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Summary of Meyer v. State, 119 Nev. Adv. Rep. 61

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Meyer v. State, 119 Nev. Adv. Rep. 61, 80 P.3d 447 (2003)[1]

EVIDENCE–JUROR MISCONDUCT-NEW TRIAL

> "The right to trial by jury, if it is to mean anything, must mean the right to a fair and impartial jury. A litigant is therefore entitled to a jury composed of 12 impartial jurors; …a party has the right to have that decision, whether for or against him, based on the honest deliberations of 12 such individuals."[2]

The legitimacy of our justice system hinges on the fact that the results of trials, as dictated by a jury of one's peers, remain free from the taint of extrinsic evidence and are grounded solely on the evidence presented by the parties at trial. However, when jurors bring with them to the jury box professional expertise or other experiences, such may enhance the deliberations and ensure that the parties are afforded a better verdict determined by a more educated jury. This is true as long as those experiences and expertise were properly exposed during voir dire.

In *Meyer v. State*, the Nevada Supreme Court clarified the standard of review for cases of alleged jury tampering or juror misconduct.[3] The following Nevada Law Commentary will discuss the facts and disposition of the *Meyer* case. Next, it will discretely outline the standard pronounced by *Meyer* regarding obtaining a new trial based on allegations of juror misconduct stemming from improper extrinsic evidence and improper use of a juror's own expertise and experiences. Finally, the corollary of when jurors conceal material information during voir dire will be discussed.

In many respects, *Meyer* is a sound and laudable ruling that will serve to clarify what the law is, while enhancing the jury deliberation process, a pillar of the legitimacy of our civil and criminal adversary system of justice relies on. Yet, the potential for jurors to conceal, during the voir dire stage, their experiences despite being asked about them may serve to weaken *Meyer's* foundation. As such, the Nevada Supreme Court would be wise to one day clarify the new trial standard based on such concealment.

1. *Meyer's* Facts, Disposition, and Analysis

Meyer was convicted of sexually assaulting his estranged wife Catrina.[4] The events leading to the conviction included a meeting between Meyer and Catrina at a bar, where Catrina intended to have Meyer served with a temporary protective order (TPO).[5] Intoxicated, Catrina left with Meyer.[6] Officers were eventually dispatched to Catrina's residence, having been contacted by Catrina's current boyfriend who had reported to police receipt of a phone call where Meyer, "hostile and threatening," had described to

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[2] McNally v. Walkowski, 462 P.2d 1016, 1018 (Nev. 1969).
[3] Meyer v. State, 80 P.3d 447, 451 (Nev. 2003).
[4] *Id.* at 453.
[5] *Id.* at 451.
[6] *Id.*

him a violent assault he was then committing against Catrina.[7] When police arrived at Catrina's residence, they found Catrina wrapped in a blanket in her bedroom.[8] Catrina "had blood on her hands, various scratches and bruises over her body, as well as significant injuries to her mouth and lips" and a series of raised bumps all over her scalp.[9] Catrina alleged that Meyer had forced her to leave with him.[10]

Meyer was arrested nine weeks later and charged with kidnapping and "anal sexual assault."[11] Catrina later recanted accusations previously waged, indicating that "she remembered consenting to vaginal sex, and that she could have consented to anal sex."[12] Later, at trial, she testified that she asked Meyer to take her home because she was drunk.[13] She said that she did not remember any details, other than throwing up, including whether she and Meyer had sex or how she received her numerous injuries.[14] Further, she suggested that "her injuries were the result of falling down and that she bruised easily because she was taking the prescription medicine Accutane."[15] She also admitted to previously engaging in "rough sex" with Meyer.[16] Both sides presented competing expert witness testimony with regard to the source of Catrina's injuries (including the bumps on her head) and the effects which Accutane may have had.[17]

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[7] *Id.* at 451-52.
[8] *Id.* at 452.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*; *see also id.* at 453 ("Meyer's expert witnesses did not attribute Catrina's bruises to the side effects of Accutane.).
[16] *Id.* at 452.
[17] *See id.* at 453.

> ("In addition to Catrina's testimony and prior statements, the State presented evidence regarding Battered Woman Syndrome, Catrina's 911 calls to police, photographs of her injuries, a videotaped interview that Catrina gave to the police the day after the incident, medical testimony regarding the sexual assault examination and findings, Hunt's testimony about his phone call with Meyer, and the responding officers' observations. The State also presented expert medical testimony from Dr. Ellen Clark, who indicated that Catrina's injuries were consistent with being punched and kicked and were not consistent with falling down due to intoxication. Dr. Clark also indicated that the injuries were not the result of Accutane side effects. On cross-examination, Dr. Clark agreed that someone hitting the toilet bowl while vomiting might cause the lip injury and that bumping into a door jam could have caused a shoulder injury.
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> Meyer testified and indicated that he went to Sneakers at Catrina's request. She was intoxicated and left with him voluntarily. He admitted that he gave the police false information because he feared that he might be taken to jail. Meyer indicated that falling down and bumping into various items that night caused Catrina's injuries. He admitted to having vaginal intercourse with Catrina and digitally penetrating her anus, however, he stated both acts were consensual. Meyer also disputed Hunt's version of the phone call. Finally, Meyer testified that he was not fleeing the country when he was but was on vacation for seven weeks with his girlfriend, although he admitted that he knew at least two days after the incident that the police were looking for him.
>
> Meyer presented testimony from three experts. Dr. Donald Henrikson indicated that Catrina's injuries were consistent with falling down or bumping into items. He indicated the anal injuries

Meyer was acquitted of first-degree kidnapping, but was found guilty of sexual assault.[18] After speaking with jurors, Meyer subsequently filed a motion for a new trial based upon alleged jury misconduct and the trial court denied the motion.[19] The Nevada Supreme Court overturned the trial court's new trial denial.[20]

Meyer's motion for a new trial was grounded, principally, in two arguments. First, with regard to the "bruises, marks, or bumps" on Catrina's scalp, affidavits established that one juror, who was a Washoe Medical Center nurse, had opined that the bumps were similar to those she had observed in domestic violence hair pulling situations.[21] Second, another juror, had consulted a "Physicians' Desk Reference" (PDR) on the side effects of Accutane and had advised the jury that "[a]ccutane only causes easy bruising in one percent of the population."[22]

The Nevada Supreme Court upheld the trial court's conclusion that the juror's statements about the connection between hair-pullling and the scalp injuries in question did not constitute misconduct because that juror "used her everyday experience as a nurse, not extrinsic information.[23] Following the New Mexico Supreme Court in *Mann*, the court held that "a juror who has specialized knowledge or expertise may convey their opinion based upon such knowledge to fellow jurors. The opinion, even if based upon information not admitted into evidence, is not extrinsic evidence and does not constitute juror misconduct."[24] The court highlighted that voir dire is an opportunity for attorneys to question jurors about their expertise and subject them to preemptory or for cause challenges.[25] Indeed, jurors failing to disclose information during voir dire commit misconduct, which may serve as grounds for a new trial.[26]

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were minor and that the small bumps on Catrina's head could be acne, though they were more likely to have been caused by 'minor blunt force injury.' Dr. Thomas Turner testified about alcoholism and alcoholic blackouts. He opined that Catrina suffered such a blackout on the night in question and that her statements were probably the result of conversations with others rather than a true memory of what happened. Finally, Diane Faugno, a registered nurse and sexual assault examiner, testified that Catrina's injuries were inconsistent with being hit and kicked in the head, though the lip injuries were consistent with being hit. Faugno had no opinion regarding the source of the small bumps on Catrina's head. Faugno indicated she saw nothing in the evidence she reviewed that suggested a violent, nonconsensual sexual assault, but she admitted she could not rule out sexual assault. Meyer's expert witnesses did not attribute Catrina's bruises to the side effects of Accutane.)

The State and Meyer produced additional witnesses who presented conflicting evidence about Catrina's appearance, statements, or attitude before and after the incident. Finally, the State introduced evidence of a prior domestic violence incident involving Meyer.").

[18] *Id.*
[19] *Id.*
[20] *Id.* at 451.
[21] *Id.* at 457.
[22] *Id.*
[23] *Id.* at 457-58.
[24] *Id.* at 459.
[25] *Id.* at 459-60.
[26] *Id.* at 460.

On the issue of the extrinsic PDR research, the Nevada Supreme Court held that the actions constituted juror misconduct that amounted to prejudice and ordered a new trial on that basis.[27] It found that the PDR information on Accutane was material to the case and "tended to undermine Meyer's theory that the victim's physical marks were caused by a reaction to medication or falling."[28] As such, the court held that "the average, hypothetical juror could have been affected by this extraneous information, and there is a reasonable probability that the PDR information affected the verdict."[29]

2. *Meyer*'s Rule Regarding Obtaining a New Trial Based on Juror Misconduct in Nevada

In addition to the aforementioned disposition, *Meyer* gave an insightful step by step standard for when jury misconduct can lead to a new trial. A description of this standard follows.

The denial of a motion for a new trial will be upheld absent an abuse of discretion by the trial court.[30] A district court's findings of fact cannot be disturbed absent clear error.[31] Yet, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct will apply to allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause.[32]

a. Proving misconduct

Generally, at common law, jurors may not impeach their own verdict.[33] The exception to this rule is where extrinsic information or contact with the jury occurs.[34] In such instances, "juror affidavits or testimony establishing the fact the jury received the information or was contacted are permitted."[35] "An extraneous influence includes, among other things, publicity or media reports received and discussed among jurors during deliberations, consideration by jurors of extrinsic evidence, and third-party communications with sitting jurors."[36] By contrast, intrinsic or intra-jury influences (i.e. improper discussions among jurors, harassment, and intimidation) are generally not admissible to impeach a jury verdict.[37] To prove misconduct, one must show "readily ascertainable" objective facts and not delve into a juror's thought process or state of mind.[38]

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[27] *Id.* at 460-61.
[28] *Id.*at 460.
[29] *Id.* at 460-61.
[30] *Id.* at 453.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 454.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

b. Burden of Proof

To prevail on a new trial motion, the defendant must present admissible evidence that establishes: (1) that juror misconduct occurred, and; (2) the misconduct was prejudicial.[39] If there is a reasonable probability or likelihood that misconduct affected a verdict then that misconduct is prejudicial.[40]

i. Determing whether Misconduct is prejudicial

Prejudice sufficient to warrant a new trial will be presumed where an extraneous influence is excessively egregious, such as in cases of jury tampering.[41] Extrinsic influences are by their nature more likely to be prejudicial, and establish a reasonable probability that extrinsic contact affected the verdict. Examples include direct third-party communications with a sitting juror relating to "an element of the crime charged" or exposure to significant extraneous information concerning the crime charged or concerning the defendant.[42] To the contrary, extrinsic material like media reports will not raise a presumption of prejudice.[43] In cases involving the latter, "extrinsic information must be analyzed in the context of the trial as a whole" to determine if by a reasonable probability the verdict was affected.[44]

ii. Evaluating Misconduct

To determine whether there is a reasonable probability that juror misconduct affected a verdict, instructive, but not dispositive factors deserving consideration 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.).
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> …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.).
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> [and]…the extrinsic influence in light of the trial as a whole and the weight of the evidence."[45]

Thereafter, "whether the average, hypothetical juror would be influenced by the juror misconduct" must be determined.[46]

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[39] *Id.* at 455.
[40] *Id.*
[41] *Id.* The Court refused to follow those federal courts that have concluded that exposure to any extrinsic influence will establish a reasonable likelihood that the information affected the verdict and adopted the position of other federal circuit courts that examine the nature of the extrinsic influence in determining whether such influence is presumptively prejudicial.
[42] *Id.*
[43] *Id.* at 455-56.
[44] *Id.* at 456.
[45] *Id.*

c. Alleged misconduct – motion for new trial.

Meyer provided key boundaries on what might constitute misconduct:

> "In reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings. A juror is prohibited from declaring to his fellow jurors any fact relating to the case as of his own knowledge. However, jurors may rely on their common sense and experience. If a juror has personal knowledge of the parties or of the issues involved in the trial that might affect the verdict, the communication of that knowledge to other jurors is considered extrinsic evidence and a form of misconduct. Likewise, if a juror considers and communicates a past personal experience that introduces totally new information about a fact not found in the record or the evidence, this would constitute extrinsic evidence and improper conduct. Personal experiences are to be used only to interpret the exhibits and testimony, not as independent evidence."[47]

i. Analysis of the evidence by a juror with professional expertise

It is possible that a juror's experiences make their statements in jury deliberations more akin to a form of expert opinion.[48] In considering the question of whether quasi-expert opinion statements by jurors constitute misconduct, courts around the country are split.[49] Following the direction articulated by the New Mexico Supreme Court, *Meyer* announced the following rules:

> "A juror who has specialized knowledge or expertise may convey their opinion based upon such knowledge to fellow jurors. The opinion, even if based upon information not admitted into evidence, is not extrinsic evidence and does not constitute juror misconduct. However, a juror is still prohibited from relating specific information from an outside source, such as quoting from a treatise, textbook, research results, etc."[50]

> "Jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation."[51]

In supporting this rule, responsibility has been placed squarely on the shoulders of: attorneys, jurors' honesty, and the integrity of the voir dire proceeding:

> "During voir dire, prospective jurors may be questioned regarding any knowledge or expertise they may have on an issue to be tried and, based upon their responses, may be the subject of peremptory or for cause challenges. ***Jurors***

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[46] *Id.*
[47] *Id.* at 458.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 459.
[51] *Id.* at 460.

who fail to disclose information or give false information during voir dire commit juror misconduct, which, if discovered after the verdict, <u>may</u> be grounds for a new trial under the standards established for juror misconduct during voir dire as opposed to misconduct that occurs during deliberations."[52]

3. *Meyer's* Implications

Courts are in disagreement with regard to the question of whether quasi-expert opinion statements by jurors constitute misconduct. New Mexico, which *Meyer* followed, has held that "jurors can rely on their professional experience and educational experiences when deliberating" and such communication does not constitute extrinsic evidence.[53] In New York, where a nurse expressed her expertise as to a material issue of the case, a new trial was ordered.[54] In recognizing that jurors could use expertise to arrive at their own decision regarding credibility or the verdict itself, New York suggested that "trial courts modify their standard preliminary instructions so that jurors are advised that they could not use their professional expertise to supplement the record on material issues."[55] In a "middle of the road" approach, California allows jurors, regardless of their education or employment background to express technical opinions so long as that opinion is based on the evidence at trial.[56]

In choosing the New Mexico approach, *Meyer* cited New Mexico's contention that it might be difficult to "distinguish between a juror's opinions and experiences as improper extraneous information and permissible deliberation based on life experiences."[57] Moreover, if an attorney feels that a juror's education or professional background may cause them to be biased that juror can be removed during voir dire and a failure of jurors to reveal important information about their expertise may be grounds for a new trial.[58]

a. A Problem: Juror nondisclosure during voir dire

Meyer did fail to contemplate one important consideration: the extent to which jurors will not be upfront during voir dire.[59] And further, when is a juror's concealment actually intentional?

Jurors' failing to disclose material information during voir dire is neither a recent development, nor is it an unusual one.[60] Accounts of information withheld include:

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[52] *Id.* at 459-60 (emphasis added).
[53] *Id.* at 458.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 459.
[57] *Id.* at 458-59.
[58] *Id.* at 459.
[59] As it was not an issue in *Meyer*, this comment will refrain from delving comprehensively into the standard for a new trial based on juror concealment during voir dire. For an excellent survey of what other states do and a well informed argument on what the standard should be *see* Robert G. Loewy, *When Jurors Lie: Differing Standards for New Trials*, 22 AM. J. CRIM. L. 733 (1995).
[60] *Id.* at 734.

failing to reveal having been a victim of a spousal abuse or even failing to reveal having met the defendant.[61] Jurors fail to respond honestly during voir dire, among other reasons, because of: nerves, a desire to serve that outweighs the desire to tell the truth, or because voir dire questions are "too trivial to merit an honest response."[62] Some may even hope to use their jury experience as anecdotal fodder for future conversations with friends.[63] "Most research indicates that approximately twenty-five percent of jurors fail to reveal material information during voir dire."[64]

So when can a party get a new trial based on a juror concealing material information during voir dire? Nevada's standard holds that "a juror's intentional concealment of a material fact relating to his qualification to be a fair and impartial juror in the case may require the granting of a new trial."[65] "Where it is claimed that a juror has answered falsely on voir dire about a matter of potential bias or prejudice, in the final analysis, the termination turns upon whether" the juror committed intentional concealment, the determination of which, is left to the sound discretion of the trial court.[66]

> "The states vary, …in their approach to determine intentional concealment; some use an objective test, while others use a subjective test. States using an objective test will look to see whether a reasonable juror would have disclosed the information during voir dire. States using a subjective test will look to see whether the juror in question acted honestly and in good faith."[67]

In *Lopez*, the Nevada Supreme Court refused to overturn the denial of a new trial motion based on a two jurors' failure to reveal that they had been the victim of child abuse.[68] There, both jurors, when questioned if they had been the victim of child abuse answered no, but did so, apparently, because neither associated the child abuse they endured to be a crime.[69] The Nevada Supreme Court agreed with the trial court that this reasoning revealed no intentional concealment.[70] Nevada jurisprudence since *Lopez* has had varied results; in one instance upholding a new trial motion denial where a juror again mistook the meaning of what a crime was and later overruling the trial court denial of a new trial motion where a juror failed to reveal that his father had been murdered when asked if he or a family member had ever been a victim of a crime.[71]

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[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] McNally v. Walkowski, 462 P.2d 1016, 1018-19 (Nev. 1969).
[66] Lopez v. State, 769 P.2d 1276, 1290 (Nev. 1989).
[67] Loewy, *supra* note 59 at 736-37.
[68] *Id*.
[69] *Id*. at 1290-91.
[70] *Id*. at 1291.
[71] *See* Echavarria v. State, 839 P.2d 589, 593-94 (Nev. 1992)

> ("Juror Charles Ivy, who served as foreman, failed to indicate on a written questionnaire or during voir dire that he had been the victim of a crime. At the evidentiary hearing on juror misconduct, Ivy admitted mentioning to some of the other jurors during a recess that he had been in a fight as a youth many years ago in which he was beaten by men with tire irons and hospitalized. Ivy

A standard that too easily finds "intentional" concealment based on jury nondisclosure may incentivize lawyers, post verdict, to "track down jurors and question them about every aspect of the deliberations in hope of finding some 'inadvertent' error."[72] However, a standard that which makes getting a new trial based on jury nondisclosure too difficult will undermine the *Meyer* ruling, and its dependence on jurors giving honest answers during voir dire.

4. Conclusion

Nevada's jury concealment new trial standard, which is subjective,[73] may not be tough enough and needs to be further defined. Possibly, the objective standard, which will more easily bring about the new trial penalty based on an unreasonable juror voir dire concealment that eventually taints a jury verdict, will better comport with *Meyer*'s rather liberal allowance of a juror's expertise and experiences in deliberations. But more questions need to be answered:[74] among others, when is a concealment material; what responsibility does the lawyer have in asking the right questions such to tease out information that might otherwise be concealed and even given concealment when does such concealment actually lead to jury bias?

Fundamentally, *Meyer* is a sound piece of case law. But as is often the case, the Nevada Supreme Court has left open for itself more work to do with regard to jury misconduct / new trial legal doctrine.

> indicated that he did not consider himself to be a victim of a crime, but instead considered the incident a fight. …As Ivy's testimony indicates that he did not view the 24-year-old incident as a criminal act, the district court was well within its discretion in determining that Ivy did not intentionally conceal information from the court.");

but see Canada v. State, 944 P.2d 781, 782-83 (Nev. 1997) (During voir dire and on the jury questionnaire, juror, Gordon, "was asked whether he, a family member, or a close friend had ever been a victim of a crime. He answered, 'Thank God, No' and 'Never.'" Later, "he informed the other jurors, both during the trial and penalty phases, that his own father had been murdered when he was an infant. …The trial court concluded that there had been no juror misconduct because Juror Gordon had not intentionally concealed any information during the jury selection process." The Nevada Supreme Court concluded that "given the numerous, major crimes of which Juror Gordon claimed that he and his family were victims, the trial court abused its discretion in failing to find intentional concealment.")

[72] Kimberly Ayn Eckhart, *State v. Furutani: Hawai'i's Protection of a Defendant's Right to a Fair Trial – Verdict Impeachment Made Easy*, 17 HAW. L. REV. 307, 326-27 (1995).

[73] Loewy, *supra* note 59 at 758.

[74] *See id.* at 742-43.