IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, PABLO, MONTANA

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| THE CONFEDERATED SALISH AND KOOTENAI TRIBES,<br><br>Appellee,<br><br>vs.<br><br>MARVIN DEVEREAUX<br><br>Appellant. | APPELLATE No. 94-116-CR<br><br>**OPINION AND ORDER** |

Decided on Briefs March 3, 1996

Edward Hayes, Public Defender's Office, Confederated Salish and Kootenai Tribes, Pablo, Montana, for defendant/appellant.

Thomas Meyers, Tribal Prosecutor's Office, Confederated Salish and Kootenai Tribes, Pablo, Montana, for plaintiff/appellee.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes; Gary L. Acevedo, Trial Judge, Presiding.

Before: PEREGOY, Chief Justice, GAUTHIER and WHEELIS, Justices.

PEREGOY, Chief Justice:

Marvin Devereaux appeals his conviction of the offense of operating a motor vehicle while under the influence of alcohol. We affirm.

## I. BACKGROUND

Marvin Devereaux, an enrolled tribal member, was cited by a tribal police officer on March 19, 1994 and charged for driving a motor vehicle under the influence of alcohol. A jury trial was held on August 18, 1994. At the beginning of the trial, the court instructed the jury that the sole issue in the case was whether the

defendant was driving while under the influence of alcohol. The record indicates that Devereaux had consumed alcohol prior to driving, and that he had also taken a prescription drug to relieve pain resulting from a back-injury.

Following the presentation of evidence, the court repeated to the jury that "[t]he only question that this jury will have before it is whether or not the defendant is guilty of the offense of operating or in actual physical control of a motor vehicle while under the influence of alcohol." Prefaced with the statement that "[t]his is the law you will follow," the court then read the jury its instructions, in relevant part as follows:

INSTRUCTION NO. 1

> To convict the defendant of the offense of operating or in Actual Physical Control of a Motor Vehicle While Under the Influence of Alcohol, the Tribal government must prove each of the following elements:
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> That the defendant:
>
> 1. Was driving a vehicle;
> 2. Upon the roadways of the state open to the public;
> 3. While under the influence of alcohol.
>
> If you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you must find the defendant not guilty.

INSTRUCTION NO. 3

> In a prosecution for Driving While Under the Influence of Drugs or Alcohol, the Tribes must prove beyond a reasonable doubt that the defendant's consumption of drugs or alcohol diminished his ability to operate a motor vehicle safely. The Tribes need not prove that the defendant actually drove in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely.

INSTRUCTION NO. 5

> The phrase "under the influence" means that as a result of taking into the body alcohol, drugs or any combination thereof, a person's ability to safely operate

a motor vehicle has been diminished.

After reading these instructions, the court retired the jury to the jury room for deliberations and charged it with a decision in the matter. The court further gave the written instructions to the jury for reference during its deliberations.

During the deliberations, the jury sent the bailiff to ask a question of the court about the jury instructions.[1] The court did not reconvene to respond, but instead informed the jury through the bailiff that a verdict was to be returned on the basis of the instructions already given.

The jury ultimately delivered a verdict of guilty. In response to a question from the court, the foreman replied that the verdict was "unanimous," whereupon the court discharged the jury.

Thereafter, Devereaux moved the court to set aside the verdict. He cited as grounds, in part, that "[a]t least some of the jurors in this case ignored or misunderstood the law regarding the charged offense and erroneously convicted the defendant." In support of this contention, Devereaux represented that he would file two affidavits from jurors indicating that he:

> ...was convicted under the instruction stating that a person may be guilty if found to be operating a motor vehicle while under the influence of either alcohol or drugs or both. Mr. Devereaux was charged with operating a motor vehicle while under the influence of alcohol, not drugs or both alcohol and drugs.

The court ultimately denied the motion to set aside the verdict and

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[1] Although the record does not so indicate, defendant asserts that the "question" dealt with "the jury's request for clarification of the law to be applied."

thereby *sub silentio* refused to grant a new trial. Devereaux appeals the conviction. Pursuant to the parties' joint motion, we decide the matter on briefs and affirm.

## II. ISSUE

We frame the sole issue on appeal as whether the trial court erred in denying defendant's motion to aside the guilty verdict and order a new trial.

## III. STANDARD OF REVIEW

A motion for a new trial is ordinarily addressed to the sound discretion of the trial court. *Farmers Co-Operative Elevator Association v. Strand*, 382 F.2d 224, 230-31 (8th Cir. 1967), *cert. denied*, 88 S.Ct. 589 (1967). We therefore review denial of motions for new trials under the abuse of discretion standard. *Id.* at 231.

We review questions of law *de novo*. *Buttonwillow Ginning Co. v. Federal Crop Ins.*, 767 F.2d 612, 613 (9th Cir. 1985). The meaning of a statute is a legal question subject to plenary review. *Dutton v. Wolpoff and Abramson*, 5 F.3d 649, 652 (3rd Cir. 1993). This standard of review is based on the fact that the no discretion is involved when a court arrives at a conclusion of law. *See e.g., In re the Marriage of Clingingsmith*, 254 Mont. 399, 402-03 (1992). The trial court either applies the law correctly, or it does not. *Id.* at 403.

## IV. DISCUSSION

Devereaux argues on appeal that the trial court erred when it declined, upon request of the jury, "to clarify the law to be applied to the jury's deliberations." He grounds his appeal on

Ordinance 36-B, the Tribal Law and Order Code, Ch. III, §J9(5) which provides:

> If while deliberating, there is any disagreement among the jurors as to the testimony presented or if the jurors desire to be informed on any point of the law relating to the case before it, the spokesperson may request clarification from the presiding judge. After receiving such request, the Tribal Court shall reconvene and in the presence of the defendant and appropriate counsels, the information requested shall be given when in the Tribal Court's discretion justice so requires.

Devereaux further argues that the trial court's failure to reconvene to clarify the law to be applied resulted in his conviction of a crime for which he was not charged, thereby violating his right to due process. We disagree.

Specifically, Devereaux claims that he was wrongfully convicted for driving under the influence of a combination of alcohol and drugs--a crime for which he was not charged--rather than driving under the sole influence of alcohol, for which he was charged. To support this contention, he relies on post-verdict affidavits secured by his attorney from two jurors, which identically state in relevant part that: (1) each affiant "...found the jury instructions to be confusing;" (2) "When, we the jury, asked for clarification, the Judge offered none;" and (3) each affiant "fe[lt] that Mr. Devereaux was impaired from a combination of factors, including the consumption of drugs." As a threshold matter, defendant's reliance on these affidavits is misplaced and defeats his argument in total.

Rule 606(b) of the Federal Rules of Evidence provides in relevant part that:

> 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 that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith...

The public policy underlying this rule rests with the fact that injury might be inflicted upon the public if jurors were permitted to testify as to what happened in the jury room. Courts do not favor "inquisitions of jurors," recognizing that such may intimidate, vex or harass jurors and that the practice might lead to dangerous consequences of jury tampering with the result that no verdict would be safe. *See United States v. Chereton*, 309 F.2d 197, 201 (6th Cir. 1962).

It is well established that a jury verdict may not be impeached as to occurrences in the jury room which inhere in the verdict by an affidavit of a juror. *See e.g., Farmers Co-Operative Elevator Association v. Strand*, 382 F.2d 224, 230 (8th Cir. 1967), *cert. denied*, 88 S.Ct 589 (1967), *citing McDonald v. Pless*, 238 U.S. 264 (1915). While it is permissible under Rule 606(b) for a court to interview jurors to resolve doubts regarding the accuracy of the verdict announced, i.e., to ascertain <u>what</u> the jury decided, a court may not question the process by which the verdict was reached. *See e.g, Attridge v. Cencorp Division of Dover Technologies Int'l*, 836 F.2d 113, 117 (2nd Cir. 1987). In short, jurors cannot impeach their verdict by affidavits or testimony as to how or in what manner they arrived at it. *See United States v. Chereton, supra*, at 201.

Here, contrary to Devereaux's contention, the items set out in the two jurors' affidavits aspire to disclose their deliberations undertaken in the secrecy of the jury room. *See Id.* Specifically, they reflect what the two jurors' felt or was on their minds in arriving at the verdict, i.e., they do not address what the jury decided. Since these affidavits seek to impeach matters occurring during the course of the jury's deliberations, they violate the clear prohibitions of Rule 606(b). We hold accordingly.

Moreover, if jurors give their unanimous consent to a verdict in the jury room and in open court, and such verdict is accepted by the court and the jury is discharged, individual jurors are thereafter precluded from changing their minds and claiming that they were mistaken or unwilling to assent to the verdict. *See Chereton*, 309 F.2d at 200, *supra*. Further, juror misinterpretation of court instructions is not a sufficient ground to vacate a verdict or order a new trial. *See Farmers Co-Operative*, 382 F.2d at 230, *supra*. In this case, the jurors gave their unanimous consent to the verdict, both in the jury room and in open court. The court clearly accepted the verdict and thereafter properly discharged the jury. Accordingly, the two juror affidavits cannot serve to impeach the verdict, i.e., support defendant's motion to set it aside, nor are they competent grounds for a new trial. We so hold.

In effect, Devereaux challenges the legal sufficiency of the jury instructions on appeal, although he claims he does not. Rule 30 of the Federal Rules of Criminal Procedure is therefore

relevant and further controlling here. It provides in pertinent part that:

> ...No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection...

"Failure to object to an instruction, or to the omission of an instruction, is usually fatal to a successful appeal of the issue." *8A Moore's Federal Practice* ¶30.04[1], n.6 (1995). Where a defendant raises a challenge for the first time on appeal, courts will review instructions for plain error only. *See e.g., United States v. Sellers*, 926 F.2d 410, 417 (5th Cir. 1991). "In applying the plain error standard, courts will look for an error which 'directly leads to a miscarriage of justice.'" *8A Moore's Federal Practice* ¶30.04[1] n.6 (1995), *quoting United States v. Young*, 470 U.S. 1, 15-16 (1985). It is uncontested that Devereaux did not object to any of the jury instructions before the jury retired to consider its verdict. We therefore review the challenged instructions for plain error only. We find none.

After review of the entire record, we find that all of the jury instructions given in this case were clear and understandable, and that they correctly stated the applicable law and standards in this case, including instruction number 3 which defendant challenges.[2] That instruction plainly states that in a prosecution

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[2] On appeal of a trial court's jury instructions, the appellate court, after review of the record as a whole, must determine whether the instructions correctly state the applicable law and provide the jury with ample understanding of the issues and standards in the case. Lamon v. City of Shawnee, Kan., 972 F.2d

for driving under the influence of "drugs or alcohol," the jury must find beyond a reasonable doubt that "defendant's consumption of drugs or alcohol" diminished his ability to drive safely. (Emphasis added). Yet, Devereaux would have the Court read the instruction in the conjunctive (and), rather than in the disjunctive ("or"), as it was properly presented to the jury. We find no error here, plain or otherwise. Defendant was unambiguously charged and convicted by a unanimous jury for driving a motor vehicle under the influence of alcohol, not for being under the influence of a combination of alcohol and drugs. Accordingly, there is no merit to Devereaux's contention that the jury instructions were confusing,[3] or that he was convicted of a crime for which he was not charged. We therefore find no abuse of discretion in this case.[4]

Devereaux's only meritorious contention is that the trial court erred by refusing to reconvene upon request of the jury to answer a question, allegedly to clarify the law to be applied

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1145 (10th Cir. 1992).

[3] An appellate court must be satisfied that the challenged jury instructions did not confuse or mislead the jury with regard to the applicable principles of law. See Computer Identics Corp. v. Southern Pacific Co., 756 F.2d 200, 204 (1st Cir. 1985).

[4] *Cf. Chereton, supra*, 309 F.2d at 201 (judge ruling on petition for writ of error sought on ground that individual jurors claimed they found defendant guilty of charge which had not been submitted to them did not abuse discretion in refusing to permit individual jurors to impeach verdict by affidavits or testimony as to deliberations in jury room where alleged mistake was not made by all jurors).

during the jury's deliberations. Defendant asserts that such refusal violated Rule J9(5) of the Tribal Law and Order Code, *supra*. We agree. However, we are persuaded that any such error was harmless, and in any event did not visit an injustice upon him. This is particularly so in light of the fact that all of the court's instructions to the jury were correct, clear and unambiguous, and that defendant did not timely or properly object thereto.

Under Rule 7 of the Tribal Appellate Court Procedures Ordinance, "[n]o judgment or order shall be reversed upon appeal by reason of any error committed by the trial court affecting the interests of the appellant where the record shows that the same result would have been attained had the trial court not committed the error or errors." Similarly, under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Defendant has failed to show that his rights have been prejudiced, or that a different result would have obtained had the trial court reconvened in conformance with the mandate ("shall") of Rule J9(5). Failure of the trial court to so conform therefore constituted harmless error and must be disregarded under controlling law. We hold accordingly.

**V. CONCLUSION**

We hold that the trial court did not abuse its discretion in

deciding not to set the verdict aside or order a new trial in this matter. The stay on defendant's sentence is lifted.

**AFFIRMED**

SO ORDERED this 3/2 day of March, 1996.


Robert M. Peregoy
Chief Justice

Robert Gauthier
Associate Justice

James Wheelis
Associate Justice

## CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the OPINION AND ORDER to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 12th day of March, 1996.

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