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### Bowman v. State, 132 Nev. Adv. Op. 74 (Oct. 27, 2016)

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*Nevada Law Journal*

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## CRIMINAL PROCEDURE: JUROR MISCONDUCT

### **Summary**

A district court's failure to provide a jury instruction prohibiting jurors from conducting independent research, investigations, or experiments in any criminal or civil case constitutes error. Though likely harmless, the resulting prejudice may constitute reversible error.

### **Background**

The Washoe County Sheriff's deputy conducted an intake search on Bowman. During the search, the deputy found a small package of methamphetamine at the Bowman's feet. The State charged the defendant with a single count of trafficking in a controlled substance. The State argued that the Bowman hid the package in his sock or on his person and it fell out during the intake search. Bowman argued the package was stuck to the bottom of the deputy's boot and became dislodged when they arrived at the intake location.

After deliberating for three hours, the jury requested to be released and continue deliberations the following morning. The district court judge admonished the jury pursuant to NRS 175.401; the statute, however, does not admonish against conducting independent research, investigations, or experiments.<sup>2</sup> That evening, two of the jurors conducted individual experiments testing the parties' arguments of the case. The jurors returned the following day, participated in deliberations, and unanimously found the Bowman guilty. After the trial, the two jurors revealed to counsel their outside experiments, and that they relied on those experiments in reaching a verdict.

Bowman moved the district court to declare a mistrial and order a new trial due to juror misconduct. After investigation, the district court denied Bowman's motion, holding that the two jurors neither changed their votes because of their experiments, nor informed the other jurors of the experiments until after reaching a guilty verdict. Bowman argues on appeal that (1) the juror misconduct merits a new trial and (2) NRS 175.401 inadequately protect a party's right to a fair trial because it lacks a warning against independent juror experiments.

### **Discussion**

*The District court erred in denying Bowman's motion for a new trial*

To succeed on a motion for a new trial alleging 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."<sup>3</sup> Misconduct is prejudicial if "there is a reasonable probability or likelihood that the juror misconduct affected the verdict."<sup>4</sup> *Meyer*

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<sup>1</sup> By Marco Luna.

<sup>2</sup> NEV. REV. STAT. § 175.401.

<sup>3</sup> *Meyer v. State*, 119 Nev. 554, 563–64, 80 P.3d 447, 455 (2003).

<sup>4</sup> *Id.*

provides factors to determine whether there is a reasonable probability that the misconduct affected the verdict.<sup>5</sup>

The district court must “objectively evaluate the effect [the extrinsic material] had on the jury” and determine whether the “average, hypothetical juror” would be influenced by the juror misconduct.<sup>6</sup> Furthermore, it is not necessary that all other members of the jury be directly exposed to the extraneous material, because a single juror may influence a verdict during deliberations by interjecting their opinion while being exposed to foreign material.<sup>7</sup>

### *The occurrence of juror misconduct*

Both jurors admitted in sworn affidavits that they were involved in individual experiments to test parties’ arguments. This was uncontested evidence of juror misconduct.

### *Juror misconduct was prejudicial*

It is disputed whether jurors who conducted the experiments informed the other jurors of what they learned. Regardless, the two jurors who conducted the experiments disclosed to counsel that they used the information learned to either sway their position or reinforce it before rendering a verdict. Furthermore, the short length of the trial and the specificity, materiality, and timing of the experiments all support concluding that foreign material would have swayed an average hypothetical juror. Therefore, the misconduct was prejudicial.

### *The district court should have provided a jury instruction admonishing jurors against conducting independent research, investigations, and experiments*

It is of paramount importance that juries receive instruction refrain from independent research, investigation, or experiments. Here, the jurors could easily test the parties’ theories. This impacts the defendant's right to a fair trial. Therefore, the district court's failure to give a jury instruction prohibiting independent research or experiments constituted error requiring reversal consistent with the analysis in *Meyer*.<sup>8</sup>

A district court's failure to provide this type of jury instruction is likely a harmless error where no juror misconduct occurs. However, given the ease with which jurors can conduct independent research, and the importance of protect the parties' right to a fair trial, failure to give this instruction constitutes error in all criminal and civil cases.

### *Bowman failed to object to the statutory jury admonition at trial*

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<sup>5</sup> *Id.* at 565, 80 P.3d at 456 (noting that factors establishing a reasonable probability of misconduct include “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.).”).

<sup>6</sup> *Zana v. State*, 125 Nev. 541, 548, 216 P.3d 244, 248 (2009).

<sup>7</sup> *See Tanksley v. State*, 113 Nev. 997, 1005, 946 P.2d 148, 152–53 (1997).

<sup>8</sup> *See Meyer*, 119 Nev. at 564–65, 80 P.3d at 455–56.

Distinguishable from jury instructions, statutory jury admonition are given at the beginning of the trial, do not permit judicial discretion regarding its content, and are without the same context and information available when the court gives a jury instruction. Therefore, no plain error occurred with the content or conveyance of the jury admonition pursuant to NRS 175.401.

### **Conclusion**

The Supreme Court held the juror misconduct resulted in prejudice to Bowman, and reversed and remanded for a new trial. Further, the district court's failure to provide a jury instruction prohibiting jurors from conducting independent experiments may constitute reversible error.