IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Respondent,	)	1 CA-CR 02-0974PRPC
v.	)	DEPARTMENT B
DAVID WAYNE KIEHLE, Petitioner.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court) **FILED 3-11-04**

Appeal from the Superior Court in Maricopa County

(Rule 32.9(c), Arizona Rules of Criminal Procedure

Cause No. CR 99-091679

The Honorable James H. Keppel, Judge

REVIEW GRANTED; RELIEF GRANTED; REMANDED

Richard M. Romley, Maricopa County Attorney — Phoenix
By Arthur Hazelton, Deputy County Attorney
Attorneys for Respondent

Thomas A. Gorman — Flagstaff
Attorney for Petitioner

S U L T, Judge

1 Petitioner David Wayne Kiehle requests this court to review an order of the trial court summarily dismissing his petition for post-conviction relief. For the following reasons, we grant review, grant relief and remand to the trial court for further proceedings.

BACKGROUND

2 Petitioner was charged with first-degree murder of his wife. His defense at trial was that his wife committed suicide. On May 2, 2000, the jury found Petitioner guilty as charged and he was sentenced to a term of natural life in prison. Petitioner appealed his conviction and sentence but they were affirmed by this court in *State v. Kiehle*, 1 CA-CR 00-0571 (Ariz. App. June 21, 2001) (mem. decision).

3 Through counsel, Petitioner filed a petition for post-conviction relief. He first alleged he was denied his Sixth Amendment right to a fair trial because of juror misconduct. He claimed a female juror conducted an experiment at home to disprove the defense theory of suicide and reported the results to the other jurors. He claimed the jury improperly considered this information during its deliberations and argued that because of jury misconduct, he was entitled to a new trial.

4 Secondly, he alleged he was denied his Sixth Amendment right to effective assistance of trial counsel. He claimed trial counsel was aware of the alleged juror misconduct but failed to file a motion for new trial or motion to vacate judgment on this basis.[1]

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[1] Defense counsel did file a motion for new trial alleging error in the admission of certain "other act" evidence and a prejudicial violation of the rule of exclusion of witnesses.

5 Petitioner attached to his petition an affidavit of Juror L.F. The affidavit stated that during jury deliberations, a female juror advised the other jurors that while at home she attempted to recreate the shooting as a self-inflicted wound using a water pistol but was unable to position her arm and hand to simulate a self-inflicted wound to the head.

6 Petitioner also attached affidavits from Petitioner's father, sister and mother. They all alleged that two or three days after the jury verdict, they were present together in defense counsel's office and counsel told them that after the jury returned its verdict, one of the female jurors telephoned him. This juror told counsel that she tried to simulate the defense version of the event at home with her son's water pistol but could not physically recreate a self-inflicted wound as proposed by the defense. Defense counsel also reported to Petitioner's family members that the juror admitted she discussed the experiment with the other jurors who likewise rejected the defense of suicide. According to the three affiants, defense counsel said he would try to locate the juror and "follow up from there as appropriate", but failed to do so.

7 The trial court summarily dismissed the petition for post-conviction relief. Petitioner filed a timely petition for review in this court.

ANALYSIS

¶8 We review the grant or denial of post-conviction relief for an abuse of discretion. *State v. Wiley*, 199 Ariz. 242, 244, ¶ 4, 16 P.3d 803, 805 (App. 2001). A defendant is entitled to an evidentiary hearing if the petition presents a colorable claim, "that is a claim which, if defendant's allegations are true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). "When doubt exists, 'a hearing should be held to allow the defendant to raise the relevant issues, resolve the matter, and to make a record for review.'" *Id.* (quoting *State v. Schrock,* 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)). The burden of proof is on the Petitioner to prove the allegations of his petition by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(c).

Juror Misconduct

¶9 The affidavit of Juror L.F. supports Petitioner's claim that a juror conducted an experiment at her home using a water pistol and attempted to recreate the defense theory of how the victim's wound was inflicted. This juror shared the information with the other jurors during deliberations.

¶10 The State claims that no misconduct occurred because the jurors did not consider extrinsic evidence. It argues that any of the jurors could have attempted the "simulation" or "re-enactment" and that this juror's "conduct [was] nothing

more than thinking about the case by herself without any outside influence." Assuming the allegations of the affidavit are true, we disagree.

11 "Extrinsic information is information obtained from or provided by an outside source, whether admissible but not admitted at trial or inadmissible for some legal reason." *State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996). Our supreme court has also stated:

> The Sixth and Fourteenth Amendment[s] guarantee the right to counsel and to confront and cross-examine the witnesses against the accused. When a juror receives evidence from an outside source the defendant is denied the right to confront and cross-examine his accusers about that extrinsic evidence.

State v. Glover, 159 Ariz. 291, 293, 767 P.2d 12, 14 (1988). (citations omitted).

12 In *Glover,* after consuming alcohol and prescription drugs over several hours, the defendant shot a victim and was convicted of aggravated assault. *Id.* at 292, 767 P.2d at 13. During deliberations, the jury foreman consulted his wife, who had medical training, about the effect of taking the alcohol and drugs at the same time. *Id.* at 293, 767 P.2d at 14. His wife advised him that the defendant could not have taken the medication and alcohol together "because he would have been dead if he had done so." *Id.* In addition, one juror reported she had consulted with someone in law enforcement about the

effect of a hung jury and was told that the defendant would not be retried and "[h]e would walk out a free man." *Id.* The supreme court found that the receipt of this "extrinsic information by the jury denied defendant any ability to cross-examine, confront or explain the matter." *Id.* at 294, 767 P.2d at 15. This constituted reversible jury misconduct and the court ordered a new trial. *Id.*

13 Apropos to this case, in *State v. Ferreira*, 152 Ariz. 289, 293-94, 731 P.2d 1233, 1237-38 (App. 1986), the court discussed the issue of experimentation as a possible form of jury misconduct. In that case, the victim of a sexual assault told an investigator that her assailant wore a brown and green plaid scarf. *Id.* A brown and grey plaid scarf was taken from the defendant and admitted into evidence at trial. *Id.* During deliberations, the jurors examined the scarf under a variety of lighting conditions. *Id.* at 294, 731 P.2d at 1238. The defendant claimed that this experimentation resulted in "new evidence not properly admitted at trial." *Id.*

14 The court reiterated the principle that "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of

cross-examination, and of counsel." *Id.* (citations omitted). The court further stated that:

> Creation of extraneous evidence by the jury through unauthorized tests violates that mandate and requires retrial. However, not every perusal by jurors of tangible exhibits creates new evidence. If the jurors are to accomplish their function of evaluating evidence properly admitted they ought not be prohibited from scrutinizing exhibits, even if their inquiry is more critical than that conducted in open court. So long as the inquiry does not differ in character from that made when the evidence was offered, the jury's examination does not subject defendant to any risks of inculpation against which he has not already had opportunity to protect himself. Examination is of a different character when it introduces "extra-record facts" and inferences not reasonably inferable from properly admitted testimony and evidence.

Id. (citations omitted). The court concluded that examining the scarf in different lighting conditions was "permissible as a closer scrutiny of the exhibit." *Id.*

15 In contrast, some jury experiments have been found to warrant reversal and a new trial. For example, in *People v. Castro*, 229 Cal. Rptr. 280, 281 (1986), the defendant was convicted of destroying jail property, rioting and arson. The state's case relied on one prison guard's identification of the defendant using a set of binoculars. *Id.* During deliberations, one juror conducted an experiment with a particular powered set of binoculars at a certain distance under particular lighting conditions and reported the findings to the other jurors. *Id.*

at 282. The *Castro* court noted that there was no showing that the binoculars used by the juror were similar to the ones used by the police officer or that the lighting conditions or distances involved were similar to the conditions present when the officer observed the defendant. *Id.* at 282-83. The court held that this attempt to verify the sensory perceptions of a key witness introduced new evidence not admitted at trial, constituted jury misconduct and required a new trial. *Id.* at 285.

16 In *People v. Brown*, 399 N.E.2d 51, 52 (N.Y. 1979), the defendant was tried for driving an escape vehicle in a robbery. The key prosecution witness, a police officer, testified he identified the defendant's face through the passenger window of the police van for the duration of a red light. *Id.* During deliberations, one juror conducted a visibility test from the passenger seat of her own Volkswagen van which was designed differently than the General Motors van used by the police officer. *Id.* The juror conveyed to the jury that based on this test, it was possible to observe the face of a driver in an adjacent vehicle. *Id.*

17 The New York Court of Appeals rejected the notion that the juror simply drew on common, everyday experience to test the officer's veracity. *Id.* at 53. Rather, it found that the test was "conscious, contrived experimentation," was directly

material to a point at issue in the trial, and placed evidence before the jury which could not have been admitted at trial "because it was not comparable in location, lighting, or type of van." *Id.* at 53-54. The court concluded that the jury misconduct prejudiced the defendant and warranted a new trial. *Id.* at 54.

18 In this case, the water pistol allegedly used by the female juror was not an exhibit admitted at trial and was therefore extrinsic evidence. There is nothing to suggest that the juror's water pistol was similar to the weapon used in the crime, either as to shape, size, weight or any other relevant characteristics. The experiment conducted by the juror and the results thereof constituted "extra-record facts" which were not properly before the jury. The experiment was central to the Petitioner's defense that the victim committed suicide. And the experiment was unlike the permissible scrutiny of the scarf in *Ferreira* in that only one juror conducted the experiment, it was done outside the presence of the remaining jurors who therefore could not independently judge its validity, and the results were conveyed by a hearsay report of the experimenting juror.

19 Our supreme court has held that if the jury improperly receives extrinsic evidence, a defendant is entitled to a new trial if "'it cannot be concluded beyond a reasonable doubt

that the extrinsic evidence did not contribute to the verdict.'" *State v. Hall*, 204 Ariz. 442, 447, ¶ 16, 65 P.3d 90, 95 (2003)(citation omitted). The court further held that:

> juror misconduct warrants a new trial if the defense shows actual prejudice *or if prejudice may be fairly presumed from the facts.* Once the defendant shows that the jury has received and considered extrinsic evidence, prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict.

Id. (citations omitted).

20 We recognize that because this trial occurred in May of 2000, it may not be possible to reassemble and question every juror. However, this does not prevent Petitioner from obtaining an evidentiary hearing. For example, in *State v. Miller*, 178 Ariz. 555, 557, 875 P.2d 788, 790 (1994), after the close of evidence, the trial judge excused an alternate juror. After being excused, the alternate juror left a note on the windshield of a remaining juror, Tucker, which stated, "[h]e's guilty" or "[m]y vote is guilty." *Id.* The prosecutor learned of the note during post-trial conversations with the jurors. *Id.* Tucker told the prosecutor that the note had no effect on his decision and the other jurors told the prosecutor that they only found out about the note after reaching the verdict. *Id.*

21 After the prosecutor informed defense counsel about the note, counsel filed a motion for new trial. *Id.* The state opposed the motion on the basis that none of the jurors were influenced by the note in reaching its verdict. *Id.* The trial judge refused to take testimony or question the jurors and denied the motion for a new trial. *Id.*

22 Our supreme court disagreed and held that the trial court abused its discretion in refusing to hold a hearing on the defendant's claim of jury misconduct. *Id.* at 558, 875 P.2d at 791. The court stated that, "[w]ithout questioning the jury, the court could not have known whether other jurors knew of the note or received similar communications from the alternate, and in either case, whether they were improperly influenced by him." *Id.* at 557, 875 P.2d at 790. The court went on to state that:

> The difficulty here is in fashioning an appropriate remedy, as this trial occurred in June and July of 1990. The arguments against ordering a hearing at this late date are understandable. Memories fade with time. Assuming jurors can be reassembled, testimony obtained now might be suspect, and its reliability subject to challenge . . . .
>
> We have previously recognized that in some situations, lengthy delay necessitates a new trial. Other courts have come to similar conclusions in juror misconduct cases.

Id. at 557-58, 875 P.2d at 790-91 (citations omitted).

23 The court acknowledged a contrary view in which courts have found that despite delay, the appropriate remedy is to hold an evidentiary hearing, rather than to automatically grant a new trial. *Id.* at 558, 875 P.2d at 791. The court adopted this latter view, concluding that:

> While the delay in this case may have rendered a productive hearing at this point unlikely, the lower court is in the best position to determine if the jurors can be reassembled and whether their memories are sufficiently reliable to ensure that this defendant received a fair trial. Justice Corcoran's special concurrence suggests that it may not be necessary for the trial judge to reassemble and interrogate *all* of the jurors. We leave that question for another day, noting only that the improper influence of even one juror taints a verdict.

Id. (citations omitted). Based on the record before this court and the legal standards set forth above, we find Petitioner has set forth a colorable claim of juror misconduct which must be addressed by the trial court.

Ineffective Assistance of Counsel

24 To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness as defined by prevailing norms and that the deficient performance resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 690-92 (1984). Although great deference is given to counsel's performance, counsel's decisions and strategies must be

"within the range of professionally reasonable judgments." *Id.* at 689, 699. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

1. *Deficient Performance*

25 Counsel's performance may be deficient for failing to "properly investigate or utilize vital evidence" in connection with the filing of a motion for new trial. *State v. Fisher*, 152 Ariz. 116, 119-20, 730 P.2d 825, 828-29 (1986). In support of his claim that counsel's performance was deficient, Petitioner has attached affidavits from three family members who claim that counsel knew of the possibility of juror misconduct but failed to investigate the truth of this allegation and to file an appropriate post-trial motion.

26 We note that Petitioner did not include an affidavit of defense counsel in his petition for post-conviction relief. However, our supreme court has recognized that in some situations, third-party affidavits may give rise to a colorable claim in post-conviction relief proceedings. *State v. Krum*, 183 Ariz. 288, 293-294, 903 P.2d 596, 601-02 (1995). The court stated that "[c]ircumstances will of course vary, but if [a third-party] affidavit appears particularly credible or reliable, or if other evidence tends to support the

affidavit . . . a trial court should order an evidentiary hearing." *Id.* at 294, 903 P.2d at 602.

¶27 The third-party affidavits in this case are detailed and factual, rather than conclusory. Although we recognize the affidavits are from Petitioner's family members who have an inherent bias, we believe the affidavits appear on their face to be sufficiently "credible or reliable" to raise a colorable claim of deficient performance.

2. *Prejudice*

¶28 Not only must Petitioner prove deficient performance, he must prove prejudice. *Fisher*, 152 Ariz. at 120, 730 P.2d at 829. In this context, Petitioner must show that if counsel had filed a post-trial motion on the ground of jury misconduct, there is a reasonable probability that the motion would have been granted and Petitioner would have been granted a new trial. *See id.* Prejudice in this context is necessarily tied to whether there was juror misconduct as there is a rebuttable presumption of prejudice if Petitioner proves the jury received and considered extrinsic evidence in reaching its verdict. *See Hall*, 204 Ariz. at 447-48, ¶¶ 16-17, 65 P.3d at 95-96. On this basis, we find Petitioner has raised a colorable claim of prejudice.

CONCLUSION

29 Based on the record, we do not conclude there was juror misconduct or that counsel was ineffective. However, we find Petitioner has raised a colorable claim for relief on these issues and is entitled to an evidentiary hearing pursuant to Rule 32.8(a). Accordingly, we grant review, grant relief and remand the matter to the trial court for further proceedings.

James B. Sult, Judge

CONCURRING:

Patrick Irvine, Presiding Judge

Daniel A. Barker, Judge