

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED: _____
AT _____ O'CLOCK _____ M
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE		
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI		
STATE OF IDAHO,)	CASE NOS. CR – 09 – 22548 & CR – 09 – 22648
)	
Plaintiff,)	MEMORANDUM DECISION AND
v.)	ORDER RE: DEFENDANTS' MOTIONS
)	FOR NEW TRIAL
WILLIAM M. TANKOVICH, Jr. and FRANK J. TANKOVICH,)	
)	
Defendants.)	

A jury convicted the Defendants of two felony counts. Each of the Defendants request a new trial, alleging the presiding juror engaged in misconduct. The State objects to the Defendants' request for a new trial.

Art Verharen, Kootenai County Prosecuting Attorney's Office, for the State of Idaho.

Christopher D. Schwartz, Schwartz Law Office, P.C., for Defendant William M. Tankovich.

Jedediah J. Whitaker, Kootenai County Public Defender's Office, for Defendant Frank J. Tankovich.

I. STATEMENT OF FACTS AND COURSE OF PROCEDURE

On November 2, 2009, a grand jury indicted William M. Tankovich, Jr., and his brother Frank J. Tankovich ("Defendants"), charging the Defendants with one count each of Malicious Harassment (I.C. §§ 18-7902, and 18-204) and Conspiracy to Commit

Malicious Harassment (I.C. §§ 18-7902, 18-1791). Trial commenced on October 25, 2010, and the jury began deliberations on October 28, 2010.¹ After the jurors began deliberating, the Presiding Juror sent a note to this Court stating:

It was disclosed in our deliberations (just now) that Juror # 6 [name omitted], has disclosed some views that (*sic*) Judge may need to question. We will cease deliberations until further instruction from the Judge.

(Presiding Juror's Note #1.) The State and the Defendants agreed that it would be appropriate to conduct a preliminary inquiry of the Presiding Juror to obtain more information. (10/28/10 2:12 p.m. Tr., p.68, L.17 – p.69, L.6.) This Court then called the Presiding Juror into the courtroom with counsel for all parties present. (10/28/10 2:12 p.m. Tr., p.70, Ls.6-12.) On the record, the following conversation occurred:

THE COURT: And hello, [Presiding Juror].

PRESIDING JUROR: Hi.

THE COURT: I understand you received the honors, and you are the presiding juror. Is that correct?

PRESIDING JUROR: I am.

THE COURT: [Presiding Juror], the Court received a note from you, and it's not really a question to the Court; it's simply a note. And I can't really discern from looking at this note what the concern of the jury is or of yourself as a presiding juror, so I don't even know if its' an issue I can even concern myself with unless I have a little bit more information.

PRESIDING JUROR: And I can be frank?

¹ The State charged the Defendants' brother, Ira Tankovich, with the same offenses (CR-09-22657). The three brothers were tried together for the first time on March 29, 2010. However, a mistrial was declared on March 30, 2010. The second trial commenced on April 12, 2010. The jury found Ira Tankovich guilty of the misdemeanor offense of Conspiracy to Commit Disturbing the Peace (I.C. §§ I.C. 18-1719 and 18-6409), but found him not guilty of Malicious Harassment (I.C. §§ 18-7902, 18-204) and Conspiracy to Commit Malicious Harassment (I.C. §§ 18-7902, 1791). However, the jury could not reach a decision regarding the charges against the Defendants. This Opinion addresses events that occurred during the third trial of the Defendants.

THE COURT:

I want you to be frank, and I may stop you if there's a concern that you're raising, but go ahead and just tell us what's behind this letter.

PRESIDING JUROR:

In the middle of deliberations, all of us taking into account everything that we're w-hat we're supposed to be doing, it was disclosed to me by Juror #6, [name omitted], that [Juror #6] has engaged with his – he talks about when he was with his buddies and they do all kinds of things like write "white power" and such and such – I can't remember the other things he described – on his truck when they go mudding or something.

And up and to that, I was trying to engage [Juror #6] to talk, because he's not very talkative, and he disclosed that to me personally. I disclosed it to the rest of the jurors, and we felt that it was possibly an oversight in the beginning and that you should perhaps take over to talk with, and we ceased our deliberations.

So, he – then other jurors did ask him about his views, and he said – you know, asked him if he was racist. And he said, well, I'm not all the way racist, but you know, that kind of thing. So, again, we stopped and I asked that I needed to let you know.

THE COURT:

All right. Do you have any other information beyond that?

PRESIDING JUROR:

I do not. I asked everybody to stop.

(10/28/10 2:12 p.m. Tr., p.70, L.13 – p.72, L.8.) Counsel for the State and for the Defendants declined to inquire further of the Presiding Juror, and this Court asked the Presiding Juror to return to the jury room and wait for this Court's response. (10/28/10 2:12 p.m. Tr., p.72, Ls.9-22.)

The State then moved to strike Juror #6 pursuant to Idaho Criminal Rule 24(d)(3), arguing Juror #6 was "disabled" because Juror #6 did not respond to the State's voir dire questions regarding whether he could sit as a fair and impartial juror. (10/28/10 2:29 p.m. Tr., p.1, L.9 – p.3, L.2.) The State requested that this Court replace Juror #6 with an alternate juror, or, the State suggested, this situation "maybe might even require some additional inquiry by the Court, specifically of [Juror #6] to determine whether or not he is able to sit as a fair and impartial juror." (10/28/10 2:29 p.m. Tr., p.1, Ls.17-22.; see, p.2, L.23 – p.3-L2.)

Counsel for the Defendants responded that Juror #6 should not be dismissed because he answered all voir dire questions put to him, and because the State did not ask any of the jurors during voir dire if they harbored beliefs that "one race is better than the other," or other like ideologies. (10/28/10 2:29 p.m. Tr., p.3, L.4 – p.4, L.13.)

Defense counsel also stated:

[t]o be frank, your Honor, I have almost more of a problem with the presiding juror's response than what [Juror #6] has supposedly said. The idea that we're going to stop jury deliberations and ask a juror, "Are you racist," completely taints the jury pool, completely destroys any ability of my client to get a fair jury panel. Now they're discussing whether racism is appropriate, not the facts of this case. They're fighting with each other, not discussing the facts of the case, and I have no other choice, your Honor, than to move for a mistrial.

(10/28/10 2:29 p.m. Tr., p.4, Ls.1-13.)

This Court denied the State's motion to strike Juror #6 because, based on the limited information available, there is

nothing that [the Presiding Juror] offered to indicate to this Court that [Juror #6] has lied during voir dire about . . . those two fundamental areas of inquiry by the State. . . . The fact that Juror #6 may have exhibited or may possess some kinds of beliefs that might be considered inappropriate or perhaps racial beliefs does not automatically indicate that he's

incapable of being fair and impartial for the purposes of this trial.
(10/28/10 2:29 p.m. Tr., p.7, L.19 – p.8, L.3.)

This Court also denied the Defendants' motion for a mistrial, stating:

I actually share some of the concerns here that I have a presiding juror that somehow wants to stop the deliberations when they come across a situation where they feel that someone may harbor beliefs that they either don't – that they simply don't agree with. I'll give [the Presiding Juror] the benefit of the doubt because of the way she voiced her concern in her question. It seemed it was more related to the voir dire process. And I think having examined that, I'm not sure that [Juror #6], based on what [the Presiding Juror] has told us, has violated that duty.

I don't want to bring [Juror #6] back in front of the Court and ask any further questions of him, because I think that would present a dangerous situation, because I don't want to single out [Juror #6] in any way that he hasn't otherwise been singled out by this whole process and to somehow put some kind of leverage upon the young man to try to explain to him that he's supposed to change his beliefs or his personal attitudes for the purposes of this trial.

And so I'm just simply not satisfied that I have enough information to conclude that [Juror #6] has either violated his oath as a juror during the selection process nor has he displayed, based on what I received here from [the Presiding Juror] that he is incapable of being a fair and impartial juror.

(10/28/10 2:29 p.m. Tr., p.8, L.24 – p.10, L.3.) This Court agreed that after the jury reached a verdict, this Court would consider a request from counsel to inquire of the jurors. (10/28/10 2:29 p.m. Tr., p.13, Ls.14-25.)

This Court then responded to the Presiding Juror's note with a note stating: "[t]he court has conferred on this issue and does not find any basis to cease the deliberations. Please resume your deliberations." (Presiding Juror's Note #1.) After further deliberations, the jury returned a verdict finding the Defendants guilty of all charges.

After the verdict, counsel for the Defendants requested an opportunity to inquire of the Presiding Juror and Juror #6. (10/28/10 4:30 p.m. Tr., p.3, Ls.4-12.) The State objected, arguing the inquiry invades the province of the jury. (10/28/10 4:30 p.m. Tr., p.3, Ls.16-24.) This Court allowed the inquiry to determine if there is any "additional information beyond that which we had received from [the Presiding Juror] that is of concern," because "the interests of justice would merit that we make some at least limited inquiry into it." (10/28/10 4:30 p.m. Tr., p.4, Ls.12-16.) This Court, and counsel for all the parties then inquired of Juror #6. (10/28/10 4:30 p.m. Tr., p.5, L.11 – p.22.) The Defendants now timely move for a new trial ("Defendants' Motions").

II. ANALYSIS

A. Information Obtained During the Post-Verdict Inquiry of Juror #6 is Inadmissible Pursuant to Idaho Rule of Evidence 606(b).

The State opposes the Defendants' Motions ("State's Brief"), arguing that Idaho Rule of Evidence 606(b) prohibits a post-verdict inquiry of Juror #6, and that this Court may not consider the information gleaned from the post-verdict inquiry of Juror #6 in its analysis of whether the Defendants are entitled to a new trial. (State's Brief, pp.1-4.)

Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute and affidavit on the issue of whether or not the jury determined any issue by resort to chance.

Statements regarding any other aspect of the jury's deliberations are inadmissible to impeach the jury's verdict. State v. Webster, 123 Idaho 233, 238, 846 P.2d 235, 240 (Ct. App. 1993). The reason for excluding evidence attempting to impeach the verdict include insuring the freedom of deliberations, the stability and finality of verdicts, and the protection of jurors. Lehmkuhl v. Booland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

Idaho Rule of Evidence 606(b) is a rule of evidence, and not a prohibition of post-verdict inquiries. Case law shows that post-verdict inquiries occur in many instances, but that trial courts must take care when considering the resulting information as evidence in support of a defendant's motion for a new trial and avoid conducting the inquiry in a manner that taints a jury's ability to deliberate. Compare State v. Seiber, 117 Idaho 637, 791 P.2d 18 (1990) (post-verdict inquiry into the potential undisclosed bias of a juror) with State v. Lee, 131 Idaho 600, 961 P.2d 1203 (1998) (post-verdict inquiry of a juror improper when the court instructed the jurors to deliberate after jury was polled and inquiry complete). This Court's post-verdict inquiry of Juror #6 was, therefore, proper because the inquiry was limited to the issue presented by the Presiding Juror's Note #1, and conducted after the verdict was rendered. Therefore the inquiry could not have further tainted the deliberative process.

The State, however, is correct that the information gained from the post-verdict inquiry of Juror #6 does not fall within the three exceptions of I.R.E. 606(b), and is therefore inadmissible. This Court, then, will not consider the information obtained during the post-verdict inquiry of Juror #6 as evidence in support of, or against, the Defendants' Motions.

B. The Defendants' Motions for a New Trial are Denied.

Idaho Criminal Rule 34 provides that a new trial may be "granted in the interests of justice." This standard is not an independent reason for a new trial, but must be applied when the Court evaluates the statutory grounds for a new trial pursuant to I.C. § 19-2406. State v. Cantu, 129 Idaho 673, 931 P.2d 1191 (1997). Idaho Code § 19-2406 provides in pertinent part, that a new trial may only be granted in certain cases. While the Defendants do not cite to any particular subsection of I.C. § 19-2406, it appears that the Defendants request a new trial pursuant to the following subsections:

3. When the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors.

Neither the rule nor the statute "prohibit the grant of a new trial on grounds not argued by the defendant, so long as the defendant has requested a new trial and the ground the court relies on is one of those specified in the statute." State v. Mack, 132 Idaho 480, 974 P.2d 119 (Ct. App. 1999). The question of whether the "interests of justice" requires a new trial is directed to the sound discretion of the trial court. Estes v. State, 111 Idaho 430, 725 P.2d 135 (1986).

1. The Defendants Have Not Shown by Clear and Convincing Evidence that the Presiding Juror Engaged in Misconduct Thereby Preventing Fair and Due Consideration of the Case.

The due process clauses of the state and federal constitutions guarantee an accused a trial by a fair and impartial jury. State v. Lee, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998), *citing* State v. Clay, 112 Idaho 261, 263, 731 P.2d 804, 806. "Jury verdicts occupy an exalted place in our criminal justice system." Clay, 112

Idaho at 263, 731 P.2d at 806. However, this vast deference “can be justified only if the integrity of the jury deliberation process is scrupulously maintained.” Id.

“Whether a defendant is entitled to a new trial due to juror misconduct is two fold. First, the defendant must present clear and convincing evidence that juror misconduct has occurred. Second the trial court must be convinced that the misconduct reasonably could have prejudiced the defendant.” State v. Seiber, 117 Idaho 637, 640, 791 P.2d 18, 21 (1990). The trial court must be convinced that the defendant has been denied an impartial trial. State v. Marren, 17 Idaho 766, 794-795, 107 P. 993, 1003 (1910).

There is no case law or statute that establishes the role of a presiding juror, but instead a court must instruct the presiding juror as to their limited role in comparison to the other jurors. This Court instructed the Presiding Juror and jury as per Idaho Standard Jury Instruction No. 42 which provides that the presiding juror’s duty is to “see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question.” (Emphasis added.)

The Defendants argue that the Presiding Juror engaged in misconduct when she halted deliberations because Juror #6 expressed an opinion and provided anecdotal information based on his life experience. (Defendants’ Motions, p.2.) According to the Defendants, the Presiding Juror’s

action completely exceeds the authority granted a presiding juror. It was designed to intimidate other jurors and taint the deliberation process . . . During that period the presiding juror interrupted another juror, and then attempted to influence that juror through the use of guilt, recrimination, harassment, and the false display of authority.

(Defendants' Motions, p.2.) The State asserts generally that there is an insufficient factual basis for the Defendants' Motions. (Id.) This Court agrees with the Defendants that the issue presented does not concern any improper behavior or bias on the part of Juror #6, but concerns the Presiding Juror's decision to halt deliberations. It is to the actions of the Presiding Juror that this Court turns its attention.

The parties have not presented this Court with any case law or other authority that addresses a situation where a presiding juror stops deliberations because another juror expresses an opinion or offers anecdotal statements about a personal experience. In fact, case law shows that deliberations continue through much more contentious situations, such as when a juror expresses an unpopular opinion or takes a position contrary to the majority of jurors. It appears, then, that the Presiding Juror's decision to stop deliberations in response to Juror #6's statements was rather unusual.

Regardless, the Presiding Juror's unusual action is not "clear and convincing" evidence of misconduct. The only admissible evidence this Court may consider (the exchange between the Presiding Juror and this Court) shows that, while the Presiding Juror's overreaction may be a cause for concern, the source of the Presiding Juror's uneasiness could have stemmed from whether Juror #6 complied with the voir dire process, just as well as from the substance of Juror #6's comments. As a result, this Court is not convinced that the Presiding Juror's action clearly amounted to misconduct. Because the evidence presented does not meet the "clear and convincing" standard for juror misconduct, this Court need not evaluate whether the Defendants suffered any resulting prejudice. The Defendants' Motions are therefore denied.

2. The Defendants Have Not Shown that the Verdict was Decided by Any Means Other than a Fair Expression of Opinion on the Part of all the Jurors.

“Heated debate is expected of jurors.” People v. Keenan, 46 Cal.3d 478, 541, 250 Cal.Rptr. 550, 758 P.2d 1081. But, if jury deliberations are tainted by undue pressure, the constitutional guarantee is violated. State v. Timmons, 141 Idaho 376, 377, 109 P.3d 1118, 1119 (Ct. App. 2005), citing Lee, 131 Idaho at 605, 961 P.2d at 1208. Trial courts take care to instruct jurors as to their role and the necessity of a full and fair deliberative process. For example, Idaho Standard Jury Instruction No. 42 states:

As a juror you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

...
Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

(Emphasis added.) Importantly, Idaho Standard Jury Instruction No. 2 states in part:

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

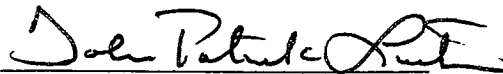
The State asserts that the verdict is valid because the jurors applied the law to the facts of the case and the Defendants have failed to show otherwise. (State's Brief, pp.4-5.) The Defendants, however, argue pursuant to I.C. § 19-2406(4) that the verdict is "invalid" because the jurors reached a verdict by compromise as a result of the "pressure and intimidation applied by the presiding juror." (Id.)

This Court is invited to infer that the other jurors were not able to express an opinion regarding the Defendants' guilt or innocence due to the actions of the Presiding Juror. As discussed above, this Court may only consider the limited evidence before it, and the exchange between this Court and the Presiding Juror contains no information regarding whether the other jurors were intimidated or pressured into compromising their opinion regarding the Defendants' guilt or innocence. The Presiding Juror did not state that she took any further action besides halting deliberations. This Court, therefore, declines to infer that the Presiding Juror's decision to halt deliberations created such an intimidating atmosphere that the other jurors were not able fully and fairly discuss the evidence or complete deliberations without compromising their opinions. The Defendants' Motions, are therefore, denied.

II. CONCLUSION

The Defendants' Motions for a New Trial are DENIED.

DATED this 31st day of January, 2011.


John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER RE: DEFENDANTS' MOTIONS FOR NEW TRIAL was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 14 day of ~~January~~ ^{February}, 2011 to the following:

Christopher D. Schwartz
Schwartz Law Offices, P.C.
206 Indiana Ave., Suite 102
Coeur d'Alene, ID
Fax: (208) 930-4972

Jedediah J. Whitaker
Kootenai County Public Defender's Office
PO Box 9000
Coeur d'Alene, ID 83816
Fax: (208) 446-1701

Art Verharen
Kootenai County Prosecuting Attorney's Office
501 N. Government Way
Coeur d'Alene, ID 83816-9000
Fax: (208) 446-1833

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CLIFFORD T. HAYES
Clerk of the District Court

By: 
Deputy Clerk