In the Court of Appeals of the State of Nevada

No. 83243-COA

ANDREW YOUNG,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from Judgment of Conviction

APPELLANT'S PETITION FOR REHEARING

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Jurisdiction and Standard for Rehearing

Nevada Rule of Appellate Procedure 40(c)(2) permits this Court to rehear and reconsider a panel decision:

(A) When the court has overlooked or misapprehended a material fact in the record of a material question of law in the case, or

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

Mr. Young submits that the Court has overlooked, misapplied, or failed to consider controlling statutes and case law in its decision, as outlined below.

A petition for rehearing is timely filed within eighteen days of the filing of the Court's decision. NRAP 40(a)(1). In this case both appellate counsel obtained full time positions elsewhere and were unable to accomplish this. So a new appointment was made and an extension was obtained for submission of the petition for rehearing by August 28, 2023. *Young v. State*, 139 Nev. Adv. Op. 20 (July 20, 2023).

II. Introduction

There are three types of juror bias in Nevada. Actual bias can occur when someone tells the judge in voir dire that they cannot be objective because they believe for instance if someone is charged with a crime they must be guilty. Or they believe a defendant with tattoos and purple hair must be guilty because of the way they look. Or they believe if they see grotesque crime photos they won't be able to remain neutral. If an issue of actual bias is raised with the judge – a colloquy can be conducted between the judge and the juror to determine if that juror can be a neutral arbiter of justice regardless of the initial statements. If the judge is satisfied they can remain on the jury.

Inferred bias also known bias as a matter of law exists when someone is related to a party in the action or has an interest in the outcome of the action. With inferred bias, the judge is not supposed to conduct a colloquy on an ability to remain neutral regardless of the inferred bias - because prejudicial bias is presumed and the juror must be stricken or if he or she has served on the jury for any period of time a mistrial should be granted because

"A defendant is denied the right to an impartial jury if only one juror is biased or prejudiced." Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990).

Inferred bias arises when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant. Inferred bias findings do not rely at all on whether the juror asserts impartiality. Once facts are elicited that give rise to inferential bias the juror's statements as to his ability to be impartial become irrelevant. United States v. Torres, 128 F.3d 38, 1997 U.S. App. LEXIS 2776, Sanders v. Sears-Page, 131 Nev. 500, 511-12 (Nev. Ct. App. 2015). One example of inferred bias is where the juror has engaged in activities similar to the issues involved in the action. Or for instance if the juror was a victim of the same type of crime charged. Sayedzada v. State, 2018 Nev. App. LEXIS 2, 134 Nev. 283, 419 P.3d 184, 134 Nev. Adv. Rep. 38, 2018 WL 2409400.

On the third day of the jury trial, juror Bilzerian forwarded a note to the judge asking if he could give each of the complainants $2,000 for an amount totaling $12,000.00.

In failing to find relief on this issue for Mr. Young the Court of Appeals analyzed the applicability of the three biases with the mistaken approach of considering a finding of actual bias a preclusion to implied or inferred bias. Mr. Young argued this decision hinged on inferred bias. We ask that this court rehear this issue because the panel overlooked important distinguishing factors between the cases they relied on and Mr. Young's case. Furthermore they disregard the policy reasons for not requiring a showing of actual bias for implied and inferred bias. Which is that it is so likely there is actual bias under these two that any colloquy would be unbelievable. Finally some of the factual matters are misstated – the court thought a motion to remove the juror was not made and had lingering unanswered questions on how it was resolved.

III. Legal Argument

A. The Panel Overlooked, Misapplied, or Failed to Consider Directly Controlling Law.

This Court of Appeals in their oral argument hearing and resulting Order of Affirmance seems to be of the mistaken belief that if there is any chance of actual bias of a juror, then it cannot be implied or inferred bias that is found to allow a mistrial. Oral Argument March 30, 2023. Order of Affirmance eFiled July 20, 2023.

This is wrong. What the rulings indicate is that if there is implied or inferred bias then the juror is out regardless of whether there is actual bias. No colloquy is to be relied on for inferred or implied bias. In fact it is clear that the policy motive behind this decision is that there is such a high potential of those with inferred or implied bias to have actual bias that they are not even going to bother conducting a colloquy they are just going to assume actual bias. With inferred bias the judge has some discretion to determine whether it is enough to warrant a mistrial. Not the case with implied bias. Be we argue herein that first it was error not to find inferred bias and second an error not to find relief for failure to remove the juror and declare a mistrial.

Bilzerian's gesture bespeaks of a desire to make the complainants whole prior to the conviction of the defendant. And that's what they are for the purposes of this analysis. Complainants. Until the convictions are secured they are not victims under the law as to the specific legal action.

The Court: All right. Before we get to these, Mr. Bilzerian, if you remember, wrote a question that was handed to me, but it wasn't a question for the jury, it was a question for me. His question was: If after – when it is appropriate and after the trial is over, can he give each of the victims $2,000 for their losses. Jury Trial Day 3: 6AA1039.

Complainant 1 Count 2, 3, 5 Mary Campo

Complainant 2 Count 5, 8 Rhonda Kay Hatcher

Complainant 3 Count 10 Joanne Frank

Complainant 4 Count 12, 14 (not guilty) Barbara Bowens

2 Complainant 5 Count 16 Serry Mello

3 Complainant 6 Count 17, 18 Robert Will

4 Complainant 7 Count 20 (not guilty), 22 Montho Booth.

$14,000 if one includes the ultimately bifurcated attempt murder count. Amended Superseding Indictment 1AA76-84.

That desire to make them whole is inseparable for this court's purpose on determining inferred bias from the other half – which is the desire to avenge their pain. As noted in appellate counsel Jason Margolis' oral argument and as most practicing attorneys must be aware it is an extraordinary action to be moved to the point of wanting prior to

conviction to give the complainants thousands of dollars: $12,000-$14,000. 83243-COA, Young (Andrew vs. State Oral Argument 3.30.23 - 4 minutes in of 35:14 recording found at https://nvcourts.gov/supreme/arguments/court_of_appeals_prior_oral_argument_recordings.

He also argues how it is unlikely that he could be motivated to make such a magnanimous gesture without also harboring prejudice against the defendant and wanting him punished. And he argues that there was never an assertion that they didn't lose money.

Impetus for such action cannot be analyzed properly under an actual bias supposition. No colloquy can appropriately determine the depth of his motivation sufficiently to ensure Mr. Young's constitutionally guaranteed rights to a fair trial. Mr. Bilzerian elaborates in his actual bias colloquy with the court on day three of the jury trial "I mean, I help victims all the time" Line 15 p. 133 of Day 3 Jury Trial Transcript. 6AA1116. Generally people pick their charities for a purpose and more likely than not – it reflects a much larger issue not being divulged by Mr. Bilzerian – which the law for implied *and* inferred bias anticipates by not allowing a self-serving colloquy to overcome findings of bias for these two. Having said that he did admit during voir dire to being

victimized similarly to the complainants on at least three occasions. 4AA676 lines 21-22. 4AA677 line 7-10. 4AA678 lines 12-19.

Which is one of the clear grounds for a finding of inferred bias and considering his overly generous offer and admitted donations or 'help' to victims all the time – must allow this honorable court to come to the only fair conclusion - an egregious error occurred when Bilzerian remained on the panel for deliberation. So manifestly unfair that the verdicts must be overturned.

The inferred bias is that he wants to shell out $12,000 and give it to the complaints – a value well over the amount of their actual monetary loses - as soon as the trial is over- – because he likes doing good things for victims. He makes a habit in his daily life of doing good things for victims. He has also noted that he has had $50,000 stolen from him in gambling during poker and has had his houses robbed 2 times. He admits that he got so angry having the $50,000 taken from him he took the matter into his own hands and was ultimately charged with attempted robbery. Bilzerian Juror No 111 aka Juror no 11 at voir dire: "This guy cheated me out of some money in poker and –" 4AA678.

Charges were dropped because the complainant did not want to testify because he was a convicted felon according to Bilzerian. 4AA678.

Appellate counsel Lemke argued in her Opening Brief: "Despite Mr. Bilzerian's assurances that his generous offer was not a reflection of his perception of the case or Mr. Young, the trial court should have granted a mistrial or, at a minimum, excused Mr. Bilzerian from further participation in the case. The failure to do so violated Mr. Young's federal and state constitutional rights." Amended Opening Brief # 83243 p. 38. eFiled March 8, 2022. And contrary to Judge Gibbons statement at the Oral Arguments – trial counsel never withdrew his request or came to some sort of compromise:

The Court: All right. Mr. Fischer, did you want to lay a record sir? Day 3 p. 138; 6AA1121

Trial Attorney for Young. Mr. Fischer: Your Honor, I absolutely want – would like to. I may need some opportunity to brief this, but just for the time being, if you'd like me to make – this is sort of obviously off the cuff, as I wasn't prepared for this issue. But I think it speaks to an exact reason we have jury selection, as I stated. And I don't see how this Court can reconcile the two. I don't see how you can have a juror who's clearly expressed a preference. Maybe it's something that he

thinks is not relevant to the trial and he can separate the two, but I cannot believe that anybody reviewing this transcript would be able to conclude that keeping this juror under the circumstances, especially somebody of his stature and his reputation, he may have an extra ability to influence this case, to say that this is not a due process violation of Mr. Young's trial, just it is an impossibility, just based on various constitutional violations I could just cite to Fourth, the Fifth the Sixth, the Eighth. 6AA1121. So having said that , Your Honor, I move for a mistrial. The Court: Okay, And so let me ask you a question. How would that be a mistrial and not just an excusal of one juror?

Attorney Fischer: Your Honor, the mistrial would be cause to the extent that I guess we don't necessarily know, maybe you could poll each one of the jurors. If he's removed I guess maybe that is a remedy, I guess I would have the concern that there was some conversation among the jurors. To the extent that there wasn't and we can assure that, if the court feels that that remedies it, I guess I could understand that. But leaving him on the jury causes me great concern.

The Court: Okay. 6AA1122.

The Court of Appeals in Oral Argument and in questioning Judge Gibbons wrongly states that the only thing trial counsel ever asked for

in remedy was a mistrial. But it was clear trial counsel was amendable to removal of the juror if the judge would agree to questioning of the jurors to see if there was any undue influence. And if that came out favorable he would consider it as a remedy. But the judge denied the motion and stated he would be open to further new information. But this was not forthcoming. But that does not change anything.

The judge concludes by discussing Hernandez v State, 118 Nev. 513 and how in that case the little girl's mother was murdered and two jurors and an alternate juror after hearing her testify decided they wanted to buy her something different. That was challenged and ultimately found not actionable. The court found this comparable and denied relief. 6AA1130. But this court should reconsider the distinguishing factors to allow relief in one where it was denied in Hernandez: They were walking out of the court house after testimony was done and the action was between the guilty phase and the penalty phase. One of the three said it would be nice if they could get the child something. So they went to a nearby store and bought her a little outfit. Hernandez Opening Brief filed July 6, 2001, p. 16 Appeal 36859. It was not being given to the victim of the crime. It was just after the guilt phase but before the penalty phase.

In Young's case, the offer of monies was extravagant. $2,000 to some who had about $300 actual damages. Unlike Hernandez, Young had not been found guilty yet. And the offer was to give the moneys directly to the complainants. And Young had additional factors that came out in voir dire supporting a finding of inferred bias. But even without those additional factors the ones initially asserted by trial counsel were sufficient to allow a mistrial due to this.

Again we stress actual bias does not cancel out a finding of inferred bias. We feel that this court started with that and then stopped without going further. Instead they should have started at inferred bias. The obscene amount of money being offered is relevant in that analysis. That he had not been found guilty yet. That he gave to victims all the time. That he had been victimized himself. That offers of this nature almost never happen despite the sympathy many complainants no doubt generate with the jury and millions of panel members over the years. It is safe to say most trial attorneys can go their entire career without having this issue arise.

An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Crawford v. State,

121 Nev. 746, 746, 121 P.3d 582, 583 (2005). An erroneous view of the law is always an abuse of discretion. United States v. Tsarnaev , 968 F.3d 24, 34 (1st Cir. 2020) overturned on other grounds. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."). Farmer v. State, 133 Nev. 693, 701-02, 405 P.3d 114, 122 (2017).

This Court of Appeals does not address the citation of Tinsley v. Borg cited in Young's Amended Opening Brief 39: A defendant is denied the right to an impartial jury if only one juror is biased or prejudiced." Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990). Thus if one juror is found to be biased a mistrial is warranted.

CONCLUSION

Because the panel overlooked the distinguishing factors between their relied on authority Hernandez v. State and Andrew Young's situation and for all the additional reasons outlined above this Court should grant a rehearing.

Dated this 28th of August 2023.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times Roman font.

I further certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) because it contains 2741 words.

Dated this 28th of August 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th of August 2023, I served this document on the following in Accordance with the Master Service List and or by USPS mail:

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