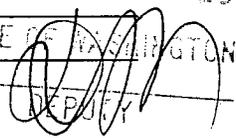


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DIVISION II

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STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

RAYMOND REYNOLDSON, RESPONDENT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 06-1-01238-2

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**Brief of Appellant**

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A. ASSIGNMENTS OF ERROR.

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2. The trial court erred in making Finding of Fact #5 and Conclusions of Law #s 1, 2, 3, 4, 5, & 6 as the record does not support these findings and conclusions, they are contrary to well established case law and the making of such findings constituted an abuse of discretion.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court err in granting defendant's motion for a new trial when it considered evidence, and subsequently made findings of fact and conclusions of law, in direct opposition to well settled case law?

C. STATEMENT OF THE CASE.<sup>1</sup>

On March 15, 2006, the State charged defendant, Raymond Reynoldson, with one count of kidnapping in the first degree, one count of attempted rape in the first degree, and one count of assault in the second degree. CP 1-2.

The case proceeded to trial and on October 1, 2010, the jury found defendant guilty as charged. 10/1/10 RP 4-5, CP 75-82. The jury also answered yes when asked if counts I and III were committed with sexual motivation. 10/1/10 RP 5, CP 83-84.

On October 7, 2010, defendant brought a motion for new trial. CP 85-95. The basis for the motion was a declaration and phone call made by one juror, Linda Ortiz, who indicated that she did not agree with the verdict. *Id.* The State responded to the motion in writing. CP 96-104. On October 28, 2010, the court held a hearing on the motion. 10/28/10 RP 4. The court heard argument from both sides and noted that there was nothing unfair about the jury process. 10/28/10 RP 16. The court also noted that much of what was contained in the juror's statement did not matter much to the proceedings. 10/28/10 RP 17. However, despite the fact that the court recognized that it was not allowed to consider the fact

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<sup>1</sup> This appeal is limited to the post-trial motion for a new trial. As such, the State has not had the trial transcribed and has not included a recitation of the substantive facts. The Statement of the Case is limited to the procedural information necessary for this appeal.

that the juror now claimed that she did not think defendant was guilty, the court considered her statement anyway and granted defendant's motion for a new trial. 10/28/10 RP 17-18, 27-28.

Findings of Facts and Conclusion of Law were entered on November 10, 2010. CP 109-111. The State filed this timely appeal. CP 116-117.

D. ARGUMENT.

1. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL WHEN IT ABUSED ITS DISCRETION BY DISREGARDING WELL SETTLED CASE LAW.

A new trial in a criminal proceeding is required only when the defendant has been so prejudiced that nothing short of a new trial can insure that he or she will be treated fairly. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). This Court reviews a grant of a motion for new trial for an abuse of discretion. *State v. Copeland*, 130 Wn. 2d. 244, 294, 922 P.2d 1304 (1996). The trial court abuses its discretion only if its decision is based on untenable grounds or reasons. *State v. Marks*, 90 Wn. App. 980, 983, 955 P.2d 406 (1998). An abuse of discretion occurs when no reasonable judge would have made the same decision. *Bourgeois*, 133 Wn.2d at 406. An order granting a new trial will be

overturned if "it is predicated on erroneous interpretations of the law."

*State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

Juror misconduct may be grounds for a new trial. The decision of whether there has been jury misconduct is within the discretion of the trial court. *State v. Young*, 89 Wn.2d 613, 630, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978). While jury misconduct may be grounds for granting a new trial, not all jury misconduct can be considered by a court on a motion, and not all jury misconduct will be grounds for a new trial. Generally, a jury commits misconduct that may be grounds for a new trial only when it considers extrinsic evidence. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." *Balisok*, 123 Wn.2d 114, 118 (internal quotation marks and citation omitted). A jury is not allowed to consider extrinsic evidence because such evidence is not subject to objection, cross-examination, explanation, or rebuttal. *Balisok*, 123 Wn.2d at 118.

The party alleging juror misconduct has the burden to show that misconduct occurred. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Generally, heated jury deliberation, raised voices, or personal remarks do not necessarily amount to juror misconduct. *See, e.g., Earl*, 142 Wn. App. 768, 774-776. Juror affidavits may not be used to show that a juror assented to a jury verdict because of intimidation by other jurors.

*State v. Aker*, 54 Wash. 342, 345-346, 103 P. 420 (1909). Appellate courts are generally reluctant to inquire into how a jury arrived at its verdict. *Balisok*, 123 Wn.2d at 117.

Other state and federal courts have rejected claims of coercion or intimidation of a juror or jurors by a fellow juror as grounds for a new trial, whether the juror's alleged intimidation takes the form of threats of physical harm, threats that the juror would be reported to or punished by the trial judge or the legal system, or excessive pressure, criticism, swearing, or other unspecified threats. See, e.g., *U. S. v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971); *Noell v. Interstate Motor Lines, Inc.*, 166 Colo. 494, 444 P.2d 631 (1968); *Crenshaw v. U.S.*, 116 F.2d 737 (C.C.A. 6th Cir. 1940), cert. granted, 313 U.S. 596, 61 S. Ct. 834, 85 L. Ed. 1549 (1941) and cert. dismissed, 314 U.S. 702, 62 S. Ct. 50, 86 L. Ed. 562 (1941); *Zimmerman v. Kansas City Public Service Co.*, 226 Mo. App. 369, 41 S.W.2d 579 (1931).

In evaluating evidence of alleged juror misconduct, a court considers only the facts that are stated in relation to juror misconduct and that in no way inhere in the verdict itself. *Jackman*, 113 Wn.2d at 777-78. All of the following factors and averments that inhere in the jury's processes in arriving at its verdict - and therefore, inhere in the verdict itself - are inadmissible to impeach the verdict: (1) the mental processes by which individual jurors reached their respective conclusions; (2) their motives in arriving at their verdicts; (3) the effect the evidence may have

had upon the jurors, or the weight particular jurors may have given to particular evidence; or (4) the jurors' intentions and beliefs. *Jackman*, 113 Wn.2d at 777-78 (internal citation omitted); *see also Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962) (if facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon the juror, the statements cannot be considered because they inhere in the verdict and impeach it).

Washington courts have a long record of dismissing claims of jurors' post-verdict change of heart. *See, e.g., State v. Maxfield*, 46 Wn.2d 822, 828, 285 P.2d 887 (1955); *State v. Gay*, 82 Wash. 423, 144 P. 711, 716 (1914); *State v. Marks*, 90 Wn. App. 980, 983, 955 P.2d 406 (1998); *State v. Hoff*, 31 Wn. App. 809, 813, 644 P.2d 763 (1982); *State v. Hughes*, 14 Wn. App. 186, 540 P.2d 439 (1975). The *Gay* court, almost a century ago, explained why the jurors should not be permitted to second-guess their verdicts:

If the juryman making the affidavit actually believed that the evidence did not justify a verdict of guilty, it was a gross wrong on his part, for any consideration of personal convenience, or any consideration of convenience to the defendant, to compromise with the other members of the jury and agree on a verdict of guilty. The only verdict he could conscientiously render in keeping with his oath was one of not guilty. He therefore violated his oath, either in returning the verdict or in making the affidavit after the return of the verdict. When he so violated it cannot, of course, be ascertained without an inquiry into the privacy of the jury's deliberations. But public policy forbids such inquiries. To permit it would encourage tampering with juryman after their discharge, would furnish to corrupt

litigants a means of destroying the effect of a verdict contrary to their interests, and would weaken the public regard for this ancient method of ascertaining the truth of disputed allegations of fact. But few verdicts are reached in which some juror does not yield in some degree his opinions and convictions to the opinion and convictions of others. And when he does so, even in criminal cases, it is to the interest of the public that he be not permitted thereafter to gainsay his act.

*Gay*, 82 Wash. 423, 439. The law in Washington on this subject is consistent with the common law and federal law. The “near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict”. *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), citing 8 J. Wigmore, Evidence § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961).

Courts are reluctant to second-guess jury verdicts. Washington courts have rejected the post-verdict change of heart when a juror felt pressured by time or procedure; when the jury may have misunderstood or misapplied the law; or even in cases of alleged misconduct by multiple jurors.

For example, in *State v. Maxfield*, the court rejected Maxfield’s argument that he should have been granted a new trial because one juror on his panel did not think Maxfield was guilty of manslaughter, but “so voted because the last two ballots came so fast that he was pressured into changing his mind.” 46 Wn.2d 822, 828. The court held that the affidavit

relaying the juror's concern, whether signed by defendant's attorney or by the juror, could not impeach the verdict. *Maxfield*, 46 Wn.2d at 828-829.

In *State v. Hughes*, the trial court refused to consider affidavits from several jurors and denied defendants' motion for a new trial. 14 Wn. App. 186, 189. The affidavits indicated that the jurors found Hughes and the co-defendant guilty after finding that defendants knew the substance they were delivering was catnip and intended to misrepresent it as marijuana, rather than finding that defendants intended to deliver marijuana. *Hughes*, 14 Wn. App. at 189-190. On appeal, the *Hughes* court held that the trial court properly refused to consider the affidavits as their content inhered in the verdict. *Id.* at 190.

In *State v. Marks*, the Court of Appeals held that the trial court abused its discretion when it ruled that the jury misapplied a jury instruction and granted defendant's motion for a new trial. 90 Wn. App. 980, 985-986. The *Marks* court reasoned that whether the jury misapplied the instruction could not be known without probing the mental processes of the jurors, and those mental processes inhered in the verdict and were inaccessible to subsequent inquiry. 90 Wn. App. at 986 (internal citation omitted). The court emphasized:

Juror affidavits about the thought processes leading to the verdict may not be considered to set aside the verdict. Jurors may provide only factual information regarding actual conduct alleged to be misconduct, not about how such conduct affected their deliberations

*Id.* at 986 (internal citation omitted); *see also State v. Cook*, 113 Wash. 391, 399, 194 P. 401 (1920) (the trial court properly denied defendant's motion for a new trial because the affidavits filed by five jurors, in which they claimed that their verdict of "guilty" was affected by a prejudicial statement made during the deliberations, was an effort to impeach the verdict with matters inhering in the verdict).

Washington courts have rejected multiple reasons that defendants have put forward in arguing for a new trial. For example, in *State v. Hoff*, a juror filed an affidavit, stating that the juror was sick with a cold during deliberation and that other jurors exerted pressure on her to vote to convict *Hoff*, 31 Wn. App. 809, 813. The trial court granted defendant's motion for mistrial and listed the juror's affidavit as one of the reasons for granting the motion. *Hoff*, 31 Wn. App. at 810-811. On appeal, the Court of Appeals held that the trial court should not have considered the affidavit, reasoning that:

The effect of a juror's illness and the claimed pressure by others inheres in the verdict and may not be used to impeach the verdict... In a motion to set aside a verdict and grant a new trial, the verdict cannot be affected either favorably or unfavorably by the fact that one or more jurors assented because of weariness, illness or importunities... Public policy forbids inquiries into the privacy of the jury's deliberations.

*Hoff*, 31 Wn. App. at 813 (internal citations omitted).

In *State v. Forsyth*, a juror, among other things, stated that she voted “guilty” because, during the end of the trial and deliberations, she was in pain and weak due to her health issues; because the deliberation room was smoky; and because she “was the subject of intense pressure from other jurors to change [her] vote.” 13 Wn. App. 133, 137-138, 533 P.2d 847 (1975). On appeal, Forsyth argued that his motion for a new trial should have been granted because the juror had committed misconduct in continuing as a juror when her illness rendered her incapable of fulfilling her functions as a juror. *Forsyth*, 13 Wn. App. 133, 137.

The appellate court disagreed, reasoning that the juror had not advised the court during the trial or deliberations that her health interfered with her performance as a juror, and that, when the trial court inquired as to whether she was feeling well, she said she was. *Forsyth*, 13 Wn. App. at 137. Further, the court emphasized that the effect of the juror's illness and the claimed pressure by other jurors inhered in the verdict and could not be used to impeach it. *Id.* at 138.

“Further, any defect in the voting procedure was cured by the jury poll.” *State v. Havens*, 70 Wn. App. 251, 257, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993). When the jury is polled, there is no doubt that the verdict was unanimous and was the result of each juror's

individual determination. *State v. Badda*, 63 Wn. 2d 176, 182, 385 P.2d 859 (1963); *Butler v. State*, 34 Wn. App. 835, 838, 663 P.2d 1390, (jury poll is tantamount to a final vote), *review denied*, 100 Wn.2d 1009 1983).

In the instant case, the trial court erred by considering information that inhered in the verdict. The court went through what the juror in question, Ms. Ortiz, had done during the trial and what she had said in her affidavit. 10/28/10 RP 14-17. Ms. Ortiz claimed she was pressured into making her verdict and felt ridiculed by other jurors. CP 85-95. Ms. Ortiz further claimed that she changed her vote under pressure and then lied about it when the jury was polled. CP 85-95. The court made it clear that it didn't see anything improper or unfair in the things that Ms. Ortiz was reporting. 10/28/10 RP 16-17. In fact, the court declared that defendant received a fair trial. 10/28/10 RP 24. However, the court went on to say that the court felt that Ms. Ortiz did not truly think defendant was guilty and that bothered the court. 10/28/10 RP 17. The court recognized that the cases presented by the State, including the *Forsyth* case which the court felt was factually on point with the instant case, told the court that it could not consider that Ms. Ortiz claimed her verdict as delivered to the court was in error. 10/28/10 RP 17-18. Further, the court also noted that the jury was polled and that Ms. Ortiz declared the verdict to be hers and the verdict of the jury. 10/1/10 RP 6-9. The court noted, as the State has

argued above, that the case law says that once the jury is polled, the court cannot consider anything else unless there is an extrinsic issue, which did not exist in this case. 10/28/10 RP 18. The trial court was clearly aware of the proper well settled case law.

Despite being made aware of case law on the subject, and that fact that the court was not to consider anything that inhered in the jury's verdict, the court did so anyway. 10/28/10 RP 28. The trial court went beyond an erroneous interpretation of the law and instead, completely disregarded the law. The case law and record do not support the trial court's Finding #5 or Conclusions #1-6. The trial court indicated that in its "heart of heart" it felt that Ms. Ortiz did lie when she declared her verdict and that she really didn't think defendant was guilty. 10/28/10 RP 18, CP 109-111, Finding #5, Conclusion #1-5. The court ruled that Ms. Ortiz had committed misconduct because, "I do believe that she never, never actually believed he was guilty of these charges, but said so. **In her declaration, when she said she lied about that, I think she is telling the truth.**" 10/28/10 RP 27 (emphasis added). However, this statement is a direct contradiction of case law. The case law is clear that "the rule is of universal acceptance that jurymen will not be permitted to impeach their own verdict, and thus declare their own perjury, for one oath would but offset the other. Both public decency and public policy alike demand the

rejection of such testimony.” *Gay*, 82 Wash. at 438. By accepting her affidavit after the fact as the truth, the court violated public policy engaged in a clearly erroneous interpretation of the case law that necessitates a reversal of its decision. *See Jackman*, 113 Wn.2d at 777.

In addition, as the jury was polled, the record supports that there was a unanimous verdict and that any defect in the voting process was cured by the polling process. *See Havens*, 70 Wn. App. at 257, *Badda*, 63 Wn. 2d at 182. The record does not support the court’s finding that the verdict was not unanimous. CP 109-111, conclusion #6. By going outside of the case law and injecting its personal opinions into the proceedings, the trial court knowingly violated well established case law and abused its discretion in granting the motion for a new trial.

The trial court admitted that case law directed it not to consider the juror’s statement and yet the trial court did so anyway. The trial court also admitted that it did not have a good legal reason to go against the well established case law but did so anyway because it just didn’t feel right. 10/28/10 RP 28. The court’s own words show a lack of deference to case law and an abuse of discretion in ignoring the case law and injecting its personal opinions into the proceedings. Allegations of juror misconduct that inhere in the verdict have been rejected by Washington courts as reason to set the verdict aside. Ms. Ortiz’s alleged motives to change her

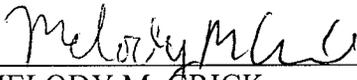
vote and her reasons to question the verdict inhere in the verdict and should have been rejected as grounds for a motion for a new trial. The trial court erred in granting defendant's motion for a new trial because the allegations made by the juror inhered in the verdict and did not amount to tenable reasons for setting the verdict aside.

E. CONCLUSION.

The State respectfully request this Court reverse the trial court's grant of defendant's motion to for a new trial, reinstate the jury's properly rendered verdict and remand for sentencing pursuant to that verdict.

DATED: March 16, 2011.

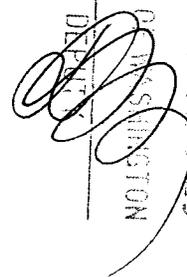
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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