

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VASQUEZ DEPAZ,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Under this Court's precedent, a deliberating juror accused of engaging in nullification should not be dismissed and replaced with an alternate if there is any reasonable possibility that the accusation stems from the juror's opinion of the merits of the State's case. On the other hand, trial courts are vested with considerable discretion to dismiss deliberating jurors for misconduct unrelated to their opinions regarding the evidence. In this case, a deliberating juror spoke with a third party about the evidence in the case and the status of the jury's deliberations in violation of the trial court's repeated instructions not to do so. Did the trial court properly exercise its discretion in dismissing the juror for misconduct and replacing her with an alternate?

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.

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 15th, the jury foreperson notified the trial 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 the jury's 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 with her husband on the telephone about the status of the jury's deliberations during the lunch recess. She also 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[.]”¹ 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 further questioning, 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.

¹ As an aside, Juror 3's statement to her husband that the case was circumstantial is plainly incorrect. To the contrary, the child victim testified at trial and related her personal experiences of vaginal intercourse with Depaz that had occurred on numerous occasions prior to her 12th birthday. RP (7/12/05) 228-31, 235-41, 249-52.

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 trial court to consider the lack of 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. 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 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, spontaneous 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 credible, 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 clearly 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 based solely on the evidence because she had promised her husband to "stick to her guns." RP (7/18/05) 13. Moreover, the court explicitly found 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. The Court of Appeals affirmed.

C. ARGUMENT

- 1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING JUROR 3 FOR DISCUSSING THE CASE WITH A THIRD PARTY IN DIRECT VIOLATION OF THE TRIAL COURT'S INSTRUCTIONS.**

Depaz argues here, as he did in the Court of Appeals, that the trial court was forbidden from dismissing Juror 3 as soon as she spontaneously disclosed that she was a holdout juror. Depaz relies

on this Court's decision in State v. Elmore, 155 Wn.2d 758, 128 P.3d 72 (2005), holding that a deliberating juror may not be excused where there is any reasonable possibility that the juror's dismissal is related the juror's opinions regarding the evidence. But Elmore does not apply in this case for two reasons.

First, the condition precedent that triggers the Elmore rule – an allegation that a juror is attempting to engage in jury nullification – is clearly not met here. Juror 3's fellow jurors did not accuse her of engaging in nullification. Rather, Juror 3 was brought to the trial court's attention solely because she had discussed the case outside the jury room with a third party, in direct violation of the trial court's repeated instructions not to do so. Second, Juror 3 was not dismissed from the jury for any reason related to her views of the merits of the case, as is also required for the application of the Elmore rule. To the contrary, Juror 3 was dismissed because she disregarded the court's instructions not to discuss the case with anyone other than her fellow deliberating jurors. In sum, Juror 3 was dismissed for misconduct, not for her opinions regarding the State's case, and the trial court exercised its discretion properly. This Court should hold that Elmore does not apply in these circumstances, and affirm.

The trial court has the continuing duty to ensure the integrity of the jury by dismissing 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. When the trial court determines that a deliberating juror should be dismissed, the court must then ensure that an alternate juror is available and fit for service, and the court 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. Jordan, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), rev. denied, 143 Wn.2d 1015 (2001).

A juror's misconduct is a valid reason to remove the juror from service; if the record establishes that a juror has engaged in misconduct, the trial court exercises sound discretion in removing the offending juror. See Jordan, 103 Wn. App. at 229. A juror's communication with a third party about the case 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 evidence or the status of deliberations is a serious transgression that gives rise to a presumption of prejudice against the validity of any verdict that is subsequently rendered. Id.; see also Stockton v. Virginia, 852 F.2d 740, 743-44 (4th Cir. 1988). Therefore, excusing a juror who has communicated with a third party is an entirely reasonable course of action. See United States v. Mitchell, 996 F.2d 419, 420 (D.C. Cir. 1993).

Furthermore, reviewing courts defer to the trial court's credibility determinations in investigating juror misconduct because the trial court "is simply in the best position to evaluate the jurors' candor[.]" Elmore, 155 Wn.2d at 769 n.3. Accordingly, a trial court's decision to dismiss an unfit juror under RCW 2.36.110 is reviewed only for manifest abuse of discretion. State v. Johnson, 90 Wn. App. 54, 73, 950 P.2d 981 (1998).

Unlike other forms of juror misconduct, however, an allegation that a deliberating juror is engaging in jury nullification gives rise to concern that the trial court may intrude upon the secrecy of the jury's deliberations when investigating the allegation. Therefore, in Elmore, this Court sought to strike a delicate balance between the 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. In striking this balance, the Court distinguished allegations of 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).

In making these observations, the Court recognized that holdout jurors in particular may affect jury dynamics in a negative way. Accordingly, the Court formulated the following rule to be applied "in the rare case" where a juror is 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.

Elmore, 155 Wn.2d at 778. At the same time, however, the Court expressly limited the application of this heightened standard 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).

In this case, Elmore's condition precedent – an allegation of nullification – is clearly not satisfied. Juror 3's fellow jurors did not accuse her of "nullification, refusing to deliberate, or refusing to follow the law." Id. In fact, Juror 3's actions that gave rise to the allegation of misconduct did not even occur in the jury room during the deliberations themselves. To the contrary, Juror 3 was accused of, and begrudgingly admitted to, committing misconduct by calling her husband during a lunch break and discussing the case with him. Juror 3's actions in this regard undisputedly violated the trial court's oft-repeated instructions not to discuss the case with anyone

other than her fellow deliberating jurors.² Thus, this case falls entirely outside the scope of the Elmore rule, and this Court may affirm for this reason alone.

But even if the heightened Elmore standard *were* applied in this case, in direct contravention of the express holding of Elmore itself, the trial court still was justified in excusing 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 views of the sufficiency of the evidence.*" Elmore, 155 Wn.2d at 760 (emphasis supplied). Again, Elmore does not justify a new trial for Depaz because the reasons for Juror 3's dismissal were unrelated to her views regarding the case. Juror 3 was dismissed solely for misconduct, and no error occurred.

² 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) 326 ("Please remember not to talk about this case."); RP (7/12/05) 351 ("Please remember not to talk about this case at home."); RP (7/13/05) 37 ("Now, please remember not to talk about this case."); RP (7/13/05) 64 ("Please remember not to talk about this case."); RP (7/13/05) 110 ("I want to caution you not to talk about this case. I realize you've heard all the evidence and testimony in this case, but you still have not been instructed on the law. And we do not want you to have outside influence by other people's opinions.").

As the Supreme Court stated more than 100 years ago, "[p]rivate communications, possibly prejudicial, between jurors and 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 the case or the status of deliberations is clear misconduct that brings any resulting verdict into question. See Stockton, 852 F.2d at 742-43 (reversing death sentence where diner owner, during lunch recess, remarked to deliberating jurors in a capital case that "they ought to fry the son of a bitch").

Furthermore, a juror's status as a holdout for acquittal does not immunize that juror from dismissal for misconduct or other reasons unrelated to his or her opinion of the case. To the contrary, trial courts are vested with considerable discretion to dismiss a deliberating juror for misconduct or unfitness, even if that juror is identified as a holdout. See, e.g., Commonwealth v. Olavarria, 71 Mass. App. Ct. 612, 615-22, 885 N.E.2d 139, rev. denied, 451 Mass. 1109, 889 N.E.2d 435 (2008) (lone holdout for acquittal properly excused for conducting outside research regarding legal terms including "reasonable doubt"); United States

v. Warner, 498 F.3d 666, 686 (7th Cir. 2007) (juror properly removed for failing to disclose criminal history similar to the crimes charged); Shotikare v. United States, 779 A.2d 335, 340-47 (D.C. Ct. App. 2001) (trial court properly excused deliberating juror for threatening other jurors, not to break jury deadlock); Perez v. Marshall, 119 F.3d 1422, 1426-28 (9th Cir. 1997) (lone holdout for acquittal justifiably dismissed for emotional unfitness); United States v. Barone, 114 F.3d 1284, 1305-09 (1st Cir. 1997) (juror properly dismissed for bias after receiving information from a third party during deliberations). In sum, so long as the trial court's reasons for dismissing a deliberating juror are unrelated to the juror's status as a holdout, the trial court may still exercise its discretion accordingly.

It is undisputed that "[c]ommunications between a third person and a juror about an ongoing trial constitute misconduct[.]" Brenner, 53 Wn. App. at 372. Therefore, when such serious misconduct is brought to the trial court's attention before a verdict has been rendered, the trial court exercises sound discretion in dismissing the offending juror. See Mitchell, 996 F.2d at 420. Such is the case here.

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 jury's deliberations with a third party. Indeed, Juror 3 admitted to committing such misconduct, although the trial court found that her testimony was not credible with respect to how extensive those discussions had been. Juror 3's misconduct, wholly independent from her opinions regarding the case, was the sole basis upon which the trial court excused her. RP (7/18/05) 17-18. Therefore, 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. Juror 3's unsolicited disclosure of her status as a holdout was unrelated to the fact of her misconduct. Rather, Juror 3's unsolicited disclosure simply prompted the trial court to proceed with caution and to reserve its ruling over the weekend to think the matter through. Ultimately, the trial court exercised its discretion carefully, thoughtfully and correctly based on the inescapable fact of Juror 3's misconduct.

D. CONCLUSION

The trial court properly exercised its discretion in dismissing a deliberating juror who had committed misconduct in direct

violation of the trial court's instructions. For the foregoing reasons, this Court should affirm Depaz's conviction for rape of a child in the first degree.

DATED this 29th day of July, 2008.

RESPECTFULLY submitted,

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King County Prosecuting Attorney

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FILED AS ATTACHMENT TO E-MAIL

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 Supplemental Brief of Respondent, 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.

Bora Ly
Done in Seattle, Washington

August 1, 2008

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 Motion for Extension, 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.

Bora Ly
Done in Seattle, Washington

August 1, 2008