

NO. 41442-2

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

STATE OF WASHINGTON, RESPONDENT

v.

RAYMOND SAMUEL REYNOLDSON, APPELLANT

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pierce County  
The Honorable Bryan E. Chushcoff, Presiding Judge

No. 06-1-01238-2

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**REPLY BRIEF**

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A. ARGUMENT.

1. THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL WHEN IT ABUSED ITS DISCRETION BY DISREGARDING WELL SETTLED CASE LAW

a. The trial court admitted to disregarding established case law without a legal reason.

A new trial in a criminal proceeding is required only when the defendant has been so prejudiced that nothing short of a new trial can insure that he or she will be treated fairly. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). This Court reviews a grant of a motion for new trial for an abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). 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). An abuse of discretion occurs when no reasonable judge would have made the same decision. *Bourgeois*, 133 Wn.2d at 406. An order granting a new trial will be overturned if "it is predicated on erroneous interpretations of the law." *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989).

Defendant argues that the trial court's decision was just and fair. The State does not agree and that is not the standard of review. The standard this Court must apply is the abuse of discretion standard. The

trial court clearly stated that defendant received a fair trial. 10/28/10 RP 24. The trial court also said it didn't see anything improper or unfair in the things that Ms. Ortiz was reporting. 10/28/10 RP 16-17. However, the court then departed from case law because of what it believed, "in my heart of heart" that Ms. Ortiz did lie and that she didn't find defendant guilty. 10/28/10RP 18. The trial court recognized that the cases presented by the State, including the *Forsyth* case which the trial court felt was factually on point with the instant case, told the trial court that it could not consider that Ms. Ortiz claimed her verdict as delivered to the trial court was in error. 10/28/10 RP 17-18. Further, the trial court also noted that the jury was polled and that Ms. Ortiz declared the verdict to be hers and the verdict of the jury. 10/1/10 RP 6-9. The trial court noted that the case law says that once the jury is polled, the court cannot consider anything else unless there is an extrinsic issue, which did not exist in this case. 10/28/10 RP 18. The trial court's ruling shows a clear abuse of discretion as he recognized and acknowledged settled case law, found that defendant received a fair trial, but set aside the case law and instead relied on the feeling he had in his heart of heart in rendering his decision. The trial court's decision was an abuse of discretion.

b. The trial court considered information that inhered in the verdict.

Despite defendant's assertion, without authority, that the court can consider any form of juror misconduct, case law has placed limits on what

the court may consider. 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. 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. Juror affidavits **may not** be used to show that a juror assented to a jury verdict because of intimidation by other jurors. *State v. Aker*, 54 Wash. 342, 345-346, 103 P. 420 (1909)(emphasis added). Appellate courts are generally reluctant to inquire into how a jury arrived at its verdict. *Balisok*, 123 Wn.2d at 117.

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. *Jackman*, 113 Wn.2d at 777-78.

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 claims that the fact that Ms. Ortiz lied about her verdict and lied about the jury poll do not inhere in the verdict and that the trial court did not consider anything else in the affidavit in reaching its decision. Brief of Respondent, page 12. Since the fact that Ms. Ortiz claims she lied goes to her mental processes in reaching her verdict, her motive in reaching her verdict and her intentions and beliefs, the State disagrees with that statement. The fact that Ms. Ortiz claims she lied about her verdict does inhere in the verdict and it goes directly to how the verdict was reached and what her motives, intent and beliefs were in reaching a verdict.

In addition, the trial court did consider Ms. Ortiz' motives in reaching a verdict. This is a process that inheres in the verdict and cannot be considered by the court. "I think that she did want out of this thing, and I think the conduct that she showed the day before to Ms. Winnie is more evidence that she genuinely just wanted out of here and, finally, just said, I will say his is guilty, so she could leave." 10/28/10RP 17. The trial court completely ignored established case law in reaching its decision. By accepting Ms. Ortiz' affidavit after the fact as the truth, and considering it in reaching its decision, the trial court violated public policy and engaged in a clearly erroneous interpretation of the case law that necessitates a reversal of its decision. *See Jackman*, 113 Wn.2d at 777.

- c. The trial court disregarded case law by accepting Ms. Ortiz' affidavit after the fact as a statement of truth.

Washington courts have a long record of dismissing claims of jurors' post-verdict change of heart. *See, e.g., State v. Maxfield*, 46 Wn.2d 822, 285 P.2d 887 (1955); *State v. Gay*, 82 Wash. 423, 144 P. 711, 716 (1914); *State v. Marks*, 90 Wn. App. 980, 955 P.2d 406 (1998); *State v. Hoff*, 31 Wn. App. 809, 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 jurymen 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. The law in Washington on this subject is consistent with the common law and federal law. The “near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict”. *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), citing 8 J. Wigmore, Evidence § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961).

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 (emphasis added).

“Further, any defect in the voting procedure was cured by the jury poll.” *State v. Havens*, 70 Wn. App. 251, 257, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993). When the jury is polled, there is no doubt that the verdict was unanimous and was the result of each juror's

individual determination. *State v. Badda*, 63 Wn. 2d 176, 182, 385 P.2d 859 (1963); *Butler v. State*, 34 Wn. App. 835, 838, 663 P.2d 1390, (jury poll is tantamount to a final vote), *review denied*, 100 Wn.2d 1009 (1983).

Defendant claims, without support, that it is a known fact that Ms. Ortiz lied when she voted to find defendant guilty. Brief of Respondent, page 17. However, there is nothing in the record that supports that Ms. Ortiz' lie to the trial court was a known fact. This conclusion is based on the trial court's own personal belief. "I do believe that she never, never actually believed he was guilty of these charges, but said so. **In her declaration, when she said she lied about that, I think she is telling the truth.**" 10/28/10 RP 27 (emphasis added). Case law establishes that it cannot be a known fact. *Gay* above is instructive on this issue and, despite defendant's claims to the contrary, is still good law and as such what controls in this case. The case law is clear that "the rule is of universal acceptance that jurymen will not be permitted to impeach their own verdict, and thus declare their own perjury, **for one oath would but offset the other.** Both public decency and public policy alike demand the rejection of such testimony." *Gay*, 82 Wash. at 438 (emphasis added). The trial court erred when it declared that it believed the juror's oath after the fact. This determination is in clear violation of established case law

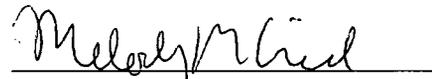
and violated public policy. The trial court abused its discretion in accepting the juror's oath after the fact as true and disregarding her previous oath.

B. CONCLUSION.

The State respectfully request this Court reverse the trial court's grant of defendant's motion to for a new trial, reinstate the jury's properly rendered verdict and remand for sentencing pursuant to that verdict.

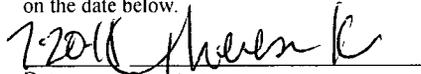
DATED: July 20, 2011.

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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.

  
Date Signature