IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES VAUGHN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50726

FILED

JUL 17 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a motion for new trial based upon newly discovered evidence. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

On April 13, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two consecutive terms of 5 to 20 years. On July 18, 2006, the district court entered an amended judgment of conviction striking the equal and consecutive sentence for the deadly weapon enhancement. This court affirmed the judgment of conviction and sentence on direct appeal.[1] The remittitur issued on January 16, 2007.

[1]Vaughn v. State, Docket No. 47199 (Order of Affirmance, December 21, 2006).

08-18337

On October 29, 2007, appellant filed a proper person motion for a new trial based upon newly discovered evidence in the district court. The State opposed the motion. On December 11, 2007, the district court summarily denied the motion. This appeal followed.[2]

In his motion, appellant claimed that he should receive a new trial due to newly discovered evidence. Attached to his motion was an affidavit from his sister, Janet Vaughn, averring that trial counsel informed her that several jurors had told trial counsel that they were confused about the jury instructions on the robbery with the use of a deadly weapon charge and would have found appellant not guilty if the jury had been properly instructed. Ms. Vaughn further stated that during the trial she witnessed a juror in the hallway make the following statement, "No matter what, I think he's guilty." Ms. Vaughn also witnessed the same juror apparently state in a crowded elevator, "Oh, I guess we[']re in a get away car" and laugh after making the statement. Ms. Vaughn believed that this statement was making fun of appellant's case as he was accused of being the driver in an armed robbery. Ms. Vaughn stated that this same juror showed disappointment when the district court told some jurors to leave during jury selection. Ms. Vaughn stated that she moved out-of-state in September 2006, approximately 7

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[2]In the interests of judicial economy, we have used the record on appeal filed in Docket No. 49858 to resolve this appeal. However, we deny appellant's motion to consolidate this matter with Docket Nos. 49858 and 50732.

months after the trial. Appellant claimed that he did not know of the juror misconduct until after his sister mailed her affidavit.

NRS 176.515(3) provides that a motion for a new trial based upon newly discovered evidence may only be made within 2 years after the verdict or finding of guilt. NRS 176.515(4) provides that a motion for a new trial based upon any other grounds than newly discovered evidence must be made within "7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period." In order to prevail on a motion for a new trial based on newly discovered evidence:

> (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.[3]

This court will not disturb the decision of the district court to deny a motion for a new trial based upon newly discovered evidence absent an abuse of discretion.[4]

Even assuming, without deciding, that claims of juror misconduct and confusion regarding jury instructions would qualify as

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[3]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

[4]McLemore v. State, 94 Nev. 237, 241, 577 P.2d 871, 873 (1978).

proper grounds for relief in a motion for a new trial based upon newly discovered evidence, we conclude that appellant's motion was properly denied. Appellant failed to demonstrate that the alleged juror misconduct was newly discovered and was not discoverable with the exercise of reasonable diligence during trial. Appellant's sister witnessed the alleged juror misconduct during the trial.[5] Appellant's sister indicated in her affidavit that she attended every day of trial except the day of the "ruling." At no time does appellant explain why this information regarding the alleged juror misconduct was not available to him during trial or immediately following the verdict. Appellant's sister indicated in her affidavit that trial counsel learned of the juror confusion regarding the jury instructions on or about the day of the verdict. The fact that appellant's sister did not set forth her allegations of juror misconduct or juror confusion in an affidavit until nearly two years after the verdict does not render this evidence "newly discovered" or demonstrate that the evidence could not have been discovered with due diligence during the trial or immediately following the verdict. Thus, because appellant did not satisfy the first and third requirements for a motion for a new trial based

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[5]See Callier, 111 Nev. at 992, 901 P.2d at 628-29 (concluding that the district court properly denied a claim of juror misconduct as procedurally barred where the claim of juror misconduct was based on information that was available to Callier during or directly after the trial as Callier's mother observed the alleged juror misconduct and confronted another juror about the alleged misconduct and took this latter juror to a notary public to sign a letter).

upon newly discovered evidence, we conclude that the district court did not abuse its discretion in denying the motion.

Moreover, as a separate and independent ground to deny relief, appellant's claims for relief lacked merit. In order to prevail on a motion for a new trial based upon 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."[6] Prejudice requires a demonstration that there is a "reasonable probability or likelihood that the juror misconduct affected the verdict."[7] This standard applies to extrinsic juror misconduct (misconduct involving outside or extraneous influences/information and third-party contacts) as well as intrinsic juror misconduct, which involves intra-jury matters such as improper discussions among jurors, intimidation or harassment of one juror of another, to name a few.[8] The verdict may not be impeached with juror affidavits that "delve into a juror's thought process" or testimony "concerning 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 concerning his mental processes in connection therewith."[9]

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[6]Meyer v. State, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003) (citations omitted).

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

[8]Id. at 562, 565, 80 P.3d at 454, 456

[9]Id. at 563, 80 P.3d at 454; NRS 50.065(2)(a).

Appellant failed to demonstrate juror misconduct in the instant case. The statement "No matter what, I think he's guilty" was set forth without any context. This statement by itself does not demonstrate that the juror made a decision on appellant's guilt or innocence prior to deliberations as nothing in this statement indicates that the juror was even talking about appellant.[10] The statement allegedly referring to the elevator as a "get away car" does not demonstrate misconduct as it does not demonstrate that the juror was discussing the case prior to deliberations or that the juror did not otherwise deliberate in a serious fashion when the matter was submitted to the jury.[11]

Even assuming that these statements could be determined to be juror misconduct, appellant failed to demonstrate that these statements had a reasonable probability or likelihood of affecting the verdict in the instant case. Substantial evidence of guilt was presented at trial; the victim testified that she was the victim of a robbery, an off-duty police officer identified appellant as the man driving the vehicle away from the crime scene. Upon his arrest, appellant also made inculpatory statements to the police and money from the robbery was found in the vehicle appellant was driving when he was stopped and arrested.

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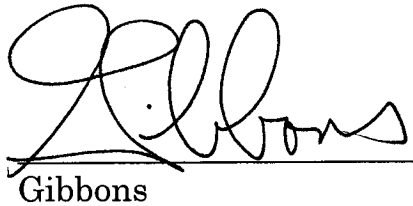
[10]See NRS 175.401(1), (3) (setting forth the admonishment the district court must give regarding juror duties, including not to converse amongst themselves on any subject connected with the trial or form or express an opinion on any subject connected with the trial until the matter has been submitted for deliberations).

[11]Id.

Finally, appellant's claim that several jurors were allegedly confused about the jury instructions is not appropriate for a motion for a new trial as it delves into the thought processes of the juror's during deliberations.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[12] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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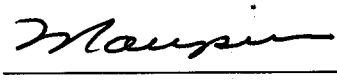
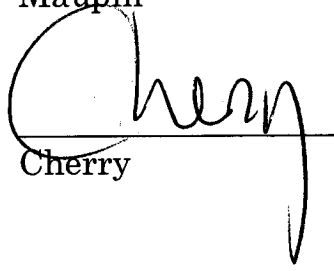
Gibbons



_____, J.
Maupin



_____, J.
Cherry

cc: Hon. Valorie Vega, District Judge
James Vaughn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[12]Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).