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Court of Appeals
Division III
State of Washington

NO. 297276

COURT OF APPEALS, DIVISION THREE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

ISREAL MORFIN

Appellant

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

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal revolves around an allegation that four hours into the deliberation process of a very strong case a juror stopped actively contributing to the discussions but continued taking part in the voting process. The trial court reviewed the allegation, reinstructed the jury, and then investigated the matter. The trial court did not find any misconduct and instead found that the accused juror was actually still engaged in the voting process but felt he had spoken his mind on the matter and simply had nothing more to add.

Upon completion of the trial court's investigation Morfin did not seek further investigation of the matter and did not move for a mistrial. Only after Morfin was convicted of murder did he move for a new trial based on a juror's alleged refusal to contribute to discussions. The motion for a new trial was denied and this appeal followed.

II. ISSUES BEFORE THE COURT

1. Did the trial court conduct its investigation of alleged misconduct in a manner in accordance with its discretion?
2. Did the trial court abuse its discretion when it denied the motion for a new trial?
3. Did Morfin waive appeal on these issues by failing to either request additional investigation or move for a mistrial?

III. STATEMENT OF THE CASE

Substantive Facts

On April 6, 2009, Israel Morfin contacted Pete Martinez, the father of the victim, Manuel Arousa, regarding a debt that Morfin claimed the victim owed him. Report of Proceedings (RP) (12/2/10) 192-193.

On the Morning of April 11, 2009, Morfin and Adrian Madrid drove around Warden in a black Nissan maxima. RP (12/2/10) 316-317. Driving around Warden, while looking for the victim, Morfin contacted a local female walking down the street and asked if she knew where the victim was. RP (12/2/10) 276-277, 318. When she said no, Morfin began to drive off but first told Youmans "tell [the victim] Looney is looking for him and I got a surprise for him". RP (12/2/10) 278.

At around the same time on the morning of April 11, 2009, John Wall was at his home in Warden. RP (2/1/10) 100. The victim came to Wall's home and the two decided to go to a local deli for some breakfast. RP (12/1/10) 100. The victim drove his car and Wall was his passenger. RP (12/1/10) 103, 104. As they started to drive to the deli they decided to turn around and go back to Wall's house so that they could switch cars and have Wall drive. RP (12/1/10) 103, 104.

As Wall and the victim were pulling into the driveway, Morfin pulled up parallel to the victim's car while telling his passenger Madrid "that somebody owed him money". RP (12/1/10) 104, 105; RP (12/2/10)

320-321. The two cars were facing opposite directions and were driver's door to driver's door. RP (12/1/10) 104, 105.

Morfin exited his car and went immediately to the driver's side of the victim's car and began to yell at the victim about money owed. RP (12/1/10) 107, 109. At the same time Morfin cocked his semi-automatic hand gun. RP (12/1/10) 107; RP (12/2/10) 167. Morfin then robbed the victim taking from him the small amount of cash the victim had on him for breakfast. RP (12/1/10) 113. Morfin and Madrid then went to the back of the victim's car to take the car stereo speakers. RP (12/1/10) 113, 114; RP (12/3/10) 362-363. While doing this Morfin told the victim and Wall, "first one to run gets smoked." RP (12/1/10) 119-120.

Near the completion of the robbery Morfin walked up to the seated victim, and while standing between the two cars fired a single round into the back of the victim's head. RP (12/1/10) 115-117, 146, 148; RP (12/2/10) 181; RP (12/3/10) 365-366. Morfin and Madrid got in the black Nissan and drove off. RP (12/1/10) 152. The two then separated. RP (12/3/10) 366, 398.

During the course of the robbery and murder John Wall activated a cell phone audio recording device that "recorded everything". 12/1/10 RP 118.

Shortly after the murder law enforcement arrived on scene. RP (12/3/10) 480, 481. A single 10 mm auto bullet casing was recovered on the ground near the victim vehicle. RP (12/3/10) 482-483, 492, 494.

Later that same day Morfin's vehicle, the black Nissan maxima, was spotted heading towards Othello. RP (12/2/10) 210. A high speed chase ensued at speeds in excess of 100 MPH. RP (12/2/10) 213-215. Morfin was the only occupant of the maxima. RP (12/2/10) 212. During the chase Morfin was observed throwing a pistol from the car. RP (12/2/10) 217. The chase culminated in the deployment of spike strips and the apprehension and arrest of Morfin. RP (12/2/10) 228-232. Morfin stated he "was attempting to get back to Sunnyside because he knew that he possibly had a better chance of getting away". RP (12/2/10) 234.

In-car video captured the chase, and Morfin throwing his pistol out of the car window while going over a bridge. RP (12/2/10) 238. His pistol was later recovered. RP (12/2/10) 283. The pistol was a 10mm semi-automatic. RP (12/2/10) 301, 303. The pistol was tested and found to be the one that fired the single casing that was found at the murder scene. RP (12/6/10) 602, 625-630.

The pistol had both a "thumb safety" and a "grip safety" on the back grip area of the pistol and could not be fired without first deactivating both the thumb safety and the grip safety. RP (12/6/10) 613.

Also, the pistol was not capable of being fired "out of battery" when there is pressure on the front of the gun. RP (12/6/10) 617-618.

The pistol required a 5+ Lbs. trigger pull to fire and could not have fired without the trigger being pulled. RP (12/6/10) 610-611, 618. In testing, the gun was cocked and then struck repeatedly with a rubber mallet and still it would not fire without the trigger being pulled. RP (12/6/10) 618-620.

Isreal Morfin stipulated that he had previously been convicted of a felony. CP 124.

Procedural Facts

A brief rebuttal closing was conducted at 10:15 on 12/8/10 after which the jury was directed to begin deliberations. RP (12/8/10) 827, 843-844. The jury deliberated until 2:28 P.M. (approximately 4 hours later) before sending a note to the court. CP 269.

Apparently, after approximately four hours of deliberation the presiding juror stated that one of the jurors was no longer interested in voting or the process. CP 269; RP (12/8/10) 858, 867. After the reading of the note, Defense Counsel stated "it says he's not interested. But it also doesn't say that he won't do that." RP (12/8/10) 867. Defense counsel then referenced *State v. Elmore*, and argued first that, under *Elmore*, no inquiry was necessary at that time "at all", and the jury should simply be reinstructed. RP (12/8/10) 867, 872-873.

The Court, after consultation with counsel for both parties, advised that it would reinstruct the jury with jury instruction number one. RP (12/8/10) 873. Neither party objected to the procedure after specific inquiry from the Court. RP (12/8/10) 873, 867. The Jury was reinstructed accordingly. RP (12/8/10) 877-878.

At 4:38 P.M. (approximately 6 hours after deliberations began), the presiding juror sent another note that stated Juror number seven was refusing to deliberate. CP 271; RP (12/8/10) 878-879.

The presiding juror was summonsed and questioned by the Court and admonished to not provide substantive information about the deliberations. RP (12/8/10) 883-884. During examination by the Court, the presiding juror acknowledged that in fact juror number seven "**was willing to vote**". RP (12/8/10) 884-885. The Court specifically asked if juror number seven was refusing to vote on any issue and the presiding juror acknowledged that juror number seven "stated he would vote". RP (12/8/10) 885. Morfin moved for juror number seven to be excused. RP (12/8/10) 887.

The Court declined to find that juror number seven was unfit to participate as a juror. RP (12/8/10) 887. The Court stated

> at some point in the deliberation process, every member of the jury may say, I've heard enough, I've decided the case for myself, I don't have anything else to say.

RP (12/8/10) 887-888. After the court announced its decision, Morfin did not move the court to examine the accused juror (number seven) and did not move for a mistrial. RP (12/8/10) 887-889.

The following day at 10:57 A.M. the jury returned five unanimous guilty verdicts for (1) murder first degree, (2) murder second degree, (3) unlawful possession of a firearm second degree, (4) attempting to elude a police vehicle, and (5) possession of marijuana. CP 277, 281, 283, 284, 210; RP (12/9/10) 897.

After conviction Morfin moved for a new trial arguing that the trial court should have interviewed juror number seven or excused him. CP 289. The trial court denied the motion. CP 408.

IV. ARGUMENT

Morfin, a convicted felon, was witnessed, and recorded, committing a murder in broad daylight, and also witnessed trying to discard the murder weapon during a high speed chase later that same day. Approximately four hours after the jury started deliberating, juror seven had reached his decision. He was still willing to vote but had nothing more to say on the topic. This is not surprising, given the strength of the case.

Morfin cites to several cases where a conviction was overturned for removing a juror (arguing that Juror seven should have been removed simply because he had nothing more to say after four hours of

deliberation) but cites to not a single criminal case where it was found to be an abuse of judicial discretion to leave the jury as it was. Morfin also provides this court no authority that during deliberations a juror is required to comment or speak for an indefinite amount of time during deliberations.

A. THE TRIAL COURT HAS BROAD DISCRETION REGARDING THE HANDLING OF ALLEGATIONS OF JUROR MISCONDUCT, AND IN THIS CASE EXERCISED THAT DISCRETION APPROPRIATELY.

A person shall be competent to serve as a juror in the state of Washington unless that person is less than eighteen years of age; is not a citizen of the United States; is not a resident of the county in which he or she has been summoned to serve; is not able to communicate in the English language; or has been convicted of a felony and has not had his or her civil rights restored. RCW 2.36.070.

> Courts face a delicate and complex task whenever they undertake to investigate reports of juror misconduct or bias during the course of a trial. This undertaking is particularly sensitive where, as here, the court endeavors to investigate allegations of juror misconduct during deliberations.

United States v. Thomas, 116 F.3d 606, 618-619 (1997).

1. ABUSE OF DISCRETION IS THE APPROPRIATE STANDARD OF REVIEW FOR THIS CASE.

Initially, with regard to the claims of juror misconduct, it must be noted that a decision of (1) whether the alleged misconduct exists, or whether (2) it is prejudicial are matters for the discretion of the trial court. *Richards v. Overlake Hosp. Medical Ctr*., 59 Wn. App. 266, 271, P.2d 737

(1990). "If misconduct is found, great deference is due the trial court's determination that no prejudice occurred". *Id. at* 271. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors". *State v. Yates*, 161 Wn.2d 714, 743, 168 P.3d 359 (2007).

"The standard of review for juror removal during deliberation is abuse of discretion". *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217, (2009); *People v. Cleveland*, 25 Cal. 4th 466, 474, 21 P.3d 1225, (2001) (The trial court's determination to discharge a juror is reviewed for abuse of discretion and a juror's inability to perform as a juror "must appear in the record as a demonstrable reality"). "The great majority of other courts reviewing juror dismissal, have applied an abuse of discretion standard". *State v. Elmore*, 155 Wn.2d 758, 768, 123 P.3d 72 (2005).

Also, "the trial court retains discretion to investigate accusations of juror misconduct in the manner most appropriate for a particular case." *Depaz*, 165 Wn.2d at 855; *State v. Earl*, 142 Wn. App. 768, 774 (2008) ("We review a trial court's investigation into jury misconduct for abuse of discretion"); *Thomas*, 116 F.3d at 618 ("the need to safeguard the secrecy of jury deliberations requires the use of a high evidentiary standard for the dismissal of a deliberating juror for purposeful disobedience of a court's instructions").

A trial judge is also invested with broad discretion in denying motions for new trial. The exercise of that discretion cannot be disturbed on appeal absent an abuse of discretion.[1] *State v. Marks*, 71 Wn.2d 295, 301-02, 427 P.2d 1008 (1967); Bunnell *v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966). A court's decision to deny a motion for a new trial based on alleged juror misconduct is reviewed for abuse of discretion. *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991).

How to investigate an allegation of juror misconduct, the determination of whether or not there is misconduct, the determination of what prejudice if any the misconduct creates, whether a juror should be removed, and whether or not to grant a motion for a new trial are all matters within the sound discretion of the trial court and should not be altered on appeal absent an abuse of that discretion.

2. THE TRIAL COURT CONDUCTED A PROPER INVESTIGATION OF THE ALLEGATION OF MISCONDUCT AND FOUND NONE.

Trial courts generally have broad discretion in conducting investigations into allegations of juror misconduct, as the *Elmore* court noted "a study of the case law reveals that some general guidelines have emerged", one of which was that "if a juror or jurors accuse another juror

[1] Morfin cites to *Marvik v. Winkelman*, 126 Wn. App. 655, 661, 109 P.3d 47 (2005), to argue that this matter should be reviewed de novo. Although Morfin is right that matters of law are reviewed de novo, what is being appealed is not a matter of law ruling. What is being appealed is the manner in which alleged misconduct was investigated, and the fact that the trial court did not find misconduct or prejudice to Morfin.

of refusing to deliberate or attempting nullification, the trial court should first attempt to resolve the problem by reinstructing the jury." *Elmore*, 155 Wn.2d at 774. The trial court did exactly that in this case. RP (12/8/10) 877-878.[2]

"If reinstruction is not effective and problems continue, any inquiry should remain as limited in scope as possible". *Id*. And, "the court's inquiry should cease if the trial judge becomes satisfied that the juror in question is participating in deliberations and does not intend to ignore the law or the court's instructions". *Id*. Again, the trial court followed the guidance of *Elmore* and conducted a limited investigation, after which the trial court was satisfied that the juror was participating and ceased the investigation. RP (12/8/10) 883-885, 887-888.[3] The trial court did not find misconduct or prejudice and properly left the jury as it was.

In *People v. Bradford*, 15 Cal. 4th 1229, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (1997), the trial court wisely conducted only a limited inquiry when faced with a request to discharge jurors. On the third day of deliberations in the guilt phase of a capital case, the trial court received a note from the jury foreperson stating that the jury had big problems and could not continue deliberations. The court questioned the foreperson, who explained that the presence of a few hostile jurors caused others

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[2] The jury is presumed to have heeded the instructions of the court. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991).

[3] Additional investigation would have been unwise as it would have run the risk of invading the privacy of the jury's deliberations.

jurors to feel they could not continue deliberations. *Id*. at 1350. The "hostile jurors" had expressed a fixed view of the case before all the evidence had been reviewed. The court then asked the jury as a whole whether they could continue deliberations. Three jurors indicated they could not. The court reread several jury instructions concerning the jury's duty to deliberate. The court advised the jury to put aside any hard feelings and resume deliberations. The jury deliberated 10 additional days before reaching a verdict. The appellate court held the trial court did not abuse its discretion. Although it was "inadvisable" for the "hostile jurors" to express a fixed view of the case early in deliberations, their action did not constitute misconduct. *Id*. at 1352.

Morfin cites to *Thomas* at length stating "The Second Circuit found the trial court properly dismissed the juror because … he refused to engage in the deliberative process." *Brief of Appellant* at 9. However, a more accurate reading of the opinion shows that "the district court erred in dismissing Juror No. 5". *Thomas*, 116 F.3d at 624. "We are required to vacate these judgments because the court dismissed Juror No. 5." *Id.*

In *Thomas*, Thomas argued that the trial court abused its discretion when it ordered the dismissal of one of the jurors during the course of jury deliberations. The juror in question was said to have hollered at fellow jurors, insulted them, and even came close to striking a fellow juror. The juror was also accused of pretending to vomit in the bathroom while other

jurors were eating lunch outside the bathroom door. *Thomas*, 116 F.3d at 611. Despite the outlandish and disruptive behavior of the juror in *Thomas*, The appellate court vacated the conviction and remanded for a new trial, holding that the trial court erred in dismissing the juror. *Thomas*, 116 F.3d at 624. Morfin's reliance on *Thomas* is unfounded as this case actually demonstrates the dangers of juror removal during deliberations.

During deliberations in *United States v. Symington*, 195 F.3d 1080 (1999), the trial court received a note from the jury indicating that one juror has stated their final opinion prior to review of all counts. *Id*. at 1083. The court sent back a note reminding the jury of their duty to participate in deliberations. The jury sent another note to the court indicating that one juror couldn't properly participate in the discussion and was "[r]efus[ing] to discuss views with other jurors". *Id.* at 1093. The court questioned each juror individually and found that the juror complained of had stated to other jurors that she did not "have to explain herself to anybody." *Id*. at 1084. The trial court discharged the juror, because she was "either unwilling or unable to deliberate with her colleagues." *Id*.

The court of appeals in *Symington* echoed the concerns over the sanctity of jury deliberations expressed in *Thomas*, and reversed the conviction, concluding that "there was a reasonable possibility that [the

juror]'s views on the merits of the case provided the impetus for her removal." *Id*. at 1088.

Morfin's reliance on *People v. Cleveland*, 25 Cal. 4th 466, 21 P.3d 1225 (2001), is also misplaced. During deliberation in *Cleveland*, the trial court was informed that one of the jurors was refusing to deliberate. The trial judge subsequently removed the problem juror. A guilty verdict followed. The appellate court reversed, holding that the trial court erred in discharging the juror because the record did not establish as a demonstrable reality that the juror refused to deliberate. *Id.*, at 486.

In *State v. Johnson*, 125 Wn. App. 443, 105 P.3d 85 (2005), Johnson appealed his conviction for first-degree murder. During deliberations in Johnson's trial juror 9 was emotionally distraught, and when the jury began making progress toward a conclusion, juror 9 would pull it back; juror 9 was crying a lot; juror 9 often retreated to the corner to embroider, curled up in a ball in the corner, and would cease communicating with the other jurors. *Id.* at 451-452.

The trial court replaced juror 9, stating that juror 9's behavior was "incompatible with proper and efficient jury service," noting that juror 9 had "curl[ed] up in a ball in the corner" and ceased to communicate with the other members of the jury. *Id.* at 451-452. Despite the actions of juror 9, the appellate court held that the trial court violated Johnson's constitutional rights when it removed juror 9 from the jury. *Id.* at 459.

In *People v. Johnson*, 3 Cal. 4th 1183, 14 Cal. Rptr. 2d 702, 842 P.2d 1 (1992), Johnson argued that the "trial court erred when it failed to inquire into possible jury misconduct". *Id.*, at 1255. The appellate court held that an inquiry into whether a juror should be discharged was not required, noting

> jurors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means. To probe as defendant suggests, in the absence of considerably more cogent evidence of coercion, would "'deprive the jury room of its inherent quality of free expression.'" [Citations.] Consequently, the trial court was not required to make the inquiry for which defendant now argues. Moreover, any such inquiry could in itself have risked pressuring the dissenting juror to conform her vote to that of the majority. [Citation.] Defense counsel presumably was aware of the potential for such an outcome, and for that reason might have declined to request such an inquiry.

Id., at 1255.

In not one of the cases discussed above did the misconduct rise to the level justifying the removal of a juror during deliberations. Just as the trial court in those cases conducted limited investigations, the trial court in this case conducted an appropriate but limited investigation and determined that the jury should be left as it was.

3. MORFIN FAILS TO MEET HIS BURDEN OF ESTABLISHING JUROR MISCONDUCT.

"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); State *v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967); *Maryland Casualty Co. v. Seattle Electric Co*., 75 Wash. 430, 438, 134 P. 1097 (1913) ("Plainly, the statement of facts presents no competent evidence of misconduct of the jurors or any of them invoking the discretion of the trial court to grant a new trial. It was, therefore, error to entertain the motion as sufficient basis for the order").

"While the rights of the defendant in a criminal action must be maintained, when once the court indulges in consideration of bare possibilities and reverses judgments because it was within the range of possibility that a juror might have received a communication from the outside, the court will wander from the path of reasonable caution into the hazy realms of fancy; for when imagination waves its magic wand, sober calculation is put to flight." *State v. Pepoon*, 62 Wash. 635, 644, 114 P. 449 (1911); *see also State v. Stackhouse*, 90 Wn. App. 344, 350, 957 P.2d 218 (challenge to a juror's impartiality must be based on more than speculation), *review denied*, 136 Wn.2d 1002, 966 P.2d 902 (1998).

In the case at hand, the record does not establish misconduct. It shows only that approximately 6 hours after deliberations began, on a very strong case, juror seven "was willing to vote". RP (12/8/10) 884-885. The Court specifically asked the presiding juror if juror number seven was refusing to vote on any issue and the presiding juror acknowledged that juror number seven "stated he would vote". RP (12/8/10) 885. The trial

court declined to find that juror number seven was unfit to participate as a juror, stating

> at some point in the deliberation process, every member of the jury may say, I've heard enough, I've decided the case for myself, I don't have anything else to say.

RP (12/8/10) 887-888. The following day at 10:57 A.M. the jury returned five unanimous guilty verdicts.

Morfin argues that juror seven stopped contributing to the discussion prior to reaching a verdict, but provides no authority showing that a juror must continue to speak for an indefinite period of time during deliberations.

Not only has Morfin failed to establish that there is misconduct by a juror, but after investigation by the trial court, the record makes clear that there was in fact no misconduct at all. Absent affirmative evidence of misconduct Morfin has failed to meet his burden.

4. MORFIN HAS FAILED TO ESTABLISH ANY PREJUDICE.

In addition to the lack of evidence of misconduct, even if juror number seven committed misconduct it would have been improper to excuse him so long as he could still deliberate fairly. *Depaz*, 165 Wn.2d at 857. In other words a showing of prejudice is required before removal, so as to avoid prejudice to one of the parties. *Id*., at 858. The burden of showing prejudice from juror misconduct is on Morfin. *Earl*, 142 Wn. App. at 776. While a finding of misconduct relates to "conduct or

practices incompatible with proper and efficient jury service," it does not fully reflect that a juror has manifested unfitness to serve on the jury as required under RCW 2.36.110. *Depaz*, 165 Wn.2d at 856.

Cases reviewing findings of juror misconduct raised in motions for a new trial have required a showing of prejudice against a party in order to support an order for a new trial. *See, e.g., State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997); *State v. Theobald*, 78 Wn.2d 184, 186, 470 P.2d 188 (1970); *McBroom v. Orner*, 64 Wn.2d 887, 888, 395 P.2d 95 (1964); *State v. Barnes*, 85 Wn. App. 638, 669, 932 P.2d 669 (1997) ("Not all instances of juror misconduct merit a new trial; there must be prejudice."); *Tate v. Rommel*, 3 Wn. App. 933, 937-938, 478 P.2d 242 (1970) (A party petitioning for a new trial on the grounds of premature deliberations must establish that the communication prejudiced the outcome of the trial); *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974) (juror's post-verdict affidavit stated that most of the jurors had discussed the case during recesses and many had formed premature opinions about defendant's guilt; trial court did not abuse its discretion in denying motion for new trial).

"We grant a new trial only where juror misconduct has prejudiced the defendant." *Earl*, 142 Wn. App. at 774. (citing *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740, *review denied*, 158 Wn.2d 1011 (2006)) *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

Prejudice should be determined by concluding whether any misconduct committed by the juror has affected the juror's ability to deliberate before deciding to excuse the juror under RCW 2.36.110. Only if the misconduct reasonably would have altered the juror's formulated opinion of the case can the court disturb the deliberations that led the juror to reach such a decision. *Depaz*, 165 Wn.2d at 857.

In this case there was and is no indication that juror number seven could not or did not deliberate fairly, in fact the evidence shows he was still voting throughout the entire process. Not only is there no evidence of actual misconduct there is no evidence of prejudice to Morfin. Absent such a showing Morfin fails to meet his burden and the motion for a new trial was properly denied.

In *People v. Keenan*, 46 Cal. 3d 478, 540, 250 Cal. Rptr. 550, 758 P.2d 1081 (1988), it was alleged in support of a motion for new trial that, during deliberations, a juror had confronted another juror, an elderly woman, stating: "If you make this all for nothing, if you say we sat here for nothing, I'll kill you and there'll be another defendant out there—it'll be me." *Id*., at 540. The California Supreme Court concluded that this incident did not amount to prejudicial misconduct impeaching the verdict, even though the "outburst … was particularly harsh and inappropriate". *Id*., at 541. The Court recognized that "[j]urors may be expected to disagree during deliberations, even at times in heated fashion", and added:

"Thus, '[to] permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression". *Id.*

Also instructive is *State v. Hatley*, 41 Wn. App. 789, 706 P.2d 1083 (1985). In *Hatley*, a juror in that case allegedly told a third party during trial that the defendant was "guilty as sin." *Hatley*, 41 Wn. App. at 792. The trial court granted the defendant's post-verdict motion for a new trial, but that order was reversed on appeal. While it was misconduct for the juror to express his opinion of guilt prematurely, there was no showing that the misconduct actually prejudiced the defendant's right to a fair trial. *Hatley*, 41 Wn. App. at 794-95.

Morfin has the burden of not only showing misconduct, but also showing that the misconduct altered a juror's formulated opinion of the case. Morfin simply fails to meet this burden of showing misconduct or prejudice warranting a new trial.

B. MORFIN'S MOTION FOR A NEW TRIAL WAS PROPERLY DENIED AS MORFIN FAILED TO ESTABLISH MISCONDUCT OR PREJUDICE.

The trial court may order a new trial when "it ***affirmatively*** appears that a ***substantial right*** of the defendant was materially affected". CrR7.5 (emphasis added). Morfin's motion stated that the "evidence ***suggests*** that Juror Number 7 refused to deliberate." CP 293, *Defendant's Motion for a New Trial* (emphasis added).

As was discussed above, a finding of juror misconduct raised in motions for a new trial requires both a showing of misconduct and prejudice in order to support an order for a new trial. In this case the record does not provide an affirmative showing of misconduct, only a bare accusation by a juror that another juror was not deliberating. However, after the court investigated and inquired of the complaining juror it became clear that the juror complained of had actually discussed the case with other jurors and was still actively voting. The jurors were instructed on the law and they, after deliberation, reached a verdict unanimously. There was also no evidence of prejudice.

In the absence of an affirmative showing of misconduct and prejudice to a substantial right, the trial court acted properly when it denied Morfin's motion for a new trial.

C. MORFIN WAIVED THE ISSUE OF JUROR MISCONDUCT WHEN HE GAMBLED ON A FAVORABLE VERDICT.

Morfin waived appellate review of this issue when he knew of the issue during the trial and failed to move for a mistrial or request further investigation after the trial court's ruling.

In *State v. Williams*, 96 Wn.2d 215, 634 P.2d 868 (1981), a juror was excused during deliberation. Instead of seeking a mistrial, Williams elected to proceed with the remaining 11 jurors. The jury returned a "guilty" verdict on each of the three charges. *Id. at* 219. The appellate court held that the claimed irregularity in *Williams* did not result in an

unfair trial because Williams (like Morfin) had many opportunities to request a mistrial and never did so. *Id.* at 226.

The appeals court went on to say that had Williams felt the procedures used were inadequate for a fair trial, it was incumbent upon Williams to move for a mistrial at that time. He did not do so. Even after all the testimony was concluded and the jury was in the process of deliberating, Williams declined to move for a mistrial when a juror was excused. "It is obvious the defense did not feel greatly prejudiced by the late revelation of the incident until after the adverse verdict. The defense made a tactical decision to proceed, 'gambled on the verdict', lost, and thereafter asserted the previously available ground as reason for a new trial." *Id.* at 226.

This kind of verdict gambling "is impermissible". *Id. at 225*-226; *Nelson v. Martinson*, 52 Wn.2d 684, 689-90, 328 P.2d 703 (1958) (reversing grant of new trial); see also *Carabba v. Anacortes School Dist*. 103, 72 Wn.2d 939, 953, 435 P.2d 936 (1967); *Warren v. Hart*, 71 Wn.2d 512, 519, 429 P.2d 873 (1967) (Finley, C.J., dissenting); *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); *Sun Life Assurance Co. of Can. v. Cushman*, 22 Wn.2d 930, 945, 158 P.2d 101 (1945); *State v. Atkinson*, 19 Wn. App. 107, 575 P.2d 240 (1978) (no complaint at trial); *State v. Stamm*, 16 Wn. App. 603, 559 P.2d 1 (1976) (prosecutorial misconduct

error not asserted at trial); *State v. Lewis*, 15 Wn. App. 172, 548 P.2d 587 (1976) (invited instructional error).

In *Casey v. Williams*, 47 Wn.2d 255, 256, 287 P.2d 343 (1995), one of the jurors was asleep on several occasions during the course of the trial. Casey interrupted the trial and called the trial court's attention to the conduct of said juror. *Id*. However, the trial proceeded without objection from Casey. *Id*. The jury returned a verdict in favor of Williams in less than 15 minutes.[4] *Id*. at 255, 258. On appeal the court held that Casey waived his right to claim error for alleged misconduct of the jury. *Id.* at 257. The Court reasoned it was Casey's duty, if he expected to claim error based upon the alleged misconduct of the jury, not only to call the matter to the attention of the trial court, but also to claim a mistrial and ask that the jury be discharged and not to wait until an adverse verdict had been rendered, and then, for the first time, claim error based upon such alleged misconduct. *Id.* at 257. "He cannot gamble on the verdict of the jury and seek relief thereafter in the event the verdict is unfavorable to him". *Id.*

Like *Williams* and *Casey*, Morfin was fully aware of the issue with juror seven. RP (12/8/10) 867, 872-873. Morfin was consulted during every step of the investigation of the allegation. Morfin had every opportunity to object to the questioning of the complaining juror but

[4] "The length of time devoted to jury deliberations is not a reliable guide to the measure of justice which has been achieved. In our opinion, the fact that the jury here returned a speedy verdict does not support the court's conclusion that substantial justice had not been done." *Casey*, 47 Wn.2d at 258.

declined to do so. RP (12/8/10) 887-889. Upon completion of the trial court's investigation and decision to leave the jury as it was, Morfin made no request for, or argument in support of, further investigation. RP (12/8/10) 887-889. Morfin also declined to move for a mistrial. RP (12/8/10) 887-889.

It was incumbent on Morfin to move for a mistrial or request further investigation at the time of trial if he felt there was actual prejudice that needed to be addressed. Instead, recognizing there was no prejudice; Morfin waived the issue he appeals by gambling on a favorable verdict.

V. CONCLUSION

The trial court took appropriate steps to investigate an allegation of juror misconduct. Upon investigation it became clear that there was no misconduct and the accused juror was still taking part in the process of reaching a verdict; but after over several hours of deliberation on a very strong case he simply had nothing more to say.

By failing to seek further investigation or move for a mistrial, after the trial court interviewed the complaining juror and announced its ruling, Morfin waived any right to appeal this issue. Morfin gambled on a favorable verdict. He lost that gamble and his conviction should be affirmed.

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Respectfully submitted,

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