72913-6

FILED
Mar 10, 2016
Court of Appeals
Division I
State of Washington

No. 72913-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAREN MORALES,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Appellant Daren Morales stands by his argument that the trial court decision to change the jury's verdict was error. Even if it may have been the trial judge's intention to submit a child molestation in the first degree verdict form, that is not what the jury received, considered, or rendered judgment on. See 8RP 93-96 (jury declaring Mr. Morales guilty of the crime of child molestation in the second degree with twelve jurors confirming this as their individual and joint verdict).

The trial court changed the jury's verdict, not clarified its own intent. The "clerical" error correction tool of CrR 7.8 does not reach that far. "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court…" CrR 7.8(a) (emphasis added).

> To determine whether a clerical error exists under CrR 7.8, we use the same test used to determine clerical error under CR 60(a), the civil rule governing amendment of judgments…. The court looks at "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial" to determine if the error is clerical. [] If it does, then the amended judgment merely corrects the language to reflect the court's intention or adds the language the court inadvertently omitted.

State v. Rooth, 129 Wn. App. 761, 770, 121 P.3d 755 (2005) quoting from Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996) (emphasis added).

The text of the rule – which speaks only to "errors therein arising from oversight or omission" – shows that the rule does not, and cannot, serve as a mechanism for "correct[ing]" a jury verdict. CrR 7.8. By necessity, the jury's verdict here becomes an "error" only through interpretation. The rule may allow for post hoc assessment of "the trial court's intention," but not that of the jury. Rooth, 129 Wn. App. 770.

More importantly, the rule cannot be used to interpret (let alone change) a jury verdict, without running afoul of the constitutional right to trial by jury. "The right of trial by jury shall remain inviolate...." Art. I, Sec. 21. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. VI. "The term 'inviolate' connotes deserving of the highest protection." Davis v. Cox, 183 Wn.2d 269, 288-89, 351 P.3d 862 (2015) quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

Certainly verdicts that "may have been the result of compromise, or of a mistake on the part of the jury, [are] possible."

Dunn v. United States, 284 U.S. 390, 394, 52 S. Ct. 189, 76 L. Ed. 356 (1932). But they still "cannot be upset by speculation or inquiry into such matters." Id. Accord State v. Wilson, 113 Wn. App. 122, 134, 52 P.3d 545 (2002).

In Mr. Morales' case, the focus of this Court's inquiry has to be on the reality that the jury rendered a verdict, a verdict which was judicially interpreted and changed. This cannot be. "[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). "[I]t is not valuing 'form over substance' to require that the State respect the constitutional [] rights of an accused." State v. MacDonald, 183 Wn.2d 1, 21, 346 P.3d 748 (2015), as corrected (Apr. 13, 2015).

State v. Imhoof, 78 Wn.App. 349, 898 P.2d 852 (1995) remains an outlier and not comparable. First, Imhoff complained that the verdict form – wherein the jury convicted him of drug possession, not attempted possession as he was charged – violated his constitutional right to be informed of the charge against him and to be tried only for the offense charged. The Imhoof opinion did not consider Mr. Morales'

legal argument that the judicial change to the jury's verdict violates his right to a trial by jury.

Second, Imhoof wanted the jury verdict – which showed a conviction for a greater degree of criminal offense than what he had been charged with – set aside. 78 Wn.App. at 352. Mr. Morales, on the other hand, wants the jury's verdict to stand. The correction of the Imhoof verdict form did not prejudice that accused. To the contrary, it improved his position. Mr. Morales, on the other hand, was most certainly prejudiced by the change to the jury verdict in his case. The trial court sentenced him for a more serious offense than the verdict announced.

Contrary to what the State suggests in its response, State v. Rooth is on point. In that case, the trial court had changed – reversed by count number – jury verdicts. This Court reversed, precisely because impeaching the verdict is impermissible. 129 Wn.App. at 771. Here, in Mr. Morales' case, the trial court also committed reversible error in changing the jury's verdict under the guise of a CrR 7.8 clerical fix.

Finally, the State is correct that State v. Walker-Williams "does not even involve CrR 7.8." BOR at 15. But this is reason to find in Mr. Morales' favor, not the other way around. The fact that there was no

discussion of relying on a clerical error rule CrR 7.8 to alter the jury's special verdict findings in that case only underscores the reality that the right to a trial by jury is "inviolate." Art. I, Sec. 21.

For the reasons stated above and in the appellant's opening brief, this Court should find error and Mr. Morales should be granted appropriate relief.

B. CONCLUSION

For the reasons stated, Mr. Morales requests this Court reverse and dismiss his conviction, reverse and remand for a new trial, or grant any other remedy it sees fit.

DATED this 10th day of March, 2016.

Respectfully submitted,

/s/ Mick Woynarowski

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONALD PORTER, DPA [paoappellateunitmail@kingcounty.gov] [donald.porter@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( )	U.S. MAIL
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	(X)	AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MARCH, 2016.

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