

CERTIFICATE OF SERVICE

1 copies of Sup Notice mailed to Peter Tillot & Carol LaVene 2/14/09

COURT OF APPEALS DIVISION TWO OF THE STATE OF WASHINGTON

FILED COURT OF APPEALS DIVISION II

09 FEB -3 PM 2:45

STATE OF WASHINGTON BY CA DEPUTY

STATE OF WASHINGTON Respondent, v. Jesse Lee Harkcom (your name) Appellant.

No. 37996-1-II

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Jesse Harkcom, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

see attached

Additional Ground 2

see attached

If there are additional grounds, a brief summary is attached to this statement.

Date: 1/26/2009

Signature: Jesse Lee Harkcom

Statement of Additional Grounds:

I request that the Court review this Statement of Additional Grounds and address the additional issues I am bringing forward.

Juror Misconduct:

I urge the court to look into juror misconduct issues. There were clearly many issues with Juror No. 12. Some of those have been addressed in the Brief filed by my attorney; it was not however argued under juror misconduct and I request that you carefully look into this issue.

Juror No. 12 sat through two days of trial *and* one day of deliberations at which point she indicated to the Court that she knew the defendant. VRP 216. It is required that the judge must apply a heightened evidentiary standard when dismissing a juror after deliberations have begun.

Juror No. 12 indicated that she knew the defendant but could not piece together how she knew him but said that something really subliminal just kept clicking. VRP 217. Although the voir dire transcript is not before the Court, Juror No. 12 never indicated knowing and/or recognizing the defendant when asked during voir dire. Had Juror 12 indicated she knew the defendant, she never would have been placed on the jury panel. It is clear in the record that she thought she recognized me, though she may not have known why she recognized me. VRP 216-217. It was Juror No. 12's duty to inform counsel and the court of her recognition of me prior to the start of trial. Juror No. 12 should have never been placed on the panel.

Juror No. 12 came into court on the second day of deliberations indicating that she knew the Defendant and that he was the defendant in a rape case that she was summoned to be on the jury for. After the Courts inquiry about whether or not she had spoken to anyone about her [incorrect] recognition of me a decision was made to dismiss Juror No. 12 and bring in the alternate juror. While Juror No. 12 indicated that she did not mention this "recognition" to

anybody else on the jury panel, the jurors also were instructed not to discuss this case with the other jurors and she did that. Looking at the record, it is clear that she was discussing this case with another juror on break, VRP 220-221, even though she had been instructed not to. The credibility of this juror is in question and this situation was handled inappropriately by the Court and by my counsel. Juror No. 12 was convinced that I was a defendant in a rape trial. That statement alone in the minds of 11 other jurors would surely be detrimental. Although she indicated that she did not directly tell anyone that she believed I was the defendant in a rape case, she clearly was speaking to other jurors on break about past court experiences. VRP 220-221. Juror No. 12 indicated in the record that she would go and tell the group what the crime was I committed before which barred me from being able carry a weapon. VRP 218-219. Juror 12 was in the jury room with other jurors prior to being called into the courtroom on the second day of deliberations. She very well could have told the rest of the jury panel her opinion on why I wasn't permitted to carry a weapon, prior to her being asked to come into the courtroom. VRP 218-219. The Court should have investigated this situation further based on the seriousness of this issue. The Court should have realized that this was an extremely serious accusation the Juror was making about me and done everything they could have to make sure the other jury members were not tainted by what Juror 12 *thought* she knew. There is no guarantee that the other 11 people on my jury panel were not tainted by what Juror 12 believed. A court cannot permit a criminal conviction to stand where the jury's deliberations have been tainted by prejudicial misconduct. To do so would violate the fundamental principal that a defendant is entitled to a fair determination of guilt or innocence. *State v. Briggs*, 55 Wn.App 44, 776 P.2d 1347 (1989).

Not all that could have been done was done in order to ensure that I received a fair trial.

Jury Nullification:

Juror No. 12's claim that I was a defendant in a rape case has no merit. Both my counsel and the prosecutor verified this after Juror No. 12 left the courtroom. VRP 221-222. It is required by the Court to apply the heightened evidentiary standard in order to protect the defendant's right to a fair trial. *State v. Elmore*, 155 Wn.2d 758. The Court should have, at a minimum, called in the jury foreperson and questioned them on Juror No. 12's actions. There was no basis to Juror 12's claim that I was a defendant in a rape case. Therefore, the possibility exists that she did not want to continue deliberation and was attempting jury nullification since the reasoning for her leaving the jury panel had no merit. The Court should have investigated this to ensure that Juror No. 12 was not attempting juror nullification since deliberation had already begun. *State v. Elmore* 155 Wn.2d 758.

Ineffective Assistance of Counsel:

It was my counsel's duty to ask for a mistrial and so I argue ineffective assistance of counsel. I recognize that the Court may look at my trial counsel's decision to not request a mistrial as a tactical or strategic decision. The failure to move for a mistrial after allegations of juror misconduct is *generally* strategic or tactical and cannot form the basis for a subsequent claim of ineffective assistance of counsel. *State v. Alires*, 92 Wn. App. 931, 966 P.2d 735 (1998). I would ask the court to review the record before coming to the conclusion that it was a tactical or strategic decision by my attorney. In the record it clearly indicates that my trial counsel had never had this happen to him before and was, without question, unsure of which direction he should proceed. My counsel comments twice about his concern with the other jurors being tainted. VRP 222. He also states that he has never before had an alternate called in and is unsure of procedures. VRP 223. These statements by my counsel are indicative of his lack of

knowledge on how to handle this situation, not on tactical or strategic planning. I would also like to note; my counsel did not take a recess to research how he should proceed nor did he ask me (the client) about my wishes on how I would like to proceed. CrR 7.5(a)(5) indicates that grounds for a new trial are “irregularity in the proceedings of the court, jury, or prosecution...by which the defendant was prevented from having a fair trial.” I was prevented from having a fair trial by irregularities of the jury and should be afforded a new trial based on the Court’s and my counsel’s inability to recognize this.

The Court did not investigate any part of Juror No. 12’s statements, let alone apply the necessary heightened evidentiary standard that must be taken when dismissing a juror after deliberations have already begun. The Court should have investigated the jury issues further based on the seriousness of this.

Request:

I am requesting the Court grant me a new trial based on the following:

1. Juror misconduct and/or jury nullification;
2. Ineffective assistance of counsel, and the lack of the trial Court to honor my constitutional right to a fair trial;
3. Failure of the Court to investigate jury misconduct and/or jury nullification, by not applying a heightened evidentiary standard when dismissing a juror after deliberations have begun.