

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

ROCKINGHAM COUNTY  
SUPERIOR COURT  
ATTORNEYS OFFICE

NOTICE OF DECISION

2008 SEP -5 P 3:00

September 5, 2008

County Attorney Office  
PO Box 1209  
Kingston NH 03848-1209

**State v. Gurrie Fandozzi**

Docket #'s:

07-S-1825; 1826; 1827; 1828; 1833; 1840; 1843

Enclosed please find a copy of the Court's Order dated 9/04/2008 relative to:

**Court Order**

Raymond W. Taylor, Clerk  
P.O. Box 1258  
Kingston, NH 03848-1258  
603-642-5256

cc: Steven G Shadallah  
Mark L Sisti

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

The State of New Hampshire

v.

Gurrie Fandozzi  
Docket Nos. 07-S-1825-1823, 1833, 1843

ORDER ON DEFENDANT'S MOTION TO SET ASIDE VERDICTS

On November 19, 2007, the defendant was convicted of 7 counts of First Degree Assault in connection with the assault of his 6 month old son. Shortly thereafter, the State notified the court that it had received contact from a juror and it provided the content of the communication to the court for in camera review. After reviewing the juror communication, the court ordered that it be disclosed to the defendant. As a result, the defendant filed this Motion to Set Aside the verdicts alleging juror misconduct. After conducting individual voir dire with each of the jurors, and after considering the arguments of counsel, the court DENIES the defendant's motion for the reasons contained in this order.

The defendant was originally charged with 26 counts of First Degree Assault, each alleging injury to a separate and distinct bone of the child's body. After deliberations, the jury returned not guilty verdicts with respect to 19 of the charges and guilty verdicts with respect to the remaining 7 charges. Those seven charges alleged injury as follows:

1. Right 5<sup>th</sup> posterior rib
2. Right 6<sup>th</sup> posterior rib

3. Right 7<sup>th</sup> posterior rib
4. Right 8<sup>th</sup> posterior rib
5. Left 5<sup>th</sup> posterior rib
6. Left 7<sup>th</sup> posterior rib
7. Sacral Vertebrae

In response to the prosecutor's public comments that she was confused by the jury's verdicts, one of the jurors contacted the county attorney's office by e-mail, which stated in pertinent part as follows:

I was juror #4 on this case. The news media has said you may be a little baffled as to our decision. Let me first say you and your team did a great job prosecuting this case. Do not look at the verdict as anything but a win. Mr. Fandozzi will be going away for many years.

I would be very willing to discuss our rationale for the verdict as we were very concerned about the message our verdict may sent (sic). Please feel free to call me anytime and I will do my best to answer your questions. . . .<sup>1</sup>

After waiting the required 30 days from the verdict, an investigator from the county attorney's office called juror #4 and asked him to clarify his comments in the email. In response to the investigator's questions, the juror stated in pertinent part as follows:

[H]e said that they were having a problem with the fact that this was a circumstantial case and that they were struggling with the fact that Mrs. Fandozzi might have done this. He went on to say that

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<sup>1</sup> The email also indicates that the court "told us we as Jurors have every right to write to the Probation Department as part of the presentencing process." The defendant makes a passing reference to the remark claiming that if the remark was made "before the verdict, a compromise verdict must be found." To ensure the record is clear, after the verdict was delivered in open court, the presiding justice thanked the jury for it's service. A juror then asked if members could have input into the sentence, and the court indicated that individual jurors could not talk to the court directly, but could write a letter to the probation department. Nothing about this procedure violates the defendant's constitutional rights.

there was nothing that was presented to them that would indicate she didn't do it. . . .

[H]e said that there were "questions in their minds as to who actually did this" and they were "not convinced 100% that he did it." He told me that the jury felt that the parents were "in cahoots," and that whoever did this, the other one was covering up. . . .

He said that there was some discussion by some members of the jury that there was no way they were going to find this guy guilty of all the charges and force him to spend the rest of his life in prison on a circumstantial case. [The juror] said that in the end, they "compromised" and found him guilty of a few of the charges, leaving the other charges on the table in the event we wanted to prosecute the wife. He then told me that "if he didn't do it, then he's covering up for her and that at least they got one of them."

After interviewing juror #4, the investigator contacted five other jurors and asked them similar questions. The first juror explained that during preliminary deliberations, the jury considered all 26 charges together to determine the defendant's guilt or innocence. When they were unable to resolve the case after one day, they decided to review each charge separately and considered each bone one at a time. Using this strategy, the jury "was unanimous that Mr. Fandozzi caused the 7 injuries they eventually found him guilty of." The juror told the investigator that while some of the jurors believed Mrs. Fandozzi could have caused some of the injuries, they all agreed that only the defendant could have caused the injuries alleged in the 7 verdicts rendered against him.

The second juror provided a similar explanation. She told the investigator that after the jury attempted to resolve all 26 indictments together, it focused on one indictment at a time. In this way, "the jurors eventually came to a compromise and agreed on the 7 charges of guilty." She further explained that "they took each individual bone and discussed it, and then took groups of bones

and based on the evidence presented, were able to all agree that [the defendant] caused this damage to these specific bones.”

The third juror told the investigator that:

[T]he jury laid out all of the individual counts and used the expert's timeline of when these injuries could have occurred. He told me that they pretty much put aside the injuries that could have been caused by either parent, and came up with the 7 that they all agreed were caused by the father. He said they narrowed down these charged [sic] and focused on them.

When the investigator asked the juror whether the jury “compromised” in reaching its verdict, the juror explained that, “the compromise was an effort to get everyone listening to all points of view, and that they didn't want anyone just hunkering down in the corner not willing to listen to another opinion. . . . The compromise was excluding the injuries that were not isolated to the father.”

The fourth juror provided a similar explanation and added that the jury was unanimous in concluding that Mrs. Fandozzi was not responsible for any of the injuries reflected in the 7 guilty verdicts rendered against the defendant. Finally, the fifth juror stated that, “they ended up excluding some of the injuries that could have been caused by either the husband or the wife, and ultimately all agreed that the husband was the only one who could have caused the injuries he was found guilty of.”

After reviewing the investigator's reports and considering the parties' post-trial pleadings, the court, with counsel and the defendant present, reconvened the jury and conducted individual voir dire, asking the following questions of each juror:

1. With regard to the 7 guilty verdicts, did you follow the Court's jury instructions during your deliberations?
2. With regard to the 7 guilty verdicts, did you base you verdicts only on the evidence presented in court and the law I gave you at the end of the case?
3. With regard to the 7 guilty verdicts, at the time each verdict was reached, did you agree that the defendant was guilty beyond a reasonable doubt of those 7 offenses?
4. With regard to the 7 guilty verdicts, did you understand at the time you were deliberating that each verdict must be unanimous?
5. With regard to the 7 guilty verdicts, was each of the verdicts unanimous?
6. With regard to the 7 guilty verdicts, did you consider the potential punishment in deciding that the defendant was guilty of the crimes charged?
7. With regard to the 7 guilty verdicts, did you decide beyond a reasonable doubt that it was the defendant, and not his wife who committed the crimes charged?

Each of the jurors properly answered "yes" to questions 1-5, and 7, and properly answered "no" to question 6.<sup>2</sup>

The defendant now argues the verdicts should be set aside as improper compromise verdicts. Specifically, he alleges: (1) the jurors characterized their deliberative process as a compromise; (2) the jurors improperly considered what message their verdicts would send; and (3) the jurors improperly considered the issue of punishment in rendering their verdicts.

While the defendant correctly states that "jurors are not to reach compromise verdicts based on sympathy for the defendant or to appease holdouts, but to render a just verdict by applying the facts it finds to the law it is

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<sup>2</sup> One juror required clarification regarding question number 7 before answering appropriately.

charged,” State v. Taylor, 141 N.H. 89, 95 (1996), the fact that some of the jurors described the deliberative *process* as one of compromise, does not render the *verdicts* unjust under the facts of this case. The use of the word “compromise” to describe the manner in which the jurors resolved the case, does not mean the court should ascribe the technical, legal definition of “compromise” in evaluating the appropriateness of the verdicts. Indeed, when asked to further explain the nature of deliberations, jurors indicated that they “compromised” by agreeing to consider and vote on each charge separately, rather than to conduct a one time vote on all 26 charges. This was done, according to one juror, to “exclude injuries that were not isolated to the defendant,” and to prevent jurors from “hunkering down in the corner not willing to listen to another opinion.” Thus, while the jurors may have “compromised” by agreeing to approach their task in varying ways throughout deliberations, they in no way surrendered their own convictions simply for the purpose of returning a verdict. Instead, they applied the court’s instructions to listen to each other’s views and to change their opinions if they believed they were erroneous. In this context, the court finds jurors’ common use of the word “compromise” appropriately described the give and take which customarily occurs in jury deliberations.

The defendant also argues that juror #4’s comments alone are sufficient to support a finding that the verdicts were compromised. The court disagrees. First, the court finds that juror #4’s statements to the county attorney investigator attempt to explain the reasons why the jurors ultimately abandoned their initial strategy of voting on all 26 indictments together in favor of considering each

charge one at a time. Because of the circumstantial nature of the case and because some jurors believed each parent had an opportunity to commit some of the offenses, the jurors could not conclude that the defendant was responsible for committing each crime. As a result, the jurors separated the indictments and applied the evidence they heard, expert and otherwise, to each charge and determined that the defendant had committed 7 of the 26 offenses.

Second, even if juror #4's post-trial email and interview may suggest improper consideration of the evidence, this suggestion was refuted when the juror responded to the court's questions during voir dire. At that time, juror #4 stated unequivocally that he followed the court's instructions, based his verdict only on the evidence presented and the law provided, understood that the verdicts must be unanimous, and determined that the defendant alone committed the 7 offenses for which he was found guilty. In addition, when questioned by the investigator, five other jurors explained that no compromise verdict occurred. Finally, the remaining 11 jurors all testified that the verdicts were a result of the proper application of the law and evidence, and not the result of a compromise in which they abandoned their beliefs about the defendant's guilt or innocence. See Bunneil v. Lucas, 126 N.H. 663 (1985).

Next, the defendant argues the jurors improperly considered the potential punishment in rendering their verdicts. The defendant makes this claim based on comments two jurors made to the investigator. After he learned the jury's verdict "baffled" the prosecutor, juror #4 stated in an email to the county attorney's office, "do not look at the verdict as anything but a win. Mr. Fandozzi

will be going away for many years.” Contrary to the defendant’s assertion, the court does not construe this isolated comment made after the verdicts were rendered as evidence that the jury improperly considered the potential punishment in deciding this case. At most, the juror’s reference to punishment indicated that the juror was concerned about the prosecutor’s public response to the verdict and was made in an effort to reassure her that the case was well-prosecuted.

A second juror told the investigator from the county attorney’s office that it was “[h]er personal opinion that some of these people agreed to find him guilty on just these 7 because they felt he would not go to jail for as long than [sic] if he was convicted of all 26.” Simply because one juror formed a personal opinion about the motivation of other jurors does not support the conclusion that any of the jurors improperly considered punishment in determining the defendant’s guilt or innocence. Indeed, when questioned individually, the jurors responded that they did not consider punishment in deciding the case, but rather determined the defendant’s guilt based on the evidence and the law.


Finally, the defendant claims the jury found the defendant guilty in order to “send a message” to the community regarding this type of offense. The court disagrees. No juror, other than juror #4, mentioned consideration of a message to the community either in their conversations with the county attorney’s investigator or during questioning by the court. Moreover, juror #4’s comments were made in response to the prosecutor’s stated confusion over the verdicts

after they were delivered. Thus, there is no evidence that the jury acted improperly during deliberations.

Accordingly, the court DENIES the defendant's Motion to Set Aside the Verdict for the reasons contained in this order.

This order shall remain under seal.

SO ORDERED.

  
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Tina L. Nadeau  
Presiding Justice

Date: 9/4/08