IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

FREDERICK LEWIS BOWMAN, No. 67656

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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APPELLANT'S PETITION FOR REHEARING

Introduction

A jury convicted Bowman of trafficking in a controlled substance. This Court reversed Bowman's conviction because two jurors performed experiments during their deliberations to investigate the parties' respective theories of the case.

The State seeks rehearing. The State submits the Court misapprehends the facts and uses a *de novo* standard of review of the district court's factual findings when it should have deferred to the district court's factual findings if substantial evidence supports those findings.

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Specifically, the Court states that both jurors admitted that their experiments influenced them to change their votes or to reinforce their previously held positions. One juror, however, never stated his experiment influenced him in any way. The other juror stated in his affidavit that he changed his vote after his experiment; but he also testified under oath in the district court that his affidavit was wrong. The district court accepted the juror's in-court testimony instead of his affidavit, finding that "the independent experiments did not change the votes of the jurors who conducted them . . . ." (Appellant's Appendix, 414). Further, that juror never stated in his affidavit that he voted to find Bowman guilty as a result of his experiment. This Court cannot substitute its judgment for the district court's finding since substantial evidence supports the district court's finding, and this Court does not find facts in the first instance.

Argument

A. The Court should grant rehearing because the district court rejected this Court's finding that the jurors' experiments led them to change their votes, and the district court's finding is based on substantial evidence–the jurors' post-trial testimony. The Court should grant rehearing as to its finding that the jurors' experiments may have reinforced their previous positions regarding Bowman's guilt because there is no evidence to support that finding as to one juror, and the other juror refuted that assertion, and this Court cannot make that factual finding in the first instance.

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"The court may consider rehearing . . . [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or . . . [w]hen the court has overlooked, misapplied or failed to consider a . . . procedural rule . . . or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(A)(B).

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). "[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)). This means that the Court must defer to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but that it can review the district court's finding of prejudice *de novo*. *See Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

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After the first day of deliberation, two jurors performed experiments regarding the parties' theories of the case. When the jury returned the next day, it convicted Bowman of trafficking in a controlled substance. Bowman filed a motion for new trial, and the district court held a hearing on the motion where the two jurors testified. After considering the evidence and testimony, the district court concluded that the jurors' experiments did not change their votes, nor did the experiments affect any of the other jurors because they did not become aware of the experiments until after the foreman had signed the verdict and given it to the district court. This Court reversed the district court order, finding that the two jurors relied on the experiments either to change their votes or to reinforce their previously held positions:

> Although there is some dispute as to whether and how the independent experiments were disclosed to fellow jurors, it is clear that two jurors conducted independent experiments testing two primary theories of the case and returned to participate in jury deliberations after being influenced by that extrinsic evidence. Those jurors later disclosed to counsel that they relied on those experiments–either to sway them to change their votes or to reinforce their previously held positions–before rendering a verdict.

The State believes the Court has misapprehended material facts.

Juror Tsuda submitted an affidavit before the hearing on Bowman's motion for new trial where he explained he put some sugar in a bag and tried

to get it to stick to his shoe (Appellant's Appendix, Volume 2, 374-75). The bag did not stick to his shoe. The experiment was relevant because Bowman's theory of the case was that a deputy sheriff inadvertently brought a bag of drugs on the sole of his shoe into the jail's holding area, and that it fell off his shoe, where it was found next to Bowman. *Id.* at 275-85.

Juror Tsuda, however, never stated in his affidavit that his experiment influenced his vote, i.e., that he relied on the experiment either to change his vote or to reinforce his previous vote. *Id*. at 374-79. At the evidentiary hearing on the motion for new trial, Juror Tsuda testified he voted to find Bowman guilty before he performed his experiment. *Id*. at 385. Juror Tsuda never testified that his investigation affected or influenced any part of his deliberation or vote to find Bowman guilty. This Court misapprehends the facts when it finds otherwise.

Juror Nielson stated in his affidavit that he performed an experiment where he put some dirt in a plastic bag, put the bag in his sock, and tried to remove the bag without using his hands, but failed. *Id*. at 368. He stated he told the other jurors about his experiment the following morning during deliberation and that he changed his vote. *Id*. at 369-70. He also stated that the foreman asked if anyone had changed their vote from the previous day.

Id. at 371. In response to that question, Juror Nielson stated he said that he had changed his vote and explained why he had done so. *Id*.

At the hearing on the motion for new trial, Juror Nielson testified he voted to find Bowman guilty before he performed his experiment. *Id*. at 39, 395. He testified his statements in his affidavit–that he told the other jurors the following morning the results of his experiment and that he changed his vote–were incorrect. *Id*. at 394. He further testified he did not think his investigation helped to confirm his guilty vote. *Id*. at 396.

The district court denied the motion for new trial after Juror Nielson and Juror Tsuda testified. *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." *Id.* at 414.

Thus, while Juror Nielson stated in his affidavit that he changed his vote after his experiment, he repudiated that statement when he testified under oath in the district court. The district court accepted Juror Nielson's courtroom testimony of what happened over what he stated in his affidavit.

It was within the district court's province to determine what version of Juror Nielson's accounts to accept. *See Lay v. State*, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994) ("it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony."); *Azbill v. State*, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) ("Where questions of fact are dependent upon the credibility of witnesses, the jury is entitled to decide questions of credibility and the weight to be attached to their testimony."). Accordingly, this Court should defer to the district court's finding that Juror Nielson's experiment did not influence him to change his vote.

Moreover, even if one were to accept the truth of Juror Nielson's statements in his affidavit, he never expressly stated that he decided that Bowman was guilty as a result of his experiment (Appellant's Appendix, 367-72). And it is difficult to see the probative value in Juror Nielson's affidavit relative to the influence it could have had where the result of his experiment actually benefitted Bowman.

In short, Juror Tsuda never made a statement–either in his affidavit, at the new trial hearing, or elsewhere–that his experiment influenced him or that he relied on the experiment in a way that swayed him to change his vote

or to reinforce his previous vote.

While one might read Juror Nielson's affidavit to suggest his experiment influenced him, the affidavit never explicitly states so. More importantly, the district court accepted Juror Nielson's testimony that contradicted his affidavit. Juror Nielson testified he voted to find Bowman guilty before his experiment, and he also testified he did not believe his experiment helped to confirm that vote. The district court was in the best position to decide what version was more credible. Since substantial evidence supports the district court's findings that neither juror was influenced by their experiments, this Court should defer to those findings. To the extent this Court finds Juror Nielson's statements in his affidavit more credible than his courtroom testimony, the Court is prohibited from making such a finding–that finding lies exclusively with the trial court. *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) ("This court is not a fact-finding tribunal; that function is best performed by the district court.").

The State respectfully requests the Court to grant rehearing.

DATED: May 16, 2016.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia 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 petition for rehearing complies with the page- or type-volume limitations of NRAP 40 or 40A because it does not exceed 10 pages.

DATED: May 16, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 16, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Theresa Ristenpart, Esq.

Destinee Allen
Washoe County District Attorney's Office