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COURT OF APPEALS
DIVISION II

NO. 39316-6

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STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

LEA DELAYNE OLNEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 08-1-00839-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court act within its discretion in denying defendant's motion for a new trial and in not holding a hearing to determine whether Ms. Stafford's allegations had basis and whether she was a competent juror (a) when, in her letter, Ms. Stafford talked about her motives and reasons to change the verdict; (b) when the court had already found that Ms. Stafford's post-verdict allegations of undue pressure during deliberation were unsubstantiated by the record; and (c) when defendant had never raised the issue of Ms. Stafford's competence prior to his appeal?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Lea Delayne Olney, hereafter "defendant," with unlawful delivery of a controlled substance (Count II) and unlawful possession of a controlled substance with intent to deliver (Count III). CP 1-2. The case proceeded to a jury trial in front of the Honorable Katherine M. Stoltz on March 9, 2009. 1RP 1.¹

¹ Because some volumes or verbatim reports of proceedings are numbered and some are not, the State will use the following citations to the record: transcript from 3/9/2009 is 1RP; transcript from 3/10/2009 is 2RP; transcript from 11/3/2009 is 3RP; transcript from 12/3/2009 is 4RP; transcript from 16/3/2009 is 5RP; transcript from 3/17/2009 is 6RP; transcript from 5/22/2009 is 7RP; and transcript from 7/24/2009 is 8RP.

While the jury was deliberating, Juror No. 9 sent a note to the judge, asking three questions, two of which were about the behavior of another juror on the panel. CP 12-14. Juror No. 9 wanted to know if it was proper that the juror in question, “despite the evidence presented,” was basing her decision on “intuition.” CP 12-14. Juror No. 9 also indicated that the juror in question sought out conversation with KOMO4 news team on two occasions. CP 12-14.

The court and the parties determined that the juror in question was Juror No. 2, Jo Anne Stafford. 6RP 496-497, 502. The court suggested that Juror No. 2 could be dismissed, and the State agreed, but defense counsel thought that dismissal was “premature.” 6RP 496-497, 499-501.

Juror No. 9 was briefly questioned by the court to confirm the identity of the juror in question. 6RP 502-503. Then the court brought in Juror No. 2, Ms. Stafford. 6RP 504.

Ms. Stafford admitted that she had talked to a news team on two occasions, and that the conversations ceased once the journalists realized Ms. Stafford was a juror. 6RP 504-505. According to her, on the first occasion, she merely asked the journalists about what they were doing there, and on the second occasion, she did not realize that she was talking to a journalist. 6RP 504.

The court also reminded Ms. Stafford that she was not to base her decision on emotion, passion, prejudice, or intuition. 6RP 505. Ms. Stafford agreed and explained that, when the jury started deliberating, she

was unprepared to state her reasoning in a cohesive and logical manner, did not understand why some evidence was not presented at trial, and so her responses “came from emotion.” 6RP 506-507. The court noted that people process information differently, but again reminded Ms. Stafford that she could not rely on her emotions or prejudices. 6RP 507-508. Ms. Stafford again agreed and stated that, although she had felt like a victim of “a verbal assault” by another juror the day before, she was grateful that that juror “was in [her] face” because that made her analyze the case in a logical and rational manner. 6RP 508.

After questioning Ms. Stafford, the court asked the parties whether they wanted her to remain on the jury. 6RP 509. Defense counsel indicated that Ms. Stafford had to stay on the jury because she had claimed her second conversation with the media to be accidental, and because she demonstrated the ability to have a rational discussion and to follow the rules. 6RP 509-510. The court kept Ms. Stafford on the jury. 6RP 510.

On March 17, 2009, the jury found defendant guilty of the crime of unlawful delivery of a controlled substance (Count II), not guilty of the crime of unlawful possession of a controlled substance with intent to deliver (Count III), but guilty of the lesser included crime of Count III of unlawful possession of a controlled substance. CP 41, 42, 43; 6RP 515. The court polled the jury, and each juror answered that the verdict was that juror’s verdict as well as the verdict of the jury. 6RP 516.

On May 5, 2009, almost two months after the trial, Jo Anne Stafford, wrote a seven-page letter to the Presiding Judge, the Honorable Bryan Chushcoff. CP 83-90. In the letter, Ms. Stafford indicated that the verdict in defendant's trial was incorrect; complained that Juror No. 4 shouted during deliberation; and stated that her verdict of "guilty" was the product of bullying by said juror and Judge Stoltz. CP 83-90. Ms. Stafford further complained that Judge Stoltz "interrogated" her; "accused" her of contacting the press; "insinuated" Ms. Stafford's vote was based on her sympathy for the defendant; "lectured" her about the jury instructions; and "alluded" to charging Ms. Stafford with a crime. CP 83-90. Ms. Stafford then listed, in great detail, "reasons to question the verdict," including that defendant had no prior criminal record, that the defense attorney did not care about defendant, and that there was an unexplained appearance of two African-American people in the courtroom during the proceedings. CP 83-90.

On May 22, 2009, the case proceeded to sentencing. 7RP 3. The court mentioned Ms. Stafford's letter, and the State, anticipating defense's motion for a new trial, argued against it and requested that the court proceed with sentencing. 7RP 3-4. Defense counsel moved to set the verdict aside and requested that the ruling be made by another judge. 7RP 4-6.

The court denied defendant's motions, finding that Ms. Stafford, like the rest of the jurors, was read standard jury instructions; that she received no threats; that the jury, including Ms. Stafford was polled; and that Ms. Stafford has made "wild accusations" and "allegations against a lot of people" that were unsubstantiated by the record. 7RP 5-6, 9-10. The court also noted that Ms. Stafford had attempted to have ex-parte contact with the court, and that the court's assistant told Ms. Stafford that such contact would be improper. 7RP 7.

On May 27, 2009, Ms. Stafford wrote another letter to Judge Chushcoff, recounting her post-verdict contacts with the defense attorney and her attempt to have an ex-parte contact with Judge Stoltz. CP 91-93.

Defendant had an offender score of one. CP 63-65; 7RP 11. The court sentenced defendant to 12 months in custody and four months on the DOSA on Count II, and to six months on Count III, the sentences to run concurrently. CP 66-82; 7RP 15, 16; 8RP 4.

Defendant filed a timely notice of appeal. CP 94-119.

2. Facts

On February 12, 2008, a confidential informant² identified defendant as the person who he had purchased methamphetamine from before and could purchase it from again. 1RP 44-45, 46. On the same

² During the trial, the informant is also referred to as "the source," "Jim, or "Creepy Jim."

day, the police organized a buy-bust operation. 1RP 44-45, 46. The informant called a telephone number that he identified as defendant's and asked "if she could sell to him." 1RP 47. The police held a briefing, pre-recorded the money for the buy-bust, searched the informant, and went to the parking lot of the Freddie's Club in Fife. 1RP 48, 50.

In the parking lot, the informant placed another phone call to the same number and finalized a buy of 3.4 grams of methamphetamine for \$220. 2RP 66, 68. The informant expected a medium-build female with blonde hair, and he expected her to come in a gold-colored Hummer. 2RP 69, 127.

After about 45 minutes, the gold-colored Hummer pulled into the parking lot. 2RP 69-70, 125. The car was registered to defendant. 2RP 125-126, 143.

The informant approached the car, contacted a female driver, later identified as defendant, through the driver's window, and then walked away. 1RP 44; 2RP 71-72, 75; 3RP 191, 227. The Hummer left the parking lot, and the informant returned to the undercover police car, and explained that he "fronted" the money – paid for the drugs in advance. 2RP 76.

After waiting for over an hour, the police had the informant call the number in question. 2RP 76-77. The informant called a few times, but no one picked up the phone; so, the informant left a few voice messages and sent a few text messages. 2RP 77-78. According to the

police officers who were present during his communications with defendant, the informant never made any threats. 2RP 106-107; 4RP 402-403, 418.

At some point later in the day, defendant finally answered the phone, and after talking to her, the informant, accompanied by the police, returned to the parking lot. 2RP 81-82. After about 30 minutes, the gold-colored Hummer pulled into the parking lot. 2RP 87. This time, there were two people in the car: a male in the driver's seat and defendant in the front passenger seat. 2RP 89-90, 100. The informant walked around the vehicle and contacted defendant. 2RP 89, 90; 3RP 209. Defendant and the informant exchanged something through the passenger window, and the informant gave a prearranged arrest signal to the police. 2RP 91-92; 3RP 210; 5RP 407-409. The arrest units moved in and the occupants of the Hummer as well as the informant were taken into custody. 2RP 94.

During the arrest, the police found a candy package with methamphetamine on the ground near the informant. 2RP 98, 99. The police also found a glass methamphetamine smoking pipe and a second bag of methamphetamine inside the Hummer. 2RP 102, 159-160. The police collected defendant's cellular phone, and its number matched the number that the informant had called to set up the drug buy. 2RP 105.

At trial, defendant presented an affirmative defense of duress. CP 5. She denied previously selling drugs to the informant. 4RP 305. She claimed that she had taken the money from the informant because he owed

her money and that she was not going to give him anything in return. 4RP 305-306. According to defendant, she returned to the parking lot because the informant kept calling her throughout the day and, at one point, threatened to come to her house and “handle things the old school way.” 4RP 314-315, 321.

Defendant also claimed that it was her friend, the driver of the Hummer, who passed the drugs to the informant by setting them on her lap, from where the informant took them; the other baggie with drugs and the pipe belonged to her friend as well. 4RP 317, 318.

Finally, defendant admitted that she had lied to the police when they initially questioned her. 4RP 320; Exhibit 8. She also admitted never telling the police about the informant’s threats. 5RP 379, 382.

C. ARGUMENT.

1. THE COURT WAS WITHIN ITS DISCRETION
WHEN IT DENIED DEFENDANT’S MOTION
FOR A NEW TRIAL

This court will not disturb a trial court's refusal to grant a motion for a new trial absent a manifest abuse of discretion. *State v. Havens*, 70 Wn. App. 251, 255, 852 P.2d 1120 (1993). The trial court abuses its discretion only if its decision is based on untenable grounds or reasons. *State v. Marks*, 90 Wn. App. 980, 983, 955 P.2d 406 (1998).

Juror misconduct may be grounds for a new trial. The decision of whether there has been jury misconduct is within the discretion of the trial court. *State v. Young*, 89 Wn.2d 613, 630, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978). The trial court also *has discretion* to conduct a fact-finding hearing to determine whether jury misconduct occurred. *State v. Cummings*, 31 Wn. App. 427, 431, 642 P.2d 415 (1982) (emphasis added). Appellate courts are generally reluctant to inquire into how a jury arrived at its verdict. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994).

While jury misconduct may be grounds for granting a new trial, not all jury misconduct can be considered by a court on a motion, and not all jury misconduct will be grounds for a new trial.

- a. The trial court properly rejected Ms. Stafford's letter as grounds for setting the verdict aside or for holding a determination hearing because it inhered in the verdict

In evaluating evidence of alleged juror misconduct, a court considers only the facts that are stated in relation to juror misconduct and that in no way inhere in the verdict itself. *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). All of the following factors and averments that inhere in the jury's processes in arriving at its verdict - and therefore, inhere in the verdict itself - are inadmissible to impeach the verdict: (1) the mental processes by which individual jurors reached their respective conclusions; (2) their motives in arriving at their verdicts; (3)

the effect the evidence may have had upon the jurors, or the weight particular jurors may have given to particular evidence; or (4) the jurors' intentions and beliefs. *Jackman*, 113 Wn.2d at 777-78 (internal citation omitted); *see also Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962) (if facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon the juror, the statements cannot be considered because they inhere in the verdict and impeach it).

Defendant's argument on appeal fails. Under the long line of Washington cases, the trial court properly denied the motion for a new trial because Ms. Stafford's allegations inhered in the verdict and did not amount to tenable reasons for setting the verdict aside.

Washington courts have a long record of dismissing cases of jurors' post-verdict change of heart. *See, e.g., State v. Maxfield*, 46 Wn.2d 822, 828, 285 P.2d 887 (1955); *State v. Gay*, 82 Wash. 423, 144 P. 711, 716 (1914); *State v. Marks*, 90 Wn. App. 980, 983, 955 P.2d 406 (1998); *State v. Hoff*, 31 Wn. App. 809, 813, 644 P.2d 763 (1982); *State v. Hughes*, 14 Wn. App. 186, 540 P.2d 439 (1975). The *Gay* court, almost a century ago, explained why the jurors should not be permitted to second-guess their verdicts:

If the juryman making the affidavit actually believed that the evidence did not justify a verdict of guilty, it was a gross wrong on his part, for any consideration of personal convenience, or any consideration of convenience to the defendant, to compromise with the other members of the jury and agree on a verdict of guilty. The only verdict he

could conscientiously render in keeping with his oath was one of not guilty. He therefore violated his oath, either in returning the verdict or in making the affidavit after the return of the verdict. When he so violated it cannot, of course, be ascertained without an inquiry into the privacy of the jury's deliberations. But public policy forbids such inquiries. To permit it would encourage tampering with jurymen after their discharge, would furnish to corrupt litigants a means of destroying the effect of a verdict contrary to their interests, and would weaken the public regard for this ancient method of ascertaining the truth of disputed allegations of fact. But few verdicts are reached in which some jurymen does not yield in some degree his opinions and convictions to the opinion and convictions of others. And when he does so, even in criminal cases, it is to the interest of the public that he be not permitted thereafter to gainsay his act.

Gay, 82 Wash. 423, 439.

Washington courts have rejected multiple reasons that defendants have put forward in arguing for a new trial. For example, in *State v. Hoff*, a juror filed an affidavit, stating that the juror was sick with a cold during deliberation and that other jurors exerted pressure on her to vote to convict *Hoff*. 31 Wn. App. 809, 813. The trial court granted defendant's motion for mistrial and listed the juror's affidavit as one of the reasons for granting the motion. *Hoff*, 31 Wn. App. at 810-811. On appeal, the Court of Appeals held that the trial court should not have considered the affidavit, reasoning that:

The effect of a juror's illness and the claimed pressure by others inheres in the verdict and may not be used to impeach the verdict... In a motion to set aside a verdict and grant a new trial, the verdict cannot be affected either favorably or unfavorably by the fact that one or more jurors

assented because of weariness, illness or importunities...
Public policy forbids inquiries into the privacy of the jury's
deliberations.

Hoff, 31 Wn. App. at 813 (internal citations omitted).

In *State v. Forsyth*, a juror, among other things, stated that she voted “guilty” because, during the end of the trial and deliberations, she was in pain and weak due to her health issues; because the deliberation room was smoky; and because she “was the subject of intense pressure from other jurors to change [her] vote.” 13 Wn. App. 133, 137-138, 533 P.2d 847 (1975). On appeal, Forsyth argued that his motion for a new trial should have been granted because the juror had committed misconduct in continuing as a juror when her illness rendered her incapable of fulfilling her functions as a juror. *Forsyth*, 13 Wn. App. 133, 137.

The appellate court disagreed, reasoning that the juror had not advised the court during the trial or deliberations that her health interfered with her performance as a juror, and that, when the trial court inquired as to whether she was feeling well, she said she was. *Forsyth*, 13 Wn. App. at 137. Further, the court emphasized that the effect of the juror's illness and the claimed pressure by other jurors inhered in the verdict and could not be used to impeach it. *Id.* at 138.

Similar to the jurors in *Forsyth* and *Hoff*, in this case Ms. Stafford, *weeks after the trial*, complained that the court's and another juror's alleged pressure on her made her vote defendant guilty. She also listed

“reasons to question the verdict”. CP 83-90. However, because Ms. Stafford’s motives to vote “guilty” and her reasons to question the verdict inhere in the verdict, they cannot be used to impeach it and must be disregarded in their entirety.

Moreover, like the juror in *Forsyth*, Ms. Stafford had multiple opportunities to let the court know that another juror on the panel was interfering with her performance as a juror, before the judge entered the verdict: when questioned by the court, before the verdict was read, and when the jury was polled. Instead, when questioned by the court, Ms. Stafford stated that being confronted by another juror during deliberation helped her better analyze the case. 6RP 508.

While seemingly offended by the alleged confrontation, she never indicated that the other juror scared, intimidated, or unduly pressured her. 6RP 507-508. After she rejoined the deliberation, Ms. Stafford never sent a note to the court complaining about Juror No. 4; and, when polled, agreed with the verdict. 6RP 516. Because Ms. Stafford failed to advise the court that she felt unduly pressured, and because her subsequent allegations inhere in the verdict, the trial court was within its discretion in not holding a determination hearing.

Other cases underscore how reluctant the courts are to second-guess jury verdicts. Washington courts have rejected the post-verdict change of heart when a juror felt pressured by time or procedure; when the

jury may have misunderstood or misapplied the law; or even in cases of alleged misconduct by multiple jurors.

For example, in *State v. Maxfield*, the court rejected Maxfield's argument that he should have been granted a new trial because one juror on his panel did not think Maxfield was guilty of manslaughter, but "so voted because the last two ballots came so fast that he was pressured into changing his mind." 46 Wn.2d 822, 828. The court held that the affidavit relaying the juror's concern, whether signed by defendant's attorney or by the juror, could not impeach the verdict. *Maxfield*, 46 Wn.2d at 828-829.

In *State v. Hughes*, the trial court refused to consider affidavits from several jurors and denied defendants' motion for a new trial. 14 Wn. App. 186, 189. The affidavits indicated that the jurors found Hughes and the co-defendant guilty after finding that defendants knew the substance they were delivering was catnip and intended to misrepresent it as marijuana, rather than finding that defendants intended to deliver marijuana. *Hughes*, 14 Wn. App. at 189-190. On appeal, the *Hughes* court held that the trial court properly refused to consider the affidavits as their content inhered in the verdict. *Id.* at 190.

In *State v. Marks*, the Court of Appeals held that the trial court abused its discretion when it ruled that the jury misapplied a jury instruction and granted defendant's motion for a new trial. 90 Wn. App. 980, 985-986. The *Marks* court reasoned that whether the jury misapplied the instruction could not be known without probing the mental processes

of the jurors, and those mental processes inhered in the verdict and were inaccessible to subsequent inquiry. 90 Wn. App. at 986 (internal citation omitted). The court emphasized:

Juror affidavits about the thought processes leading to the verdict may not be considered to set aside the verdict. Jurors may provide only factual information regarding actual conduct alleged to be misconduct, not about how such conduct affected their deliberations

Id. at 986 (internal citation omitted); *see also State v. Cook*, 113 Wash. 391, 399, 194 P. 401 (1920) (the trial court properly denied defendant's motion for a new trial because the affidavits filed by five jurors, in which they claimed that their verdict of "guilty" was affected by a prejudicial statement made during the deliberations, was an effort to impeach the verdict with matters inhering in the verdict).

In sum, the allegations of juror misconduct that inhere in the verdict have been rejected by Washington courts as reason to set the verdict aside. Ms. Stafford's alleged motives to change her vote and her reasons to question the verdict inhere in the verdict and should be rejected as grounds for reversal.

b. The record is devoid of any evidence of juror or court misconduct

Generally, a jury commits misconduct that may be grounds for a new trial only when it considers extrinsic evidence. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by

document." *Balisok*, 123 Wn.2d 114, 118 (internal quotation marks and citation omitted). A jury is not allowed to consider extrinsic evidence because such evidence is not subject to objection, cross-examination, explanation, or rebuttal. *Balisok*, 123 Wn.2d at 118.

The party alleging juror misconduct has the burden to show that misconduct occurred. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Generally, heated jury deliberation, raised voices, or personal remarks do not necessarily amount to juror misconduct. *See, e.g., Earl*, 142 Wn. App. 768, 774-776.

Other state and federal courts have rejected claims of coercion or intimidation of a juror or jurors by a fellow juror as grounds for a new trial, whether the juror's alleged intimidation takes the form of threats of physical harm, threats that the juror would be reported to or punished by the trial judge or the legal system, or excessive pressure, criticism, swearing, or other unspecified threats. *See, e.g., U. S. v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971); *Noell v. Interstate Motor Lines, Inc.*, 166 Colo. 494, 444 P.2d 631 (1968); *Crenshaw v. U.S.*, 116 F.2d 737 (C.C.A. 6th Cir. 1940), *cert. granted*, 313 U.S. 596, 61 S. Ct. 834, 85 L. Ed. 1549 (1941) *and cert. dismissed*, 314 U.S. 702, 62 S. Ct. 50, 86 L. Ed. 562

(1941); *Zimmerman v. Kansas City Public Service Co.*, 226 Mo. App. 369, 41 S.W.2d 579 (1931).³

Here, without considering the information that inheres in the verdict, Ms. Stafford has alleged court misconduct by Judge Stoltz and juror misconduct by Juror No. 4.⁴ However, the trial record is devoid of any evidence of improper behavior by the judge or the juror.

The jury received standard instructions, and the judge was neutral and respectful in questioning Ms. Stafford about her contact with the press and in reminding her about the jury's duties. 6RP 504-508; CP 15-40. Further, there was no reason for the judge to admonish or question Juror No. 4 because, when questioned by the judge, Ms. Stafford said that, although she had been "verbally assaulted" by another juror on the panel and "didn't appreciate it", she was "*grateful because it made [her] go to the rational, logical thought - -*" 6RP 508 (emphasis added). She also said, "actually, what was, really, wonderful - - I am grateful what happened yesterday because it - - it kept me up half the night trying to convey the feeling into rational thought." 6RP 507-508. In other words,

³ Frequently, like Washington courts, foreign courts reject such new trial motions on the ground that arguments, discussions, and reasons made and advanced by members of the jury among themselves while considering their verdicts may not be shown by affidavit to impeach a verdict returned by them. *See, e.g., Noell*, 166 Colo. 494.

⁴ Defendant does not argue that *Ms. Stafford* committed jury misconduct by relying on extrinsic evidence in reaching the guilty verdict. *See* Opening Brief of Appellant.

according to Ms. Stafford, even though the discussion in the jury room got contentious at one point or another, she felt such discussion helped her analyze the case better.

Similarly, Ms. Stafford's allegations against Juror No. 4 are conclusory, and, even if true, the juror's actions did not amount to jury misconduct such that the jury's verdict should be questioned. In her letter, Ms. Stafford alleged that Juror No. 4 "verbally attacked any juror who disagreed with her", and that Ms. Stafford "paid the price" for standing up to Juror No. 4 on a few occasions. CP 83-90. However, heated discussions between jurors during deliberation are not misconduct; they are not "extrinsic" pressure; and Ms. Stafford never elaborated as to how she paid the price. Additionally, when one considers that Ms. Stafford was the only juror to complain about Juror No. 4, and Ms. Stafford's propensity to exaggerate and jump into sinister conclusions, as evident from her letters, her contentions lose credibility.

In sum, defendant failed to meet her burden and show juror misconduct or court irregularity.

- c. The court was within its discretion in not holding a hearing to determine whether Ms. Stafford was a competent juror

Defendant also argues that the court abused its discretion when it did not hold a hearing to determine whether Ms. Stafford was a competent juror.

First, defendant's argument about Ms. Stafford's competency is an argument in passing unsupported by any legal authority. An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 170-171, 829 P.2d 1082 (1992). This Court should disregard it. *See also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficient argument); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (appellate court will not consider issues unsupported by adequate argument and authority); *State v. Camarillo*, 54 Wn. App. 821, 829, 776 P.2d 176 (1989) (no references to the record), *aff'd* by 115 Wn.2d 60 (1990); RAP 10.3(a). However, should this Court choose to address the issue of Ms. Stafford's competency, it will find that defendant's argument fails because the trial court was within its discretion in not holding a hearing, and because defendant waived the issue when he advised the trial court that he was not concerned with Ms. Stafford's "permeations".

The trial court was within its discretion in not holding a hearing to determine whether Ms. Stafford was a competent juror. The law presumes each juror sworn is impartial and qualified to sit on a particular case, otherwise he would have been challenged for "cause." *State v. Latham*, 30 Wn. App. 776, 781, 638 P.2d 592 (1982). Moreover, "[a]llegations of

juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.” *Tanner v. U.S.*, 483 U.S. 107, 120, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) (internal citation omitted).

While *Tanner* was a federal case, the court’s unwavering dismissal of alleged mental incompetence of a juror as a reason to question the jury’s verdict is persuasive:

Most significant for the present case, however, is the fact that lower federal courts treated allegations of the physical or mental incompetence of a juror as “internal” rather than “external” matters. In *United States v. Dioguardi*, 492 F.2d 70 (CA2 1974), the defendant Dioguardi received a letter from one of the jurors soon after the trial in which the juror explained that she had “eyes and ears that ... see things before [they] happen,” but that her eyes “are only partly open” because “a curse was put upon them some years ago.” *Id.*, at 75. Armed with this letter and the opinions of seven psychiatrists that the letter suggested that the juror was suffering from a psycho-logical disorder, Dioguardi sought a new trial or in the alternative an evidentiary hearing on the juror’s competence. The District Court denied the motion and the Court of Appeals affirmed. The Court of Appeals noted “[t]he strong policy against any post-verdict inquiry into a juror’s state of mind,”...

...

The Court of Appeals concluded that when faced with allegations that a juror was mentally incompetent, “courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance ... of jury service,” or proof of “a closely contemporaneous and independent post-trial adjudication of incompetency.”

483 U.S. 107, 118-119. Thus, the court below acted well within its discretion when it did not hold a hearing to determine whether Ms. Stafford had been a competent juror based merely on her post-verdict letter which contained unsubstantiated allegations and sinister conclusions. Moreover, the judge never stated that Ms. Stafford was or appeared to be incompetent. 7RP 6, 9.

It should also be noted that, when the trial court mentioned that Ms. Stafford's reasoning appeared questionable, the defense attorney stated that he was not concerned with her decision-making, but rather with her allegations. Specifically, the judge stated:

...her letter clearly goes into an awful lot of speculation about stuff that was not presented in court and would be outside evidence, which I mean as suitability of jurors is somewhat in question if that's how she makes her decision based on some sort of emotional reaction. And she certainly seems - - real sinister conclusions from stuff that's very innocuous.

7RP 9. But the defense attorney stated, "Just to make it painfully clear, our concern is not all her permeations with things going on. It's her specific allegations." *Id.* Thus, defendant waived the issue, if any, of juror incompetence.⁵

⁵ Even prior to the verdict, after the court questioned Ms. Stafford, defendant noted that Ms. Stafford had "a quirky personality", but argued to keep her on the jury. 6RP 509-510.

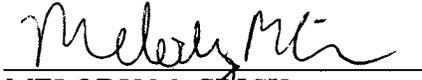
In sum, the trial court was well within its discretion in not holding a hearing to determine whether Ms. Stafford had been a competent juror. Defendant never raised the issue of Ms. Stafford's competence during the trial or sentencing; on appeal, defendant raised the issue only in passing; and, even if the issue was preserved, Ms. Stafford's alleged incompetence was an "internal" matter that required further inquiry only if there was proof of adjudication of insanity.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions.

DATED: February 16, 2010.

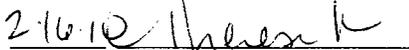
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Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-16-10 
Date Signature

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