

No. 704931-1-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent

v.

FABIAN GARZA, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying defendant's motion for a new trial after two distinct incidents of juror misconduct deprived defendant of his Constitutional right to a fair trial before an impartial jury.

2. The trial court erred by reading a transcript of the alleged victim's testimony to the jury during deliberations, because this read-back unduly and unfairly emphasized the victim's testimony, and caused the jury to reach a verdict of guilty.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the jury misrepresents to the court the reasons for requesting that the alleged victim's testimony be read back to them during deliberations, has the jury committed misconduct? (Pertains to Assignment of Error No. 1).

2. Where juror misconduct leads the trial court to read the alleged victim's testimony (and only the alleged victim's testimony) back to the jury during deliberations, and the jury relies on this read-back to convict, is the defendant entitled to a new trial? (Pertains to Assignment of Error No. 1).

3. Where one juror's daughter is the victim of an assault during deliberations, and the juror promises the court that his daughter's

assault would not affect his ability to deliberate, and that he would not share information about the assault with the other jurors, does the juror commit misconduct by breaking these promises to the court? (Pertains to Assignment of Error No. 1).

4. Where a juror commits misconduct by telling the other jurors that his daughter had been assaulted, and by urging the rest of the jury to promptly convict in this case, does the juror's misconduct deprive defendant a fair trial? (Pertains to Assignment of Error No. 1).

5. Did the trial court commit reversible error by reading the alleged victim's testimony, and only the alleged victim's testimony, to the jury during deliberations? (Pertains to Assignment of Error No. 2).

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 25, 2009, appellant Fabian Garza was charged with 2 counts of child molestation in the first degree, alleged violations of RCW 9A.44.083. CP 4-5. The alleged victim was the defendant's niece, Jordyn Casimir. ("JC"). CP 6-8.

On February 19, 2013, the case proceeded to jury trial. See Generally, Report of Proceedings ("RP") at 1, *et. seq.* JC testified during the trial. RP 208-237.

Throughout the trial, the jury complained about having difficulty hearing the attorneys' questions and the witnesses' testimony, and the court's comments and instructions:

- “The Court: Can you all hear her okay? The Jurors: No.” RP 160;
- “The Bailiff: The jurors ask that everybody use the mics. They can't hear very well.” RP 201.
- “[The prosecutor]: Good use of the microphone. We have had some difficulties hearing people in this room, so I'm going to ask you to try to use this. I'm going to bend it down.” RP 208;
- “[Defense counsel]: I'm sorry, I can't hear your honor.” RP 234;
- “[The prosecutor]: Yes, Your Honor, I was going to mention that there is, apparently they are setting up a metal detector right outside in the hallway. I'm not sure what for but they are testing it and setting it up. It's much louder out there. The Court: Okay, that's all right. [The prosecutor]: But it is a little annoying in here. The Court: I think we can bear with it.” RP 434;
- “[Defense Counsel]: I'm having a little difficulty hearing the witness. Can everyone hear okay? Juror No. 10: No. Half of what he says is not coming through the microphone. The witness: Is this better? Juror No. 10: Yes. Juror No. 9: You need to use the mic, too. The Witness: Would you like me to repeat any of that? [Defense counsel]: Let's just move on.” RP 747;
- “[Defense Counsel]: And if I recall correctly, we did conduct a good portion of that interview but we didn't conclude it. [The witness]: I can't hear you actually.” RP 751;
- “[Defense Counsel]: We are going to move the mic close because we have had some trouble hearing. Don't be afraid to belt it right out.” RP 768;
- “[Defense Counsel]: I guess, Your Honor, before I get started I would like to hope that the jury would indicate if they can't hear

me if I stand here and don't sue the microphone. Juror No. 10:
It's hard. [Defense Counsel]: It's hard? All right. Is this better?
Juror No. 10: Yeah. I'm deaf in this ear. RP 812.

During deliberations, the jury requested that JC's entire testimony be read back to them. CP 30-31. The jury did not request a read-back of any other witness's testimony. CP 30-31; RP 895. The jury requested the read-back purportedly because they could not hear a portion of the JC's testimony. The jury's initial question was the following:

Due to hearing issues early in witness questioning we are requesting the courtroom transcripts of [JC's] sworn testimony.

CP 30. The trial court asked the jury to clarify, and they submitted the following additional question:

Due to issues with acoustics within the courtroom and the lack of use of the microphone questions and responses by the attorney's and witness were not heard by the jurors. Thus we would like the courtroom transcripts of [JC] sworn testimony read. Both attorney & witness response.

CP 31. (The jury's inquiries are attached as Appendix A). The trial court had the entirety of the alleged victim's testimony read back to the jury verbatim. RP 628. None of the other witnesses' testimony was read back to the jury.

Also during deliberations, one juror's daughter was sexually assaulted in California. Despite assurances that he could be fair, and that the sexual assault of his daughter would not influence his deliberations on

this case, this juror actually told the other jurors about the assault, and urged them to quickly return a guilty verdict in this case. RP 665-666; Declaration of Juror Don Parker, CP 37-39.

The jury returned a verdict of “not guilty” on one count of child molestation and “guilty” on the other count. CP 32.

After the verdict, defense counsel learned that the jury had misrepresented the reasons for requesting the read-back. JC’s testimony had been hard to hear, just like a lot of the other testimony. However, it was not “hearing” problems that lead the jury to request the JC’s testimony be repeated. The juror’s requested only her testimony be read back because they could not agree on what she had said. The jury requested the read back because they could not agree about what the alleged victim’s testimony had been, not because of any problem with courtroom audibility. The jury lied to the court and the parties when they explained the reason for wanting the testimony read back. See CP 36 (“It was not that she was not heard; it was that we could not agree on what was said”). (The Donald Parker declaration is attached as Appendix B).

Defense counsel also learned that the juror whose daughter had been assaulted had told the other jurors about this, and urged them to convict the defendant quickly. See CP 36 (“several jurors, including a juror who disclosed during trial that his daughter had been sexually

assaulted were in a big hurry to wrap things up. . . . I felt pressured to change my vote. . . . I reluctantly changed my vote to “guilty”).

On March 11, 2013, Mr. Garza filed a motion for a new trial alleging juror misconduct in (1) misleading the court about the reasons for requesting a read-back, and (2) improperly discussing the fact that one juror’s daughter had just been sexually assaulted and rushing to a conviction on this improper basis. CP 33-36.

On May 20, 2013, the court held a hearing on the motion for a new trial. RP 662 *et seq.* The court clearly forgot about the issues the jury was having with hearing the testimony at trial and misunderstood defense counsel’s argument in favor of a new trial. The court stated:

I know the discussions with the jury afterwards are not part of the record, but it was my recollections that the jurors, specifically, stated they had no trouble hearing the witnesses so much as they did hearing the lawyers.

RP 669. The court overlooked the fact that although the jury had trouble hearing much of the testimony, they only requested a read-back of the alleged victim’s testimony. The jury inquiry was misleading because the jury claimed, falsely, that they needed the read-back because they could not hear the alleged victim’s testimony. See CP 30, 31.

The court summarily denied the motion for a new trial:

Well, I did review the written statement [of Donald Parker, CP 37-39], and I think the second basis is more significant

than the first in terms of analysis. I don't find much basis in the first at all.

In terms of the second, I agree with the State's analysis there. I am not going to read more into that declaration than that which is contained in it and its susceptible to numerous interpretations, but I don't see anything that suggests that there was – that there has been stated legitimate grounds for a new trial. So that motion will be denied.

RP 672.

The case proceeded to sentencing and the court imposed a standard range indeterminate sentence which included, *inter alia*, a minimum term of 60 months in prison. CP 34-57.

This appeal timely follows. CP 58-73.

B. SUBSTANTIVE FACTS

In November of 2009, Jami Garza, appellant Fabian Garza's wife, operated a day-care in her home in Bellingham. RP 162. The Garzas' niece, Jordyn Casimir, (hereafter "JC"), was one of several children who attended Ms. Garza's day-care. RP 161-162. JC was five years old in November of 2009. RP 189.

One afternoon in November of 2009, RP 171, Jami Garza called JC's mother, Lindi Moore, and told her that she believed Fabian Garza had inappropriately touched JC. 2RP 168-170.

Lindi Moore picked up JC and her other children from Jami Garza's house and took them to the home of Lindi's grandmother, JC's great-grandmother, Ruby Kuhns. RP 172. As the kids were packing up, Lindi Moore had a discussion with JC's brother, Marlo Garza. RP 177. During this discussion, Marlo Garza also claimed that his father, Fabian Garza, had inappropriately touched JC. RP 177.

When the family got to grandma's house, Lindi Moore questioned JC directly about the alleged abuse:

I brought her in the back bathroom because none of the other kids knew anything was even going on. And I asked her if Fabian had touched her anywhere inappropriate and she pulled her sweater up over her face and started crying and shook her head yes.

RP 179.

After this apparent disclosure, Lindi Moore decided to go to the police. RP 180. Lindi Moore and Jami Garza took JC and Marlo to the Ferndale Police Department to report the allegations of inappropriate touching. RP 180-181. They arrived in the evening, around 5:30 pm. RP 183.

Ferndale Police Detective Campos arrived at the Ferndale Police Station at 9:00 pm to begin the interviews. RP 479. Detective Campos first spoke with Jami Garza. Jami Garza told detective Campos that she believed "something had happened" between JC and the defendant. RP

483. Jami Garza also gave a written statement to that effect. RP 484. Detective Campos next spoke with Marlo Garza. RP 490. Marlo also indicated his belief that the defendant (his father) had touched JC. RP 492.

Finally, some time between 11:00 pm and midnight, RP 500, the detective finally spoke with JC herself. JC was initially reluctant to speak with the detective. RP 493. However, after repeated questioning, JC eventually told the detective “something had happened.” RP 502. Although JC remained reluctant to talk about it, she admitted that she had talked to her aunt, Jami Garza, about “uncle touching me.” RP 503.

Several months later, in March 2010, Marlo Garza, contacted defense counsel and informed him that the statement he had given to Detective Campos in November, 2009 was not true, and was motivated by Marlo’s anger at the defendant over unrelated issues. RP 332-333.

At trial, in February of 2013, JC testified that the defendant had touched her inappropriately. See generally, RP 208-237.

Marlo Garza, testified that he had lied to the police during his initial interview, and in a written statement that he had given to the police. RP 264. Marlo Garza testified that he had lied to the police when he said he had seen the defendant and JC together. RP 265. Marlo testified that

he and his dad had had an argument, and that he had become angry and fabricated the allegations as retaliation. RP 270, 273.

Jami Garza, the defendant's wife, testified that she had been mistaken about seeing the defendant and JC together, and had given a misleading and erroneous statement to the police. RP 354. Jami testified that she was "really, really, mad and upset" with the defendant so she gave a statement to the detective that was at least partially false. RP 355.

The jury found the defendant guilty of one count of child molestation in the first degree. The jury acquitted the defendant on the second count. CP 32.

IV. ARGUMENT

A. The trial court erred by denying defendant's motion for a new trial after two distinct incidents of juror misconduct.

The denial of a motion for a new trial is reviewed under the abuse of discretion standard. *State v. Bourgeois*, 133 Wn2.d 389, 406, 945 P.2d 1120 (1997). In the instant case, the trial court abused its discretion by denying Garza's motion for a new trial because Garza presented competent and uncontroverted evidence that the jury deceived and misled the parties and the court by misrepresenting the reason for requesting the alleged victim's testimony to be read-back to the jury.

1. The jury's misrepresentation of the reason for its request constitutes juror misconduct warranting a new trial.

The jurors in this case violated their oaths and committed juror misconduct when they deceived and misled the parties and the court about the need to hear the alleged victim's testimony read back. The misconduct improperly induced the court to read the alleged victim's testimony back to the jury, thereby unduly emphasizing the alleged victim's testimony and depriving Garza of a fair trial. Because the jury's misconduct deprived Garza of a fair trial, his conviction should be reversed and the case should be remanded to Whatcom County Superior Court for re-trial.

“It is the general rule that if a juror deceives or misleads a party by falsely testifying when being examined as to his competency, and as a result the juror, though in fact disqualified, is accepted, such conduct, when discovered, *after verdict*, will be ground for a new trial.” *Grist v. Schoenburg*, 115 Wash. 335, 340, 197 P. 35 (1921) (quoting 20 Ruling Case Law *New Trial* §27, at 242 (1918)).

The moving party bears the burden of proving that juror misconduct occurred. *State v. Barnes*, 85 Wn. App. 638, 668-69, 93 P.2d 669 (1997). The moving party may overcome the burden by submitting affidavits of persons with firsthand knowledge of the misconduct. *State v. Hawkin*, 72 Wn.2d 565, 568, 434 P.2d 584 (1967). On appeal, the party challenging the trial court's decision on the objection must show more than a mere possibility that the juror was prejudiced. *State v. Stackhouse*, 90 Wn. App. 344, 350, 957 P.2d 218 (1998).

In the instant case, the defendant submitted a declaration from Don Parker, one of the sitting jurors. CP 37-39. Mr. Parker had first-hand knowledge of the jury's misconduct because he was a member of that jury. The misconduct (lying about the reason for the read-back request) caused actual prejudice because it induced the trial court to read back the alleged victim's testimony to the jury, thereby unduly emphasizing the alleged victim's testimony and leading the jury to convict. Accordingly, because

the jury's misconduct deprived Garza of his constitutional right to a fair trial, his conviction should be reversed and the case should be remanded to the Whatcom County Superior Court for re-trial.

2. One juror's introduction of extrinsic evidence into deliberation constitutes juror misconduct warranting a new trial.

It is misconduct for a juror to introduce extrinsic evidence into deliberations. *Kuhn v. Schnall*, 228 P.3d 828, *review denied*, 169 Wn.2d 1024, 238 P.3d 503 (2010). Such misconduct will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced. *Id.* The court must make an objective inquiry into whether the extrinsic evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence on the jury. *Id.* Any doubt that the misconduct affected the verdict must be resolved against the verdict. *Id.*; *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 272, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014 (1991).

Extrinsic evidence is “information that is outside all the evidence admitted at trial, either orally or by document.” *Kuhn, supra*, 155 Wn. App. at 575-76 (quoting *Richards, supra*, 59 Wn. App. at 270).

A defendant is guaranteed a fair trial before an impartial

jury by the Sixth and Fourteenth Amendments. *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273 (1988). This right is violated by the inclusion on the jury of a biased juror, whether the bias is actual or implied. *See Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L. Ed. 2d 492 (1992) (inclusion of a single biased juror invalidates death sentence); *Smith v. Phillips*, 455 U.S. 209, 221-24, 102 S.Ct. 940, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring) (noting that implied bias may violate a defendant's Sixth Amendment rights).

In Re Yates, 177 Wn.2d 1, 31, 296 P.3d 872 (2013).

In the instant case, one juror introduced extrinsic evidence into the deliberations by telling the other jurors that his daughter had just been sexually assaulted in California, and by urging the jury to convict on that basis. The juror whose daughter was assaulted was biased and should have been excused. His introduction of extrinsic evidence of an unrelated assault into the deliberations deprived Garza of his constitutional right to a fair trial by an impartial jury. Because the jury misconduct deprived the defendant of a fair trial, his conviction should be reversed and the case should be remanded to Superior Court for a new trial.

B. The trial court erred by reading back only the alleged victim's testimony to the jury during deliberations.

The trial court here allowed the jury to hear the alleged victim's testimony in its entirety a second time during deliberations. This decision should be reviewed for an abuse of discretion. *State v. Koontz*, 145 Wn.2d

recorded on videotape. During deliberations, the jury requested that several witnesses' testimony (including the victim) be played back, and the trial court allowed it.

On review, the Supreme Court began with the observation that

Viewed in light of the principle that a jury must remain impartial as it determines the facts, reading back testimony during deliberations is disfavored. *United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir. 1989). Whether a jury should reread transcripts is dependent upon the particular facts and circumstances of the case and must be weighed against the danger that the jury "may place undue emphasis on testimony considered a second time at such a late stage of the trial." *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998) (quoting *United States v. Sacco*, 869 F.2d 499, 501 (9th Cir. 1989)).

Koontz, supra, 145 Wn.2d at 658. In finding that the court committed reversible error by allowing the jury to hear the video-taped testimony during deliberations, the court noted that although the trial court "did take some precautions to prevent the manner of the replay from unduly emphasizing any portion of the testimony,"

the precautions in this case were insufficient because the court failed to consider the improper effect of the video replay and none of the protections it employed could correct this failure. . . . In essence, the jury sought an improper repetition of the complete trial testimony of three critical witnesses. The initial deadlock illustrates the difficulty the jury had making its determination without what amounts to a retrial.

Koontz, supra, at 659-660.

In *State v. Morgenson, supra*, the court noted that

A trial court has discretion to permit a jury to review witness testimony during its deliberations. *State v. Monroe*, 107 Wn. App 637, 638, 27 P.3d 1249 (2001), *review denied*, 146 Wn.2d 1003 (2002). However, concern that such a review does not unduly emphasize any portion of the testimony circumscribes that discretion. *Monroe*, 107 Wn. App. at 638 “Whether a jury should reread transcripts is dependent upon the particular facts and circumstances of the case and must be weighed against the danger that the jury may place undue emphasis on testimony considered a second time at such a late stage of the trial.” *Koontz*, 145 Wn.2d at 654 (internal quotation marks omitted) (quoting *United States v. Montgomery*, 150 F.3d 983, 999(9th Cir.), *cert. denied*, 525 U.S. 917 (1998)); *Monroe*, 107 Wn. App. at 638. Further, because a jury must remain impartial as it determines the facts, our Supreme Court disfavors reading back testimony during deliberations. *Koontz*, 145 Wn.2d at 654 (citing *United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990)).

Morgenson, supra, 148 Wn. App. 181 at 187.

While there is no absolute prohibition on reading back trial testimony during jury deliberations, the right to a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 22 of the Washington Constitution, requires that the trial court balance the need to provide the jury with relevant portions of testimony to answer a specific inquiry against the danger of allowing a witness to testify a second time. *Morgenson, supra*, at 87, *citing Koontz*, 145 Wn.2d at 653, 657.

In *Morgenson, supra*, the court ultimately upheld the trial court’s

decision to read the entire trial testimony back to the jury. In doing so, the Court of Appeals noted the “proper precautions” the trial court took to address the concerns raised in *Koontz, supra*, and therefore did not abuse its discretion:

First, in response to the jury's request for a transcript of the trial testimony, the trial court reviewed *Koontz* with the parties to determine if playing the entire audiotape of trial testimony would be proper under the facts and circumstances of the case. **While *Koontz* disfavors playing the entire testimony of a witness**, the trial court determined that, given the relatively short nature of the testimony, playing a recording of the entire trial testimony would not unduly delay the proceedings and was the most reasonable course in this case. The trial court also determined that **playing the entire testimony minimized undue emphasis on any one part of any one witness's testimony**. Additionally, the trial court found that playing an audiotape of the testimony once was preferable to letting the jury repeatedly review written transcripts. Finally, before playing the audiotape of the testimony in open court, the trial court cautioned the parties not to make expressions of any kind during the playing of the tape.

Morgenson, supra at 89.

Although *Koontz* suggests that a trial court should evaluate the need to play relevant recorded portions of testimony “to answer a specific jury inquiry,” the trial court here decided to read back only the victim’s testimony, thereby placing undue emphasis on that portion of the evidence. As the court in *Morgenson* noted, “playing the entire audio-taped testimony of both witnesses eliminated any undue emphasis.”

Morgenson, supra, at 90. See also, *Koontz, supra*, 145 Wn.2d at 657 (trial court did not abuse its discretion because it allowed the jury to hear both the defendant's testimony and the officer's testimony again.

In the instant case, in contrast to *Morgenson* and *Koontz*, the trial court abused its discretion by reading back to the jury only the victim's testimony and not any of the other testimony. This procedure unduly and unfairly emphasized the alleged victim's testimony, and denied the defendant his constitutional right to a fair trial.

Moreover, the trial court based the reason for allowing the read-back on misrepresentations from the deliberating jury. During deliberations the jury stated that they needed the alleged victim's testimony read back "due to issues with acoustics within the courtroom." CP 31. It is not true that the problems with court-room acoustics were limited to the alleged victim's testimony. The jury had trouble hearing all of the witnesses, as well as the attorneys.

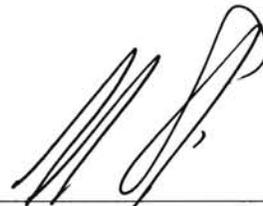
The true reason for the jury's request to re-hear the alleged victim's testimony was that they could not agree on what she had said. CP 37-39 ("It was not that she was not heard; it was that we could not agree on what she had said."). The fact that the jury could not agree on exactly what JC had said is not a valid basis for reading back the alleged victim's testimony back to the jury.

Reading back the entirety of the alleged victim's testimony during deliberations placed undue emphasis on the alleged victim's testimony and deprived defendant of his right to a fair trial. This court should reverse the conviction and remand the case for a new trial.

V. CONCLUSION

The jury's misconduct in this case deprived the defendant of a fair trial by an impartial jury sworn to fairly consider the case. The trial court, relying on the jury's misrepresentations, read the victim's testimony back to the jury during deliberations and thereby unduly and improperly emphasized the alleged victim's testimony and thereby deprived the defendant of his right to a fair trial. For these reasons, defendant is entitled to a new trial.

Respectfully Submitted, this 14th day of February, 2014.



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PROOF OF SERVICE

I, Andrew Subin, hereby certify that on the 14th day of February, 2014, I hand delivered a copy of the foregoing Brief of Appellant to the Whatcom County Prosecuting Attorney at 311 Grand Ave., Bellingham, Washington. On the same date, I also mailed a copy, postage prepaid, to the defendant, Fabian Garza c/o the Washington Department of Corrections, and to the Court of Appeals.

Signed in Bellingham, WA this 14th day of Feb. 2014.



Andrew Subin
WSBA No. 21436
Attorney for Defendant, Fabian Garza

Appendix A

SCANNED 1

FILED IN OPEN COURT
2-28-13
WHATCOM COUNTY CLERK
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

State of Wash
Plaintiff,
vs.
Fabian Garza
Defendant.

No. 09-1-01400-3

QUESTION FROM
DELIBERATING JURY

Jurors: If, after carefully reviewing the evidence and instructions, you need to ask the court a procedural or legal question that you have been unable to answer, then write down your question on this form. Please print legibly. Do not state how the jury has voted.

JURY'S QUESTION: DUE TO HEARING ISSUES EARLY IN WITNESS
QUESTIONING WE ARE REQUESTING THE COURTROOM TRANSCRIPTS
OF JORDYN CASIMIR SWORN TESTIMONY.

DATE AND TIME: 2/28/2013 9:37

Robert Vach
PRESIDING JUROR'S SIGNATURE

COURT'S ANSWER: Your question has been addressed with the Lawyers,
and more clarity is required as to the reason for your request.

DATE AND TIME: Feb 28 2013 12:50 pm

[Signature]
JUDGE'S SIGNATURE

147

SCANNED

FILED IN OPEN COURT
2-28 2013
WHATCOM COUNTY CLERK

By [Signature]
Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

STATE OF WASHINGTON
Plaintiff,

vs.

FABIAN GARZA
Defendant.

No. 09-1-01400-3

QUESTION FROM
DELIBERATING JURY

Jurors: If, after carefully reviewing the evidence and instructions, you need to ask the court a procedural or legal question that you have been unable to answer, then write down your question on this form. Please print legibly. Do not state how the jury has voted.

JURY'S QUESTION: DUE TO ISSUES WITH ACCOUSTICS WITHIN
THE COURT ROOM AND THE ~~ATTORNEY~~ USE LACK OF USE OF THE
MICROPHONE QUESTIONS AND RESPONSES BY THE ATTORNEYS AND
WITNESS WERE NOT HEARD BY THE JURORS. THUS WE WOULD LIKE
THE COURTROOM TRANSCRIPTS OF JORDYN CASIMIR SWORN TESTIMONY READ. BOTH ATTORNEY &
DATE AND TIME: 2/28/2013 2:03 WITNESS RESPONSE

[Signature]
PRESIDING JUROR'S SIGNATURE

COURT'S ANSWER: (transcript was read to Jury)

DATE AND TIME: 2/28/13 @ 3:55 PM

[Signature]
JUDGE'S SIGNATURE 148

Appendix B

evidence had established that it could not have happened that way because the defendant was not home on the day she went to the police, as argued by defense counsel in closing argument. Other jurors argued that she had not testified that she had been touched the day she went to the police and we could not come to an agreement on that point. It was not that she was not heard; it was that we could not agree on what she had said.

We had found the defendant "not guilty" on count II and were in disagreement as to count I. I requested on the morning of February 28, 2013 the second day of deliberations to hear J.C.'s testimony again. We sent a communication to the judge. We responded to the judge's request for clarification and soon thereafter heard J.C.'s testimony read in court. I felt I was right about what I had heard after the re-reading, but we still could not come to an agreement.

Meanwhile, several jurors, including a juror who disclosed that during the trial his daughter had been sexually assaulted, were in a big hurry to wrap the case up. It was late in the day when the testimony was re-read and the jurors did not want to come back for another day of deliberations. I felt pressured to change my vote of "not guilty" on Count I and remarks were made that it didn't matter if it couldn't have happened the way J.C. said, because she said there were lots of incidents. I reluctantly changed my vote to "guilty" and I regret my decision now. I have been thinking about this a great deal since the trial and was relieved when I was contacted by the defense investigator and given an opportunity to make what happened known.

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Signed this 8 day of APRIL, 2013, at
FERNDALE, Washington.

Don Parker
DON PARKER