70493-1

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No. 70493-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

FABIAN GARZA, Appellant.

BRIEF OF RESPONDENT

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B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in denying the motion for new trial in which defendant alleged that the jury had misled the trial court as to the reason it wanted the victim's testimony read back where the motion was based on only one juror's declaration, most of which inhered in the verdict, and where the jury had informed the court that it had not heard questions and responses during the victim's testimony due to acoustics and lack of use of the microphones.

2. Whether the trial court abused its discretion in denying the motion for a new trial in which the defendant alleged that a juror committed misconduct when he disclosed that his daughter had been sexually assaulted to other jurors and that a number of jurors wanted to wrap up the case where the motion was based on one juror's declaration, the declaration did not state when the juror had disclosed the information and most of the information in the declaration inhered in the verdict.

3. Whether the defendant can assert for the first time on appeal the court's failure to read back other testimony to the jury where the defendant agreed to the read back of the one witness's testimony, and the procedure for the read back, did not request that any other specific witness testimony be read back, and the jury did not request any other witness testimony to be read back.

4. Whether the trial court abused its discretion in not having any other witness testimony read back to the jury where the jury only requested the testimony of the victim be read back, the testimony was read back to the jury in open court, after the court and counsel carefully considered the method for doing so, and the court was aware that read backs are disfavored.

C. FACTS

1. Procedural facts

Appellant Fabian Garza was charged on November 25, 2009 with two counts of Child Molestation in the First Degree, in violation of RCW 9A.44.083. CP 4-5. The first incident was alleged to have occurred between May 1, 2009 and June 30, 2009, and the second between Nov. 1, 2009 and Nov. 7, 2009. CP 4-5. The first count related to an incident that the victim's older cousin had reported he walked in on, and the second related to one that victim's aunt reported she had interrupted, shortly before the abuse was reported to the police. CP 6-8, 25-26; 5RP 842-49.

Garza was tried by jury and found guilty of count I and not guilty of count II. CP 32. During trial, one of the jurors informed the court that his 19 year old daughter had been sexually assaulted the night before. 5RP 683. After questioning the juror regarding his ability to be fair and impartial and to remain focused on the trial, defense counsel told the court that he was comfortable with the juror remaining on the jury, and the court and the prosecutor agreed as well. 5RP 686-88.

During deliberations the jury sent out a question that stated:

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

CP 30-31.[1] After a significant amount of discussion between counsel and the court, and ultimately agreement, the court's answer was:

> Your question has been addressed with the lawyers, and more clarity is required as to the reason for your request.

CP 30-31; 5RP 895-908. The jury responded:

> Due to issues with accoustics (sic) 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 [the victim] sworn testimony read. Both attorney & witness response.

CP 30-31. After more discussion as to whether and how to read back the transcript, the court and both counsel agreed to the read back and the manner in which the transcript would be read back. 5RP 910-928.

After Garza was found guilty and prior to sentencing, defense moved for a new trial based on a declaration of one of the juror's, which alleged that the reason the jury requested the transcript of the victim's testimony was because the jury could not agree as to what she had said, not because it couldn't hear the testimony. CP 33-39. The declaration also alleged that the juror had felt pressured into changing his vote to "guilty" because "several jurors, including a juror who disclosed that during the trial his daughter had been sexually assaulted, were in a big

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[1] It isn't clear from the index to clerk's papers whether CP 30 is the first question or whether CP 31 is.

hurry to wrap the case up." CP 38. The court denied the motion for new trial. 4RP 672.

The court imposed an indeterminate sentence, pursuant to RCW 9.94A.507, with a minimum of 60 months and a maximum of life. CP 45. Subsequent to sentencing an order was entered permitting the defendant's biological children and grandchildren to visit him while he's incarcerated. Supp CP __, Sub Nom. 182.

2. Substantive Facts

When Lindi Moore got off work on Nov. 20, 2009, she got a call from her sister Jamie Garza[2] who was so upset that Moore couldn't understand exactly what she was saying. 2RP 168-69. She initially thought Jamie was saying something about Garza, Jamie's husband, punching Moore's daughter, J.C., but came to understand that it was about Garza's touching J.C. 2RP 170. Moore told Jamie to pack a bag for herself and Jamie's kids, and then she drove to the Garza house while she remained on the phone. 2RP 170-71. When Moore arrived at the house, Jamie and her son Marlo, who was 15 years old, were packing. 2RP 171, 259. She spoke with Jamie, who was still crying, and then went into Marlo's room and told him if there was any time in his life that he needed

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[2] Jamie Garza will be referred to as Jamie, and other members of Garza family will be referred to by their first names as well, to distinguish them from Appellant Garza.

to tell the truth, that it was then. 2RP 173. Marlo appeared to understand, and then he told her he had seen something involving her daughter. 2RP 173, 177.

Jamie had been providing daycare for J.C., who was five years old, and Moore's two other children, Deano and Kailyn[3], for 14 years, along with Jamie's and Garza's five children, Marlo, Justice, Emma, Bella and baby Liv. 2RP 161-62, 189, 3RP 351. Jamie stopped caring for J.C. that day. 2RP 162-63, 168. Jamie was a licensed daycare provider, but only provided care for Moore's children and Jamie's. 2RP 163. Sometimes Garza would be at the house when he wasn't at work, on rare occasions he would care for the children, and sometimes he was alone with the children. 2RP 165-66.

Moore and Jamie got Jamie and her children packed up, drove over to their grandmother's[4] house where J.C. was, got J.C. and then drove to their mother's[5] house. 2RP 172-73, 178. While at their mother's house, Moore took J.C. aside and asked her if Uncle Fabian had touched her anywhere inappropriate. 2RP 179. J.C. pulled her sweater over her face, started crying and nodded yes. 2RP 179. Moore explained that she and

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[3] This name may be a typographical error because there are references to an older brother Caleb that J.C. had elsewhere in the transcript.
[4] The grandmother's name was Ruby Kuhn.
[5] The mother's name was Sherry Moore.

J.C.'s father had talked with J.C. before about "inappropriate" touching, and that meant any private parts or parts that only show in the bath. 2RP 179-80. When asked if it happened a lot, J.C. said yeah. 2RP 182.

Around 9 p.m. that evening, a friend drove Moore, J.C., Jamie, Marlo and Liv to the Ferndale Police Station. 2RP 180-81. Det. Campos spoke first with Jamie, who cried, sobbed and rocked her body back and forth at times during the interview. 4RP 483. After the interview, Jamie read the written statement prepared by Det. Campos, made changes and signed it under penalty of perjury.[6] 4RP 486-87. Jamie told Det. Campos that she cared for J.C. and her brother Caleb every day, that J.C. started staying overnight more often since last summer and that J.C. and Caleb would take turns spending the night on the weekends. 4RP 610.

Jamie said that Marlo had told her something that morning that made her cry, that he had been hysterical. Id. Marlo had stayed the night at a friend's house the night before and when he didn't come home in the morning to get changed for school, Garza had driven over to the friend's house and got Marlo. 4RP 611. When they returned to the house, both of them were very angry and Marlo was crying, which was unusual for him. Id. Marlo grabbed his backpack and left the house, and Garza left soon

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[6] The unredacted portions of the Jamie's and Marlo's statements ultimately came in as substantive evidence. 4RP 460-74, 524-38.

afterwards. Id. Marlo returned home and went into his room, crying, so she went into his room.[7] Id.

Later that morning Jamie asked her daughter Bella if Garza ever had touched her on her front or back private parts, and Bella said no. Id. When Justice, Emma and J.C. got to the house after school, Jamie spoke with them individually. When she asked Justice if Garza had ever touched him on his private area, he said no, and looked at her funny. 4RP 612. When she asked Emma, Emma said no, only when he spanked her. Id. When she asked J.C. if Garza ever touched her on her private parts or bottom, J.C. said no. Id. Jamie could tell J.C. was trying not to cry, and then said that she didn't know what would happen. Id. Jamie told J.C. she was not in trouble and asked J.C. if Garza had told her not to tell. Id. J.C. said yeah, that Garza had said that if she did, that he would say J.C. was playing mom and dad. Id. J.C. said she hadn't wanted to tell Jamie because she thought she might get grounded. Id. Jamie told her she wouldn't. Jamie said that Garza had touched her on her bottom and on her front, which Jamie knew to be her vaginal area. Id. Jamie told her that it was okay that she had told her and that they would talk with her mom and probably the police. Id.

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[7] What Marlo told Jamie was redacted from the statement.

Jamie said she was upset so she called Moore after Moore got off work and told Moore that she thought Garza was touching J.C. 4RP 613. Jamie said Moore thought she meant punching J.C. Id. In addition to telling Moore what everyone had told her, Jamie told Moore that something had happened the first week of November, that she had been at home, and had to go to the bathroom. Id. She saw a shadow go by the door and got a creepy feeling. Id. She opened the door and saw Garza jump back. He had the baby in one arm and J.C. had been in front of him squatting down. It looked to Jamie like Garza's hand had been on J.C.'s back. Id. Jamie told Garza to get out, but Garza went into the bathroom. Jamie closed the bedroom door and asked J.C. if Garza had touched her. J.C. had a look on her face like she was trying to hide something. Id. J.C. said no, but Jamie told her she wasn't in trouble and asked her again. Id. J.C. told her that he touched her on the bottom, and then showed Jamie by rolling her fingers on her thigh. 4RP 614.

Jamie then went into the bathroom and Garza was washing only one hand, which seemed strange to Jamie. 4RP 614. Jamie asked Garza if he touched J.C. and what was going on. Garza said he didn't touch her and nothing was going on. Id. Then he said maybe he rubbed her butt, but he wasn't doing anything. Id. In disgust, Jamie grabbed the baby. Id. Garza sat on toilet and started crying. Jamie told him he needed to get his

stuff and get out, that he could have visitation with the children. Id. Garza told her that the children and her were his life. Id. Garza never left.

Jamie didn't know what to do or whom to tell. She also wondered what she would do financially and how she would take care of the children alone. Id. She was torn. 4RP 615. She kept the children and J.C. away from Garza. She said this happened before her daughter's birthday which was on Nov. 11th. She said there was no reason for Marlo to lie about what he saw, that they are very open and honest with one another. Id. She also told the detective that she was completely done with her husband. 4RP 616.

Jamie, however, testified at trial that she thought she had overreacted to the "bathroom" incident (count II), and that she had been upset by what Marlo had told her when she made the statement. 3RP 354 - 381. Specifically, she testified it was not true that she had told J.C. she was not in trouble and asked her whether Garza had said not to tell and that J.C. had told her yes. 3RP 369. It was also not true that J.C. told her that Garza had touched her on her front and bottom. Id. Jamie confirmed what was in her statement about what she saw regarding the bathroom incident, but said it was not true that Garza told her that he may have rubbed J.C.'s butt. 3RP 371-79. It was true, though, that J.C. did say that Garza touched her when asked a second time and that J.C. showed Jamie

how he touched her on her butt. 3RP 421. Jamie testified it also was not true that Garza sat down and started crying. 3RP 380. She testified that she was worried something had happened because her grandfather had done the same thing to her. 3RP 379.

Jamie testified that the first time she spoke with J.C. about touching was the first week of November, and the second time was when J.C. had gotten home from school that day. 3RP 422.

The detective also spoke with Marlo who was tearful when she spoke with him. 4RP 490-91. After she interviewed Marlo, she told him she wanted to obtain a written statement, and that he needed to tell her the entire truth at that time, but that she needed to speak with J.C. 4RP 492. When she went back to get a written statement from him, Marlo was still emotional. Before Marlo signed the statement, he found out that Garza had been arrested and he put his hands in face and his body shook as he sobbed. 4RP 522.

In the sworn statement Marlo said that about five to six months before, after his birthday, he walked into the living room after taking a nap. 4RP 616. He saw Garza holding J.C. in his lap with her pants pulled down and he was rubbing her. Id. It looked like Garza's hand was up her shirt and on her leg. Her pants were down around her ankles, and Marlo could see J.C.'s bare butt. Id. Garza looked up at Marlo. Id. When Marlo

looked again, J.C. was pulling her pants back up. Id. Marlo asked Garza what he was doing and Garza said nothing, we were just sitting here. Id. Marlo left the house because they were the only ones home and he didn't want to be there with Garza. Id. Garza followed Marlo out onto the porch, and Marlo asked him why he would do such a thing. 4RP 617. Garza just kept repeating Marlo's name. Id. Marlo asked him why he saying Marlo's name, when he did something stupid. Id. Marlo asked if he had ever done this to Marlo's sisters and Garza said no, he hadn't. Id. Marlo asked Garza if he had ever done this before, and Garza told him no. Marlo left and didn't know what to do. Id. Garza kept calling his name, but went back inside. Id.

Marlo called his uncle to come get him. Id. He told his uncle that he had gotten into a big fight with Garza and his uncle said he would come pick up Marlo. Id. Marlo waited in the bushes near the post office because he was crying and he didn't want anyone to see him. Id. When his uncle arrived, Marlo told his uncle that he had gotten into a fight with Garza and that he didn't want to talk about it. Id. His uncle took Marlo back to his house. 4RP 618. Garza tried calling Marlo on Marlo's cell phone, but Marlo didn't answer. Id. Garza texted Marlo and asked him where he was at and whether he needed anything. Id. Marlo texted him back that he didn't need anything.

Later Garza texted Marlo that he was going to leave for four weeks. Id. Marlo called Garza and asked him what he was going to do. Id. Garza said that if Marlo didn't want him there, he would leave, that he was going to Seattle to stay with a friend. Id. He said that he didn't know how long he would be gone, that he didn't think this person would let him stay with him, and that he didn't even bring a backpack or clothes. Id. There was silence on the phone. Id. Garza then said, Marlo. There was more silence. Id. Marlo then told Garza that they needed him and that he guessed he could just come back. 4RP 618-19.

Marlo told the detective that they needed Garza's money to support them. 4RP 619. Marlo made Garza promise that he wouldn't touch any of the girls. Id. Marlo told the detective he did that for the family. Id. Garza said he promised this was the first time he had done anything like that. Id. Marlo told Garza he guessed that he could forget it then, and told him to come pick him up. He said that Garza and he hardly ever talked anymore and that he watched Garza with J.C. after that and had noticed Garza touching J.C. in a more sexual way than he did with Marlo's sisters, as if Garza favored J.C. more. He said that he felt stupid because he didn't say anything, that he wanted Garza far away from them, but they needed Garza for support, and that his sisters would be devastated. Id. He said that this had been a huge weight on him. Id.

Marlo also said that something had been up between Jamie and Garza for the past week, that Garza was sad and pouting lately. 4RP 620. As for that morning, Marlo said that when Garza picked him up, Garza lectured him about not going to school on time, and that he took Marlo's cell phone. Marlo said he took his backpack and left the house and waited until Garza left and then returned to his room and started crying. Id. When Jamie came in and asked him what was wrong, he told her he couldn't tell her because it would change the family. Id. After Jamie kept asking, Marlo told her what he had seen between Garza and J.C. Jamie told him she had caught Garza too with J.C. Id. Later that day, they left the house and decided to tell police so that Garza didn't do this to other people. 4RP 621.

At trial, Marlo recanted his statement and testified that while he told Jamie the things that are in his statement, they weren't true. 2RP 264-70. He testified he was upset that day because he thought his girlfriend was pregnant and that he was mad at Garza's trying to discipline him. 2RP 264, 270, 273, 292. He testified that most of what was in the statement was untrue, although the portion about him leaving the house, being really upset and going to his uncle's was true. 2RP 290-97. He testified that Garza did text him about leaving for 4 weeks. 2RP 298. He said that what he said about Jamie coming in his room that morning and asking what was

wrong and his telling her that he couldn't tell her because it would change the family was also true. 3RP 309-10. While what he told her he saw was untrue, it was true that Jamie had told him she had noticed something between Garza and J.C. too. 2RP 310-315. He denied ever seeing Garza being inappropriate with J.C. and said that he decided that he couldn't let Garza go down for something he didn't do. 2RP 327, 335.

J.C. testified that she spent a lot of time at Jamie's house with her older brother Caleb, and that she was in court because Uncle Fabian had done something wrong at Jamie's house. 2RP 209-11. She testified that her uncle touched her in her privates, where someone is not supposed to touch you. 2RP 211. The first incident happened in Aunt's bedroom while she was watching television with her cousins, and the last time was when she and her uncle were in the living room, Marlo was in his room and the other kids were with Jamie. 2RP 215-16. She said the last time it happened it ended when somebody walked out. 2RP 217. She described other times and places that it happened. 2RP 217-18. She said he touched her in her front and on her bottom, on her "private spot" in front, below her waist and between her legs and rear end. 2RP 218-19, 222-23. J.C. demonstrated in court where Garza touched her by pointing to her crotch, in between her legs, and by pointing to her buttocks. 2RP 235. She testified that she had been touched right before she told Jamie and that the

last time it happened was when she told Jamie. 2RP 223-24, 226-27. She said she didn't tell because Garza told her not to and she thought he would hurt her. 2RP 216.

The touching J.C. described was largely consistent with what she told Det. Campos. 4RP 501-12. She described to Det. Campos in greater detail how Garza moved his hand. 4RP 509-12. She told Det. Campos that Garza had said not to tell, or he would say that they were playing mommy and daddy and that she would get in trouble. 4RP 513-14.

After the disclosure, Moore noticed changes in J.C.'s behavior, particularly when she had to be interviewed about the case. 2RP 185. J.C. said that everyone hated her, that everyone was mad at her, and she scratched her hair and stood in a corner and cried, all of which was uncharacteristic behavior. 2RP 185. Moore and Jamie had not spoken with each other since soon after they reported this. 3RP 427-28.

D. ARGUMENT

1. The trial court did not abuse its discretion in denying the motion for a new trial based on juror misconduct because the juror's declaration did not show that misconduct occurred and the information contained in it inhered the verdict.

Garza asserts the trial court erred in denying his motion for a new trial because there was two occasions of juror misconduct. First, he alleges, based on the declaration of one juror, that all the jurors misled the

court as to the real reason they wanted the testimony of the victim read back. Second, he alleges that one juror introduced extrinsic evidence into the deliberations. To the extent that the juror's declaration discusses how and why the jury reached the verdict it did, all that information inhered in the verdict and could not be considered by the court in determining if there was misconduct. Even if it didn't inhere in the verdict, Garza interprets the declaration too broadly. The declaration does not prove that the jurors collectively misled the court or that one juror introduced extrinsic evidence into the deliberations. The trial court therefore did not abuse its discretion in denying Garza's motion for a new trial.

A trial court's decision regarding whether juror misconduct occurred and whether the alleged misconduct affected the verdict is reviewed for abuse of discretion. Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 203, 75 P.3d 944 (2003). A court abuses its discretion if its decision was manifestly unreasonable or based on untenable grounds. Id. It is the defendant's burden to prove the misconduct. State v. Barnes, 85 Wn. App. 638, 668, 932 P.2d 669, *rev. den.*, 133 Wn.2d 1021 (1997). "'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.'"

Breckenridge, 150 Wn. 2d at 203 (quoting State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994)). The appellate court defers to the judge's factual determinations regarding whether a juror engaged in misconduct. State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000), *rev. denied*, 143 Wn.2d 1015 (2001).

In order to warrant granting a new trial based on juror misconduct, in addition to the misconduct, there must be prejudice. "Something more than a possibility of prejudice must be shown to warrant a new trial. ... there must be a showing of reasonable grounds to believe that a defendant has been prejudiced." State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The question is whether, from an objective perspective, erroneous information could have affected the jury's verdict. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), *rev. den.*, 118 Wn.2d 1021 (1992). "To assess whether prejudice has occurred, it is necessary to compare the particular misconduct with all the facts and circumstances of the trial." Id. at 342. The judge is in the best position to make this determination. Id. Absent a showing of both misconduct and prejudice, a new trial is not warranted. Id. at 341.

In considering an allegation of misconduct, a court may not consider statements or discussions that inhere in the verdict. "The individual or collective thought processes leading to a verdict "inhere in

the verdict" and cannot be used to impeach a jury verdict." State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

> The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Breckenridge, 150 Wn.2d at 205 (*quoting* Cox v. Charles Wright Academy, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)).

> The need for finality in litigation requires a public policy making inadmissible evidence that inheres in a jury verdict. If every verdict were subject to impeachment if the losing side could obtain an affidavit indicating that in making up his or her mind, the juror reached certain critical conclusions prior to commencement of deliberations, disregarded some evidence, misunderstood an instruction, misapplied the rules of law, or completely misunderstood the testimony of one or witnesses, then a jury verdict would simply be the first round in an interminably prolonged trial process.

State v. Hatley, 41 Wn. App. 789, 794, 706 P.2d 1083, *rev. den.* 104 Wn.2d 1024 (1985).

One test to determine whether evidence of misconduct inheres in the verdict "is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him.... Another test is whether that to which the juror testifies can be rebutted by other testimony without probing the juror's mental processes." Breckenridge, 150 Wn.2d at

205. One court distinguished the use of a juror's averments to establish the *fact* of misconduct versus their use to establish the *effect* of the misconduct, the former being permissible, the latter not. Gardner v. Malone, 60 Wn.2d 836, 843, 376 P.2d 651 (1962).

a. Garza did not meet his burden to show that the jury committed misconduct when it requested to have the victim's testimony played back.

Garza claims that the jury intentionally misled the court as to the reason it desired to have the testimony of the victim read back to them, asserting that it wasn't because it had not heard the testimony, but rather because there had been a dispute as to what the testimony was. The court essentially found that the jury did not commit misconduct as to this basis, not being persuaded that the allegation in the juror's declaration demonstrated misconduct where the court had received two communications from the jury indicating it, or some of them, did not hear the testimony. The trial judge was in the best position to make this discretionary call. Moreover, any prejudice that would have flowed from the jury rehearing all of the victim's testimony a second time, including cross-examination, would have been minimal.

To the extent that juror Parker's declaration could have been considered by the court, at most it could only be considered to establish

that there was a dispute as to what the testimony was. The rest of the declaration concerning the dispute about the testimony and its effect on the deliberations could not be considered by the court. The court was entitled to rely upon the jury's clarifying written statement in reply to the judge's response to their initial request. *See*, State v. Cooney, 23 Wn.2d 539, 547, 161 P.2d 442 (1945) (a juror is presumed to follow his oath and to have acted fairly and impartially). The jury replied: "Due to issues with accoustics (sic) within the courtroom and the lack of use of the microphone questions and response by the attorneys and witness were not heard by the jurors." The court had specifically requested this clarification because it was not clear from the jury's first question as to why they wanted the transcript.

The prosecutor argued that juror Parker's was insufficient to establish that the jury as a whole was attempting to mislead the court. 4RP 668. The prosecutor further argued there was no prejudice because the issue of whether an incident happened on the same day that J.C. told her aunt related to the second count, the one on which the jury found Garza not guilty. 4RP 670. Finally the prosecutor asserted the defendant had agreed the testimony should be read back and had not objected to the read back. 4RP 671. The court ruled that it didn't "find much basis" in this first assertion "at all." 4RP 672. The judge obviously found juror Parker's

statement insufficient to demonstrate that the jury had intentionally misled the court as to its reason for requesting the read back.

The court did not abuse its discretion in finding that defense had failed to demonstrate that the jury had committed misconduct when it requested the read back of the testimony. Moreover, there could not have been any prejudice from the read back. Even if the court had found that the jury had committed misconduct, this is not a situation in which some extrinsic evidence or erroneous information was injected into the deliberations that could have affected the verdict.[8] This was a reiteration of testimony that the jury was entitled to hear before making its decision, and as is discussed *infra* at p. 33-37, one that was done in a manner so as not to unduly emphasize the testimony.

b. Garza did not meet his burden to show that the other juror committed actual misconduct or that it affected the verdict.

Where an allegation of juror misconduct is made based on the jury's consideration of extrinsic evidence, the test to determine whether a new trial may be granted is whether the alleged information constituted

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[8] As noted by the prosecutor, the juror's concern as to whether sexual abuse occurred on the day that the victim told her aunt, the day that the family went to the police, related to the second count, the one that the jury had found the defendant not guilty of. 4RP 670. As noted by defense counsel in his motion for new trial, he had argued that the last incident could not have occurred on the day that the victim said it did because the defendant wasn't home that day. Supp CP __, Sub Nom. 160. 5RP 862-63.

actual misconduct and, if it did, whether it affected the verdict. Richards v. Overlake Hospital Medical Center, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *rev. den*, 116 Wn.2d 1014 (1991). If it is determined that extrinsic evidence was injected into the jury discussions, then prejudice is presumed. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740, *rev. den.*, 158 Wn.2d 1011 (2006). This presumption may be overcome, however, if the trial court is satisfied that "viewed objectively, it is unreasonable to believe the misconduct could have affected the verdict." Id.; *see also*, Kuhn v. Schnall, 155 Wn. App. 560, 573, 228 P.3d 828, *rev. den.* 169 Wn.2d 1024 (2010) (if extrinsic evidence is introduced into deliberations, verdict cannot stand unless trial court is satisfied evidence had no effect on verdict).

> Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." ... It is jury misconduct for jurors to interject extrinsic evidence into the jury deliberations, as such evidence is not subject to objection, cross examination, explanation, or rebuttal. ... Jurors may, however, rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. ... In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial. ...

Breckenridge, 150 Wn.2d at 199 n.3 (citations omitted, emphasis added). In determining whether a jury considered extrinsic evidence, a court considers only those facts regarding the alleged misconduct of the juror,

and discards those portions of the affidavits that inhere in the verdict. Overlake Hospital, 59 Wn. App. at 272; *see also,* State v. Jackman, 113 Wn.2d 772, 783 P.2d 580 (1989) (bailiff's affidavit was hearsay and consideration of juror's affidavit was improper because it asserted matters that inhered in the verdict). Then the court determines whether the juror's comments or misconduct had a prejudicial effect on the rest of the jurors. Id. When conducting the objective inquiry into whether the extrinsic evidence could have affected the jury's verdict, the court considers the purpose for which the extrinsic evidence was interjected. State v. Johnson, 137 Wn. App. 862, 870, 155 P.3d 183 (2007).

Garza does not assert that the juror failed to disclose information that would have led to his/her being excused for cause. In fact, the information concerning the juror's daughter was disclosed to counsel and the court before deliberations, and despite initial reservations, the court and defense counsel were both comfortable with the juror continuing to serve after speaking with the juror. 5RP 683-86. The juror Parker indicated in his declaration that he felt pressured to change his vote because other jurors did not want to come back for another day of deliberations. The declaration stated: "several jurors, including a juror who disclosed that during the trial his daughter had been sexually assaulted, were in a big hurry to rap the case up." His declaration also

referenced some comments that were allegedly made by other jurors as to why it didn't matter as to the way the victim said the incident happened. This information, as to how and why the jury reached its verdict, inheres in the verdict, and couldn't be considered by the court.

The court in State v. Jackman encountered a similar situation with an allegation that the jury had hurried its verdict. In that case the bailiff and a juror signed affidavits indicating that the jury might have hurried the verdict because the foreman was overdue for a vacation. Jackman, 113 Wn.2d at 777. The court held the bailiff's affidavit about what a juror told her was inadmissible hearsay and could not be considered in determining whether there was juror misconduct. Id. The court also held that the juror's affidavit inhered in the verdict and therefore was inadmissible to impeach the verdict. Id. at 777-79.

As in Jackman, the juror's declaration that the jury was in a big hurry to wrap up the case and that he felt pressure to change his vote references information involving consideration of the motive for the jury's reaching its verdict and the mental process by which the jury reached that verdict, and thus inhered in the verdict. *See also,* State v. Reynoldson, 168 Wn. App. 543, 277 P.3d 700, *rev. den.* 175 Wn.2d 1019 (2012) (juror's affidavit that she was coerced into changing her verdict and that she did not believe the defendant had been proven guilty inhered in the verdict);

State v. Hoff, 31 Wn. App. 809, 813, 644 P.2d 763, *rev. den.,* 97 Wn.2d 1031 (1982) (effect of juror's illness and pressure from other jurors to vote to convict inhered in the verdict and couldn't be considered by the court); *see also,* State v. Hatley, *supra* (testimony as to when juror reached a decision regarding defendant's guilt or innocence inhered in the verdict and couldn't be considered in order to impeach the verdict); State v. Duhaime, 29 Wn. App. 842, 631 P.2d 964 (1981), *rev. den.* 97 Wn.2d 1009 (1982) (juror's misgivings regarding his verdict in capital case was not misconduct, nor basis for a new trial).

In responding to the motion for a new trial on this basis, the prosecutor observed that the declaration did not make clear when juror Parker learned the information about the other juror's daughter's sexual assault and the fact that the jury wanted to hurry up and finish the case did not mean that any extrinsic information was introduced into the deliberations. 4RP 671. The judge agreed with the prosecutor's analysis, noting that he wasn't going to read more into the declaration than was already there and that the declaration was "susceptible to numerous interpretations." 4RP 672.

As was noted by the prosecutor, the declaration did not disclose when the declarant juror found out that the other juror had a daughter who had been sexually assaulted during the trial. It just referred to the juror as

"a juror who disclosed that during the trial his daughter had been sexually assaulted..." The juror could have disclosed that to the rest of the jury after deliberations, but before the declaration was written. There was nothing in the declaration that demonstrated that the juror disclosed the information to any of the other jurors *during* deliberations or in any way attempted to influence the deliberations with the information. The rest of the declaration amounted to a claim that the jury was in a hurry to reach a verdict. Under Jackman, that information cannot be considered and is insufficient in and of itself to grant a new trial. The trial court did not abuse its discretion in denying the motion for a new trial on this basis.

2. The court did not abuse its discretion in permitting the testimony of one witness to be read back to the jury per the jury's request.

Garza asserts that the trial court erred in permitting the child victim's testimony, and only the victim's, to be read back to the jury in response to the jury's request. First, Garza did not object below, but specifically agreed to the process for reading back the testimony below. He never requested that anyone's testimony be read back at the same time as the victim's and the jury had only requested the victim's testimony. Therefore, he may not assert this issue for the first time on appeal. Second, the trial court did not abuse its discretion in having the testimony of only the victim read back to the jury because that was the only

testimony the jury requested, the only testimony apparently at issue, and no one requested any other testimony.

a. Garza may not raise this issue for the first time on appeal

Garza asserts that the trial court erred in having only the child victim's testimony read back though he did not object and never requested that anyone else's testimony be read back. As he didn't request any other testimony and the jury's request was limited to the victim's, he did not preserve this issue for appeal. Moreover, he has failed to demonstrate how, under RAP 2.5, this is an error of constitutional magnitude. He is thus precluded from raising this on appeal for the first time.

By failing to request that the court read back any testimony other than the victim's, Garza failed to preserve this alleged error. WA RAP 2.5(a); CrR 6.15 provides in relevant part:

> ... In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. ...

WA CrR 6.15(f)(1). The restriction on testimony being replayed or being reviewed is based on court rule and common law rule. State v. Monroe, 107 Wn. App. 637, 641-42, 27 P.3d 1249 (2001), *rev. den.* 146 Wn.2d 1002 (2002). It is not based on constitutional provisions. Rationales

based on common law are not constitutional in origin. *See*, State v. Grimes, 165 Wn. App. 172, 189, 267 P.3d 454 (2011), *rev. den.* 175 Wn.2d 1010 (2012) (Bashaw[9]'s requirement of jury unanimity to answer "no" on special sentence enhancement verdicts was based on common law and was not constitutional in nature). Moreover, the court in Koontz, cited by Garza, applied a non-constitutional, evidentiary harmless error analysis in that case. State v. Koontz, 145 Wn.2d 650, 660, 41 P.3d 475 (2002), *citing* State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

When the jury sent out its first note asking to have the transcript of the victim's testimony, the parties and the court were very cautious about this, and, in fact, initially were inclined not to grant the jury's request. After counsel had seen the question, defense counsel stated that it was defense's position to oppose the request due to a concern that it would overemphasize that portion of the trial testimony. 5RP 896. The court clarified that if permitted, the testimony would be read back to the jury, the jury would not be permitted to have the transcripts. 5RP 896-97. When asked if he still objected, defense counsel stated: "I am, but I recognize the difficulty by virtue of the fact that the jurors are saying they couldn't hear the testimony, which I think, you know, obviously causes

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[9] State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled by* State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012).

some problems as well." 5RP 897. The prosecutor then referenced State v. Morgenson[10] and indicated it was not in favor of a replay with defense objecting, assuming that defense counsel had consulted with Garza. Id. The court indicated that it was disinclined to grant the request given the positions of the parties and the need to ensure that both the State and the defense receive a fair trial. 5RP 898-99. Responding to the court's disinclination to grant the jury's request, defense counsel inquired, "Including a read back?" When the court said yes, defense counsel requested time to consult with Garza. The court also suggested that given the vague nature of the request, another option would be to ask the jury to clarify what portions they didn't hear, but the prosecutor expressed concern that would place undue emphasis on that portion of the testimony. 5RP 900. Defense counsel then inquired how the read back would occur and was given time to discuss the issue with Garza. 5RP 900-01.

When court reconvened in the afternoon, the judge indicated that while read backs are disfavored, they can be permissible, referencing Morgenson, Monroe and Koontz. The prosecutor suggested that the court clarify what the hearing issue was because there were a couple possible reasons for the request: 1) the jury as a whole didn't hear the testimony; 2)

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[10] State v. Morgenson, 148 Wn. App. 81, 197 P.3d 715 (2008).

there's a dispute as to what was testified; or 3) some of the jurors didn't hear the testimony. 5RP 904. Defense counsel then stated he had no objection to clarifying with the jury what the issue was. Id. There was some discussion then as to what the answer back to the jury should be, and ultimately it was agreed that the answer should be: "Your question has been addressed with the lawyers, and more clarity is required as to the reason for your request."

The jury responded that "questions and responses by the attorneys and witnesses were not heard by the jurors" due to acoustics and failure to use the microphones. They reiterated their request for the transcript of the victim's testimony, including "attorney (sic) and witness response." After considering the jury's response, defense counsel stated:

> I don't think it matters if it's one or if it's 12. I think if there is a juror that's back there deliberating that didn't hear some of the evidence that was presented, then we have a problem. ... my position is that the transcript of the testimony that has been requested has to be read to the jury [,] that it has to be read in its entirety to the jury and, um, it has to be read in a manner that is fair to both sides, ... And if the court doesn't do that, then, I think the only alternative is a mistrial.

5RP 910-11. The prosecutor informed the court that given defense's position, the State agreed that the whole testimony should be read back in order not to put undue emphasis on a portion. 5RP 911-12. The court and counsel then discussed how the read back should be conducted. 5RP 912-

29. At the beginning of this discussion defense counsel stated, "I think that if we are going to do this, though, I think we should ask the jury whether there is (sic) other portions of the trial they didn't hear. I am a little concerned about that." 5RP 914. The court indicated that it wasn't going to do that because clearly the jury knew they could ask for other witnesses' testimony. Id.

Defense never requested that anyone's testimony aside from the victim's be read back and explicitly agreed to having her testimony read back. Garza cannot now assert that the trial court abused its discretion by failing to read back other specific testimony because he did not request it below. While he did mention inquiring of the jury as to whether there was other testimony it didn't hear, he did not request specific testimony be read back[11] or request that other testimony be read back in the interest of mitigating any undue emphasis on the victim's testimony. Moreover, he cannot raise the issue of the jury's alleged misrepresentation for the read back because he didn't raise it below and agreed to the specific procedure employed, ultimately with the attorneys reading their parts and a mutually agreeable disinterested person reading the victim's.

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[11] Even if the inquiry had been made, it is quite possible the jury would have not requested to hear any other testimony again.

b. The trial court did not abuse its discretion in having only the victim's testimony read back to the jurors.

In addition to asserting that the trial court abused its discretion in not ordering additional testimony to be read back, Garza asserts that the trial court abused its discretion because the jury misrepresented to the court the reason for requesting the read back. As asserted above, Garza draws unwarranted conclusions from the single juror's declaration, a declaration the court could not consider because it inhered in the verdict. Moreover, his request is based on hindsight. Even if the jury's request was not based on the reason it stated in the jury notes, the trial court had no way of knowing that at the time it made its decision. The trial court did not abuse its discretion in permitting the read back of the victim's testimony, the only testimony the jury requested.

A trial court's decision to permit a jury to have certain testimony read back to them during deliberations is reviewed for abuse of discretion. State v. Morgensen, 148 Wn. App. 81, 87, 197 P.3d 715 (2008); *see also*, U.S. v. Montgomery, 150 F.3d 983, 999 (9th Cir. 1998) (decision to allow jury to read transcripts of testimony in jury room is subject to abuse of discretion standard). "A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it on untenable grounds or reasons. Morgenson, 148 Wn. App. at 87-88. A court's decision to allow

a jury to read transcripts of testimony is "dependent upon the particular facts and circumstances of the case." Koontz, 145 Wn.2d at 654. The reading back of testimony during jury deliberations is disfavored. Id. It is disfavored because it may place undue emphasis upon on certain testimony. Id.; *see also*, U.S. v. Bertoli, 40 F.3d 1384, 1400 (3rd Cir. 1994) (trial court's broad discretion to allow jury to read transcripts of testimony is limited only if the request will slow the trial and if doing so would place undue emphasis on selected portions of testimony)[12]. A court's admonition not to place too much emphasis on the replayed testimony mitigates against this concern. Koontz, 145 Wn.2d at 658-59. Having the requested testimony read back in open court, instead of having transcripts go back to the jury room, also mitigates against the jury placing too much emphasis on isolated testimony.[13] Id. Courts have also found that undue emphasis on selected testimony can be mitigated by the court providing the transcript for both the direct and cross-examination of the witness. *See*, U.S. v. Barker, 988 F.2d 77, 80 (9th Cir. 1993) (trial court did not abuse

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[12] In fact, the court in Bertoli held that it is an abuse of discretion to *not* permit the reading back of testimony if it is not based on one of those two reasons. Bertoli, 40 F.3d at 1400; *see also,* U.S. v. Shabazz, 564 F.3d 280, 285 (3rd Cir. 2009) (court abused discretion in refusing jury's request to read back testimony of one witness where court's reason was not based on prolonging trial nor on concern of jury placing undue emphasis on testimony).

[13] Some courts, however, have found no rational distinction between reading back of testimony in open court and providing the jury with transcripts to take back to the jury room. *See*, Bertoli, 40 F.3d at 1400.

discretion in playing back audiotape of witness's testimony in open court where both the direct and cross examination were played back and where the court consulted both counsel prior to the play back).

In State v. Morgensen, during deliberations the jury requested a copy of the detective's and the defendant's testimony, the only two witnesses who testified at trial. Morgensen, 148 Wn. App. at 84. After discussing the Koontz concerns, the trial court overruled defendant's objection to playing an audiotape of the entire 35 minutes of testimony and played the audiotape in open court. Id. at 84-85. The trial court decided to play the entire trial testimony, instead of permitting the transcripts to go back to the jury room, in order to avoid any undue emphasis on isolated portions of the testimony. Id. Prior to playing the audiotape the trial court advised the parties not to make expressions during the playing of the audiotape and advised the jury that the manner in which the witness testified would not be available during the replay and this was a factor it could consider in its deliberations. Id. at 85. The court concluded that the trial court had not abused its discretion in replaying the entire trial testimony via audiotape in court because the trial court took proper precautions before playing it and because the concerns with videotapes in Koontz were not present in Morgensen's case. Id. at 88-90.

Here, the court and parties thoroughly discussed whether to read back the requested testimony to the jury and the specific procedure for doing so. The court requested additional clarification from the jury before considering granting the request. The court did not permit the jury to have transcripts of the testimony. The testimony read back included both direct and cross-examination. As noted by defense counsel the transcript was only 34 pages long. 5RP 913.

Garza maintains though that this case is similar to the circumstances in Koontz. It is not. In Koontz, during deliberations, the jury requested the testimony of three witnesses, which had been recorded via videotape, so that they could "break an apparent deadlock." Koontz, 145 Wn.2d at 651. The presiding juror informed the judge that some of the jurors felt like they didn't have enough information and favored a not guilty verdict. Id. at 652. The court decided to replay all three witnesses' testimony over defense objection. Id. While the judge instructed the jury not to place undue emphasis on the testimony, playback of the videotape was troublesome because the videotape did not duplicate the jurors' view of the witness and focused on features of the courtroom and persons the jurors may not have seen during the trial, such that the jury got a different view of the trial. Id. at 654. For example, at some points the videotape simply focused on the defendant sitting at counsel table. Id. at 653. The

court concluded, "Reviewing videotaped testimony raises greater concerns than reading from a transcript because videotaped testimony allows the jury to hear and see more than the factual elements contained in a transcript." Id. at 655. It advised that the "unique nature of videotaped testimony" requires courts to apply protections against undue emphasis that arise from the specific effect and manner of video replay. Id. at 657. The court ultimately held that the while the judge employed some protections to avoid undue emphasis, the precautions were not sufficient because the court "failed to consider the improper effect of the video replay and none of the protections it employed could correct this failure." The court noted that the play back had not been limited to specific testimony but had also provided the jury with non-testamentary information like views of the defendant and non-testifying participants. Id. at 659.

The read back here did not involve a videotape, the attorneys read their portions and the witness testimony was read by a disinterested third person. The jury did not receive any additional information that it did not receive during the trial itself. None of the concerns regarding videotape play back that were at issue in Koontz were at issue here. The judge and counsel worked out concerns regarding the process of the read back prior to the read back. The trial court was aware that read backs are disfavored

and did not permit it until both parties agreed and the jury had reiterated that it had not heard portions of the witness's testimony. The trial court did not abuse its discretion in permitting all the testimony of one witness, the only testimony the jury requested, to be read back to the jury.

E. CONCLUSION

Based on the foregoing the State requests the Court to deny Garza's appeal and affirm his conviction for Child Molestation in the First Degree.

Respectfully submitted this 29th day of May, 2014.

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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Andrew Subin
1000 McKenzie Ave., Ste 24
Bellingham, WA 98225

Legal Assistant

5/29/2014
Date