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No. 70493-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent

v.

FABIAN GARZA, Appellant.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. The juror misconduct that occurred in this case does not "inhere in the verdict" because it does not concern the thought processes relied upon by the jury in reaching its verdict.

The state argues that Garza cannot challenge the juror misconduct that occurred in the case because the "thought processes" leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. Brief of Respondent at 17-18, citing *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). This argument is misplaced.

Generally, when evaluating a claim of juror misconduct, a court may not consider matters that inhere in the verdict, including the weight accorded to the evidence by individual jurors, or the jurors' intentions or beliefs. *State v. Jackman*, 113 Wn.2d 772, 783 P.2d 580 (1989). The mental processes, both individual and collective, by which jurors reach their conclusions are all factors "inhering in the verdict". *Jackman*, 113 Wn.2d at 777-78.

The *Jackman* court explained:

> The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's process in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Jackman, 113 Wn2d at 777-78, (quoting *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)). In *State v. Allen*, 178 Wn. App. 893, 317 P.3d 494 (2014), the Court restated this idea in a slightly different way:

> A factor inheres in the verdict if it concerns the jurors' mental processes, such as their motives, intents, or beliefs. *State v. Hatley*, 41 Wn. App. 789, 793, 706 P.2d 1083 (1985) (quoting *State v. Crowell*, 92 Wn.2d 143, 146, 594 P.2d 905 (1979)).

State v. Allen, 178 Wn. App. at 918.

Thus, in *State v. Blazina*, 174 Wn. App. 906, 174 Wn. App. 906 (2013), the court found that the jury's assessment of a witness's credibility was a matter that "inhered in the verdict." 174 Wn. App. at 910-11. But a claim that a juror was racially biased, and failed to disclose this information, did not "inhere in the verdict." See also, *State v. Jackson*, 75 Wn. App. 537, 879 P.2d 307 (1994)(where defendant makes prima facie showing of a juror's actual bias, the trial court violates due process by denying motion for new trial without conducting an evidentiary hearing).

On the other hand, where there is evidence that a juror has lied to the court, this type of misconduct does not "inhere in the verdict." See *State v. Reynoldson*, 168 Wn. App. 543, 552, 277 P.3d 700 (2012)(Juror's post-trial declaration presented no facts supporting a finding of misconduct because she did not lie to the trial court).

In the instant case, juror Don Parker's declaration establishes that the jury did mislead the court and counsel about the reasons for requesting a read-back of the juror testimony. This does not reveal anything about the thought processes going on in the jury room. For a jury, acting through the foreperson, to lie to the court is misconduct that does not "inhere in the verdict." The jury's misrepresentations to the court about their reasons for requesting the victim's testimony to be repeated does not concern the jury's thought processes in reaching a verdict, and therefore it does not "inhere in the verdict."

B. The declaration of juror Don Parker establishes that the jury committed misconduct when it lied to the court about the reason for requesting a read back of the victim's testimony.

Garza argues that the jury's misrepresentation to the court about the reason for requesting a read-back constituted juror misconduct. Brief of Appellant at 11.

The State responds that the jury did not commit misconduct, and even if they did, such misconduct did not prejudice the defendant. Brief of Respondent at 17-19. This argument is misplaced.

When a juror deceives or misleads the court, this constitutes juror misconduct. See *Grist v. Schoenburg*, 115 Wash. 335, 340, 197 P. 35 (1921) (quoting 20 Ruling Case Law *New Trial* §27, at 242 (1918))(if a

juror deceives or misleads a party by falsely testifying when being examined as to his competency such conduct will be ground for a new trial). Here, although the jury's misrepresentations to the court did not necessarily concern the competency of the juror, the analysis should be the same. It is juror misconduct for a juror to mislead or deceive the court and trial counsel.

Moreover, this misconduct resulted in prejudice to Mr. Garza and ultimately deprived him of his constitutional right to a fair trial by an impartial jury. The juror misconduct (deceiving the court about the reasons for requesting the victim's testimony to be read back) improperly induced the court to read back the victim's testimony under false pretenses. The read-back unduly emphasized the victim's testimony and deprived Garza of a fair trial.

Furthermore, the introduction of extrinsic evidence (that one juror's daughter had been the victim of a sexual assault during deliberations) also constituted misconduct. According to juror Don Parker's affidavit, this extrinsic evidence was likewise prejudicial to Garza. Thus, the juror misconduct caused actual, demonstrable prejudice to Garza. His conviction should be reversed and the case should be remanded for re-trial.

C. This court should consider Garza's argument that the trial court abused its discretion by reading the victim's testimony to the jury, despite defense counsel's failure to object.

The State argues that this court should not address Garza's argument that a read-back of the victim's testimony to the jury was an abuse of discretion because Garza raises this issue for the first time on appeal. See Brief of Respondent at 27. This argument is misplaced for two reasons.

First, although defense counsel agreed to the read back, he did so under false pretenses. The jury lied to the court and counsel about the reason for requesting a read-back of the testimony. At the time counsel agreed to such a read-back, he was operating under the mistaken impression that the jury had honestly expressed its reasons for requesting the read-back. Defense counsel here was entitled to expect that the jury would follow the court's instructions and that the jury would be candid with the court in its questions and its responses to the court. See *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993) (a jury presumed to follow the instructions given).

Because the jury misled defense counsel, his failure to object to the read-back should not bar this court from addressing this issue on appeal.

Secondly, this issue of reading the victim's testimony back to the

jury concerns Mr. Garza's constitutional right to fair and impartial jury, a right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 22 of the Washington Constitution. Reading back the victim's testimony to the jury during deliberations deprived Garza of his right to trial by a fair and impartial jury. This was a manifest error affecting a constitutional right. It can therefore be raised for the first time on appeal. RAP 2.5 ("a party may raise the following claimed errors for the first time in the appellate court . . . (3) manifest error effecting a constitutional right).

Because the court read the victim's testimony (and only the victim's testimony) back to the jury, Garza was denied a fair trial by an impartial jury. Because this is a manifest error affecting a constitutional right, Garza may raise this issue for the first time on appeal.

D. The trial court abused its discretion by reading the victim's testimony to the jury.

A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it on untenable grounds or reasons. *State v. Powell*, 126 Wn2d 244, 258, 893 P.2d 615 (1995), *cited in*, *State v. Morgenson*, 148 Wn. App. 181, 187, 197 P.3d 715 (2008). Here, the trial court abused its discretion because the decision to read back

only the alleged victim's testimony was manifestly unreasonable. Moreover, the trial court's reasons for allowing the read-back were "untenable" because the trial court relied on misrepresentations from the deliberating jury as a basis for allowing the read-back.

A trial court has discretion to permit a jury to review witness testimony during its deliberations, but the concern that such a review does not unduly emphasize any portion of the testimony circumscribes that discretion. *State v. Monroe*, 107 Wn. App. 637, 638, 27 P.3d 1249 (2001). Further, because a jury must remain impartial as it determines the facts, our Supreme Court disfavors reading back testimony during deliberations. *State v. Koontz, supra*, 145 Wn.2d at 654.

The State argues that *Koontz* is inapposite because in *Koontz* the trial court allowed the jury to view a videotape of the trial, whereas in the instant case, a transcript was read to the jury. This is a distinction without a difference. Although the *Koontz* court did focus on the unique nature of a video playback, see Brief of Respondent at 36, they also noted that the video contained the entire trial testimony, not just the victim's testimony:

> Although the video replay consisted of a substantial portion of the entire testimony presented at trial, it was largely directed to a single issue. No effort was made to restrict review to specific factual issues. The context of replay heightened this emphasis. Although the jury had deliberated for a relatively brief time, they were not instructed to continue deliberations, but were allowed to replay the video testimony. The decision to allow the replay

strongly implied that review should resolve the apparent deadlock. *State v. Koontz*, 145 Wn.2d 650, 660, 40 P.3d 475 (2002).

The facts in the instant case are even more troubling than the facts in *Koontz*, notwithstanding the fact *Koontz* involved a video transcript and this case involves a written transcript. *Koontz* stands for the proposition that reading back only the victim's testimony, rather than the whole trial, unduly emphasizes that testimony in an improper and, indeed, unconstitutional manner. See *State v. Morgenson*, 148 Wn. App. 181, 189, 197 P.3d 715 (2008) ("*Koontz* disfavors playing the entire testimony of [one] witness" because "playing the entire testimony minimize[s] undue emphasis on any one witness's testimony").

The read back of the victim's (and only the victim's) testimony was erroneous. It unduly emphasized the victim's testimony and thereby deprived Garza of his constitutional right to a fair trial by an impartial jury. This court should reverse his conviction and remand the case for a new trial.

II. CONCLUSION

The jury's misconduct in this case deprived the defendant of a fair trial by an impartial jury sworn to fairly consider the case. The trial court, relying on the jury's misrepresentations, read the victim's testimony back

to the jury during deliberations and thereby unduly and improperly emphasized the alleged victim's testimony and thereby deprived the defendant of his right to a fair trial. For these reasons, defendant is entitled to a new trial.

Respectfully submitted, this 25 day of June 2014.

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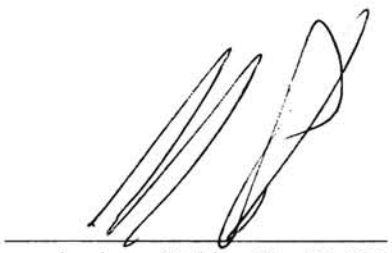
PROOF OF SERVICE

I, Andrew Subin, hereby certify that on the 25th day of June 2014, I hand delivered a copy of the foregoing Brief of Appellant to the Whatcom County Prosecuting Attorney at 311 Grand Ave., Bellingham, Washington. On the same date, I also mailed a copy, postage prepaid, to the defendant, Fabian Garza c/o the Washington Department of Corrections, and to the Court of Appeals.

Signed in Bellingham, WA this 25th day of June 2014.



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