence, could have obtained the information” at issue. In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). Here the mail delivered to Amaya Rochez consisted in, among other things, bills from Comcast in Amaya Rochez’s name. 8RP 7. With only a small amount of effort, defendant’s counsel could have subpoenaed not only the bills but all of the information associated with Amaya Rochez’s account including the billing

address. Further, defense conducted an interview of Paula Smith along with her investigator who took notes of the interview. 1RP 7. Defendant's counsel could have asked Paula Smith about any mail that Amaya Rochez was receiving at the apartment but at the time "...didn't see any need". 1RP 20.

Finally, the mail in Amaya Rochez's name is not exculpatory evidence. Both the State and defense established at trial that Amaya Rochez lived at Paula Smith's residence shortly before the incident. It would therefore be expected that the defendant may receive items of mail at that residence, especially since he stayed there on occasion throughout the summer of 2008.

4. CUMULATIVE ERROR DID NOT DEPRIVE AMAYA ROCHEZ OF A FAIR TRIAL.

The Appellant argues that cumulative errors deprived Amaya Rochez of a fair trial citing State v. Russel, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994) and State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). However, none of the assignments of error materially affected the outcome of the case.

D. **CONCLUSION**

The State of Washington respectfully requests that Amaya Rochez's conviction for Burglary in the First Degree be affirmed.

DATED this 26 day of February, 2010.

Respectfully submitted,

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