

FILED

2013 NOV -1 PM 2: 32

LINDA F. DUNLEIGH
WHITE PINE COUNTY CLERK
BY: *[Signature]*

1 Case No. CR-1208084

2 Dept. No. 2

3
4 RECEIVED

5 NOV - 1 2013

6 IN THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF NEVADA,

White Pine County Clerk

IN AND FOR THE COUNTY OF WHITE PINE

8

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 vs.)

12 MIKE NEWCASTLE,)

13 Defendant.)

**OPPOSITION TO DEFENDANT'S
MOTION FOR NEW TRIAL**

14

15 Plaintiff, STATE OF NEVADA, by and through counsel, CATHERINE CORTEZ MASTO,
16 Attorney General of the State of Nevada, and MICHAEL J. BONGARD, Deputy Attorney General,
17 hereby files this opposition Defendant's motion for new trial. This motion is based upon the following
18 points and authorities, the exhibits filed in this matter, and all the documents and pleadings on file in
19 this case.

MEMORANDUM OF POINTS AND AUTHORITIES

21

I. PROCEDURAL HISTORY

22 On August 22, 2012, the State filed a Criminal Information charging NEWCASTLE with:
23 attempted murder with a deadly weapon, a violation of NRS 193.330, NRS 200.101, 200.030 and
24 193.165, and in the alternative; battery by an inmate with a deadly weapon causing substantial bodily
25 harm, in violation of NRS 200.481.

26 Trial in the matter commenced on October 15, 2013. On October 18, 2013, after approximately
27 two hours of deliberation, the jury returned a verdict of guilty for battery by an inmate with a deadly
28 weapon causing substantial bodily harm. Sentencing is currently scheduled for December 9, 2013.

1 On October 28, 2013, the defendant filed a motion for new trial. The State now submits its
2 opposition to the motion.

3 II. ARGUMENT AND LAW

4 A. Summary of Argument (Juror Misconduct).

5 The motion for new trial is based upon two claims: 1.) juror misconduct, and; 2.) conflicting
6 evidence.

7 Based upon the applicable law, there is no relevant, admissible evidence of juror misconduct.
8 The case law discussing this claim differentiates between extrinsic and intrinsic evidence. Intrinsic
9 evidence, that is evidence about the jurors' thought processes and deliberations are inadmissible. The
10 defense presents no extrinsic evidence supporting their claim.

11 The defense's arguments regarding conflicting evidence is merely a re-argument of the case
12 and asks this Court to substitute itself as the fact finder in this matter.

13 B. Relevant Law (Juror Misconduct).

14 Nevada law discusses the admissibility of jurors as a witness regarding the verdict or return on
15 an indictment. The relevant portion of the statute reads:

16 NRS 50.065 Competency: Juror as witness.

17 1. . . .

18 2. Upon an inquiry into the validity of a verdict or indictment:

19 (a) A juror shall not testify concerning the effect of anything upon the
20 juror's or any other juror's mind or emotions as influencing the juror to
21 assent to or dissent from the verdict or indictment or concerning the
juror's mental processes in connection therewith.

22 (b) The affidavit or evidence of any statement by a juror indicating an
effect of this kind is inadmissible for any purpose.

23 NRS 50.065(2).

24 The Nevada Supreme Court extensively reviewed and discussed admissible evidence in juror
25 misconduct proceedings in Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003). The Court focused on the
26 difference between extrinsic and intrinsic evidence of misconduct. Discussing the differences, the Court
27 stated:

28 . . .

1 In some cases, an extraneous influence, such as jury tampering, is so
2 egregious that prejudice sufficient to warrant a new trial is presumed. In
3 addition to jury tampering, certain federal circuit courts of appeal have
4 concluded that exposure to any extrinsic influence establishes a reasonable
5 likelihood that the information affected the verdict and prejudice is
6 assumed. In contrast, other circuit courts look to the nature of the
7 extrinsic influence in determining whether the influence presents a
8 particular likelihood of affecting the verdict.

9 We conclude that a conclusive presumption of prejudice applies only in
10 the most egregious cases of extraneous influence on a juror, such as jury
11 tampering. We reject the position that any extrinsic influence is
12 automatically prejudicial. Instead, we adopt the position of the circuit
13 courts that examine the nature of the extrinsic influence in determining
14 whether such influence is presumptively prejudicial.

15 Of course, some types of extrinsic influences are, by their very nature,
16 more likely to be prejudicial. Direct third-party communications with a
17 sitting juror relating to an element of the crime charged or exposure to
18 significant extraneous information concerning the defendant or the
19 charged crime fall into this category. This is because the nature of the
20 extrinsic information alone establishes a reasonable probability that the
21 extrinsic contact affected the verdict.

22 However, other types of extrinsic material, such as media reports,
23 including television stories or newspaper articles, generally do not raise a
24 presumption of prejudice. Jurors' exposure to extraneous information via
25 independent research or improper experiment is likewise unlikely to raise
26 a presumption of prejudice. In these cases, the extrinsic information must
27 be analyzed in the context of the trial as a whole to determine if there is a
28 reasonable probability that the information affected the verdict.

The same standard applies to cases involving intrinsic jury misconduct.
The defendant must, through admissible evidence, demonstrate the nature
of the juror misconduct and that there is a reasonable probability that it
affected the verdict. Because intrinsic misconduct can rarely be proven
without resort to inadmissible juror affidavits that delve into the jury's
deliberative process, only in extreme circumstances will intrinsic
misconduct justify a new trial.

Meyer, at 563-565, 80 P.3d at 455-456 (internal cites omitted).

The Court held that “[P]roof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. Juror affidavits that delve into a juror’s thought process cannot be used to impeach a jury verdict and must be stricken.” *Meyer*, at 563, 80 P.3d at 454, citing *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 148-49 (3rd Cir. 1975).

The Nevada Supreme Court previously held “[T]hat the proper standard to be applied in light of the confrontation clause and due process implications of juror misconduct is that a new trial must be granted unless it appears beyond a reasonable doubt that now prejudice has resulted.” *Barker v. State*,

1 95 Nev. 309, 313, 594 P.2d 719, 721 (1979). To prevail on a motion for new trial alleging juror
2 misconduct, the defendant bears the burden of presenting admissible evidence demonstrating “the
3 nature to the juror misconduct and that there is a reasonable probability that it affected the verdict.”
4 *Zana v. State*, 125 Nev. 541, 547, 216 P.3d 244, 248 (2009), citing *Meyer v. State*, 119 Nev. at 561, 80
5 P.3d at 453 (2003).

6 **C. Juror Statements In The Motion For New Trial Are Inadmissible.**

7 In the motion for new trial, the defendant states their interview of jurors revealed: 1.) A juror
8 stated the jury compromised on the verdict reached; 2.) That during deliberations, a juror declared that
9 the defendant was in prison for a reason; 3.) That during deliberations, the jury discussed Ely State
10 Prison, that the defendant was in the room at the time of the battery and that “they knew he was
11 involved with the battery somehow;” 4.) The jury opined that the defendant may have been in the room
12 to assist in the attack. Motion, at 3-4. These statements discuss what was on the juror’s minds and their
13 emotions as they were deliberating and are not to be considered pursuant to NRS 50.065(2). (“A juror
14 shall not testify concerning the effect of anything upon the juror’s or any other juror’s mind or emotions
15 as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s
16 mental processes in connection therewith.”).

17 The State argues that the statements from the jurors constitute intrinsic evidence, which is not
18 admissible under NRS 50.065(2) or the Court’s holding in *Meyers*.¹ In *Myers*, the Court held “[I]f a
19 juror considers and communicates a past personal experience that introduces totally new information
20 about a fact not found in the record or the evidence, this would constitute extrinsic evidence and
21 improper conduct.” 119 Nev. at 568, 80 P.3d at 458 (internal cite omitted). Personal experiences are to
22 be used only to interpret the exhibits and testimony, not as independent evidence. *Id.*

23 There is nothing in the defendant’s motion that states that any juror “introduce[d] totally new
24 information” into the deliberations based upon “past experiences.”²

25 ...

26 ...

27
28 ¹ In their current form, the juror’s statements are also hearsay, in violation of NRS 51.055. Even if the Court were to somehow find the witnesses unavailable, the statement from the jurors themselves are inadmissible under NRS 50.065(2)(b) (“evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose”)

² The parties stipulated that the defendant was in lawful custody of the Nevada Department of Corrections.

1 Looking at the individual purported statements of the jurors, the first comment made was that
2 the jury compromised on a verdict. Motion at 3. This statement clearly goes to the thought process and
3 deliberations of the jury and is prohibited by NRS 50.065(2)(a). See also *McDonald v. Pless*, 238 U.S.
4 264 (1915) (affidavits or testimony of juror regarding “arbitrary and unjust” method of arriving at a
5 verdict not permitted).

6 The second comment by the juror that the defendant was in prison for a reason is followed by an
7 unfounded conclusion by the defense (“clearly suggesting that Mr. Newcastle was guilty simply
8 because he was incarcerated”). Motion, at 3. There is no evidence in the record regarding the context
9 in which the juror made the statement. In addition, there is nothing in the record that suggests
10 discussions of the alleged statement took place. The State argues that this statement is also intrinsic
11 evidence regarding the thought process of the juror, admissibility of which is prohibited under NRS
12 50.065(2).

13 Likewise, the statements from the third juror and fourth jurors (Motion, at 3-4) discuss the
14 thought processes of the jurors during deliberation and are inadmissible for the same reasons as the
15 statement from the first juror. Additionally, the statements are intertwined with discussion of the
16 evidence in the case and the jurors’ views of the evidence.

17 The juror statements in the motion for new trial discuss the thought processes of the jurors and
18 facts relating to the process used by the juror to arrive at a verdict. The Court in *Meyer* discussed an
19 adopted the reasoning of the New Mexico Supreme Court to distinguish between past experience and
20 professional expertise. 119 Nev. at 569-71, 80 Nev. at 458-59. The complained of statements fall into
21 neither category of extrinsic evidence (past personal experience or professional expertise). They are
22 purely intrinsic evidence of the actual deliberations of the jury. See *U.S. v. Brito*, 136 F.3d 397, 414
23 (9th Cir. 1998) (juror affidavit not competent even where the affidavit contained allegations that the
24 jury discussed information contrary to the court’s instructions because there was no evidence
25 suggesting the discussed information was brought to the jury’s attention by an outside source).

26 The State argues the record is bereft of any evidence that any juror brought new information
27 into the deliberations. Admission of these juror statements would create havoc on the jury system. The
28 United States Supreme Court foresaw this almost a century ago when it wrote:

1 But let it once be established that verdicts solemnly made and publicly
2 returned into court can be attacked and set aside on the testimony of those
3 who took part in their publication and all verdicts could be, and many
4 would be, followed by an inquiry in the hope of discovering something
5 which might invalidate the finding. Jurors would be harassed and beset by
6 the defeated party in an effort to secure from them evidence of facts which
7 might establish misconduct sufficient to set aside a verdict. If evidence
8 thus secured could be thus used, the result would be to make what was
9 intended to be a private deliberation, the constant subject of public
10 investigation; to the destruction of all frankness and freedom of discussion
11 and conference.

12 *McDonald v. Pless*, at 267-68.

13 The record contains no evidence of outside influence brought to bear upon any juror. There is
14 no evidence for this Court to consider other than that prohibited by NRS 50.065(2). The State requests
15 the Court deny the motion for new trial based upon allegations of juror misconduct.

16 **D. Conflicting Evidence Claims.**

17 NRS 176.515(4) gives district courts discretion to grant a new trial based on an independent
18 evaluation of the evidence. *State v. Purcell*, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994).

19 In their motion, the defense argues the evidence in the light most favorable to the defense, rather
20 than pointing out conflicts. The defense motion ignores the fact that there was no evidence that anyone
21 else was present in the room, or left the room after Roundy was struck with the paddle. There was no
22 evidence of visible blood evidence on any other inmate besides the defendant. The defense expert
23 could not rule out (although he stated it was not likely) that blood spatter on the back of the defendant's
24 jumpsuit came from the victim falling to the floor. Given the facts about how the equipment (including
25 the weapon) were signed out and if fingerprinting had been done, fingerprints of other inmates (and
26 staff) on the paddle would have been expected.

27 In their motion for new trial, the defense is not arguing insufficient evidence supported the
28 verdict in this case. The defense is instead asking this Court to substitute another fact-finder and asking
that fact-finder to return a verdict after re-arguing the case and asking the Court to consider additionally
consider the impermissible evidence from the jurors. Motion, at 13 ("there is sufficient cause for the
Court to grant a motion for new trial, especially in light of the misconduct outline above").

...

...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

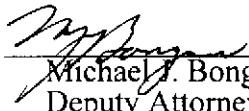
The defendant presents no competent evidence that the jury considered outside evidence not in the record in determining the defendant's guilt for battery by an inmate with a deadly weapon causing substantial bodily harm. The allegations in the motion are based wholly on intrinsic evidence about the jury's deliberations and thought process, which is inadmissible pursuant to NRS 50.065(2).

The defendant also asks for a new trial based upon conflicting evidence. However, the defendant's motion merely argues the evidence in the light most favorable to the defense and argues the claim in conjunction with the consideration of the intrinsic evidence presented in the juror misconduct claim.

For these reasons, the State requests the Court deny the motion for new trial.

RESPECTFULLY SUBMITTED this 1st day of November 2013.

CATHERINE CORTEZ MASTO
Attorney General

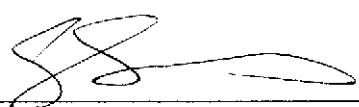
By: 
Michael J. Bongard
Deputy Attorney General
Criminal Justice Division

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 1st day of November 2013, I served a copy of the foregoing Opposition to Motion for New Trial, by placing said document in the Public Defender's Box at the White Pine County Courthouse, addressed to:

Charles Odgers
Deputy Public Defender
PO Box 151690
Ely Nevada 89315




AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document, Opposition to Motion for New Trial, filed in case number CR-1208084:

X Does not contain the social security number of any person.

DATED this 1st day of November 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: 

MICHAEL J. BONGARD
Deputy Attorney General
Nevada Bar No. 007997
mbongard@ag.nv.gov
Bureau of Criminal Justice
1539 Ave F
Ely, Nevada 89301