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Case No. CR-1208084
Dept. No. 2

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LINDA F. BURLEIGH
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BY: *Shuman*

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WHITE PINE

THE STATE OF NEVADA,
Plaintiff,

vs.

MIKE FIXER NEWCASTLE,
Defendant.

REPLY TO OPPOSITION TO A NEW
TRIAL AND REQUEST FOR AN
EVIDENTIARY HEARING

COMES NOW the Defendant, MIKE FIXER NEWCASTLE, by and through his attorneys of record, KARIN L. KREIZENBECK, ESQ., Nevada State Public Defender; CHARLES H. ODGERS, ESQ., and JAMIE N. BEDWELL, ESQ., Deputy Nevada State Public Defenders; and hereby files his reply to the state's opposition to his motion for a new trial based upon jury misconduct and request for an evidentiary hearing. This motion is based upon the attached Points and Authorities, all documents and pleadings on file herein and all relevant points of law and rules of court.

PROCEDURAL HISTORY

On October 28, 2013, Mr. Newcastle, by and through his counsel of record, filed his motion for a new trial based upon jury misconduct. On October 30, 2013, an amended motion for a new trial based upon juror misconduct was filed. On November 1, 2013, the state filed an opposition to the motion for a new trial.

1 **DISCUSSION**

2 A. **Juror Misconduct**

3 "Before a defendant can prevail on a motion for a new trial based on juror
4 misconduct, the defendant must present admissible evidence sufficient to establish: (1)
5 the occurrence of juror misconduct, and (2) a showing that the misconduct was
6 prejudicial.¹" In Meyer, the Nevada Supreme Court said that the defendant meets his
7 burden of proof when he has shown that there is a reasonable probability or likelihood
8 that the verdict may have been affected.² More recently, in Valdez v. State, the Court
9 clearly stated that "[t]he defendant must prove the nature of the jury misconduct and
10 that there is a reasonable possibility that the misconduct could have affected the
11 verdict."³ Where the defendant has shown the court that misconduct did occur, a new
12 trial must be granted unless it can be said that beyond a reasonable doubt, no prejudice
13 resulted.⁴

14 To establish that misconduct occurred, only objective facts are admissible.⁵ If
15 evidence of a juror's state of mind, emotions, or thought process is revealed, it must be

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17 ¹ Meyer v. State, 119 Nev. 554, 563, 80 P.3d 447, 455 (2003).

18 ² Id. at 564 n.22. There, the Supreme Court cites "U.S. v. Williams-Davis, 90 F.3d 490,
19 496; People v. Brown, 48 N.Y.2d 388, 399 N.E.2d 51, 53, 423 N.Y.S.2d 461 (N.Y.
20 1979); see also U.S. v Keating, 147 F.3d 895, 900 (9th Cir. 1998); U.S. v. Berry, 64 F.ed
21 305, 307 (7th Cir. 1995) (reasonable possibility misconduct affected verdict); State v.
22 Smith, 573 N.W.2d 14, 18 (Iowa 1997)(reasonable probability misconduct affected the
23 verdict."

24 ³ 124 Nev. 1172, 1186-87, 196 P.3d 465, 475 (2008) (there the Court cited Meyer and
25 its discussion regarding probability and likelihood).

23 ⁴ Id.

24 ⁵ Id.

1 stricken from the record and not considered by the court.⁶ However, statements made
2 by jurors, during deliberations, are considered objective evidence and do not go to the
3 state of mind or emotions of any juror as long as the juror does not describe how the
4 statement affected him.⁷ Therefore, statements made by jurors which are objective
5 evidence may be considered by the court so long as the statements do not delve into
6 the juror's thought process or the effect that the statement had on the jury.⁸

7 Here, the state correctly argues that only objective evidence of intrinsic juror
8 misconduct is admissible. However, where the state misses the mark is in its argument
9 that statements which were made aloud and heard by others during deliberations are
10 inadmissible in Nevada. As outlined in Maestas, the Nevada rule differs from the
11 federal rule substantially with regard to whether or not the court may consider evidence
12 of statements during deliberations. Objective facts can include those things which are
13 readily observable, including specific statements or conduct by jurors.⁹ Additionally, the
14 court may consider statements about whether or not the jury compromised, as it does
15 not go to thought process, but goes to the events that actually took place during
16 deliberations.¹⁰

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18 ⁶ Meyer, At 563, 80 P.3d at 454.

19 ⁷ Valdez, at 1187, 196 P.3d at 475.

20 ⁸ See Id; Maestas v. State, 275 P.3d 74, 85 n.13 , ___ Nev. ___, ___ n.13 (2012).

21 ⁹ Meyer, at 567, 89 P.3d at 457. The court allowed actual statements made aloud by the
22 jurors during deliberations. However, the Court struck any statements made by jurors
23 which addressed the impact or effect those statements had on the mental processes or
24 decision making of the jurors.

25 ¹⁰ Valdez, at 1187, 196 P.3d at 475. The Court said, "In particular, the jury may have
compromised..."

1 In this case, specific statements were made by jurors constituting objective
2 evidence. The first juror indicated that the issue of guilt or innocence was one that was
3 close. While specific statements of the juror's thoughts or feelings are not directly
4 admissible, statements regarding observations she made in the jury room pertaining
5 initial vote are. The result of such a vote is plainly objective evidence and thereby is
6 admissible. Furthermore, here, like in Valdez where the court said, "The jury
7 foreperson's statement that the jury had decided Valdez's sentence was objective
8 evidence of the misconduct,"¹¹ the statement made by juror Jensen that there was a
9 compromise is admissible as objective evidence of misconduct. It does not discuss
10 juror thought process or emotions. It explains what happened. In addition, the second
11 juror admitted to acting in contradiction to the Court's instructions when he said that Mr.
12 Newcastle was incarcerated for a reason. While it is true that the parties stipulated to
13 the fact that Mr. Newcastle was lawfully in custody, there was never any mention in the
14 record of the inmates' custody status at Ely State Prison, nor was there any evidence in
15 the record that the reason he is presently incarcerated impacted or pertained to the
16 present offense in any form. His admission to acting in defiance to the court's
17 instructions is objective evidence in the form of a declaration he made in the jury room,
18 to the other jurors. The impact that statement had upon other jurors is not admissible,
19 but the actual statement is. The third and fourth jurors' admissions that conversations
20 occurred in the jury room regarding Mr. Newcastle's background are also statements
21 that were made in an objective fashion. The statements did not declare the juror's
22 thought process or the juror's emotional state. Nor do the statements concern the effect

24 ¹¹ Id.

1 that any juror's statements had on a given juror. The only thing that the statement does
2 is establish, through objective evidence, that the jury failed to obey this court's very
3 clear instructions.

4 Certainly, no juror can declare that improper material presented during
5 deliberations impacted their decision, thoughts about the case, or emotions. However,
6 jurors can communicate specific statements which were made during deliberations.
7 Those statements constitute objective evidence which goes to show that jury
8 misconduct did or did not occur.

9 Once the court determines that jury misconduct did occur, the question then
10 turns to the impact the misconduct might have had on deliberations. However, the court
11 may not consider the impact it had on these deliberations. Mr. Newcastle argues that
12 the court may only consider the impact it might have had on an objectively reasonable
13 juror, including a juror who was making the offending statements.

14 **Conclusion:**

15 Here, there is objective evidence based upon the evidentiary standards outlined
16 in Nevada case law that Jurors considered evidence not in the record. Therefore, Mr.
17 Newcastle argues that the court must grant an evidentiary hearing to determine if a new
18 trial is appropriate.

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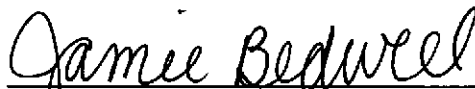
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RESPECTFULLY submitted this 6 day of November, 2013.

KARIN L. KREIZENBECK, ESQ.
Nevada State Public Defender



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CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada State Public Defender's Office and that on this ⁶ ~~30~~ day of ^{November} ~~October~~, 2013, I served the foregoing reply by hand-delivering a true and correct copy of the same to:

Nevada State Attorney General's Office
1539 Avenue F, #2
Ely, NV 89301



An employee of the Public Defenders Office

AFFIRMATION Pursuant to N.R.S. § 239B.030

The undersigned does hereby affirm that the preceding document, filed in this Court in STATE v. NEWCASTLE, does not contain the social security number of any person.

DATED this 6 day of November, 2013.



JAMIE N. BEDWELL, ESQ.
Deputy Nevada State Public Defender