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SUPREME COURT
STATE OF WASHINGTON
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NO. 95920-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS MUSSIE BERHE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the trial court reasonably deny the defendant's request for a hearing based on the defendant's claim of juror misconduct premised on an allegation that one juror voted guilty because she perceived that the other jurors exhibited racial bias towards her?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

A jury convicted the defendant of first-degree murder and first-degree assault for the execution-style killing of Everett Williams and shooting of Michael Stukenberg. CP 1-2, 285, 287.¹ In an unpublished opinion, the Court of Appeals affirmed his conviction. This Court then accepted review of the juror bias issue.

2. SUBSTANTIVE FACTS

Voir dire began on January 25, 2016, using the "struck method," wherein each juror is assigned a number. See 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 4002, at 165 (1997). The juror who would ultimately be seated as juror 6 was juror 69 of the venire.² 1/26RP 563. The Honorable Judge Mariane Spearman

¹ A detailed recitation of the shooting is contained in the State's Brief of Respondent.

² To avoid confusion, the juror will be referred to as juror 6 throughout.

began *voir dire* by explaining that through a lifetime of experiences people form biases and prejudices and *voir dire* is an attempt to discover these biases and prejudices that might make it difficult for any particular juror to decide a case with impartiality. 1/25RP 55-56. This was followed by a number of general questions from the court.

Juror 6 indicated that she had been a juror on a criminal case before. 1/25RP 60. She also answered that she had a close friend or relative who had been convicted of a crime and was treated unfairly by the criminal justice system. 1/25RP 78-79. When asked about her view on firearms, juror 6 said that she felt that if a person owned a gun, at some point they would use it. Id. at 81. She admitted that her feelings about firearms “might” make it hard to listen to the evidence and decide the case on the facts. Id.

During the course of *voir dire*, the jurors were asked about their general thoughts of the police and how race might play a role in policing. 1/26RP 485-89. Juror 6 did not respond. Id. She did respond when asked if she had a family member or close friend who had been accused of a crime. 1/26RP 491-92. She disclosed that her nephew had been convicted of theft even though he said he didn’t do it. 1/26RP 499. She felt it was unfair that his crime partners “got off” while he received a 43 month

sentence. Id. Juror 6 was one of 14 jurors selected to hear the case.

1/26RP 562-64.

Although the parties had agreed that the alternate jurors would be selected at random, Judge Spearman noted at the close of trial that juror 6 was the only Black juror and that it would be unfortunate if she were chosen as the alternate. 2/24RP 3346. Thus, the parties agreed that juror 6 would not be the alternate. 2/24RP at 3346-51. The jury began deliberations on February 24. Id. Deliberations began anew the next morning due to a juror's illness and an alternate having to be brought in. 2/25RP 3355-56.

After deliberating for four days, the jury returned a guilty verdict on both counts. 3/1RP 3363. The court polled the jury, asking each individual juror if the verdicts were the verdicts of the jury and if the verdicts were each juror's individual verdicts. 3/1RP 3363-66. Each juror, including juror 6, unequivocally answered both questions in the affirmative. Id. In speaking with the jurors post-verdict, Judge Spearman did not detect any disharmony. 3/10RP 11. The record contains no evidence of any disharmony having occurred while the jury was deliberating.³

³ The jury sent out a single question asking for a street map. CP 283-84.

Nine days after the verdict, the parties appeared before the court. 3/10RP 2-3. At that time, the defense disclosed that they had been in contact with juror 6, along with four other jurors.⁴ 3/10RP 6-7. The defense claimed that juror 6 had “acquiesced” in the guilty verdict.⁵ 3/10RP 2-3. The defense asked for more time to investigate. Id. Judge Spearman informed the parties that one juror had contacted the court unhappy about being contacted by the defense. 3/10RP 7, 11. The defense argued that they had every right to contact any juror they wanted, with or without the court’s permission. 3/10RP 22. The court disagreed. The court stated that a letter would be sent to each juror informing them that counsel wished to speak with them. 3/10RP 11. The letter contained contact information for the prosecutor and defense. CP 292.

Fifteen days later, juror 6 sign an affidavit the defense crafted. CP 474-78. The defense then filed a motion for a new trial based on the affidavit. CP 452-87. Although the defense admitted speaking with seven other jurors, the defense did not provide an affidavit from any other juror or disclose the information they had obtained from the jurors. CP 463; 4/6RP 95.

⁴ Judge Spearman indicated that juror 6 had come into court after having contacted the defense, and that she had been referred to a counselor the court uses for jurors who have developed issues post-trial. 3/10RP 6.

⁵ The defense did not identify or disclose what the other four jurors said.

Per her affidavit, juror 6 stated that she believed the defendant was innocent. CP 474. She said she “felt personally attacked and belittled during the deliberation process.” CP 475. She stated she “felt these attacks carried an implicit racial bias.” Id. She said she felt this way because other jurors were dismissive of her and accused her of being close-minded. CP 475. She asserted that is why she voted guilty despite believing the defendant was innocent. CP 476. No particular jurors were identified by juror 6 as exhibiting racial bias. However, juror 6 did state that there were initially four jurors who voted not guilty or were uncertain, but that she was the only one accused of being “partial” and “close-minded,” thus suggesting that it was the eight jurors who did not agree with her position who were exhibiting racial bias. CP 475. There was no allegation that any juror voted to convict the defendant based on the defendant’s race.

The State filed a response with affidavits from six jurors. CP 322-28. These six jurors were asked two questions: (1) Did you personally do anything to juror 6 which was motivated by racial bias during deliberations, and (2) Did you observe any other juror do anything to juror 6 which appeared to be motivated by racial bias during deliberations. CP 322-28. All six jurors indicated that they had not perceived anything that

they considered racially motivated.⁶ Id. A few jurors stated that juror 6 was challenged by other jurors because she kept saying that she did not believe the defendant was guilty, but she was unwilling to support her position with a discussion of the evidence and she did not seem very open-minded. CP 323, 325, 328. A few jurors said that juror 6 had expressed difficulty based on a friend of her son who she claimed had been falsely accused of murder.⁷ CP 323, 325, 326. Overall, the jurors indicated that discussions were respectful and that after juror 6 decided to vote guilty she was specifically asked if she was sure and she responded that she was. CP 322-28.

Judge Spearman held a hearing to determine whether the defense had made a sufficient showing of juror misconduct necessitating further investigation. In finding that the defense had not made a sufficient showing, Judge Spearman stated that while juror 6 had been emotionally upset and felt attacked by the other jurors, there was insufficient factual support for the proposition that the other jurors had challenged juror 6 based on racism or implicit racial bias. 4/6RP 109-10; CP 405-10. Judge Spearman added that in her experience, lone holdouts often feel pressured

⁶ One juror noted the jury consisted of a mix of men and women, with one Native American, one Black and at least two jurors of "Asian heritage." CP 334.

⁷ Juror 6 did not disclose this fact during *voir dire*.

and that many times persons who feel they have been treated disrespectfully by persons of another race will presume that the disrespect was due to the person's race. Id. Without more, Judge Spearman stated, she would not presume implicit racial bias, and that it was equally likely juror 6 felt pressured because she was the lone holdout. 4/6RP 111.

The Court of Appeals affirmed Judge Spearman's decision, finding that the decision was consistent with the applicable case law and not an abuse of discretion.

[T]he holdout juror's declaration contained no details buttressing the allegation of racial bias. The declaration set forth the holdout juror's subjective perceptions concerning the conduct of the other jurors and the holdout juror's belief as to the reasons for that conduct. The trial court credited the holdout juror's perceptions. But, the court concluded, those perceptions did not indicate racial bias among the jurors. . . The holdout juror's assertion of racial bias was, thus, a conclusory allegation lacking particularized factual support.

State v. Berhe, 2018 WL 704724, at *16 (Feb. 5, 2018).

C. **ARGUMENT**

WHERE SUFFICIENT EVIDENCE OF JUROR RACIAL BIAS IS SHOWN, A TRIAL COURT MUST TAKE APPROPRIATE ACTION THAT MAY INCLUDE ACCEPTING EVIDENCE NOT OTHERWISE PERMITTED UNDER THE NO IMPEACHMENT RULE; BUT IN THIS CASE THERE WAS INSUFFICIENT SUPPORT FOR THE CLAIM OF RACIAL BIAS

“The jury is a central foundation of our justice system and our democracy.” Pena-Rodriguez v. Colorado, ___ U.S. ___, 137 S. Ct. 855, 861, 197 L.Ed.2d 107 (2017). To protect the integrity of our jury system, at common law and in every jurisdiction, there exists a “no impeachment rule” whereby evidence from a juror may not be used to impeach the jury’s verdict. Id. at 861, 863.

The no impeachment rule is intended to ensure the “stability and finality to verdicts” and “to assure jurors that once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.” Id. at 861, 865. The rule also serves the purpose of protecting jurors from being “harassed or annoyed by litigants seeking to challenge [an unfavorable] verdict” once the jurors have returned to their daily affairs. Id. at 865, 869.

Courts are quite cognizant of the undesirable consequences that could result from unfettered post-verdict inquiries.

Post-verdict inquiries may lead to evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts.

United States v. Baker, 899 F.3d 123, 131 (2d Cir.), cert. denied, 2018 WL 5045137 (2018) (quoting United States v. Ianniello, 866 F.2d 540, 543 (2d Cir. 1989)). As a result, courts generally are “reluctant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.” Id.

Despite adhering ardently to the no impeachment rule, the Supreme Court has never shut the door on the possibility that in certain compelling situations it would be appropriate for the court to inquire into the deliberative process. In McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), the Court stated that the rule might give way “‘in the gravest and most important cases’ where the exclusion of juror affidavits might well ‘violate the plainest principles of justice.’” Pena-Rodriguez, 137 S.Ct. at 864 (quoting McDonald, at 269). The Court identified such an exception where there is sufficient evidence of “overt racial bias” that a defendant’s Sixth Amendment interest will overcome the important purposes of the no impeachment rule. Id. at 869.

Pena-Rodriguez was convicted of harassment and unlawful sexual contact. Post-verdict, two jurors disclosed that another juror had made

anti-Hispanic statements, such as “I think he did it because he’s Mexican and Mexican men take whatever they want,” and “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Id. at 862. The trial court acknowledged the apparent bias of the juror but ruled that the no impeachment rule barred consideration of the other jurors’ affidavits. The Supreme Court reversed.

The Supreme Court held that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant...the no-impeachment rule [must] give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” Id. Still, the Court cautioned, “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry.” Id. at 869. “For the inquiry to proceed,” the Court held, “there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.” Id. “To qualify,” the Court added, “the statement must tend to show that

racial animus was a significant motivating factor in the juror's vote to convict.”⁸ Id.

Like most jurisdictions, Washington's no impeachment rule prohibits inquiry into the internal process by which a jury has reached its verdict. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003). Under the rule, “[t]he individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” Id. A fact inheres in the verdict if it relates to the effect of evidence or events upon the mind of a juror, or is directly associated with the juror's reasons, intent, motive, or belief, when reaching the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962); Cox v. Charles Wright Acad., 70 Wn.2d 173, 179, 422 P.2d 515 (1967).

Washington courts have consistently applied this rule. In State v. Maxfield, a manslaughter case, the defense was denied a new trial based on an affidavit of a juror who said that he did not believe that Maxfield was guilty but that he was “pressured into changing his mind.” 46 Wn.2d 822, 828-29, 285 P.2d 887 (1955). In State v. Forsyth, a sex offense case,

⁸ The Court noted that “careful *voir dire*” by the court and parties, a court's instruction that jurors must “not let any bias, sympathy or prejudice” influence their decision, and full, thoughtful and robust deliberations, are existing processes designed to prevent racial discrimination during deliberations.

the defense was denied a new trial based on a juror who stated in an affidavit that she was the “subject of intense pressure from other jurors to change my vote. Had I not been subjected to that kind of pressure and had I been in good physical condition, I would have held out indefinitely for a vote of acquittal.” 13 Wn. App. 133, 138, 533 P.2d 847 (1975). In State v. Reynoldson, a rape case, the defense was denied a new trial based on a juror’s claim that she lied when returning a verdict of guilty and when she answered yes upon being polled if this was her verdict. 168 Wn. App. 543, 544-45, 277 P.3d 700, rev. denied, 175 Wn.2d 1019 (2012). The juror proclaimed that she was “verbally abused” by the other jurors, told that her reasoning was “ridiculous,” and that she was ultimately “coerced” into rendering a guilty verdict. Id. at 546. On review, the court ruled in each of these cases that the no impeachment rule barred the use of the juror’s evidence to impeach the verdicts.

In many way, the affidavit of juror 6 mirrors the affidavits in the above three cases and would ordinarily be barred by the no impeachment rule. Thus, the question is whether the defendant presented sufficient evidence to meet the high standard of the Pena-Rodriguez exception to the no impeachment rule, thus triggering further questioning or action by the trial court.

Whether that threshold showing has been satisfied is a matter committed to the sound discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence. Pena-Rodriguez, 137 S. Ct. at 869; Breckenridge, 150 Wn.2d at 203. An abuse of discretion is shown when this Court is satisfied that “no reasonable judge would have reached the same conclusion.” State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). “A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994).

There are no published cases in Washington addressing the Pena-Rodriguez decision, but there are two pre-Pena-Rodriguez cases where Washington courts have addressed allegations of racial bias that occurred during deliberations.

The first case arose over 50 years ago when a post-verdict affidavit of a juror was submitted that included the following

I am of the opinion that James A. Jackson did not receive a fair deliberation on the verdict that was returned by the jury. There was little discussion of the evidence, nor did the discussions follow the framework of the Court’s instructions; more specifically, reasonable doubt or presumption of innocence were not discussed. The jury, without exception, appeared to be of the opinion that the defendant was guilty.

I also heard some discussion of the Watts incident in California during which the statement was made that we did not want a similar incident to happen in our city. In my opinion, the verdict was reached as a racial determination rather than on the evidence presented, and with bias. In other similar cases in which I was a member of a jury, evidence was discussed and a verdict reached after the jurors discussed the matter. This was not so in the Jackson case.

City of Seattle v. Jackson, 70 Wn.2d 733, 737, 425 P.2d 385 (1967). This

Court agreed that a juror's racial bias would not inhere in a verdict.

We agree that the right to trial by jury includes the right to an unbiased and unprejudiced jury. A trial by a jury, one or more of whose members are biased or prejudiced, is not a constitutional trial. Nor do those matters inhere in the verdict or impeach it.

Id. at 738 (internal quotations omitted). Nonetheless, this Court rejected

Jackson's claim, finding that the affidavit was built upon opinions rather

than facts. This Court noted that only one sentence was "factual in

character"; the sentence that referred to the Watts Riots. Id. at 739.

However, the Court noted that defense counsel had referred to the Watts

Riots in closing argument, and thus, without greater detail as to the actual

discussion that occurred among the jurors, racial bias could not be

established.

There is absolutely no elucidation as to what specifically was said, who said it, when it was said, or in what context. The factual assertion in the affidavit is altogether too general upon which to predicate error.

Id. In regards to the rest of the affidavit, this Court found that it contained nothing but opinion. Absent were facts necessary for a court to determine whether a due process violation had occurred.

Of course the opinions that juror Poff expressed in the affidavit cannot be considered as raising issues to be determined by this court. Affidavits used to impeach juries ***must state facts not mere opinions.***

Id. at 740 (emphasis added).

Twenty-four years ago, in State v. Jackson, a robbery case, Jackson submitted a post-verdict affidavit of a juror who had heard another juror talking about a reunion he said he had attended. The other juror made comments such as: “[t]here are a lot more coloreds now [at home] then [*sic*] there ever used to be,” “the worst part of the reunion was that I had to socialize with the coloreds,” and “you know how those coloreds are.” 75 Wn. App. 537, 540, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995). The trial court denied Jackson’s motion for a new trial based on the affidavit.⁹ A two-person majority of the Court of Appeals reversed, holding that when a claim of racial bias during deliberations is “raised post-verdict, and the moving party has made a *prima facie* showing of

⁹ The Court of Appeals did not address the no impeachment rule. Rather, the Court stated that the sole issue to be decided was “whether the trial court abused its discretion by denying Jackson’s motion for a new trial.” Jackson, at 542.

bias, an evidentiary hearing is always the preferred course of action.”¹⁰ Id.
at 543.

Together, these case illustrate that Washington has followed an analogous to Pena-Rodriguez; evidence of racial bias does not inhere in the verdict as long it is based on factual assertions and not opinion or supposition. The question here is whether Judge Spearman abused her discretion in determining that the affidavit lacked sufficient factual support to warrant further inquiry.

Judge Spearman reasonably interpreted the affidavit in this case in virtually the same manner as this Court did in City of Seattle v. Jackson. Although juror 6 felt ridiculed during deliberations, there are insufficient facts to support the conclusion that pressure from other jurors was the result of racial bias. The affidavit is devoid of any claim that any particular juror used racially charged or offensive language. While juror 6 stated she was accused of being “partial” because of her race, without anything more, this statement could reasonably be interpreted as an allegation or opinion rather than a fact. This was not simply a juror making a comment to the court. The defense, cognizant of the burden

¹⁰ The majority did not specify what sort of hearing it envisioned. For example, it is unknown whether the court envisioned that jurors would actually be subpoenaed to testify and subject to direct and cross-examination, whether a hearing could be based solely on documentation and affidavits, or whether the nature and extent of the hearing would be subject to the trial court’s discretion.

they had to meet, interviewed and prepared the affidavit for juror 6. Yet there either was a failure to follow-up on these general statements, or juror 6 could not be any more specific in regards to what jurors actually said. While there is no expectation that every statement made during deliberations be recited verbatim, at least some factual specificity is required to meet the standard of Pena-Rodriguez.

In addition, while a juror would not be expected to admit to their own racial bias, it must not go unnoticed that the defense talked to at least seven other jurors and yet presented no evidence that any juror saw or heard racially-biased conduct during deliberations. Rather, what other jurors observed was that juror 6 was challenged, not because of her race, but because she failed to support her positions based on the evidence. Juror 6's attribution of that pressure to racial bias is based on speculation, not facts.

For example, to show mistreatment, juror 6 states that she was disparaged when she suggested that the defendant may have possessed the murder weapon because he had taken it from the real shooter. This was a highly improbable assertion that reasonably invited criticism.

The evidence showed that Elijah Washington and the defendant were stopped in a Chevy Impala fleeing the scene of the murder.¹¹ The murder weapon was found in the car.¹² Washington could not have been the shooter because store security video showed he was inside a store when the shots were fired in the parking lot.¹³ Washington testified that after the shots were fired, he ran out of the store, jumped into the Impala, picked up the defendant and that the defendant tossed the gun in his lap and yelled for him to drive.¹⁴ Further, a civilian witness positively identified the Impala and positively identified the defendant as the shooter.¹⁵ To suggest there was yet another person – unseen by any civilian witness, who shot the victim, and that the defendant then – unseen by any witness – obtained the murder weapon from the real shooter before jumping in Impala car and fleeing the scene, is a position that could fairly be criticized as unsupportable. Thus, the fact that her position was criticized is simply not evidence of racial animus or bias.

Racism animus in any form is repugnant and should be of great concern when alleged. Juror 6 admitted to voting to convict and admitted

¹¹ 2/1RP 1235-36, 1251; 2/4RP 1931-33; 2/10RP 1985-86; 2/17RP 2699-2704.

¹² Id.

¹³ 2/10RP 2013-14; 2/11RP 2222, 2235-38, 2252.

¹⁴ 2/10RP 2023-27.

¹⁵ 1/27RP 811-13; 1/28RP 853, 876, 878.

that she later regretted her vote. She claimed “I only agreed to the guilty verdicts because I felt emotionally and mentally exhausted from the personal and implicit race-based derision from other jurors.” CP 476.¹⁶ This is a claim of personal struggle, an issue many jurors face. What is missing are facts showing the nexus between her feelings and race-based misconduct.

Here, Judge Spearman found, and the Court of Appeals agreed, that the defense had failed to present sufficient evidence of racial bias during deliberations despite the defense having interviewed juror 6 and many other jurors. Neither courts’ application of law conflicts with Pena-Rodriguez or decisions from this Court. Some showing of “overt racial bias that cast serious doubt on the fairness and impartiality of the jury deliberations and resulting verdict” is required. Pena-Rodriguez, at 869. There is no question juror 6 harbored honest misgivings about her verdict once she returned to her family and friends in the days following her verdict. But trial judges are tasked with deciding whether or not

¹⁶ While proclaiming that she believed the defendant was innocent, juror 6 also made the rather odd statement that she now believes “Mr. Stukenberg should be charged with murder.” CP 477. The two victims, Stukenberg and Williams, were seated in a car together (Williams in the front passenger seat) when the shooter walked up and fired four shots through the passenger side window. 1/27RP 679-83, 763-65; 2/18RP 2977-78. Williams was struck four times. Stukenberg was struck with a bullet that passed through Williams’ body. 1/27RP 709-10. Judge Spearman observed at sentencing that there was no evidence Stukenberg participated in the murder. 5/26RP 172.

misgivings stem from misconduct by the other jurors, or whether they were personal to the juror. In light of the juror's concerns about her son's friend allegedly wrongly accused of murder, her nephew whom she believed had been unfairly treated by the justice system, her unusual and unsupported theories of liability in the case, the paucity of facts supporting racial bias in the affidavit drafted by the defense, and the lack of any corroborating evidence from other jurors, it cannot be said that no reasonable jurist would have concluded as Judge Spearman did, that there was an insufficient showing of racial misconduct sufficient to require further court action and pierce the veil of the jury's deliberations.

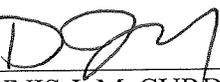
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.¹⁷

DATED this 14 day of January, 2019.

Respectfully submitted,

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¹⁷ In the event this Court finds that the trial court should have engaged in further court action, the State requests that the case be remanded to the trial court.

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