NO. 33714-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

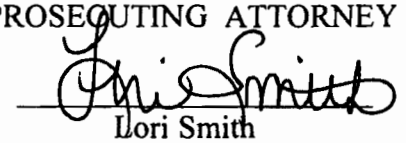
DALE TUCKER JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PEND OREILLE COUNTY

The Honorable Patrick Monasmith, Judge

DOLLY N. HUNT
PROSECUTING ATTORNEY

By: 
Lori Smith
Deputy Prosecuting Attorney
Attorney for Respondent
Pend Oreille County Prosecutor's Office
P.O. Box 5070
Newport, Washington 99156-5070
509-447-4414

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A. STATEMENT OF THE CASE

Appellant Dale Tucker (Tucker) was charged with residential burglary and second degree theft. CP 1-3. Tucker was prohibited from entering his grandmother Virginia (Betty) Durfee's residence at 662 Baker Lake Road, Newport, Washington, by a condition in a court order prohibiting him from entering Durfee's property until the order expired (October 26, 2016). RP 71-72; Ex.1.

On or about May 8, 2015, Tucker unlawfully entered Durfee's residence and was recorded on video stealing items from a freezer in the kitchen. RP 142. The video shows Tucker pulling his shirt up over his face when he saw the cameras. RP 142, 182, 183. Pictures of Tucker later that night and the next day show Tucker in the same shirt in both the pictures and video. RP 143. Among items missing from the residence were food, a couple of heaters, a radio and some antlers. RP 146, 147.

Cheyenne Bradbury and Robert Bradbury are cousins to Tucker. RP 95, 138. Robert Bradbury set up the cameras inside and outside of Betty Durfee's residence. RP 99, 140, 141, 177-180. The camera inside the residence took videos and the camera facing outside took still pictures. RP 100.

Cheyenne Bradbury identified her cousin Dale Tucker as the person on both the video and still pictures of the burglary of the Durfee

property. Robert Bradbury also identified his cousin Dale Tucker as being the person in the video who was inside Durfee's residence. RP 142. Pend Oreille County Sheriff's Deputy Travis Stigall had known defendant Dale Tucker since grade school. RP 220. Deputy Stigall also identified Tucker as being the person in the video. RP 221, 246.

The jury convicted Tucker of residential burglary and the lesser-included crime of third degree theft. CP 46-48; RP 303.

B. STANDARD OF REVIEW

Jury instructions are reviewed de novo for errors of law, in the context of the instructions as a whole. State v. Sublett, 176 Wn.2d 58, 78, 292 P.3d 715 (2012).

C. ARGUMENT

1. APPELLANT IS PRECLUDED FROM RAISING THE ALLEGED INSTRUCTIONAL ERROR FOR THE FIRSTTIME ON APPEAL.

For the first time on appeal appellant claims that the trial court's failure to instruct the jury that "deliberations must include all twelve jurors at all times" deprived him of unanimous jury verdicts. Brief of Appellant 5. Appellant attempts to convert the trial court's failure to give a non-existent jury instruction into a constitutional "unanimity" issue. But appellant did not propose such an instruction below, and the alleged error

is not of manifest constitutional magnitude. Accordingly, appellant may not raise the issue for the first time on appeal. RAP 2.5(a) (3).

Where a defendant fails to offer an instruction or to object in the trial court, no error can be predicated on the failure of the trial court to give an instruction unless the error is of constitutional magnitude. State v. Parker, 97 Wn.2d 737, 742, 649 P.2d 637 (1982); RAP 2.5(a). Instructional errors are not automatically deemed manifest errors. State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimensions. State v. O'Hara, 167 Wn.2d at 98.

A manifest error requires a showing of actual prejudice. Id. at 99-100. To show actual prejudice there must be a "plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case." Id. (emphasis added). "The focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Appellant has not met this showing.

a. *Appellant Has Not Shown that He Was Prejudiced by the Alleged Instructional Error.*

Appellant claims that because the trial court did not instruct the jury that "deliberations must include all twelve jurors at all times," he was deprived of unanimous verdicts. Brief of Appellant 5, 13, 14. But appellant presents no facts whatsoever from the record to support his claim that he was prejudiced by deliberations that allegedly were flawed or by verdicts that allegedly were not unanimous. As such, he cannot demonstrate prejudice.

Appellant's entire argument is based on speculation about what might have occurred during jury deliberations. Brief of Appellant 13, 14. Appellant claims that the jury had "opportunities" for "improper deliberations." Brief of Appellant 13. But there is no evidence in the record to support this allegation. There were no objections or protestations about improper juror deliberations or juror misconduct in the trial court.

Appellant goes on to speculate that because the jury deliberated "for less than one hour" and came back with a quick verdict this means that the jury must have wanted to speed up the deliberation process so they could start their summer weekend, so the presiding juror probably

improperly divided the jury in two and had half the jurors decide each count, "with each group agreeing to follow the recommendation of the other." Brief of Appellant 13. There is absolutely no support in the record for this assertion.

Furthermore, respondent is not aware of any Washington case stating that a quickly-obtained verdict indicates a unanimity problem. And appellant cites none. In fact, it seems that the opposite would be true. Frankly, the most likely reason for the quickly-returned verdict in the present case is the overwhelming evidence that was presented: appellant was caught on video unlawfully entering and remaining in the victim's residence, stealing food from her freezer, and relatives identified him as the person in the video. RP 101, 102, 104, 142.

Appellant further claims there is a "reasonable possibility" that some jurors may have discussed the case "without the benefit of every other juror's presence, whether by phone, over lunch, simply walking to and from the jury room, or even in the jury room itself." Brief of Appellant 14. This is pure speculation. Once again, appellant has not pointed to any facts in the record to support any of these purely speculative statements. No facts back up his allegations that the trial process or deliberations were flawed or that the verdicts were non-unanimous. "If the facts necessary to adjudicate the claimed error are not

in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333.

b. The Alleged Instructional Error is Not of Constitutional Magnitude.

Appellant claims "[t]he court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present and only as a collective constituted manifest constitutional error," and then cites State v. Lamar, 180 Wn.2d 576, 585-586, 327 P.3d 46 (2014). Brief of Appellant 12. However, Lamar does not stand for the proposition that it is manifest constitutional error for a trial court to fail to give the jury an instruction stating that "jury deliberations must include all twelve jurors at all times." Id. Rather, the Lamar Court found manifest constitutional error because an alternate juror was added to the jury panel and the trial court failed to instruct the jury that deliberations were to start anew. Id.

In fact, none of the cases cited by appellant support his claim that it is manifest constitutional error to fail to instruct the jury that "deliberations must include all twelve jurors at all times." For example, appellant also cites to State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60 (1993) in support of this argument. But Ashcraft is also an alternate juror case where the trial court failed to instruct the jury to start deliberations anew. Id. Ashcraft does not say that it is manifest constitutional error for

a trial court to fail to instruct a jury that "deliberations must include all twelve jurors at all times." Id. Nor does State v. Fisch, 22 Wn.App. 381, 588 P.2d 1389 (1979) (cited by appellant) (Fisch is a double defendant, double ballot trial.) Id.

Thus, none of the cases cited by appellant state that failure to "instruct the jury that deliberations must include all twelve jurors at all times" is manifest constitutional error. And respondent has found no authority stating that such instruction is required or that failure to give such instruction is manifest constitutional error.

In sum, appellant has not demonstrated actual prejudice or that it is manifest constitutional error for the trial court to fail to instruct the jury that "deliberations must include all twelve jurors at all times." The authority cited by appellant does not stand for this proposition, and cases cited by appellant are distinguishable. This Court should accordingly refuse to review appellant's claimed instructional error pursuant to RAP 2.5(a) (3).

2. THE TRIAL COURT'S INSTRUCTIONS AND ADMONITIONS WERE PROPER AND THERE IS NO AFFIRMATIVE EVIDENCE THAT THE JURY DISREGARDED THOSE INSTRUCTIONS.

The adequacy of jury instructions are reviewed *de novo* as a question of law. State v. Clausing, 147 Wn.2d 620, 627, 56 P.3d 550

(2002). A reviewing court presumes that juries follow all the instructions given unless there is affirmative evidence that a jury disregarded a trial court's instructions. State v. Brunson, 128 Wn.2d 98, 109-10, 905 P.2d 346 (1995). In the present case, there is absolutely no affirmative evidence in the record to indicate that the jury disregarded the trial court's instructions in the manner indicated in appellant's briefing.

Although not expressly assigned as error, Appellant discusses two Washington Pattern Jury Instructions in his brief, WPIC 4.61[1] and a portion of WPIC 1.01.[2] Brief of Appellant 9-12. Appellant complains that the trial court failed to admonish the jury not to discuss the case amongst themselves often enough because it did not do so "before every recess" as contemplated by WPIC 4.61. Brief of Appellant 11. Although the trial court did admonish the jury several times pursuant to near-identical language from WPIC 1.01, appellant states, "neither time was the admonishment as thorough as set forth in WPIC 4.61." Id. Appellant did

[1] WPIC 4.61 states, in relevant part, "[d]uring this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well—you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

[2] WPIC 1.01 (part 2), in relevant part, states "[u]ntil you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. 'No discussion' also means no e-mailing, text messaging, blogging, or any other form of electronic communications."

not ask the trial court to read WPIC 4.61 to the jury, nor did appellant object to the adequacy of any of the trial court's other admonishments.

The language in WPIC 4.61 and mirroring language contained in a portion of WPIC 1.01 (part 2), in which a court instructs a jury not to discuss the case with each other (or anyone else) until the jurors are in the jury room for deliberations, is sometimes referred to as the "premature discussion instruction"(or "juror discussion admonition"). *See e.g.,* State v. Erickson, 108 Wn.App. 732,743,744, 33 P.3d 85 (2001), *review denied* 146 Wn.2d 1005 (2002). In Erickson the defendant argued that the trial court committed reversible, prejudicial error by failing to constantly and fully admonish the jury not to discuss the case with each other until they were in deliberations. Id. at 742, 743. The trial court in Erickson had given an alternative form of juror discussion admonition, but not WPIC 1.01. Id. at 743. The defendant in Erickson—like appellant here— had not raised the issue in the trial court. Id.

In Erickson, this Court held, "[a]bsent a constitutional requirement for juror discussion admonitions . . . the alleged error is not amenable to review for the first time on appeal." Id. at 744. This Court further cited as "persuasive" several Circuit Court decisions that have held, "no

constitutional requirement exists that a trial court admonish its jury panel not to discuss the case amongst themselves prior to deliberation."[3]

Nonetheless, this Court in Erickson cited WPIC 1.01 with approval as "[a]n instruction normally given in every case." Erickson, 108 Wn.App. at 743(citations omitted). And indeed, WPIC 1.01 was read to the jury in the present case.

For example here, the trial court read WPIC 1.01—the advance oral instruction—in full, right after empaneling the jury. Supp. RP 6-15. As to the premature discussion admonition portion specifically, on that first day of trial, the court told the jury, "[u]ntil you are in the jury room for deliberations you must not discuss the case with other jurors or anyone else." Supp. RP 7.

The second time the trial court admonished the jury not to discuss the case was at the end of that first day of trial when it told the jurors, "because we are separating tonight I'm obliged to tell you much the same as you probably heard from me this morning and that is please do not discuss the case among yourselves or with anybody else. . . ." RP 149.

The third time the trial court admonished the jury was on the second and final day of trial, just before releasing the jury for lunch, when

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[3] Erickson,108 Wn.App. at 743, Citing Meggs v. Fair, 621 F.2d 460, 463 (1st Cir. 1980); *see also* U.S. v. Abrams, 137 F.3d 704, 708 (2nd Cir. 1998)(noting Second Circuit does not require such instructions even though they are given routinely).

the trial court told the jury, "the court is obliged to, once again, give you this directive about discussing the case. So of course none of that among yourselves. "RP 253, 254. Thus, several times in this case the trial court admonished the jury not to discuss the case among themselves, including reading all of WPIC 1.01 at the beginning of the trial. Supp. RP 6-15. While it is true the trial court did not read WPIC 4.61 before every recess, it is also true that there were only two recesses in this brief two-day trial. RP 132; RP 249. And, while appellant complains about the trial court's failure to read WPIC 4.61 "before every recess," it should be remembered that appellant did not ask the court to read that instruction either.

The trial court's other written jury instructions explained the deliberation process and the need to reach unanimous verdicts. CP 17-45. For example, Instruction Number 2 states, in relevant part, "you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 22. Instruction 19 instructed the jury how to carry out the process of deliberations. CP 39-41. Included in Instruction 19 are instructions for filling out the verdict forms, including express statements that jurors must be unanimous and that "[b]ecause this is a criminal case, each of you must agree for you to return a verdict." CP 41.

As to these admonitions and instructions, appellant has not pointed to any facts in the record to indicate that the jury failed to follow the court's instructions—which might result in premature discussions, or flawed deliberations, or non-unanimous verdicts. There is nothing in the record showing that jurors had improper discussions or deliberations or that separate deliberations caused non-unanimous verdicts. In fact, appellant's entire argument is based on rampant speculation. Brief of Appellant 13, 14. In other words, appellant has not presented any affirmative evidence showing that the jury disregarded the court's instructions. State v. Brunson, 128 Wn.2d 98, at 109-10. Thus, we must presume that the jury followed the instructions and admonitions. Id.

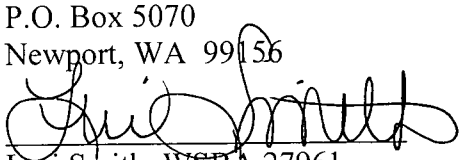
This was not a difficult case and the jury instructions were pretty standard instructions. CP 17-45. There were no objections to the trial court's instructions. RP 153, 154, 258, 259. In short, the trial court's instructions provided appellant with a constitutionally protected deliberative process that resulted in unanimous verdicts. There is nothing in the record to indicate otherwise. To the extent that this Court reaches the issue of these instructions, this Court should agree that the trial court's instructions and admonishments were proper.

D. CONCLUSION

The alleged instructional error raised by appellant cannot be raised for the first time on appeal. Appellant has not shown that he has been prejudiced and that the alleged instructional error is of constitutional magnitude. The trial court's instructions were proper and there is no evidence that the jury failed to follow those instructions. This Court should refuse to review the alleged instructional error pursuant to RAP 2.5(a) (3) and should affirm appellant's convictions in all respects.

Respectfully submitted this 4th day of August, 2016.

DOLLY N. HUNT
PEND OREILLE COUNTY PROSECUTING ATTORNEY
P.O. Box 5070
Newport, WA 99156



Lori Smith, WSBA 27961
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, vs. DALE TUCKER, Appellant.	))))))	No. 33714-6-III DECLARATION OF SERVICE by Electronic Mail

The undersigned declares under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 4th day of August 2016, I caused a true and correct copy of the Respondent's Brief to be served upon Christoper Gibson, counsel for appellant, *via electronic email*, at the email address listed below.

Christopher Gibson
GibsonC@nwattorney.net

Signed in Newport, Washington, this 4th day of August, 2016.

Lori Smith, WSBA 27961
Deputy Prosecuting Attorney
Attorney For Respondent
Pend Oreille County Prosecutor's Office
Newport, WA 99156