

65934-1

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No. 65934-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHAWN A. REID,

Appellant.



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

The Honorable Ronald L. Castleberry

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

On appeal, Shawn Reid contends the prosecutor's misstatement of the presumption of innocence during closing argument must result in reversal of his convictions. In addition, juror misconduct during deliberations, where two jurors, one a recovering alcoholic and the other a former bartender, shared their professional experiences with alcohol with the other jurors, resulting in the verdict being based upon extrinsic evidence, which also must result in reversal. Finally, Mr. Reid submits that several conditions of the sentence imposed by the court must be stricken as not being crime related.

B. ASSIGNMENTS OF ERROR

1. Mr. Reid's Fourteenth Amendment right to due process was infringed by the prosecutor's misstating the presumption of innocence during closing argument.

2. Juror misconduct during deliberations violated Mr. Reid's rights to a fair and impartial jury under the Sixth Amendment of the United States Constitution and article I, section 21 of the Washington Constitution.

2. Juror misconduct during deliberations violated Mr. Reid's right to counsel and right to confront and cross-examine witnesses against him in violation of the Sixth Amendment.

3. The trial court erred in denying Mr. Reid's motion for a new trial based upon juror misconduct during deliberations.

4. The court's imposition of Conditions of Sentence 6, 7, 8, 12, 13, and 14 exceeded the trial court's authority as they were not crime related.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor intentionally misstates the presumption of innocence to the jury during closing argument, the defendant is denied a fair trial. Did the prosecutor's attempt at misleading the jury by misstating the presumption of innocence during closing argument deny Mr. Reid a fair trial?

2. A defendant is entitled to a fair and impartial jury, which renders a verdict based solely on the evidence produced at trial. A defendant is entitled to a new trial where extrinsic evidence introduced during deliberations may have affected the verdict. Did the trial court err in refusing to order a new trial where Mr. Reid

produced evidence that two jurors had introduced their own “expert” opinions regarding the effects of alcohol on a person, thus leading to an inference that the verdict was based on extrinsic evidence which prejudiced Mr. Reid?

3. In imposing the sentence, a trial court does not have the authority to impose conditions that are not related to the offense for which the defendant was convicted. Is this Court required to strike Conditions of Sentence 6 through 8 and 12 through 14 as these conditions were not related to the crimes for which Mr. Reid was convicted?

D. STATEMENT OF THE CASE

Milly Baquero and Shawn Reid met through mutual friends. RP 176. In September 2008, Ms. Baquero was living with Mr. Reid as roommates after Ms. Baquero’s failed four year romantic relationship. RP 179. The relationship between Ms. Baquero and Mr. Reid was purely platonic as Ms. Baquero was a lesbian, a fact of which Mr. Reid was aware. RP 180-81. In early 2009, the two had to find another place to live after the condominium in which they were living was lost in foreclosure. RP 183. The two remained friends until April 2009, when they had a falling out after

Mr. Reid and Ms. Baquero's partner at the time, Deanna Hayes, had an argument. RP 52, 183.

On July 14, 2009, Ms. Baquero was at the home of couple who were friends of both her and Mr. Reid, hoping to spend the night with them. RP 185. At the time, Ms. Baquero had no fixed address and was getting by on the generosity of her friends. RP 121-22, 147, 185. While Ms. Baquero was visiting, Mr. Reid, who was in a business relationship with this couple, arrived. RP 186. Mr. Reid and Ms. Baquero rekindled their friendship, and it came to light during their conversation that Mr. Reid was staying at a hotel in Smoky Point. RP 187. Mr. Reid indicated the hotel room was already paid for that night and he intended to go to Puyallup to see his daughters and his ex-wife. RP 58, 187. It was agreed Mr. Reid would drop Ms. Baquero off at the Smoky Point hotel where she would spend the night, go to Puyallup, and return to pick up Ms. Baquero the next morning. RP 187-88.

Once the two arrived at the hotel, Ms. Baquero agreed to have a drink at a bar with Mr. Reid before he drove to Puyallup.¹ RP 189. Ms. Baquero and Mr. Reid left the first establishment and went to another for more drinks. RP 191. At this second

¹ There was testimony that Mr. Reid had had several drinks before picking up Ms. Baquero. RP 54-57, 78-84.

establishment, Mr. Reid and another woman customer got into an argument and Mr. Reid was asked to leave. RP 793. The two returned to the hotel. RP 194.

Ms. Baquero felt Mr. Reid had had too much to drink and went to call the friends where she was originally going to stay. RP 194. After receiving no answer, Ms. Baquero told Mr. Reid she was going to try again. RP 197. According to Ms. Baquero, Mr. Reid became enraged, assaulted her, and attempted to have sex with her. RP 197-203. When Ms Baquero screamed for help, according to her, Mr. Reid began punching her in the nose, eyes, and head. RP 203. At some point, Ms. Baquero was able to run out of the room and was assisted by nearby hotel guests. RP 217-22. Mr. Reid fled. RP 217.

Mr. Reid was subsequently arrested and charged with attempted second degree rape, second degree assault with sexual motivation, and unlawful imprisonment. CP 153-54. In the final moments of the prosecutor's rebuttal argument, the prosecutor stated:

The presumption of innocence ends after my argument.

RP 972. The court immediately sustained Mr. Reid's objection. *Id.* Mr. Reid was convicted as charged following a jury trial. CP 58-61.

After the jury had announced its verdict, the prosecutor and Mr. Reid's attorney spoke to the jurors. CP 50. The jury foreman disclosed he was a recovering alcoholic and that another one of the jurors had worked in a bar. *Id.* During deliberations, both related to the jury their experiences and opined that people get more aggressive the more they drink. *Id.* From that they opined Mr. Reid was under the influence when he engaged in a dispute with a female customer at a bar, was aggressive towards a female friend, and his aggressiveness continued when he attacked Ms. Baquero. *Id.*

In addition, the jurors related that in their experience with fights, Ms. Baquero's injuries could not have come from just one blow as stated by Mr. Reid. *Id.* Finally, they opined that Ms. Baquero's contradictory statements and actions after the incident were the result of her being under the influence. *Id.*

In light of these statements, Mr. Reid moved for a new trial based on juror misconduct. CP 49-57. The court denied the motion, finding the jurors' statements and opinions inhered in the jury's verdict. 8/26/2010RP 9.

As part of his sentence, the court imposed several conditions as part of community custody, including the following:

6. Do not possess or access sexually explicit materials, as defined by the supervising CCO and therapist.
7. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
8. Do not possess or control sexual stimulus material as defined by the supervising CCO and therapist except as provided for therapeutic purposes.
- ...
12. Do not associate with known users or sellers of illegal drugs.
13. Do not possess drug paraphernalia.
14. Stay out of drug areas as defined by the supervising CCO.

CP 19.²

E. ARGUMENT

1. THE PROSECUTOR'S INTENTIONAL MISSTATEMENT OF THE PRESUMPTION OF INNOCENCE VIOLATED MR. REID'S RIGHT TO DUE PROCESS

a. Mr. Reid had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is

² At sentencing, the trial court vacated the second degree assault with sexual motivation conviction, finding it merged with the attempted second degree rape conviction. CP 7; 8/26/2010RP 12-13. The court also found the remaining counts to constitute the same criminal conduct. CP 8; 8/26/2010RP 13.

the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because “the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence,” appellate courts must exercise care to insure that prosecutorial comments have not unfairly “exploited the Government's prestige in the eyes of the jury.” *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereignty whose interest “is not that it shall win a case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431

(1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

b. The presumption of innocence lasts until the jury finds the State has proven the offenses beyond a reasonable doubt. Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” (citation omitted); *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“It [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’”), *quoting Leland v. Oregon*, 343 U.S. 790, 802-03, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952) (Frankfurter, J., dissenting); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006).³ The presumption of innocence

³ See also *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (“We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct.

continues to operate until overcome by proof of guilt beyond a reasonable doubt. *United States v. Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950).

The prosecutor's comments here were impermissible because they undermined two fundamental aspects of the presumption of innocence, namely that the presumption (1) remains with the accused throughout every stage of the trial, including, most importantly, the jury's deliberations, and (2) is extinguished only upon the jury's determination that guilt has been established beyond a reasonable doubt. *See generally Mahomey v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990); *United States v. Braxton*, 877 F.2d 556, 562 (7th Cir. 1989); *United States v. Walker*, 861 F.2d 810, 813-14 n. 14 (5th Cir. 1988); *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928); *Nelson v. Scully*, 672 F.2d 266, 269 (2d Cir.), *cert. denied*, 456 U.S. 1008 (1982); *United States v. Jorge*,

2078, 124 L. Ed. 2d 182 (1993) ("What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." (citations omitted)); *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) ("The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."); *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

865 F.2d 6, 10 (1st Cir.), *cert. denied*, 490 U.S. 1027 (1989). As a consequence of the prosecutor's improper argument, Mr. Reid's rights to due process and a fair trial were violated.

c. The prosecutor's argument warrants reversal.

Prosecutorial misconduct requires reversal where the appellate courts are convinced beyond a reasonable doubt that the error contributed to the jury verdict. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995). The State cannot meet this standard by speculating that a hypothetical juror who did not hear the improper argument could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict. *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

"[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *State v. Johnson*, __ Wn.App. ___, 243 P.3d 936, 940-41 (2010), *citing State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *State v. Anderson*, 153 Wn.App. 417, 432, 220 P.3d 1273 (2009).

Here, the State cannot prove beyond a reasonable doubt Mr. Reid's jury would have reached the same result absent the error. The prosecutor's argument was clearly an intentional misstatement of the presumption of innocence designed to mislead the jury and lessen the State's burden of proof.

Further, a curative instruction would not have remedied the error. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). This claim regarding the use of curative instructions ignores the behavior of jurors and can lead to absurd results:

If juries could honestly be counted upon to literally construe and obey an instruction that closing arguments are "not evidence," and that their verdict is to be based solely on the evidence, it would make no sense for the jury to do anything but disregard closing arguments altogether. If that were the case it would be impossible to justify the Supreme Court's holding that a criminal defendant has a constitutional right to give a closing argument. Nor could one possibly justify the rule that it may be reversible error to grant a jury's request to read back portions of the prosecutor's closing. It would also be absurd for attorneys to object at all to improper closings, although we insist that they do so, and redundant for judges to strike improper closing remarks. It would always be pointless for the prosecution to exercise its right to give a rebuttal argument because it would

merely be responding to an argument that the jury had been told to disregard. And as one court of appeals has correctly noted, that logic, if taken seriously, “would permit any closing argument, no matter how egregious.”

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Finally, the prosecutor’s argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction or an objection. “[A] bell once rung cannot be unring.” *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). This Court must reverse Mr. Reid’s convictions and remand for a new and fair trial which comports with due process.

2. THE JURORS' "EXPERT" OPINIONS REGARDING MR. REID'S AND MS. BAQUERO'S TESTIMONY WHICH THEY SHARED WITH THE OTHER JURORS VIOLATED MR. REID'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY

a. Juror misconduct which has a prejudicial effect on the verdict requires reversal. It is axiomatic that fundamental to the administration of justice is a fair and impartial jury. U.S. Const. amend. VI; Const. art. I, sec. 21; *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Robinson v. Safeway Stores*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989) (The right of trial by jury under our state constitution "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct."). The introduction of outside influences into the deliberative process of the jury is inimical to our system of justice. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed.2d 654 (1954). The jury should reach its decisions only upon the evidence produced at trial, unaffected by extrinsic facts. The Sixth Amendment demands that evidence material to the guilt or innocence of an accused be subject to judicial control and the rules of evidence. *Turner*, 379 U.S. at 472-73.

Further, jury exposure to facts not in evidence deprives a defendant of his rights to confrontation, cross-examination and the assistance of counsel embodied in the Sixth Amendment. *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988); *see also Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993).

When the jury considers extrinsic evidence in its deliberations, it constitutes misconduct which is grounds for a new trial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Before a new trial will be granted on this basis, “there must be a showing of reasonable grounds to believe that a defendant has been prejudiced.” *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). Importantly, this Court must ask whether the evidence *could have* affected the jury’s decision, not whether the evidence *did in fact* affect the decision. *Richards v. Overlake Hospital Medical Center*, 59 Wn.App. 266, 273, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014 (1991). This is because the actual effect of the extraneous evidence on the jury’s decision inheres in the verdict. *Id.* Any reasonable doubt that the misconduct affected the verdict must be resolved against the verdict. *State v. Briggs*, 55 Wn.App. 44, 55-56, 776 P.2d 1347 (1989).

Since juror misconduct violates a defendant's rights under the United States and Washington Constitutions, the burden of proving that the error was harmless beyond a reasonable doubt is on the State. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See also *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir.1981) ("[A] new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.").

b. The juror's personal extrinsic evidence did not inhere in the verdict. The trial court denied Mr. Reid's motion for a new trial based upon juror misconduct, ruling that evidence of the juror's conduct during deliberations inhered in the jury's verdict.
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A court cannot review matters of the jury deliberation process that inhere in the verdict. *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). The mental processes by which jurors reach their conclusion are all factors inhering in the verdict. *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989), citing *Cox v. Charles Mitchell Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967). A juror's statements inhere in the verdict if the alleged facts of misconduct are linked to the juror's motive,

intent, or belief, or describe the effect upon him or her. *Gardner*, 60 Wn.2d at 841.

Instructive on this issue is this Court's decision in *Briggs*, *supra*. The issue in *Briggs* was the omission during *voir dire* of a member of the *venire* who ultimately was selected as a juror, of the revelation of his stuttering problem. This was important because the defendant had a profound stuttering problem and the central issue in the case was whether a stutterer could control his speech impediment. None of the five victims in the case had testified their attacker stuttered. During deliberations, the offending juror spoke of his personal experiences with stuttering and his methods of overcoming or controlling his speech problem. Once this evidence of juror's infecting the deliberations with extraneous and untested theories came to light, Mr. Briggs moved for a new trial. The trial court initially ordered a new trial, then granted the State's motion to reconsider and denied the motion for a new trial.

This Court reversed and ordered a new trial. This Court rejected the trial court's conclusion that the juror's information inhered in the jury's verdict because this was the type of life experiences jurors are expected to bring to deliberations. *Id.* at 58-59. This Court noted:

[The information] was highly specialized, as evidenced by the fact that the topic was the subject of expert testimony by a prosecution witness. Juror White's comments were used to elaborate upon and clarify the expert testimony by explaining how appellant might have controlled his stuttering in certain instances, despite the existence of testimony that he always stutters.

This is evidence outside the realm of a typical juror's general life experience and therefore should not have been introduced into the jury's deliberations.

Id.

This argument regarding the life experiences of jurors was the same argument made by the State here. The jurors' opinions and experiences here regarding their professional/occupational knowledge of the effects of alcohol on a person were the same type of "highly specialized" information found offensive in *Briggs, supra*. This was not merely evidence of the "mental processes by which jurors reach their conclusion" but expert-type evidence beyond the realm of the average juror. The jurors' "expert" opinions did not inhere in the jury's verdict.⁴

⁴ The case of *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 75 P.3d 944 (2003), does not alter the analysis or the outcome. *Breckenridge* did not purport to overrule *Briggs*. Further, the decision in *Breckenridge* merely recites the time honored test from *Richards* for determining whether something inheres in the jury.

c. The jurors' use of evidence not admitted at trial to develop their own theory of the case constituted juror misconduct.

"The injection of information by a juror to fellow jurors, which is outside the recorded evidence of the trial . . . constitutes juror misconduct." *Richards*, 59 Wn.App. at 270 (emphasis omitted).

"[I]f the experiment, or what the jury has done, has the effect of putting them in possession of material facts which should have been supported by evidence upon the trial, but which was not offered, this generally constitutes such misconduct as will vitiate the verdict." *State v. Everson*, 166 Wash. 534, 536-37, 7 P.2d 603 (1932).

[T]he consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial. *State v. Gobin*, 73 Wn.2d 206, 211-12, 437 P.2d 389 (1968). "Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document." (Italics ours.) *Richards*, at 270. See also *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973). Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal. *Halverson*, at 752.

Balisok, 123 Wn.2d at 118.

Again *Briggs, supra*, is instructive here. As the *Briggs* Court related about the information in question:

In *Haley* [*v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1538 (4th Cir.1986)], a venire member was erroneously placed on a jury without being subject to voir dire. The case involved whether a trucking company treated its truckers fairly, and this “nonjuror”, during deliberations, said he knew from experience that trucking companies treat truckers badly and that he would not believe what the trucking company had to say. The *Haley* court found that there was a reasonable possibility these comments were prejudicial. *Haley*, at 1534, 1538. Similarly, in this case the juror interjected his personal experience into deliberations on the central issue being tried. His comment, while less direct than that in *Haley* concerning the company's credibility, rebutted the credibility of those witnesses who said appellant always stutters.

Briggs, 55 Wn.App.at 56.

Here, the information provided by the jurors concerned the credibility of Ms. Baquero and why her statements and actions after the incident were seemingly contradictory, which undoubtedly led all of the jurors to decide Ms. Baquero was credible. The jurors' information was in the guise of “expert” testimony about the effects of alcohol. This information was no different than the information found to be misconduct in *Briggs*.

d. There was a reasonable possibility that the jurors' exposure to extrinsic evidence affected the verdict. A jury's misconduct is presumed to be prejudicial, and the State must overcome this presumption by proof beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); *State v. Brenner*, 53 Wn.App. 367, 372, 768 P.2d 509 (1989). The State must demonstrate that the misconduct could not have affected the jury's determinations. *Gardner*, 60 Wn.2d at 841; *Briggs*, 55 Wn.App. at 56. Any doubt about whether the misconduct affected the verdict must be resolved against the verdict. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

Where the jury uses evidence that was not introduced at trial, the defendant is entitled to a new trial if there is "a reasonable possibility that the extrinsic evidence *could have* affected the verdict." (Emphasis added.) *Dickson*, 849 F.2d 405. See also *Richards*, 59 Wn.App. at 270-71 ("The trial court will normally review this alleged new evidence and then determine whether the juror's remarks or the new evidence itself probably had a prejudicial effect on the minds of the other jurors."). "This rule derives from 'one of the most fundamental tenets of our justice system: that a defendant's conviction may be based only on the evidence

presented during trial.” *United States v. Keating*, 147 F.3d 895, 900 (9th Cir. 1998), *quoting United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996). If the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to resolve the doubt in favor of granting a new trial. *Halverson*, 82 Wn.2d at 752. “If only one juror was unduly biased or improperly influenced, [the defendant] was deprived of [her] Sixth Amendment right to an impartial panel.” *Dickson*, 849 F.3d at 408.

“When asking whether prejudice occurred, the inquiry is objective rather than subjective.” *State v. Tigano*, 63 Wn.App. 336, 341, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). The question is whether the extraneous information *could have* affected the verdict, *not whether it actually did*. *Id.* A new trial must be granted unless it can be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. *Briggs*, 55 Wn.App. at 55

Here, *the* issue at trial was the credibility of Ms. Baquero and whether the jury should believe her despite her seemingly contradictory statements and actions after the incident. Her actions immediately after the “incident” were erratic and contradictory. This type of behavior could have led the jury to discount Ms. Baquero’s

credibility. The jurors' opinions discounted Ms. Baquero's behavior and bolstered her otherwise suspect credibility. The jurors' actions affected the jury verdict.

Mr. Reid was entitled to a new trial and the trial court erred in denying him one. This Court must reverse Mr. Reid's conviction and remand for a new trial.

3. CONDITIONS IN THE JUDGMENT AND SENTENCE THAT WERE NOT CRIME RELATED MUST BE STRICKEN

a. Courts are not authorized to impose prohibitions that are not "crime-related" as part of the sentence. Only the legislature may establish potential legal punishments. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). RCW 9.94A.505(8) provides: "As a part of *any sentence*, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." Under the statute, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been

convicted . . .” RCW 9.94A.030(13). Such conditions are usually upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Sentencing conditions are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Although Mr. Reid did not challenge these conditions at sentencing and although they are not a constitutional challenge, crime relationship sentencing challenges can be raised for the first time on appeal. *State v. Julian*, 102 Wn.App. 296, 304, 9 P.3d 851 (2000) (“A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.”). See also *State v. Jones*, 118 Wn.App. 199, 204, 76 P.3d 258 (2003) (defendants can object to community custody conditions for the first time on appeal).

b. The challenged conditions are not related to the crimes of which Mr. Reid was convicted. Crime-related prohibitions should “not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(13). Under RCW 9.94A.030(13), no causal link need be established between the

prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Acrey*, 135 Wn.App. 938, 946, 146 P.3d 1215 (2006).

In *State v. Zimmer*, it was determined that a prohibition on possession of a cellular phone and an “electronic data storage device” was not a crime related prohibition because there was no evidence in the record indicating that the defendant used such a device in committing the crime. 146 Wn.App. 405, 413-14, 190 P.3d 121 (2008).

The challenged conditions here fall into two categories: one related to possession of sexual materials (nos. 6-8) and the other to drug use (nos. 12-14). First, there was no evidence presented at trial that Mr. Reid was involved in any drug use or that the events were fueled by drugs. Certainly barring a defendant from possessing drug paraphernalia, where the conviction was related to drugs or substance abuse, “is a ‘crime-related prohibition[]’ authorized under RCW 9.94A.700(5)(e).” *State v. Motter*, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007), *review denied*, 163 Wn.2d 1025 (2008). But that was not the case here. There certainly was evidence of alcohol use and/or abuse, and that was one of the bases for the State’s theory on how events unfolded.

But there was no evidence this event was precipitated or caused by drug use. These conditions do not relate to the crime and must be stricken.

Regarding sexually explicit material or frequenting establishments where there are sexually explicit materials, again there was no evidence presented at trial that prior to the events in question Mr. Reid was in possession of sexually explicit material. The jury did find Mr. Reid attempted to rape Ms. Baquero and his assault on her was sexually motivated, but there was no evidence of prior sexual misconduct by Mr. Reid or that he was motivated to engage in this conduct by reading, possessing, or being around people in possession of sexually explicit material.

Imposition of conditions 6 through 8 and 12 through 14 exceeded the trial court's authority as they were not crime-related.

c. The appropriate remedy is to strike the offending conditions(s). Where the trial court exceeds its authority in imposing an invalid condition of sentence, the remedy is to strike the offending condition or conditions. See *Jones*, 118 Wn.App. at 212 ("On remand, the trial court shall strike the condition pertaining to alcohol counseling."). This Court should strike the challenged

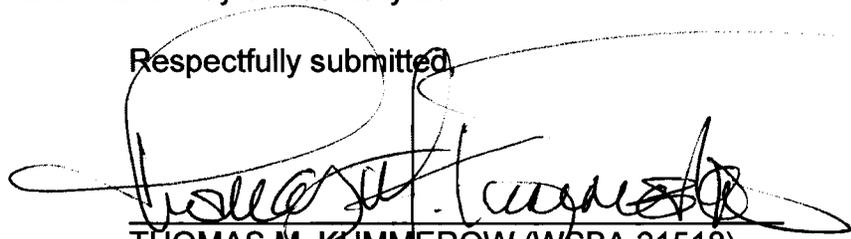
conditions as being unrelated to the crimes for which Mr. Reid was convicted.

F. CONCLUSION

For the reasons stated, Mr. Reid request this Court reverse his convictions and remand for a new trial. Alternatively, Mr. Reid requests this Court strike the offending conditions of his sentence.

DATED this 24th day of February 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

THOMAS M. KUMMEROW (WSBA 21518)

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Washington Appellate Project – 91052

Attorneys for Appellant

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

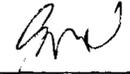
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65934-1-I
)	
SHAWN REID,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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