

FILED
Court of Appeals
Division III
State of Washington
5/30/2019 3:28 PM

COURT OF APPEALS NO. 36406-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JESSE CRISWELL,

Appellant.

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

The Honorable John M. Antosz, Judge

OPENING BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	
1. THE COURT MISAPPLIED THE LAW IN DENYING ADMISSION OF EXHIBIT 2 AS A RECORDED RECOLLECTION.	15
2. CRISWELL WAS ENTITLED TO A NEW TRIAL BASED ON JUROR MISCONDUCT AND/OR BIAS	27
(i) <u>Harrell Committed Misconduct that Prejudiced Criswell</u> .	28
(ii) <u>Harrell Concealed his Bias Against Criswell</u>	30
D. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Allison v. Dep't of Labor & Indus.</u> 66 Wn.2d 263, 401 P.2d 982 (1965)	25
<u>Allyn v. Boe</u> 87 Wn. App. 722, 943 P.2d 364 (1997)	26
<u>Dalton v. State</u> 115 Wn. App. 703, 63 P.3d 847 (2003)	1-2, 23-26, 30, 32
<u>Gardner v. Malone</u> 60 Wn.2d 836, 376 P.2d 651 (1962)	29
<u>Robinson v. Safeway Stores, Inc.</u> 113 Wn.2d 154, 776 P.2d 676 (1989)	26
<u>Smith v. Kent</u> 11 Wn. App. 439, 523 P.2d 446 (1974)	25, 28
<u>State v. Alvarado</u> 89 Wn. App. 543, 949 P.2d 831 (1998)	17-18, 20
<u>State v. Balisok</u> 123 Wn.2d 114, 866 P.2d 301 (1994)	28
<u>State v. Benn</u> 120 Wn.2d 631, 845 P.2d 289 (1993)	16
<u>State v. Briggs</u> 55 Wn. App. 44, 776 P.2d 1347 (1989)	29, 30
<u>State v. Castellanos</u> 132 Wn.2d 94, 935 P.2d 1353 (1997)	15
<u>State v. Cho</u> 108 Wn. App. 315, 30 P.3d 496 (2001)	26, 31

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT.)

<u>State v. Criswell</u> noted at 6 Wn. App.2d 1043 (2018) (unpublished).....	4-5
<u>State v. Depaz</u> 165 Wn.2d 842, 204 P.3d 217 (2009)	28
<u>State v. Jackman</u> 113 Wn.2d 772, 783 P.2d 580 (1989)	25
<u>State v. Lemieux</u> 75 Wn.2d 89, 448 P.2d 943 (1968)	29
<u>State v. Mathes</u> 47 Wn. App. 863, 737 P.2d 700 (1987).....	2, 17
<u>State v. Nava</u> 177 Wn. App. 272, 311 P.3d 83 (2013).....	2, 16, 18-21, 23
<u>State v. Tharp</u> 96 Wn.2d 591, 637 P.2d 961 (1981).	16
<u>State v. Tigano</u> 63 Wn. App. 336, 818 P.2d 1369 (1991).....	31
<u>State v. Young</u> 160 Wn.2d 799, 161 P.3d 967 (2007)	15

TABLE OF AUTHORITIES

Page

OTHER JURISDICTIONS

Drury v. Franke
247 Ky. 758, 57 S.W.2d 969 (1933) 25

State v. Marcy
165 Vt. 89, 680 A.2d 76 (1996) 17

FEDERAL CASES

McDonough Power Equip., Inc. v. Greenwood
464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) 28, 31

Smith v. Phillips
455 U.S. 209, 102 S. Ct. 490, 71 L. Ed. 2d 78 (1982) 28

United States v. Porter
986 F.2d 1014 (6th Cir. 1993) 17

TABLE OF AUTHORITIES

Page

RULES, STATUTES AND OTHER AUTHORITIES

Const., art. I, sec. 21	28
CrR 7.8(b)(1), (5).....	10
ER 104(a).....	16
ER 803(a)(5)	1, 13-14, 17, 20-21, 23
RCW 4.44.170(2)	31
U.S. Const. amend. VII	28

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to admit exhibit 2 as substantive evidence under the recorded recollection exception to the hearsay rule.

2. The court erred in denying appellant's motion to admit exhibit 2 as substantive evidence under this Court's decision in Dalton v. State, 115 Wn. App. 703, 63 P.3d 847 (2003).

3. The court erred in denying appellant's motion for a new trial based on juror misconduct.

4. The court erred in denying appellant's motion for a new trial based on juror bias.

5. The trial court erred in entering: findings of fact 2.5, 2.6, 2.8; and conclusions of law 3.3, 3.4 and 3.6.

Issues Pertaining to Assignments of Error

1. A recorded recollection is admissible as substantive evidence if it is:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

ER 803(a)(5).

Admission is proper when the proponent of the evidence demonstrates that (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately. State v. Mathes, 47 Wn. App. 863, 867–68, 737 P.2d 700 (1987).

To meet foundational requirements (3) and (4), this Court has held it is not required for the witness to personally vouch for the accuracy of the prior statement. State v. Nava, 177 Wn. App. 272, 311 P.3d 83 (2013). Yet, that is precisely why the trial court here denied admission of exhibit 2 as a recorded recollection. Did the court abuse its discretion?

2. As a general matter, hearsay is not admissible unless the proponent establishes an exception to the prohibition, such as past recollection recorded. However, this Court has recognized that (1) allegations of juror bias or misconduct are often brought to the court's attention through affidavits containing hearsay statements of the juror in question, and (2) it is error for the court on a motion for a new trial to refuse to consider such affidavits on

grounds they are “mere hearsay.” Dalton, 115 Wn. App. at 716. Under Dalton, did the court err here in failing to consider exhibit 2 as substantive evidence in ruling on appellant’s motion for a new trial?

3. Where the record shows a juror committed misconduct by speaking to a third person about the case during trial and it caused the juror to remember he knew the defendant and thought of him as an “asshole,” did the court err in denying appellant’s motion for a new trial based on juror misconduct?

4. Where the evidence showed the juror failed to disclose his bias against the defendant and instead remained silent, did the court err in denying appellant’s motion for a new trial based on the juror’s concealment of bias?

B. STATEMENT OF THE CASE

Following a jury trial in Grant county superior court in July 2017, appellant Jesse Criswell was convicted of two counts of forgery and one count of third degree theft. CP 11. If believed, the state’s evidence showed that on the morning of May 1, 2016, Criswell entered Hawk Fuel and purchased miscellaneous items using 8 fake \$50 bills. See this Court’s unpublished opinion in

State v. Criswell, COA No. 35581-1-III, filed December 18, 2018, noted at 6 Wn. App.2d 1043.

The clerk working at Hawk Fuel at the time of the transaction was John Driesen. Interestingly, the store's security footage showed Driesen did not mark any of the bills Criswell gave to him with a currency checking pen. CP 5. In the till, the store's manager also found two additional fake \$50s that could not be attributed to Criswell's transaction. CP 5-7.

On appeal, Criswell's attorney challenged the amount of restitution, which the state subsequently corrected. State v. Criswell, noted at 6 Wn. App.2d 1043 (2018). In his Statement of Additional Grounds, however, Criswell sought a new trial on grounds of juror bias:

I ask that the guilty verdict please be overturned on grounds the jury was not impartial. To elaborate, a juror by the name of Melvin Harrell Sr lied during the jury selection process by claiming that he did not know me personally. On the contrary, Melvin knows me well and is likely to have a biased opinion. I am certain that he is capable of using the court system as a platform for personal vendetta and therefore my 6th amendment rights have been violated.

Let it be known that during jury selection Melvin did not raise his paddle when asked if he had any sort of personal relationship with me. The fact is Melvin and I have had several interactions, most of

which were not pleasant. Our opposition derives mainly from Melvin having an intimate relationship with a girlfriend of mine which ultimately led to our demise. As you might imagine, our several conversations that followed were uncordial at best.

Knowing that Melvin took part in deliberations and had the ability to sway the jury's opinions is unsettling. I would hardly consider this to be a fair jury and certainly not impartial. Therefore I ask that we respectfully declare a mistrial and the guilty verdict be overturned.

Ex 3.

Ultimately, this Court declined to consider the issue of juror bias reasoning it was outside the record on appeal and better suited to a personal restraint petition. State v. Criswell, noted at 6 Wn. App.2d 1043 (2018). This was also the advice Criswell received from his appellate attorney – that he would need some evidence, such as a declaration from Harrell, to substantiate his claim of juror bias and that he could then raise it in a motion for a new trial or personal restraint petition. RP (9/19/19) 53.¹

At the hearing on Criswell's motion for a new trial, Criswell explained he did not feel comfortable contacting Harrell himself, so Criswell's mother obtained a statement from him. RP 53.

¹ "RP" refers to the motion for a new trial held on September 19, 2018.

In his signed and notarized affidavit, Harrell stated:

The undersigned, Melvin Harrell, being duly sworn, hereby deposes and says:

1. I am over the age of 18 and am a resident of the State of Washington. I have personal knowledge of the facts herein, and, if called as a witness, could testify completely thereto.

2. I suffer no legal disabilities and have personal knowledge of the facts set forth below.

3. On 7/27/2017 I was a juror in Grant County Washington case no. 16-1-00326-8.

4. I did not raise my paddle when asked if I knew the defendant.

5. After the case started I realized I did know the defendant.

6. I had a personal relationship with the defendants Girlfriend.

7. That friendship prevented me from being able to reach a fair and impartial decision based on the evidence in this case.

8. My verdict was based on my personal feelings involving their relationship instead of the evidence in this case.

CP 64-65.

Upon receiving this sworn affidavit, Criswell's trial attorney David Bustamante contacted his investigator, Ellyn Berg, and asked her to interview Harrell. CP 58. The interview took place on May 25, 2018. CP 58; Ex 2.

Harrell told Berg that when he was first seated on Criswell's jury, he did not believe he knew Criswell. CP 70-71. However, during a break in the trial, Harrell received a call from someone asking him for a ride. CP 70. Harrell said he couldn't because he was in court. CP 70. The caller said, "oh that must be Jenny's boyfriend, Jesse." RP 70.

Jenny used to come over to Harrell's house "all the time" to visit a woman who was staying with Harrell. CP 69. Harrell explained he'd listen to their conversations and Jenny would "be there complaining that they [she and Criswell] were always arguing and fighting among themselves." CP 71.

When asked if knowing Criswell impacted Harrell as a juror, he said "kinda:"

Yeah, kinda. I kinda I didn't like the idea after I hung up, you know, because she complained about they were arguing all the time, I mean, _____ I hung up or nothing, so I didn't know nothing. That's about, that's all I knew.

CP 72.

Regarding his verdict, Harrell thought there was something fishy about the clerk but sided with the rest of the jurors in finding Criswell guilty:

Harrell: And giving them the bills, paying for buying stuff and the clerk there didn't even look at the bill or didn't mark it or nothing and I thought that was kinda funny and I questioned it and said something about that but nobody seemed to care and I didn't think that was right. I said that clerk's got something to do with this _____, you know, that's not right. And I said any place I've ever went as to late in the evening, any convenience store, they always hold the bill up and look at it or they take and mark it.

Berg: Yeah, with that special pen they have.

Harrell: You know, yeah, yeah, they mark it. And that wasn't done there. And I thought something's kinda funny there. I said that ain't right, something ain't right. And I said then the way they kept going, I had it in my mind that that damn clerk has got something to do with this here. This ain't all on the up and up. But then they said, yeah, well, they kinda convinced me to go along with the rest of 'em. Of course I didn't agree with them but –

CP 73. Harrell did not believe the state presented sufficient evidence to convict Criswell. CP 73.

When asked if “knowing who Jesse was” played any part in his thought process, Harrell initially said no. CP 74. When pressed, however, Harrell admitted his knowledge about Criswell's fights with Jenny made Harrell view Criswell as “an asshole:”

Harrell: Well, in a way. From what Jenny had mentioned about he's or the arguing going on all the time, I said he's kind of an asshole, you know, but I didn't really care that much about it, you know.

Berg: yeah.

Harrell: But I seen who was then.

Berg: So, it sounds like it did sway you a little bit?

Harrell: Yeah, it did.

Berg: It did, okay.

CP 75.

At the close of the interview, Berg confirmed the accuracy of Harrell's affidavit:

Berg: ... And then when you wrote out this statement and had it notarized, did somebody suggest that you do that or did somebody contact you?

Harrell: Yeah, I was contacted by what the hell His mother.

...

Harrell: I said yeah, I can make out a statement just exactly what I see and what I know, you know.

Berg: But your statement you made, these are your words and your thoughts, right?

Harrell: Yeah, yeah.

Berg: Nobody had influenced you to –

Harrell: No, no.

Berg: -- make these statements? Okay, okay. And I know it's a silly question, but nobody has paid you or threatened you?

Harrell: Oh no, no, no.

CP 76-77.

Based on Harrell's affidavit and interview, defense counsel Bustamante filed a motion for relief from judgment under CrR 7.8(b)(1), (5). CP 55-80; RP 9. The trial court found Criswell had made a sufficient showing he was entitled to relief and held an evidentiary hearing. RP 83.

When 77-year-old Harrell arrived at the hearing, it was evident he was in significant pain. RP 3-4, 6 (court notes he moved "very slowly and painfully here"); RP 18. The week before, Harell fell in his house on the way to the bathroom and cracked a rib. RP 5. He had been prescribed pain medication but had not taken any that day. RP 5. Harrell believed he was well enough to testify. RP 6.

Harrell affirmed he was a juror on Criswell's case. RP 7. When asked during voir dire if he knew Criswell, Harrell didn't raise his paddle because he didn't remember knowing Criswell at the time. RP 8.

Later on, however, Harrell remembered hearing Criswell's name before. RP 8. Harrell thought maybe Criswell had been at Harrell's house. Harrell explained he had a lot of visitors, including Criswell's girlfriend. RP 8. Harrell half listens to the various conversations occurring at his house:

I remember the name. I can't remember. I remember the name after – later on, I remember hearing the name, and I can't remember if he was at my house at the time. There's people at my house all the time. His girlfriend is at my house visiting, staying at my house, and the people coming in there all the time to visit, and they talk about who is going out with who and who is doing this, and names are thrown around. I'm sitting at my chair watching TV about half drunk, and I hear all this stuff going on, and I halfway pay attention about what's going on. Later on, when I came back into court there, I hear the name again, I listen to it, and I kind of remembered that I heard that name before. And I heard people talking about it there at the house. Where, I don't know, I can't remember, I can't remember where the hell I heard it at.

RP 8-9.

Defense counsel asked if Harrell received a call from anyone that day but Harrell couldn't remember. RP 9, 19, 20.

Defense counsel asked if Harrell remembered writing an affidavit about the incident and signing it. Harrell responded:

I did, but I can't remember, it's been so damn long, I can't remember what it was about. I was telling exactly the way I thought, what I remember when the case was going on.

RP 9.

When shown Exhibit 1, his affidavit, Harrell said, "Yeah, it looks right." RP 12. But then he said he'd never seen it before. Nonetheless, he recognized his signature on the bottom. RP 12. The court admitted exhibit 1 without limitation. RP 57.

Defense counsel asked if Harrell remembered having an interview with the defense investigator Ellyn Berg. RP 20. Harrell remembered speaking with a lady at the 76 Gas Station in Grand Coulee. RP 21. He did not remember the nature of the conversation or telling the lady someone telephoned him during a lunch break at trial. RP 21.

Harrell nevertheless confirmed that at some point during the trial, he remembered he knew Criswell but failed to alert the court of his knowledge. RP 21-22. He remembered Criswell was Jenny's old boyfriend. RP 24. When asked if he had a negative impression of Criswell, Harrell could not remember. RP 22. As far as Harrell could remember, his friendship with Jenny did not impact his

decision on Criswell's case. RP 22. But Harrell couldn't remember what the verdict was. RP 26-27. He thought the jury found Criswell guilty, which Harrell disagreed with. RP 27.

Investigator Ellyn Berg testified Harrell looked very different the day of the hearing from when she met him at the 76 Station in Grand Coulee. RP 33. At their prior meeting, Harrell had no apparent difficulty with his memory. RP 33.

Berg testified she made a recording of their interview and had it transcribed. Ex 2 was a true and correct transcript of the interview she had with Harrell. RP 39.

Defense counsel sought to admit Ex 2 as substantive evidence under the recorded recollection exception to the hearsay rule. ER 803(a)(5).² RP 57-60. The prosecutor responded that defense counsel did not meet the last two foundational requirements for a recorded recollection, i.e. that the interview was

² A recorded recollection is admissible as substantive evidence if it is:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

made or adopted at a time when the matter was fresh in Harrell's mind and that it accurately reflected his prior knowledge. RP 61-62. The court agreed with the state that the foundation had not been met on grounds Harrell never said the interview occurred at a time when Criswell's trial was fresh in his mind:

So normally, the foundation is the witness on the stand will say, I don't remember something, but I can tell you when I did do that, I remember it was fresh in my memory.

Sometimes like with law enforcement they blur that with refreshing memory. Sometimes they think they're refreshing memory and it's actually past recollection recorded. But they should be testifying, no, this doesn't refresh my memory still, but I can tell you when I did this, it was. We don't have that kind of testimony here.

RP 63. The court admitted exhibit 2 solely as impeachment evidence. RP 63.

Criswell testified that eight months before his trial, Harrell was the reason why he was having trouble with his girlfriend. RP 48. Jenny was always over at Harrell's drinking with her friend Angel. RP 48. Criswell had disagreements on the phone with Harrell and either saw him or met him while sitting in a car waiting for his girlfriend. RP 48-49. They never had any one-on-one time,

ER 803(a)(5).

however, which is why Criswell did not recognize him at trial. RP 48-50. Criswell heard Harrell had served on his jury from Angel. RP 52.

The court denied the motion for a new trial relying on cases addressing juror bias. RP 74. The court found that there was an inadequate amount of evidence to conclude Harrell had actual bias against Criswell such that he would have been dismissed for cause had he divulged he knew Criswell and their past interactions. RP 80.

C. ARGUMENT

1. THE COURT MISAPPLIED THE LAW IN DENYING ADMISSION OF EXHIBIT 2 AS A RECORDED RECOLLECTION.

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and ordinarily will not be reversed on appeal absent a showing of abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court abuses its discretion if it improperly applies an evidence rule. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). Here, the court found Criswell had not met the foundational requirements for exhibit 2 to be admitted as a recorded recollection. In doing so, the

court misapplied the rule and abused its discretion. See e.g. State v. Nava, 177 Wn. App. 272, 311 P.3d 83 (2013).

The proponent of evidence must establish the elements of a required foundation by a preponderance of the evidence. State v. Benn, 120 Wash.2d 631, 653, 845 P.2d 289 (1993) (citing State v. Tharp, 96 Wash.2d 591, 594, 637 P.2d 961 (1981)). The trial court generally determines preliminary questions concerning the admissibility of evidence and in doing so is not bound by the rules of evidence except those with respect to privileges. ER 104(a). On appeal, this Court will uphold the trial court if its determination of the preliminary questions is supported by substantial evidence. Benn, 120 Wash.2d at 653, 845 P.2d 289.

A recorded statement or interview is inadmissible hearsay unless it qualifies for an exception to the hearsay rule. The exception for “recorded recollections” is one such exception. A record qualifies as a recorded recollection if it is:

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

ER 803(a)(5). A recorded recollection is admitted as substantive evidence.

Courts evaluating a record or memorandum for admission under ER 803(a)(5) have gleaned four elements of a foundation from the rule. Admission is proper when the proponent of the evidence demonstrates that (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately. State v. Mathes, 47 Wn. App. 863, 867–68, 737 P.2d 700 (1987).

In Alvarado, Division One adopted the view of the Sixth Circuit Court of Appeals and several other courts that the fourth element of the foundation — that the record reflects the witness's prior knowledge accurately — may be satisfied without the witness's direct averment of accuracy at trial. 89 Wn. App. at 551, 949 P.2d 831 (quoting State v. Marcy, 165 Vt. 89, 680 A.2d 76, 80 (1996) and United States v. Porter, 986 F.2d 1014, 1017 (6th Cir.1993), whose reasoning was adopted by Marcy). Instead, to determine whether the record reflects the witness's prior knowledge

accurately, Alvarado announced that “[t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.” Id. at 551–52, 949.

In Nava, this Court applied this analysis to uphold the trial court’s admission of the recorded statements of several witnesses even though the witnesses could not say, or did not say, their recordings were accurate at the time they were made. Nava, 177 Wn. App. 272, 274. Following a fatal shooting outside a taco truck in 2001, police located and interviewed several witnesses who identified Nava as the shooter. Nava, at 278-79.

For instance, Andres Orozco had been riding in the same car as Nava on the night of the shooting. Nava, at 278. About a month after the shooting, police interviewed Orozco. He told police that he, Nava and several others arrived at the taco truck following a social gathering. When Orozco got out of the car, a man started “talking shit” to him. Nava, at 281 (citation to record omitted). Orozco confronted the man, who he claimed ran away. Two other cars then came their way and, according to Orozco, the occupants

of the cars started “throwing signs.” Id. (citation to record omitted). Orozco then saw Nava fire a revolver three or four times. Nava at 281.

When asked at trial if he had any memory of what happened the night of the shooting, Orozco testified, “Not really, I was drunk.” Nava, at 283 (citation to record omitted). He elaborated: “I was drunk drunk. I can’t remember nothing.” Id. (citation to record omitted). He said he had been drinking beer and doing drugs and probably lied when he gave the statement to police. Nava, at 283.

The state sought to admit Orozco’s prior recorded interview with police. Outside the presence of the jury, the state called former detective David Cortez who previously sat in on Orozco’s interview. When asked if Orozco had appeared under the influence of drugs or alcohol at the time of the interview, Cortez responded, “No, not that I recall,” and then testified that Orozco had not been difficult to interview, that the interview went smoothly; and that “[t]here wasn’t any time where Orozco didn’t quite understand what he was being asked, didn’t have any or give any indication that he was tired, that he was under the influence or that he couldn’t remember something.” Nava, at 283 (citation to record omitted). The detective testified Orozco was able to describe events

chronologically, spoke coherently and logically, and did not change his story, and that information provided by Mr. Orozco in June 2001 was consistent with physical evidence recovered at the scene. He testified that Mr. Orozco's recollection appeared to be fresh in his mind and that he never expressed any fear of retaliation or concerns for his safety. Nava, at 284.

After hearing argument of counsel, the trial court ruled it would admit the recorded recollection. It found all four elements of the required foundation established, explaining that with respect to former knowledge and accuracy, it found Mr. Orozco was being evasive and simply did not want to cooperate. Id.

On appeal, this Court agreed with Alvarado that ER 803(a)(5) provides no textual basis for requiring that the witness personally vouch for the accuracy of the recorded statement in order to establish the fourth foundational element – that the record reflects the witness's prior knowledge accurately." Nava, 293-94. Thus, even though Orozco disavowed his statement at trial, this Court found sufficient indicia or reliability to affirm its admission. Nava, at 297-98.

Under this Court's decision in Nava, the trial court here misapplied ER 803(a)(5) and therefore abused its discretion in

denying admission of exhibit 2 as substantive evidence. The trial court explicitly held the third and fourth foundational requirements for ER 803(a)(5) could not be met because Harrell did not personally vouch for the accuracy of the interview at the hearing. As this Court held in Nava, however, there is no such requirement. The court erred in denying admission of the exhibit as substantive evidence under the criteria set forth by this Court in Nava.

First, unlike Orozco's statement at issue in Nava, Harrell never disavowed the accuracy of his prior statement (exhibit 2). Rather, he did not remember it. Thus, this is not "the rare case" where there must be an articulable reason supported by the record as to why the witness's disavowal must be deemed incredible before the recorded recollection can be admitted.

Regardless, there was an articulable reason supported by the record as to why Harrell could no longer remember the interview. Since the interview, he had become feeble. He was elderly, appeared to have a drinking problem, broke a rib and was in pain. Investigator Berg testified he appeared to be a much different man at the time of the interview. And the court specifically found: "From what I gleaned from his testimony today, he does have some purported memory problems." RP 78.

Second, Harrell averred accuracy at the time of making the statement. Investigator Berg asked about the accuracy of Harrell's prior affidavit (exhibit 1). Harrell confirmed his affidavit consisted of "his words and thoughts." No one influenced him, paid him or threatened him to make the affidavit. CP 76-77. The affidavit is corroborative of the interview in that Harrell wrote he had a personal relationship with Crisswell's girlfriend and that the relationship prevented him from reaching a fair and impartial decision based on the evidence admitted at trial. That is precisely what Harrell said during the interview – that his relationship with Jenny and knowledge of her fights with Criswell made Harrell view Criswell as an "asshole" and that it swayed him "a bit." CP 75. Thus, by averring to the accuracy of the affidavit, Harrell also averred to the accuracy of his statements in the interview.

Third, the recording process was reliable. Berg testified she recorded the interview and had it transcribed. She reviewed the transcript (ex 2) and testified it was a true and correct transcript of the interview. Additionally, Harrell remembered the interview with Berg, he just didn't remember the content.

Fourth, other indicia establish the reliability of exhibit 2. Contrary to the prosecutor's argument that the interview did not

occur when the matter was fresh in Harrell's mind because trial occurred in July 2017 and the interview occurred in May 2018, investigator Berg testified Harrell appeared to have no memory issues at the time of the interview. RP 42. His responses to Berg's questions were "relatively quick and facile." RP 42. Moreover, the consistency between Harrell's affidavit and the interview provides additional indicia of reliability. Thus, exhibit 2 was admissible under ER 803(a)(5) under this Court's reasoning in Nava.

Assuming arguendo this Court disagrees, the trial court still erred in excluding exhibit 2 based on this Court's reasoning in Dalton. There, Casey Dalton initiated a civil lawsuit against various medical professionals and her son's foster mother for the death of Dalton's son (Dirk) while in foster care. A jury convicted Dirk's foster father of homicide by abuse. But Dalton claimed medical professionals were negligent in not recognizing the abuse. Dalton, 115 Wn. App. 704-708. The jury found only the foster mother negligent and awarded Dalton just \$4,900 for Dirk's funeral expenses. Id. at 708.

Dalton moved for a new trial on grounds of juror bias. She obtained an affidavit from Starla Rai Beckley – a worker at a hearing aid service – who alleged that during the same week as

jury selection in Dalton's case, prospective juror Donald Polumsky came in and made numerous derogatory comments about Dalton, such as "he thought that Casey Dalton was an opportunist trying to profit from her child's death." Id. at 708 (citation to record omitted). During voir dire, Mr. Polumsky never gave any inkling he might have a bias against Dalton, and he ultimately sat on the jury. Dalton, at 710-711.

In response to Dalton's motion for a new trial based on Beckley's affidavit, the opposing party obtained a declaration from Polumsky. He denied that any jurors appeared to have a personal bias against Dalton. He also denied making a different statement about one of his family members having a "run in" with Dalton that caused him to have a negative perception of her. However, he did not deny making the statement he thought she was an opportunist trying to profit from her child's death. Dalton, at 711-712.

Nonetheless, the trial court found Dalton had not made a sufficient showing of misconduct. It also held a hearing was not necessary because Mr. Polumsky's affidavit "den[ied] misconduct," and the only evidence to the contrary was the hearsay statement of Mr. Beckley. Dalton, at 712 (citation to record omitted).

On appeal, this Court disagreed. This Court found the only logical reason Polumsky did not deny making the “opportunistic” comment about Dalton is because he actually made the statement. This Court further found that Polumsky’s statement showed actual bias. Had Polumsky revealed this bias during voir dire, Dalton could have challenged his selection as a juror for cause. Thus, this Court found the trial court abused its discretion in denying the motion for a mistrial. Dalton, at 715.

Significantly here, this Court also concluded it was error for the trial court not to consider Beckley’s affidavit on grounds it was “mere hearsay.”

The doctors and Spectrum cite several cases in support of their argument that Ms. Beckley’s hearsay affidavit cannot be used to impeach the jury’s verdict. See, e.g. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). But the cited cases do not involve concealed juror bias. “The existence of concealed bias or prejudice in a juror is not a matter that inheres in a verdict.” Smith, 11 Wn. App. at 444, 523 P.2d 446^[3] (citing Allison, 66 Wn.2d at 265, 401 P.2d 982).^[4] Neither does juror misconduct in giving a false answer to a material question propounded to the prospective juror on voir dire examination inhere in the verdict.” Smith, 11 Wn. App. at 445, 523 P.2d 446 (citing Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933)). In the Washington cases that have considered allegations that a juror concealed his or her bias against a party, affidavits containing hearsay

³ Smith v. Kent, 11 Wn. App. 439, 523 P.2d 446 (1974).

⁴ Allison v. Dep’t of Labor & Indus., 66 Wn.2d 263, 401 P.2d 982 (1965).

statements of the juror in question were the means by which that bias was brought to the court's attention. See, e.g. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 156, 776 P.2d 676 (1989); Cho, 108 Wn. App. at 329, 30 P.3d 496;^[5] Allyn, 87 Wn. App. at 728, 943 P.2d 364.^[6] Hence, we hold the superior court erred when it refused to consider Ms. Beckley's affidavit as mere hearsay.

Dalton, at 716 (footnotes omitted).

Here, Harrell initially did not conceal his bias against Criswell. He did not remember he knew Criswell. However, once he realized their connection and the negative feelings Harrell harbored for Criswell based on Criswell's fights with Jenny, the situation became one of concealed juror bias due to the fact Harrell did not speak up at that point. In this respect, Criswell's case is analogous to Dalton's. Just as Beckley's affidavit should have been considered on the motion for a new trial in Dalton's case, Harrell's interview captured in exhibit 2 likewise should have been considered.

For all these reasons, the trial court erred in admitting exhibit 2 solely as impeachment evidence. It was admissible as substantive evidence as a recorded recollection and under this Court's decision in Dalton. Criswell was prejudiced by the court's

⁵ State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001).

⁶ Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997).

evidentiary ruling because the substance of exhibit 2 supported his motion for a new trial based on juror misconduct and bias.

2. CRISWELL WAS ENTITLED TO A NEW TRIAL
BASED ON JUROR MISCONDUCT AND/OR BIAS.

In denying the motion for a new trial, the trial court found the circumstances were unlike those in juror misconduct cases because there was no allegation Harrell lied when he failed to raise his paddle when asked if he knew Criswell. Rather, the allegation centered on Harrell's failure to speak up once he realized his connection to Criswell. RP 74-75. However, exhibit 2 – which the court erred in failing to consider – showed Harrell committed misconduct when during trial, he answered the phone and spoke to the caller about the case.⁷ Talking to someone about the case is misconduct.

Moreover, as argued above, once Harrell did not speak up after realizing his connection to Criswell and his belief Criswell was “an asshole,” the situation became one of concealed juror bias similar to that in Dalton, set forth above. For both reasons, the court erred in denying the motion for a new trial.

⁷ Although the court did not admit exhibit 2 as substantive evidence, it nonetheless entered a finding that: “During a break in the trial Mr. Harrell talked to a friend, and he realized he might know Mr. Criswell.” CP 88.

“One touchstone of a fair trial is an impartial trier of fact – ‘a jury capable and willing to decide the case solely on the evidence before it.’” McDonough Power Equip., Inc. v Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). Our federal and state constitutions provide that the right of trial by jury shall “be preserved” and “remain inviolate.” U.S. CONST. amend. VII; WASH. CONST., art. I, sec. 21. “The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” Smith v. Kent, 11 Wn. App. 439, 443, 523 P.2d 446 (1974).

(i) Harrell Committed Misconduct that Prejudiced Criswell.

This court reviews a trial court’s ruling on a motion for a new trial based on possible juror misconduct for an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 301, (1994). A juror’s communication with a third party about a case constitutes misconduct. State v. Depaz, 165 Wn.2d 842, 858-59, 204 P.3d 217 (2009). A party alleging juror misconduct must demonstrate that the misconduct actually occurred. Balisok, 123 Wn.2d at 117-18. The trial court may grant a new trial only where juror misconduct

has prejudiced the defendant. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

When asking whether prejudice occurred, the inquiry is objective rather than subjective. State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). The question is whether the unrevealed or extraneous information could have affected the jury's determinations, not whether it actually did. Briggs, 55 Wn. App. at 55. Whether it actually did is a matter that inheres in the verdict and may not be delved into. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962).

Criswell proved Harrell committed misconduct. He admitted to investigator Berg that during a break in the trial, he spoke on the telephone with an unknown caller about the case. In doing so, he learned the man on trial – Criswell – was someone whom Harrell knew of as an “asshole” because he fought with his girlfriend Jenny (who was a friend of Harrell's) all the time.

This extraneous information was prejudicial to Criswell because it was negative. Logically, it would be difficult to presume innocence when the accused is believed to be an “asshole” from the get-go. Without the information, Harrell might not have convicted. He even said so, although the case law would suggest

that inheres in the verdict. Nonetheless, the facts and circumstances of the case show reasonable doubt in that there was something fishy about the clerk. While the trial court is considered to be in the best position to assess prejudice,⁸ the trial court here did not have the benefit of exhibit 2 as substantive evidence when it denied the motion for a new trial. It therefore abused its discretion. Briggs, 55 Wn. App. at 60.

(ii) Harrell Concealed his Bias Against Criswell

Even the prosecutor agreed that “Mr. Harrell should have spoken up when he figured out who Mr. Criswell was.” RP 67. Significantly, Harrell initially was seated as an alternate and this whole issue of juror bias could have been avoided had he simply spoken up. RP 64-65. His failure to do so amounted to a concealment of bias and deprived Criswell of his right to a fair and impartial jury. See Dalton, discussed above.

In cases that involve a juror’s alleged concealment of bias, the test is “whether the movant can demonstrate that information a juror failed to disclose in voir dire was material, and also that a truthful disclosure would have provided a basis for a challenge for

⁸ In assessing prejudice, it is necessary to compare the particular misconduct with all the facts and circumstances of the trial. The trial judge is in the best

cause. Cho, 108 Wn. App. at 321. “[O]nly those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.” McDonough, 464 U.S. at 556.

Here, Harrell failed to disclose material information – that he knew Criswell and thought he was “an asshole” because he always fought with his girlfriend Jenny. Truthful disclosure of this information would have provided a basis to challenge Harrell as a juror for cause. See RCW 4.44.170(2) (actual bias consists of “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.”)

In finding insufficient evidence that Harrell could not set his bias aside, the court appeared to consider Harrell’s statements that he did not put much stock in his opinion of Criswell in coming to a decision in the case. Those statements inhere in the verdict. What the court should have considered was Harrell’s admission in exhibit 2 that he thought Criswell was “an asshole” who fought with his girlfriend all the time. This is evidence of clear bias against a party.

position to make this comparison. State v. Tigano, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991).

As such, the trial court abused its discretion in denying the motion for a new trial. Dalton, 115 Wn. App. at 715.

C. CONCLUSION

The court erred in refusing to admit exhibit 2 as substantive evidence. When all the evidence presented to the court is properly considered, Criswell was entitled to a new trial based on juror misconduct and/or bias. This Court should grant him one.

Dated this 30th day of May, 2019.

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

May 30, 2019 - 3:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36406-2
Appellate Court Case Title: State of Washington v. Jesse L. Criswell
Superior Court Case Number: 16-1-00326-8

The following documents have been uploaded:

- 364062_Briefs_20190530152622D3014775_2843.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 36406-2-III.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov

Comments:

Copy mailed to: Jesse Criswell PO Box 586 Electric City, WA 99123

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190530152622D3014775