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FILED
COURT OF APPEALS
DIVISION II

83525-0

NO. 37172-3-II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

FRANCISCO MILLAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin, Judge

No. 07-1-01782-0

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny the defense motion for a new trial or in the alternative to recall and interview the jurors where there was no evidence that extrinsic factors affected the jury verdict and where the defense failed to meet their burden to show that anything was improper with the verdict?

B. STATEMENT OF THE CASE.

1. Procedure

On April 2, 2007, Francisco Millan was charged with one count of Unlawful Possession of a Firearm in the First Degree and one count of Driving While License Suspended or Revoked in the First Degree. CP 1-2. The defendant pleaded guilty to the suspended license count on October 29, 2007. CP 10-13. The case proceeded to trial before a jury on the firearm count on October 30, 2007. RP 50. The jury returned a guilty verdict. CP 24.

After the trial was completed, the prosecutor and defense counsel spoke with the jurors. CP 50-51, 62. As a result of that contact, defense counsel had a concern that the jurors may have considered improper matters during deliberation. CP 49, 50-51. Prior to sentencing, defense moved for a new trial, or in the alternative for the jurors to be called in and

questioned. CP 49, 50-51. On December 7, 2007 the court denied the motion and the defendant was sentenced.

This appeal was filed timely on January 3, 2008. CP

2. Facts

On April 1, 2007 Tacoma Police were dispatched to a report of a disturbance in Tacoma's Hilltop area. RP 59, ln. 17 to p. 60, ln. 22. The report was specifically of the defendant assaulting his wife, however, in response to a motion in limine by the defendant, the court prohibited the officers from referring to the assault. RP 16, ln. 22 to p. 17, ln. 14.

Officers located the vehicle and activated their lights, but the vehicle was slow to stop. RP 63, ln. 17 to p. 64, ln. 2. Upon stopping the defendant's vehicle, officers contacted the defendant and his passenger and removed them from the vehicle. RP . 64, ln. 19-25. After conducting their investigation, the officers arrested the driver of the vehicle, Francisco Millan. RP 65, ln. 17 to p. 66, ln. 3.

Officer Caber conducted a search of the vehicle incident to arrest. RP 89, ln. 22 to p. 90, ln. 3. Officer Caber clearly observed through the window that there was a pistol behind the driver's seat. RP 91, ln. 6-17. The pistol was located on the floor between the driver's seat and the back seat. RP 96, ln. 2-4. The gun was sitting on its spine, with the magazine pointing to the top of the car and the barrel pointing toward the back end of the car. RP 91, ln. 20 to 92, ln. 1.

The jury returned a verdict of guilty to the charge of unlawful possession of a firearm in the first degree. CP 24. After the verdict, counsel for both parties met with the jury to discuss the case with them. Defense counsel Berneburg was not present as he had to leave to attend to matters in Lewis County. RP 291, ln. 5-6. But his associate, Patricia Todd was present, as was Deputy Prosecuting Attorney Maureen Goodman. RP 291, ln. 6-8; CP 50. During the post-verdict discussion, there was discussion of the disturbance call that led to officers contacting Millan's vehicle. *See* CP 51, 62. Both Ms. Todd and Ms. Goodman gave brief accounts of the discussion, which accounts differed from each other. Ms. Todd indicated that two jurors stated that they believed that the 911 disturbance call to the officers included a report of a gun being brandished and that several jurors nodded their heads to that. CP 51. Ms. Goodman indicated that a juror asked if the 911 call had included mention of the handgun, and she answered that it did not, to which some jurors nodded their heads. CP 62; RP 294, ln. 14-17.

Based upon Ms. Todd's account, the defense requested a new trial, or in the alternative to question the jurors about what happened. CP 49; 52-53; RP 293, ln. 4-20. The court denied the defense motion and proceeded to sentence Millan. RP 297, ln. 22 ff. In denying the motion, the court indicated that it was the defendant's burden. RP 295, ln. 13, 21-22. The court noted that there was no indication from any of the jurors

that anything improper actually occurred. RP 295, ln. 13-19. The court noted that there was no information to suggest that anything extrinsic affected the verdict. RP 295, ln. 22-24. The court then went on to note that the evidence put forth by Ms. Todd was consistent with ordinary and proper jury deliberations. RP 295, ln. 24 to p. 296, ln. 10. Ultimately, the court held that the defense had failed to meet their burden to put forth sufficient evidence to even warrant further investigation. *See* RP 296, ln. 23 to p. 297, ln. 22.

C. ARGUMENT

1. THE TRAIL COURT PROPERLY DENIED THE DEFENSE MOTION FOR A NEW TRIAL AND TO RECALL AND INTERVIEW THE JURORS WHERE THERE WAS NO EVIDENCE THAT EXTRINSIC FACTORS AFFECTED THE JURY VERDICT.

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). Substantial deference is due the trial court's exercise of its discretion in handling situations involving potential juror bias or misconduct. *See, Hawkins*, 72 Wn.2d at 567 (holding that trial court did not abuse its discretion); *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir. 2003); *United States v. Aiello*, 771 F.2d 621, 629 (2d Cir. 1985); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106, 105 S. Ct. 2340, 85 L.Ed.2d 855

(1985), *United States v. Kelly*, 722 F.2d 873, 881 (1st Cir. 1983), *cert. denied*, 465 U.S. 1070, 104 S. Ct. 1425, 79 L.Ed.2d 749 (1984).

Moreover, the determination of whether misconduct has occurred lies within the discretion of the trial court. *State v. Havens*, 70 Wn. App. 251, 255-56, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993). Not all instances of juror misconduct merit a new trial; there must be prejudice. *State v. Barnes*, 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997).

It is well-settled in Washington that while juror affidavits or testimony may be used to establish jury misconduct involving outside influences, such evidence may not be used to contest the thought processes involved in reaching a verdict. *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962); *Hendrickson v. Konopaski*, 14 Wn. App. 390, 393, 541 P.2d 1001 (1975). Testimony may not be considered if “the facts alleged are linked to the juror's motive, intent, or belief, or described their effect upon him”; however, it may be considered if “that to which the juror testifies can be rebutted by other testimony without probing a juror’s mental processes.” *State v. Crowell*, 92 Wn.2d 143, 146, 594 P.2d 905 (1979) (quoting *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962)). Evidence concerning the mental processes of jurors, including their expressed opinions and when they made up their minds, inheres in the verdict. *State v. Aker*, 54 Wash. 342, 345-46, 103 P.

420 (1909); *Hosner v. Olympia Shingle Co.*, 128 Wash. 152, 154-55, 222 P. 466 (1924); *see also*, *State v. Hall*, 40 Wn. App. 162, 169, 697 P.2d 597 (1985) (third party's impression that juror had made up mind before end of trial inheres in verdict).

The law of Washington on this subject is consistent with the common law and federal law. The "near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict". *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), *citing* 8 J. Wigmore, Evidence § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961). The only exceptions to the common-law rule were in situations in which an outside influence was alleged to have affected the jury. *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 36 L.Ed.917 (1892) (testimony of jurors describing how they heard and read prejudicial information not admitted into evidence was admissible), *Parker v. Gladden*, 385 U.S. 363, 365, 87 S. Ct. 468, 17 L.Ed.2d 420 (1966)(testimony from jurors showing non-juror or third party influence admissible), *Remmer v. United States*, 347 U.S. 227, 228-230, 74 S. Ct. 450, 98 L.Ed.654 (1954) (testimony on bribe offered to juror admissible). *See also*, *Smith v. Phillips*, 455 U.S. 209 (1982) (juror in criminal trial had submitted an application for employment at the District Attorney's office).

In situations that did not fall into this exception for external influence, however, the Supreme Court adhered to the common-law rule against admitting juror testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. at 117 (court upholds lower court's refusal to consider juror affidavits or to hold evidentiary hearing on whether jurors were engaged in drinking and drug use during recesses of trial); *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L.Ed.1300 (1915) (testimony of jurors as to how damages were calculated inadmissible); *Hyde v. United States*, 225 U.S. 347, 384, 32 S. Ct. 793, 56 L.Ed.1114 (1912) (testimony of jurors inadmissible to show matters which essentially inhere in the verdict itself).

A trial court faces a delicate situation when the allegations of potential misconduct stems from a dispute between jurors as the dispute might stem from a disagreement about the case. *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999). *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). This is because a trial judge must not compromise the secrecy of jury deliberations. *Symington*, 195 F. 3d at 1086.

The common law principle was essentially codified in the Federal Rules of Evidence 606(b).¹ See also, *United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988) (“the alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b)”); *United States v. Barber*, 668 F.2d 778, 786-87 (4th Cir. 1982). Evidence that a juror had been threatened by the jury foreman held inadmissible to impeach verdict under Rule 606(b). Even though Washington did not adopt the equivalent of the federal rule, as explained above, the standard in Washington remains essentially the same.

In *State v. Aker*, 54 Wash. 342, 345-346, 103 Pac. 420 (1909), the court held that juror affidavits may not be considered to show that, during a recess taken in the prosecution’s case in chief, jurors went back into the jury room and commented about the defendant’s guilt. The court also forbade use of a juror’s affidavit to show that he assented to a guilty

¹ Which provides: (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

verdict because of intimidation by other jurors. *Aker*, 54 Wash. at 345-346.

Public policy forbids inquiries into the jury's private deliberations; the mental processes by which jurors reach their conclusion are all factors inhering in the verdict. *State v. Havens*, 70 Wn. App. 251, 256, 852 P.2d 1120 (1993); *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989).

Nor does due process require a new trial every time a juror has been placed in a potentially compromising situation, as it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982). Rather, "[w]hen a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury." *Williams v. Bagley*, 380 F.3d 932, 945 (6th Cir. 2004).

If a juror communicates with a third person about an ongoing trial, this constitutes misconduct; it warrants a new trial only if such communications prejudice the defendant. *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986), see, *State*

v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). At a minimum, a juror must discuss the pending case with a non-juror to create misconduct. *State v. Brenner*, 53 Wn. App. 367, 372, 768 P.2d 509 (1989).

The United States Supreme Court has stated that the remedy for allegations of juror partiality based on unauthorized juror contacts is a hearing in which the defendant has the opportunity to prove actual juror bias. *Smith*, 455 U.S. at 215, (citing *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L.Ed.654, 1954-1 C.B. 146 (1954)). A *Remmer* hearing is required “in all cases involving an unauthorized communication with a juror or the jury from an outside source that presents a likelihood of affecting the verdict.” *United States v. Rigsby*, 45 F.3d 120, 123 (6th Cir.), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2015, 131 L.Ed.2d 1013 (1995).

A *Remmer* hearing is not constitutionally required in every circumstance where allegations of jury misconduct are raised. *Rigsby*, 45 F.3d at 124. The trial court enjoys wide discretion in determining the amount of inquiry, if any, that is necessary to respond to such allegations. *United States v. Logan*, 250 F.3d 350, 378 (6th Cir.), *cert. denied*, 534 U.S. 895, 122 S. Ct. 216, 151 L.Ed.2d 154 (2001); *see also*, *Rigsby*, 45 F.3d at 124-25; *United States v. Olano*, 62 F.3d 1180, 1192 (9th Cir. 1995), *United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir.

2000) (district courts are not required to hold evidentiary hearings each time there is an allegation of jury misconduct).

In *Tanner v. United States*, 483 U.S. 107, 116-34, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court held that the trial court's failure to hold a post-verdict hearing, based on certain jurors' allegations that some jurors consumed alcohol and drugs during recesses of the trial, did not violate the defendant's Sixth Amendment right to a fair and impartial jury. The Court distinguished cases involving an "extrinsic influence or relationships" from cases involving an inquiry into the "internal processes of the jury." *Tanner*, 483 U.S. at 120. This distinction is necessary to preserve "one of the most basic and critical precepts of the American justice system: the integrity of the jury." *Logan*, 250 F.3d at 379; *see also, Tanner*, 483 U.S. at 119-20. The Court found that the defendant's Sixth Amendment interest in an impartial, "unimpaired" jury was protected by "several aspects of the trial process," including voir dire, and the opportunity for jurors and court personnel to report observable inappropriate juror behavior before a verdict is rendered. The Court stressed that the distinction made between external and internal influences on the jury is not based on whether the juror was inside or outside the jury room when the alleged misconduct occurred, but rather on the "nature of the allegation." *Tanner*, 483 U.S. at 117-18.

It is generally considered less serious if the misconduct allegation does not involve outside influences or extraneous information. *See, United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir. 1974) (district court did not err in denying a mistrial, even though eleven jurors prematurely discussed the case during recesses, and nine of the jurors expressed premature opinions about the defendant's guilt). Claims that do not involve an outside or extrinsic influence, but rather only a potential intra-jury influence, are not subject to a *Remmer* hearing or further inquiry by the trial court. *United States v. Briggs*, 291 F.3d 958, 963 (7th Cir) (affirming district court's denial of motion for post-verdict hearing based on a juror's allegations that jurors and the jury foreman behaved improperly during deliberations, including exerting "extreme and excessive pressure on individuals to change votes"), *cert. denied*, 537 U.S. 985, 123 S. Ct. 458, 154 L.Ed.2d 350 (2002); *United States v. Prospero*, 201 F.3d 1335, 1340-41 (11th Cir.) (district court's refusal to grant mistrial or an inquiry into alleged misconduct by two jurors engaged in a "heated discussion" away from the other jurors, did not amount to an abuse of discretion and, in fact, would have "invited reversible error" if a contrary decision had been made), *cert. denied*, 531 U.S. 956, 121 S. Ct. 378, 148 L. Ed. 2d 292 (2000); *see also, United States v. Yoakam*, 168 F.R.D. 41, 45-46 (D. Kan. 1996) (denying request for investigation based

on allegations of juror misconduct obtained from courthouse guard, who overheard two jurors participating in a “heated discussion” concerning their deliberations).

Here, after the jury had delivered its verdict, counsel for the parties went back to the jury room and spoke with the jurors. CP 50; RP 291, ln. 6-8; RP 294, ln. 14-17. Patricia Todd, one of the attorneys for the defendant, submitted a declaration in which she stated that during the post-verdict discussion with the jurors, two jurors stated that they believed the 911 disturbance call that directed the officers to the defendant’s vehicle included a gun being brandished. CP 51. Deputy Prosecuting Attorney Maureen Goodman indicated that she recalled the juror’s comments differently than Ms. Todd. RP 294, ln. 14-15. Ms. Goodman stated that during the post-verdict discussion, a juror asked if the 911 call had included mention of the handgun, and Ms. Goodman advised that juror it did not, and that some jurors then nodded and some did not. CP 62; RP 295, ln. 15-17.

The defense requested a new trial, or in the alternative that the jury be recalled and interviewed. RP 289, ln. 24 to p. 290, ln. 1; RP 293, ln. 4-20. The court denied the defendant’s request. RP 297, ln. 22. In making that decision, the trial court properly noted that burden was on the defendant. RP 295,ln. 13-15. The court noted that there was no evidence

that something extrinsic affected the jury verdict. RP 295, ln. 21-24; RP 296, ln. 23 to p. 297, ln. 2. Even if Ms. Todd's account were accepted as correct, the court clearly viewed the facts as consistent with differences in juror recollections that would properly be sorted out during the process of juror deliberation. RP 295, ln. 24 to p. 196, ln. 7.

The trial court did not abuse its discretion when it found that Ms. Todd's declaration was insufficient to give any indication that extrinsic evidence was introduced into the jury deliberations. Accordingly, the trial court's denial of the defendant's motion was proper and not error. The court would have in fact erred if it had granted the motion and inquired into the juror's deliberations. Thus, the court's denial of the defendant's motion was proper.

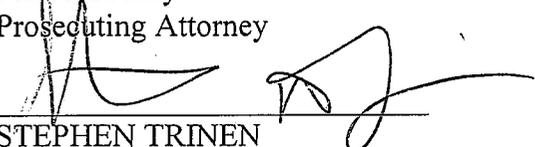
D. CONCLUSION

The trial court did not err where it found that there was no evidence of extrinsic evidence influencing the jury's deliberations.

Accordingly, the court properly denied the defendant's motions for a new trial and to recall the jurors for questioning about their deliberative process.

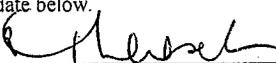
DATED: January 21, 2009.

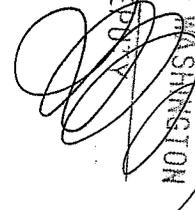
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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