IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEA DELAYNE OLNEY, Appellant.	No. 39316-6-II UNPUBLISHED OPINION

Williams, J.P.T.[1] — Lea Delayne Olney appeals her jury trial convictions for unlawful delivery of a controlled substance (methamphetamine) and unlawful possession of a controlled substance (methamphetamine). She argues that the trial court erred when it denied her motion for a new trial based on a letter from a juror without first ordering an evidentiary hearing. We affirm.

FACTS

Following a drug buy operation, the State charged Olney with unlawful delivery of a controlled substance (methamphetamine) and unlawful possession of a controlled substance (methamphetamine) with intent to deliver. The case went to a jury trial.

Before opening statements, the trial court gave the jury its preliminary instructions. The trial court began these instructions by stating:

> It is important that you keep your minds open and attentive throughout the trial. Do not discuss the case among yourselves or with anyone else. Do not permit anyone to discuss this case with you or in your presence. Violation of this order is serious and can result in a personal penalty to you, as well as result in a

[1] Judge Williams is serving as judge pro tempore of the Court of Appeals, Division II, under CAR 21(c).

> mistrial which would cause great inconvenience and injury to the parties and the case and to the County.

I Verbatim Report of Proceedings (VRP) at 19.

On the fifth day of trial, March 16, 2009, the jury began to deliberate. As part of its instructions to the jury, the trial court had instructed the jury that the jurors' decisions "must be made solely upon the evidence presented during these proceedings," and that:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Clerk's Papers (CP) at 16, 18 (jury instruction 1).

The next day, juror 9 sent a note to the trial court in which he expressed concerns about juror 2. Juror 9 asserted that juror 2 (1) had insisted on basing her decisions on her intuition despite the rest of the jury explaining the jury instructions to her several times and (2) had twice talked to a television news team outside the courthouse.[2]

The trial court, counsel, and Olney met in the courtroom to discuss juror 9's note. The trial court brought juror 2 into the courtroom to ask her about her contact with the news team and her apparent insistence on relying on intuition rather than following the trial court's instructions. Juror 2 confirmed that she had talked with a television news team, but she asserted that the contacts were inadvertent.

The trial court then questioned juror 2 about her decision making process:

[2] Juror 9 also asked a question about the jury instructions. That question and the trial court's response are not relevant to this appeal.

THE COURT: Okay. Now, we also understand that, at this point, that you understand the instructions say you are not to base the decision on emotion—

JUROR NO. 2: Right.

THE COURT: —passion, prejudice, or intuition.

JUROR NO. 2: Absolutely.

THE COURT: All right. And there's some indication that, apparently, despite being told that by the other jurors, that you are still saying you are going to go on your intuition.

JUROR NO. 2: Well, here—here's—here's the—where I'm coming from. We all have different ways how we process our thoughts. Some people are logical. Some people are analytical, and some people base their—their opinions and whatever on feeling. Yesterday, what happened in the jury room, I felt like I was on the stand; and I felt—I felt like I was on the stand totally unprepared, trying to explain how I could come about these decisions; and I couldn't, in a logical, analytical manner, explain where I was coming from; so I came from emotion. I came from feeling because I could not put it in a way that other minds could understand it, so I—I did come from that point of view. However, yesterday, you asked us—when we would go into deliberation, you said something about losing sleep at night when something is on your mind.

THE COURT: I think that was closing argument.

JUROR NO. 2: No, you had said something about making a decision on, you know, if you have—whatever. You said something—you said something about sleep—about not—something on your mind that you couldn't get off of your mind and to take this all into consideration, and perhaps—I don't know—but perhaps I have done more thought on it because I have lost some sleep—about—when we left the courtroom here on Thursday, I was—I was—I—I didn't quite understand why we hadn't had more evidence presented to us, and I—I couldn't get that out of my mind; and when I—when we came in here yesterday, I—I wasn't really, totally, prepared that we were, definitely, going to go in here for deliberation, so I—I—this is the way I process things.

THE COURT: Well, you understand that—I mean, people do process information very differently.

JUROR NO. 2: Right.

THE COURT: Some people have more of an auditory learning.

JUROR NO. 2: Right.

THE COURT: Some people, it's visual. The problem we have is that decisions on guilt or innocence, we don't want people making those decisions on emotion.

JUROR NO. 2: Right. And, actually, what was, really, wonderful—I am grateful what [sic] happened yesterday because it—it kept me up half the night trying to convey the feeling into rational thought.

THE COURT: Okay.

> JUROR NO. 2: And I honestly believe that I have that now.
> THE COURT: Okay. Because the instructions tell you—
> JUROR NO. 2: Right.
> THE COURT: —flat out, permit neither sympathy, prejudice, or passion—
> JUROR NO. 2: Well, when—when I felt as—do you know how I felt when one of the—one of the fellow jurors was in my face? And I mean, she was doing this to me. (Indicating.) I felt a verbal assault. I—I—I—I felt like I was guilty of something. I couldn't think, so I did not—I didn't appreciate it, but you know what? I'm grateful because it made me go to the rational, logical thought—
> THE COURT: Okay.
> JUROR NO. 2: —that I now have.

VI VRP at 505-08.

After this discussion, the trial court asked counsel if they had any questions. When counsel said that they did not have any questions, the trial court told juror 2 to return to the jury room.

Once juror 2 left, the trial court asked counsel if they wanted to continue with this jury. Defense counsel responded that he did not think they had a choice but to go forward with juror 2 still on the jury because she had clarified that her contacts with the news team were accidental and she had, in her own way, said that she was now able to "have a rational discussion" about the case based on the jury instructions. VI VRP at 510. The trial court then told the jury to resume deliberating.

The jury returned its verdict that day, finding Olney guilty of unlawful delivery of a controlled substance and of the lesser-included offense of unlawful possession of a controlled substance. The trial court polled the jury and each juror, including juror 2, confirmed that this was his or her individual verdict and the jury's verdict.

On March 18, juror 2 apparently returned to the courthouse and attempted to contact the trial court judge to tell the judge that she "was upset and that [her] vote was wrong." CP at 92. A judicial assistant told juror 2 that she could not see the judge.

On May 5, more than a month after the verdict but before the sentencing hearing, juror 2 sent a letter to the Pierce County Superior Court's presiding judge. The letter stated:

> I was a juror during a trial that was held in Judge Stolz['s] court room [sic]. Trial started on March 9 and went through March 17. I do not feel that the verdict was correct.
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> As a law abiding citizen and a business professional, I took my jury duty seriously. I came each day ready to actively listen and take notes: I was shocked and disillusioned at the reality of the situation.
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> The jury itself had a member, Juror 4, that bullied and over-shouted all the others. She was apparently known for her behavior as the person that [sic] took the lead. The Jury Foreman for the jury said he had volunteered to do so simply because he did not want Juror 4 running over everyone else, as she had done to him the week before.
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> During the week of trial, I observed [as] Juror 4 belittled and verbally attacked any juror who disagreed with her on any point, from the weather to the trial. I stood up to her a couple times, and paid the price during deliberation. During deliberation, after having listened intently and watched the behavior of the defendant, though I did not find her without blame, I did not find the defendant guilty of the crime she was on trial for. I thought that as a juror, that was our "job", to listen to the defense and the prosecution and see if the one proves their point with the most facts that line up. The evidence did not seem to support a guilty conclusion. When I expressed my doubts in deliberation, I was verbally assaulted by Juror 4: she raised her voice to talk over me and anyone else who might try to speak, she physically pointed her finger at me and shook it like she was scolding a child. She continued her verbal attack on me to the point that it seemed I was on trial in the jury room—as if I were the one charged with a crime. I was stunned. That evening I could not sleep due to her tirade and verbal assault on me.
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> The next day, when I arrived for continued deliberation, I was called out by the guard, which was confusing and nerve wracking, and next thing I know, I was actually put on the witness stand in the court room [sic] and the Judge began interrogating me. She even went so far as to accuse me of "seeking out" the press, KOMO 4. Also, she insinuated I was voting merely on sympathy for the defendant, and took it upon herself to lecture me again on the jury rules for what

> we are to base our decision on. She alluded to charging me with a crime for my decision making process.
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> I was so upset, and felt so threatened by the Court, the Court's apparent power to charge innocents of crimes and the bullying juror, that I changed my vote from "not guilty" to "guilty", even though I did not truly believe it. The intimidation tactics worked, to the shame of all of us.
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> On March 18th at 8:00 a.m., I returned to the Court hoping I could relate this to the Judge. Since that was not possible this letter follows.
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> I have attached my reasoning [sic] for thinking the defendant was not guilty. My hope in writing this letter is that 1) no one else in a jury will be bullied by the judge and a fellow juror to change their decision; and 2) that the trial I was a juror for will be reviewed to see if perhaps the defendant's conviction should be changed or at the very least, re-tried in front of a jury that will not practice intimidation.

CP at 45-46.

Juror 2 also attached a five-page document entitled "Reasons to question the verdict," in which she described in detail her perception of the evidence, her observations during the trial, and her "[t]houghts" about the evidence and her observations. CP at 47-51. She discussed the jury deliberations; criticized defense counsel; and noted that juror 4 "verbally attacked" defense counsel "in a humiliating and demeaning manner" when counsel spoke to the jury after the verdict. CP at 50. On May 20, the presiding judge's judicial assistant forwarded juror 2's letter and the attachment to trial counsel and to the trial court judge.

At the May 22 sentencing hearing, Olney moved to continue the sentencing, to recuse the trial court judge, and for a new trial based on juror 2's allegations that another juror's "bull[ying]" and the trial court's perceived threats had forced her to change her vote. CP at 62. The State argued against the motion, asserting that juror 2's claims inhered in the verdict and were, therefore, not grounds for a new trial.

The trial court denied having threatened juror 2 in any way when it had talked to her on March 17, but it acknowledged that it had informed all of the jurors at the outset of the case “that juror misconduct can lead to a mistrial and can involve a personal penalty to them.” VRP (May 22, 2009) at 6. The trial court then stated, “Quite frankly, as I read through this letter—I mean with some of the things that she’s drawing significance from, I mean I am a little concerned perhaps about her suitability as a juror, but I don’t find any reason why I’m going to set aside the verdict of the jury.” VRP (May 22, 2009) at 6. When defense counsel responded that he was more concerned that the trial court “should [not] be the one that makes that decision,” the trial court replied, “Court of Appeals can make that decision, Counsel.” VRP (May 22, 2009) at 6.

The trial court continued, noting that juror 2 had agreed that her verdict was guilty when the court had polled the jury, it commented that juror 2’s letter and its attachment included “a number of rather wild accusations, most of which are not substantiated by anything in the record,” and numerous conclusions drawn on matters that were entirely outside the record. VRP (May 22, 2009) at 6. The trial court also noted that juror 2 may have been a hold out “for emotional reasons” and that she had made several “real sinister conclusions from stuff that’s very innocuous.” VRP (May 22, 2009) at 8-9. When defense counsel expressed concern about juror 2’s “specific allegations,” the trial court responded that juror 2’s allegations about the court were “totally ridiculous,” and noted that (1) it was necessary to talk to juror 2 after juror 9 brought possible misconduct to the court’s attention and (2), given that it had admonished the entire jury at the start of the case that “they’re not to cause a mistrial or can [sic] involve a personal penalty to them,” there was no reason why juror 2 should have felt singled out. VRP (May 22, 2009) at 9-

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The trial court concluded that there was no reason to delay the sentencing and noted that the "appellate court can deal with" juror 2's allegations based on the existing record. VRP (May 22, 2009) at 10. The trial court then sentenced Olney.[3]

Olney appeals.

ANALYSIS

Olney argues that the trial court erred when it denied her motion for a new trial without first ordering an evidentiary hearing to investigate juror 2's allegations. She asserts that juror 2's allegations of having been pressured by the other jurors and by the trial court and the trial court's concern about juror 2's competency as a juror justified an evidentiary hearing.

We review a trial court's denial of a motion for new trial for abuse of discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

I. Trial Court Contact with Juror 2

Relying on *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90

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[3] On May 27, juror 2 sent a second letter to the presiding judge. In this letter, juror 2 described her contact with defense counsel on May 22, and stated that she had come to the courthouse that day and had been available to sign a declaration if defense counsel had asked her to do so. But she also asserted that she was afraid to go into the courtroom because she thought it would not be "a safe place" for her. CP at 92. She clarified that she had tried to contact the trial court on March 18, but that the judicial assistant had told her she "was not allowed to talk with the judge." CP at 92. Juror 2 stated that she told the assistant that she "was upset and that [her] vote was wrong." CP at 92. She closed by criticizing defense counsel's failure to defend his client, noting that counsel failed to have her submit a declaration.

(1987), Olney argues that whether juror 2 "felt threatened and bullied by the trial judge," was an issue that "should have been investigated . . . before a different judge" and that this issue did not inhere in the verdict because it was an "'extraneous influence'" that affected the verdict. Br. of Appellant at 7-8 (quoting *Tanner*, 483 U.S. at 118-19). We disagree.

In *Tanner*, the defendant argued that the district court had "erred in not ordering an additional evidentiary hearing at which the jurors would testify concerning drug and alcohol use during the trial." *Tanner*, 483 U.S. at 116. The *Tanner* court held that a court could consider "extraneous" or "external" influences that could have affected the verdict, but it did not address whether the effect of a trial court's discussions with an individual juror was such an extraneous influence. *See Tanner*, 483 U.S. at 118 (noting that determining whether an irregularity was external or internal does not rest on where the alleged irregularity took place but, rather, on whether the alleged irregularity related to a factual matter, such as whether the juror considered extraneous information presented by news media, or to the juror's thought processes, such as the juror's inability to comprehend the court's instructions).

To the extent Olney is arguing that the trial court should have considered juror 2's assertion that she changed her vote based on threats by the trial court, that allegation clearly relates to the juror's thought processes and inheres in the verdict. Thus, the trial court did not err when it refused to consider or investigate this assertion.

As to whether the trial court in fact exerted undue pressure on juror 2 or threatened her, that issue arguably relates to an external influence that could have affected the verdict. But, even assuming that the trial court's contact with juror 2 was an "extraneous influence" that the trial

court or another judge could have examined, the record does not support juror 2's claim that the trial court threatened her or pressured her to come to agreement or to change her mind. The record shows that the trial court (1) inquired into juror 2's admitted contacts with the news media, and (2) admonished juror 2 to follow the jury instructions and not to base her verdict on "emotion," "sympathy," "passion, prejudice, or intuition."[4] VI VRP at 505, 508. This inquiry and admonition cannot be reasonably characterized as a threat "to charge[ ] [juror 2] with a crime for [her] decision making process," CP at 45, nor can it be construed as undue pressure to come to agreement with the other jurors or to change her view. Nor do we think that the trial court's inquiry and admonition rise to the level of coercion or threat even if considered with the trial court's opening instructions to the jury.

Because the effect of the trial court's contact with juror 2 on her decision-making process inheres in the verdict and the record does not support juror 2's assertion that the trial court threatened her or exerted undue pressure on her to change her vote, Olney does not show that the trial court erred when it denied her motion for a new trial on this basis without first holding an evidentiary hearing.

II. Juror Competency

Olney next argues that the trial court's comments about juror 2's "'wild accusations'" and

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[4] We also note that Olney and her counsel were present when the trial court interacted with juror 2 and that Olney and her counsel heard the trial court's entire conversation with juror 2. Not only did Olney not object to anything the trial court discussed with the juror, Olney later agreed that the trial court had resolved any concerns she had about juror 2's ability to participate in the jury deliberations. Olney's lack of objection strongly suggests that the trial court's contact with juror 2 was appropriate.

her "'suitability as a juror'" indicated that juror 2 was not competent to be a juror and that the trial court erred when it refused to hold a hearing to investigate this issue. Br. of Appellant at 8 (quoting VRP (May 22, 2009) at 6). Again, we disagree.

Although there is a historical common law exception to the prohibition on examining the juror conduct during deliberation when there is "'substantial if not wholly conclusive evidence of incompetency,'" *Tanner*, 483 U.S. at 125 (quoting *United States v. Dioguardi*, 492 F.2d 70, 80 (2nd Cir.), *cert. denied*, 419 U.S. 873 (1974)), the evidence here, namely juror 2's letter, does not meet that standard. The letter may have established that juror 2 was confused and that she had a creative and suspicious mind, and the trial court could have reasonably wondered about juror 2's ability to understand and follow the jury instructions, but, ultimately, the letter did not amount to substantial or conclusive evidence that juror 2 was incompetent at the time of the deliberations. At best, juror 2's accusations were reflections of her thought processes, something that clearly inheres in the verdict. *State v. Rooth*, 129 Wn. App. 761, 771-72, 121 P.3d 755 (2005). Accordingly, the trial court did not err when it denied the motion for a new trial without first holding an evidentiary hearing to investigate juror 2's competency.

III. Jury Pressure

Finally, Olney argues that juror 2's assertion that other jurors bullied and pressured her into changing her vote was sufficient to justify further investigation because juror 2 brought this information to the trial court's attention "during deliberations." Br. of Appellant at 9. Again, we disagree.

Citing *State v. Forsyth*, 13 Wn. App. 133, 533 P.2d 847 (1975),[5] and *State v. Hoff*, 31

Wn. App. 809, 644 P.2d 763, *review denied*, 97 Wn.2d 1031 and *cert dismissed*, 459 U.S. 1093 (1982),[6] Olney acknowledges that "Washington courts have generally held that claimed pressure by other jurors inheres in the verdict and may not be used to impeach that verdict." Br. of Appellant at 8. But she attempts to distinguish this case by asserting that the "claims of internal pressure" here were brought to the trial court's attention before the verdict. Br. of Appellant at 8-9. Olney mischaracterizes the record.

Although juror 2 told the trial court on March 17 that she had been pressured by some of the jurors, she never indicated that this pressure was overwhelming or that it compelled her to change her verdict. Instead, juror 2 acknowledged that this pressure helped her to articulate her reasons for disagreeing with the other jurors when she stated:

> Well, when—when I felt as—do you know how I felt when one of the—one of the fellow jurors was in my face? And I mean, she was doing this to me. (Indicating.) I felt a verbal assault. I—I—I—I felt like I was guilty of something. I couldn't think, so I did not—I didn't appreciate it, but you know what? I'm grateful because it made me go to the rational, logical thought—
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> . . . .
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> . . . that I now have.

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[5] In *Forsyth*, a juror alleged in an affidavit that she submitted to the court after the verdict that she had been ill and had been pressured by the other jurors into voting to convict the defendant. *Forsyth*, 13 Wn. App. at 138. Division Three of this court held that these matters related to the juror's decision-making process and therefore inhered in the verdict and could not be the basis of a new trial. *Forsyth*, 13 Wn. App. at 138-40.

[6] In *Hoff*, this court held that a juror's affidavit stating that she "was sick with a cold during deliberation and that other jurors exerted pressure on her to vote to convict the defendant," could not be considered as grounds for a new trial because "[t]he effect of a juror's illness and the claimed pressure by others inheres in the verdict and may not be used to impeach the verdict." *Hoff*, 31 Wn. App. at 813 (citing *Forsyth*, 13 Wn. App. at 138). We noted that "[p]ublic policy forbids inquiries into the privacy of the jury's deliberations." *Hoff*, 31 Wn. App. at 813 (citing *State v. Gay*, 82 Wash. 423, 439, 144 P. 711 (1914)).

VI VRP at 508. At no point before the verdict or when the trial court polled the jury did juror 2 assert that the other jurors' behavior was coercive. It was not until the trial court received juror 2's May 5 letter, more than a month after the verdict, that it knew about any potential undue pressure. Accordingly, the record does not support Olney's assertion that this case is different because the juror advised the trial court of the internal pressures before the verdict.[7]

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Williams, J.P.T.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.

[7] Olney also relies on *State v. Vergilio*, 261 N.J. Super. 648, 619 A.2d 671 (N.J. Super. Ct. App. Div. 1993), asserting that in *Vergilio*, a New Jersey court found reversible error after the trial court sent a distraught juror, who complained of significant unfair treatment by and pressure from other jurors, back to the jury room to deliberate without further inquiry or a curative instruction. Again, nothing in the record here shows that juror 2 advised the trial court before the verdict that the other jurors' behavior was coercive.