

No. 44137-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Detention of:

MORGAN HEATH,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Repeated instances of juror misconduct deprived Morgan Heath of a fair trial.

2. The trial court deprived Mr. Heath of his right to a unanimous jury.

B. ISSUES PRESENTED

1. 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?

2. Article I, section 21 and Article I, section 22 together provide the right to a unanimous jury in all criminal trials. RCW 71.09.060 similarly requires jury unanimity for commitment. This statutory provision has been interpreted to mirror the constitutional protections afforded in criminal trials. Where the State alleges alternative means

support commitment under RCW 71.09, the requirements of a unanimous jury require the court must instruct the jury it must unanimously agree upon a single alternative means. In the absence of an instruction the court must reverse unless there is sufficient evidence to support each alternative means. Where the trial court did not provide the required unanimity instruction and there is insufficient evidence to support at least one of the alternative means, must this Court reverse Mr. Heath's commitment?

C. 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.

D. ARGUMENT

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

a. 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 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.

Here Juror 11 first gathered additional evidence, and then she shared that information with other jurors. When it was brought to the court's attention, jurors lied about their actions in response to direct questioning by the court. Jurors also ignored the court's instruction not to discuss the case or evidence until they began deliberations. Jurors expressed their praise for the state's hired expert, not only before deliberations, but before Mr. Heath had even been allowed to conduct cross-examination. Each of these acts constitutes misconduct.

The State allowed "we have jurors that have not strictly followed the court's order." 10/12/12 RP 351. This is not a case in which jurors skirted ambiguous lines. The court instructed them not to discuss the case and yet they did. The court instructed them not to

gather any outside evidence and yet they did. And then when directly questioned about their actions they lied. That is misconduct.

b. The misconduct of several jurors entitles Mr. Heath to a new trial.

Jury misconduct is presumed prejudicial. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). To overcome that presumption the State must prove beyond a reasonable doubt that the misconduct, objectively viewed, could not have affected the jury's verdict. *Id.* (citing *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)). Any doubt about whether the misconduct could have affected the verdict must be resolved against the verdict. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

Here the State made no effort to show the misconduct could not have affected the jury's verdict. The court seemed unaware of the standard, saying simply that it didn't believe the misconduct reached the level of a mistrial. 10/12/12 RP 334. Rather than determine whether the State had overcome the presumption, the court instead seems to have been measuring the severity of the misconduct. That, however, is not the standard. If there was misconduct, and the court found there was, reversal is required unless the State demonstrates beyond a

reasonable doubt that misconduct could not have influenced the verdict. The State never undertook that burden, and there is nothing that would support such a conclusion in any event. Mr. Heath is entitled to a new trial.

2. Mr. Heath was denied his right to a unanimous jury.

- a. Jury unanimity is required when the State alleges alternative means support commitment.

Based on principles of due process as well as the state constitutional right to a unanimous jury trial, a defendant in a criminal case has a constitutional right to a conviction only by a jury which unanimously agrees that the crime charged has been committed beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); U.S. Const. amend. XIV; Const. art 1, § 22. Likewise, involuntary detention in RCW 71.09 proceedings is governed by the due process protections that apply in a criminal proceeding. *Young*, 122 Wn.2d at 48. Specifically, RCW 71.09.060(1) requires a jury unanimously conclude the State has proved each element necessary for commitment beyond a reasonable doubt.

In re the Detention of Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006), the Court concluded the unanimity requirements announced in

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), apply to RCW 71.09 proceedings. The Court said “[g]iven that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases.” *Halgren*, 156 Wn.2d at 720.

Petrich requires that where the State alleges a defendant has committed multiple acts, each of which could independently establish the charge, either the prosecutor must elect which act it is relying on or the jury must be instructed they must unanimously rely on a single act in assessing the defendant’s guilt. *Petrich*, 101 Wn.2d at 572. When the State alleges a defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. *Kitchen*, 110 Wn.2d at 409 (citing *Petrich*, 101 Wn.2d at 569). Where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to support the conviction. *State v. Ortega–Martinez*, 124 Wn.2d 702, 707–08, 881 P.2d 231 (1994); *Halgren*, 156 Wn.2d at 809. The Court cautioned:

We strongly urge counsel and trial courts to heed our notice that an instruction regarding jury unanimity on the alternative method is preferable.

Ortega-Martinez, 124 Wn.2d at 717 n.2 (citing *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)).

b. Although the State alleged alternative means for commitment, the court did not instruct the jury on the need for unanimity.

The court instructed the jury that to commit Mr. Heath it had to find:

That Morgan Heath suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior.

CP 877 (Instruction 4). *Halgren* held “‘mental abnormality’ and ‘personality disorder’ are alternative means for making the SVP determination.” 156 Wn. 2d at 810.

Despite the plain holding of *Halgren* and the Court’s cautionary statement in *Ortega-Martinez*, in this case, the State contended “as to the *Petrich* instruction that was requested, I had indicated that there was a case that provides that’s inappropriate in [71.09] cases, and I was able to determine that was *In re the Detention of Halgren*. . . .” 10/15/12 RP 653. As is clear, that is not the holding of *Halgren*. Instead, *Halgren* recognized the applicability of unanimity rules but concluded the failure to provide a unanimity instruction did not require reversal as

there was sufficient evidence to permit a jury to find either alternative means beyond a reasonable doubt. 156 Wn.2d at 811(citing *Kitchen*, 110 Wn.2d at 410-11.) The same is not true here.

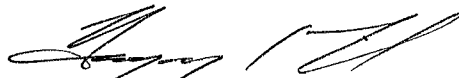
c. Because the State did not offer sufficient evidence to support each alternative means, Mr. Heath's commitment must be reversed.

When asked what impact Mr. Heath's personality disorder had, Dr. Phenix opined "I think they contribute" to his behavior. 10/9/12 RP 281. But that is not enough. Instead, there must be sufficient evidence to permit a juror to conclude the personality disorders, by themselves, make Mr. Heath more likely than not to reoffend. The State offered no evidence that would support such finding by the jury. As such, there is insufficient evidence to support at least one alternative means alleged – that his personality disorders make Mr. Heath likely to commit new sexually violent offenses. In the absence of sufficient evidence, Mr. Heath's commitment must be reversed. *Ortega–Martinez*, 124 Wn.2d at 707–08; *Halgren*, 156 Wn.2d at 809.

E. CONCLUSION

The jury's misconduct deprived Mr. Heath of a fair trial. Further, the failure to ensure the unanimity of the jury's verdict requires a new trial.

Respectfully submitted this 4th day of June, 2013.



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

IN RE THE DETENTION OF)	
)	
MORGAN HEATH,)	NO. 44137-3-II
)	
)	
APPELLANT.)	


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