

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

KARL THOMPSON, JR.,
Defendant.

No. CR-09-88-FVS

ORDER DENYING REQUEST FOR
PERMISSION TO INTERVIEW
JURORS

THIS MATTER comes before the Court based upon the "Defendant's Motion for Leave to Contact Jurors Pursuant to LR 47.1(d)." He is represented by Carl J. Oreskovich and Courtney A. Garcea. The government is represented by Timothy M. Durkin, Aine Amed, and Victor Boutros.

RELIEF REQUESTED

A jury found the defendant guilty of violating 18 U.S.C. § 242 and 18 U.S.C. § 1519. His attorneys are concerned that jurors were exposed to extraneous prejudicial information during their deliberations. They would like to interview the jurors in order to determine whether their concerns are justified. However, they may not do so without the Court's permission. Local Rule 47.1(d). As a result, they have filed a motion requesting permission to conduct interviews. (In the alternative, they ask the Court to conduct them.)

1 The government objects.

2 **BACKGROUND**

3 Numerous newspaper articles and television reports were published
4 during the course of the defendant's trial. The Court admonished
5 jurors to ignore them. The following is an oral instruction that was
6 given by the Court on the first day of trial shortly after the jury
7 was selected:

8 Also, don't read any reports or any accounts or
9 descriptions or discussions, whether it's in the, whether it
10 should be in the newspaper or you see something on
11 television, just turn it off. Or walk away. Turn the radio
12 off or change the station or whatever.

13 The important thing in this matter to keep in mind is
14 what other people think may be happening here in court is
15 not important, what is important is what you think. And
16 that's your determination of what you think, not what
17 somebody else's is. Just don't listen or read anything
18 about the case.

19 The next morning, the Court gave preliminary instructions to the jury
20 (ECF No. 670). Preliminary Instruction No. 13 admonished jurors not
21 to discuss the case with anyone until authorized by the Court to do
22 so. Throughout the trial, the Court repeatedly reminded jurors of the
23 preceding admonitions.

24 Trial took place in the William O. Douglas Federal Building in
25 Yakima, Washington. As it turned out, a number of jurors lived a
26 significant distance from Yakima. Some stayed in a motel during the
trial. The motel has four floors, with over 100 rooms for guests.
Members of the defense team stayed in the same motel. The motel

1 serves a complimentary breakfast to guests in its dining room. Two
2 television monitors are located in the dining room. Generally, the
3 monitors display news broadcasts and sports events.

4 The presentation of evidence was completed on Friday October 28,
5 2011. On Monday October 31st, the Court instructed the jury, and the
6 attorneys made their closing arguments. The alternate jurors were
7 excused, and the jury began deliberating. Jurors did not reach
8 verdicts that afternoon. Accordingly, the Court excused them for the
9 evening and directed them to resume their deliberations the following
10 morning.
11

12 On November 1st, a member of the defense team ate breakfast in
13 the motel dining room. She thought she observed the following message
14 displayed on a ticker-tape that rolls continuously across the bottom
15 of one (or perhaps both) of the television screens, "Yakima jury
16 deliberating Spokane police officer's beating death of mentally ill
17 janitor." Two jurors were present in the dining room. The defendant
18 did not notify the Court of the ticker-tape broadcast while the jury
19 was deliberating.
20

21 The jury resumed its deliberations on the morning of November
22 1st, but it did not reach verdicts that day. Once again, the Court
23 excused the jurors for the evening. They resumed deliberations on the
24 morning of November 2nd. That afternoon, the presiding juror advised
25 the Court that the jury had reached verdicts. The Court summoned the
26 jury to the courtroom and the presiding juror delivered the verdict

1 form to the Court. The jury found the defendant guilty as charged.

2 On November 3rd, one of the alternate jurors sent an unsolicited
3 email to counsel for the defendant:

4 Mr. Oreskovich my name is [name omitted]. I sat in the jury
5 box during the trial. I was dismissed as a alternate. I
6 was shocked to have the news. I do not and have the same
7 opinion of my fellow jurors. I am sorry.

8 On November 4th, the defendant filed a motion requesting the
9 Court to authorize his attorneys to interview the jurors. He suspects
10 jurors saw the ticker-tape news broadcast and learned Otto Zehm was
11 mentally ill. He further suspects the jurors' knowledge of Mr. Zehm's
12 mental illness tainted the verdict.

13 The parties contacted motel management and news organizations in
14 order to determine the content of the November 1st ticker-tape. The
15 parties now agree that the jurors who were present in the motel dining
16 room for breakfast on November 1st could have seen the following
17 message displayed on the news ticker-tape on at least one of the
18 television monitors:

19 Jurors deliberated briefly yesterday after attorneys wrapped
20 up closing arguments in the trial of a Spokane police
21 officer accused of excessive force in the beating death of a
22 mentally ill man. The jury will continue deliberations
23 today.

24 The morning of November 1st was the only morning during deliberations
25 that this message appeared on the television monitors in the motel
26 dining room.

1 At some point after November 4th, the person who served as the
2 presiding juror learned the defendant suspects the jury may have
3 considered extraneous prejudicial information. She contacted a
4 Spokane newspaper reporter and gave an interview. On November 16th,
5 the newspaper published an account of the interview. The last
6 paragraph of the article states:

7 "Most of us had never heard of this case," she said. "we
8 didn't know the particulars. But one of the jurors had an
9 acquaintance who lived in Spokane. (The juror) made
10 comments in deliberations. She said politics in Spokane are
11 corrupt and dirty. That was the only person who had a sense
of what was going on."

12 Shortly thereafter, the presiding juror gave a televised interview to
13 a Spokane television station. She stated in part:

14 I had mentioned . . . to another reporter that . . . there
15 was . . . one juror that had some knowledge of Spokane. She
16 had lived there like 15-20 years ago . . . and she had
17 mentioned that . . . Spokane can be kind of a . . . Spokane
18 politics is kind of corruptive. But that is the extent of
the knowledge that we had before.

19 **STANDARD**

20 Local Rule 47.1(d) prohibits the defendant's attorneys from
21 initiating contact with jurors unless they first obtain permission
22 from the Court. However, Local Rule 47.1(d) does not establish a
23 standard for determining whether the Court should grant permission.
24 Some courts require a showing of good cause. 6 Wayne R. LaFave et
25 al., *Criminal Procedure* § 24.9(g), at 542 n.129 (3d ed.2007).
26 Requiring good cause places an appropriate check on juror interviews.

1 A losing party may not initiate contacts with jurors unless the party
2 can demonstrate that interviews will serve some legitimate purpose.

3 **RULING**

4 The defendant's attorneys are seeking to interview jurors in
5 order to obtain evidence with which they may impeach the jury's
6 verdicts. At common law, a juror could not, as a general rule, offer
7 testimony for the purpose of impeaching a verdict. *Tanner v. United*
8 *States*, 483 U.S. 107, 117, 127, 107 S.Ct. 2739, 2746-2748, 2751, 97
9 L.Ed.2d 90 (1987). Congress codified this common-law rule in Federal
10 Rule of Evidence 606(b). *Tanner*, 483 U.S. at 121, 107 S.Ct. 2739.
11 However, in doing so, Congress provided three exceptions. "[A] juror
12 may testify about (1) whether extraneous prejudicial information was
13 improperly brought to the jury's attention, (2) whether any outside
14 influence was improperly brought to bear upon any juror, or (3)
15 whether there was a mistake in entering the verdict onto the verdict
16 form." Fed.R.Evid. 606(b).
17

18 Rule 606(b) does not preclude attorneys from interviewing jurors.
19 It is Local Rule 47.1(d) that bars juror interviews absent judicial
20 approval. Nevertheless, the two rules must be considered together.
21 There is no point in authorizing juror interviews under Local Rule
22 47.1(d) unless there is reason to think the interviews will produce
23 evidence that is admissible under Rule 606(b). In this case, the
24 issue is whether there is reason to think interviews will produce
25 evidence that jurors considered extraneous prejudicial information
26

1 during their deliberations.

2 The defendant's attorneys cite a number of circumstances in
3 support of their request for juror interviews. First, a juror sent a
4 note to the Court during the course of the trial requesting more
5 information concerning Mr. Zehm. Second, at least two jurors were
6 exposed to a ticker-tape news broadcast indicating Mr. Zehm was
7 mentally ill. Third, an alternate juror expressed disagreement with
8 the jury's verdict. Fourth, the presiding juror allegedly made
9 statements to a newspaper reporter indicating one of her fellow jurors
10 heard something about the case from an acquaintance and shared it with
11 the jury during deliberations.
12

13 The Court has considered each of the circumstances cited by the
14 defendant's attorneys. Insofar as the note is concerned, the Court
15 acknowledges at least one juror requested additional information about
16 Mr. Zehm. However, the Court responded to the note during the trial.
17 The Court advised the jury as a whole that the individual juror's
18 request for additional information was foreclosed by prior evidentiary
19 rulings. Presumably, the jurors respected this explanation and did
20 not attempt to circumvent the Court's prior rulings. See *United*
21 *States v. Scott*, 642 F.3d 791, 800 (9th Cir.2011) (citing *Brown v.*
22 *Ornoski*, 503 F.3d 1006, 1018 (9th Cir.2007)).
23

24 Insofar as the ticker-tape news broadcast is concerned, the Court
25 acknowledges there is evidence indicating at least two jurors were
26 present in a motel dining room in which prejudicial information was

1 displayed upon a television monitor on November 1st. However, the
2 defendant did not bring the broadcast to the Court's attention that
3 morning. Had he done so, the Court could have made inquiries and
4 taken appropriate corrective action. As it was, the Court repeatedly
5 admonished jurors to ignore media reports concerning the trial in the
6 event they encountered them. Again, the presumption is that jurors
7 followed those instructions. *Id.*

8
9 Insofar as the email from the alternate juror is concerned, the
10 Court acknowledges this person was surprised and disappointed by the
11 jury's verdict. However, there is nothing in the email indicating
12 that jurors were exposed to extraneous prejudicial information while
13 this person was involved in the case. Given the absence of any such
14 indication, the email does not support the defendant's request for
15 juror interviews.

16 Insofar as the presiding juror's interviews are concerned, the
17 Court acknowledges the final paragraph of the newspaper article is of
18 concern:

19
20 "Most of us had never heard of this case," she said. "we
21 didn't know the particulars. But one of the jurors had an
22 acquaintance who lived in Spokane. (The juror) made
23 comments in deliberations. She said politics in Spokane are
24 corrupt and dirty. That was the only person who had a sense
25 of what was going on."

26 The preceding comments suggest that one of the jurors heard something
about the case from an acquaintance and that she shared it with her
fellow jurors. However, the newspaper article must be read with

1 caution. It represents the reporter's perception of what the
2 presiding juror said. The Court cannot be certain the statements that
3 are attributed to the presiding juror are word-for-word quotations or
4 whether they are paraphrases. By contrast, the Court can watch the
5 television interview that also occurred on or about November 16th. In
6 it, the presiding juror said in part:

7 I had mentioned . . . to another reporter that . . . there
8 was . . . one juror that had some knowledge of Spokane. She
9 had lived there like 15-20 years ago . . . and she had
10 mentioned that . . . Spokane can be kind of a . . . Spokane
11 politics is kind of corruptive. But that is the extent of
the knowledge that we had before.

12 Neither here nor anywhere else in the interview did the presiding
13 juror say that one of the other jurors has an acquaintance in Spokane,
14 much less that the other juror learned something from the acquaintance
15 and shared it with the jury as a whole. Rather, the presiding juror
16 said that one of the other jurors lived in Spokane many years ago and
17 that she formed certain unfavorable impressions concerning Spokane
18 politics as a result of her experiences there. Such impressions do
19 not constitute extraneous prejudicial information because they were
20 formed years before the defendant's trial began and they do not
21 reflect knowledge about his confrontation with Mr. Zehm.

22 In conclusion, the defendant has failed to demonstrate reason to
23 believe the jurors considered extraneous prejudicial information. The
24 Court repeatedly instructed jurors to ignore media accounts of the
25 trial. Thus, to the extent jurors were exposed to such accounts, the
26

1 Court is satisfied they ignored them. That leaves the interviews
2 which were given by the presiding juror. The final paragraph of the
3 November 16th newspaper article is explained by the television
4 interview. There is nothing in the latter indicating jurors
5 considered extraneous prejudicial information. Absent some such
6 indication, the defendant cannot establish good cause for conducting
7 juror interviews. His motion for permission to conduct juror
8 interviews will be denied.
9

10 **IT IS HEREBY ORDERED:**

11 1. The "Defendant's Motion for Leave to Contact Jurors Pursuant
12 to LR 47.1(d)" (**ECF No. 754**) is **denied**.

13 2. The United States' "Motion to Expedite Hearing" (**ECF No. 790**)
14 is **granted**.

15 3. The "United States' Motion to Strike" (**ECF No. 788**) is **granted**
16 with respect to the "Declaration of Courtney A. Garcea" (ECF No. 787),
17 but the motion is denied with respect to the "Supplemental Declaration
18 of Courtney A. Garcea" (ECF No. 793).
19

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to counsel.

22 **DATED** this 6th day of December, 2011.

23 s/ Fred Van Sickle
24 Fred Van Sickle
25 Senior United States District Judge
26