

No. 90774-9
Court of Appeals No. 44137-3-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

MORGAN HEATH,

Petitioner.

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

PETITION FOR REVIEW

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON CRF

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Morgan heath asks this Court to accept review of the opinion of the Court of Appeals in *In re the Detention of Morgan Heath*, 44137-3-II.

B. OPINION BELOW

The Court of Appeals concluded several instances of misconduct by jurors in Mr. Heath's commitment trial did not warrant a new trial.

C. ISSUE PRESENTED

The Due Process Clause of the Fourteenth Amendment guarantees an individual a trial before an impartial jury. Jurors commit misconduct where they introduce extrinsic evidence, fail to follow the trial court's instructions, and where they are not candid in responses to the questions from the court. Here, jurors gathered and discussed extrinsic evidence. Despite plain instructions not to, jurors discussed the case prior to deliberations. When questioned by the court, jurors lied about their actions. Did the jurors' misconduct deprive Mr. Heath a fair trial?

D. STATEMENT OF THE CASE

As a 14-year-old boy, Mr. Heath was convicted of a rape of a child. 10/8/12 RP 120-22. Mr. Heath served his term of confinement in the Juvenile Rehabilitation Administration (JRA) and was released. Mr. Heath was subsequently charged with several offenses involving two 13-year-old girls. 10/9/12 RP 231. Those charges ultimately resulted in guilty pleas to misdemeanors.

The State, however, filed a petition seeking Mr. Heath's confinement under RCW 71.09. CP 1-3. The petition alleged the offense committed when Mr. Heath was 14 constituted the predicate crime and the more recent misdemeanor charges were the recent overt act required by RCW 71.09.060(1).

The State offered the testimony of Dr. Amy Phenix who opined that Mr. Heath suffers from a mental abnormality (pedophilia) and a personality disorder (antisocial personality disorder) which makes it difficult for him to control his sexually violent behavior. 10/9/12 RP 279-81.

A jury determined the State proved the requirements RCW 71.09.020(18) and RCW 71.09.060. CP 898.

E. ARGUMENT

Repeated instances of juror misconduct denied Mr. Heath a fair trial.

The Court of Appeals's conclusion that juror misconduct did not occur much less deprive Mr. Heath a fair trial is contrary to this Court's opinions and presents substantial constitutional issues. This Court should accept review under RAP 13.4.

1. Jury misconduct deprives a defendant of a fair trial.

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment and Washington Constitution. U.S. Const. amend. VI; Const. Art. I, §§ 21, 22. The right of trial by jury "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991) (quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989)). The Supreme Court has interpreted the statutory guarantee of a jury verdict based upon proof beyond a reasonable doubt provided by RCW 71.09.060 to mirror the jury guarantees afforded in criminal trials. *In re Detention of Young*, 122 Wn.2d 1, 48, 857 P.2d 396 (1995).

A juror's misrepresentations in response to questions posed to them by the court of parties are misconduct. *Robinson*, 113 Wn.2d at 159. A jury commits misconduct when it considers extrinsic evidence. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994) (quoting

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990)). That is especially true where the court's instructions expressly prohibit that. *Tigano*, 63 Wn. App. at 341.

2. Several jurors disregarded the court's instruction and engaged in other acts of misconduct.

At the outset of trial, the court instructed the jury "it's your duty to decide the facts in this case based upon the evidence produced here in this courtroom." 10/8/12 RP 113. The court also instructed the jury that

[w]hen all the evidence has been presented to you, I will instruct you on what the law is that applies to this case. . . . At that time you will be taken to the jury room You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for these deliberations, you must not discuss this case with other jurors or with anyone else

Id. at 115-16.

Despite the court's explicit instructions, on the very first day of trial, at least one juror, Juror 11, looked up Mr. Heath's custody status on a Kitsap County website. 10/10/12 RP 345 Again in spite of the court's instructions, that juror shared what she learned with at least one other juror, Juror 8. That conversation was overheard by a third juror, Juror 9, who shared what she had heard with the court.

When directly questioned by the court, Jurors 8 and 11 initially lied about their activities. The following exchanges occurred:

The Court: Good morning. I have a couple of questions to ask you.

Yesterday after the jury was excused at 4:20, did you hear any discussions in the jury room about the defendant or the respondent, Morgan Heath?

Juror No. 11: No I did not.

The Court: Did you hear anybody discuss any information obtained from the internet.

Juror No 11: No I did not.

10/12/12 RP 326-27. The Court also questioned Juror 8:

The Court: Good morning. Please be seated.

I have two questions to ask you. Yesterday after the jury was excused at 4:20, did you hear any discussion about Morgan Heath in the jury room?

Juror No. 8: No.

The Court: Did you hear any information obtained by a juror on the internet?

Juror No. 8: No.

10/12/12 RP 328.

When each of the remaining jurors also answered “no” to each of the court’s questions, defense counsel remarked “someone is not

telling the truth.” 10/12/12 RP 334. The Court responded “I know.” *Id.* But, the court recognized there was no reason to doubt the credibility of Juror 9’s report. *Id.* at 344.

Defense counsel noted the Juror 13 revealed jurors had commented on the testimony of the state’s witness, Amy Phenix. 10/12/13 RP 332. Defense counsel argued that such discussion of witnesses or their testimony prior to deliberations was a further violation of the court’s instructions. 10/12/12 RP 338.

The court then called jurors 8 and 11 back to the courtroom to question them further. After several follow-up questions, Juror 11 reluctantly acknowledged she had found Mr. Heath’s custody status on line and that she shared that information with other jurors including Juror 8. 10/12/12 RP 345. Juror 8 denied having heard that information. 10/12/12 RP 348. Juror 8 did share that another member of the jury was “wondering . . . whether he was incarcerated” and that another juror had responded to that inquiry. *Id.*

Juror 13 was also questioned further and explained that she overheard jurors offer comments on how articulate Dr. Phenix was during her testimony. 10/10/12 RP 355. Juror 13 explained “It was just praise nothing about the case.” *Id.*

Despite all these revelations, the trial court refused question jury members regarding their discussion of the witness and denied Mr. Heath's motion for a mistrial. 10/10/12 RP 353, 361-62.

The Court of Appeals concludes the information regarding Mr. Heath's custody status was not extrinsic. Opinion at 14. The court reads *Balisok* to mean that so long as the subject matter was discussed in court additional information on the topic could never be deemed extrinsic. Such a narrow definition of extrinsic would permit jurors to read a recap of the preceding day's testimony in a newspaper or on a blog. Because it merely repeats what occurred in court the day before the evidence could not, according the Court of Appeals, be deemed extrinsic. By that logic jurors would be free to seek out evidence which corroborates what they heard in court. That cannot be the case.

"Extrinsic" means

1a : not forming part of or belonging to a thing : EXTRANEOUS
b : originating from or on the outside; *especially* : originating outside a part and acting upon the part as a whole <*extrinsic* muscles of the tongue>
2: EXTERNAL

<http://www.merriam-webster.com/dictionary/extrinsic>. Plainly information which comes from a source other than the evidence admitted at trial is "external" to that evidence and not "part of or

belonging to” that evidence. There is no question that Juror 11 found information about Mr. Heath from a source other than the evidence and shared that information with other jurors. That is extrinsic evidence. By permitting jurors to freely gather evidence from sources other than the courtroom, the opinion endorse a stark departure from this Court precedent and presents an issue of substantial public interest. This Court should accept review under RAP 13.4.

Even assuming the Court’s exceedingly narrow definition of extrinsic is correct, the Court of Appeals does not address the juror’s misrepresentations to the trial court in response to direct questioning. That, by itself, constitutes misconduct by the jurors. *Robinson*, 113 Wn.2d at 159. In light of the presumption of prejudice, the trial court and Court of Appeals each were required to determine whether the State overcame the presumption which arose when the two jurors lied to the court. The State never made such a showing and neither court ever engage in that analysis. Thus, the presumption of prejudice survives and Mr. Heath’s commitment must be reversed. This Court should accept review of this case under RAP 13.4.

Finally, the Court of Appeals dismisses Mr. Heath’s claim that jurors’ discussion of the testimony of the State’s experts outside of and

before its deliberations. The opinion state's Mr. Heath has provided no authority for his claim. Opinion at 15, n.16. The court expressly instructed the jury

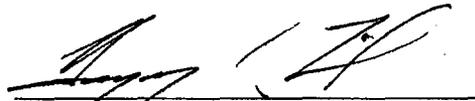
[w]hen all the evidence has been presented to you, I will instruct you on what the law is that applies to this case. . . . At that time you will be taken to the jury room You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for these deliberations, you must not discuss this case with other jurors or with anyone else

10/8/12 RP at 115-16. Plainly, the jurors violated that instruction. That is misconduct. This Court should accept review.

F. CONCLUSION

For the reasons above this Court should grant review under RAP 13.4, The Court should find the jury's misconduct deprived Mr. Heath of a fair trial.

Respectfully submitted this 11th day of September, 2014.

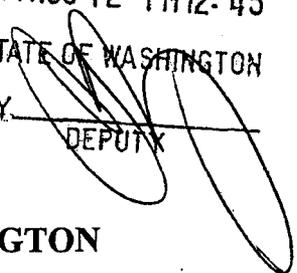


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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE DETENTION OF

MORGAN A. HEATH.

No. 44137-3-II

UNPUBLISHED OPINION

HUNT, J. — Morgan A. Heath appeals the trial court's order for civil commitment as a sexually violent predator (SVP) under chapter 71.09 RCW¹. He argues that the trial court (1) abused its discretion in denying his motion for mistrial based on juror misconduct; and (2) violated his right to a unanimous jury verdict (a) in failing to instruct the jury that it must be unanimous about the underlying reason for its finding him likely to reoffend and (b) because the State failed to offer sufficient evidence to prove that Heath suffered from a mental abnormality or specific personality disorder that would make him likely to reoffend. We affirm.

FACTS

I. BACKGROUND

In 2003, Morgan A. Heath molested a two-year-old girl, the daughter of his father's girlfriend, four or five times over a few months; Heath was 14 years old at the time. Based on these acts, Heath pled guilty to first degree rape of a child and was sentenced to Juvenile

¹“Sexually violent predator means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18).

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Rehabilitation Administration (JRA) for a period of 15 to 36 weeks. After completing his JRA sentence, Heath was released on community supervision.

Heath violated the terms of his community supervision by committing theft and false reporting in 2004. Between December 2004 and August 2006, Heath was convicted for assaulting his girlfriends; thereafter, Heath violated no-contact orders for these girlfriends. In January 2007, Heath was charged with failure to register as a sex offender between November 26 and December 14, 2006; he pled guilty, was sentenced to jail for 45 days, and was put under the supervision of a community corrections officer (CCO), Nancy Jo Nelson, for 12 months. In July 2007, Heath was again arrested for failure to register as a sex offender and for various violations of his community supervision conditions, including contact with a minor child. In April 2008, Heath was arrested, and released, for third degree malicious mischief for beating in the windows of his girlfriend's car.

In July, while "released to the community," Heath took a job working at a carnival, which violated his release condition not to be in the presence of minors; he was again arrested. 3 Verbatim Report of Proceedings (VRP) at 249. When he was released from custody on August 9, Heath walked to a festival where he interacted with an eight-year-old boy, put the boy on a horse, and started leading the horse out of the park. Heath was again arrested. Shortly after Heath's release from jail, Nelson put him on GPS² monitoring.

In June 2009, Heath was jailed for 61 days for living in an unauthorized location and for going to a mall, where he could pick up young teenage girls, in violation of his community

² "Global Positioning System" (GPS). 2 VRP at 133.

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supervision conditions. In November, Heath was again charged with failure to register and jailed for about 90 days. He was released in February 2010 and again put on GPS monitoring.

Shortly after his release, Heath began violating his community supervision conditions again. Nelson had told Heath he could not stay with his friend, Tammy Brown and her two children, one 13 years old and the other 12 years old. But Heath stayed at Brown's house without informing Nelson; instead, when Nelson called Brown, she lied to Nelson about where he was living. There, he had multiple contacts with multiple children, including a 17-year-old girl, eight to ten other children at Brown's apartment complex playground, a 10-year-old developmentally disabled girl, and three other minor children. While playing with children at the playground, Heath gave them "piggyback rides"; made sexual innuendos to them; and, when a dog started "humping" Heath's leg, told the children to get down on their hands and knees to mimic the dog's behavior. 3 VRP at 253. When Nelson learned that Heath was staying with Brown and her children, she arrested him for several community supervision violations.

Nelson then learned that also in February 2010, Heath had sexually assaulted two 13-year-old girls, JR and AC,³ one of whom had been staying at Brown's house. Based on these acts, Heath pled guilty to attempted communication with a minor for immoral purposes and fourth degree assault with a special allegation of sexual motivation. He was sentenced to 214 days in JRA, to run concurrently with his previous sentence, followed by a two-year probation; the court also issued a no contact order with JR or AC.

³ It is appropriate to provide some confidentiality in this case. Accordingly, we use initials to identify the juveniles involved.

II. PROCEDURE

On August 30, 2010, while Heath was still incarcerated, the State filed a petition to commit Heath as a sexually violent predator (SVP) under RCW 71.09 *et seq.* The case proceeded to a jury trial.

A. Trial

1. CCO Nancy Jo Nelson's testimony

Heath's CCO, Nancy Jo Nelson, testified that she had supervised Heath from February 2007 until he went to the Special Commitment Center (SCC) in 2010. Nelson described Heath's multiple violations of his conditions of release as previously set forth. Because Heath was again incarcerated, she would continue supervising him on community custody after "*he's finally released again.*" 2 VRP at 155.

2. Psychologist Dr. Amy Phenix's testimony

Clinical psychologist Dr. Amy Phenix testified that on August 10, 2010, she had conducted an initial evaluation of Heath to determine whether he had a mental abnormality that predisposed him to committing future criminal sexual acts. Dr. Phenix relied on Heath's criminal legal records, parole violation reports, police reports, charging documents, conviction documents, juvenile custody documents, and Heath's treatment documents. She explained Heath's criminal behavior as previously described. Pertinent facts leading to Dr. Phenix's diagnoses were Heath's pattern and duration of behavior toward prepubescent children, including his reported sexual fondling of a four to five-year-old child when he was 14; sexual molestation, including penetration, of a two-year-old girl with whom he admitted to being sexually interested; and his masturbating to ongoing sexual fantasies about the two-year-old girl even during his

period of treatment. Dr. Phenix diagnosed Heath with pedophilia, a mental abnormality, and two personality disorders—antisocial personality disorder and borderline personality disorder.

a. Pedophilia

Dr. Phenix explained that in diagnosing a person with pedophilia⁴, she looked for individuals reporting abnormal sexual fantasies about children, generally age 13 years and younger. She had studied Heath's behavioral pattern since he raped the two-year-old when he was 14-years-old. She also considered Heath's subsequent violations of community release conditions that had involved seeking out and being in the presence of children: (1) After Heath's July 2008 release from custody back into the community, he had violated his release condition not to be in the presence of children, when he worked at a carnival; (2) Heath had put an eight-year-old boy on a horse and started leading the horse out of the park festival a month later; (3) Heath had spent the night with a friend who had a two-year-old child, deliberately putting himself in a high-risk situation; (4) Heath viewed pornography; (5) Heath had moved in with Brown, who had minor children; (6) Heath had given piggyback rides to children and induced them to mimic a dog's "humping behavior"⁵ while playing with the children at a playground in 2010; and (7) Heath had forced sexual acts with two 13-year-old females in 2010. Based on her

⁴ The State offered for the jury's consideration the *Diagnostic and Statistical Manual of Mental Disorders* (4th rev. ed. 2000) (DSM or DSM-IV-TR) definition of "pedophilia," exhibit 21. 3 VRP at 239. The DSM is an American Psychiatric Association publication that provides criteria for the classification of mental disorders. commonly used by mental health professionals to determine a patient's diagnosis.

⁵ 3 VRP at 253.

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evaluation, Dr. Phenix concluded “to a reasonable degree of psychological certainty” that Heath had pedophilia. 3 VRP at 256.

b. Antisocial personality disorder

Dr. Phenix explained that an individual has antisocial personality disorder⁶ when he or she violates the rights of others, engages in criminal behaviors, and is generally associated with jail terms, going to prison, and incarceration for criminal behavior. Dr. Phenix also explained that personality disorders can “further sex offending” because such individuals tend to disregard the law. 3 VRP at 258.

Dr. Phenix diagnosed Heath with antisocial personality disorder because of his repeated failures to conform to social norms with lawful behaviors: (1) Heath was engaged in a number of domestic violence incidents with various girlfriends; (2) Heath had been in and out of custody since the age of 14; (3) Heath had a striking lack of compliance with community supervision or parole; (4) Heath exhibited deceitfulness by denying his criminal sexual behavior; (5) Heath demonstrated significant impulsivity and an inability to consider the consequences of his behaviors, such as molesting his father’s girlfriend’s two-year-old daughter; and (6) Heath’s uncontrolled violent tendencies resulted in his engaging in fights with teachers and peers in school and being aggressive to his peers in juvenile custody.

Dr. Phenix also assessed Heath on a Hare Psychopathy Checklist-Revised (PCL-R)⁷, through a series of interviews and review of past records. Heath scored a 33 out of 40 on the

⁶ The State also offered the DSM definition of “antisocial personality disorder” as an illustrative exhibit for the jury. 3 VRP at 257.

⁷ The State introduced the PCL-R as an illustrative exhibit.

PCL-R, in the high range; this high score signaled to Dr. Phenix that Heath (1) had a high psychopathy, (2) had a stronger than average propensity for violent behavior in the future, (3) would likely engage in future violations of community supervision and a greater than average amount of future sexual criminal behavior, and (4) suffered from a pervasive and “particularly severe” form of antisocial personality disorder. 3 VRP at 271.

c. Borderline personality disorder

Dr. Phenix also diagnosed Heath with borderline personality disorder.⁸ She explained that, unlike antisocial personality disorder, borderline personality disorder focuses more on maladaptive relationships with others and involves an impaired ability to develop and to maintain close friendships and intimate relationships. 3 VRP at 272. Dr. Phenix found that Heath had traits of borderline personality disorder, including lengthy histories of troubled relationships, such as (1) abandonment by his mother; (2) “clingy”⁹ behavior with his girlfriends, which led to arrests for stalking; (3) physically assaulting his girlfriends; (4) impulsive behavior and alcohol abuse; (5) suicidal behaviors, a common symptom of borderline personality disorder; and (6) mood instability. Dr. Phenix opined that although borderline personality disorder did not have “the strongest relationship” in this case, it was likely to lead to inappropriate sexual activity because it affects Heath’s choice-making and the persons with whom he interacts. 3 VRP at 276. Dr. Phenix reiterated that she had diagnosed Heath with both antisocial personality disorder and borderline personality disorder.

⁸ The State introduced the definition of “borderline personality disorder” from the DSM-IV-TR as an illustrative exhibit for the jury. 3 VRP at 271.

⁹ 3 VRP at 273.

d. "Mental abnormality"

Dr. Phenix then opined about Heath's "mental abnormality."¹⁰ 3 VRP at 277. She explained that "mental abnormality" is a condition that affects either the volitional or emotional capacity of a person, for example, predisposing a person to act out in criminal sexual ways. 3 VRP at 279. Dr. Phenix opined that Heath's pedophilia constituted a mental abnormality that affected his emotional capacity: For example, when Heath tried to engage in sexual intercourse with the two-year-old, he penetrated her; and when she screamed, he said, "If you don't stop screaming, I will push it in farther," demonstrating that Heath could not appreciate the pain he caused to others. 3 VRP at 279. Dr. Phenix also opined that (1) Heath's pedophilia predisposed him to commit criminal sexual acts that menaced the health and safety of others; (2) Heath had a mental abnormality to a reasonable degree of psychological certainty; and (3) Heath had serious difficulty controlling his sexually violent behavior, to which his personality disorders also contributed.

Dr. Phenix further testified that Heath had reoffended in 2010, "has not been out in the community since that time," and had not completed treatment. 3 VRP at 310. Dr. Phenix also considered how safe Heath would be in the community "should he be released" and that Heath had about a year and a half left of parole or community supervision "once he's released." 3 VRP at 311. Dr. Phenix opined that Heath was not "safe to be released to the community until he has sufficient treatment and demonstrated that he can comply with conditions." 3 VRP at 312. Dr.

¹⁰ The State offered the definition of "mental abnormality" as an illustrative exhibit for the jury. 3 VRP at 277.

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Phenix concluded that Heath is a high risk sex offender and that he should remain confined for treatment. 3 VRP at 313.

B. Motion for Mistrial

Juror 9 wrote the following note to the trial court one day after trial proceedings:

[A]t 4:20 pm we as jurors were wanting to leave in jury room. [A] jur[or] said "Is he incarcerated now?" a couple jur[ors] said yes. One jur[or] was talking to a friend jur[or]. She stated something like this may not be exact words "yes he is." I . . . looked to see where he was on the internet and the other jur[or] said "where is he." She shook her head but I did not hear what she said.

Clerk's Papers (CP) at 863. The next day, the trial court held a hearing to address Juror 9's note. Heath moved for mistrial based on possible juror misconduct. The trial court opined that the prejudice was not great enough to declare a mistrial and suggested bringing the jury in to question them individually. The trial court then spoke with Juror 9, who said she had not told anyone she had sent the note to the court. The trial court said it was "going to keep this anonymous from the other jurors." 4 VRP at 325. Next, the trial court called the other jurors individually to ask whether there had been any discussion about a juror's looking up Heath on the internet. All the jurors responded in the negative. Juror 11, who had allegedly done an internet search for Heath, told the court that (1) she had used the Kitsap County website for work but had not looked up anything about Heath; (2) she had told Juror 8 about having been on the Kitsap County website, which she used for work on a daily basis, hence chancing upon Heath's name; and (3) knowing Heath's name showed up on the Kitsap County website would not have impaired her ability to hear the case fairly. Juror 8 reported that (1) he did not hear any jurors talk about looking up Heath on the internet; (2) "somebody said something about they were wondering . . . whether or not he was incarcerated," 4 VRP at 348; and (3) such information

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would not impact his ability to serve as a juror because he “would assume most people are incarcerated if they are in this situation.” 4 VRP at 348. Juror 13 did not hear anything about Heath or anyone talk about searching the internet, but someone had commented about Dr. Phenix’s “articulating” speech. 4 VRP at 332.

The trial court decided not to declare a mistrial because (1) the fact of Heath’s incarceration was well known to the jury panel; and (2) reinstruction of the jury was sufficient to take care of the issue. Heath’s incarceration since February 2010 had come to the jury’s attention in many different ways, and there had been no motions in limine to keep such information from the jury. The trial court also noted that Juror 11 was very clear that she had merely made a remark or mention about Heath’s possible incarceration and that there had been no discussion beyond that remark. Juror 8 similarly reported that there had been no discussion about Heath’s incarceration and that it had been a passing remark.

The trial court again called Juror 13 to clarify the comment about Dr. Phenix; Juror 13 responded there had been a comment about Dr. Phenix’s speech being “so articulated,” but she (Juror 13) had heard nothing about incarceration. 4 VRP at 355. Heath argued that the juror’s comment about Dr. Phenix’s being articulate was a comment on the evidence. Disagreeing, the trial court ruled that (1) the comment about Dr. Phenix’s speech was not a comment on the evidence or her credibility, but rather about how Dr. Phenix had appeared to the jury; and (2) such a comment did not rise to the level of unfair prejudice that would taint the jury panel. The

trial court then brought in the entire jury, read them the “fair trial”¹¹ instruction again, and reminded them not to talk or research outside the courtroom. 4 VRP at 365.

C. Post mistrial motion trial testimony

After the trial court denied Heath’s motion for a mistrial, the trial testimony resumed.

1. Heath

Heath testified that his half brothers had molested him when he was six years old. Heath described his feelings toward his molestation of the two-year-old girl as “nightmares” and not “fantasies.” 5 VRP at 467. Concerning his sexual assaults of the two 13-year-old girls, Heath explained that he had taken an *Alford* plea¹² because he did not think a jury would believe he was innocent, even though the assaults were “something [he] didn’t do.” 5 VRP at 472. As for the 2004 assault of his ex-girlfriend, Heath stated that although he had pushed her into a car, he did not mean to do so. With respect to his 2005 assault of another ex-girlfriend, Heath denied having tackled her in the school parking lot, even though he had pled guilty. Heath also admitted he worked at the carnival in July 2008. He also explained that he had been incarcerated at the SCC “for a while now.” 5 VRP at 471.

¹¹ The instruction stated, in pertinent part:

It is essential for a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. There should not be any discussions about anything about the case with any fellow jurors, family members, or friends until you are released from that instruction.

...

Until you are dismissed, again, at the end of the trial, you must avoid any outside sources such as newspapers, magazines, blogs, the Internet, or radio or television broadcasts.

4 VRP at 365

¹² *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

2. Dr. Luis Rosell

Dr. Luis Rosell, a psychologist, testified on behalf of Heath, and stated that he did not agree with Dr. Phenix's diagnosis of pedophilia and Dr. Phenix's opinion that Heath was likely to reoffend. Dr. Rosell opined that Heath's sexual assault of the 13-year-olds should not have been considered in Heath's pedophilia diagnosis because their statements were inconsistent. Dr. Rosell did, however, diagnose Heath with antisocial personality disorder.

3. AC

AC testified that around February 2010, when she had stayed at Brown's house, Heath had sat on a couch next to her, pinned her down, kissed her, and raped her.

D. Jury Instructions

When the trial court discussed the parties' proposed jury instructions, Heath requested a *Petrich*¹³ instruction; the State objected that such instruction was neither appropriate nor required in SVP cases. Heath told the trial court to "take [his *Petrich* instruction request] under advisement." 6 VRP at 647. The State told the trial court that it had found a case, *In re Det. of Halgren*, 156 Wn.2d 795, 807, 132 P.3d 714 (2006), which stood for the proposition that it was inappropriate in SVP cases to give a *Petrich* instruction. Heath did not object. And the trial court proceeded, without giving a *Petrich* instruction.

The jury found that the State had proved beyond a reasonable doubt that Heath was a SVP. Heath appeals.

¹³ *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

ANALYSIS

I. JUROR MISCONDUCT

Heath argues that repeated instances of juror misconduct violated his right to a fair trial. Heath specifically asserts that the jurors engaged in misconduct by (1) gathering extrinsic evidence of Heath's incarceration and presenting it to the other jurors; (2) lying about having discussed Heath's incarceration; (3) ignoring the trial court's instruction not to discuss the case or evidence until deliberations; and (4) expressing praise for Dr. Phenix before Heath cross-examined her, and before deliberations, which conduct we should presume was prejudicial. Even assuming, without deciding, that the jury engaged in misconduct, the misconduct that Heath asserts does not warrant a new trial.

A trial court's decision to deny or grant a motion for mistrial is a matter addressed to the sound discretion of the trial court, which we review for abuse of discretion. *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable. *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). Litigants are entitled to a fair trial, not a perfect one. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). As a general rule, an appellate court is reluctant to inquire into how a jury arrived at its verdict. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Courts grant a new trial only where juror misconduct¹⁴

¹⁴ The introduction of extrinsic evidence by a juror to fellow jurors is juror misconduct and can be grounds for a new trial. *Balisok*, 123 Wn.2d at 118. Extrinsic evidence is information, oral or documented, that is *outside all the evidence admitted at trial*. *Balisok*, 123 Wn.2d at 118.

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has prejudiced the defendant. *State v Earl*, 142 Wn. App. 768, 774, 177 P.3d 132, *review denied*, 164 Wn.2d 1027 (2008); *see also* CrR 7.5(a) (new trial warranted only where a “substantial right of the defendant was materially affected[.]”).

Heath argues that jury misconduct is presumed prejudicial and that the State failed to prove, beyond a reasonable doubt, that the misconduct could not have affected the jury’s verdict. We may presume prejudice on a showing of misconduct; but such a presumption can be overcome by “an adequate showing that the misconduct did not affect the [jury’s] deliberations.” *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). Here, regardless of whether prejudice is presumed in theory, the alleged misconduct could not have affected the jury’s verdict.

First, contrary to Heath’s assertion, Juror 11’s internet information about Heath’s incarceration was not “extrinsic evidence” because the jury had already heard other evidence of Heath’s incarceration during trial.¹⁵ *Balisok*, 123 Wn.2d at 118 (extrinsic evidence is information outside *all the evidence admitted at trial*); *Meerdink v. Krieger*, 15 Wn. App. 540, 546, 550 P.2d 42, *review denied*, 87 Wn.2d 1011 (1976) (deliberating juror’s factual assertions about amount of damages did not warrant new trial when amount of damages was within the testimony presented at trial).

¹⁵ For example, on October 9, the jury heard Heath’s deposition clip in which he repeatedly referred to being at the SCC, that he was “locked up,” that had no contact with his family since he had been at the SCC, and that he had been incarcerated since about February 2010. CP at 540. Dr. Phenix also testified that (1) Heath “has not been out in the community since” he reoffended in 2010, 3 VRP at 310; (2) Heath would likely reoffend “should he be released,” 3 VRP at 311; (3) Heath had about a year and a half left of parole or community supervision “once he’s released,” 3 VRP at 311; and (4) Dr. Phenix she did not think “that he is safe to be released to the community until he has sufficient treatment and demonstrated that he can comply with conditions.” 3 VRP at 312.

Second, the instructions stated that for the jury to find Heath a SVP, the State had to prove that (1) he had been convicted of a crime of sexual violence, here, first degree child rape; (2) he suffered from a mental abnormality or personality disorder that caused serious difficulty in controlling his sexually violent behavior; and (3) his mental abnormality or personality disorder made him likely to engage in predatory acts of sexual violence. All three factors were clearly established independent of any information about Heath's incarceration.

Heath conceded his first degree child rape conviction. Dr. Phenix testified extensively¹⁶, with fact-based support, that to a reasonable degree of psychological certainty, (1) Heath suffered from pedophilia and two personality disorders—antisocial personality disorder and borderline personality disorder; and (2) Heath had a stronger propensity than the average person to engage in violent behavior, violations of community supervision, and a greater amount of future sexual criminal behavior; and (3) Heath's borderline personality disorder would likely to lead to inappropriate sexual activity because it affected his choice-making and with whom he interacted.

We hold that, based on the substantial evidence already before the jury, no juror misconduct prejudiced the outcome of the trial, the jury would have found Heath was a SVP regardless of the alleged juror misconduct, and Heath is not entitled to a new trial on this ground. Therefore, we affirm the trial court's denial of Heath's motion for a mistrial.

¹⁶ Heath also asserts that juror misconduct occurred when jurors commented about Dr. Phenix's articulateness during her testimony. Heath provides no authority or further supporting argument for the proposition that expressing praise for an expert witness's articulateness constitutes juror misconduct. Because this asserted error lacks developed supporting argument as RAP 10.3(a)(6) requires, we need not further consider it. Nevertheless, even had Heath developed this argument, he fails to show resulting prejudice.

II. UNANIMITY INSTRUCTION

Heath next contends that he was denied his right to a unanimous jury because the trial court (1) failed to instruct the jury on the need for unanimity about which of his multiple mental disorders underlay its SVP determination, and (2) the State did not offer sufficient evidence to support each alternative means. This argument fails.

RCW 71.09.060 provides that when a jury determines a person is a SVP, the verdict must be unanimous. Under RCW 71.09.020(18), a SVP is any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality *or* a personality disorder that makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Our Supreme Court has held that (1) the alternative means test applies to SVP proceedings, and (2) the SVP statute allows two alternative means—"mental abnormality" and "personality disorder"—to support a SVP determination. *Halgren*, 156 Wn.2d at 810, 811. Although the State need prove only one alternative means to support a SVP determination, where the evidence is sufficient to prove *both* alternative means (mental abnormality *and* personality disorder) beyond a reasonable doubt, a trial court does not violate the SVP's constitutional right to unanimity by failing to instruct the jury that it must be unanimous about which means it used to support its SVP determination. *Halgren*, 156 Wn.2d at 811, 812. If in addition to or in lieu of the mental abnormality means, the SVP suffers from *two* personality disorders, the jury need not

be unanimous about which personality disorder contributed to its SVP determination. *See In re Det. of Sease*, 149 Wn. App. 66, 78-79, 201 P.3d 1078, *review denied*, 166 Wn.2d 1029 (2009).¹⁷

Halgren suffered from “at least” one mental abnormality and one personality disorder. *Halgren*, 156 Wn.2d at 800. Halgren argued that the trial court should have instructed the jury that it had to agree unanimously about whether it was his mental abnormality or personality disorder that caused him to be a SVP. *Halgren*, 156 Wn.2d at 807. The Supreme Court rejected this argument because there was sufficient evidence of both the mental abnormality and the personality disorder, noting that “because an SVP may suffer from both defects simultaneously, the mental illnesses are not repugnant to each other and may inhere in the same transaction.” *Halgren*, 156 Wn.2d at 810.

To determine whether the jury’s SVP verdict was based on substantial evidence of both alternative means here, we must determine whether the evidence, “viewed in a light most favorable to the State, is sufficient to persuade a fair-minded, rational person that the State has

¹⁷ More specifically, as we held in *Sease*:

The SVP statute delineates two alternatives for satisfying the State’s burden of establishing a mental condition “which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility”—*mental abnormality or personality disorder*. RCW 71.09.020(16). *There is no dispute that Sease suffered from one or, possibly, two personality disorders.*

As in [*In re Pers. Restraint Petition of Patrick James Jeffries*, 110 Wn.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988)], the jury here need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. *The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder.* Therefore, the trial court did not err in failing to give a unanimity instruction and it is not an error that Sease can raise for the first time on appeal.

Sease, 149 Wn. App. at 78-79 (emphasis added).

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proved beyond a reasonable doubt that [the defendant] is a sexually violent predator.” *State v. Hoisington*, 123 Wn. App. 138, 147, 94 P.3d 318 (2004), *review denied*, 153 Wn.2d 1031 (2005). “The substantial evidence test is satisfied if this court is convinced that ‘a rational trier of fact *could* have found each means of [fulfilling the SVP requirements] proved beyond a reasonable doubt.’” *Halgren*, 156 Wn.2d at 811 (quoting *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988)).

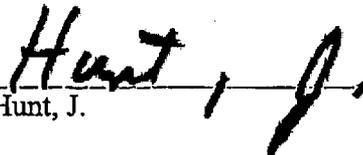
Here, there was substantial evidence of both Heath’s personality disorders *and* his mental abnormality, either of which alternate means would support the jury’s determination that Heath is a SVP. Dr. Phenix testified at length about Heath’s pedophilia, antisocial personality disorder, and borderline personality disorder. Dr. Phenix also opined, to a reasonable degree of psychological certainty, that (1) Heath’s pedophilia constituted a mental abnormality that affected his emotional capacity and predisposed him to commit criminal sexual acts that menaced the health and safety of others; and (2) Heath’s personality disorders—antisocial personality disorder (predominantly) and borderline personality disorder—contributed to his sexually violent behavior, which he had serious difficulty controlling. Here, a rational trier of fact could have found each means of being a SVP beyond a reasonable doubt.

Viewing the evidence in the light most favorable to the State, we hold there was sufficient evidence to persuade a fair-minded rational person beyond a reasonable doubt that Heath suffered from both personality disorders and a mental abnormality, each and both of which made him more likely to engage in predatory acts of sexual violence if not confined to a

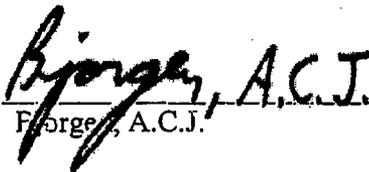
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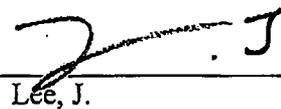
secure facility. *See Halgren*, 156 Wn. 2d at 811; *Sease*, 149 Wn. App. at 80. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Hunt, J.

We concur:


Bjorge, A.C.J.


Lee, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44137-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: September 11, 2014

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