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SUPREME COURT OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

VASQUEZ DEPAZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The respondent, the State of Washington, asks this Court to deny Depaz's petition for review.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Depaz, No. 57081-1-I, filed July 2, 2007 (per curiam, unpublished).

C. STATEMENT OF THE CASE

The defendant, Vasquez Depaz, was charged with four counts of rape of a child in the first degree. CP 7-8. He was tried to a jury before the Honorable John Erlick in July 2005.

During the trial, the jurors were instructed repeatedly not to discuss the case with anyone. See, e.g., RP (7/11/05) 15; RP (7/12/05) 264; RP (7/13/05) 64, 110. But during deliberations, on Friday, July 15, the jury foreperson notified the court that Juror 14 had heard Juror 3 making a telephone call during the lunch break and speaking with a third party about the case and the status of the jury's deliberations. RP (7/15/05) 10. The trial court and the prosecutor thought the allegation should be investigated; the defense attorney suggested waiting until after a verdict had been reached. RP (7/15/06) 11-13. The trial court concluded that the

only reasonable course of action was to investigate further. RP (7/15/05) 11-12.

Juror 14 was then sworn and examined. Juror 14 testified that she was walking with Juror 3 during the lunch break, and that Juror 3 called someone that Juror 14 presumed was Juror 3's husband. Juror 14 further reported that Juror 3's side of the conversation included the remark that "all the evidence is circumstantial," and the response, "I will." RP (7/15/05) 16. Juror 14 testified that she told Juror 3 that she was concerned because of the court's instructions not to talk about the case. RP (7/15/05) 16. Juror 14 was also concerned that Juror 3 was receiving feedback from her husband regarding deliberations. RP (7/15/05) 17-18. Juror 14 felt very strongly that Juror 3 had conducted herself improperly:

JUROR 14: Well, for me, personally, I felt it was disrespectful of the Court, and the process, and the whole two weeks that we've spent because I felt that it contaminated the process.

RP (7/15/05) 19-20. Juror 14 was also under the distinct impression that Juror 3 had been influenced by the outside contact with her husband:

THE COURT: Ma'am, when you said contaminated the process, you meant she might have

been influenced by this conversation? Is that what you mean or --

JUROR 14: I would think so. I felt that she was talking to him for support in some way.

RP (7/15/05) 20.

Juror 3 was then sworn and examined. Juror 3 admitted that she had spoken to her husband on the telephone about the status of the deliberations during the lunch recess. She admitted that her husband had told her to "argue persuasively to convince others of [her] view." RP (7/15/05) 22. Upon further questioning by the court, Juror 3 further admitted that she "may have" told her husband that "the case rested on circumstantial evidence[.]" RP (7/15/05) 22. The following exchange then ensued:

THE COURT: Why did you tell him about that?

JUROR 3: Because we were at a point where it was 11 to 1 and I was beginning to feel that I was being badgered by others.

THE COURT: But what does that have to do with circumstantial evidence or not?

JUROR 3: Probably nothing.

RP (7/15/05) 22-23. Juror 3 then admitted that she had also spoken with her husband about the status of the deliberations before she had left for court that morning. 9RP 23. Under

questioning by the prosecutor, Juror 3 conceded that her husband had told her to "stick to her guns." RP (7/15/05) 24.

The State asked that Juror 3 be dismissed for misconduct. RP (7/15/05) 26. The trial court, while "disturbed" that Juror 3 had discussed the case with a third party, initially denied the State's request because Juror 3 said she would continue to discuss the case with the other jurors. RP (7/15/05) 29-30.

Immediately thereafter, however, the jury informed the court that two other jurors had irreconcilable conflicts that would prevent them from deliberating the following week. RP (7/15/05) 32. The prosecutor renewed his request to excuse Juror 3 on grounds of misconduct, and specifically asked the court to consider the lack of credibility in Juror 3's testimony regarding the extent to which she had discussed the case with her husband, given her demeanor during questioning. RP (7/15/05) 33. Given Juror 3's misconduct, the prosecutor astutely observed that "there would [not] be any hesitation on this Court's part to excuse her had we not known" how the jury was currently voting. RP (7/15/05) 34.

The trial court brought the jury in, ascertained that they were still unable to reach a verdict, and further ascertained that Juror 6 had an unavoidable conflict the following Monday. RP (7/15/05) 38.

After excusing the jury to consult further with counsel, the trial court admitted that its primary difficulty with the State's request to excuse Juror 3 was due to her unsolicited disclosure that she was a holdout juror. RP (7/15/05) 39. The court agreed with the prosecutor that Juror 3 "wasn't being totally transparent with us" during questioning, and the court was very troubled "about why she was discussing the fact that it was a circumstantial evidence case[.]" RP (7/15/05) 40. The court was also increasingly troubled by Juror 3's inability or refusal to answer the court's questions as to why she had told her husband that she thought the case was circumstantial. RP (7/15/05) 42. After extensive discussion, the trial court decided: 1) to excuse the jury for the weekend; 2) to excuse Juror 6 permanently due to the Monday conflict; 3) to have both alternate jurors appear Monday morning; and 4) to reserve ruling on whether to excuse Juror 3. RP (7/15/05) 51-54.

First thing Monday morning, the trial court questioned both alternate jurors, and determined that they remained impartial and fit to serve. RP (7/18/05) 4-10. The court then made its final ruling regarding Juror 3.

The court cited the standard as set forth in RCW 2.36.110, and noted the court's continuing obligation to excuse any juror who

was unfit or unable to perform her duties. RP (7/18/05) 11. The court noted that Juror 3 had admitted telling her husband "that all the evidence was circumstantial," yet she had denied discussing the case with him in any detail. RP (7/18/05) 12. The court concluded that Juror 3 was not being candid with the court, and that she had discussed the case with a third party to an extent beyond what she was willing to admit. RP (7/18/05) 13. The court found that Juror 3 had obviously violated the court's instructions not to discuss the case with third parties, and further found that she had violated the court's instruction to decide the case for herself because she made a promise to her husband to "stick to her guns." RP (7/18/05) 13. The court stated explicitly that Juror 3's misconduct was grounds for dismissal wholly independent from her unsolicited disclosure that she was a holdout juror. RP (7/18/05) 18.

The alternates were seated in place of Juror 3 and Juror 6, and the trial court instructed the reconstituted jury to begin its deliberations anew in accordance with CrR 6.5. RP (7/18/05) 16-17. The jury convicted Depaz of one count of first-degree child rape as charged, and acquitted him of the remaining three counts. CP 36-39.

D. REASONS TO DENY REVIEW

1. JUROR 3 WAS DISMISSED FOR VIOLATING THE TRIAL COURT'S ORDER NOT TO DISCUSS THE CASE WITH THIRD PARTIES, NOT FOR HER OPINIONS REGARDING THE EVIDENCE.

Depaz argues here, as he did in the Court of Appeals, that under this Court's decision in State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005), the trial court was forbidden from excusing Juror 3 as soon as she spontaneously disclosed that she was a holdout juror. See Pet. for Review. But, as found by the Court of Appeals, Elmore does not apply here for two reasons.

First, the condition precedent that triggers application of the Elmore rule – an allegation that a juror is engaging in nullification – is clearly not met. Juror 3's fellow jurors did not allege that she was engaging in nullification. Rather, they reported that she had discussed the case with a third party in violation of the trial court's repeated instructions not to do so. Second, Juror 3 was not excused for any reason related to her views regarding the merits of the State's evidence, as is also required for the application of Elmore. To the contrary, Juror 3 was dismissed because she disregarded the trial court's instructions not to discuss the case with anyone other than her fellow deliberating jurors. In short, Juror 3 was dismissed for misconduct, not for her opinions regarding the

case. Because Elmore is clearly inapplicable, review is unwarranted and Depaz's petition should be denied.

In Elmore, this Court sought to strike a delicate balance between a trial court's duty to investigate allegations of juror misconduct during deliberations and the secrecy of those deliberations "in the rare case *where a deliberating juror is accused of attempting jury nullification.*" Elmore, 155 Wn.2d at 761 (emphasis supplied). In striking this balance, the Court distinguished allegations of jury nullification from other types of juror misconduct:

For example, accusations that a deliberating juror has discussed or considered extrinsic evidence, that the deliberating juror was dishonest during voir dire, or that the juror is biased because she knows the defendants all can be investigated without direct discussion of the juror's views about the merits of the case. *But accusations that a juror intends to engage in nullification go to the quality and coherence of the juror's views on the merits.*

Elmore, 155 Wn.2d at 770 (citations and internal quotations omitted) (emphasis supplied). In drawing this distinction, the Court recognized that, unlike other forms of misconduct, "investigation into a claim that a juror is *engaging in nullification* risks violation of the cardinal principle that juror deliberations must remain secret." Id. (emphasis supplied).

In reaching these conclusions, the Court recognized that holdout jurors may affect jury dynamics in a negative way. Specifically, the Court observed that "ten or eleven members of a jury that have collectively reached agreement on a case's outcome may thereafter collectively agree that the one or two hold-outs – instead of honestly disagreeing about the merits – are actually refusing to apply the law as instructed by the court in an impermissible attempt to nullify the verdict." Id. at 771. Thus, the Court cautioned that trial courts must ensure that jurors accused of nullification are not being so accused merely for holding the minority view.

Given these considerations, and the defendant's constitutional right to a unanimous jury verdict, this Court formulated the following rule:

[W]here a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence.

Elmore, 155 Wn.2d at 778. At the same time, however, the Court expressly limited the application of this rule to cases involving allegations of nullification:

Yet we also emphasize that this standard is applicable *only* in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law.

Id. (emphasis supplied).

This Court's holding could not be clearer. The heightened standard for juror dismissal set forth in Elmore applies only in cases where a juror is accused of attempting to engage in nullification during deliberations. Thus, by its very terms, an accusation of nullification is a condition precedent to application of the Elmore rule.

In this case, Elmore's condition precedent is not satisfied. Juror 3's fellow jurors did not accuse her of "nullification, refusing to deliberate, or refusing to follow the law." Id. at 778. In fact, the juror's actions that gave rise to the accusation of misconduct did not even occur in the jury room during the deliberations themselves. To the contrary, Juror 3 was found to have committed misconduct – and rightfully so – because she called her husband during a lunch break and discussed the case with him. Juror 3's actions in this regard were undisputedly in violation of the trial court's instructions not to discuss the case with anyone other than her fellow

deliberating jurors.¹ This Court should reject Depaz's claim that this case falls within the ambit of Elmore. The petition for review should be denied on this basis alone.

But even if the Elmore standard were applied in this case, in direct contravention of the express holding of Elmore itself, the trial court was still justified in its decision to excuse Juror 3. In Elmore, this Court restricted the ability of a trial court to dismiss a deliberating juror in cases of alleged nullification, but only "where there is any reasonable possibility that *the impetus for dismissal is the juror's view's of the sufficiency of the evidence.*" Id. at 760 (emphasis supplied). Again, this case falls outside the Elmore rule because the reasons for Juror 3's dismissal were unrelated to her opinion of the State's case. Rather, she was dismissed for misconduct, and thus, no error occurred.

As the Supreme Court stated more than 100 years ago, "[p]rivate communications, possibly prejudicial, between jurors and

¹ See, e.g., RP (7/11/05) 14 ("You must not discuss [the case] with anyone else[.]"); RP (7/11/05) 70 ("Again, I ask that you not talk about this case."); RP (7/11/05) 146 ("Do not discuss this case when you go home this evening. Do not talk to anyone about it."); RP (7/12/05) 264 ("Please remember not to talk about this case among yourselves, or with anyone else[.]"); RP (7/12/05) ("Please remember not to talk about this case at home."); RP ("Please remember not to talk about this case."); RP (7/13/05) 110 ("I want to caution you not to talk about this case.").

third persons . . . are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 2d 917 (1892). Thus, any discussion between jurors and third parties about either the substance of the case or the status of the deliberations is clear misconduct that brings any resulting verdict into question. Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988).

In Stockton, the defendant stood trial for capital murder. During the jury's deliberations, several jurors took a lunch break at a local diner. The diner's owner "approached the jurors and inquired whether they had reached a decision yet." Stockton, 852 F.2d at 742. When one juror replied that "they had all decided except for 'one damned woman,'" the diner owner replied that "he thought 'they ought to fry the son of a bitch.'" Id. After the lunch break, the jurors reached a verdict in favor of the death penalty. Id.

In reversing the defendant's death sentence due to the incident at the diner, the Fourth Circuit observed that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial[.]" Stockton, 852 F.2d at 743 (quoting Remmer v. United States, 347 U.S. 227,

229, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954)). Moreover, although Stockton involved misconduct that prejudiced the *defendant*, jurors certainly may be removed during deliberations for misconduct that prejudices the prosecution as well. See United States v. Warner, 498 F.3d 666, 686 (7th Cir. 2007) (despite defendant's claim that a dismissed juror was holding out for acquittal, the trial court properly removed the juror for misconduct in failing to disclose criminal history bearing "significant similarities to the charged conduct at issue in the case").

In sum, "[c]ommunications between a third person and a juror about an ongoing trial constitute misconduct,"² and when such contact occurs before a verdict has been rendered and the misconduct is brought to the trial court's attention, the court exercises sound discretion in dismissing the offending juror. See United States v. Mitchell, 996 F.2d 419, 420 (D.C. Cir. 1993). Such is the case here.

In this case, the trial court's investigation established that Juror 3 had committed misconduct by discussing both the substance of the case and the status of the deliberations with a

² State v. Brenner, 53 Wn. App. 367, 372, 768 P.2d 509 (1989).

third party. This misconduct, wholly independent from the juror's opinions regarding the State's case, was the basis upon which the trial court excused her. RP (7/18/05) 17-18. Accordingly, this case falls outside the scope of Elmore, because there is no "reasonable possibility that the impetus for dismissal is the juror's views of the sufficiency of the evidence." Elmore, 155 Wn.2d at 761.

Nonetheless, Depaz argues that Juror 3 could not be removed from the jury under Elmore because she spontaneously disclosed that she was a holdout juror. Pet. for Review, at 13-14. If this were the law, jurors could *never* be excused for unfitness under RCW 2.36.110, no matter what sort of flagrant misconduct they had committed, so long as they also informed the court that they were planning to vote for acquittal. Fortunately, this is not the law, and this Court should decline Depaz's invitation to make it so. The petition should be denied.

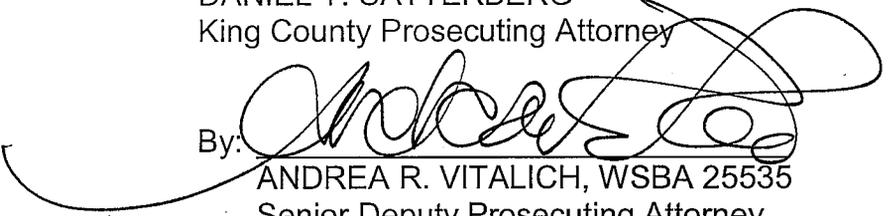
E. **CONCLUSION**

This Court should deny Depaz's petition for review.

DATED this 12th day of May, 2008.

RESPECTFULLY submitted,

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Today I deposited in the mail of the United States of America, postage 3: 11
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1908 E. Madison Street, Seattle, WA 98122, containing a copy of the
Answer to Petition for Review, in STATE V. VASQUEZ DEPAZ, Cause No.
80574-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that
the foregoing is true and correct.

W Brame
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