IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellant,

v.

FRANK RONALD CASTRO
Defendant-Appellee.

OPINION

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Supreme Court Case No.: CRA01-002
Superior Court Case No.: CF0324-98

Appeal from the Superior Court of Guam
Argued and submitted on December 11, 2001
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and JOHN A. MANGLONA, Designated Justice.

CARBULLIDO, J.:

[1] The Defendant-Appellee Frank Ronald Castro ("Castro") was convicted by a jury of one count of negligent homicide. Subsequent to entry of the verdict, the trial court granted Castro's motion for new trial on the ground that there was a reasonable possibility that extraneous information before the jury could have possibly affected the verdict. The Plaintiff-Appellant People of Guam ("Government") appeals the trial court's grant of Castro's motion for a new trial. Specifically, the Government argues that the trial court abused its discretion in conducting an evidentiary hearing on Castro's motion and that, even if the evidentiary hearing was proper, the trial court abused its discretion in finding that the extraneous information before the jury could have affected the verdict. We reject the Government's challenges and find that the trial court properly held a hearing and admitted juror testimony for the purpose of determining Castro's motion, and did not abuse its discretion in granting Castro's motion for a new trial. Accordingly, we affirm the trial court's decision.

I.

[2] On May 6, 1998, Castro was indicted for manslaughter and the concomitant weapons possession special allegation, and criminal negligent homicide and the concomitant weapons possession special allegation. The case was tried before a jury. After the Government rested its case, Castro moved for judgment of acquittal on the manslaughter charge. The lower court granted the motion. The remaining counts were submitted to the jury. On December 22, 2000, the jury

returned a guilty verdict as to the negligent homicide charge, but found that Castro was not guilty with regard to the special allegation. *See* Transcript, vol. IV, p. 120 (Trial, Dec. 22, 2000); Record on Appeal, tab 149 (Verdict Form, Dec. 21, 2000).

[3] After the verdict was rendered, Juror Number 8 sent a letter to the trial judge. *See* Appellant's Excerpts of Record, pp. 4-6 (Letter from Juror, Jan. 3, 2001). The court provided counsel with a copy of the letter. In the letter, the juror made references to two facts: first, the fact that Christmas was a few days away and, second, that the original manslaughter charge was dropped. Based on the contents of this letter, Castro filed a motion for a new trial on the ground of juror misconduct.

[4] On January 26, 2001, the trial court conducted a sealed evidentiary hearing wherein the court accepted testimony from the jurors regarding the two facts identified in Juror Number 8's letter. At the hearing, the trial judge asked each juror questions regarding their knowledge of the above-mentioned facts. Based on the jurors' testimony, the trial court granted Castro's motion for a new trial, finding that there was a reasonable possibility that the extraneous information received by the jury regarding the manslaughter charge could have affected the verdict, and that the Government failed to prove beyond a reasonable doubt that the information did not contribute to the verdict. Appellant's Excerpts of Record, pp. 7-14 (Decision and Order, May 2, 2001). This appealed followed.

II.

[5] This court has jurisdiction over this appeal from an order granting a new trial pursuant to Title 7 GCA §§ 3107(a) (1994) and Title 8 GCA § 130.20(a)(1) (1993).

III.

[6] The issue before the court is whether the trial court erred in granting a new trial on the ground that the jury's verdict may have possibly been affected by the jury's knowledge that Castro was acquitted of the manslaughter charge or that the manslaughter charge was dropped. We must first determine whether the trial court, in determining whether a new trial was warranted, erred in holding a hearing and admitting juror testimony. If no error is found, we must next determine whether a new trial was warranted based on the jurors' testimony.

A. Evidentiary Hearing.

[7] The Government argues that the trial court erred in conducting an evidentiary hearing regarding the existence of extraneous information after the verdict was rendered. Specifically, the Government argues that there is nothing in Juror No. 8's letter which reveals that the juror was apprised of extraneous information, thereby precluding the need for an evidentiary hearing. We disagree.

[8] A criminal defendant may be granted a new trial based on juror misconduct. One type of juror misconduct that forms grounds for a new trial is the possession of extraneous information. Under this circumstance, a defendant is entitled to a new trial if there is a reasonable possibility that the extrinsic information could have affected the verdict. *United States v. Keating*, 147 F.3d 895, 900, 901 (9th Cir. 1998); *United States v. Herrero*, 893 F.2d 1512, 1539 (7th Cir. 1990) (citation omitted), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990); *see also United States v. Cheek*, 94 F.3d 136, 144 (4th Cir. 1996); *United States v. Berry*, 92 F.3d 597, 600 (7th Cir. 1996). "When a colorable showing of extrinsic influence appears, a court must investigate the asserted impropriety." *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995)

(citation omitted). In other words, once the trial court becomes aware that the jury possessed extra-judicial information, it is required to hold a hearing to determine "the probable effect of the information on the jury, the materiality of the extraneous material, and its prejudicial nature." *People v. Palomo*, Crim. No. 96-00070A, 1997 WL 209048, at *5 (D. Guam App. Div. Apr. 21, 1997) (citation omitted), *aff'd by* 139 F.3d 907 (9th Cir. 1998); *see also Keating*, 147 F.3d at 898 (recognizing its previous remand to the trial court for the purpose of conducting an evidentiary hearing to determine whether the extraneous information prejudiced the verdict). Extraneous prejudicial information has been defined as a fact learned through "outside contact, communication, or publicity." *United States v. Tran*, 122 F.3d 670, 673 (8th Cir. 1997) (holding that the defendant's failure to testify was not extraneous prejudicial information); *United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991) (providing that extraneous information is new or "additional information applicable to the facts of the case" that the jury did not receive as a result of their presence at trial).

[9] "A judge's decision to hold a hearing to investigate alleged juror misconduct is reviewed for an abuse of discretion." *Wilson v. Vermont Castings, Inc.*, 170 F.3d 391, 395 n.5 (3d Cir. 1999). The admission of juror testimony for the purpose of impeaching the verdict is similarly reviewed for an abuse of discretion. *See People v. Evaristo*, 1999 Guam 22, ¶ 6.

[10] In this case, Juror Number 8's letter included the following statement: "We assumed that the dropping of the original, Felony 1 Manslaughter, charge was all the mitigation the law would allow." Appellant's Excerpts of Record, p. 6 (Letter from Juror, Jan. 3, 2001). We find that it was not unreasonable for the trial court to interpret this statement to mean that Juror Number 8 was given outside information that Castro was acquitted of the manslaughter charge or that manslaughter charge was dropped. The information in Juror Number 8's letter amounted to a colorable showing

of extraneous information because those facts were not presented during the trial.[1] Accordingly, the trial court did not abuse its discretion in conducting the evidentiary hearing. *Cf. United States v. Swinton*, 75 F.3d 374, 380-81 (8th Cir. 1996) (finding that because the information before the jury amounted to "extraneous prejudicial information," the trial court erred in failing to conduct an evidentiary hearing to determine whether a new trial was warranted).

B. New Trial.

[11] The next issue we must address is whether the trial court abused its discretion in granting Castro's new trial motion based on extrinsic information before the jury. *See J.J. Moving Servs., Inc., v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 at ¶ 14 (reviewing the grant of a new trial based on extraneous information for an abuse of discretion); *Palomo*, 1997 WL 209048, at *5.

[12] Under the Sixth Amendment of the United States Constitution, a criminal defendant has the right to an impartial jury, to confront witnesses, and to the assistance of counsel. *See Virgin Islands v. Gereau*, 523 F.2d 140, 150 (3d Cir. 1975). These rights may be compromised if the jurors possess information that was not presented at trial. *Berry*, 92 F.3d at 600; *see also Gereau*, 523 F.2d at 150-51; *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994). "[W]here jurors consider evidence, in the form of either fact or opinion, which has not been introduced in court, the confrontation and counsel rights of an accused are obviated as regards the particular evidence received." *Gereau*, 523 F.2d at 151. The tendency of particular evidence to cause impartiality in the minds of the jurors is often only capable of being tempered by the controls imposed by the court; therefore, it is "necessary that all evidence developed against an accused come from the witness stand in a public courtroom where

[1] As will be discussed later in this Opinion, we disagree with the Government's contention that the facts regarding the manslaughter charge were presented through Jury Instruction Number 33. Furthermore, the Government has not identified anywhere in the record where the jury was informed, either through the evidence or the instructions, that Castro was acquitted of manslaughter, or that the manslaughter charge was dropped.

there is full judicial protection of the defendant's right[s]." *United States v. Howard*, 506 F.2d 865, 868 (5th Cir. 1975) (quoting *Turner v. Louisiana*, 379 1965 U.S. 466, 472-73, 85 S. Ct. 546, 550 (1965)) (internal quotations omitted); *see also United States v. Bagnariol*, 665 F.2d 877, 884 (9th Cir. 1981) ("The sixth amendment demands that evidence material to the guilt or innocence of an accused be subject to judicial control and the rules of evidence."); *Gereau*, 523 F.2d at 151.

[13] Thus, it is axiomatic that "the jury's verdict must be based only upon the evidence as developed at the trial, and not on extrinsic facts." *Palomo*, 1997 WL 209048, at *5. A defendant is entitled to a new trial if there is a reasonable possibility that extraneous information could have affected the verdict. *See id.*, 1997 WL209048, at * 5; *see also Keating*, 147 F.3d at 901-02; *Herrero*, 893 F.2d at 1539 (citation omitted); *see also Cheek*, 94 F.3d at 144; *Berry*, 92 F.3d at 600; *Ruggiero*, 56 F.3d at 652.

[14] A presumption of prejudice arises when the jury has received extraneous information. *See Keating*, 147 F.3d at 901; *cf. Ruggiero*, 56 F.3d at 652 (holding that when an extraneous influence affected the jury, there arises a "rebuttable presumption of prejudice to the defendant"); *Swinton*, 75 F.3d at 382 n.6 ("[P]roof that one juror had informed other jurors of defendant's prior conviction would constitute a prima facie showing of prejudice.") (citation omitted); *Bibbins*, 21 F.3d at 16 ("[E]xtra-record information that becomes known to the jury is presumptively prejudicial."); *Gereau*, 523 F.2d at 150 ("[C]onsideration by the jury of extra-record facts about the case . . . [is] Prima facie incompatible with the Sixth Amendment.").[2] *But see United States v. Lloyd*, 269 F.3d

[2] The U.S. Supreme Court has similarly deemed "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury" to be "for obvious reasons, . . . presumptively prejudicial . . . ." *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451 (1954) (statement that one juror was approached with a bribe).

228, 238-39 (3d Cir. 2001) (applying the presumption of prejudice "only when the extraneous information is of a considerably serious nature"). The government bears the burden of showing that extraneous evidence did not contribute to the verdict. *Keating*, 147 F.3d at 902; *see also Ruggiero*, 56 F.3d at 652 (stating that the government must rebut the presumption of prejudice by "proving the harmlessness of the breach"); *Swinton*, 75 F.3d at 382.

[15] The test employed in determining whether a new trial is warranted, i.e., whether the government has met its burden to rebut the presumption, varies among jurisdictions. *Compare Berry*, 92 F.3d at 600, *with Ruggiero*, 56 F.3d at 653, *Herrero*, 893 F.2d at 1540-41, *Swinton*, 75 F.3d at 382. The trial court relied on the test as announced by the Ninth Circuit in the cases of *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) ("*Jeffries*"), and *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) ("*Dickson*"). In *Dickson*, the court analyzed the following factors in determining whether the government met its burden to show that the verdict was not affected by the extraneous information:

1. whether the material was actually received, and if so how;
2. the length of time it was available to the jury;
3. the extent to which the juror discussed and considered it;
4. whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and
5. any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.

Keating, 147 F.3d at 902 (quoting *Dickson*, 849 F.2d at 406). In *Jeffries*, the court discussed several other factors to consider, including:

1. whether the prejudicial statement was ambiguously phrased;
2. whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial;
3. whether a curative instruction was given or some other step taken to ameliorate the prejudice;

4. the trial context[3]; and
5. whether the evidence was insufficiently prejudicial given the issues and evidence of the case.

Id., 147 F.3d at 902 (citing *Jeffries*, 114 F.3d at 1491-92).

[16] The Government does not challenge, and we do not disapprove of, the trial court's reliance on the *Jeffries* and *Dickson* factors in deciding Castro's motion. The issue, therefore, is whether the trial court erred in determining that, under an analysis of the *Jeffries* and *Dickson* factors, there was a reasonable possibility that the verdict was affected by the extraneous information.

[17] A trial court's grant of a new trial based on extraneous information before the jury is reviewed for an abuse of discretion. *See J.J. Moving*, 1998 Guam 19 at ¶ 14; *see also Ruggiero*, 56 F.3d at 653; *United States v. Caldwell*, 83 F.3d 954, 955 (8th Cir. 1996); *Herrero*, 893 F.2d at 1539; *United States v. Duncan*, 598 F.2d 839, 866 (4th Cir. 1979); *Berry*, 92 F.3d at 600. Furthermore, this court "must accord special deference to the trial judge's impression of the impact of the alleged misconduct." *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002) (citation omitted). The abuse of discretion standard has been adopted, and deference is given the trial judge's finding, because the trial judge is in a better position, by virtue of his or her observation of the jury over the case, to determine the probabilities that that particular jury was prejudiced by particular extra-judicial information. *See J.J. Moving*, 1998 Guam 19 at ¶ 14; *Herrero*, 893 F.2d at 1539 (citation omitted); *Berry*, 92 F.3d at 600.

[18] We first note that an analysis of whether the extraneous information could have affected the verdict is objective rather than subjective. *See Keating*, 147 F.3d at 901-02; *Duncan*, 598 F.2d at

[3] An analysis of this factor includes a consideration of the *Dickson* factors. *Keating*, 147 F.3d at 902 n.5 (citing *Jeffries*, 114 F.3d at 1491-92).

866; *Swinton*, 75 F.3d at 382. In other words, in analyzing whether the information could have affected the verdict, courts do not rely upon statements by the jurors regarding the effect that knowledge of the information actually had on the verdict; rather, courts determine the likely effect on the verdict using a reasonable person or reasonable juror standard. *Bibbins*, 21 F.3d at 17; *Wilson*, 170 F.3d at 394. In fact, in accordance with Rule 606(b) of the Guam Rules of Evidence[4], in an inquiry into the validity of a verdict, a juror is only competent to testify as to two matters, extraneous prejudicial information and outside influence. *See* Title 6 GCA § 606 (1994).[5] Furthermore, under Rule 606(b), jurors may only testify regarding the *existence* of any extraneous information and the content of the information, but are incompetent to, and thus may not, testify as

[4] Rule 606(b) provides:

> (b) 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 what he would be precluded from testifying be received for these purposes.

Title 6 GCA § 606(b) (2000) (emphasis added).

[5] Traditionally, under the common law, jurors were incompetent to impeach the verdict; therefore, *all* juror testimony was inadmissible to impeach the verdict once rendered. *See Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 2746 (1987); *Gereau*, 523 F.2d at 148 (citing *McDonald v. Pless*, 238 U.S. 264, 267, 35 S. Ct. 783, [ ] (1915)). However, because a bright-line rule excluding juror testimony had the potential of allowing injustice, courts carved out an exception to the rule for certain types of juror testimony. *See Gereau*, 523 F.2d at 148-50; *McDonald*, 238 U.S. at 268-69, 35 S. Ct. at 785 ("[I]t would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice.") (citation omitted). Specifically, the emerging exception was that jurors are competent to give testimony regarding extraneous influences, and such evidence is therefore admissible in determining whether the defendant is entitled to a new trial. *See Tanner*, 483 U.S. at 117, 107 S. Ct. at 2746; *Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 53 (1892). The rule and exception are now embodied in Rule 606(b) of the Federal Rules of Evidence, which is mirrored by Rule 606(b) of the Guam Rules of Evidence. *See Tanner*, 483 U.S. at 121, 107 S. Ct. at 2748.

to their mental processes.[6] 6 GCA § 606(b); *Ruggiero*, 56 F.3d at 652; *Wilson*, 170 F.3d at 394; *Berry*, 92 F.3d at 601; *Duncan*, 598 F.2d at 866. In determining whether extraneous prejudicial material affected the verdict, thereby warranting a new trial, a judge's reliance on testimony regarding the jurors' mental processes amounts to an abuse of discretion. *See, e.g., Cheek*, 94 F.3d at 144.

[19] A review of the January 26, 2001 hearing reveals that the trial court did not elicit testimony regarding the jurors' thought processes. The court limited its questions to the existence and content of the extraneous information. Thus, testimony from the hearing was admissible under Rule 606(b). Furthermore, a review of the trial court's analysis of the *Jeffries* and *Dickson* factors in its Decision and Order reveals that the trial court did not, at any point in its analysis, rely on or cite to the jurors' subjective opinions regarding the effect of the information on the verdict. *See* Appellant's Excerpts of Record, pp. 7-14 (Decision and Order, May 2, 2001). The court's analysis was purely objective, and was therefore proper in this regard. *See Keating*, 147 F.3d at 902.

[20] Because the jurors' testimony in this case was admissible to impeach the verdict, we must next determine whether the trial court abused its discretion in granting Castro's motion based on that testimony. Specifically, we must review whether the trial court erred in its analysis of the jurors' testimony under the *Jeffries* and *Dickson* factors in arriving at its decision to grant Castro's motion for a new trial. As the trial court correctly pointed out, no one factor is determinative. *See id*.

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[6] Testimony regarding a juror's mental processes includes:

> (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations.

Ruggiero, 56 F.3d at 652.

[21] We will first review the lower court's analysis of the *Dickson* factors. The first four *Dickson* factors are "whether the material was actually received, and if so, how; the length of time it was available to the jury; the extent to which the juror discussed and considered it; whether the material was introduced before a verdict was reached, and if so at what point in the deliberations." *Id.* at 901. The trial court held that the first, second, third, and fourth of the *Dickson* factors weighed "heavily in favor of granting Defendant a new trial." Appellant's Excerpts of Record, p. 11 (Decision and Order, May 2, 2001). This conclusion was based upon its finding that "more than half of the jury panel was in actual receipt of the information regarding Defendant's acquittal; five jurors testified that there was some discussion surrounding this issue, and . . . [such discussion] ranged anywhere from 45 seconds to two hours; finally, the point in time at which the jurors recall the discussion occurred ranged from the beginning to the middle to the end." Appellant's Excerpts of Record, pp. 11-12 (Decision and Order, May 2, 2001).

[22] The trial court's findings are generally consistent with the jurors' testimony. Based on the testimony, it is clear that four jurors testified that they actually received specific information about the manslaughter charge.[7] Of those four, two jurors testified that they received information that the charge was dropped, and two testified that they received information that Castro was acquitted. Several of these jurors testified that they received the information from an outside source, including the newspaper or televised news, and from a friend or co-worker, and that they received the information prior to deliberating. Furthermore, three jurors testified that the jury actually discussed the information. Of the three, one juror testified that it was discussed for between 15 to 20 minutes,

[7] Seven jurors testified that they received information regarding the manslaughter charge. However, only four testified as to the content of that information.

and the other testified that it was discussed for about a half an hour, a significant amount of time considering that the jury reached a verdict on the negligent homicide charge after deliberating for only six hours. Finally, of these four jurors, one testified that the extraneous information was discussed but did not remember at what point, one testified that the information was discussed at the beginning and middle of the deliberations, and another testified that it was discussed at the end of the deliberations.

[23] The facts the jurors testified to, outlined above, tip the first four *Dickson* factors in favor of granting a new trial. While the jurors presented varied testimony regarding when the information was received and the extent to which the information was discussed, it is clear from the jurors' testimony that extraneous information was actually received prior to the verdict being rendered and that the jurors discussed the information for an undue amount of time while deliberating. *See Keating*, 147 F.3d at 902 (determining that the first four *Dickson* factors weighed in favor of a new trial because the juror actually received the extraneous information from another juror during the trial, the information was available to the jury during the trial and throughout deliberations, the information was available before the verdict was reached, and several jurors testified that the information was discussed in the jury room). Thus, we find that the trial court's analysis of these first four *Dickson* factors was not in error.

[24] The fifth *Dickson* factor requires a more detailed discussion. This factor requires the court to consider "any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict," which includes an analysis of the nature of the extrinsic evidence. *See Id*. In determining that the fifth *Dickson* factor weighed in favor of a new trial, the trial court relied on the fact that the jurors considered the extraneous information despite the court's

instruction, through Instruction No. 33, that they were not to consider the fact that the manslaughter charge was no longer before them. As the Government points out, noticeably absent from the court's analysis of the fifth *Dickson* factor was a discussion of the nature of the extraneous information.

[25] In its Brief, the Government repeatedly emphasizes that the extraneous information in this case was not prejudicial in nature. Specifically, the Government argues that unlike the cases cited by the trial court which involved information of the defendant's prior conviction or other prior bad acts, the extraneous information in this case would, if anything, help the defendant. To scrutinize the Government's argument, it is useful to reference other courts' findings on this issue.

[26] *Mattox v. United States*, 146 U.S. 140, 13 S. Ct. 50 (1892) is particularly useful in determining whether particular extraneous information is prejudicial in nature. In *Mattox*, the Supreme Court held that the extra-record information that the jurors possessed was prejudicial. *Mattox*, 146 U.S. at 150-51, 13 S. Ct. at 53. In that case, the defendant was on trial for murder. *Id*. at 141, 13 S. Ct. at 51. During deliberations, the jurors were read a newspaper article on the trial. The court held that statements in the article - that the defendant was previously tried for murder, that the evidence against him was very strong, that the prosecution's arguments were of such a nature that the defendant's friends gave up hope of an acquittal, and that the jury would probably return the verdict within an hour – were of such a damaging nature that they "could have no other tendency" than to be "injurious to the defendant." *Id*. at 150-51, 13 S. Ct. at 53. Based on this finding, the Court reversed the judgment, holding that the lower court erred in failing to receive and consider the jurors' affidavits' which described the extra-judicial material.

[27] As *Mattox* indicates, the prejudicial nature of extraneous information may be characterized by the tendency of the information to be injurious to the defendant. Several other courts have discussed the nature of the extraneous information, and have found that reversible prejudice occurs when there is "a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning." *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981).

[28] In the instant case, the information before the jury was that Castro was acquitted of the manslaughter charge or that the manslaughter charge was dropped. The question is whether this information has a tendency to be injurious to the defendant in that it directly and rationally results in a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reasoning. *See Mattox*, 146 U.S. at 150-51, 13 S. Ct. at 53; *Bagnariol*, 665 F.2d at 885.

[29] As stated earlier, the Government argues that the extraneous information in this case would, if anything, be helpful, rather than prejudicial, to the defendant. We disagree. The jury's knowledge of the trial court's disposition of the manslaughter charge may reasonably have had the effect of influencing the jury in its decision about Castro's guilt or innocence on the negligent homicide charge. A judge's decisions carry significant weight in the mind of the average juror. *See State v. Leep*, 569 S.E.2d 133, 146 (W. Va. 2002) ("The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts."). In reaching its verdict of guilt, the jurors may have attached significance to the fact that the trial judge dropped or acquitted Castro on the manslaughter charge, yet left the negligent homicide charge standing. It is not inconceivable for the jury to have thought that because the trial judge dropped

or acquitted Castro of the manslaughter charge, then Castro may be guilty of the lesser-included offense of negligent homicide that was eventually submitted to the jury. Furthermore, while the prejudicial impact of the extraneous information in this case may not be as obvious as in other cases dealing with this issue, we cannot say that the prejudicial impact on the question of Castro's guilt was the result of irrational reasoning. *See Berry*, 92 F.3d at 602 (deferring to the trial court's decision to grant the defendant's new trial motion notwithstanding that the unique facts of the case did "not necessarily give the impression of unfair prejudice").

[30] The trial court failed to articulate the prejudicial nature of the evidence; however, this omission was inconsequential considering our determination that the extraneous information in this case could have directly and rationally resulted in a prejudicial jury conclusion. Therefore, we find that the lower court did not err in concluding that the fifth *Dickson* factor weighed in favor of granting a new trial.

[31] In sum, the trial court did not abuse its discretion in finding that an analysis of the *Dickson* factors weighs in favor of granting Castro's motion for a new trial. We must next review the *Jeffries* factors. The first *Jeffries* factor is "whether the prejudicial information was ambiguously phrased." *Keating*, 147 F3d at 902. The trial court held that this factor weighed in favor of granting a new trial. Appellant's Excerpts of Record, p. 13 (Decision and Order, May 2, 2001). The trial court determined that seven jurors testified regarding the information, and that the information was not ambiguous. We find that the trial court's analysis of this factor was not in error. Several of the jurors testified that they had information regarding the manslaughter charge, but did not articulate exactly what information they had. Notwithstanding this, two jurors specifically testified that they received information that Castro was acquitted of the manslaughter charge. Two other jurors

specifically testified that they received information that the manslaughter charge was dropped. Thus, four jurors had specific unambiguous information regarding the manslaughter charge.

[32] The second *Jeffries* factor is "whether the extraneous information was otherwise admissible or merely cumulative of other evidence." *Keating*, 147 F.3d at 902. Finding that this factor weighed in favor of granting a new trial, the trial court concluded that Jury Instruction No. 33 indicated that the information was not to be considered and therefore was not otherwise admissible and was not cumulative of any other evidence. Appellant's Excerpts of Record, p. 13 (Decision and Order, May 2, 2001). The trial court's conclusion was proper. The fact that Castro was acquitted of the manslaughter charge would be inadmissible under Title 6 GCA §§ 401 and 403 (1995).[8] *See United States v. Gricco*, 277 F.3d 339, 352 (3d Cir. 2002) (holding that evidence of acquittals are inadmissible); *United States v. De La Rosa*, 171 F.3d 215, 219 (5th Cir. 1999); *United States v. Jones*, 808 F.2d 561, 566 (7th Cir. 1986); *United States v. Kerley*, 643 F.2d 299, 300 (5th Cir. 1981).

[33] Furthermore, we also find that the extraneous information was not cumulative of Jury Instruction No. 33. That instruction provided:

> The issues of the guilt of the defendant, Frank Roland Castro, as to Charge One, Manslaughter, and the first special allegation in charge one are no longer before you. In other words, as you will recall, initially when this case started there was a manslaughter charge and that has now been removed. Do not consider this fact for any purpose.

Transcript, vol. IV, pp. 103-04 (Trial, Dec. 22, 2000); Appellant's Excerpts of Record, p. 3 (Jury

[8] Title 6 GCA § 401 provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Title 6 GCA § 401 (1995). Title 6 GCA § 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Title 6 GCA § 403 (1995).

Instruction No. 33). Jury Instruction No. 33 merely informed the jurors that the manslaughter charge was removed. The instruction did not inform the jurors of the *reason* the charge was no longer before them, that is, because the trial judge acquitted Castro of that charge, or that the charge was dropped. Thus, we do not agree that Jury Instruction No. 33 apprised the jury of the information they received through extra-judicial sources. Therefore, because the fact that Castro was acquitted of the manslaughter charge or that the manslaughter charge was dropped was not admitted into evidence and was not revealed through Jury Instruction No. 33, that information was not cumulative of other information received at trial. *See Eslaminia v. White*, 136 F.3d 1234, 1239 (9th Cir. 1998) ("[T]o be truly considered cumulative, there must be an extremely close relationship between the extrinsic evidence and the evidence actually admitted.")

[34] The third *Jeffries* factor is "whether a curative instruction was given or some other step taken to ameliorate the prejudice." *Keating*, 147 F.3d at 902. The trial court held that because the court became aware of the jury misconduct *after* the jury returned the verdict, it could not and, in fact, did not take any step to ameliorate the prejudice. We agree with this reasoning.

[35] We recognize that through Jury Instruction No. 33, the jury was told that they were not to consider that the manslaughter charge was no longer before them in determining the remaining negligent homicide charge. However, we do not think that the instruction was curative in nature. The term curative implies that a situation has already arisen which is the object to be cured. Because the trial court was not aware that the jury received extraneous information until after the jury rendered its verdict, Jury Instruction No. 33 was not given in response to the extraneous information and was thus not a curative instruction. *See id.* at 903 (agreeing that the lower court did not "offer a curative instruction because the court was unaware that the jurors had discussed the extrinsic evidence.").

[36] Moreover, Jury Instruction No. 33 similarly cannot be seen as otherwise ameliorative because the instruction does not specifically address the acquittal or that the charge was dropped. Here, the jury was able to reach their verdict on the negligent homicide charge without any specific instruction that the extraneous information before them was not to be considered. While Jury Instruction No. 33 may have informed the jury not to consider anything about the previously "removed" manslaughter charge, we do not think the instruction was specifically tailored as an admonishment that the jury was not to consider the specific extraneous information the jury *already possessed* in this case. *See Berry*, 92 F.3d at 601 (agreeing with the trial court's determination that instruction given to the jury was not detailed enough considering the circumstances present in the case.) The instruction did not specifically inform the jury that the particular extraneous information they possessed was both inadmissible and irrelevant to the issue of guilt or innocence on the remaining charges. *See, e.g., United States v. Pinto*, 486 F. Supp. 578, 582 (E.D. Pa. 1980). Thus, Jury Instruction No. 33 was neither a curative instruction, nor did it help to ameliorate the prejudicial effect of the extra-judicial information. *See Untied States v. Bagley*, 641 F.2d 1235, 1241 (9th Cir. 1981) (characterizing the lower court's instruction, which was given after the parties became aware of the extra-judicial information and prior to the jury's verdict, as a curative instruction). Accordingly, because the lower court did not give a curative instruction or take any other step to ameliorate the prejudice, the third *Jeffries* factor weighs in favor of granting a new trial.

[37] The fourth *Jeffries* factor, the trial context, requires an analysis of the five *Dickson* factors. *See Keating*, 147 F.3d at 902 n.5. As discussed above, an analysis of the *Dickson* factors weighs in favor of granting Castro's motion for a new trial.

[38] The fifth and final *Jeffries* factor is "whether the statement was insufficiently prejudicial given the issues and evidence in the case." *Keating*, 147 F.3d at 903. The trial court also found this factor to weigh in favor of granting a new trial. Specifically, the court found that the extraneous information "centered around the same set of facts and events which also formed the basis of the charge that was before the jury at the time of the deliberation." Appellant's Excerpts of Record, p. 13 (Decision and Order, May 2, 2001). We agree. The manslaughter charge was submitted on the same facts which formed the basis for the negligent homicide charge. Thus, it would not be unreasonable to conclude that the jury may have used the extraneous information regarding the manslaughter charge in reaching their verdict on the negligent homicide charge.[9]

[39] Accordingly, we find that the trial court did not abuse its discretion in determining that analysis of the *Jeffries* factors weighs in favor of granting Castro's motion for a new trial.

[40] In sum, after analyzing the *Dickson* and *Jeffries* factors under the present facts, we find that the trial court was correct in determining that there was a reasonable possibility that the extraneous information could have affected the verdict and that the Government did not meet its burden to overcome the presumption of prejudice. Because we agree with the trial court's decision granting Castro's new trial motion, we find it unnecessary to discuss whether Castro was entitled to a new trial based on the jurors' knowledge that Christmas was a few days away.

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[9] We note that in determining whether the extrinsic evidence was sufficiently prejudicial given the issues, one relevant consideration is the strength of the evidence against the defendant, that is, whether the prejudicial information was harmless in light of the rest of the evidence. *See Keating*, 147 F.3d at 903. In *Keating*, the Ninth Circuit found that the evidence supporting the verdict was *not* overwhelming, which indicated that the introduction of extraneous evidence was probably not harmless error. *See id*; *see also United States v. Winkle*, 587 F.2d 705, 715 (5th Cir. 1979) (taking into account the strength of the evidence against the defendant in determining prejudice caused by juror misconduct); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981) ("The strength of the Government's case, however, has a bearing on the issue of prejudicial error."). In the instant case, the Government's challenge to the lower court's decision does not reference the strength of the evidence against the Castro.

IV.

[41] In accordance with the foregoing, we find that there was reasonable possibility that the extraneous information before the jury could have affected the verdict. Therefore, the trial court did not abuse its discretion in granting Castro's motion for a new trial. Accordingly, we **AFFIRM** the lower court's decision and **REMAND** the case for further proceedings not inconsistent with this opinion.

SIGUENZA, J., Dissenting:

[42] I disagree with the majority's opinion and therefore respectfully dissent. I believe that the trial court committed a clear error of judgment in the conclusion it reached after weighing the *Jeffries* and *Dickson* factors. *See People v. Tuncap*, 1998 Guam 13, ¶ 12 (stating that a trial court abuses its discretion when it commits a clear error of judgment in the conclusion it reached upon a weighing of relevant factors). As discussed below, it is my view that many of the *Jeffries* and *Dickson* factors, when considered in light of the facts of this case, clearly weigh against the grant of a new trial in this case.

[43] As the majority states, a criminal defendant is entitled to a new trial if there is a reasonable possibility that extraneous information could have affected the verdict. *People v. Palomo*, Crim. No. 96-00070A, 1997 WL 209048, at *5 (D. Guam App. Div. Apr. 21, 1997), *aff'd by* 139 F.3d 907 (9th Cir. 1998). Thus, the starting point of any analysis under this test is whether the jurors had knowledge of extrinsic information. Evidence is only considered extrinsic if it was not received at trial, either through the evidence presented or in the instructions. *See Thompson v. Borg*, 74 F.3d 1571, 1574 (9th Cir. 1996) (stating that juror misconduct occurs when a juror introduces into the jury's deliberation a matter which was not in evidence or in the instructions); *see also United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991) (defining extraneous information as "additional information applicable to the facts of the case" that the jury did not receive as a result of their presence at trial).

[44] According to the testimony elicited from the jury at the January 26, 2001 hearing, seven jurors testified that they had knowledge about the manslaughter charge. Of those seven, three did not testify as to what information they had. Thus, because we do not know exactly the content of the information that was before these three jurors regarding the manslaughter charge, it cannot be

concluded that these jurors in fact possessed extraneous information. Upon review of the hearing transcripts, it is evident that only four jurors testified as to specific facts relating to the manslaughter charge. Of these four jurors, two testified that they received information that Castro was *acquitted*, and the other two testified that the manslaughter charge was *dropped*. The question is whether these two facts were "extraneous" information as defined above.

[45] With regard to the first fact, that Castro was acquitted of the manslaughter charge, I agree with the majority that this information was not revealed during the trial. However, I disagree that the other fact, that the manslaughter charge was dropped, was extraneous information. The jury was presented with the indictment listing both the manslaughter and negligent homicide charges, but was later asked to render a verdict only as to the latter. This circumstance alone informed the jury that the manslaughter charge was dropped. Moreover, as the Government points out, the jurors were given information regarding the manslaughter charge in Jury Instruction No. 33, which provided:

> The issues of the guilt of the defendant, Frank Roland Castro, as to Charge One, Manslaughter, and the first special allegation in charge one are no longer before you. In other words, as you will recall, initially when this case started there was a manslaughter charge and that has now been removed. Do not consider this fact for any purpose.

Transcript, vol. IV, p. 120. Clearly, Jury Instruction No. 33 also informed the jury that the manslaughter charge was dropped. Therefore, because it was received at trial, the fact that the manslaughter charge was dropped was not extraneous information, and should not have been considered in determining whether to grant Castro's new trial motion based on juror misconduct.

[46] Thus, the only unambiguous extraneous information before the jury was the fact that Castro was acquitted of the manslaughter charge. As provided earlier, only two jurors testified as to this specific fact. Of those two, one indicated that the acquittal was not discussed at any point during deliberations, and the other indicated that it was discussed but did not recall when it was discussed

or for how long it was discussed. Based on the testimony of these two jurors, several of the relevant factors which would weigh in favor of a new trial were not met. Specifically, it is unclear how long the information was available to the jury, how long the jury discussed it, if at all, and at what point in their deliberations the acquittal was discussed.

[47] Furthermore, while I agree that the information regarding the acquittal was probably inadmissible and not cumulative, I disagree with the majority's opinion that any alleged prejudice resulting from the information was not ameliorated. The trial court specifically instructed the jury that the fact that the manslaughter charge was not before them could not be considered for any reason in reaching a verdict on the negligent homicide charge. Thus, the jury was told that *any* information they possessed regarding the manslaughter charge was irrelevant to the remaining charges. While the instruction was not necessarily "curative" as defined by the majority, the instruction was tailored specifically enough to accomplish what a curative instruction would have accomplished; that is, to precisely warn the jury not to consider the manslaughter charge in reaching its verdict on the remaining negligent homicide charge.

[48] Moreover, it is hard to see how the fact of the acquittal is prejudicial in nature. As stated by the majority, an analysis of whether a new trial should be granted requires the consideration of "any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict" including the *nature* of the extrinsic evidence. *See United States v. Keating*, 147 F.3d 895, 902 (9th Cir. 1998). A test that focuses on the "nature" of the information necessarily implies that there are varying degrees of possible prejudice, depending on the type of information before the jury. *See United States v. Bagnariol*, 665 F.2d 877, 887 (9th Cir. 1981) (recognizing that there is a "continuum in which jury misconduct fails to affect the jury's verdict"). As indicated by the majority, in determining whether certain extraneous information is prejudicial,

courts look to see whether there is a rational connection between the extraneous information and a prejudicial jury conclusion. *Id*. at 885.

[49] In cases where courts have found that a new trial is warranted, the information before the jury often relates to the defendant's prior bad acts or propensity to commit a crime. *See id*. at 885-86 (summarizing cases where courts found the extraneous information to be prejudicial in nature). *See Mancuso v. Olivarez*, 292 F.3d 939, 953 (9th Cir. 2002) (recognizing that the type of information which generally warrants a finding of sufficient prejudice to overturn the verdict includes "evidence of the facts surrounding a defendant's prior conviction, bad reputation, or propensity to violate the law."). With this type of evidence, there is clearly a rational connection between the evidence and the prejudicial jury conclusion. Specifically, information regarding a defendant's criminal history, or other similar information which reflects negatively on the defendant's character, can easily be seen as prompting a prejudicial jury conclusion as to the defendant's guilt or innocence as to the charges before the jury. *See United States v. Bagley*, 772 F.2d 482, 488 (9th Cir, 1985) (commenting on "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again").

[50] In cases where the prejudicial impact was less obvious, such as cases dealing with other types of extraneous information, the jury's verdict has only been overturned where the court has concluded that the extraneous information was somehow related to the charges or the conduct at issue in the trial. *See Farese v. United States*, 428 F.2d 178, 182 (5th Cir. 1970) (finding that the jury's discovery of cash inside the pocket of a shirt which was admitted into evidence resulted in a "strong probability of prejudice to the defendant then on trial upon a charge involving unlawful monetary gain"); *United States v. Littlefield*, 752 F.2d 1429, 1432 (9th Cir. 1985) (determining that the defendant was entitled to a new trial where a juror brought a copy of *Time* magazine into the jury

room which contained an article relating to tax fraud schemes similar to the charges against the defendant). Even in these cases there was a rational connection between the extraneous information and a jury's conclusion of guilt. I have not found any case where the jury's verdict was overturned based on the extraneous information present in this case.

[51] Here, the majority agrees with Castro's argument that the extraneous evidence before the jury was prejudicial in that, upon learning it, the jury could have thought that because Castro was acquitted of the manslaughter charge, Castro must therefore be guilty of negligent homicide. While I agree that this jury conclusion is plausible, I cannot agree that such conclusion is the result of rational reasoning. *See Bagnariol*, 665 F.2d at 888 (declining to find that the extraneous material affected the verdict because such conclusion would require an improper "assumption that the jury members reached an irrational conclusion, lacking in common sense logic"). Simply put, unlike evidence which is probative of guilt, such as the defendant's prior bad acts or other evidence specifically related to the elements required to convict or the conduct at issue, the fact that Castro was acquitted on the greater offense of manslaughter has no *rational* bearing on the issue of Castro's guilt as to the lesser-included negligent homicide charge. *See United States v. Mills*, 280 F.3d 915, 923 (9th Cir. 2002) (determining that although there was a risk that the extraneous information may have had a prejudicial effect, "the risk was slight and did not distinguish th[e] case from most others"). The information about the acquittal in this case does not relate to the elements required to convict on the remaining charge or the conduct at issue.

[52] It is not at all uncommon that a jury will be presented with an indictment with several charges, but are then required to render a verdict on fewer charges than those originally presented. We cannot condone a practice of readily overturning the verdict in these cases on the belief that the verdict was affected by the fact that the more egregious charges were dismissed. The majority's

attempt to do so in this case establishes a dangerous precedent in this jurisdiction.

[53] Courts have historically trusted that the jurors would act sensibly and in accordance with legal principles and instructions given by the court. The dangers inherent in substituting the court's judgment for that of the jury are apparent, and courts have refused to do so even where the circumstances would seem to warrant such an inquiry into the verdict. As astutely acknowledged by the Fifth Circuit,

> "The essential feature of a jury lies in the interposition between the accused and his accuser of the *common sense judgment of a group of laymen*." To preserve that essential feature, the law trusts that a jury will understand and follow the law as instructed, and it indulges the jury when apparent gaps in understanding or logic later surface. A jury, for example, may render logically inconsistent verdicts on different counts of an indictment or as to different co-defendants. It is not the duty of the court "to unravel the ratiocinations of the jury's collective logic." Nor may a court speculate that a verdict may have been the result of compromise, mistake or even carelessness. "Juries may indulge in precisely such motives and vagaries." If courts were permitted to retry such verdicts, the result would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave. This would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees.

See United States v. D'Angelo, 598 F.2d 1002, 1005 (5th Cir. 1979) (emphasis added) (internal footnotes and citations omitted).

[54] I am cognizant of the argument that this case is distinguishable from cases where courts refuse to inquire into the verdict, because, in the case *sub judice*, the jury possessed extra-judicial information. The majority, however, does not attribute significance to the proper remedy in such circumstance, which is *not* to readily overturn the verdict upon a finding that there is *any* possibility that the verdict was affected, but rather, to grant a new trial only after conducting an objective analysis to determine whether there is a *reasonable* possibility that the verdict could have been affected by the information. *See United States v. Herrero*, 893 F.2d 1512, 1539 (7th Cir. 1990) ("[A] new trial is not required automatically whenever a jury is exposed to material not properly in

Gevidence. Rather, a new trial is required only when there is a 'reasonable possibility' that the material affected the jury verdict.") (citation omitted), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990).

[55] After reviewing the relevant factors, the distinction between this case and most others loses its significance specifically because, in this case, it is unclear how long the jury was in possession of the extraneous information, whether the information was discussed for any significant length of time if it was discussed at all, and at what point during the trial the information was discussed. Moreover, the information the jury possessed in this case could not rationally lead to a prejudicial jury conclusion, and any irrational jury conclusion which could possibly have been reached was prevented at the outset by Jury Instruction No. 33.

[56] Overall, while I agree that there was a possibility that the verdict was affected by the extraneous information regarding the acquittal, it is my opinion that, under an analysis of the relevant factors, such possibility was extremely remote, and was thus not a *reasonable* possibility. I think that the trial court abused its discretion in overturning the jury's verdict and concluding that Castro was entitled to a new trial. Therefore, I respectfully dissent.