

DISSENTING OPINION BY ACOBA, J.

I must strongly disagree with the majority.

Intimidation or overbearing conduct of one juror by and towards another is unacceptable in our courts. We should not countenance coercive conduct in jury deliberations. To permit such conduct is to set a legal threshold so low as to be destructive of the deliberative process insured by our constitutions and of the role of those who are called to jury service. Because of this and other juror misconduct, I disagree with affirmance and would remand for an evidentiary hearing.

In this case, there was an objective and prima facie showing by the defense that mandates an evidentiary hearing as to whether there was a reasonable possibility that such conduct prejudiced the right to a fair trial of Defendant-Appellant Edwin Kim (Defendant). See State v. Augustin, 89 Hawai'i 215, 219, 971 P.2d 304, 308 (App. 1998) ("A fair trial by an impartial jury is guaranteed to the criminally accused by both the sixth amendment to the United States Constitution and article I, § 14 of the Hawai'i Constitution, as well as by principles of due process under both the state and federal constitutions." (Quoting State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994). (Quotation marks, brackets, and citations omitted.))).

I believe substantial prejudice resulted from (1) the intimidation of one juror by another, or (2) the introduction of extraneous information as a basis to prove an element of the

offense charged. Such occurrences substantially prejudiced Defendant's right to a fair trial.

I.

First, it is fundamental in our jurisprudence that a defendant's right to a fair trial entitles the defendant to the considered judgment of each juror as to the evidence in a case. The defendant is also guaranteed a juror's independent judgment as to the appropriate vote to cast. Such judgment cannot properly be exercised if this court permits the intimidation of one juror by another.

Accepting Defendant's offer of proof as true, the conduct of Juror Ten during jury deliberations was improper. Juror Ten cursed repeatedly in "a very angry and intimidating manner, which caused everything to stop." He attempted to impede examination of the jury instructions and commented, "What the f[*]ck are we doing this for?" Plainly, such comments were calculated to terminate deliberations.

Juror Ten's remarks also indicate a design to coerce into submission Juror Seven, who had voted contrary to his position, or any juror who might be considering a position opposing his own. He stated, "I want to know who voted for the Manslaughter" and "I don't know why we're doing this. I want to know who the f[*]ck said Manslaughter[.]" During deliberations, no juror is required to disclose his or her vote to the others as

demanded by Juror Ten. His statement, then, on its face, suggests an intent to bully and to frighten Juror Seven into changing her vote. Such juror misconduct taints the deliberation process and is sufficient to justify an evidentiary hearing without regard to any alleged effect on Juror Seven.

The Colorado courts, which are subject to Rule 606(b) of the Colorado Rules of Evidence,¹ a rule materially similar to FRE Rule 606(b),² faced a similar situation and recognized an additional exception for jury misconduct. See People v. Rudnick, 878 P.2d 16, 21 (Colo. Ct. App. 1993). In Rudnick, the defendant

¹ Rule 606(b) of the Colorado Rules of Evidence states:

Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

² FRE Rule 606(b) states as follows:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to 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 indictment or concerning the juror's mental processes in connection therewith except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(Emphases added.)

filed a post-trial motion for a new trial when one of the jurors alleged that she “had been coerced into voting for a guilty verdict by the abusive language, threatening gestures, and psychological pressures exerted by another juror.” Id. at 21. Consequently, the trial court conducted a hearing on the matter. Id. The reviewing court noted, “If the alleged misconduct involves threats or coercion by fellow jurors, the trial court should conduct a hearing to determine whether there is a reasonable possibility that the misconduct affected the verdict to the defendant’s detriment.” Id. (citing Wiser v. People, 732 P.2d 1139 (Colo. 1987); People v. Black, 725 P.2d 8 (Colo. Ct. App. 1986)) (emphasis added).³

A jury misconduct exception as in Colorado does not have to be read into the Hawai’i rules in order to conclude that an evidentiary hearing on the alleged misconduct is proper in this instance. In contrast to the federal rules, Hawai’i Rules of Evidence (HRE) Rule 606(b)⁴ permits a juror to testify on a

³ At the hearing, the juror alleged that during deliberations, another juror “would lean forward with his hands on the table, red-faced with angry veins popping out of his forehead. . . . [H]e accused her of not having the ‘stomach for first degree’ and called her a ‘girl’ and ‘weak.’” Rudnick, 878 P.2d at 21 (internal quotation marks omitted). Although the alleged conduct is not as egregious as in the case before us, the Colorado courts have found that allegations of such conduct warrants an evidentiary hearing.

⁴ HRE Rule 606(b) states as follows:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify 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 indictment or concerning the juror’s mental processes in connection therewith. Nor may the juror’s affidavit or evidence of any statement by the juror indicating an effect of this kind be received.

(continued...)

broader range of matters. HRE Rule 606(b) prohibits juror testimony on "the effect of anything," including the effect of matters and statements during deliberation. It does not prohibit, however, testimony on the matters and statements, themselves. HRE Rule 606(b) almost verbatim tracks FRE Rule 606(b), but the Hawai'i rule does not contain the restriction, "may not testify as to any matter or statement occurring during the course of the jury's deliberations" and the related exception allowing juror testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention." FRE Rule 606(b). Rather, HRE Rule 606(b) allows juror testimony about objective misconduct and irregularities.

Indeed, the commentary to HRE Rule 606(b) confirms the admissibility of such testimony and underscores the majority's erroneous application of that rule. The commentary explains that

[t]he intent of the subsection [b] is to strike a proper balance by excluding testimony relating to the internal deliberative process and allowing testimony about objective misconduct and irregularities. No attempt is made to specify substantive grounds for setting aside verdicts.

The Advisory Committee's Note to the original federal proposal, upon which subsection (b) is modeled, said: "The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. . . . The jurors are the persons who know what really happened. Allowing [jurors] to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion." For example, under this rule jurors would be competent to testify to the consumption of alcoholic beverages by deliberating jurors, a matter which under some circumstances may be cause for

⁴(...continued)

(Emphases added.)

setting aside a verdict, see *Kealoha v. Tanaka*, 45 H[aw]. 457, 370 P.2d 468 (1962). A similar rule is found in Cal. Evid. Code § 1150.

(Emphases added.) HRE Rule 606(b) is modeled on the original proposal for FRE Rule 606(b). As noted by the Advisory Committee, the values inhering in that proposal “include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.”

(Emphases added.) Those values, then, are also incorporated in HRE Rule 606(b).

Hence, HRE Rule 606(b) was not intended to shield, from the court’s purview, proceedings in which jurors have been coerced or intimidated. A juror’s impartial evaluation of the case should turn on the facts and the evidence, not on harassment or coercion. Justice is not served if the fate of a defendant is decided by the juror who bullies, intimidates, or curses at others. Thus, that jurors may not testify as to the effect of the improper statement upon them, does not mean that jurors may not testify about incidents of jury misconduct during deliberations.⁵ There is no other way in which a court may determine objectively whether jurors’ statements were used as a circumstance against a defendant.

⁵ HRE Rule 606(b) does not prohibit a juror from testifying about any matter or statement made during deliberations, but only “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 a verdict” (Emphases added.) The offer of proof here was as to the matters that took place before the jury and, thus, such matters could be described and proffered as improper. See supra page 2.

II.

Second, the alleged introduction of extraneous information to prove an element of the offense by Juror Ten and the foreperson also provided a proper ground for an evidentiary hearing. The court told the jurors, "[Y]our decision making in this case as it pertains to [Defendant] is limited just to what comes out in evidence and the law that applies to that." The court asked, "Would any of you have a problem in making your decision in this case about [Defendant] just on the evidence that comes out in court and the instructions that apply to that evidence? Because that's how you make your decision. Anyone have a problem with that?" (Emphasis added.) The jurors all answered, "No."

Despite those admonitions by the court, Juror Ten and the foreperson tainted the deliberations by introducing their outside experience with guns to persuade the other jurors that Defendant possessed the requisite intent to commit the crimes charged:

At that point, [Juror Ten] again in a very forceful manner started talking about how he on a weekly basis went to the shooting range and fired firearms. And in a very heated manner again, saying, Do you know the type of damage that a magnum can do? That that can do so much damage, that is a deadly weapon, and if anyone uses a magnum, they had to have a deadly intent. [The foreperson] also discussed his experience with firearms, and again supporting [Juror Ten]'s assertions that it was a very dangerous weapon and that again relying on his personal experience, that it had to have been an intentional or knowing shooting.

(Emphases added.) Jurors are permitted to weigh only the evidence presented at trial in determining whether or not a

defendant committed the charged offense or whether an element of that offense has been proven. The prosecution has the burden of proving its case at trial; it may not rely on any extraneous information that may prejudice the defendant. But, in fact, according to the offer of proof, the foreperson argued to the jurors that, based on his experience with guns, "it had to have been an intentional or knowing shooting."

Our law permits a juror to testify as to extraneous information introduced into the deliberations. Such testimony would exemplify the "objective misconduct" described in the commentary to HRE Rule 606(b). But the majority appears to gloss over this issue. Even the exception drawn in FRE Rule 606(b) permits testimony on "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." FRE Rule 606(b).

III.

In arguing their experiences with firearms in the deliberations, the foreperson and Juror Ten implicated for consideration their voir dire promises not to do so. Juror Ten was specifically questioned during voir dire about such experience and responded he could set such matters aside:

[PROSECUTION]: . . . Can you kind of put aside everything you know about firearms in your personal life and private life and rely on what you hear in court?

[JUROR TEN]: Well, I could try, but I've, you know, been in a lot of arguments with my friends where most of them are against it and it causes you to want to defend what

you do in your pastime.
[PROSECUTION]: Sure. Oh, you mean about gun control, that they have of guns?
[JUROR TEN]: Yeah.
[PROSECUTION]: That won't be an issue here?
[JUROR TEN]: Uh-uh.
[PROSECUTION]: Except as far as one of the charges is a possessory type offense. Would you have any trouble with that?
[JUROR TEN]: Um, I'm not sure. I can try. That's why I didn't raise my hand before. But I can try.
[PROSECUTION]: You think you might have any difficulty following the law as the judge gives it to you?
[JUROR TEN]: Probably not.
. . . .
[DEFENSE]: What are you going to look for then?
[JUROR TEN]: How they present themselves, quality of what they say, what everyone said.

(Emphases added.)

The foreperson was asked by the court, "Is there anything . . . that you can think of that would interfere with or prevent you from being fair and impartial if you were called upon to be a juror in this case?" The foreperson responded, "No." The court asked, "Do you believe you can be fair and impartial if you were called upon to do so?" The foreperson stated, "Yes." In voir dire, the foreperson indicated his exposure to guns would not affect his deliberations:

[PROSECUTOR]: So you are familiar with guns?
[THE FOREPERSON]: Yes.
[PROSECUTOR]: All right. What type of firearms do you use?
[THE FOREPERSON]: Um, 20 guage, 12 guage.
[PROSECUTOR]: Any familiarity with handguns at all?
[THE FOREPERSON]: Um, well I was in the military before.
[PROSECUTOR]: Okay.
[THE FOREPERSON]: And I was classified as a sharp shooter.
[PROSECUTOR]: So you're a good shot then?
[THE FOREPERSON]: Yeah.
[PROSECUTOR]: I'll keep that in mind. Did you--in the military you carried a handgun; right?
[THE FOREPERSON]: A rifle, M-16.
[PROSECUTOR]: You didn't have a handgun?
[THE FOREPERSON]: No.
[PROSECUTOR]: Were you trained in the use of a handgun in the military?
[THE FOREPERSON]: No.

[PROSECUTOR]: Okay. Have you ever fired a handgun?
[THE FOREPERSON]: Um, once.
[PROSECUTOR]: Okay. Anything about your exposure to firearms, and we have a few people who have, anything that would cause that to affect your decision making in this case if you're selected as a juror?
[THE FOREPERSON]: No.
.
[PROSECUTOR]: . . . And we know what the truth is. Can you search in this case for the truth?
[THE FOREPERSON]: Yes.
.
[DEFENSE]: . . . would you be able to . . . pay attention and fulfill the duties of a juror as required?

[THE FOREPERSON]: Oh, yes.
[DEFENSE]: You can do that?
[THE FOREPERSON]: Yeah.
[DEFENSE]: That won't be a problem?
[THE FOREPERSON]: No.
[DEFENSE]: Well, how do you decide if someone is believable or not or whether something is believable when you search for the truth? What are you going to look for?
[THE FOREPERSON]: Um, the same as what the other jurors said yesterday--body language, facial expressions, also what they say, their testimony.
[DEFENSE]: Um-hmm. Um-hmm. Okay. Think you can do that in this case?
[THE FOREPERSON]: Yeah.
.
[DEFENSE]: Okay. You know, we talked some, maybe a lot, about presumption of innocence, the burden of proof. Are you going to be able to hold the prosecution to its burden of proof, beyond a reasonable doubt?
[THE FOREPERSON]: . . . Oh, yes.
.
[DEFENSE]: Okay. Can you keep an open mind?
[THE FOREPERSON]: Yes, I can.

(Emphases added.)

This court has stated that, "[g]lobally speaking, 'proof that a juror was biased against the defendant or lied on voir dire [to the defendant's prejudice] entitles the defendant to a new trial[,]'" Furutani, 76 Hawai'i at 181, 873 P.2d at 60 (internal citation omitted), and that "the trial court must grant a motion for [a] new trial if any member (or members) of the jury was not impartial; failure to do so necessarily constitutes an abuse of discretion." Id. at 179, 873 P.2d at 58 (citing State

v. Sugiyama, 71 Haw. 389, 391, 791 P.2d 1266, 1267 (1990)). In Furutani, this court stated that

when a criminal defendant makes a prima facie showing that improper juror comments during deliberations have been used as a circumstance against him or her, there is a presumption of prejudice and the verdict will be set aside unless it is clearly shown that the juror's [comments] could not have affected the verdict. And consistent with our case law, the burden is on the prosecution to make such a clear showing beyond a reasonable doubt.

Id. at 185-86, 873 P.2d at 64-65 (emphases added) (internal quotation marks and citations omitted). Juror Ten's and the foreperson's arguments to the other jurors based on their experiences with guns were clearly improper and, hence, a presumption of prejudice arose. Similarly, in Furutani, the circuit court found, inter alia,

[t]hat counsel for [Furutani] did, during voir dire, obtain a commitment from the jurors that they would not hold [Furutani's] failure to testify . . . against him . . ., [t]hat during voir dire, the jurors responded "Yes" when asked by defense counsel if they thought it was fair that a defendant did not have to testify

Id. at 178, 873 P.2d at 57. Accordingly, the circuit court determined "that the possible misconduct at voir dire and the misconduct during deliberations deprived [defendant] of a trial by twelve fair and impartial jurors," id., a finding upheld on appeal, id. at 185, 873 P.2d at 64. This court went on to state that

[w]hen used as a circumstance against the accused, a juror's comments regarding a defendant's failure to testify are presumptively prejudicial because they constitute an ipso facto demonstration that the juror could not be . . . impartial and would have been excused for cause had the juror's bias been made known during voir dire.

Id. at 186, 873 P.2d at 65 (emphases added) (internal quotation marks and citations omitted). In this case, evidence of Juror

Ten's and the foreperson's bias, if made known in voir dire, would have resulted in their being excused.

IV.

In light of Juror Ten's alleged intimidation, along with his, and the foreperson's, introduction of extraneous information, there is prima facie evidence "that improper juror comments during deliberations [were] used as a circumstance against the defendant." State v. Gabalis, 83 Hawai'i 40, 46, 924 P.2d 534, 540 (1996) (internal quotation marks and citations omitted). The comments went directly to a verdict on a greater offense as opposed to a lesser offense. Such objective misconduct and irregularities are the proper objects of an evidentiary hearing. Juror conduct that taints the integrity of the verdict manifestly redounds to the defendant's detriment. Therefore, an assessment of the jurors' statements during deliberations must be made in this case. See Gabalis, 83 Hawai'i at 45-46, 924 P.2d at 539-40; Jackson, 81 Hawai'i at 48, 912 P.2d at 80.

V.

The majority states that "public policy demands that the sanctity of jury deliberation be vigorously guarded to ensure frankness and open discussion." Majority opinion at 13. In doing so, the majority cites federal cases rather than Hawai'i

cases. Those federal cases are inapposite. In United States v. Barber, 668 F.2d 778 (4th Cir. 1982), the court determined that one juror's post-verdict "anguish over participation in the verdict" and another juror's indication to a news reporter that "she had been threatened by the foreman of the jury to report her to the judge" could not be reviewed in light of

[FRE] 606(b)[, which] provides that a juror may not impeach the jury's verdict by testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to . . . the verdict."

Id. at 786-87 (emphasis added). This reasoning is not applicable here, however, because HRE Rule 606(b) does not include the quoted provision of FRE Rule 606(b). Our rule does not prohibit a juror testifying as to the internal deliberations of the jury. By relying on Barber, the majority in effect imports the greater restrictive scope of FRE 606(b) into HRE 606(b).

The majority also cites to McDonald v. Pless, 238 U.S. 264 (1915), in which the jury awarded the plaintiff the amount that constituted the average of the amounts the jurors would award independently. Some jurors disapproved of the fact that some amounts indicated by some of the jurors were higher than the amount sought by the plaintiff and were dissatisfied with the result. The defendant moved to set aside the verdict but the court did not allow the jurors to testify at the hearing of the motion, which the reviewing court affirmed. It should be noted that Pless is a civil case (rather than a criminal case) and is a

decision that pre-dates the Federal Rules of Evidence. Moreover, the Pless Court conceded that "there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice . . . which might occur in the gravest and most important cases." Id. at 268-69 (internal quotation marks omitted). Therefore, the Court did not "attempt[] to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion." Id. at 269. Rather, the Court explained that its holding did not apply to criminal cases:

The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceeding brought to punish the wrongdoers, is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

Id. (emphases added). Plainly, Pless is not applicable to this case.

VI.

This decision will have a substantial impact on a juror's jury experience. That jury deliberations may be "contentious" or "even offensive" is not disputed. Majority opinion at 13. But to permit jurors to intimidate their fellow jurors goes beyond what is permissible. See Rudnick, supra, page 4 and note 3. It is not only detrimental to a defendant's right to a fair trial, but also infringes upon a juror's right to serve. This court has stated that the "privilege to serve as a

juror in the courts of Hawai'i belongs to one as a citizen of the State of Hawai'i." State v. Johnston, 51 Haw. 195, 201, 456 P.2d 805, 809 (1969). Similarly, the United States Supreme Court has held pursuant to the Fourteenth Amendment Equal Protection Clause, that all people have the "same right and opportunity to participate in the administration of justice enjoyed by the [entire] population." Batson v. Kentucky, 476 U.S. 79, 91 (1986). In light of this guarantee, we are duty-bound to prevent coercive conduct of fellow jurors from encroaching on a juror's right to participate in the administration of justice.

Our judicial system requires that citizens take time from their daily obligations to serve on juries. Jury duty is often quite burdensome, requiring significant amounts of time, and often personal and financial sacrifices. It is each court's responsibility as it is this court's, to protect a juror's right to deliberate free from harassment while fulfilling his or her civic duty.

VII.

More than juror "regret," majority opinion at 15, is involved here. The reasoned application of HRE Rule 606(b) is what is called for rather than the specter of an "inundat[ion] . . . of new trials." Majority opinion at 15. HRE Rule 606(b) is not intended to permit an inquiry into all jury deliberations

where more assertive jurors persuade other jurors. Rather, each situation must be evaluated on a case-by-case basis. Plainly, the facts alleged in this case, on their face, warrant an evidentiary hearing. Accordingly, I would remand for that purpose. On the present record, the verdict rendered under the circumstances of this case is not worthy of such designation.