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SUPREME COURT
STATE OF WASHINGTON
8/30/2021 2:44 PM
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NO. 100042-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TEDGY WRIGHT,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Tedgy Wright seeks review of the published-in-part Court of Appeals opinion affirming his judgment and sentence for rape in the first degree with a deadly weapon, rape in the second degree, robbery in the first degree with a deadly weapon, and unlawful possession of a firearm in the first degree.¹ State v. Wright, No. 80348-4-I, 2021 WL 3485469 (August 9, 2021) (“Slip op.”).² A majority of the Court of Appeals panel held that Wright had no right to be present under the United States Constitution when the trial court and counsel considered the deliberating jury’s question, “If we are unable to reach a verdict on a count, what happens?”

Wright argues this Court should consider whether Division One’s decision in this case conflicts with Division Two’s decision in State v. Burdette, 178 Wn. App. 183, 313 P.3d 1235 (2013). Wright also contends this Court should determine whether article I, section 22 of the Washington Constitution provides greater protection of the right to be present than the United States Constitution—a question not presented to the Court of Appeals, but upon which the dissenting judge in this case

¹ Wright was also convicted of assault in the second degree with a firearm and a deadly weapon enhancement, but this conviction was vacated based on the parties’ agreement that it merged into the robbery charge.

² The opinion is attached to Wright’s petition for review.

opined. As this issue cannot be raised for the first time in a petition for review, this Court should deny review of the state constitution claim.

This Court should also deny review because the facts of this case are distinguishable from Burdette for the reasons expressed by the majority opinion. However, if this Court accepts review of either issue, it should also review whether any constitutional violation was harmless beyond a reasonable doubt, an issue the majority opinion did not need to reach.

B. STANDARD FOR ACCEPTANCE OF REVIEW

“A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b).

C. STATEMENT OF THE CASE

The State charged Wright with numerous violent offenses arising from his separate contact with J.B. and N.F. Slip op. at *1. In brief, the State alleged Wright enticed both women to meet with him by promising they could earn money for sexual favors, raped and robbed the women while armed with a gun, and threatened future harm if the women reported the crimes. Slip op. at *1-3. During its deliberations, the jury submitted a question to the court asking, “If we are unable to reach a verdict on a count, what happens?” Slip op. at *13.

The court and counsel agreed to answer the question by referring the jury back to the instructions as a whole, and “particularly” instructions 10 and 28. Id. Instruction 10 stated, “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” Id. Instruction 28 provided, in pertinent part:

When you begin deliberating, you should first select a presiding juror. The presiding juror’s duty is to see that you discuss the issues in the case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. . . .

You must fill in the blank provided in each verdict form the words “not guilty” or the word “guilty,” according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the

verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Slip op. at *13-14. Wright was not present when the court and counsel considered and crafted a response to the jury's question. The jury later convicted him on all charges.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. WRIGHT MAY NOT RAISE A STATE CONSTITUTIONAL ISSUE FOR THE FIRST TIME IN A PETITION FOR REVIEW.

Wright invites this Court to review whether article I, section 22 affords greater protection to the defendant's right to be present than the United States Constitution. Pet. Rev. at 11-15. As he acknowledges, he did not present a separate state constitutional claim to the Court of Appeals. Pet. Rev. at 11 n.4. Accordingly, that court's majority opinion did not address the issue.

Before it is appropriate to conduct an independent interpretation of a constitutional claim under the state constitution, the proponent of such analysis must address the six neutral criteria set forth in State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986). State v. Ladson, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999). Only when these criteria weigh in favor of independent interpretation does this Court have a principled basis

for departing from federal constitutional precedent. Gunwall, 106 Wn.2d at 59-63. Otherwise, the Court risks “merely substitute[ing its] notion of fairness for that of duly elected legislative bodies or the United States Supreme Court.” Id. at 62-63.

Wright presents a Gunwall analysis to support a separate state constitutional claim for the first time in his petition for review. This Court will not ordinarily consider an issue not raised or briefed in the Court of Appeals. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); RAP 13.3(a) (allowing a party to seek review only of a “decision” of the Court of Appeals). Thus, this Court should deny review of Wright’s belated state constitutional claim.

Wright asserts that review is nevertheless appropriate because of language in this Court’s opinion in State v. Irby, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). There, the defendant was not present when the trial court and counsel discussed via email dismissing prospective jurors based on their responses to a questionnaire. Id. at 877-88. On appeal, Irby argued that this procedure violated his state and federal constitutional right to be present, but did not ask the court to interpret the State constitutional provision independently of the United States constitution. Id. at 885.

Noting that it “has routinely analyzed alleged violations of the right of a defendant to be present by applying federal due process

jurisprudence,” this Court began its analysis by discussing the due process clause of the Fourteenth Amendment. Id. at 880. The Court held that conducting jury selection in Irby’s presence violated that provision. Id. at 884.

Although Irby “ha[d] not asked this court to interpret article I, section 22 independently,” and doing so was unnecessary given the Court’s conclusion that a federal due process violation occurred, the Irby Court asserted it was “nevertheless obliged to examine Irby’s state constitutional claim separately because this court has previously interpreted the right to ‘appear and defend’ independently of federal due process jurisprudence.” 170 Wn.2d at 885. The Court cited no authority for this “obligation,” devoted only a paragraph to this independent examination, and conducted no Gunwall analysis. Instead, the Court cited a single, nearly century-old decision that *exclusively* applied the state constitution, without even mentioning the Fourteenth Amendment. Id. (citing State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)).

“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.” Johnson v. Liquor and Cannabis Board, 197 Wn.2d 605, 618, 486 P.3d 125 (2021) (internal quotation omitted). Because it was not necessary to the resolution of the case, included no Gunwall

analysis, and relied on a case in which it appears the appellant asserted a violation *only* under the state constitution, Irby's statement that the Court is "obliged" to examine a state constitutional question not presented by the parties and its one-paragraph conclusory application of article I, section 22 is nonbinding dicta.

Concurring and dissenting in the decision below, Judge Coburn relied on Irby's dicta to address the state constitutional issue neither party had argued or briefed. Like the Irby Court, Judge Coburn relied on Shutzler, the 1914 case in which the court exclusively addressed the right to be present under the state constitution, included no Gunwall analysis, and confined her discussion to a brief, conclusory postscript to her more robust federal due process analysis. Slip op. Dissent at *6. Judge Coburn's dissent does not put Wright's state constitutional claim properly before this Court.

Wright identified a possible violation of article I, section 22 in his appeal to the Court of Appeals, but abandoned that claim by failing to argue it before that court. The Court of Appeals majority properly declined to reach the issue. This Court should deny review of Wright's state constitutional claim.

2. THERE IS NO CONFLICT BETWEEN WRIGHT AND BURDETTE.

Wright contends this Court should grant review of the Court of Appeals decision because it conflicts with Division Two's decision in State v. Burdette, 178 Wn. App. 183, 201, 313 P.3d 1235 (2013). As a majority of the Division One panel in his case concluded, that is not so. Slip op. at 12-14. Moreover, the decision in this case follows directly from the Court of Appeals decision in State v. Sublett, which this Court affirmed. 156 Wn. App. 160, 178, 231 P.3d 231 (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012).

a. There Is No Right To Be Present While The Trial Court And Counsel Consider A Jury Question.

A criminal defendant has a constitutional right to be present at every critical stage of the criminal proceedings against him. Sublett, 156 Wn. App. at 182 (citing State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008)). A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed. 2d 486 (1985)). "A defendant does not have the right to be present during in-chambers or bench conferences

between court and counsel on legal matters.” Id. (citing In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)). How to respond to a jury question about its instructions is a purely legal issue, so a conference on that matter is not a critical stage and the defendant has no right to be present. Id.

In Sublett, the trial court held an in-chambers conference without the defendant in response to a question the jury submitted during deliberations, and the defendant argued this violated his right to be present. 156 Wn. App. at 181. Division Two of this Court disagreed. “Here, the trial court’s in-chambers conference addressed a jury question regarding one of the trial court’s instructions, a purely legal issue that arose during deliberations and did not require the resolution of disputed facts.” Id. at 182. Accordingly, it was not a critical stage in the proceedings and the defendant had no right to be there. Id.

In State v. Burdette, 178 Wn. App. 183, 201, 313 P.3d 1235 (2013), the jury sent a message to the court that stated, “Jury is deadlocked over several issues relating to the defendant’s intent.” Id. at 189. This “bald assertion of deadlock” came only a few hours after the jury began deliberating. Id. at 196. After consulting with counsel in chambers without the defendant, the court instructed the jury, “[P]lease continue to deliberate in an effort to reach verdicts.” Id. at 189 (alteration

in original). The jury acquitted Burdette of one charge but convicted on the other. Id. at 189.

Burdette appealed, arguing that he had a right to be present when the court discussed its response to the jury's communication. Id. at 189-90. Distinguishing Sublett as a case that did not involve deadlock, the court reasoned that "all may pivot on how long the court will require a deadlocked jury to continue deliberations before declaring a mistrial," and so "the defendant's presence at this stage has a direct relation to the fullness of his opportunity to defend against the charge." Id.

Division One's decision in this case does not conflict with Burdette because Wright's jury did not state it was deadlocked or that it could not come to consensus. Here, the jury asked "what happens" if the jury could not reach a verdict on "a count"; it did not state, as in Burdette, that it was in fact unable to reach a verdict. Id. at 196. This question did not call for strategic input on how long to require the jury to continue deliberations, so it does not present the same situation as in Burdette.

The Court of Appeals properly distinguished Burdette on its facts and recognized that Sublett applies here and is dispositive. Wright did not have a right to be present when the court and counsel considered and responded to the jury's procedural question that did not indicate deadlock, so there was no violation of his constitutional rights.

b. Any Violation Was Harmless Beyond A Reasonable Doubt.

Violations of a defendant’s constitutional right to be present do not require reversal when shown to be harmless beyond a reasonable doubt. Burdette, 178 Wn. App. at 201. In Burdette, the court affirmed because “it is very unlikely that [the defendant’s] absence had any effect on the judge’s response[.]” Id. at 201-02. The same is true here. The jury asked what would happen “if” they were “unable to reach a verdict on a count,” and the trial court responded that the jury should refer to its instructions. The trial court identified two jury instructions in particular—the one directing the jury to decide each count separately and not allow its verdict on one count to control its verdict on any other, and the one informing the jury it must be unanimous to convict Wright on any count. CP 377, 396. These instructions were legally correct and directly responsive to the jury’s question.

Wright suggests that, had he been present, he might have encouraged his counsel to ask the court to also emphasize the instruction directing the jury not to abandon their beliefs for the sake of a verdict. But the jury had this instruction in its packet, had been orally advised of it by the trial court, and the court answered the jury’s question by directing it to “see your instructions” without limitation. CP 364. There is no reason to

believe that Wright would have made this recommendation where his trained legal counsel saw no need for it.

Further, while Judge Coburn suggests Wright might have “advocated for a mistrial” based on the jury’s question, any such advocacy would fail. A court that discharges the jury when further deliberations may produce a fair verdict deprives the defendant of his “valued right to have his trial completed by a particular tribunal.” State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982) (quoting Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)). There must be “extraordinary and striking circumstances” before the trial court has discretion to discharge a jury. Id. at 164. “The jury’s acknowledgement of *hopeless deadlock* is an ‘extraordinary and striking’ circumstance which would justify the judge’s exercise of his discretion to discharge the jury,” but not even that compels the court to declare a mistrial. Id. at 164 (emphasis added). Here, the jury’s question did not express “hopeless deadlock” and it is clear from the trial court’s response that the trial judge did not consider the jury to be deadlocked. Given the risk of infringing on the defendant’s right to have his trial completed by a particular tribunal, that determination is “entitled to special respect.” Arizona, 434 U.S. at 510. The trial court would not have granted a mistrial based upon a

question about “what happens” “if” the jury could not come to a verdict as to “a charge” among many. Any error was harmless.

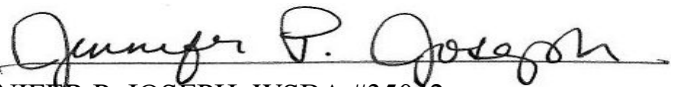
E. CONCLUSION

For the foregoing reasons, the petition for review should be denied. In the event this Court wishes to review the Court of Appeals decision, it should exclude review of the state constitutional claim Wright failed to present to the Court of Appeals.

DATED this 30th day of August, 2021.

Respectfully submitted,

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