IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL TARANGO, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46680

FILED

SEP 25 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for a new trial in a criminal case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Manuel Tarango, Jr. was convicted of burglary with the use of a deadly weapon. attempted robbery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, three counts of battery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon, in relation to an attempted robbery and shootout with off-duty police officers at a local bar. The district court sentenced him to serve concurrent and consecutive terms totaling 16 to 40 years in prison.

Tarango moved for a new trial, alleging juror misconduct and outside influence on the jury process. The district court denied the motion, and this appeal followed. We now affirm.

The district court has broad discretion to deny a motion for a new trial, and we will not overturn the district court's decision absent an abuse of discretion.[1] However, if there were allegations that the jury was

[1]Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 454 (2003).

exposed to extrinsic evidence, then this court reviews the prejudicial effect of the juror misconduct de novo.[2]

Tarango contends that the following facts show juror misconduct and external communication; according to a letter Shockley subsequently wrote to the district court, Shockley had doubts during jury deliberation about convicting Tarango. Shockley decided to vote for guilt on the second day of deliberations because he thought he had been followed by a police car that morning and felt intimidated. Several days later, Shockley emailed Tarango's counsel, Marc Saggese. He attached to the email a copy of a letter he had written to the judge after the jury returned its verdict, in which he told the judge he had changed his vote after feeling intimidated by police. Saggese then filed his motion for a new trial, alleging that Shockley had committed juror misconduct and that the police following Shockley constituted outside influence with the jury process and an improper external communication.

For a defendant to prevail on a motion for a new trial based on misconduct, the defendant must present admissible evidence sufficient to establish (1) the occurrence of misconduct, and (2) a showing that the misconduct was prejudicial.[3] Prejudice can be shown whenever there is a reasonable likelihood that the misconduct affected the verdict.[4]

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[2]Id. at 561-62, 80 P.3d at 454.

[3]Id. at 563, 80 P.3d at 454.

[4]Id. at 564, 80 P.3d at 455.

Shockley's note and letter to the district court and email to Tarango's counsel, Marc Saggese, as to his unwillingness to convict Tarango, formed the basis for his motion to dismiss with prejudice, or in the alternative, a motion for a new trial on the grounds of juror misconduct.

On the first day of jury deliberations, Shockley indicated to the district court that he was not going to be able to vote to convict Tarango. Tarango asserts that after the district court had read two notes from the jury into the record,[5] Saggese overheard an attorney from the district attorney's office, Mr. DiGiacomo, speaking on his cellular phone and indicating to Detective Vacarro of the Las Vegas Metropolitan Police Department on the other end of the call that juror number 2 was a holdout juror. The State disputes Saggese's allegation that Shockley was identified or that his identity was known to Mr. DiGiacomo.[6] The jury continued to deliberate even after Shockley's note was received by the district court.

The next day the jury deliberated for a few hours, emerging to return a verdict of guilty on all seven counts. Several days later, Saggese received an email from Shockley. The email alerted Saggese to a letter sent by Shockley to the district court on November 4, 2005. The email reads in relevant part:

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[5]One note was from Shockley and one was from the foreperson indicating a juror's unwillingness to participate in deliberations.

[6]Mr. DiGiacomo would later testify that he only told Detective Vacarro that there was likely a holdout on the jury without knowing who the holdout juror was.

> Good day to you.
>
> I feel compelled to notify you of my 'Letter to the Judge.'
>
> I still have doubt as an X-Juror [sic], but I realize it is now too late.
>
> I do wish I really knew if Mr. Tarango was present that night in question.
>
> But I also realize my role in this case is done.
>
> Mainly, I wanted you to have a copy of the letter I mailed.
>
> And I wish you luck in your request for leniency.

The attached letter was marked confidential and its subject line included the Tarango case as well as an article from the Las Vegas Review-Journal discussing Tarango's conviction. The letter began with the headline from the Review-Journal Article: "Man convicted in 1999 case." The excerpt of the newspaper article read:

> "But a juror who spoke to the Review-Journal afterward said the taped phone call was key.
>
> 'For me it was the taped call – that did it,' the juror said.
>
> The juror said the case was close to a hung jury because one juror seemed unwilling to convict following nearly two days of deliberations. But by Wednesday morning, the other jurors were able to convince the holdout to convict. Tarango faces a sentence ranging from four to 111 years in prison when he is sentenced by District Judge Michelle Leavitt in December.'"

Shockley's letter stated:

> Your Honor,
>
> First I would like to thank you for taking the time to talk to the Jury after the trial was completed. Although we never spoke, it was an honor to shake your hand.

> As you can see from the excerpt from the newspaper article, dated November 03, 2005, one of the Jurors talked to the press. I do not know which one. We had however agreed as a group, not to discuss the deliberations. I am the one Juror mentioned in the article. I underlined it above. I am also the Juror that wrote you the note during deliberations. It read: "I have doubt beyond the limit of what I consider a reasonable doubt." I also stated, "I did not believe further deliberations would cure that doubt." Further deliberations in fact, did not cure my doubt.
>
> However, when returning to re-deliberate Wednesday November 2nd from the Henderson area, A Metro squad car followed me north bound on I-95 and into the downtown area.
>
> I found that action unnerving.
>
> I realize the State has much time and money invested in this case. There were not [sic] alternate Jurors. I concluded Metro somehow knew who I was and knew of my unwillingness to convict. I have never been in trouble with the law. Therefore, I relinquished my vote under duress. I only ask, within the law, please show leniency, as it was printed in the article, Saggese said he will ask Leavitt to show Tarango leniency. "He's a good person; he's salvageable," Saggese said. "He will one day be able to contribute to society."

Based on Shockley's email and his attached letter, Saggese filed a motion for a new trial and attached to it an affidavit signed and sworn by him providing details as to the cell phone conversation he overheard between Mr. DiGiacomo and Detective Vacarro on November 1, 2005, as well as the conversation he had with Mr. DiGiacomo after DiGiacomo's phone conversation ended.

The district court held a hearing on the motion, but excluded Shockley's written communications, which included Shockley's email to

Saggese and Shockley's letter to the district court. The district court denied Tarango's motion, expressly relying on this court's opinion in Meyer v. State.[7]

Tarango argues on appeal that Shockley's note to the district court, his letter, and his email to Saggese paint a convincing picture of juror misconduct. However, the district court properly excluded these materials under NRS 50.065(2)[8] and Meyer. Under the rule set forth by Meyer, for misconduct to be proved it "must be based on objective facts and not the state of mind or deliberative process of the jury."[9] The testimony of other witnesses was insufficient to show by objective facts that Shockley committed misconduct.

Further, Shockley failed to show by objective facts that there was an improper external communication between him and the police. Although any unauthorized communication between law enforcement and

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[7]119 Nev. 554, 80 P.3d 447.

[8]NRS 50.065(2) provides that

> Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

[9]119 Nev. at 563, 80 P.3d at 454.

a juror during trial about a matter pending before a jury may be "presumptively prejudicial,"[10] it follows that there must be an actual communication. An example of an unauthorized communication would be a bailiff's unauthorized communication with a juror during jury deliberation.[11]

Here, even assuming arguendo that Shockley was followed by a marked police car, it is not clear whether being followed by a marked car qualifies as a communication at all. It is even more dubious as to whether such a "communication" was about a matter pending before the jury. In any event, we conclude that the alleged external influence in the case at bar was far too speculative to sustain a motion for a new trial.

Having concluded that Tarango failed to demonstrate juror misconduct or external influence on the jury process, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Cherry

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[10]State v. Videau, 900 So.2d 855, 860 (La. App. 2005).

[11]See id. at 861.

cc: Hon. Michelle Leavitt, District Judge
Cristalli & Saggese, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk