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STATE OF WASHINGTON
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No. 37172-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO J. MILLAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Thomas P. Larkin, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. Testimony at trial 2

D. ARGUMENT 7

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL BASED ON JURY MISCONDUCT AND IN FAILING TO FURTHER INQUIRE 7

a. Relevant facts 8

b. The motion for a new trial or a hearing on the issue should have been granted 11

E. CONCLUSION 16

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962) 13, 14

Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973). . . 12, 14, 15

Robinson v. Safeway Stores, 113 Wn.2d 154, 776 P.2d 676 (1989) 7

State v. Balisok, 123 Wn.2d 114, 866 P.2d 631 (1994) 11, 12

State v. Jackman, 113 Wn.2d 772, 783 P.2d 580 (1989) 13

State v. Parker, 25 Wash. 405, 65 P. 776 (1901). 14

WASHINGTON COURT OF APPEALS

Richards v. Overlake Hosp. Med. Center, 59 Wn. App. 266, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991). 13, 14

State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989). 8, 12, 14, 15

State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001) 13

State v. Cummings, 31 Wn. App. 427, 642 P.2d 415 (1982) . . . 11, 13, 14

FEDERAL AND OTHER STATE CASELAW

Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954) 8, 14

Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965) 7

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Art. I, § 21. 8

RCW 46.20.342. 2

RCW 9.41.010 2

RCW 9.41.030 2

Sixth Amend 8

A ASSIGNMENT OF ERROR

The trial court abused its discretion in refusing to inquire further into juror misconduct and in denying Mr. Millan's motion for a new trial based on that misconduct.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The state and federal rights to trial include the right to have the jury make its decision based solely upon the evidence presented at trial. It is misconduct for jurors to consider evidence which was not presented at or subject to the rigors of trial. Where there is evidence that such misconduct occurs, a trial court has a duty to investigate. Did the trial court abuse its discretion in failing to investigate juror misconduct in this case where counsel filed an affidavit raising serious questions of such misconduct?

2. Where there is juror misconduct in considering evidence outside the record, a new trial must be granted if the extrinsic evidence could have had an effect on the verdict. The test is objective and does not require proof that the verdict was actually affected by the evidence, because that inquiry would require examination of matters which inhere in the verdict.

Mr. Millan was accused of unlawful possession of a firearm after he was stopped based upon a report of a disturbance in a car. The jury was not given information about the disturbance, which involved an alleged assault on his wife. After trial, jurors indicated that they assumed as a fact that the disturbance call included a report of brandishing or use of a gun,

although there was no evidence of such a fact. Did the court err in denying Mr. Millan's motion for a new trial based on juror misconduct?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Francisco J. Millan was charged by information with first-degree unlawful possession of a firearm and driving while license suspended. CP 1-2; RCW 9.41.010; RCW 9.41.030; RCW 46.20.342. Trial was held before the Honorable Thomas P. Larkin on October 29-31 and November 1, 2007.[1] The jury found Mr. Millan guilty of the unlawful possession and Mr. Millan entered a plea of guilty to the DWLS. CP 10-13, 24; RP 1. On December 7, 2007, Judge Larkin imposed a standard range sentence. RP 304; CP 63-74. Mr. Millan appealed, and this pleading follows. See CP 88-100.

2. Testimony at trial

On April 1, 2007, at just before one in the morning, someone phoned the Tacoma Police Department from their car in order to report a "disturbance." RP 57-62. TPD officers Christopher Shipp and Timothy Caber responded and pulled alongside the reporting parties' vehicle. RP 57, 62, 82, 83-84. The officers were pointed to another vehicle, which the reporting parties said was involved. RP 62, 85-86. The officers then

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[1]The verbatim report of proceedings consists of 12 volumes, which will be referred to as follows:

June 7, 2007, as "1RP;"
July 31, 2007, as "2RP;"
August 1, 2007, as "3RP;"
August 28, 2007, as "4RP;"
September 6, 2007, as "5RP;"
the seven chronologically paginated proceedings of the trial and sentencing of September 20, 25-27, October 1-2 and November 2, 2007, as "RP."

pulled behind the other car, activating their lights. RP 63.

The car the officers were following slowed "considerably" and, within two blocks, pulled into a parking spot on the side of the road. RP 63-64, 87. The officers said that, when the car did not immediately pull over, they activated their siren in a short burst. RP 63-64, 86. When the car parked, it was in "angle-in" parking, and the officers pulled their vehicle behind, blocking the other vehicle in at least partially. RP 64-65, 88.

Officer Shipp testified that he had his attention on the car ahead while the officers were following. RP 67. During that time, neither the passenger nor the driver made any movements or "furtive" gestures. RP 67, 72. Shipp admitted that making such a movement "quite often" means someone is hiding something and that he saw no such movements, nor did he record anything like that in his report. RP 72-73.

Officer Caber similarly said that, during the entire time he watched the car ahead as they signaled it to stop and stopped it, he saw nothing inside the car such as furtive movements by the driver or anything like that. RP 96. Indeed, he said, if he had seen something like that, he would have included it in his report. RP 96-97. Nothing Caber saw indicated any such movements by the driver when the car was pulling over, either. RP 100.

Once the car they were following was stopped and the officers got out of their car, Officer Caber approached the driver, asked him to step out of the car and placed him into wrist restraints while Officer Shipp

contacted the passenger. RP 64-65, 88-89, 97. Caber searched the driver for weapons and found nothing. RP 89, 97-98.

Shipp said the passenger, a woman, seemed "very upset," appeared to have been crying and also seemed "fearful." RP 65. Shipp told her to wait up at the front of the vehicle while he went back and spoke to the reporting parties in their car. RP 65. Shipp claimed that he kept his eyes on the woman passenger the entire time he walked back to the reporting parties in their car and while he spoke to them. RP 75. He later said he can do "more than one thing at once" and could see the woman from his peripheral vision, 50-100 feet away from where he was walking. RP 75-76, 78. He said he never saw her move towards the car or get back into the car at any time. RP 79.

Caber said he did not recall whether the female passenger ever got back into the car. RP 90, 105. Unlike Shipp, Caber thought the woman was standing in the open door of the passenger side of the vehicle. RP 90. Indeed, when asked if she was in front of the vehicle, Caber was clear she was standing in the passenger's side door, which was open. RP 99. He testified that, before he conducted the search of the car, he recalled having to ask the woman to move up onto the curb in the front of the vehicle. RP 99. At that time, Shipp was busy talking to the reporting parties in their car. RP 99.

By this time, the driver was already in the back of the police car, although Caber claimed the man was not yet officially "under arrest." RP 99, 106. Caber said that the driver was put there because he was yelling

out a female name and giving what the officer thought were "pretty hard and intimidating looks" at the woman passenger and the officer felt the driver was "trying to intimidate" the woman. RP 106. Caber admitted, however, that he knew the driver and passenger had been involved in an argument. RP 107-108. Caber conceded that what Caber thought was "intimidating" might just have been the driver telling the woman to communicate and cooperate with the officers. RP 107-108. There was no testimony about what was said or whether the officers could not understand it because it was not in English. RP 107-108.

The driver was later identified as Francisco Millan. RP 65-66, 88-89. The woman passenger identified herself as Millan's wife. RP 68. The car was searched and, on the back floorboard behind the driver's seat, a gun was found perched with its barrel pointing towards the back end of the car. RP 91-92. The gun was not registered to anyone. RP 92. Caber said he saw the gun in "plain view" on the floorboard behind the driver's seat after he started his search of the compartment of the vehicle incident to Millan's arrest. RP 99. Caber admitted that, when he initially walked up to the car after it was first pulled over, he did not see any gun. RP 101.

The gun was in an unusual position, balanced on its spine. RP 100. Caber said he would have thought if the gun was like that while the car was being driven, regular car movement would have tipped the gun over, as would simply pulling into a parking place. RP 100.

When Caber went to demonstrate the unusual position of the gun in court, it started to tip over and he had to catch and rebalance it in order to

get it to stand as it was positioned when found. RP 107.

The gun was not loaded. RP 104. The magazine which was inside of the gun had no prints but did have a piece of hair attached to it, which a crime scene technician placed into evidence. RP 127. The technician could not remember the color of the hair and admitted it might have had a root ball attached to it. RP 135-36. Although he reported its existence as required, that hair was never tested to see if it could provide insight into who had been in possession of the gun. RP 127-28.

Tests on the gun revealed "ridge detail" prints which were able to be examined and identified by a latent fingerprint examiner. RP 128, 140, 149. The examiner stated unequivocally that the print did not match those of Mr. Millan. RP 149, 163, 164. The examiner never tested against the prints of Mrs. Millan or anyone else and did not suggest that such testing should be done in this case. RP 152-54. Although the tests excluding Mr. Millan were completed on May 14, 2007, the "negative finding" report was not produced until August of 2007, because it is not the policy of the police to report negative findings. RP 156, 161-62. The gun was tested and was capable of being fired. RP 220.

A spent shell casing of the same caliber as the gun was found on the driver's side floor of the car, "in between the little bit of floorboard where the door closes" and the driver's seat is positioned. RP 207. The casing was against a mechanical underpiece of the seat, in between that piece and where the carpeted area comes up for the door frame. RP 208. An officer testified that she thought the casing and gun were "within

reach" of the driver but not the passenger. RP 211-12. She admitted, however, that she saw no movements or furtive movements from either the passenger or the driver as the car was contacted and being pulled over on April 1. RP 212. She also admitted that the passenger could have reached the gun if she was leaning or sitting less than full upright in the seat. RP 215.

That officer also admitted that the casing was not in "plain view" and she would not have seen it if she had not been searching the car and using a flashlight. RP 215.

Two TPD officers testified that, several weeks after the incident, they were asked to "locate" a particular car and Mr. Millan was associated with that car. RP 165-66. One officer said that, on April 12, he saw Millan walking towards the car with keys in his hand. RP 167. Another said that she searched the vehicle on the 12th and found two pieces of mail addressed to Millan, somewhere in the passenger compartment of the car. RP 178-79. The mail was several months old. RP 180.

The registered owner of the car was a woman named Graciela Solorzano. RP 181.

D. ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL BASED ON JURY MISCONDUCT AND IN FAILING TO FURTHER INQUIRE

Both the state and federal constitutions guarantee the accused the right to a fair trial before an impartial jury. Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); Robinson v. Safeway

Stores, 113 Wn.2d 154, 159, 776 P.2d 676 (1989); Sixth Amend.; Art. I, § 21. A fundamental part of these guarantees is the right to have the jury reach its decision based solely upon the evidence produced at and subjected to the rigors of trial. See Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954); State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989). Where the jury considers evidence outside the record during its deliberations, that is considered juror misconduct and a new trial must be granted if the extrinsic evidence could have affected the verdict. Briggs, 55 Wn. App. at 55-56.

In this case, the trial court erred in failing to either grant Millan's motion for a new trial or his request to have the court inquire of the jurors about misconduct which counsel brought to the court's attention, because the extrinsic evidence in question could well have affected the verdict.

a. Relevant facts

Prior to sentencing, Mr. Millan moved for a new trial based upon juror misconduct. CP 50-53. The motion was based on the declaration of co-counsel, in which she reported that, in talking to the jurors after the verdicts were entered, the following had occurred:

> [T]wo jurors stated they believed the 911 disturbance call that directed the officers to the defendant's vehicle included a gun being brandished;
>
> This was followed by several jurors shaking their heads in the affirmative, as if they had discussed it during deliberations[.]

CP 51. In the alternative, if the court was not inclined to grant the motion based on counsel's declaration, Mr. Millan asked the court to recall the jurors to ask them about the misconduct and the allegations of extrinsic

evidence. CP 50-53.

The parties agreed to have the court hear those motions at the time scheduled for sentencing. RP 289. At that hearing, counsel reminded the court that the case had begun because some people in a car called 9-1-1 to report what they believed was an assault occurring. RP 290. The assault was the reason the officers had pulled over the car Millan was driving and it was at that stop that the gun which was the subject of the charges in this case. RP 290. The court had granted a pretrial motion to exclude evidence of the alleged assault, because of the potential prejudice such evidence would cause. RP 290. The jury was thus told only that police were "responding to a report of a disturbance" when the pulled the car over. RP 290.

After trial, co-counsel and the prosecutor had talked with the jurors, several of whom had revealed that they had assumed that the "disturbance" was "somebody waving the gun around in the car or brandishing the weapon." RP 291. Although the jurors had been instructed not to consider evidence outside the record, their revelations indicated that they had done so, because no evidence had been admitted which would support the jurors' assumptions. RP 292. Somehow, counsel noted, a juror had injected into the deliberations "evidence" which did not exist. RP 292. As a result, counsel argued, there could be no "confidence in" the verdicts. RP 292-93. Counsel asked the court to either grant a new trial at which the improper extrinsic evidence would not be introduced or, if the court was not inclined to do so based upon the

information it had, to recall the jurors in order to inquire about the misconduct. RP 293.

The prosecutor did not recall the jurors' comments the same way as co-counsel. RP 294. Instead, she recalled only that jurors had asked the question of whether the 9-1-1 call had included mention of the gun. RP 294. She said when she had told the jurors "no," some of the jurors had nodded. RP 294. As a result, the prosecutor questioned whether there was "extrinsic evidence" involved. RP 294.

In ruling, the court first said it had a problem in that it did not "know" what the jurors did for sure. RP 295. Counsel noted that there was a declaration from co-counsel which established what jurors had said, but the court was unhappy that it did not have a declaration from any of the jurors. RP 295. The judge stated that jurors do not always agree on things and may have different recollections of the evidence, but that was not "jury misconduct." RP 296. The court went on:

> [T]hey may not all remember it the same. That isn't jury misconduct. That is what they're supposed to do, rely on their memory. One person could say, no, he said it was a red coat. The other person, no, it was a blue coat. They could argue it. They reached a verdict, and the evidence was that it was a yellow coat. I am not going to change that decision, am I?

RP 296. The court said that was what it was being presented with "today," that it did not know what happened and did not "have enough to make a decision on it one way or another." RP 296.

At that point, counsel renewed his request to have the jurors brought back in and asked about the misconduct. RP 296. The court refused, saying that it would be a "fishing expedition" and it would have to

do that in every case if it did so in this one. RP 296. The court again said it had no "basis" to show that the jurors relied on outside evidence but that if the court had something indicating they had done so, the court "might do something else." RP 297. Even though co-counsel had filed a declaration so indicating, the judge said that "[t]hat is what one or maybe two jurors' recollections were," but that other jurors might not remember that having occurred. RP 297. The court concluded, "I don't even know enough about it to determine whether it would do anything" to the verdict if the jurors had considered the extrinsic evidence as alleged. RP 297.

b. The motion for a new trial or a hearing on the issue should have been granted

The trial court erred in denying both Millan's request for the court to inquire of the jury regarding the misconduct and his request for a new trial. Although a trial court's decision to deny a motion for a new trial will be reversed only where there is a showing of abuse of discretion, a new trial should be granted for juror misconduct where the jury considers extrinsic evidence, i.e., "information that is outside all the evidence admitted at trial, either orally or by document." State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Further, a much stronger showing of abuse of discretion is required to set aside an order granting a new trial than a denial. State v. Cummings, 31 Wn. App. 427, 429-30, 642 P.2d 415 (1982).

While appellate courts are generally reluctant to inquire into the manner in which a jury reaches its verdict, that policy is outweighed where there is a strong, affirmative showing of juror misconduct. Balisok, 123

Wn.2d at 117-18. Consideration of extrinsic evidence by a jury can amount to such misconduct. Id; see also, Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Indeed, where such misconduct occurs, any doubt that the misconduct affected the verdict must be resolved against the verdict and in favor of a new trial. Briggs, 55 Wn. App. at 55, citing, Halverson, 82 Wn.2d at 752.

It is misconduct for jurors to interject extrinsic evidence into jury deliberations, because that evidence is not subject to the proper rigors of inquiry as other evidence, such as objection, cross-examination, explanation or rebuttal. Balisok, 123 Wn.2d at 118. Here, based upon counsel's affidavit, there was a very real issue of the jury potentially having engaged in such misconduct in considering improper "evidence" outside the record when it relied on the unproven "fact" that the "disturbance" call which led the officers to stop Millan in the first place included use of a gun. Co-counsel's declaration indicated that at least two jurors were aware of this alleged "evidence" that the 9-1-1 call to which the officers responded included "a gun being brandished," and that several other jurors indicated by "shaking their heads in the affirmative" that they, too, were aware of this alleged "evidence." CP 51. But there was no evidence whatsoever that the 9-1-1 call involved a gun - and, in fact, it involved only an alleged domestic disturbance between Millan and his wife, with no gun being seen.

Based upon counsel's affidavit, the trial court should have either inquired of the jury or granted the motion for a new trial. In general, when

the court is presented with an affidavit such as the one counsel filed here, the court is required to assume those facts were true unless it holds an evidentiary hearing on the issues. Cummings, 31 Wn. App. at 430-31; see State v. Cho, 108 Wn. App. 315, 329-30, 30 P.3d 496 (2001). Further, even if the court had questions about whether relief should be granted because of the prosecutor's competing recollection and declaration, the trial court should have held a hearing in order to determine the facts. Where, as here, affidavits "establish a question of fact about juror deliberations not inhering in the verdict, a fact-finding hearing should be held to resolve the issue." Cummings, 31 Wn. App. at 432.

Here, the "evidence" was not something which "inhered" in the verdict. Matters which "inhere" are such things as the mental processes by which jurors reach their conclusion, or their motives or intent in deciding the case. See, State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989); Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962).

Extrinsic evidence, however, does *not* inhere in the verdict. Such evidence is "information that is outside all of the evidence admitted at trial, either orally or by document." Richards v. Overlake Hosp. Med. Center, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991). Examples of such evidence are such things as 1) a juror's expert knowledge about an issue relevant to the case, 2) a juror's declarations - unsupported by the record - that the defendant belonged to a "gang of toughs" who were implicated in a murder, 3) a juror's speculation about the projected estimate of future lost wages - unsupported by the

record - and 4) several jurors' beliefs that the defendant had been in and out of jail and had a prior record - again, unsupported by anything in the record. See Halverson, 82 Wn.2d at 752; Richards, 59 Wn. App. at 273; Cummings, 31 Wn. App. at 430-31; State v. Parker, 25 Wash. 405, 410, 415, 65 P. 776 (1901).

Thus, it is fully proper for a court to inquire into whether the deliberations were infected with information which was not contained in the record, so long as the judge does not ask how that information actually affected a juror's decisionmaking process. See e.g., Gardner. 60 Wn.2d at 841. The trial court should have so inquired here and indeed had a duty to do so, because a court which has become aware that the deliberative process may have been infected with extrinsic evidence should determine the circumstances and potential impact on the verdict. See Remmer, 347 U.S. at 230; Cummings, 31 Wn. App. at 432.

Where a court fails to conduct the required inquiry, this Court has the authority to order it to do so on remand. Cummings, 31 Wn. App. at 432.

Notably, the trial court erred in focusing on whether it had sufficient evidence to know whether the jury actually relied on the extrinsic evidence or whether that evidence actually had some effect on the jurors' verdicts. See RP 297. The court's focus was wrong because the question is not whether the verdicts were *actually* affected by the evidence (a subjective inquiry). Briggs, 55 Wn. App. at 55-56. Instead, the question is *objective*, i.e., whether the extrinsic evidence *could have*

affected the verdict. Briggs, 55 Wn. App. at 55-56. This is because inquiring as to the effect particular evidence had on a juror's subjective decision-making process is an improper inquiry into matters which inhere in the verdict, while asking if the evidence *could have* had an effect does not require such inquiry. Id.

There can be no question that the extrinsic evidence here could have had an effect on the verdict for unlawful possession of a firearm in this case. Mr. Millan was charged with possessing the firearm found in the back of the car. But he was not seen placing it back there, nor was he seen making any furtive motions whatsoever. Further, there was conflicting testimony about whether his wife had the opportunity to put the gun there when she was unsupervised at the car. "Evidence" that the 9-1-1 call had involved someone brandishing a gun in the car, coupled with the evidence admitted at trial that the female passenger was upset and appeared scared, would likely have been construed by the jury as evidence that Millan was, in fact, in knowing possession of the firearm later found in the car.

The trial court abused its discretion by failing to either grant the motion for a new trial or inquiring further, given the competing information before it. Notably, if there is any doubt that juror misconduct affected the verdict, in this state that doubt must be resolved *against* the verdict and in favor of a new trial. Briggs, 55 Wn. App. at 55, citing, Halverson, 82 Wn.2d at 752. This principle reflects the strong interest of our courts in ensuring that the sanctity of juror deliberations is not violated

by the injection of extrinsic evidence into those deliberations. The trial court's decisions here did not honor that interest and were an abuse of discretion, and this Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 7th day of October, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Francisco Millan, DOC 839093, WCC, P.O. Box 900, Shelton, WA. 98584.

DATED this 7th day of October, 2008.

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