

69022-1

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COA No. 69022-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LAVELLE JOHNSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Michael Hayden
The Honorable Michael Heavey

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Lavelle Johnson's jury trial on charges of Eluding a Police Vehicle and Driving While License Suspended, juror misconduct in considering extrinsic evidence about the defendant's past juvenile history and sexual relationship with a juvenile facility guard, located by Juror 12 in an internet search before the second day of deliberations, required that the trial court grant Mr. Johnson's motion for a new trial on both counts.

2. The trial court erred in entering its written order denying a new trial. CP 97.

3. The trial court erred in entering motion for new trial Finding of Fact (1)(e). CP 121-23.

4. The trial court erred in entering motion for new trial Finding of Fact (1)(f). CP 121-23.

5. The trial court erred in entering motion for new trial Finding of Fact (1)(g). CP 121-23.

6. The trial court erred in entering motion for new trial Conclusion of Law (2)(d). CP 121-23.

7. The trial court erred in entering motion for new trial Conclusion of Law (2)(e). CP 121-23.

8. The finding and verdict imposed on the RCW 9.94A.834

special allegation of “endangering” persons during the eluding crime must be reversed and stricken, because the language of the special verdict form relieved the State of its burden of proof.

9. The information entirely failed to include the essential “endangerment” element of the RCW 9.94A.834 special allegation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Juror 12 violated the trial court’s warning to the jurors to not look up anything about anything on the internet or elsewhere about the case during Lavelle Johnson’s trial. In denying Mr. Johnson’s motion for new trial, did the trial court abuse its discretion when it failed to apply the correct standard of reversal, where the court found clear juror misconduct occurred, but did not require the State to overcome the resulting presumption of prejudice and prove beyond a reasonable doubt that there was not a single reasonable ground to believe that the extrinsic evidence may have affected the verdicts?

2. Did the trial court abuse its discretion when it ruled that the extrinsic evidence did not become a “part of jury deliberations,” since only a single juror considered it?

3. Did the trial court abuse its discretion when it relied for its decision on Juror 12’s promise that the extrinsic evidence did not

affect his decision since he had already made up his mind about the case on the previous day of deliberations, where the affect of jury misconduct and extrinsic evidence must be assessed objectively, and not subjectively according to the juror's thought processes, which inhere in the verdict?

4. Did the trial court similarly abuse its discretion when it reasoned that a mistrial was not required because the court had warned this jury to not consider the defendant's ER 609 adult dishonesty convictions except for impeachment, and reasoned that this warning had a mitigating affect on the prejudice of the extrinsic evidence that showed the defendant also had an apparent conviction as a juvenile?

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

7. The jury at trial learned that Mr. Johnson, who testified, had three adult convictions for crimes of dishonesty. Objectively, however, the improper extrinsic evidence portrayed the defendant as a lifelong offender whose criminal conduct commenced when he

was a juvenile, and cast the defendant in a poor moral light by indicating he had a sexual relationship with a juvenile facility guard. The sole issue for the jury's decision was whether Mr. Johnson was believable and correct when he testified at trial that he was not driving the car that eluded police, but was only a passenger. Can it be said, beyond a reasonable doubt, under the objective standard, that the extrinsic evidence could have had no possible affect on the outcome?

8. Must this Court reverse the RCW 9.94A.834 enhancement and strike the special verdict where the language of the special verdict form required the jury to find that the eluding crime "threatened" third persons, but the statute in fact requires that the jury find that the crime "endangered" others in order for the enhancement to be applied, and the instructions thus relieved the State of its burden to prove the "endangerment" element?

9. Did the information entirely fail to include the essential "endangerment" element of the RCW 9.94A.834 special allegation, requiring reversal for failure of notice to the defendant?

C. STATEMENT OF THE CASE

1. Charges. Lavelle Johnson was charged with Attempting to Elude a Pursuing Police Vehicle, and Driving While License

Suspended/Revoked in the First Degree, following a vehicle chase on October 20, 2010. CP 1-6, CP 7-8 According to the affidavit of probable cause, Seattle police officers were surveilling Mr. Johnson while he was inside the Best Damn Sports Bar in south Seattle. Police allegedly saw Mr. Johnson exit the bar and enter the driver's side door of a black Mercedes, later determined to registered to his fiancé Mariko Taylor. The vehicle then drove off the premises; pursuing police later signaled for it to stop. CP 3-6.

2. Mistrial – State's case inadequate to outweigh prejudice of gang association. Mr. Johnson's defense conceded that the Mercedes failed to stop for signaling law enforcement officers, during a lengthy chase. CP 3-6; 12/20/11RP at 61. Mr. Johnson, however, was not the driver -- his friend Pierce Dubois, who left the sports bar with him after they performed a Rap routine there, drove the car away from signaling police.¹ 6/13/11RP at 33-34, 39.

The trial court ordered a mistrial when the State's rebuttal witness, a Seattle police gang unit officer, revealed that the police

¹ Mr. Johnson sought to call Mr. Dubois as a witness at trial, but in an initial hearing, upon advice of counsel, Dubois asserted his Fifth Amendment right to not answer Mr. Johnson's counsel's questions, including when asked whether he was the driver of the car on the night in question. 6/13 at 2-3, 8-9.

had been watching Mr. Johnson at the sports bar because of suspected involvement in illegal gang activity. 6/13/11RP at 64-65, 86-89; CP 24. In deeming a mistrial order necessary, the trial court considered that eluding “is not necessarily what someone would think of as gang activity,” but reasoned that the mention of gang association had prejudiced Mr. Johnson by casting him as a person who “engaged in unlawful conduct on a regular basis.”² 6/13/11RP at 86.

3. Second trial. At Mr. Johnson’s second trial, Seattle police detective Edward Chan again testified that he was in the vicinity of the Best Damn Sports Bar on the date in question. He testified that from his vantage point approximately a football field away from the doors of the sports bar, he saw the defendant enter the driver’s side of the Mercedes. 12/20/11RP at 51, 54-56. Detective Chan also stated that he saw the defendant driving the car when he passed the vehicle after a u-turn. 12/20/11RP at 56.

State Trooper Seaburg, who came upon the Mercedes at the

² The court applied the Weber/Escalona mistrial standards. 6/13/11RP at 86; see State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987) (paucity of credible evidence and inconsistencies in State’s case require mistrial for revelation of defendant’s bad conduct) (citing State v. Weber, 99 Wn.2d 158, 163-65, 659 P.2d 1102 (1983) (whether improper interjection requires mistrial must be determined against backdrop of strength of evidence of State’s case)).

end of the chase as it rolled to a near stop, again testified that “[t]he vehicle was abandoned by the two occupants and continued to roll and strike a parked vehicle.” 12/21/11 at 121, 126, 129-32.

Trooper Seaburg did not see which direction the passenger went.

12/21/11RP at 122.

Mr. Johnson testified, as he did at the first trial. He explained that after performing their Rap music act at the Best Damn Sports Bar, he and Mr. Dubois exited the business through a crowd of well-wishers. 12/22/11RP at 152-56, 161-65. Mr.

Johnson entered the passenger side of the Mercedes, and Mr.

Dubois entered the driver’s side, as the designated driver.

12/22/11RP at 164-68. Mr. Johnson’s own driver’s license was

suspended at the time, and his fiancé Mariko Taylor had allowed

Mr. Dubois to drive her car for that night’s birthday celebrations for

Lavelle. 12/22/11RP at 164.

The sudden, reckless vehicle chase started when Mr. Dubois

“presse[d] on the gas and “[took] off.” 12/22/11RP at 167-68. It

was not Mr. Johnson’s idea and he was terrified. 12/22/11RP at

168. When Mr. Dubois finally slowed the vehicle, Mr. Johnson

exited the passenger door and ran on foot from the scene, as police

had observed. Mr. Johnson was soon located by a police canine

unit. 12/22/11RP at 168, 174.

Mariko Taylor explained that she loaned her Mercedes to Mr. Dubois that day, which was Mr. Johnson's birthday, but she extracted promises from the two men that only Pierce would drive, because Lavelle's license was suspended.³ 12/21/11RP at 140-43.

4. Closing argument, deliberations. In closing argument, Mr. Johnson's lawyer re-emphasized to the jury that the defense admitted all of the conduct elements of the Eluding and DWLS crimes charged, because Mr. Johnson's license was suspended on that day, and the driver of the Mercedes drove recklessly away from the police. However, Mr. Johnson, as he testified, was not the driver of the car, and the issue for the jury to deliberate upon was his credibility in so testifying.⁴ 12/22/11RP at 220-22.

The jury so deliberated, from 11:30 in the morning to 4 pm in the afternoon, sending out inquiries to the court asking to see a map used as an exhibit, and asking to see a series of photographs of the defendant. 12/22/11RP at 231-36; CP 43-44, CP 45-46;

³ At Mr. Johnson's second trial, Mr. Dubois was not called based on his counsel's representations to defense counsel that her client would again assert his Fifth Amendment rights. 12/21/11RP at 88-89.

⁴ The prosecutor agreed in closing argument that the issue was whether the defendant was driving the vehicle. 12/22/11RP at 209,213-14. In rebuttal argument, the prosecutor argued extensively that the jury, for many reasons, should conclude that Mr. Johnson was not credible in

Supp. CP ____, Sub # 143A (minutes packet for December 19 to 23, 2011, including minutes of December 22, at pp. 10-12).

The next day, December 23, the jury continued to deliberate, from the start of the court day before 9 a.m., until a quarter till three in the afternoon. During this second day of deliberations, the jury asked for a DVD player to view video-recorded trooper vehicle 'dash-cam' evidence, and also asked to hear the transcribed trial testimony of Detective Chan, who had claimed that he accurately saw Mr. Johnson enter the driver's side of the Mercedes. CP 56, CP 57; see 12/20/11RP at 51, 53-55, 65 (Chan testimony).

The jury subsequently issued verdicts of guilty on the Eluding and DWLS charges, and answered "yes" to the special verdict question whether third persons were threatened with injury by the eluding. Supp. CP ____, Sub # 151A, CP 58-59.

5. Juror misconduct during deliberations. Unfortunately, after the first day of jury deliberations ended, Juror 12 decided to conduct an internet search overnight, looking for Lavelle Johnson's name. 12/30/11RP at 21. Juror 12 located an article that revealed that Mr. Johnson apparently had a prior juvenile offense, and also had a sexual relationship with a juvenile facility officer or guard.

his testimony. 12/22/11RP at 224-29.

12/30/11RP at 22-27; CP 89-90. In an affidavit drafted by the prosecutor after Juror 12 revealed his conduct, the juror stated that the internet article he located had no impact on him, because he had “already” made his mind up about the case during the previous day’s deliberations:

1. On December 22, 2011, following the jury’s first day of deliberations, I conducted an internet search for the defendant’s name – Lavelle Johnson.
2. I found a news article about a person named Lavelle Johnson having a sexual relationship with a corrections officer at a juvenile facility.
3. I was not sure if this person was the same Lavelle Johnson as the defendant.
4. I believe I read the beginning of the article, but did not read the entire article.
5. The information I discovered on the internet did not change my feelings about the case or affect my decision about the verdict. During deliberations on the first day, I had already expressed my feelings about the case.
6. I did not tell the other jurors about my internet search until I was discussing the case in the hallway of the courthouse with Mr. Thompson after the verdict was read.

CP 89-90 (affidavit of Juror 12). Following argument on Mr. Johnson’s motion for a new trial, the trial court found the juror credible in his assurances that the internet evidence did not affect his verdict, which he had already decided, and expressed, the previous day. 12/30/11RP at 42-44; CP 97, CP 121-23. The court also signed written findings. CP 121-23. See Part D, infra.

Following the trial court's imposition of a DOSA sentence, Mr. Johnson appeals his judgment of convictions. CP 109, 126.

D. ARGUMENT

1. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD AND ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL.

a. Trial court's ruling. In its oral ruling, the trial court stated that the internet information about the defendant's sexual relationship with a juvenile detention officer and about Mr. Johnson potentially having an adjudication, as a juvenile, did not "become part of the jury deliberation" because it was only known by one juror, who stated that he did not share the information. 12/30/11RP at 42-43.

Additionally, the trial court reasoned that three prior convictions for crimes of dishonesty had properly been admitted at trial under ER 609 to impeach Mr. Johnson, and the jury had been specially instructed to consider those convictions only for credibility. 12/30/11RP at 43; see CP 69 (Jury instruction 5) (ER 609 limiting instruction). With regard to the juvenile offense revealed in the internet search, the court stated, "This one they shouldn't consider at all." 12/30/11RP at 43.⁵

⁵ The jury was instructed, "You may consider evidence that the

The trial court also reasoned that the jury likely assumed that the defendant was the victim in the alleged sexual relationship, and thus he logically suffered no prejudice. 12/30/11RP at 43-44.

Finally, the court concluded that where misconduct occurred, the proper analysis on a motion for new trial would include an inquiry into the mind of the juror and the impact of the extrinsic evidence. 12/30/11RP at 39. The court then found Juror 12 to be believable in his assertion that the internet evidence "made no impact on [him]." 12/30/11RP at 42-43.

In its written findings, the trial court expressly found Juror 12 to be credible in his assurances to the court that the internet article did not affect his decision in the case:

The information [Juror 12] discovered did not change his feelings about the case or affect his decision about the verdict.

CP 121-23 (Findings 1.e and 1.f). The trial court's written findings, which incorporated its oral ruling, state in full as follows:

1. FINDINGS OF FACT:

a. During trial, the Defendant testified and three criminal convictions were admitted at trial for impeachment purposes: Theft in the Second Degree from 2007; Taking a Vehicle without Permission in the Second Degree from 2004; and Attempted Tampering with a witness from 2007.

defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." CP 69 (Jury instruction 5) (ER 609 limiting instruction).

b. The jury was instructed that the Defendant's convictions were to be used for the sole purpose of assessing what weight or credibility to give to the Defendant's testimony.

c. The Court admonished the jurors to not do any outside research during the trial or deliberations.

d. Juror 12 conducted an internet search of the Defendant's name, which was juror misconduct.

e. Juror 12 detailed in his affidavit that he conducted an internet search for Lavelle Johnson after the first day of deliberations on December 22, 2011, and he found a news article about a person named Lavelle Johnson having a sexual relationship with a corrections officer at a juvenile facility; that he was not sure if the this person was the same Lavelle Johnson as the defendant; that he believed he read the beginning of the article, but did not read the entire article; that the information he discovered did not change his feelings about the case or affect his decision about the verdict; that he had expressed his feelings about the case to his fellow jurors during the first day of deliberations; and that he did not tell the other jurors about the internet search until he was discussing the case in the hallway after the jury's verdict was read in court.

f. Juror 12 is credible. There are no other affidavits of jurors and no evidence has been presented that puts Juror 12's affidavit in doubt.

g. The information found by Juror 12 was in the mind of one juror who did not share it with the other jurors and it was not a part of jury deliberations.

2. CONCLUSIONS OF LAW:

The Defendant's motion for a new trial based on juror misconduct is denied for the following reasons:

a. A juror discovering information about a conviction that would have been inadmissible at trial is juror misconduct.

b. While juror misconduct did occur, it does not automatically warrant a new trial.

c. The trial court conducts a fact-finding hearing since it has a better opportunity to consider and weigh whether juror misconduct warrants a new trial because the trial court can look at the facts and circumstances of the case and the trial over which it presided.

d. Information about a potential juvenile criminal conviction, in light of three adult felonies admitted at trial, made no difference in the way the jury deliberated, especially since it was known by only one juror and not shared with the rest of the jury.

e. The juror misconduct in this case did not prejudice the Defendant's right to a fair trial, and is not grounds for a new trial.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

CP 121-23 (Findings of Fact).

b. Abuse of discretion – legal error. A trial court's decision denying a new trial motion based on jury misconduct is reviewed on appeal under the abuse of discretion standard. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). An abuse of discretion occurs when reaches its conclusion on untenable grounds. Pete, 152 Wn.2d at 552. Additionally, a trial court abuses its discretion by applying an incorrect legal analysis, or committing other error of law. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); see, e.g., State v. Rohrich, 149 Wn.2d 647, 654, 71

P.3d 638 (2003) (trial court abuses its discretion when it applies the wrong legal standard, or relies on unsupported facts).

c. The consideration of extrinsic evidence by even a single juror is misconduct and violates a defendant's

constitutional right to trial by a fair and impartial jury. A

criminal defendant's right to trial by an impartial jury is guaranteed the by the federal and state constitutions. U.S. Const. amend. 6;⁶ Wash. Const. art 1, §§ 21, 22.⁷ In addition, a criminal defendant's right to "due process" also guarantees the right to a fundamentally fair jury trial. U.S. Const. amend. 14; Wash. Const. art. 1, §§ 3, 22; Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (due process means a jury capable and willing to decide the case solely on the evidence before it).

Where, as here, a juror considers extrinsic evidence during the deliberation process, the juror commits misconduct and the

⁶ The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" See Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment right to jury trial is incorporated to the states by the Fourteenth Amendment).

⁷ Article 1, section 21 of the Washington Constitution provides, "The right of trial by jury shall remain inviolate[.]" Article 1, section 22 of the Washington Constitution provides, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]"

defendant's constitutional right to trial by a fair and impartial jury is compromised. State v. Pete, 152 Wn.2d at 552. Extrinsic evidence is "information that is outside all the evidence admitted at trial." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). The information about Mr. Johnson's juvenile matter and his sexual relationship with a guard was extrinsic evidence. Richards, at 270.⁸

Such evidence should not have been interjected into Mr. Johnson's trial, because it was not subject to objection and argument, or cross-examination or rebuttal, by Mr. Johnson's counsel. Pete, 152 Wn.2d at 553; Marshall v. United States, 360 U.S. 310, 312-13, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

The trial court erred in deciding that the misconduct did not actually become a "part of deliberations," because only a single juror, 12, considered the extrinsic evidence. CP 121-23. The court erred in relying substantially on this finding that the juror did not share the extrinsic evidence with other members of the jury panel.

⁸ Similar are State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) (information about defendant's aliases on paper sent to jury room was extrinsic evidence); State v. McChesney, 114 Wash. 113, 194 P. 551 (1921) (juror's statements of personal experience with theft was extrinsic evidence); State v. Parker, 25 Wash. 405, 65 P. 776 (1901) (juror's knowledge that defendant was member of "gang of toughs" and was implicated in a murder was extrinsic evidence).

CP 121-23. It is not required that multiple jurors be exposed to the extrinsic evidence before the constitutional protections at issue are infringed. Parker v. Gladden, 385 U.S. 363, 366, 87 S.Ct. 468, 471, 17 L.Ed.2d 420 (1966) (A defendant is “entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.”).⁹

d. The trial court abused its discretion. A trial court abuses its discretion when it applies an incorrect legal standard. State v. Tobin, 161 Wn.2d at 523.

(i). The court failed to hold the State to its burden to prove beyond a reasonable doubt that there was no reasonable ground to believe the verdict was prejudiced.

The trial court in the present case determined that Juror 12’s conduct was not grounds for a new trial because it “did not” affect deliberations. CP 121-23 (Conclusion of law 2.d). However, the long-standing rule is that consideration of any material by a jury not properly admitted as evidence vitiates a verdict

⁹ To the same effect are Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.1998) (“The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer’s right to a fair trial”); Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) (“If only one juror was unduly biased or improperly influenced, Dickson was deprived of his Sixth Amendment right to an impartial panel”); United States v. Gonzalez, 214 F.3d 1109 (9th Cir.2000); Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir.1990) (even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury).

when there is a reasonable ground to believe that the defendant may have been prejudiced.

(Emphasis in original.) State v. Pete, *supra*, at 555 n. 4 (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967); see also State v. Burke, 124 Wash. 632, 215 P. 31 (1923). Crucially, it is the State's burden to prove, beyond a reasonable doubt, that there is no reasonable ground to believe the verdict was affected. State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989). Under that standard, once misconduct is established (as here), and there is a reasonable doubt as to its effect, the doubt must be resolved against the verdict. State v. Cummings, 31 Wn. App. 427, 430, 642 P.2d 415 (1982); State v. Briggs, 55 Wn. App. at 55-56 (any reasonable doubt must be resolved against the verdict).

The trial court failed to hold the State to the constitutional error standard in either its oral ruling or its written findings. 12/30/11RP at 42-44; CP 121-23.

(ii). The trial court failed to apply the correct "objective" standard for determining prejudice.

A juror admitting misconduct during deliberations, through an affidavit solicited and prepared by the party prosecutor, is unlikely to state that the extrinsic evidence did affect his deliberations. Certainly, the trial court's reliance on Juror 12's statements claiming

non-materiality of the outside evidence constituted inquiry into matters that 'inhere in the verdict.'

However, the rule is that the trial court, in deciding the motion for new trial, must make an *objective* inquiry into whether the extraneous evidence could have affected the jury's determination, and not a subjective inquiry into the actual effect of the evidence on the jury, because the actual effect of the evidence inheres in the verdict. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. at 273; State v. Briggs, 55 Wn. App. at 55.

This dictate was not followed below. The mental processes by which jurors reach their unanimous finding of guilt is a matter inhering in the verdict. State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). Here, the trial court expressly rested its decision on a finding that Juror 12 was credible in his subjective statements regarding the effect of the extrinsic evidence upon him. CP 121-23. Indeed, the court delved deeply into the subjective result of the misconduct, relying additionally on Juror 12's statements that he had already decided his feelings about the case on the first day of deliberations, before searching out the extrinsic evidence. CP 121-23.

The trial court inquired yet further into Juror 12's thought process, when it appeared to reason that the juror in this case did obey the court's jury instruction 5, which directed that the defendant's prior convictions could only be used in deciding credibility. CP 121-23. In so doing, the court was reasoning that the limiting instruction mitigated or eliminated the prejudice actually caused by the extrinsic evidence in the case. CP 121-23. This, too, was directly contrary to the rule that the court should assess the effect of extrinsic evidence on an objective basis, rather than attempting to determine how it actually affected this particular juror or jury, or the jury's deliberations.

Finally, the trial court abused its discretion by relying on unsupported facts and ruling that this jury likely assumed that the defendant was the victim in any sexual relationship with a guard, and that he was, therefore, not prejudiced by the extrinsic evidence. CP 121-23. No substantial evidence supports such a determination - the affidavit of Juror 12 includes no such attestation. Furthermore, even if it did, similar to the trial court's previously described errors of law, the court erred by applying a subjective analysis of the extrinsic evidence on Juror 12.

The court's decision was an abuse of discretion by legal error. The trial court was required to conduct an objective inquiry into whether the extraneous evidence could have affected the verdict, not a subjective inquiry into the actual effect of the evidence. Allyn v. Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020 (1998).

"The affidavits of the jurors provided significant information about their feelings and attitudes towards the deliberation process. To the extent they "inhere in the verdict", they should not be considered."

State v. Cummings, 31 Wn. App. at 428 (it is not material for juror to say what effect the extrinsic evidence had on his decision-making one way or the other). Thus the question is whether the extraneous information could have affected the jury's determinations, not whether it actually did. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (citing Briggs).

The trial court in this case applied the wrong legal standard, which is critical in juror misconduct cases. State v. Briggs, 55 Wn. App. at 57 (trial court's reasons for finding presumption of prejudice was rebutted must be supported by case law). 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 v. Malone, 60 Wn.2d 836, 840-41, 376 P.2d 651 (1962); State v. Jackman, supra. The trial court erred.

e. Ultimately, the State failed to prove beyond a reasonable doubt that the misconduct could have had no affect on the verdicts. It is true that the jury heard properly introduced evidence that Mr. Johnson had several dishonesty convictions as an adult. 12/22/11RP at 152, 175. Possibly, the interjection of extrinsic evidence of another dishonesty conviction might not have any affect on the outcome. However, the extrinsic evidence in this case indicated a juvenile conviction, which was not apparently a crime of dishonesty. This extrinsic evidence interjected new matters which objectively would make an accused appear to be a lifelong offender, one who had in fact commenced a criminal career, as a juvenile. See State v. Cummings, supra, 31 Wn. App. 427, 430, 642 P.2d 415 (1982) (extrinsic evidence of defendant previously being in jail required new trial); Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988) (sheriff's comment to two jurors that defendant "had done something like this before" required new trial).

Furthermore, the extrinsic evidence portrayed the accused as a person of poor or at least dubious moral character. Evidence

that suggests moral depravity always prejudices a defendant and certainly has no place in a non-sex case. See State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995); see also State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009). Prior bad conduct evidence is inherently prejudicial to the criminal defendant before a lay jury. State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1994). This is true even where a limiting instruction accompanies the prior act evidence – which, of course, is not the case here. State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984).

Importantly, the State's evidence at trial was far from strong. The jury certainly was not overwhelmed with the State's case, and required two days of deliberations to decide to not believe Mr. Johnson's trial testimony that he was not driving the Mercedes. During those deliberations, the jury asked to review critical evidence on this question, including the testimony of Detective Chan (the officer who claimed to see, from a football field away, the defendant enter the driver's side of the car); the pictures of what the defendant's physical appearance was; and a DVD the jury apparently thought might show the two individuals exiting the Mercedes when it stopped.

The jury was in demonstrated equipoise. In such

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

Mr. Johnson testified in his defense, and his credibility was crucial. The important jury function of *all 12 jurors* unanimously deciding whether or not he was telling the truth in his trial testimony should not have been sullied and impaired by Juror 12's independent internet investigation. The trial court abused its discretion in denying the motion for new trial by applying the wrong legal standard, and relying on Juror 12's promises to the court that his violation of the court's warning did not affect his decision on the two charges against Lavelle. Reversal is required.

2. THE SPECIAL VERDICT LANGUAGE RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT OTHER PERSONS "WERE ENDANGERED" DURING THE CRIME OF ELUDING A POLICE VEHICLE.

a. Language of special verdict. The jury instructions in Mr. Johnson's trial instructed the jury, if it found that Lavelle committed

the crime of Eluding, to answer the special verdict form, which asked:

Was "any person, other than Lavelle Johnson or a pursuing law enforcement officer, threatened with physical injury or harm by the actions of Lavelle Johnson during his commission of the crime of attempting to elude a police vehicle?"

CP 59. Reversal is required.

b. Manifest constitutional error. The State must prove a special allegation beyond a reasonable doubt. State v. Tongate, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). Mr. Johnson argues herein that the State was relieved of its burden to prove the "endangerment" special allegation beyond a reasonable doubt because the language of the special verdict form did not require proof of endangerment, as required by RCW 9.94A.834. The alleged error is constitutional. See State v. Harris, 164 Wn. App. 377, 383, 385, 263 P.3d 1276 (2011) (erroneous definition of recklessness element relieved State of burden of proving every element and was constitutional error); State v. Stein, 144 Wn.2d 236, 240-1, 27 P.3d 184 (2001) (Where trial court's instructions to jury could be construed as omitting element of charged offense, defendant could challenge error as constitutional).

The error is also manifest, having “practical and identifiable consequences in the trial of the case.” State v. Stein, 144 Wn.2d at 240; see State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (constitutional error of failure to properly require proof of an element was “manifest” because jury employs instructional language to measure guilt or innocence on the included elements, and review was therefore proper despite absence of objection below); State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005) (failure to properly instruct on an element of a charged crime is manifest constitutional error which may be raised for the first time on appeal under RAP 2.5(a)). In addition, reversal is the presumed outcome. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980).

Review may be taken by this Court. RAP 2.5(a)(3).

c. The special verdict language relieved the State of its burden to prove every fact necessary to imposition of the sentence enhancement authorized by RCW 9.94A.834, which requires proof that persons were “endangered” during the crime. When the term “sentence enhancement” describes an increase beyond the authorized sentence for the offense, the special allegation becomes the equivalent of an element of a greater offense, which must be proved beyond a reasonable doubt.

U.S. Const. amend. 14; State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). See also State v. Williams–Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010) (“under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict.”).

Due Process is the source of the requirement the State of Washington must prove all elements of the crime charged beyond a reasonable doubt. State v. Aver, 109 Wn.2d 303, 310, 745 P.2d 479 (1987); U.S. Const. amend. 14. The same standard applies to prove a sentencing enhancement. State v. Tongate, supra, at 754 (“Our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty”); see also State v. Recuenco, supra; State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588 (1991); see, .e.g., State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995) (school zone enhancement); State v. Simms, 171 Wn.2d 244, 250, 250 P.3d 107 (2011) (any fact that increases the penalty beyond that prescribed for the criminal offense must be properly proved to jury before imposition of punishment).

Accordingly, Due Process, under both the United States and Washington Constitutions, requires that the jury be instructed on every essential element. U.S. Const. amend. 14; Wash. Const. art 1, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.ed.2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden). A defendant cannot be said to have had a constitutionally fair trial if the jury might assume that an essential element need not be proved. State v. Stein, 144 Wn.2d at 241.

In the present case, the prosecutor purported to file the special allegation of RCW 9.94A.834, which may be charged whenever there is evidence that the defendant's actions in committing a crime of Eluding "threatened" any person (except for the defendant or officer) with physical injury or harm.

**RCW 9.94A.834 Special allegation--
Endangerment by eluding a police vehicle—
Procedures**

(1) The prosecuting attorney may file a special allegation of endangerment by eluding in every criminal case involving a charge of attempting to elude a police vehicle under RCW 46.61.024, when sufficient admissible evidence exists, to show that one or more persons other than the defendant or the pursuing law enforcement officer were

threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle.

(Emphasis added.) RCW 9.94A.834, subsection (1).¹⁰ However, the statute explicitly provides that, in order for the sentencing court to impose the 12+ months enhancement, the jury must find, beyond a reasonable doubt, that other person(s) actually were “endangered” by the defendant’s driving actions during the crime.

(2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were

¹⁰ RCW 9.94A.533(11) authorizes the 12+ month enhancement where the jury has found the endangerment allegation:

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(Emphasis added.) RCW 9.94A.533(11).

endangered during the commission of the crime.

(Emphasis added.) RCW 9.94A.834, subsection (2).

In this case, the trial court did not have authority to impose the sentence enhancement of 12+ months incarceration. CP 7/10/12RP at 205-06. RCW 9.94A.533(11). The plain language of the applicable statutes requires proof of “endangerment” of others beyond a reasonable doubt before the prescribed sentence enhancement may be imposed. RCW 9.94A.834; RCW 9.94A.533(11).

The jury instructions therefore relieved the State of its burden of proof in Mr. Johnson’s case. Jackson v. Virginia, *supra*, 443 U.S. at 316; State v. Brown, *supra*, 147 Wn.2d at 339; see also State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997) (instructions that relieve the State’s burden of proof violate due process); State v. Bennett, 161 Wn.2d 303, 306–07, 165 P.3d 1241 (2007) (instructions that diminish State’s burden of proof violate due process); County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The State was entirely relieved of its burden of proving beyond a reasonable doubt that other persons were “endangered.” RCW 9.94A.834(2). Neither the special verdict form, or any other

instruction, informed the jury that it must find endangerment. Cf. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (failure of to-convict instruction to specify the degree of rape attempted was harmless because another instruction did so; therefore, the State was not relieved of its burden of proof). Constitutional error occurred.

d. Constitutional error in omitting an element is presumed prejudicial Constitutional error is presumed to be prejudicial, requiring reversal. State v. Stephens, *supra*, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980) (violation of a defendant's constitutional rights is presumed to be prejudicial."); *cf.* State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) ("[F]ailure to instruct on an element of an offense is automatic reversible error.").

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

Here, the dictated remedy is reversal, and the sentencing enhancement must be vacated and dismissed. State v. Pierce, 155

Wn. App. 701, 714-15, 230 P.3d 237 (2010) (reversing and dismissing firearm enhancement where, *inter alia*, jury was relieved of its burden to prove an operable firearm) (citing State v. Williams–Walker, supra) (sentencing court violates defendant's right to jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by explicitly finding that, beyond a reasonable doubt, the defendant committed the offense while so armed).

3. REVERSAL IS REQUIRED WHERE THE CHARGING DOCUMENT OMITTED THE ESSENTIAL “ENDANGERED” ELEMENT.

a. **Language of charging document.** All essential elements of a crime, including sentencing enhancements, must be alleged in the information. State v. Recuenco, supra, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CrR 2.1(a)(1); U.S. Const. amend. 6; Wash. Const. art. I, § 22. “The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense.” Recuenco, 163 Wn.2d at 434 .

Because Mr. Johnson is here challenging the sufficiency of the information for the first time on appeal, this Court construes the document liberally in favor of validity. Kjorsvik, 117 Wn.2d at 102.

Even under this standard, the endangerment element was not charged by the information. The information in this case completely omitted the essential element that persons other than the defendant or the pursuing officer were “endangered,” instead alleging that others were threatened with harm CP 1-8.

b. No prejudice showing required. Where even a liberal reading of the information indicates that an essential element is wholly missing, reversal of the conviction is required, without any requirement that the defendant must show he was prejudiced in his defense by the absence of the element in the charging document. State v. Marcum, 116 Wn. App. 526, 536, 66 P.3d 690 (2003) (prejudice need not be shown if charge cannot be saved by liberal construction). As the Supreme Court recently said:

While the second Kjorsvik prong requires the defendant to show actual prejudice as a result of vague charging language, courts do not reach that part of the analysis unless the necessary elements can be fairly found on the face of the information. As we reiterated in State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010), if the necessary elements are not found explicitly or by fair construction in the charging document, prejudice is presumed and reversal is required[.]

State v. Zillyette, 173 Wn.2d 784, 786, 270 P.3d 589 (2012) (citing Brown, at 198 (Omission of term “knowledge” necessitated reversal

without prejudice showing, and reference to the statute did not sufficiently allege the essential elements)).

Using correct language and simple rules of grammar, the information must be written in such a manner as to enable persons of common understanding to know what elements are charged. State v. Simon, 120 Wn.2d 196, 198-99, 840 P.2d 172 (1992) (citing Kjorsvik, 117 Wn.2d at 110; and RCW 10.37.050(6)) (to be sufficient, information must clearly and distinctly set forth the acts charged as the crime “in such a manner as to enable a person of common understanding to know what is intended”).

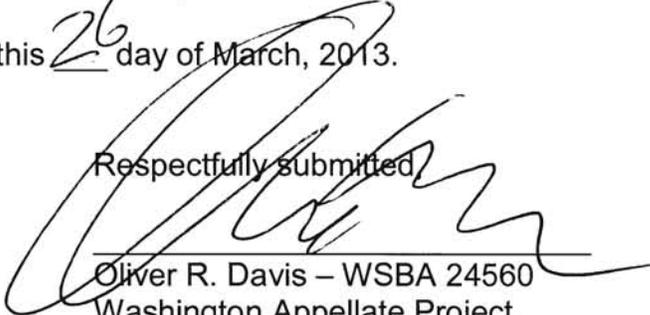
Here, the information entirely failed to apprise Lavelle of the essential element of endangerment of RCW 9.94A.834(2). When an information fails to charge an essential element, the remedy is to reverse the conviction and without prejudice to the State refiling the charge. State v. Marcum, 116 Wn. App. 526, 536, State v. Guzman, 119 Wn. App. 176, 186, 79 P.3d 990 (2003). The essential “endangered” element enacted by the Legislature does not, at all, appear in the language of the charging document in Lavelle’s case, and reversal is thus required without necessity of showing prejudice.

E. CONCLUSION.

Lavelle Johnson respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 26 day of March, 2013.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> LAVELLE JOHNSON 3845 S ELM GROVE ST. SEATTLE, WA 98118	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MARCH, 2013.

X _____ 

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