

IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK LEWIS BOWMAN,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 67656

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Tracie K. Lindeman
Clerk of Supreme Court

FAST TRACK STATEMENT

1. Appellant, Frederick Lewis Bowman.
2. Theresa Ristenpart, Esq. 200 S. Virginia Street, Suite 833, Reno, NV 89501; (775) 223-4135.
3. Same as above.
4. Second Judicial District Court in and for the County of Washoe, in District Court Case Number CR14-0708, Department No. 15.
5. The Honorable David A. Hardy, District Judge.
6. Three (3) day jury trial.
7. One count of felony Trafficking in a Controlled Substance a violation of NRS 453.3385(1) .
8. Judge Hardy sentenced Mr. Bowman to be punished by imprisonment in the Nevada Department of Corrections for a minimum term of nineteen (19) months to a maximum term of forty-eight (48) months, with credit for time served

in the amount of 370 days. JA 415-417.¹ It was further ordered that Mr. Bowman pay \$25.00 as an administrative assessment fee, \$60.00 as a chemical analysis fee, \$3.00 as an administrative assessment for obtaining a biological specimen and conducting a genetic marker analysis, and reimburse the County of Washoe the sum of \$1,000.00 for legal representation. Id.

9. February 26, 2015 (imposition of sentence) and February 19, 2015 (denial of Defense Motion for New Trial due to Juror Misconduct).

10. February 27, 2015 (judgment of conviction); February 23, 2015 (order denying Motion for New Trial).

11. Not applicable.

12. Not applicable.

13. On March 21, 2015, Mr. Bowman filed a notice of appeal. JA 418 (Notice of Appeal).

14. NRAP 4(b).

15. NRS 177.015(3).

16. Judgment after jury verdict.

17. Not applicable.

18. Not applicable.

19. Not applicable.

¹ “JA” stands for Joint Appendix. Pagination conforms to NRAP 30(c).

20. Procedural History: On June 6, 2013, Mr. Bowman pled not guilty to the single count in the Information alleging Trafficking in a Controlled Substance, a felony. JA 1-3. Mr. Bowman then cycled through several attorneys and was transferred from Department 1 in District Court to Department 15 for jury trial December 1-3, 2014. The jury returned a guilty verdict on December 3, 2014. JA 316-317. On December 8, 2014, Mr. Bowman filed a Motion for a New Trial due to reported juror misconduct for independent investigations conducted during deliberations. JA 342-343. Judge Hardy decided to hold an evidentiary hearing on February 19, 2015 regarding the issue of juror misconduct after a motion hearing on January 29, 2015. JA 349. After the evidentiary hearing, Judge Hardy denied the Defense Motion for a New Trial and issued an order on February 23, 2015. JA 416. Sentencing was held on February 26, 2015 and a judgment of conviction issued February 26, 2015. JA 415-417.

21. Facts: The State charged Mr. Bowman with committing one felony, Trafficking of a Controlled Substance. JA 1-2. On December 1, 2014, jury trial commenced. JA 3. Jury selection occurred Monday December 1, 2014 from 3:00 p.m. until 6 p.m. JA 3-115. The entire trial took place on December 2, 2014 in a span of approximately 5 hours. JA 115-304. The State presented three (3) witnesses. JA 117, 134, 188, 189, 222. Defense did not present any witnesses, nor evidence. JA 260. The State's theory was that Mr. Bowman secreted a small plastic bag filled

with 5 grams of methamphetamine in his sock area and that it shook loose during an inmate search at Washoe County jail where it was discovered by Washoe County Sheriff's Office Deputy Gerow who was performing the search. JA 265-275.

Defense's theory was that the bag did not belong to Mr. Bowman and that Deputy Gerow who performed the search may have carried the bag in on his work boot. JA 275-285.

The jury began deliberations at approximately 5:00 p.m. JA 293. At approximately 8:30 p.m. on December 2, 2014, this Court brought the jury into the courtroom to ascertain whether further deliberations were needed and took a vote as to whether to go home for night or to continue deliberating. JA 297. The jury informed the Court that they would like to continue deliberating and in a close vote determined to go home for the night and continue deliberating the next day. JA 299-300. Prior to releasing the jurors for the night, this Court instructed the jurors:

“During this evening recess, you are admonished not to converse among yourselves or with anyone else – go ahead and be seated. Thank you, sir – or with anyone else on any subject connected with this trial. You are not to read, watch, or listen to any report of or commentary on the trial by any person connected with this case or by any medium of information, including without limitation the newspaper, television, internet, or radio. You are further admonished not to form or express an opinion until you are together again in deliberations.”

JA 300.

The next day on December 3, 2014, jury began deliberating at approximately 10:20 a.m. and returned a guilty verdict within approximately thirty (30) minutes by

11:07 a.m. JA 311, 319. After the reading of the verdict, Deputy District Attorney Travis Lucia, Defense Counsel Theresa Ristenpart and Galen Carrico all proceeded into the jury room to discuss the case with the jurors. JA 341-343. The jury informed counsel that the jury was six (6) guilty and six (6) not guilty during deliberations on December 2, 2014. Id.

During discussion with the nine (9) jurors who elected to stay and talk with counsel, two jurors informed counsel that they had gone home and conducted independent experiments and investigation. Id. Defense file a Motion for a New Trial. JA 342-343.

During the motion hearing on January 29, 2015, Judge Hardy commented that he believed “that I will find conclude that there is misconduct” but that the problem was in “analyzing the prejudicial nature.” JA 347. Judge Hardy also commented that he will have to “answer a question about my role in evaluation the cumulative weight of trial evidence” and that he had “an opinion about the cumulative weight of the evidence. But I feel like I just become a 13th juror, with an absolute veto. And that feels wrong as well.” JA 355. Judge ordered the State to track down the jurors and inquire as the nature of the independent investigation and the effect it had on deliberations. JA 356. The State filed affidavits from three jurors regarding the independent investigations. JA 362-379.

In his affidavit, juror Mr. Dean Tsdua testified that on December 2, 2014, he went home, took a plastic sandwich bag, filled it with 5 grams of sugar, and then proceeded to try to see if it would stick to his work boot and he could not make it stick. JA 375. The vote was “50/50” for guilt and innocence. JA 377. Mr. Tsdua did discuss his experiment during deliberations that eventually cumulated in a unanimous vote for guilt on Thursday morning. JA 376.

Juror Mr. Richard Nielson testified in his affidavit that he went home December 2, 2014, took a plastic sandwich baggie, filled it with approximately 5 grams of dirt, and stuck it in his sock trying to work the baggie loose out of his sock. JA 369. Mr. Nielson wrote that on December 3, 2014, he told the “other jurors and changed his vote.” JA 370. Furthermore, Mr. Nielson wrote that on December 3, 2014, the foreman asked if anyone had changed votes and Mr. Nielson indicated he had and explained why. JA 371.

During the evidentiary hearing held on February 19, 2015, Mr. Tsdua’s memory was “fuzzy” as to when the discussion regarding his experiment took place during deliberations, before or after the unanimous finding. JA 387-388. Mr. Nielson indicated that he had talked to the State investigator prior to the hearing and now wanted to change his affidavit statement. JA 394. Mr. Nielson had discussed this independent investigation with his fellow jurors, but changed the timeline to stating that this discussion took place after the final vote for guilty while they were

waiting to be returned back to the courtroom for the announcement of the verdict. JA 394-395. Judge Hardy found that that there was juror misconduct, but that it was not prejudicial. JA 408, 413-414.

23. Argument: The stock admonition jury instruction used by Judge Hardy pursuant to NRS 175.401 fails to instruct jurors that they are prohibited from doing any independent investigation and this violates both parties right to a fair trial. Judge Hardy's abused his discretion when he denied Mr. Bowman's Motion for a New Trial.

Standard of Review and Discussion

Pursuant to NRS 175.401, a judge must give the admonition to the jury at each adjournment, and be admonished that it is their duty to not:

1. "Converse among themselves or with anyone else on any subject connected with the trial;
2. Read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation newspapers, television and radio; or
3. If they have not been charged, form or express any opinion on any subject connected with the trial until the cause is finally submitted to them." *State v. Lewis*, 59 Nev. 262, 91 P.d2d 820 (1939) (decision under a former similar statute).

Jurors are prohibited from conducting an independent investigation. *Meyer v. State of Nevada*, 119 Nev. 554, 572, 562, 80 P.3d 447, 453 (2003). The admonition under NRS 175.401 which Judge Hardy utilized fails to instruct jurors that they are prohibited from conducting independent investigations. JA 300. The purpose of the admonition is protect jurors from outside information in order to guarantee both parties receive a fair trial. This obsolete stock admonition does not include the critical language in *Meyer* that independent investigations by jurors are prohibited and therefore does not adequately protect the parties' right to a fair trial.

The district court is vested with broad discretion in resolving allegations of juror misconduct. *Id.* at 562. "Juror misconduct" falls into two categories: (1) conduct by jurors contrary to their instructions or oaths, and (2) attempts by third parties to influence the jury process. *Id.* at 561. The first category includes jurors who conduct independent research or investigation and basing their decision on evidence not admitted. *Id.*

Whether a defendant is prejudiced by juror misconduct is a fact question to be determined by the trial court, and its determination will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Barker v. State*, 95 Nev. 309, 313, 594 P.2d 719, 721-22 (1979). In determining whether juror misconduct constitutes harmless or prejudicial error a trial court must consider "whether the issue of innocence or guilt is close, the quantity and character of the

error, and the gravity of the crime charged." *Rowbottom v. State*, 105 Nev. 472, 486, 779 P.2d 934, 942-94 (Nev. 1989), citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Here, it is clear from the length of deliberations and the jurors' affidavits that the issue of Mr. Bowman's guilt or innocence was split evenly amongst jurors. JA 371, 377. The jurors' affidavits, written before meeting the State's investigator, demonstrate that these experiments affected the course of deliberations and votes. JA 367-379. Here, the independent investigations dealt specifically with material issues at trial. On February 2, 2014, Mr. Bowman was brought to Washoe County jail where Washoe County Deputy Gerow searched him. JA 153. During the search, a small plastic bag filled with white crystalline substance was found on the floor near Mr. Bowman's right foot. JA 155. Deputy Gerow testified he never saw the bag fall, never saw it in Mr. Bowman's possession, and never heard it drop. JA 169-170. The State's theory was that the 5 grams of methamphetamine was secreted somewhere in Mr. Bowman's socks whereupon it fell out while being searched. JA 265-275. Defense theory was that Deputy Gerow unknowingly carried the plastic bag stuck on his work boot into the search room. JA 275-285.

Mr. Nielson's independent investigation of placing a small plastic bag filled with 5 grams of dirt and sticking it in his sock, trying to work it loose, goes directly to the viability of the state's case theory. Mr. Tsdua's independent investigation

where he tried to ascertain whether 5 grams of sugar in a plastic bag could become stuck to his work boot goes directly to disprove defense theory of the case. This information was specific in content and affected material issues in this case which was relayed to the other jurors during deliberations. Mr. Bowman was prejudiced by these independent investigations as jurors changed votes after this information was imparted.

Lastly, Judge Hardy stated during the motion hearing that he felt like the “13th juror” and had already formed his opinion about the cumulative weight of the evidence. JA 355. This Court has said a district court’s exercise of discretion should not be arbitrary or capricious, or founded on prejudice or preference, or exceed the bounds of reason or law. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001); *State v. Dist. Ct. (Armstrong)*, 127 Nev. ____, ____, 267 P.3d 777, 780 (2011).

Judge Hardy identified his own prejudiced struggle, as he had already formed an opinion about the facts in this case and Mr. Bowman’s guilt or innocence, but chose to exercise his “absolute veto” by denying Mr. Bowman a new trial despite the overwhelming evidence of juror misconduct and the prejudicial effect it had on Mr. Bowman.

24. Counsel did not object did not object to the standard admonition pursuant to NRS 175.401, but the issue is ripe for review as this admonition is

obsolete and does not adequately protect parties' right to a fair trial. Counsel did object to Court's denial of Motion for New Trial.

25. This appeal does present an issue of first impression or public interest as the stock admonition pursuant to NRS 175.401 has not been reviewed nor updated to reflect current case law prohibiting juror's independent investigations.

VERIFICATION

1. I hereby certify that this fast track statement 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: This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

2. I further certify that this fast track statement complies with the page – or type-volume limitations of NRAP 3C(h)(2) because it is: Proportionately spaced, has a typeface of 14 points and contains 2,307 words, and does not exceed 15 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that

the information provided in this fast track statement is true and complete to the best of knowledge, information and belief.

DATED this 11th day of June, 2015.

/s/ Theresa Ristenpart
THERESA RISTENPART

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 11th day of June, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Chief Appellate Deputy,
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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Theresa Ristenpart, Esq.