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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT

03/05/2015

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
K. Schermerhorn
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

CAPITAL CASE MANAGER

TRIAL MINUTE ENTRY
DAY FIFTY-ONE

Courtroom SCT-5C

State's Attorney: Juan Martinez
Defendant's Attorney: Kirk Nurmi & Jennifer Willmott
Defendant:
Present

Court Reporter, Mike Babicky, is present.

A record of the proceeding is also made by audio and/or videotape.

8:36 a.m. Trial to Jury continues from 3/4/15.

The Jury is not present.

LET THE RECORD REFLECT the Court has received a question from the Jury.

Court and counsel discuss matters.

8:37 a.m. Court stands at recess.

9:37 a.m. Court reconvenes with respective counsel and the Defendant present.

Court Reporter, Mike Babicky, is present.

A record of the proceeding is also made by audio and/or videotape.

The Jury is not present.

LET THE RECORD REFLECT the Court has received an additional question from the Jury. Same is discussed by court and counsel and an answer agreed upon and submitted to the Jury.

Filed: Juror Deliberation Question (1)

9:39 a.m. Court stands at recess.

10:04 a.m. Court reconvenes with respective counsel and the Defendant present.

Court Reporter, Mike Babicky, is present.

A record of the proceeding is also made by audio and/or videotape.

The Jury is present.

LET THE RECORD REFLECT that the Jury indicates that they are unable to reach a unanimous decision and the Court declares a mistrial.

Filed: Unsigned Verdict; Exhibit Worksheet; Trial Worksheet

LET THE RECORD REFLECT that a Presentence Report was initially ordered but then cancelled later this date and a PSR will NOT be prepared for sentencing in this matter.

IT IS ORDERED setting Sentencing on 4/13/15 at 8:30 a.m. in this division.

10:08 a.m. Court is adjourned.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

LATER:

On March 3, 2015, the Court received Juror Deliberation Questions 5 and 6 simultaneously. Juror Deliberation Question 6 contained two issues: (1) Juror 17 stated she previously watched a Lifetime movie about the defendant; and (2) eleven jurors felt Juror 17 was ineffective in deliberations. The Court obtained a copy of the jury questionnaire completed by Juror 17 to determine if Juror 17 had disclosed she had previously viewed the Lifetime movie referenced in the juror question. In the juror questionnaire submitted by Juror 17 (Juror 138 during jury selection), Juror 17 wrote she had watched the Lifetime movie "Dirty Little Secrets". She further stated: "I caught parts of it. I've never watched it through and wondered how much of it was facts or opinions but didn't stay up at night about it." Clearly, Juror 17 disclosed she had watched the movie. The Court finds no misconduct by Juror 17 on this issue.

The second issue raised in Juror Deliberation Question 6 was a concern by eleven jurors that Juror 17 is "ineffective in deliberating" and would not "clearly articulate reasons for views." There is no Arizona case describing what a trial court must do when it receives information that a juror is not participating in deliberations. However, the Arizona Supreme Court has cautioned that in a capital case impermissible coercion of the jury's verdict might be found if a trial court is not careful respecting the jury's deliberations in the penalty phase.

> The penalty phase of a capital case is unique. Unlike any other part of the trial, the jury's determination that a particular mitigating circumstance exists need not be unanimous, A.R.S. § 13–751(C) (Supp.2009), and whether to impose the death penalty is based on "each juror's individual, qualitative evaluation of the facts of the case, the severity of the aggravating factors, and the quality of any mitigating evidence." *State ex rel. Thomas v. Granville,* 211 Ariz. 468, 472 ¶ 17, 123 P.3d 662, 666 (2005). Because of the individual nature of the penalty determination, there is more cause for concern that jurors may be coerced rather than convinced to change their views. Therefore, we caution trial courts to exercise special care, as did the court here, when faced with circumstances similar to those presented in this case [jury at possible impasse].

State v. Kuhs, 223 Ariz. 376, ¶50, 224 P.3d 192 (2010).

The Supreme Court has instructed that a trial judge may not single out a lone "hold out" juror and suggest he/she reconsider his/her position to allow the jury to reach a verdict. That court found this conduct to be reversible error in *State v. Huerstel*, 206 Ariz. 93, 75 P.3d 698 (2003), and in *State v. Lautzenheiser*, 180 Ariz. 7, 8-11, 881 P.2d 339, 340-43 (1994). A trial judge also is prohibited from intruding on the secrecy of the jury's deliberations and may not consider any evidence that inquires into the subjective motives or mental processes that led a juror to assent or dissent from the verdict. Rule 24.1(d), Ariz.R.Crim.P. Secrecy surrounding jury deliberations is necessary not only to prevent the unsettling of verdicts, but also as an aid to the deliberative process itself.

Other courts have held that the court should focus on the conduct of the jurors rather than the content of the deliberations. One court found proper grounds for removing a deliberating juror refusing to deliberate include: a juror's unwillingness to engage in the deliberative process (not willing to participate in discussions with fellow jurors by listening to their views and by expressing his or her own views; expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view; refusing to speak to other jurors; attempting to separate oneself physically from the other jurors). That court determined that the fact a juror does not deliberate well or uses faulty logic or analysis is not a refusal to deliberate and is not a ground for discharge. The fact a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts or the manner in which deliberations should be conducted also is not a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror states he/she will not alter his/her views. See *People v. Cleveland*, 25 Cal.4th 466, 474 21 P.3d 1225 (2001).

Juror Deliberation Question 5 (submitted by Juror 17) stated she was feeling harassed with "pictures and many comments that are not a part of the mitigating factors such as time served and the possibility of getting out early from prison, a book deal, the looks one juror wants to give the family." She further stated she had been "completely up front open and honest." She further stated she did not socialize at lunch or outside of court with other jurors in an effort to remain as impartial as possible and followed all instructions "to a T."

The Court provided Juror Deliberation Questions 5 and 6 to counsel and gave them an hour to research and propose a response to each question. The Court later conferred with counsel and determined the appropriate response to juror deliberation questions 5 and 6 would be to give a written modified impasse instruction that directed the jurors to deliberate about the law (the written jury instructions) and the evidence presented during the trial through the testimony of witnesses and exhibits admitted at all phases of the trial. The Court called the jury into the courtroom and read Court Response to Juror Deliberation Questions 5 and 6. A written copy of the instruction was also provided to the jury.

On March 3, 2015, the State filed under seal a Motion to Strike Juror Number 17 because her Facebook account indicated she had recently viewed the movie "The Secret" and had

researched "The Law of Attraction World." As such, the State claimed Juror 17 violated the court's admonition and should be excused for cause.

Late in the afternoon on March 3, 2015, the Court conducted individual questioning of jurors in chambers to determine if the jurors continued to have concerns about Juror 17 effectively deliberating and to inquire of Juror 17 regarding the allegation that she had violated the court's admonition by watching "The Secret" and researching "The Law of Attraction World." The defendant, all counsel and victim family members were present.

The Court questioned two jurors, including the foreperson, regarding whether there was still a concern that Juror 17 was not effectively deliberating.

Juror 19, the foreperson, stated that prior to submitting the juror question about Juror 17, the consensus was that the juror was "not sharing his or her viewpoint" and was "not participating in the deliberation process as everybody else was." Juror 19 stated he noticed "immediate improvement" after the question was submitted but it was even better in the afternoon after the court had provided the additional instruction. When asked if he believed this juror was able to participate in deliberations, he answered affirmatively. (R.T. March 3, 2015, pages 11 and 12)

Juror 18 stated he agreed with the assessment conveyed in the note that a juror was not able to deliberate with the other jurors. Specifically, he stated the juror does not seem to see the evidence clearly. The juror was not refusing to speak to the other jurors. As of that afternoon, Juror 18 stated the juror is able to deliberate "with what the juror has said in the room." (R.T. March 3, 2015, pages 13 and 14)

The Court also questioned Juror 17. Juror 17 stated she had not read, seen or heard anything about the case in the media nor had she done any research about the case or any of the topics discussed during the trial. Juror 17 stated she knew of "The Secret" before the trial and had read it two years ago and saw the movie but had not watched the movie or read the book since sitting on the jury. Juror 17 stated she had done no research on the Law of Attraction. She stated she had a Facebook page but had not ever discussed these topics on her Facebook page.

When asked if she can deliberate with her fellow jurors, she stated: "I don't feel that I'm being given a shot." "My opinion is not being heard." "My opinion is being --- it's not being valued whereas I'm sitting and listening to – you know, we are sitting taking turns. And you know, other people's opinions are being written down and valued. I don't feel mine is." She stated she had not refused to consider other points of view from her fellow jurors. She had not refused to speak to the other jurors and she had not physically separated from the other jurors except she made it a point not to go to lunch with anybody to remain as impartial as possible. After the court's further instruction was provided, she said she is expressing her opinion and others are expressing their opinions. Later, Juror 17 stated she had not been getting on her Facebook page recently because she did not think it was a good idea. However, she did get on her Facebook page the other day to wish her sister-in-law happy birthday. With regard to "liking" something on Facebook, she stated she was pretty sure she liked "The Secret" because it had motivational quotes. That occurred before the trial started. The information she has about "The Secret" and the Law of Attraction was learned before she became a juror. (R. T. March 3, 2015, pages 15 -27)

During the court's individual questioning of the jurors on March 3, 2015, every deliberating juror was asked these questions.

(1) Have you read, seen, or heard anything about this case in the media?

(2) Has anyone attempted to speak with you about this case?

(3) Have you spoken with anyone about this case?

(4) Have you done any research about this case?

Each juror responded "no" to each question. Since Jurors 18 and 19 indicated Juror 17 was deliberating, the court determined, and the parties agreed, it was not necessary to question other jurors about Juror Deliberation Question 6.

On March 4, 2015, the State filed, under seal, a Motion for Reconsideration of State's Request to Strike Juror Number 17 with attachments. The Court set oral argument on the motion later that day. At the oral argument, Mesa Police Department Detective Esteban Flores explained the attachments to the State's motion. Detective Flores stated he had accessed the Facebook page for Juror 17. Because it was a private page, he could only see limited information. Detective Flores stated Juror 17 had accessed her Facebook page the previous day. He was able to learn that Juror 17 had "liked" ABC News, The Daily Share, Nancy Grace, Fox 10 News, 3TV Phoenix, CBS 12 News, CBS 5 AZ-KPHO among others. He could not state a date when Juror 17 "liked" each site. There is a link attached to each site but there was no information available regarding whether Juror 17 actually read more than what was depicted on the Facebook screen. Detective Flores stated it was possible Juror 17 had received news feeds on her Facebook page from these entities but he could not determine if that occurred unless he obtained the records from Facebook. Some of the pages attached to the State's motion were from other Facebook pages like Nancy Grace. One way to determine if Juror 17 read those news feeds would be to determine if she "clicked" on the newsfeed to get more information. A subpoena

would be required to get records that would so indicate and it would take at least two weeks to obtain those records. During the hearing, Defense Counsel Willmott stated she had learned that other jurors had Facebook pages and had accessed their pages during the trial. Without information subpoenaed from Facebook, she could not determine if the jurors had accessed information in violation of the court's admonition.

The Court found that without more specific information the Court could not conclude the Juror 17 improperly viewed information about the case. The Court acknowledged the juror had the opportunity to read about the case on her Facebook page, but all jurors have that opportunity every day to read or see or hear something about this case if they wish to do so. See R.T. March 4, 2015, pages 27, 28. It is presumed the jurors will follow the court's instructions. There is no presumption a juror will betray his/her trust. It is in the sound discretion of the trial court to determine whether a juror should be interrogated about violating the admonition. See *State v. Hilliard*, 89 Ariz. 129, 135, 359 P.2d 66, 70 (1961).

On March 4, 2015, the defense filed a Motion for Mistrial; Juror Coercion alleging the individual questioning of jurors was coercive thus requiring a mistrial. The Court heard oral argument that same day and denied the motion on the record. In *State v. Huertsel*, 206 Ariz. 93, 75 P.3d (2003), the Arizona Supreme Court identified factors to consider in determining whether a trial court has coerced a verdict. Those factors include: (1) was the court aware of the jury's numerical split and how the majority of jurors were leaning when it offered assistance in resolving the impasse; (2) whether subsequent instructions focused on the holdout juror; and (3) whether the jury was provided new information or evidence to consider during further deliberations. In this case, as stated on the record, the Court did not know the numerical split or how the majority of jurors were leaning. No subsequent instructions were given to the jury and no new information or evidence was provided to the jury during deliberations. Thus, under the totality of the circumstances, there was no coercion. The Motion for Mistrial; Juror Coercion was thus denied.

The jury continued deliberating on March 5, 2015. Late in the afternoon, the jury sent a note to the Court indicating the jury was not unanimous and the votes had been steady since the

previous Thursday. *See* Juror Deliberation Question 8. The following morning, the jury sent a note to the Court stating "status is unchanged as of this morning." *See* Juror Deliberation Question 9. The Court conferred with counsel. There was no objection to the Court declaring a mistrial. The Court declared a mistrial.

The Court has received a request from the media to broadcast the sentencing hearing live. Any objection to the request must be submitted to the court on or before March 28, 2015.