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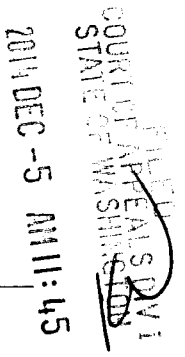
COUR OF APPEALS No. 70493-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

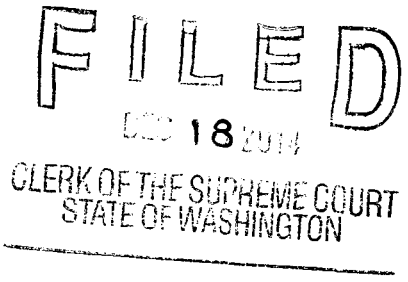
STATE OF WASHINGTON, Respondent

v.

FABIAN GARZA, Petitioner.



PETITION FOR REVIEW



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A. IDENTITIY OF PETITIONER

Appellant Fabian Garza asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Garza seeks review of the decision of the Court of Appeals affirming his judgment and sentence, filed November 10, 2014. A copy of the Court of Appeals decision is in the Appendix at pages A-1 through 14.

C. ISSUES PRESENTED FOR REVIEW

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?

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?

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?

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?

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?

D. STATEMENT OF THE CASE

1. 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 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 that JC's testimony be repeated. The jurors' 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.

Mr. Garza appealed his conviction to the Court of Appeals. CP 58-73. On November 10, 2014, the Court of Appeals affirmed Garza's conviction and sentence. (The Court of Appeals decision is attached hereto as Appendix A.) Mr. Garza seeks review of the Court of Appeals decision affirming his judgment of conviction and his sentence.

2. Substantive Facts.

In November of 2009, Jami Garza, appellant Fabian Garza's wife, ran 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.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should accept review because the juror misconduct in this case deprived Mr. Garza of his right to a fair trial, a right guaranteed by the State and Federal Constitutions. The Constitutional right to a jury trial must include the right to a jury that does not commit juror misconduct. Whether Mr. Garza's right to a fair trial was violated by the

juror misconduct in this case involves "a significant question of law under the Constitution of the State of Washington or the United States." This court should, therefore, accept review pursuant to RAP 13.4(b)(3).

1. The trial court erred by denying defendant's motion for a new trial because two distinct incidents of juror misconduct deprived defendant of his constitutional right to a fair trial.

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 mislead the parties and the court by misrepresenting the reason for requesting the alleged victim's testimony to be read back to the jury.

a. 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 mislead 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 his constitutional right to a fair trial, this court should accept review to consider this important question of law under the Constitutions of the State of Washington and the United States.

"'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, this Court should accept review to determine whether his conviction should be reversed and the case remanded to the Whatcom County Superior Court for re-trial.

b. 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, this Court should accept review to determine whether Garza's conviction should be reversed and the case remanded to Superior Court for a new trial.

2. The trial court's decision to read the victim's testimony back to the jury during deliberations violated Mr. Garza's constitutional right to a fair trial.

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 650, 658, 40 P.3d 475 (2002) (A trial court's decision to allow a jury to watch a videotape of trial testimony during deliberations is reviewed for an abuse of discretion).

A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it on untenable grounds or reasons. *State v. Powell*, 126 Wn2d 244, 258, 893 P.2d 615 (1995), *cited in*, *State v. Morgenson*, 148 Wn. App. 181, 187, 197 P.3d 715 (2008). Here, the trial court abused its discretion because the decision to read back only the alleged victim's testimony was manifestly unreasonable. Moreover, the trial court's reasons for allowing the read-back were "untenable" because the trial court relied on misrepresentations from the deliberating jury as a basis for allowing the read-back.

A trial court has discretion to permit a jury to review witness testimony during its deliberations, but the concern that such a review does not unduly emphasize any portion of the testimony circumscribes that discretion. *State v. Monroe*, 107 Wn. App. 637, 638, 27 P.3d 1249 (2001).

Further, because a jury must remain impartial as it determines the facts, our Supreme Court disfavors reading back testimony during deliberations. *State v. Koontz, supra*, 145 Wn.2d at 654.

Koontz is factually similar to the instant case. In *Koontz*, the defendant was on trial for second-degree assault of a child. The trial was 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 an 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 Constitutional right to a fair trial. This court should accept review to consider this significant constitutional issue.

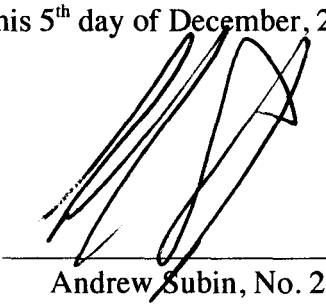
F. CONCLUSION

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.

The denial of Mr. Garza's right to a fair trial involves a significant question of law under the Washington and United States Constitutions.

This court should grant review under RAP 13.4(b) to address these significant constitutional issues.

Respectfully Submitted, this 5th day of December, 2014.



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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FABIAN LUKE GARZA, Appellant.	)	No. 70493-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 10, 2014

SPEARMAN, C.J. — In this prosecution for child molestation, the trial court did not abuse its discretion in denying Frank Garza's motion for a new trial due to juror misconduct or in granting the jury's request for a read-back of the victim's testimony. Garza's pro se claims on appeal do not warrant relief. We affirm.

FACTS

Based on allegations that Garza molested his niece in the spring and fall of 2009, the State charged him with two counts of child molestation in the first degree. The State's evidence at trial established that in November of 2009, Garza's wife, Jamie, operated a day-care in their Ferndale home. Jamie's sister Lindi Moore, had a daughter, five-year-old J.C., who attended Jamie's day-care. Garza was occasionally alone with the children.

One afternoon in November 2009, Jamie called Moore and told her that Garza had touched J.C. inappropriately. Moore spoke with Jamie's son, Marlo, who told Moore that Garza had inappropriately touched J.C. Later that day, Moore asked J.C. if Garza had touched her inappropriately. J.C. "pulled her

sweater up over her face and started crying and shook her head, 'yes.'" Verbatim Report of Proceeding (VRP) (02/19/13 and 02/20/13) at 179. Moore and Jamie then took J.C. and Marlo to the Ferndale Police Department.

Jamie told Ferndale Police Detective Melanie Campos that she believed she had seen "something that had happened" between J.C. and Garza. VRP (02/25/13) at 483. In a written statement, she said that a conversation with Marlo prompted her to ask J.C. and the other children if Garza had touched them. J.C., who was trying not to cry, said "'no.'" VRP at 612. Jamie asked her if Garza had told her not to tell and she said "'yeah." Id. J.C. then said Garza had touched her "on her bottom and on her front." VRP at 612.

Jamie also told police that in early November, 2009, she had discovered Garza with his hand on J.C.'s back. After Garza left the room, Jamie asked J.C. if he had touched her. She said, "'no', but had a "look on her face like she was trying to hide something." VRP at 613. J.C. eventually said Garza touched her on her bottom. When Jamie asked Garza if he touched J.C., "[h]e said maybe I rubbed her butt but I wasn't doing everything." Jamie told him to leave the house and Garza "sat down . . . and started crying." VRP at 614. Jamie recanted most of these statements at trial.

Marlo told Detective Campos that Garza had touched J.C. In a written statement, he said that five or six months earlier, he walked into the living room and saw Garza holding J.C. in his lap. J.C.'s pants were pulled down and her bare bottom was exposed. Garza was rubbing her and it looked like his hand was

up her shirt and on her leg. Garza looked up at Marlo. When Marlo looked again, J.C. was pulling her pants up.

Marlo went onto the porch and Garza followed. Marlo asked Garza why he would do such a thing, and Garza just started repeating Marlo's name. Marlo asked if he had ever done this before or to Marlo's sisters and Garza said no.

Marlo called his uncle and asked him to come get him. He waited in the bushes near the post office because he was crying and didn't want anyone to see him. When his uncle arrived, Marlo told him he had a fight with Garza and did not want to talk about it.

Garza called Marlo's cell phone, but Marlo didn't answer. Garza texted Marlo and asked him where he was and whether he needed anything. Later, Garza texted Marlo that he was going to leave for four weeks. Marlo called Garza, and Garza said that if Marlo did not want him there, he was going to Seattle to stay with a friend. Marlo said they needed his truck and his money to support them and he should just come back. Marlo made Garza promise that he wouldn't touch any of the girls. Marlo later told Jamie what he had seen between Garza and J.C. Jamie told him she had seen something involving Garza and J.C. too. They went to the police that day and told their stories.

The State charged Garza with two counts of child molestation. Count one was based on the living room incident witnessed by Marlo. Count two was based on the November 2009 incident witnessed by Jamie.

At trial, Marlo testified that most of his statement to police was untrue, including the substance of the statements he made to Jamie. He denied ever seeing Garza act inappropriately with J.C. He explained he was recanting because he did not want Garza to be convicted of something he did not do. He did not recant his statement that Jamie told him she witnessed something involving Garza and J.C.

J.C. testified that Garza touched her in her privates on several occasions. The first incident happened in her aunt's bedroom while she was watching television with her cousins. The last incident occurred when she and Garza were in the living room, Marlo was in his room, and the other kids were with Jamie. She described incidents occurring at other times and places. She said Garza touched her on her bottom, on her "private spot" in front, below her waist, and between her legs and rear end. VRP at 218-19; 222-23. She demonstrated in court where Garza touched her by pointing to her crotch, in between her legs, and her buttocks.

Garza testified and denied J.C.'s allegations. He also denied the allegations in Marlo and Jamie's recanted statements to police.

Throughout the trial, the jury complained of difficulty hearing the attorneys and witnesses. During deliberations, the jury sent out a request: "[d]ue to hearing issues early in witness questioning we are requesting the courtroom transcripts of [J.C.'s] sworn testimony." Clerk's Papers (CP) at 30. After discussing the matter

with counsel, the court responded to the jury, stating "more clarity is required as to the reason for your request." Id. The jury's response stated:

> Due to issues with acoustics within the court room and the 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 [J.C.] sworn testimony read. Both attorney and witness response.

CP at 31. After additional discussions, the court and counsel agreed to read back the entirety of J.C.'s testimony to the jury.

A juror also disclosed during deliberations that his daughter had been sexually assaulted the night before. After questioning the juror, defense counsel concluded, and the court and prosecutor agreed, that the juror should remain on the panel. The jury subsequently convicted Garza on count one – the incident witnessed by Marlo -- and acquitted him on count two.

Garza moved for a new trial based on allegations in the affidavit of juror Don Parker. In pertinent part, the affidavit stated:

> During the course of the trial there were many times when the jurors could not hear the witnesses and sometimes the questions posed by the attorneys. . . .
>
> During deliberations, jurors were unclear about what had been said by J.C., the alleged victim. I was certain that I heard that she had been touched by the defendant on the same day that she spoke to the police. I felt that the 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 . . . . 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.

CP at 37-38. Defense counsel argued that the affidavit established two instances of juror misconduct: misleading the court about the jury's reasons for requesting a read-back, and improperly discussing the fact that one juror's daughter had been sexually assaulted.

The prosecutor responded that Garza had not shown misconduct or prejudice. Regarding the allegation that the jury misled the court in its request for a read-back, the prosecutor pointed out that the jury's reason was consistent with the jurors' hearing difficulties throughout the trial. He also noted that Garza was not prejudiced since the jury acquitted him on one count shortly after the read-back. With respect to the juror's disclosure about his daughter, the prosecutor noted that the affidavit did not indicate "when that disclosure was made, and we can't know that it was used in any fashion that would have been misconduct, and, really, the deliberations . . . , these [inhered] in the verdict as well." VRP at 671. In denying the motion, the court stated:

> THE COURT: All right. Well, I did review, carefully, the written statement 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 the declaration than that which is contained in it and it's 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.

Garza appeals.

DECISION

Garza first contends the trial court abused its discretion in denying his motion for a new trial. We disagree.

A court may grant a new trial based on juror misconduct only if it affirmatively appears that a substantial right of the defendant was materially affected. CrR 7.5(a)(2). "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, 117-18, 866 P.2d 631 (1994) (quoting Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271-72, 796 P.2d 737 (1998)). A court should grant a motion for a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citing State v. Johnson, 124 Wn.2d 57, 76, 873 P.3d 514 (1994)). We give great deference to the trial court because it is in the best position to discern prejudice for mistrial purposes. Lewis, 130 Wn.2d at 707; Smith, 124 Wn. App. at 428. We will disturb a court's decision

on a mistrial motion only if the court abused its discretion. State v. Applegate, 147 Wn.App. 166, 175-76, 194 P.3d 1000 (2008).

Garza claims there were two instances of juror misconduct warranting a new trial. First, he maintains the entire jury committed misconduct by "lying about the reason for the read-back request." Brief of Appellant at 12. This claim fails because the allegations in the affidavit inhere in the verdict and, in any event, do not make a strong, affirmative showing of misconduct.

Juror Parker's affidavit begins with the statement that, throughout the trial, jurors had trouble hearing the witnesses. The affidavit then states that jurors disagreed as to whether J.C. said she was touched on a certain day. Juror Parker states that "[i]t was not that she was not heard; it was that we could not agree on what she had said." CP at 37-38. These matters inhere in the verdict and do not support a new trial. Henslin v. Pratt, 119 Wash. 443, 444-48, 205 P. 867 (1922) (holding that jurors' disagreement about what witness said inhered in the verdict, and stating that "[i]t is common for jurors to disagree as to what the evidence shows in certain particulars. If affidavits such as are in this case will support a motion for a new trial, then it seems manifest that relatively few verdicts would stand."). Id. at 448.

Even if the jurors' recollections of the evidence did not inhere in the verdict, juror Parker's affidavit did not provide the strong, affirmative showing necessary for a new trial. Juror Parker's conclusion that the jurors' disagreement was not due to problems with hearing the testimony is speculative. It was undisputed that

jurors had problems hearing throughout the trial. Thus, it was entirely possible that the jurors who claimed J.C. never said something had simply not heard her say it. The court was therefore entitled to discount Parker's speculative claim that "[i]t was not that she was not heard...." CP at 37-38. In addition, the affidavit says nothing about the jurors agreeing, either tacitly or expressly, to mislead the court in their request for a read-back. Nor is it clear from the affidavit that the written answer to the court's question was even discussed by the jury. The affidavit thus failed to make the requisite strong, affirmative showing of misconduct.

Garza contends a second instance of juror misconduct occurred when a juror introduced extrinsic evidence of his daughter's sexual assault into the jury's deliberations. Again, he fails to demonstrate misconduct warranting a new trial.

It is misconduct for a jury to consider extrinsic evidence. Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 199 n.3, 75 P.3d 944 (2003). Extrinsic evidence is information that is outside the evidence admitted at trial and is improper because it "is not subject to objection, cross-examination, explanation, or rebuttal." Id. (Citing Balisok, 123 Wn.2d at 118). But it is not misconduct for jurors to use common sense or consider their own life experiences in reaching a verdict. Johnson v. Carbon, 63 Wn. App. 294, 302, 818 P.2d 603 (1991). In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, we consider whether the comments impart the kind of

specialized knowledge that is provided by expert witnesses at trial. State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991).

Here, the disclosed information was more in the nature of a juror's personal experience than specialized knowledge. Juror Parker's affidavit alleged only that the sexual assault was revealed; it did not allege that the matter was discussed or that any conclusions were drawn from it. Moreover, the affidavit did not indicate whether the information was revealed before or after the jury reached its verdict. In these circumstances, the court did not abuse its discretion in denying Garza's motion for a new trial.[1]

Garza next contends the court abused its discretion in allowing only J.C.'s testimony to be read back to the jury. He claims "[t]his procedure unduly and unfairly emphasized the alleged victim's testimony, and denied the defendant . . . a fair trial." Brief of Appellant at 19. There was no abuse of discretion.[2]

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); State v. Koontz, 145 Wn.2d 650, 658, 41 P.3d 475 (2002). Such review is disfavored, however, and "must be weighed against the danger that the jury 'may

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[1] Garza states in his brief that the juror not only revealed the sexual assault, but also "urg[ed] the jury to convict on that basis." Brief of Appellant at 14. Nothing in Juror Parker's affidavit supports that assertion.

[2] The State contends this argument is raised for the first time on appeal and does not qualify for review under RAP 2.5(a) because it does not involve manifest constitutional error. Garza's counsel contends the issue should be reviewed because trial counsel was misled by the jury and because the alleged error concerns his constitutional right to a fair and impartial jury. We need not resolve this issue because even assuming the issue is properly before us, the court did not abuse its discretion.

place undue emphasis on testimony considered a second time at such a late stage of the trial.' " Koontz, 145 Wn.2d at 654 (quoting United States v. Montgomery, 150 F.3d 983, 999 (9th Cir.1998); State v. Morgensen, 148 Wn.App. 81, 87, 197 P.3d 715, 717-718 (2008). "It is seldom proper to replay the entire testimony of a witness," and courts should take precautions against unduly emphasizing testimony. Koontz, 145 Wn.2d at 657.

Here, the trial court exercised appropriate caution before allowing the read-back of J.C.'s testimony. Counsel and the court discussed the issue at great length, weighing the jurors' difficulty hearing against the dangers of emphasizing particular testimony. Before acting, they sought clarification of the jury's reasons for requesting a read-back. When the jury responded, defense counsel told the court that, given the jurors' problems hearing J.C.'s testimony, a transcript of that testimony should be read to the jury in its entirety. Counsel believed that the only other alternative was a mistrial. The prosecutor agreed, noting that reading back the entirety of J.C.'s testimony would avoid emphasizing any one portion of it. The parties and the court proceeded to discuss and implement precautions for ensuring that the read-back was as benign as possible. These included not allowing the jury to have a transcript of the testimony and having J.C.'s testimony read by a neutral party, in open court, and only once.

Considering the jury's reasons for requesting a read-back, the court's thorough vetting of the issue with counsel, the agreement of all parties to the

read-back, and the precautions taken by the court to minimize any prejudicial effects, we conclude the court did not abuse its discretion.[3]

Garza raises several additional claims in his pro se statement of additional grounds for review. He contends the State's "repeated use of Marlo's recanted statement" was "prejudicial" and denied him a fair trial. Appellant's Statement of Additional Grounds (SAG) at 2. But evidence that is prejudicial may nevertheless be admissible. ER 401, 403. Garza does not claim that the evidence was inadmissible. Nor does he articulate a specific basis in law for concluding that the State's use of the evidence was error. An "appellate court will not consider . . . additional grounds for review if [appellant] does not inform the court of the nature and occurrence of [the] alleged errors"). RAP 10.10(c). The claim therefore fails.

Garza also contends the trial court violated the spousal privilege contained in RCW 5.60.060 when it allowed his wife to testify against him. He concedes the statute allowed his wife to testify if his crime was against a child for whom he was a parent or guardian. He argues in conclusory fashion that he was not his niece's parent or guardian and that the trial court was wrong in concluding otherwise. But he nowhere addresses the arguments, evidence, and ruling on this issue below. His contention is therefore too conclusory to merit consideration. RAP 10.10.

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[3] For the first time on appeal, Garza objects to the read-back procedure used by the court, arguing that the court should have read back the testimony of all the witnesses. In addition to not being preserved, this argument ignores the length of the trial. The parties presented numerous witnesses over four days. While reading back the entire trial might be appropriate when a trial is extremely short, that was not the case here. See State v. Morgensen, 148 Wn. App. at 89-90.

Next, Garza contends his conviction for the alleged incident in Jamie's bedroom is not supported by sufficient evidence ". . . because the victim's version of the offense was physically impossible." SAG at 4. Garza was acquitted on this count.

Garza also argues that his conviction is not supported by sufficient evidence because ". . . [t]he State did not establish when and where the alleged assault occurred." SAG at 5. But Garza again relies on evidence relating to the count on which he was acquitted. He then mentions testimony from defense witnesses to the effect that J.C. had denied being touched inappropriately by anyone. There was contrary evidence, however, and the weight, credibility, and persuasiveness of the evidence are matters for the trier of fact. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (abrogated on other grounds by In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, n.8, 327 P.3d 660 (2014)).

Finally, Garza contends "The trial court erred by not allowing my lawyer to show that some witness[es] were biased because of their own sexual abuse." SAG at 5. He argues that "[t]heir own histories with childhood sex abuse made them more prone to believe J.C.'s statements, even though they were physically impossible." SAG at 6. There was no abuse of discretion.

A trial court has discretion to determine the scope of cross examination. State v. McDaniel, 83 Wn. App. 179, 184, 920 P.2d 1218 (1996). The court may reject cross examination where the circumstances only remotely tend to show bias. State v. Buss, 76 Wn. App. 780, 788, 887 P.2d 920 (1995) (abrogated on

other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999)). Where a case hinges on the credibility of essentially one witness, that witness' believability or motive must be subject to close scrutiny. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). In this case, defense counsel argued that prior sexual abuse of J.C.'s mother and aunt was relevant to their motivation and bias. The court ruled that any abuse of the mother was "a collateral matter related to an event that may or may not have happened that doesn't relate at all to Mr. Garza [.]" VRP at 189. Garza offers no principled basis for concluding that the court abused its discretion. Nor is an abuse of discretion manifestly apparent. The State's case did not depend solely on the mother's testimony and the mother's prior sexual abuse was a collateral matter of marginal relevance.

With respect to J.C.'s aunt, the defense asked her, without objection, about her prior sexual abuse and whether she was "more likely to jump to some conclusions with respect to this case?" VRP at 395. Thus, contrary to Garza's assertions, he was not precluded from asking her about her own sexual abuse and potential bias.

Affirmed.

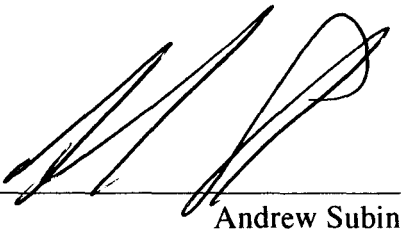
Spearman, C.J.

WE CONCUR:

PROOF OF SERVICE

I, Andrew Subin, hereby certify that on the 5th day of December, 2014, I hand delivered a copy of the foregoing Petition for Review 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 5 day of DECEMBER 2014.



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