SUPREME COURT NO. 100509-1
NO. 81283-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

NICHOLAS BATES,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR
SNOHOMISH COUNTY

The Honorable Janice Ellis, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Nicholas Bates asks this Court to grant review of the court of appeals' decision in State v. Bates, No. 81283-1-I, filed November 29, 2021 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

The trial court unilaterally determined there was an inconsistency in the jury's original verdict forms, instructed the jury there was an inconsistency, and then ordered the jury to continue deliberating with new verdict forms. Despite defense counsel's objection, the court did all of this while refusing to reveal the purported inconsistency to the parties.

Bates argued on appeal that the trial court's communication with the jury, without meaningful input from counsel, constructively deprived him of his fundamental rights to be present and to be represented

by counsel at all critical stages of trial. The court of appeals rejected Bates's argument, applying a 1941 civil case to hold the trial court's "interaction" with the jury was proper "regardless of Bates's or his counsel's input." Opinion, 8-9.

Is this Court's review necessary under all four RAP 13.4(b) criteria, where the court of appeals misapplied civil case law to the question of criminal defendants' constitutional rights to be present and represented by counsel at all critical stages of trial, in direct conflict with decades of precedent holding that a trial court's communications with a deliberating jury is a critical stage at which those rights attach?

C. STATEMENT OF THE CASE

1. **Substantive Evidence**

Bates and Morgan George dated for a year and a half. RP 1191. By July of 2019, they had broken up

and Bates had moved out of George's apartment, but they were attempting to reconcile. RP 1191-92. On July 13, Bates and George spent much of the day together, drinking and visiting friends. RP 1195-1202. By the early morning hours on July 14, both Bates and George were quite inebriated. RP 1203-06.

Back at George's apartment, Bates told George he was going home and did not want to be with her anymore. RP 1205-06. When Bates tried to leave, he could not find his new phone. RP 1207. George had taken it into the bathroom with her and locked the door. RP 1207. Through the bathroom door, Bates demanded his cell phone back. RP 1207. George refused and threatened to break Bates's new phone, upset that he was leaving. RP 1207, 1226.

Bates grabbed a kitchen knife to try to pry open the locked bathroom door and retrieve his phone before

George broke it. RP 1207-08. Bates admitted he did not know what he was thinking in that moment, "I was drunk." RP 1208.

Unable to unlock the door, Bates finally kicked the door open. RP 1209. He still had the knife in his hand. RP 1201. George screamed at him and charged, "swinging arms and legs." RP 1209-10. Bates attempted to hold George off and they both fell to the floor. RP 1210. Bates explained, "All I was trying to do [was] get my phone so I could leave." RP 1211.

A struggle ensued. RP 1211. Bates was on his knees while George was on her back. RP 1211. Bates was still holding the knife down by his waist. RP 1212. On reflection, Bates did not know why he still had the knife: "I know I was drunk . . . I don't know why I had it to begin with, let alone why I held onto it. I wish I could tell you." RP 1212-13.

Bates explained George kicked up, hit the knife in his hand, and "her leg split open." RP 1213. It was a "bad wound," so Bates stopped struggling with George. RP 1213. Bates did not intend to cut George's leg, explaining, "The only intention I had of was breaking down the door [to] get my phone so I could leave. I never wished harm on her ever." RP 1213.

Bates dropped the knife and grabbed a towel for George's leg. RP 1215-16. He then went to the kitchen to get a first-aid kid. RP 1216. The next thing he knew, George had left the apartment. RP 1216. Bates found his phone in the bathroom and repeatedly called George, without answer. RP 1218.

Bates then called his parents. RP 1218. Bates's mother noticed her son was extremely upset, his voice cracking. RP 1256. She recalled Bates telling her that he accidentally cut George's leg and wanted to find her

to make sure she was okay. RP 1257. Bates's parents picked him up and they all went to the hospital in the hopes of finding George there. RP 1257-58.

George told a different story. George said Bates broke down the bathroom door before she had a chance to unlock it. RP 1050. She claimed Bates charged at her in the shower and put the knife to her neck. RP 1052-55. George tried to get away from Bates, but he grabbed her and threw her against the wall. RP 1062-63. George claimed Bates repeatedly kicked her, threatened to kill her, and pressed the knife against her body. RP 1063-64, 1068-70. Bates then supposedly put the knife against George's left shin, said something like, "you don't think I will do it," then sliced her leg. RP 1066-67.

When Bates stopped and went to the kitchen, George claimed she fled through the sliding glass door,

unclothed, to her friend's apartment in the same complex. RP 1075. George told her friend that Bates sliced her leg and was trying to kill her. RP 980-82. George's friend took her to the hospital, where the police were called. RP 986.

Police responded to the hospital. RP 826. The responding deputy observed a deep cut on George's left shin, as well as bruising and red marks on George's body. RP 830-37. Bates was arrested that same morning at the hospital. RP 838.

2. **Procedural Facts**

The prosecution charged Bates with second degree assault, felony harassment, and unlawful imprisonment, all with deadly weapon enhancements and domestic violence designations. CP 208-09. The prosecution further alleged the aggravating

circumstance that Bates's conduct manifested deliberate cruelty and intimidation. CP 208-09.

Bates proceeded to a jury trial. RP 148. The jury deadlocked on all three counts and a mistrial was declared. CP 125-27.

At Bates's second trial, defense counsel proposed an instruction on the inferior offense of fourth degree assault. CP 113-17. The trial court agreed to give the fourth degree assault instruction and corresponding verdict form. CP 66, 89-91; RP 1180.

The jury began deliberations on a Friday afternoon, resuming on Monday morning. CP 266. Mid-afternoon on Monday, the jury notified the court it had reached a verdict. 2RP 3. The court brought the jury into the courtroom, reviewed the verdict forms, but then immediately excused the jury back to the jury room. 2RP 4; CP 266.

The court informed the parties, "I sent the jury out because the verdict forms that have been completed in this case are not -- there is an inconsistency with the jury instructions on the law." 2RP 4. The court told the parties its intent to advise the jury "that there is an inconsistency with the Court's instructions on the law, and to have them return back to the jury room with a new set of original verdict forms to address the concern." 2RP 4. The court invited the parties to put "any questions or concerns" on the record. 2RP 4.

Defense counsel objected to the proposed procedure:

> I don't know what this is all about so I don't know what the inconsistencies are, but at this point it sounds like they're going to redo the verdicts in some form, in some manner. And, of course, only you and they know what the problem is, so to the extent that we may, we would like to be informed, and I assume the prosecutor would, too.

2RP 4-5. The court refused to share any additional information with the parties, claiming "the privacy and secrecy afforded to jury deliberations" prohibited the court from "advis[ing] the parties anything other than there is an inconsistency with the instructions on the law, and it is important that the verdict forms be completed in a manner that is consistent with the Court's instructions and the law." 2RP 5.

Defense counsel moved for a mistrial. 2RP 6-7. Counsel explained, "At this point Mr. Bates knows nothing about what is being done except that -- and I'm using a term which I use probably ill-advisedly, but it appears that the Court, for whatever reason, is impeaching the verdict presently rendered by the jury, so I'm respectfully objecting to that process." 2RP 6-7. The court denied the mistrial motion "based upon the

current circumstances," giving no other reasoning or explanation of the verdict inconsistency. 2RP 7.

The trial court instructed the jury as indicated:

> I have reviewed the forms that were returned to me and it appears that there is an inconsistency with the Court's instructions on the law, and so I am going to take this step. I am going to ask [the bailiff] to return your original set of jury instructions and your original verdict forms to your presiding juror. I am also going to give [the bailiff] a new set of verdict forms, a complete new set of verdict forms, and return you to the jury room to continue with your deliberations with the knowledge that I've alerted you to that I see an inconsistency between the materials that have been provided to me at this point in time and the Court's instructions and the law. So I hope that provides you an understanding of why I sent you out, why I've had you come back, and why I am sending you out again to continue with your deliberations.

2RP 8. The jury deliberated for nearly a half hour before returning a new set of verdict forms. CP 267. The jury found Bates guilty as charged. CP 51-63. The

court concluded the new verdict forms were "consistent with the Court's instructions to the jury." 2RP 9.

After the verdict was entered, the court finally informed the parties of the inconsistency. 2RP 14. The original verdict forms indicated the jury found Bates guilty of second degree assault on Count 1, but also indicated guilty on the lesser fourth degree assault verdict form. 2RP 14; CP 65-66. The prosecutor asked the court to poll the jury. 2RP 15. The court did so, and the jurors agreed the verdicts were their individual verdicts and the verdicts of the jury. 2RP 15-46.

Bates has no criminal history and everyone at sentencing agreed this was an isolated incident. CP 29, 46; RP 1315, 1319. The standard range sentence for second degree assault, the most serious offense, was 15 to 20 months. CP 30. The trial court imposed an exceptional sentence of 84 months on the second degree

assault, plus another 24 months for the three consecutive deadly weapon enhancements, for a total of 108 months in confinement. CP 32.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's review is warranted to resolve whether a trial court's refusal to reveal an alleged inconsistency in the jury verdicts before instructing the jury and giving them new verdict forms violates a criminal defendant's constitutional rights to counsel and to be present at all critical stages of trial.

Bates argued on appeal that the trial court's communication with the jury, done without revealing the verdict inconsistency or seeking input from counsel, constructively deprived Bates of his fundamental rights to be present and meaningfully represented by counsel at all critical stages of trial. Br. of Appellant, 28-39.

The court of appeals acknowledged "[a] message from the jury should generally be answered in open court, and counsel should be given an opportunity to be

heard before the trial court responds." Opinion, 8. The court nevertheless rejected Bates's argument, concluding the court's communication the jury was not a critical stage of the proceeding.[1] Opinion, 8-9.

For this conclusion, the court of appeals relied solely on a civil case from 1941: "But where a jury returns a verdict that is inconsistent, insensible, or not responsive to the issues, 'they may be directed by the court to reconsider it and bring in a proper verdict; and this may be done with or without the consent of counsel and should be done whether requested or not.' Haney v. Cheatham, 8 Wn.2d 310, 325-26, 111 P.2d 1003 (1941)." Opinion, 8.

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[1] Notably, however, the court of appeals characterized the communication as an "interaction," potentially in an attempt to avoid triggering the controlling case law discussed below holding that a trial court's communication with a deliberating jury is a critical stage of trial. Opinion, 8.

The court of appeals acknowledged Bates and his attorney "were given only a limited opportunity to be heard because the court did not disclose the error in the verdict." Opinion, 8. The court further agreed Bates "would have been able to engage in a more informed way if the court had told the parties what the inconsistency was." Opinion, 8. The court of appeals nevertheless reasoned the trial court "simply directed the jury to continue its deliberations with the court's instructions in mind." Opinion, 8. The court believed, "[u]nder Haney, this was proper for the court to do regardless of Bates's or his counsel's input." Opinion, 8-9.

The court of appeals' decision, particularly its reliance on the civil case Haney, is incorrect and cannot be squared with decades of precedent from Washington courts. RAP 13.4(b)(1), (2). The trial court's unilateral action and the court of appeals' affirmance of it also

seriously undermines the constitutional rights of accused persons to be present and to have meaningful representation at all critical stages of the proceedings. RAP 13.4(b)(3), (4).

First and foremost, as a civil case, Haney is completely inapposite here. Haney involved personal injury and property damage claims following an auto accident. Bates, on the other hand, contends the trial court violated his Sixth Amendment and article I, section 22 rights to presence and to counsel. These rights are guaranteed "[i]n criminal prosecutions." CONST. art. I, § 22; see also U.S. CONST. amend. VI ("In all criminal prosecutions . . ."); CrR 3.4(b) (mandating presence of criminal defendant at every stage of trial, including "the return of the verdict"). Civil cases have no bearing on these rights. Unsurprisingly, Haney does

not include any discussion of the constitutional rights guaranteed to criminal defendants.

No Washington court has ever before applied Haney to mean criminal defendants do not have the right to be present or participate through counsel in the formulation of communications with the jury. Rather, it is relevant to criminal cases only for the unremarkable proposition that the trial court may order the jury to correct a verdict form. See, e.g., State v. Badda, 68 Wn.2d 50, 61-62, 411 P.2d 411 (1966); State v. Ford, 171 Wn.2d 185, 196, 250 P.3d 97 (2011) (Stephens, J., dissenting).

Contrary to the court of appeals' reliance on Haney, the resounding authority in Washington holds that communication between the court and the jury is a critical stage of trial at which the defendant has a right to be present and receive meaningful representation.

State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988).[2] "It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." State v. Caliguri, 99 Wn.2d

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[2] See also State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (recognizing "a trial court should not communicate with the jury in the absence of the defendant" and must generally "'disclose the communication to counsel for all parties'" (quoting Rushen v. Spain, 464 U.S. 114, 119, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)); State v. Burdette, 178 Wn. App. 183, 201, 313 P.3d 1235 (2013) ("[A] defendant has a constitutional right to be present when the court is responding to a message that the jury is deadlocked."); State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702 (1988) ("Communications between judge and jury in absence of the defendant or defense counsel are clearly prohibited and therefore constitute error."); State v. Langdon, 42 Wn. App. 715, 717, 713 P.2d 120 (1986) ("Any communication between the court and the jury in the absence of the defendant is error and must be proven by the State to be harmless beyond a reasonable doubt."). But see State v. Yonker, 133 Wn. App. 627, 636, 137 P.3d 888 (2006) ("The law forbids only communications that could possibly influence deliberations . . . Communications necessary for the proper care of the jury, such as lunch orders and other administrative matters, do not raise an inference of impropriety because these communications are neutral and innocuous." (citation omitted)).

501, 508, 664 P.2d 466 (1983) (replaying evidence for the jury, without notice to defendant, was "highly improper").

CrR 3.4(a) likewise mandates the defendant shall be present "at every stage of the trial including the empaneling of the jury and the return of the verdict." The United States Supreme Court has held the identical Fed. R. Crim. Proc. 43 requires defense counsel be given an opportunity to be heard before the trial court communicates with the jury. Rogers v. United States, 422 U.S. 35, 39, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975).

Most cases in Washington address ex parte communications between the court (or the bailiff) and the jury, such as instructing the jury in the defendant's absence or answering a jury question without notice to the parties. Bates's case presents an apparently novel scenario where he and his attorney were *technically*

present for the court's instruction to the jury that there was an inconsistency in their verdicts. Research revealed no Washington case involving this precise scenario. The District of Columbia Court of Appeals, however, recently considered a nearly identical issue and found reversible error.

In Roberts v. United States, 213 A.3d 593, 594-95 (D.C. 2019), a juror sent a note to the court indicating deadlock and the numerical breakdown of the holdout jurors. The trial court refused to let defense counsel review the note, believing neither the court nor the parties were "'entitled to see that note because we're not supposed to know anything about the[ ] [jury's] deliberations.'" Id. at 595 (alteration in original) (quoting record). The court ultimately instructed the jury that it must reveal only its final verdict and no

other information, without ever letting the defense read the juror note. Id. at 595-96.

The Roberts court held the trial court's refusal to allow the defense to review the note violated the defendant's constitutional rights to be present and to be represented by counsel at every stage of his trial. Id. at 596. While the trial court "appear[ed] to have been acting from the best of motives"—trying to insulate itself from the jury's numerical division—it was error "'to insulate defense counsel [from this information] as well.'" Id. at 597 (second alteration in original). The error was not harmless because defense counsel "has a critical role to play in advocating for a response to a jury note that is most favorable to his client." Id. at 598. Counsel could have moved for a mistrial or advocated for a different instruction, but instead was "flying blind." Id. Reversal was required. Id. at 599.

Roberts is consistent with the weight of authority across the country.[3] For instance, the Ninth Circuit has held "[t]he 'stage' at which the deprivation of counsel may be critical should be understood as the *formulation* of the response to a jury's request for additional instructions, rather than its delivery." Musladin v. Lamarque, 555 F.3d 830, 842 (9th Cir. 2009). The Musladin court explained "[c]ounsel is most acutely

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[3] See, e.g., French v. Jones, 332 F.3d 430, 438 (6th Cir. 2003) (constitutional error where defense was denied the opportunity to respond to a jury note); Curtis v. Duval, 124 F.3d 1, 4-5 (1st Cir. 1997) ("It is evident to us that giving a sua sponte jury instruction without consulting, and in the absence of, the defendant's attorney, as occurred here, denies the defendant the assistance of counsel at that critical stage."); Manning v. State, 348 P.3d 1015, 1018 (Nev. 2015) (defendant has the constitutional right "to have his or her attorney present to provide input in crafting the court's response to a jury's inquiry"); Taylor v. State, 722 A.2d 65, 68-69 (Md. 1998) (same); People v. O'Rama, 579 N.E.2d 189, 277 (N.Y. 1991) (defense must have the opportunity for a "meaningful" response, which requires "notice of the actual specific content" of the jury's request for information or instruction).

needed before a decision about how to respond to the jury is made, because it is the substance of the response—or the decision whether to respond substantively or not—that is crucial." Id. Counsel might object to the proposed instruction or suggest an alternate manner of stating the message. Id. at 840. Bottom line, defense counsel "has an important role to play" in helping shape communications with a deliberating jury. Id.

This authority makes clear the defendant's and counsel's "actual or *constructive* absence" at a critical stage is constitutional error. Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985) (emphasis added). What occurred in Bates's case was the constructive absence of Bates and his attorney when the trial court formulated its response to the jury's inconsistent verdicts. Just like in Roberts, the trial court refused to reveal the verdict

inconsistency to the parties based on a misguided perception of the secrecy inherent in deliberations. 2RP 5. While the court asked the parties to voice "any questions or concerns," 2RP 4, without knowledge of the inconsistency, defense counsel was "flying blind," just as in Roberts. 2RP 6-7 (counsel advising the court, "[a]t this point Mr. Bates knows nothing about what is being done"). Bates and his attorney were denied any meaningful opportunity to participate in determining the appropriate course of action or formulating supplemental instructions to the jury.

Furthermore, contrary to the trial court's belief, verdicts are not secret. Rice, 110 Wn.2d at 617 (defendant has due process right to be present at the return of his verdict); State v. Booth, 36 Wn. App. 66, 68, 671 P.2d 1218 (1983) (court and bailiff may inquire whether the jury has reached a verdict). Jurors' motives

and thought processes inhere in the verdict. State v. Rooth, 129 Wn. App. 761, 771, 121 P.3d 755 (2005). This principle may have limited questions the court could pose of Bates's jury to resolve the alleged inconsistency. But the "secrecy of deliberations" did not preclude the court from sharing the verdict inconsistency with the parties. Refusing to reveal the inconsistency was akin to refusing to divulge the contents of a jury question, which the court obviously cannot do. Roberts, 213 A.3d at 596; State v. Ratliff, 121 Wn. App. 642, 646, 90 P.3d 79 (2004) (constitutional error where trial court answered several jury questions without notifying the parties).

The court of appeals' application of Haney in Bates's case cannot be squared with any of the above-discussed authority. Indeed, the court of appeals made no attempt to address or distinguish such authority,

perhaps because it compels the conclusion that Bates was denied his right to presence and right to counsel.

The court of appeals further held, in a footnote without any discussion or analysis, "even if the court violated Bates's rights by directing the jury to continue deliberating, any error was harmless." Opinion, 9 n.9. The court cited State v. Johnson, 56 Wn.2d 700, 709, 355 P.2d 13 (1960), where this Court held a trial court's written response to a jury inquiry without informing counsel was improper, but the error was not prejudicial because the trial court "communicated no information to the jury that was in any manner harmful to the [defendant]." The court of appeals was again incorrect in its cursory conclusion and application of the case law.

Courts find harmless error when a court's ex parte communication with the jury "conveys no affirmative information" or is "neutral, simply referring the jury

back to the previous instructions." State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980); Langdon, 42 Wn. App. at 718.

The trial court did not simply refer Bates's jury back to its instructions. Rather, the trial court informed the jury "that there is an inconsistency with the Court's instructions on the law." 2RP 8. The trial court gave jurors "a complete new set of verdict forms" and ordered them "to continue with your deliberations," with "knowledge" that the court "alerted" them to an inconsistency in their verdict forms. 2RP 8. The jury then deliberated for almost a half hour before returning a new set of verdict forms. CP 267. The court's instruction and order to continue deliberating with new verdict forms cannot be characterized as "neutral" or conveying "no affirmative information."

This is particularly true when considering the "inconsistency" the court later revealed. The jury originally found Bates guilty of both second degree assault and the lesser fourth degree assault. CP 65-66. The verdict form on the inferior offense stated, "We, the jury, having found the defendant not guilty of the crime of assault in the second degree as charged in Count 1," signed and dated by the presiding juror. CP 66. Instruction No. 9 similarly stated the jury was to consider the lesser crime of fourth degree assault only if "you are not satisfied beyond a reasonable doubt that the defendant is guilty" of second degree assault. CP 89. A guilty verdict on fourth degree assault (a gross misdemeanor) therefore meant exclusion of the greater second degree assault (a violent felony). As in Roberts, the inconsistency was "most favorable" to Bates, necessitating input from the defense. 213 A.3d at 598.

Defense counsel's timely input was critical because courts recognize "[j]uries return inconsistent verdicts for various reasons," including mistake, but also "compromise[ ] and lenity." State v. Goins, 151 Wn.2d 728, 733, 92 P.3d 181 (2004). Therefore, "an inconsistent guilty verdict 'should not necessarily be interpreted as a windfall to the Government at the defendant's expense.'" Id. (quoting United States v. Powell, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)). Irreconcilable verdicts can therefore be allowed to stand, so long as there is sufficient evidence to support the guilty verdict. Id.

The trial court unilaterally decided the jury's original verdicts were inconsistent with its instructions. The defense was not given an opportunity to argue to the contrary, despite well-established case law that

inconsistent verdicts do not necessarily need to be corrected.

Had the trial court timely informed the defense of the purported inconsistency, defense counsel could have advocated for entry of the fourth degree assault verdict with no further instruction or deliberation. Or counsel could have requested immediate polling of the jury. CrR 6.16(a)(3); State v. Pockert, 49 Wn. App. 859, 861, 746 P.2d 839 (1978) ("The purpose of polling the jury is to determine if the verdict signed by the foreman is that of the individual jurors and not one that has been coerced or caused by mistake."). Alternatively, counsel could have proposed different instructions, perhaps pointing the jury to Instruction No. 9, guiding their consideration of the lesser degree offense (CP 89), or emphasizing jurors must not "surrender [their] honest belief about the value or significance of evidence solely because of the

opinions of your fellow jurors." CP 104; Roberts, 213 A.3d at 598 (recognizing defense counsel could have, at the very least, argued for this instruction with proper notice of the juror note).

The defense was denied any meaningful opportunity to address the purported inconsistency in the verdict forms before the court proceeded to instruct the jury. Where Bates's attorney could have proposed several alternatives, and inconsistent verdicts do not necessarily require correction, the violation of Bates's right to counsel and right to presence was not harmless beyond a reasonable doubt. The court of appeals' cursory treatments of these constitutional rights, along with its misapplication of civil case law, warrants this Court's review under all four RAP 13.4(b) criteria.

E. CONCLUSION

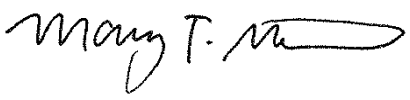
For the reasons discussed above, this Court should grant review and reverse the court of appeals.

DATED this 28th day of December, 2021.

I certify this document contains 4,707 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix

FILED
11/29/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS ACOSTA BATES, Appellant.	No. 81283-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Nicholas Bates was convicted of second degree assault, felony harassment, and unlawful imprisonment after a violent fight with Morgan George in which he cut open her leg with a knife. Bates appeals, contending that the court erred by refusing to instruct the jury on defense of property, by refusing to reveal an error in the jury verdicts before sending the jury back for continued deliberation, by imposing discretionary legal financial obligations (LFOs) without adequately inquiring into Bates's ability to pay, and by failing to enter written findings of fact and conclusions of law justifying its exceptional sentence. Because we disagree that the defense of property instruction was required or that Bates had a right to know what the error in the verdict was before the court sent it back, we affirm Bates's conviction. However, because we agree that the court made an inadequate inquiry into Bates's ability to pay LFOs, we remand for the court to rectify this sentencing error.

FACTS

In the early morning of July 14, 2019, Bates and his girlfriend, George, had a fight at George's apartment in Lynnwood, Washington. After a night out drinking with friends, Bates ended up kicking down the bathroom door while George was showering and entering the bathroom with a large butcher knife. George reported that he kept her trapped in the bathroom for 45 minutes, pressing the knife into every part of her body; kicking her in the ribs, back, and head; and telling her he would kill her. At the end of the fight, Bates slashed George's leg with the knife. George went to the emergency room with bruises and cuts all over her body and a heavily bleeding cut on her left shin, which was about three inches long, an inch and a half wide, and deep enough to reach her fatty tissue and muscles.

Bates was arrested and charged with second degree assault, harassment, and unlawful imprisonment, all with deadly weapon and domestic violence enhancements. In November 2019, the case proceeded to a jury trial.

At trial, Bates testified that after he drove George back to her apartment, they started arguing. Bates decided he wanted to leave to sleep on a friend's couch but realized that he had left his phone in the bathroom where George was showering. Bates was frustrated because he needed his phone to be able to call his friend and leave, and he yelled at George to open the door. He stated that George yelled back something like, she was not going to let Bates have the phone and it was "going to get broken again." This was significant to Bates because George had broken his previous phone. Bates then got a kitchen knife

to try to pop the door open. When that didn't work, because he was "pissed off" and needed his phone in order to leave, he kicked the door open. He testified that George then came toward him and fought with him while he tried to fend her off, and that she kicked her leg and he accidentally cut her with the knife he was still holding.

At the end of trial, Bates requested a defense of property instruction based on a theory that Bates had been trying to protect his phone. The court rejected Bates's request, concluding that the instruction was not warranted because, under an analysis of "whether or not the force used was more than necessary under the circumstance[s] . . . the evidence does not meet that standard." After the jury began deliberating, it informed the court that it was unable to reach a verdict. The court found that the jury was deadlocked and declared a mistrial.

In January 2020, the same judge presided over the second trial. The court informed counsel that its rulings on motions in limine from the first trial would apply to the second trial. It also told counsel that the jury instructions from the first trial would be its working set of instructions, but that counsel could propose any other instructions it liked. Bates renewed certain objections to the jury instructions, but did not raise the defense of property issue.

At the second trial, Bates again testified that he broke down the bathroom door so that he could get his phone and leave. He said that before he broke the door down, George "referenced basically destroying [his] new phone." When he broke the door down, George screamed at him and came towards him, trying to hit and kick him. George kicked up and hit the knife, and her leg split open.

Bates testified that "I didn't tell her I was trying to attack her, because I was not trying to attack her. I never had intention of attacking. The only intention I had of was breaking down the door is get my phone so I could leave." After the fight, when George had fled the apartment, Bates testified that he looked for his phone and found it "in the bathroom underneath some stuff."

At the end of trial, the court instructed the jury. Among other instructions, it directed the jury to consider whether Bates was guilty of second degree assault, and, if it was not satisfied that he was, to then consider whether Bates was guilty of fourth degree assault. However, the jury returned verdict forms that found Bates guilty on both second degree assault and the lesser included charge of fourth degree assault. Upon seeing the inconsistency, the court excused the jury and told the parties that the verdict forms were completed in a manner that was inconsistent with the jury instructions on the law. Bates asked to be informed as to the issue, but the court declined to do so, determining that informing the parties would conflict with the secrecy afforded to jury deliberations. Bates moved for a mistrial, and the court denied the motion.

The court brought the jury back in, and informed them that upon reviewing the forms it had identified an issue, and directed them to "return . . . to the jury room to continue with your deliberations with the knowledge . . . that I see an inconsistency between the materials that have been provided to me at this point in time and the Court's instructions and the law." The jury reentered the jury room and then returned with verdict forms that found Bates guilty on all charges but left the verdict form for fourth degree assault blank. The jury also found with

respect to all three charges that Bates was armed with a deadly weapon, that he and George were members of the same family or household, and that Bates's conduct manifested deliberate cruelty or intimidation.

The court sentenced Bates to an exceptional sentence of 84 months plus 24 months for the deadly weapons enhancements. It noted in its oral ruling that, although the standard range was 15 to 20 months, the aggravating factors found by the jury and the cruelty exhibited by Bates required an exceptional sentence. The court also stated that it had "no reason to believe" that Bates was indigent and therefore imposed several discretionary LFOs. Bates's attorney stated that Bates had no funds, that his family was paying the attorney fee, and that he had lost his job. The court dismissed these concerns, saying "I understand he is not employed currently, but when he is released from incarceration there is no reason to believe that he will not be able to be gainfully employed and financially independent."

Bates appeals.

ANALYSIS

Defense of Property Instruction

Bates first contends that the court erred by denying his defense of property instruction. We disagree.[1]

[1] Bates also contends that to the extent his attorney waived this argument, he received ineffective assistance of counsel. Bates did appear to waive this argument because although the court invited additional proposed instructions at the second trial, Bates abandoned the defense of property claim. State v. O'Brien, 164 Wn. App. 924,932, 267 P.3d 422 (2011). Furthermore, renewing his objection would not have been a "useless endeavor" because arguably more evidence supported the defense at the second trial. State v. Cantabrana, 83 Wn.

"A defendant is entitled to have the jury instructed on his theory of the case if evidence supports that theory." State v. O'Brien, 164 Wn. App. 924, 931, 267 P.3d 422 (2011). A use of force is lawful when "used by a party about to be injured . . . in preventing or attempting to prevent . . . a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary."
RCW 9A.16.020(3).

The court evaluates the evidence in the light most favorable to the defendant when determining whether sufficient evidence supports a defense instruction. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). We review the court's refusal to give a requested jury instruction de novo when it is based on a ruling of law and for an abuse of discretion to the extent that it is based on a factual determination. O'Brien, 164 Wn. App. at 930-31.

Viewing the evidence here in the light most favorable to Bates, there is no support for a defense of property instruction. Although the evidence could support a finding that Bates came into the bathroom to protect his phone, there was no evidence whatsoever that Bates's use of force was to protect his phone. There was no suggestion that he saw the phone when he came in to the bathroom, that George was holding it, or that they were fighting over it. Instead, Bates claimed that he stabbed George accidentally when she kicked her leg and that he did not find his phone until after she left, "under some stuff" in the

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App. 204, 208-09, 921 P.2d 572 (1996). However, because the court did not err by rejecting this instruction, we need not address whether Bates received ineffective assistance of counsel through his attorney's failure to object.

bathroom. These facts are clearly insufficient to support an inference that Bates was "about to be injured" or "attempting to prevent" a malicious interference with his property when he stabbed George, let alone that such force was "not more than [was] necessary." RCW 9A.16.020(3); see also State v. Yelovich, 191 Wn.2d 774, 788, 426 P.3d 723 (2018) (Wiggins, J., concurring) (noting that the statutory requirements "make it clear that defense of property must be used defensively rather than offensively"), State v. Walther, 114 Wn. App. 189, 192, 56 P.3d 1001 (2002) (defendant was not entitled to lawful force instruction where he was not about to be injured, property was not in his possession, and force used was more than necessary). Therefore, Bates was not entitled to a defense of property instruction, and the trial court did not err by denying to give one.

Right to be Present in Discussion of Verdict Form Inconsistency

Bates contends the trial court's handling of the jury's error in filling out the verdict form violated his due process rights, including his right to counsel and right to be present at trial. We disagree.

A defendant has a constitutionally guaranteed right to counsel and to be present at "all critical stages of a criminal proceeding." State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). A critical stage with respect to the right to counsel is one where a "defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." State v. McCarthy, 178 Wn. App. 90, 101, 312 P.3d 1027 (2013) (quoting State v. Heddrick, 166 Wn.2d 898, 910, 215 P.3d 201 (2009)). A critical stage with

respect to the right to be present is one where the defendant's presence has a reasonably substantial relationship to his opportunity to defend against the charge. Irby, 170 Wn.2d at 881. The defendant generally does not have the right to be present when their presence would be useless. Irby, 170 Wn.2d at 881. The inquiries into whether the right to counsel applies and whether the right to be present applies are "almost identical." McCarthy, 178 Wn. App. at 101. Whether a defendant's constitutional right has been violated is a question of law that we review de novo. Irby, 170 Wn.2d at 880.

A message from the jury should generally be answered in open court, and counsel should be given an opportunity to be heard before the trial court responds. Rogers v. U. S., 422 U.S. 35, 39, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975). But where a jury returns a verdict that is inconsistent, insensible, or not responsive to the issues, "they may be directed by the court to reconsider it and bring in a proper verdict; and this may be done with or without the consent of counsel and should be done whether requested or not." Haney v. Cheatham, 8 Wn.2d 310, 325-26, 111 P.2d 1003 (1941).

Here, Bates and his counsel were both present for the court's interaction with the jury, but were given only a limited opportunity to be heard because the court did not disclose the error in the verdict. Although Bates would have been able to engage in a more informed way if the court had told the parties what the inconsistency was, the court ultimately did not give any new instructions to the jury but instead simply directed the jury to continue its deliberations with the court's instructions in mind. Under Haney, this was proper for the court to do

regardless of Bates's or his counsel's input. Accordingly, because the court was not giving any instructions but merely directing the jury to return a proper verdict, this was not a critical stage of the proceeding and the court did not violate Bates's rights by not disclosing the error in the verdict form.[2]

Sentencing Issues

Finally, Bates raises procedural issues related to sentencing, contending that the court made an inadequate inquiry into his ability to pay legal financial obligations and entered insufficient findings and conclusions in support of the exceptional sentence. We address each contention in turn.

"Sentencing errors resulting in unlawful sentences may be raised for the first time on appeal." State v. Dunleavy, 2 Wn. App. 2d 420, 432, 409 P.3d 1077 (2018). "We review de novo whether a trial court's reasons for imposing an exceptional sentence meet the requirements of the [Sentencing Reform Act of 1981, chapter 9.94A RCW]." State v. Friedlund, 182 Wn.2d 388, 393-94, 341 P.3d 280 (2015).

Before imposing discretionary LFOs, the trial court must "conduct an individualized inquiry on the record concerning a defendant's current and future ability to pay." State v. Ramirez, 191 Wn.2d 732, 742, 426 P.3d 714 (2018). The court must "consider important factors, such as incarceration and a defendant's

[2] Furthermore, even if the court violated Bates's rights by directing the jury to continue deliberating, any error was harmless. State v. Johnson, 56 Wn.2d 700, 709, 355 P.2d 13 (1960) (holding that trial court erred by answering the jury question without counsel's input, but that because the court's response did not communicate any information, there was no prejudice resulting from the communication).

other debts, including restitution, when determining a defendant's ability to pay." State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). If someone meets the standard for indigency under GR 34, "courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. If the court finds a defendant to be indigent at the time of sentencing, it may not order the defendant to pay certain costs. RCW 10.01.160(3), RCW 36.18.020(2)(h).

Here, the court's inquiry into Bates's ability to pay failed to consider most relevant factors, focusing only on the likelihood that Bates could obtain employment after his incarceration. The court also found Bates to be indigent four months later with no obvious change in Bates's circumstances. The State concedes, and we agree, that the court's inquiry was inadequate under Blazina and Ramirez. On remand, the court must make an individualized inquiry into Bates's ability to pay, consider the relevant factors, and if it finds Bates to be indigent it must strike any improperly imposed LFOs.

Bates also challenges the court's imposition of an exceptional sentence on the grounds that the court failed to enter written findings supporting the sentence. "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535. "Permitting verbal reasoning—however comprehensive—to substitute for written findings ignores the plain language of the statute. It would also deprive defendants of the finality accorded by the inclusion of written findings in the court's formal judgment and sentence." Friedlund, 182 Wn.2d at 394. "The remedy for a trial court's failure to enter

written findings of fact and conclusions of law is to remand the case for entry of those findings and conclusions." Friedlund, 182 Wn.2d at 394.

Here, the trial court entered written findings and conclusions supporting the exceptional sentence. The judgment and sentence, in a section entitled "Findings," stated that "[a]ggravating factors were . . . found by [the] jury by special interrogatory" and that "substantial and compelling reasons exist which justify an exceptional sentence." The jury's findings of aggravating factors were attached to the judgment. Thus, the record is not "devoid of written findings," Friedlund, 182 Wn.2d at 395, and the statutory requirement of written findings under RCW 9.94A.535 is satisfied. Moreover, as we held in State v. Sage, 1 Wn. App. 2d 685, 709, 407 P.3d 359 (2017), a sentencing court may not constitutionally enter findings of fact on an exceptional sentence beyond "confirm[ing] that the jury has entered by special verdict its finding that an aggravating circumstance has been proven." The court must then "make the legal . . . determination whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence." Sage, 1 Wn. App. 2d at 709. Therefore, the court here complied with the statutory requirement discussed in Friedlund without exceeding the constitutional limit articulated in Sage.[3]

[3] We note that one of the cases reversed by the Supreme Court in Friedlund contained a judgment and sentence with substantially similar language to the judgment and sentence in this case. State v. Volk, No. 30707-7-III, slip op. at 17 (Wash. Ct. App. Feb. 4, 2014) (unpublished) (rev'd sub nom. Friedlund, 182 Wn.2d at 397), http://www.courts.wa.gov/opinions/pdf/307077.unp.pdf. Nonetheless, the Supreme Court remanded on the basis that the record was "devoid of written findings," which the record here is not. Friedlund, 182 Wn.2d

We affirm in part but remand for the court to make an individualized inquiry into Bates's ability to pay and to strike any improperly imposed LFOs.

WE CONCUR:

at 395. Given the constitutional limit described in Volk, it does not appear that the trial court could enter any further findings. See State v. Carson, No. 82537-2-I, slip op. at 12-14 (Wash. Ct. App. Aug. 2, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/825372.pdf (concluding that substantially similar language in a judgment and sentence was not insufficient under Friedlund and was appropriate under Sage).

NIELSEN, BROMAN & KOCH P.L.L.C.

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