IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK LEWIS BOWMAN, No. 67656

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Joseph R. Plater, Deputy District Attorney, Washoe County District Attorney's Office, P. O. Box 11130, Reno, Nevada 89520; (775) 328-3200.

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

4. Proceedings raising same issues: None.

5. Procedural history: The State accepts appellant's account.

6. Statement of facts:

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance.

The State's theory of prosecution was that Bowman had a baggie of methamphetamine in his sock that fell out while he was being searched in the jail (Joint Appendix, Vol. 2, 265-75).("JA"; Vol."). Bowman's theory of defense was that the baggie did not belong to him, and that a deputy sheriff had inadvertently stepped on the baggie at some other location and carried it on his work boot until it fell off. *Id.* at 275-85.

The trial lasted one day (JA, Vol. 1, 128-184; Volume 2, 189-292). The jury started to deliberate the same day, and the district court excused the jury later in the evening (JA, Vol. 2, 293, 300-03, 310-11, 315-17). The jury found Bowman guilty the next day, and the foreman signed the verdict form. *Id.* at 392.

After the foreman gave the verdict form to a deputy sheriff, one of the jurors, Richard Nielson, told another juror, Dean Tsuda, that after the first day of deliberations, he had put some dirt and pebbles in a sandwich bag, put the bag into a sock, and tried to take the bag out of the sock without using his hands. *Id.* at 385-86, 390. He could not do so. *Id.* at 390. Juror

Tsuda told Juror Nielson that he had performed a similar experiment after the first day of deliberations. *Id.* at 385-86. Juror Tsuda had put some sugar in a baggie and walked over it to see if it would stick to his shoe. *Id.* at 384-85. The baggie did not stick to his shoe. *Id.* at 385. Both jurors believed Bowman was guilty before they performed their investigations. *Id.* at 385, 391.

Bowman moved the district court for a new trial, arguing that the jurors' investigations were "introduced late into deliberations and shortly before the verdict" and there was "a reasonable probability that the information affected the verdict." *Id.* at 326-27.

The district court denied the motion for new trial after Juror Nielson and Juror Tsuda testified at a hearing on the motion. *Id.* at 413-14. The district court found there was "no reasonable probability the verdict was affected because the evidence before it is that the independent experiments did not change the votes of the jurors who conducted them and the results of the experiments were not broadcast to other jurors until after a unanimous guilty verdict had been reached. It appears the verdict forms had already been filled out when the experimenting jurors informed the others of their experiments." *Id.* at 414.

This appeal follows.

7. Issues on appeal:

Whether the district court erred in denying Bowman's motion for new trial based on experiments that two jurors performed, where the experiments did not change the two jurors' opinions about Bowman's guilt, and the jurors described their experiments to each other–and perhaps to other jurors–only after the jury foreman had signed the verdict form and handed it to a deputy sheriff.

8. Legal argument:

Bowman contends the district court erred by denying his motion for new trial and by failing to admonish the jury not to perform independent investigation. The claims lack merit.

A. The district court did not err in denying Bowman's motion for new trial because two jurors performed independent investigations, where the investigations did not affect the two jurors' opinions about Bowman's guilt, and the two jurors did not publicize their investigations until after the foreman had signed the verdict form.

1. Standard of review

The Court reviews a district court's denial of a motion for a new trial based upon juror misconduct for abuse of discretion and will not disturb the district court's findings absent a showing of clear error. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). To merit a new trial, a party must

show that the alleged juror misconduct occurred and was prejudicial. *Maestas v. State*, 128 Nev. ___, ___, 275 P.3d 74, 84 (2012).

"[W]here the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." *Meyer v. State*, 119 Nev. 554, 561-62, 80 P.3d 447, 453 (2003) (citing *United States v. Saya*, 247 F.3d 929, 937 (9th Cir.2001)).

2. Discussion

"Jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation." *Id.* at 572, 80 P.3d at 460. "Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial. . . . Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." (citations omitted). *Id.* at 563-64, 80 P.3d at 455.

"Jurors' exposure to extraneous information via independent research or improper experiment is [] unlikely to raise a presumption of prejudice. In

these cases, the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* at 565, 80 P.3d at 456 (citation omitted).[1]

Here, Jurors Nielson and Tsuda improperly performed private experiments, after the case had been submitted to them, to test the prosecution and defense theories of the case. The district court found no prejudice ensued from the experiments because they did not change the votes of either Juror Nielson or Juror Tsuda, "and the results of the experiments were not broadcast to other jurors until after a unanimous guilty verdict had been reached." (JA, Vol. 2, 414). The district court noted

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[1]In *Meyer*, the Court noted a number of factors that a court may consider in determining whether juror misconduct affected a verdict:

> For example, a court may look at how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence. These factors are instructive only and not dispositive.

Id. at 566, 80 P.3d at 456 (citations omitted).

that "the verdict forms had already been filled out when the experimenting jurors informed the others of their experiments." *Id.*

The record supports the district court's findings. Both Jurors Nielson and Tsuda testified that they performed simple experiments to test the parties' contesting theories. But they also explained that they did not discuss the nature of their investigations until after the foreman had signed the verdict form. *Id.* at 386, 387-88; 391-92. Thus, the investigations could not have influenced the other jurors' decisions about Bowman's guilt. Nor did the investigations influence how Juror Nielson or Juror Tsuda voted on the case–they had previously decided that Bowman was guilty. *Id.* at 385, 391. Moreover, it appears that not more than a couple of other jurors–maybe none at all–even heard either Juror Nielson or Juror Tsuda discuss the results of their investigations. *Id.* at 386, 387, 393, 395. And it is not known what exactly any of the other jurors heard from either Juror Nielson or Juror Tsuda. *Id.* at 384-96. Whatever occurred lasted for only a few moments. *Id.* at 386, 387, 392-93. The weight of the evidence against Bowman is also overwhelming.

In *Tanksley v. State*, 113 Nev. 997, 1002-03, 946 P.2d 148, 151-52 (1997), this Court found that a juror's misconduct in igniting mattress stuffing to see

if it was flammable did not prejudice the defendant, because the other jurors had voted to find the defendant guilty before the test and the offending juror did not immediately change his vote to guilty after his test. If the defendant in *Tanksley* failed to show prejudice, then Bowman has surely failed as well, where it is more certain here that no juror's vote changed because of Juror Nielson's and Juror Tsuda's experiments. Accordingly, the district court did not err in denying the motion for new trial.

B. No authority requires a district court to admonish a jury not to perform independent investigation.

Bowman argues the district court failed to tell the jury not to perform independent investigation. The claim lacks merit.

1. Standard of review

The failure to object during trial generally precludes appellate consideration of an issue. *Saletta v. State*, 127 Nev. ___, ___, 254 P.3d 111, 114 (2011). The Court has "discretion to review constitutional or plain error." *Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008). "In conducting plain error review, [the Court] examine[s] whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). To demonstrate plain error, the appellant has the burden of demonstrating

actual prejudice. *Id.* "An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record." *Saletta*, 127 Nev. at ___, 254 P.3d at 114 (internal quotation omitted).

2. Discussion

NRS 175.401 requires the district court, at each adjournment of the court, to tell the jurors not to (1) discuss the case with anyone; (2) read, watch or listen to any report or any person connected to the trial; or (3) form or express any opinion about any aspect of the trial. Here, the district court admonished the jury as NRS 175.401 requires at each break of the trial (JA, Vol. 1, 184; Vol. 2, 256, 261, 263, 300). Nevertheless, Bowman argues that the district court failed to instruct the jurors not to perform any independent investigation.

Bowman did not request the district court to admonish the jury not to perform independent investigation. Nor does he cite any authority that a trial court is required to do so, and that such a failure is reversible error. It might be good practice to give such an instruction during trial, but no statute or controlling decision in this State requires it. Accordingly, Bowman fails to show plain error. *See Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) ("[A]t a minimum," plain error must be "clear under current

law") (quotation marks omitted). Even if it were error for the district court not to give such an instruction, Bowman was not prejudiced, as discussed above. Any error was therefore harmless.

This Court should affirm the judgment of conviction.

9. Preservation of issues: Bowman preserved his motion for new trial by litigating the issue in the district court where Judge Hardy denied the motion by written order. Bowman did not preserve the issue of whether he is entitled to a new trial because the district court did not admonish the jury not to perform outside investigation.

DATED: July 9, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response 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 response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Constantia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, 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

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response is true and complete to the best of my knowledge, information and belief.

DATED: July 9, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 9, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Theresa Ristenpart, Esq.

Shelly Muckel
Washoe County District Attorney's Office