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NO. 57081-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VASQUEZ DEPAZ,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A trial court has the duty to dismiss any juror that the court determines to be unfit for service. The court's decision to dismiss a juror is reviewed for abuse of discretion. A juror's communication with a third party about the case constitutes misconduct that justifies excusing the juror. In this case, a juror communicated with her husband about the case and the substance of the deliberations in direct violation of the trial court's repeated instructions not to do so. The juror's husband influenced her as to how to conduct herself during deliberations. Did the trial court exercise sound discretion in dismissing the juror for misconduct?

B. 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. 5RP - 8RP.¹

These crimes were charged after 11-year-old M.P. reported to her mother that she had been having sexual intercourse with Depaz, who lived across the courtyard in the same apartment

¹ The verbatim report of proceedings consists of 11 volumes, which will be referenced here in the same manner as in the Brief of Appellant.

complex as M.P. and her mother. 6RP 259. M.P. testified that Depaz had sex with her multiple times during the fall and winter of 2005. She described having sex several times in Depaz's roommate's van, several times in Depaz's friend's apartment, and once in Depaz's apartment when her mother was out of town. 6RP 223-32, 234-36, 238-41, 252. M.P.'s physical examination revealed findings consistent with penetrative trauma. 5RP 48-50. When Depaz was arrested, the police found a school photograph of M.P. in his wallet. 5RP 102-03. M.P. had written "I love you, sexy baby" in Spanish on the back of the photo. 5RP 103; 6RP 262. Depaz testified, and denied having sex with M.P. He claimed that he "didn't even dare to touch her hands." 7RP 88.

During the trial, the jurors were instructed several times not to discuss the case with anyone. 5RP 15; 6RP 264; 7RP 64, 110. During deliberations, however, it came to the trial court's attention after a lunch recess on Friday, July 15th that Juror 14 had overheard Juror 3 speaking to a non-juror on the telephone about the case and the status of the jury's deliberations. 9RP 10. The court and the State thought the allegation should be investigated; defense counsel, however, indicated that she would rather wait until after a verdict had been reached. 9RP 11-13. The court

disagreed, and concluded that the only reasonable course of action was to investigate further. 9RP 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 had placed a call to 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 a response, "I will." 9RP 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. 9RP 16. Juror 14 was also concerned that Juror 3 was receiving feedback from her husband regarding her deliberations. 9RP 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.

9RP 19-20. Juror 14 was also under the distinct impression that

Juror 3 had been influenced by 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.

9RP 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." 9RP 22. Under questioning from the Court, Juror 14 further admitted that she "may have" told her husband that "the case rested on circumstantial evidence[.]" 9RP 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.

9RP 22-23. Juror 3 then admitted that she had also spoken with her husband about the status of deliberations before she had left home 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." 9RP 24.

The State asked the trial court to excuse Juror 3 on grounds of misconduct because she had discussed the case and the deliberations with a third party, and because the third party was in a position to influence her decision. 9RP 26. The trial court, while "disturbed" that Juror 3 had discussed the case with her husband, initially denied the State's request to remove Juror 3 because she had said that she would continue to discuss the case with the other jurors. 9RP 29-30.

Immediately thereafter, however, the jury informed the court that two of the deliberating jurors had irreconcilable conflicts that would prevent them from deliberating the following week. 9RP 32. After the trial court sought input from the parties as to how to proceed, the State renewed its request to excuse Juror 3 on grounds of misconduct. 9RP 32-33. The prosecutor specifically asked the court to consider the credibility of Juror 3's testimony regarding the extent to which she had discussed the case with her husband in light of her demeanor during questioning. 9RP 33. Given the misconduct that Juror 3 had committed, 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 voting. 9PR 34.

The trial court brought the jury in, ascertained that the jury was still unable to reach a verdict, and further ascertained that Juror 6 had an unavoidable conflict all day the following Monday. 9RP 38. After excusing the jury to consult further with counsel, the trial court acknowledged that its primary difficulty with the State's request to excuse Juror 3 was due to the juror's unsolicited disclosure that she was a holdout juror. 9RP 39. The court agreed that Juror 3 "wasn't being totally transparent with us" during questioning, and the court was troubled "about why she was discussing the fact that it was a circumstantial evidence case[.]" 9RP 40. The court also stated that it was becoming 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. 9RP 42. After an extensive discussion of the issue with both parties, the trial court decided to do the following: 1) to excuse the jury for the weekend; 2) to excuse Juror 6 permanently; 3) to bring in both alternate jurors first thing Monday morning; and 4) to reserve its final ruling on whether to excuse Juror 3. 9RP 51-54.

First thing on Monday, July 18th, the trial court questioned both alternate jurors, established that they had not discussed the

case with anyone, and determined that they remained impartial and fit to serve. 10RP 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 that the court had a continuing obligation to excuse a juror who was unable to perform his or her duties. 10RP 11. The court noted that Juror 3 had admitted to telling her husband "that all the evidence was circumstantial," yet she had denied that she had discussed the case with him beyond making that remark. 10RP 12. The court concluded that Juror 3 was not being entirely candid, and had discussed the case with her husband to an extent beyond what she was willing to admit during her testimony. The court found that Juror 3 had obviously violated the court's instructions not to discuss the case with a third party, and further found that she had violated the court's instruction to decide the case for herself because her husband had told her to "stick to her guns," and "she made a commitment to him that she would." 10RP 13. The court further noted that the juror's misconduct was grounds for dismissal wholly independent from her unsolicited disclosure that she was the holdout. 10RP 18.

The trial court seated the alternates in place of the two jurors who had been excused, and the court instructed the reconstituted jury to begin its deliberations anew in accordance with CrR 6.5. 10RP 16-17. The jury convicted Depaz of one count of rape of a child in the first degree, and acquitted Depaz of the remaining three counts. 10RP 19-20; CP 36-39.

At sentencing, Depaz moved for a new trial, claiming that the court had improperly excused Juror 3. 11RP 2-3. The trial court denied the motion, and reiterated that it had excused Juror 3 because she had committed misconduct by discussing the case with her husband. The court further reiterated that its "decision on removing her had nothing to do with the fact that we had inadvertently found out that she may or may not have been the hold-out juror." 11RP 3. The court imposed a standard-range sentence. 11RP 13-14; CP 77-86. Depaz now appeals. CP 87-97.

C. **ARGUMENT**

1. **THE TRIAL COURT EXERCISED SOUND DISCRETION IN DISMISSING A JUROR WHO COMMITTED MISCONDUCT THAT COMPROMISED HER ABILITY TO PERFORM HER DUTIES AS A JUROR.**

Depaz argues that he is entitled to a new trial because he claims that the trial court could not excuse Juror 3 once she

identified herself as a holdout for acquittal. This claim should be rejected. The trial court did not dismiss Juror 3 for any reason related to her status as a holdout or her views of the case. Rather, the court dismissed Juror 3 because she committed misconduct by discussing the case with a third party in direct violation of the court's repeated instructions not to do so, and because the third party had influenced Juror 3's deliberations. The trial court exercised sound discretion in dismissing Juror 3, replacing her with an alternate juror, and instructing the reconstituted jury to begin its deliberations anew.

A trial court has the duty to dismiss any juror that the court determines to be unfit for service:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. After a trial court determines in its discretion that a deliberating juror should be dismissed, the court must ensure that an alternative juror is available and fit for service, and must instruct the reconstituted jury to begin its deliberations anew. CrR 6.5. The statute and the court rule "place a continuous obligation on the trial

court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001).

A juror's misconduct is a valid basis to remove the juror from service under RCW 2.36.110, and if the record establishes that a juror has engaged in misconduct, the trial court acts within its discretion in removing the offending juror. See Jorden, 103 Wn. App. at 229. A juror's communication with a third party about the substance of an ongoing trial constitutes misconduct. State v. Brenner, 53 Wn. App. 367, 372, 768 P.2d 509 (1989). In fact, a deliberating juror's communication with a third party regarding the facts of the case or the status of deliberations is a serious transgression that gives rise to a presumption of prejudice against the validity of the verdict if such misconduct is not discovered until after a verdict has been rendered. Id.; see *also* Stockton v. Virginia, 852 F.2d 740, 743-44 (4th Cir. 1988). Therefore, when the trial court discovers such misconduct prior to a verdict, excusing the juror who has communicated with a third party is a reasonable course of action that ensures that any verdict subsequently obtained is free from any such potential for prejudice. See United States v. Mitchell, 996 F.2d 419, 420 (D.C. Cir. 1993).

Reviewing courts recognize that trial courts are "uniquely situated to make the credibility determinations that must be made" when investigating allegations of juror misconduct. State v. Elmore, 155 Wn.2d 758, 778, 123 P.3d 72 (2005) (quoting United States v. Abbell, 271 F.3d 1286, 1303 (11th Cir. 2001)). In other words, "[t]he trial court is simply in the best position to evaluate the jurors' candor and their ability to deliberate." Elmore, 155 Wn.2d at 769 n.3 (citing United States v. Symington, 195 F.3d 1080, 1085 (9th Cir. 1999)). Accordingly, a trial court's decision to dismiss a juror as unfit under RCW 2.36.110 is reviewed for abuse of discretion. State v. Johnson, 90 Wn. App. 54, 73, 950 P.2d 981 (1998); State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). The trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Based on the standards set forth above, the trial court exercised its discretion both carefully and soundly in this case.

First, the trial court took appropriate steps to investigate as soon as the allegation of Juror 3's misconduct was brought to its attention. Second, the trial court's investigation established that Juror 3 had in fact committed misconduct by discussing the case

and the deliberations with a third party -- misconduct that she admitted, and which fully justified her removal from the jury. Moreover, the trial court found that Juror 3 was not being candid about the extent to which she had discussed the case with her husband -- a finding that the trial court was "uniquely situated to make," and which this court is unable to review. Elmore, 155 Wn.2d at 778.

Furthermore, the trial court's ruling was clearly based on the fact of Juror 3's misconduct, her violation of the court's instructions, and the influence of her husband on the course of her deliberations, and not on her unsolicited disclosure of her status as a holdout. Certainly, the trial court approached the issue cautiously due to Juror 3's unsolicited disclosure. Indeed, the court conceded that the juror's disclosure of the status of deliberations was the reason it was reluctant to grant the State's request to excuse Juror 3. 9RP 39. Nonetheless, after thoughtful consideration and extensive argument from both parties, the court ultimately took an entirely reasonable course of action in removing Juror 3 due to her misconduct. 10RP 14. The trial court's ruling was a proper exercise of its discretion, and should be affirmed.

Nonetheless, Depaz argues that reversal is mandated under the heightened evidentiary standard set forth in State v. Elmore. But the heightened Elmore standard applies only in cases where there has been an allegation that a juror is attempting to engage in nullification, not in cases like this one where it has been established that a juror has engaged in misconduct by discussing the case with a third party. Elmore is thus inapposite, and Depaz's arguments are without merit.

In Elmore, two jurors sent notes to the trial court during deliberations indicating that another juror was refusing to follow the court's instructions and would not follow the law. At the same time, one of the reporting jurors indicated that the problem juror was refusing to find that any of the witnesses were credible. Elmore, 155 Wn.2d at 763. The trial court questioned the two reporting jurors. The reporting jurors confirmed that the information in their notes to the trial court was accurate, and the trial court ascertained that both jurors were complaining about Juror 8. Id. Without questioning Juror 8, the trial court concluded that the notes and testimony had established that Juror 8 was refusing to follow the law and refusing to deliberate, and ruled that Juror 8 would be replaced with an alternate. Id. at 764.

After both parties urged the trial court to question Juror 8, the trial court reluctantly agreed, but only for the purpose of supplementing the record. Elmore, 155 Wn.2d at 764-65. During questioning, Juror 8 stated that the other jurors had misstated what he had said during deliberations. Juror 8 explained that he had said that the jury's decision should be based on whether "we believe the witnesses are credible. If we believe the witnesses are credible, then we vote one way. But if we do not believe what the witnesses say, then we are obligated to vote the other way." Id. at 765. Over defense counsel's objection, the trial court excused Juror 8 for refusing to follow the law, and replaced him with an alternate. Id. The reconstituted jury convicted the defendant. Id. at 766.

On appeal, the Washington Supreme Court reaffirmed that RCW 2.36.110 gives trial judges broad discretion to investigate allegations of juror misconduct and to excuse offending jurors for unfitness in most circumstances. Elmore, 155 Wn.2d at 768-69. However, the court recognized that special concerns arise "in the rare case where a deliberating juror is accused of attempting jury nullification[.]" Id. at 760. The court observed that special concerns arise in such "rare" cases because, unlike other kinds of alleged

misconduct, "accusations that a juror intends to engage in nullification 'go to the quality and coherence of the juror's views on the merits.'" Id. at 770 (quoting Symington, 195 F.3d at 1087-88 n.6). Accordingly, the court adopted a heightened evidentiary standard for cases where a juror is accused of attempting nullification. Specifically, the court held that when nullification is alleged, "a deliberating juror must not be dismissed where there is any reasonable possibility that the impetus for dismissal is the juror's views of the sufficiency of the evidence." Elmore, 155 Wn.2d at 761.

In reaching this conclusion, however, the Elmore court was very specific in limiting its holding only to cases where a juror has been accused of attempting nullification:

[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. *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. at 778 (emphasis supplied). Moreover, the court reaffirmed that other forms of alleged juror misconduct still "can be investigated without direct discussion of the juror's views about the merits of the

case," and a juror's dismissal on grounds other than nullification would not be subject to any heightened standard. Id. at 769-70. Furthermore, the court observed that "*both the defendant and the State* have a right to an impartial jury," and thus a trial court retains broad discretion to dismiss jurors who are shown to be unfit. Id. at 773 (emphasis in original).

Despite the specific language in Elmore to the contrary, Depaz argues that the heightened evidentiary standard applies in this case, and thus he claims that the trial court was divested of any ability to discharge Juror 3 as soon as she disclosed that she was the holdout juror. But Elmore itself makes abundantly clear that the heightened standard applies only in cases where a juror is accused of attempting nullification. As discussed at length above, this is not such a case. Juror 3 was accused of – and admitted to – discussing the case and the deliberations with a third party, and this misconduct was the sole basis for her dismissal. Therefore, Juror 3's unsolicited disclosure that she was a holdout is simply not relevant, and Elmore does not apply.

In effect, Depaz asks this court to hold that no juror can ever be excused for unfitness, even for flagrant and egregious misconduct wholly unrelated to jury nullification, so long as he or

she is voting for acquittal. This court should decline Depaz's invitation to create such a rule, and hold in accord with Elmore that the heightened standard does not apply. Moreover, even if this court were to apply a heightened evidentiary standard here, that standard is met because Juror 3's misconduct and the reasons for her dismissal are wholly independent from her opinions as to the merits of the case. Elmore is inapplicable for this reason as well.

The trial court properly exercised its discretion under RCW 2.36.110 in excusing Juror 3 for misconduct, and the court followed the appropriate procedures under CrR 6.5 in ensuring that the alternates were fit for service and in instructing the jurors to begin their deliberations anew. In so doing, the trial court fulfilled its continuing obligation to excuse any juror who is unfit and unable to perform her duties, and to ensure a fair trial for both the defendant and the State. This court should reject Depaz's claim, and affirm.

D. CONCLUSION

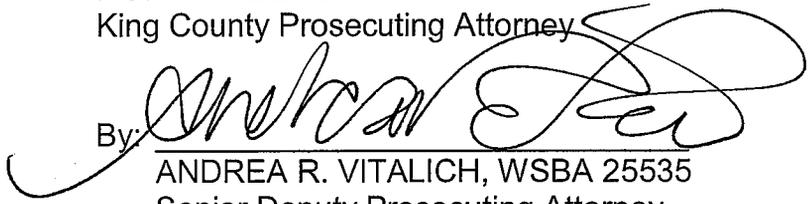
The trial court exercised sound discretion in dismissing a juror who had committed misconduct and violated the court's instructions not to discuss the case with a third party. Moreover, both the misconduct alleged and the basis for the trial court's decision were wholly unrelated to the juror's opinion as to the merits

of the case, and thus the rationale of State v. Elmore does not apply. This court should reject the defendant's claim, and affirm his conviction for rape of a child in the first degree.

DATED this 22nd day of November, 2006.

RESPECTFULLY submitted,

NORM MALENG
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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. VASQUEZ DEPAZ, Cause No. 57081-1-I, in the Court of Appeals, Division I, 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

Name

Done in Seattle, Washington

11/22/06

Date

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