

68148-6

68148-6
NO. 68148-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

LONNIE C. LAMAR, Jr.,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

With the concurrence of the parties, the court excused a juror and impaneled an alternate. It then instructed the jurors to bring the alternative “up to speed” concerning deliberations that had already occurred. Defense counsel specifically stated that they had no objection. Does the instruction constitute “manifest error affecting a constitutional right,” so that it can be challenged for the first time on appeal?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

Between 1998 and 2000, the defendant (appellant), Lonnie Lamar, Jr., lived with Michelle McNeil in Stanwood. After the two of them separated, Mitizi McNeil (Michelle’s mother) helped box up her possessions. At first, they were put in a storage facility. Later, they were moved to Spokane, where Michelle was then living. Michelle died prior to trial, so her testimony was unavailable. 10/11 RP 118-26.

On October 15, Michelle called her mother. The testimony does not show what Michelle said. Mitizi told her to contact the Spokane Police. 2 RP 129-31.

On October 16, 2009, a woman brought a number of photographs to Spokane Police. There was an 8 ½ x 11 picture in a glass frame, along with some Polaroid photographs. 10/11 RP 136-38. One of these depicted a pre-pubescent girl with an erect penis between her buttocks. The photograph does not show the face of either the man or the girl. 2 RP 261. Other photographs depicted K. (born 4/95) in a bathtub. 10/13 RP 109. Still others showed the interior of the trailer where the defendant had been living. 10/11 RP 236-37.

DNA on the photographs matched the defendant. Any paternal relative of the defendant would have the same profile. One male in 1300 has this profile. 10/12 RP 378-81.

The photographs had factory markings on the back. These identified the date and shift on which the film was manufactured and the machine on which it was made. All of the Polaroids came from film that was manufactured by the same machine during the same shift on the same date. 10/14 RP 222-27.

On February 10, 2011, the defendant was questioned by police and provided a taped statement. 10/12 RP 403-05. On February 14, the defendant called the officer and left a voice mail. When the officer returned his phone call, the defendant said that he

had two apology letters to give him. The next day, they met, and the defendant delivered the letters. 10/12 RP 403-15. One of the letters said:

I took a couple pictures of [K.] in the bath. I really don't know why. But later than night I took a few more pictures that I was dissappointed I did right away. There was never sexual contact. I took all the pictures I took of her and I hid them in a picture on the wall of me and my son. I have never done anything like that again, since that one time. I have tried to forget about that and also forgot about the pictures. Cause they were found and turned into the police dept. a year ago I heard of it right away and my pain was hard for what I did to [K.] by taking the pictures. Me and her have even talked about it she forgives me. She also knows I would never again. When I think about it now, I wouldn't forgive myself it was wrong I was wrong and sorry to this day. Thank you.

Ex. 51; see 10/14 RP 261-62.

The defendant's son testified that the photograph showing a girl with a penis between her buttocks was pornography that he had stolen from a camper. 10/14 RP 144-45, 152-53. When he was forced to leave his father's trailer, he left it behind. 10/14 RP 147. The defendant's ex-girlfriend testified that the penis shown in the photograph was not the defendant's. 10/13 RP 90. K. testified that the girl shown in the photograph was not her. 10/13 RP 110.

B. IMPANELING OF ALTERNATE JUROR.

The defendant was charged with first degree child molestation and first degree rape of a child. CP 72-73. Closing arguments were heard on Friday afternoon, October 14, 2011. Before the jury retired, the court excused an alternate juror, but it directed him to remain available and not talk about the case. 10/14 RP 298-301. The jury deliberated for less than an hour that afternoon. 10/17 RP 429.

On Monday morning, a juror called in sick. The court held a hearing to address this problem. The defendant was present and represented by an attorney from the same law firm as his original trial counsel. The parties agreed that the juror could be excused and replaced by the alternate. The court said that it would "tell the other members of the jury that they should provide [the alternate] with a recap of what their deliberations had been on Friday." The court then asked defense counsel if there was "anything else." He said that there was not. The court then noticed that the original defense counsel had arrived in the courtroom. It asked her if she had any objections. She said no. 10/17 RP 428-29.

The jury was brought into the courtroom. The court informed them that a juror was ill and had been replaced by the alternate.

The court then stated:

What I will advise you to do is this When you go back to the jury room and begin your deliberations, you should some time reviewing, recapping with [the alternate] any discussion that you may have already had Friday in terms of the case, so that he's first brought up to speed in terms of whatever the deliberative process was.

Then once that's been done, resume your deliberations without any other hitches or anything else.

10/17 RP 430. No objection was made to this instruction.

Later that day, the jury returned a verdict. It found the defendant guilty of first degree child molestation but not guilty of first degree rape of a child. The court informed that jury that it was "going to ask you is this how you voted on both of these counts." Each juror, including the former alternate, answered "yes." 10/17 RP 432-33.

III. ARGUMENT

A. SINCE THE RECORD SHOWS THAT THE JURY WAS UNANIMOUS, THE ABSENCE OF AN INSTRUCTION TO BEGIN DELIBERATIONS ANEW DID NOT IMPACT THE DEFENDANT'S RIGHT TO JURY UNANIMITY.

The sole issue raised on this appeal involves the court's instructions concerning deliberations after an alternate juror was

empanelled. The court had specifically told the parties what instruction it planned to give. Defense counsel twice stated that they had no objections. 3 RP 429. The defendant nevertheless argues that this instruction was constitutional error that should be raised for the first time on appeal. This argument should be rejected.

Under RAP 2.5(a)(3), “manifest error affecting a constitutional right” may be considered for the first time on appeal. To invoke this rule, the defendant must satisfy two requirements. First, he must demonstrate that the alleged error is “truly of constitutional magnitude.” State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Second, the defendant must “show how, in the context of the trial, the alleged error actually affected the defendant's rights.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant here cannot make either showing.

The defendant relies on State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993), and State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004). In Ashcraft, the trial court seated an alternative jury without notice to the parties. The record did not show that the court gave any instruction to the jury about how to proceed with

deliberations. Ashcraft, 71 Wn. App. at 460. This court held that the absence of such an instruction was constitutional error, because of the possibility of a non-unanimous verdict. Id. at 464-65.

The facts of Stanley were substantially identical. Again, the record did not show that the parties were given an opportunity to object to seating of the alternate juror. The record likewise did not show what instructions, if any, were given to the jurors. Stanley, 120 Wn. App. at 313. The State conceded that this procedure was error. It argued that the error was harmless because a poll showed that the jury was unanimous. The court rejected this argument: “It is not beyond the realm of reasonable possibility that the reconstituted jury could have concluded that it need not begin deliberations anew as to any issues already considered by the original 12 jurors.” Id. at 316-17.

In both Ashcraft and Stanley, the record failed to show *any* instructions about resumption of deliberations. In contrast, the court in the present case did give an instruction. 33 RP 430. Although it was not precisely the instruction required by CrR 6.5, it satisfied the essential constitutional requirement of insuring juror unanimity. The newly seated juror was not to be simply told the results of prior determination. Rather, he was to be “brought up to speed in terms

of whatever the deliberative process was.” There would be no point of doing so if he was not going to have any role in subsequent deliberations. The jurors were then to “resume your deliberations without any other hitches.” 10/17 RP 430. It was thus clear that the newly-impaneled juror was to be a full participant whose agreement was necessary for any verdict.

The form of polling in this case was also different than in Stanley. There, the jury was asked whether the “the verdict was both his or her individual verdict as well as the verdict of the jury as a whole.” Stanley, 120 Wn. App. at 316. Here, the court asked the jurors if “this is how you voted on both of these counts.” Each of the jurors, including the former alternate, affirmed that this was in fact his or her vote. 3 RP 432-33. When the former alternate specifically said that he had voted “guilty,” is not reasonable to conclude that he had merely accepted some other person’s determination of the defendant’s guilt.

In short, when the record is considered as a whole, it clearly demonstrates that the verdict was unanimous. The defendant’s objections to the court’s instruction do not raise an issue that is truly of constitutional magnitude. Consequently, it cannot be raised for the first time on appeal.

B. THE DEFENDANT HAS NOT ESTABLISHED THAT THE ERROR HAD ANY PRACTICAL OR IDENTIFIABLE CONSEQUENCES TO THE TRIAL.

Even if this issue is considered constitutional in nature, that is not enough to allow it to be considered for the first time on appeal. The defendant must additionally demonstrate that the error actually affected his rights. McFarland, 127 Wn.2d at 333. This means that the defendant must show that the error had “practical and identifiable consequences in the trial of the case.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If the effects of the error are purely abstract and theoretical, it cannot be raised for the first time on appeal. Id. at 346.

This court has not previously addressed the application of the “manifest error” standard in a context similar to the present case. Neither Ashcraft nor Stanley considers this issue. In both of those cases, neither the defendant nor counsel was present when the jury was re-impaneled, so they had no opportunity to object.

For the error here to have impacted the defendant’s rights, the court would have to assume that the following events occurred. First, during the deliberations with the original juror – a period of less than one hour – the jury reached a definite conclusion concerning one or more of the elements of child molestation.

Second, during the ensuing deliberations with the former alternate, the jury never re-examined those conclusions. Third, when the former alternate said that he had voted “guilty,” he did not mean that this was his personal conclusion – he merely meant that this was the conclusion reached by other jurors in his absence. Nothing in the record suggests that any of these things happened. The possibility that they all did is purely abstract and theoretical. Such a possibility does not justify reviewing issues for the first time on appeal.

In deciding whether the issue can be raised, the court should consider the policy underlying the rule that a party must raise a timely objection to jury instructions:

[Its] purpose is to give to the trial court the benefit of the study and research of counsel, and to advise the trial court of the contentions of the respective parties as to the law or the facts, at a time when the court can, if it so desire, correct any error which it may feel it has made in its instructions.

State v. Severns, 13 Wn.2d 542, 562, 125 P.2d 659 (1942).

Here, the error could easily have been corrected if anyone had called it to the trial court’s attention. If the issue can be raised for the first time on appeal, there is no conceivable reason for defense counsel to object at trial. Counsel has no way to know

whether the initial period of deliberations was favorable or unfavorable to the defendant. She therefore cannot know whether resuming deliberations anew would help or harm him. On the other hand, it can be of enormous benefit to the defendant to have the trial court commit error that can lead to a new trial. If the verdict turns out to be not guilty, the case will be over. If the verdict is guilty, he gets a second chance to persuade another jury.

If the issue can be raised for the first time on appeal, the defendant has no reason to object at trial and every reason not to. This court should not encourage a procedure that will lead to unnecessary re-trials, based on events that have only a speculative impact on the defendant's rights. Since the error was not "manifest," it cannot be raised for the first time on appeal.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on November 9, 2012.

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