COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

NO. 40344-7-II

IN THE WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

MICHAEL MEE,

Defendant-Appellant.

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

Appeal from the Pierce County Superior Court
The Hon. Susan K. Serko, Superior Court Judge
No. 08-1-03121-9

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ORIGINAL

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I. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Michael Mee assigns error to the entry of the judgment and sentence in this case.

2. Mee adopts and incorporates by reference the "assignments of error" set forth in the *Opening Brief of Appellant*, at 1.

3. Jury Instruction No. 19 incorrectly informed the jury that it must be unanimous in order to answer "no" to the question posed in the special verdict form.

4. The trial court abused its discretion when it denied Mee's motion for a mistrial based on juror misconduct and when it declined to inquire further of the remaining jurors once the misconduct of one juror was discovered.

II. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Mee adopts and incorporates by reference the "issues presented" in the *Opening Brief of Appellant*, at 1.

2. Was Jury Instruction No. 19 an incorrect statement of the law, where it instructed the jury that it must be unanimous in order to answer "no" to the question posed in the special verdict form?

3. Was the instructional error harmless beyond a reasonable doubt?

4. Did the trial court abuse its discretion by failing to grant a mistrial after Juror No. 5 admitted watching—in direct contravention of an order from the court— a television program about gangs which featured the trial prosecutor, and then talked about the program with other jurors?

5. Did the trial court abuse its discretion by failing to question other jurors about Juror No. 5's statements regarding the television program?

III. STATEMENT OF THE CASE

Factual and Procedural Background

Mee adopts and incorporates by reference the factual and procedural background set forth in *Opening Brief of Appellant*,

at 1-9. Facts relevant to the supplemental assignments of error are set forth below.

Jury Instruction No. 19

Jury Instruction No. 19 informed the jury how to complete the special verdict form for the firearm enhancement. It stated, in relevant part:

> Because this is a criminal case, ***all twelve of you must agree in order to answer the special verdict form.*** In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. ***If you unanimously have a reasonable doubt as to the question, you must answer "no."***

CP 294 (emphasis supplied).

Juror Misconduct

Midway through the trial, the prosecutor informed the trial court that he would be appearing the following night on an episode of the television show "Gangland" on the History Channel.[1] VI RP 1119-20. Based on this information, the trial

[1] For information regarding the "Gangland" television series *see* http://www.history.com/shows/gangland

court twice admonished the jury in an effort to prevent them from watching "Gangland." VI RP 1123 ("do not view any television programs or anything on the subject matter of this case"); VIIB RP 134:

> Do not ready any newspaper or other written account, watch any televised account, listen to any radio program, or consult any other outside sources including the internet about this case or its general subject matter. That means any television shows, anything on the general subject matter of this case. It's critically important.

Despite the trial court's clear admonition, the following week during deliberations[2] Juror No. 5 stated to the bailiff "that the prosecutor had his 'stuff' together, and that [the juror's] wife was flipping through the channels the other night and saw the prosecutor on TV." XI RP 1887.

Based on this statement the trial court questioned Juror No. 5 outside the presence of the other jurors. The court did not allow the attorneys to ask any questions. XI RP 1899. In

[2] The juror's statement to the bailiff occurred after the jury had reached a verdict but prior to the announcement of the verdict in open court.

response to questioning from the court, Juror No. 5 revealed the following:

> I believe it was last week, we were watching the History Channel at home and they were talking about what they were going to be showing during that episode and it was talking about San Bernadino gangs. . .
>
> And then they went on to another thing quickly and they talked about some gang activity, different types of gangs here in Tacoma, and it showed a picture of the Tacoma Dome area and I said to my wife, I says, that's Tacoma on there. And it was about a white—I don't know how much you want me to get into this, but white supremacist kind of folks, I guess, that went down to—I want to call it Hobo Village or something, and beat up one or two individuals.
>
> And then the picture that came on there next happened to be one of the people that I've seen in the courtroom and I was surprised to see him and I was impressed with what I heard and the wildness of the act.

XI RP 1900-01. When asked by the trial court if he had watched the episode involving the prosecutor, Juror 5 responded, "I watched—when I saw that, I watched that episode, yes, ma'am." XI RP 1901.

The juror initially denied discussing the show with other jurors, but then added, "I did say something that I had seen [the

prosecutor] on television that week, and I thought it was kind of ironic, but that's all I had said about that." XI RP 1901-02. Juror No. 5 did not recall which other jurors he had discussed the television show with: "We've been gibbering in here quite a bit." XI RP 1902.[3] He did recall that whatever statements he made about the program occurred prior to the jury's reaching a verdict. XI RP 1903.

The defense moved for a mistrial. XI RP 1909. The trial court found that Juror No. 5 had engaged in juror misconduct, but denied the motion for a mistrial. XI RP 1910-11, 1920. The court opted to excuse Juror No. 5, call in an alternate, and instruct the jury to begin deliberations anew, but declined to question any of the other jurors about what they may have been told by Juror No. 5. XI RP 1911-13.

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[3] During his colloquy with the court Juror No. 5 also volunteered, "I do talk a lot. Since I retired I'm a little more loose with things." XI RP 1900.

Juror No. 5 was then brought back into the courtroom to be formally excused by the court, at which point he volunteered:

> I was sitting there trying to go through my mind as to who, in fact, I may have discussed something with. My best recollection is early in the morning, I think there might have been only one or two people in there, we got there early.

RP 1918. The trial court did not revisit the issue of questioning the remaining jurors.

IV. ARGUMENT

The Trial Court Erred By Instructing the Jury That It Must Be Unanimous to Answer "No" to the Question Posed in the Special Verdict Form.

Instruction No. 19 Was an Incorrect Statement of the Law.[4]

Mee's jury had to be unanimous in order to answer "yes" on the special verdict form. However, the reverse was not true—the jury did not have to be unanimous to answer "no." Instead, if *any one* of the jurors had a reasonable doubt regarding the special verdict, then the jury was required to answer "no" on the special verdict forms.

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[4] Mee's trial counsel did not object to the instruction. However, "[t]he proposition is well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal." *State v. Davis*, 141 Wash.2d 798, 866, 10 P.3d 977 (2000). *But cf. State v. Nunez*, ___ Wash. App. ___, ___ P.3d ___, 2011 WL 536431 (2011), in which Division III held that a *Bashaw* error was not a manifest constitutional error which could be raised for the first time on appeal. Meanwhile, Division I has reached the opposite conclusion as the *Nunez* court, albeit in an unpublished decision which cannot be cited in this proceeding. It is also worth noting that in the *Bashaw* case itself trial counsel did not object to the defective instruction. *See State v. Bashaw*, 144 Wash. App. 196, 198-99, 182 P.3d 451 (2008).

The outcome of this claim of error is controlled by the Washington Supreme Court's recent decision in *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010). In *Bashaw*, the defendant was accused of engaging in multiple drug sales to an informant, each occurring within 1,000 feet of a school bus route stop. Regarding the enhancement, the trial court instructed the jury that "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Bashaw*, 169 Wash.2d at 139. This language is virtually *identical* to the instruction given to Mee jury. *See* CP 294.

The Washington Supreme Court framed and resolved the instructional issue as follows:

> [W]hen a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? We answered this question in *State v. Goldberg,* 149 Wash.2d 888, 72 P.3d 1083 (2003), and the answer is no. A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt. . .

Bashaw, 169 Wash.2d at 145 (footnote omitted).

The Court noted that this rule serves a number of important values:

> First, we have previously noted that "[a] second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses." *State v. Labanowski,* 117 Wash.2d 405, 420, 816 P.2d 26 (1991). The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal." *State v. Wright,* 165 Wash.2d 783, 792-93, 203 P.3d 1027 (2009) (internal quotation marks omitted) (quoting *Arizona v. Washington,* 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Bashaw, 169 Wash.2d at 146-47. The Court concluded:

> [T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, *see Goldberg,* 149 Wash.2d at 893, 72 P.3d 1083, it is not required to find the *absence* of such a

> special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wash.2d at 147.

Mee's case is indistinguishable from *Bashaw*. Instruction No. 19 was an incorrect statement of the law, and it was error for the trial court to give it.

The Error Was Not Harmless Beyond a Reasonable Doubt.

In order for the instructional error in this case to be deemed harmless, this Court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Bashaw*, 169 Wash.2d at 147, quoting *State v. Brown,* 147 Wash.2d 330, 341, 58 P.3d 889 (2002), and *Neder v. United States,* 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In *Bashaw*, despite the fact that there was ample evidence admitted at trial that all three transactions took place within 1,000 feet of a school bus route stop, and that two of the transactions occurred within 100-150 feet of a school bus

route stop, the Court nevertheless concluded that the instructional error was not harmless:

> ***The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction.*** *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. ***We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.***

Bashaw, 169 Wash.2d at 147-48 (emphasis supplied).

This reasoning applies with equal force here. It is simply impossible to determine what the jury would have done had it been properly instructed. The holding of *Bashaw* is clear: the instructional error which occurred here cannot be deemed harmless.

The Trial Court Abused Its Discretion When It Denied the Defense Motion for a Mistrial Based on Juror Misconduct and When It Declined to Inquire Further of the Remaining Jurors Once the Misconduct of Juror No. 5 Was Discovered.

Introduction

Juror No. 5 disobeyed an explicit court order and watched a television show on the subject of gangs—the very centerpiece of the State's case. *See Opening Brief of Appellant*, at 9-33. But it wasn't just a program about gangs, it was a show which featured Mr. Mee's trial prosecutor talking about a case he had handled. The prosecutor's appearance on the show "impressed" Juror No. 5, who then shared information about the show with at least one or two other jurors.

Despite this misconduct, the trial court denied the defense motion for a mistrial and declined to inquire of the other jurors to determine exactly what Juror No. 5 shared and how many heard Juror No. 5's comments. This was error.

The Trial Court Abused Its Discretion.

A trial court's investigation into juror misconduct is reviewed for abuse of discretion. *State v. Earl*, 142 Wash. App. 768, 774, 177 P.3d 132 (2006), *rev. denied*, 164 Wash.2d 1027 (2008).

> A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record.

State v. Depaz, 165 Wash.2d 842, 858, 204 P.3d 217 (2009) (quotations and citations omitted).

This standard of review must be viewed within the context of the trial court's duty to investigate claims of juror misconduct. RCW 2.36.110 places that burden squarely on the trial judge:

> ***It shall be the duty of a judge to excuse*** from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect ***or by reason of conduct or practices incompatible with proper and efficient jury service.***

(emphasis supplied).

> RCW 2.36.110 and CrR 6.5 place a "continuous obligation" on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating.

State v. Elmore, 155 Wash.2d 758, 773, 123 P.3d 72 (2005), quoting *State v. Jorden*, 103 Wash. App. 221, 227, 11 P.3d 866 (2000), *rev. denied*, 143 Wash.2d 1015 (2001).

Once a finding of juror misconduct is made, a new trial is required if the defendant can show that he was prejudiced by the misconduct. *Depaz*, 165 Wash.2d at 856. The prejudice inquiry is an objective one: "The question is whether the unrevealed or extraneous information ***could*** have affected the jury's determination, not whether it actually did." *State v. Tigano*, 63 Wash. App. 336, 341, 818 P.2d 1369 (1991), *rev. denied*, 118 Wash.2d 1021 (1992) (emphasis supplied). Moreover, "prejudice may be presumed upon a showing of misconduct," though "that presumption can be overcome by an

adequate showing that the misconduct did not affect the deliberations." *Depaz*, 165 Wash.2d at 856.

While investigation of allegations that a juror is refusing to follow the law require special care to avoid inquiry into the jurors' deliberations, allegations of misconduct involving the consideration of extrinsic evidence "can be investigated without direct discussion of the juror's views about the merits of the case." *Elmore*, 155 Wash.2d at 770. In other words, the trial court can inquire into whether jurors have been exposed to extrinsic evidence without intruding on deliberations. Put yet another way, there is no tenable reason for failing to fully investigate a claim that a juror has introduced extrinsic evidence into the jury room.

Here, the trial court's decision not to question any additional jurors about Juror No. 5's statements was not only based on untenable reasons—it was based on no reason at all. The court utterly failed to articulate why additional inquiry of

the remaining jurors would somehow harm the deliberative process.

The court conducted a very limited colloquy with Juror No. 5 during which it did not allow any questions from the parties. Indeed, even after the court had already made the decision to excuse Juror No. 5, the court actively discouraged Juror No. 5 from revealing information to the court:

Juror No. 5: Can I speak freely?

The Court: No, no you shouldn't speak freely.

XI RP 1917.

Despite this limited inquiry, Juror No. 5 still managed to reveal that (a) he had committed juror misconduct; (b) as a result of the misconduct he came away "impressed" with the prosecutor; (c) he had shared the extraneous information he had gleaned from television with at least one or two other jurors, and possibly more; (c) he was a man who was "loose" with his tongue and liked to "talk a lot"; and (d) all of the jurors had been "gibbering" "quite a bit" in the jury room. The facts

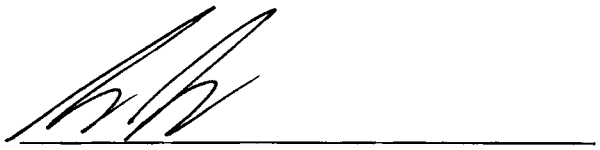
disclosed by Juror No. 5 cried out for additional investigation to determine whether and the extent to which he had contaminated the other jurors. The court's failure to inquire of the other jurors was an abuse of discretion.

V. CONCLUSION

For the foregoing reasons, as well as those set forth in the *Opening Brief of Appellant*, this Court should reverse Mee's convictions and remand for a new trial, or should vacate the firearm enhancement and remand for re-sentencing.

DATED this 24th day of March, 2011.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on March 24, 2011, I served a copy of the attached brief on counsel for the State of Washington by causing the same to be mailed, first-class postage prepaid, to:

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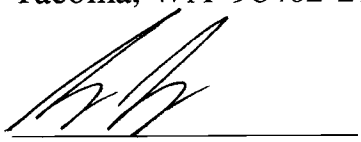

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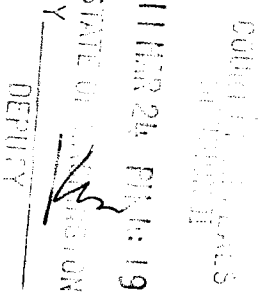

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON, Respondent, vs. MICHAEL MEE, Appellant.	)	NO. 40344-7-II AMENDED CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on March 24, 2011, I served a copy of the *Supplemental Opening Brief of Appellant* on the Appellant and on counsel for the State of Washington by causing it to be mailed, first class postage pre-paid, to:

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