

68308-0

68308-0

NO. 68308-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDIBERTO MUJO-HERNANDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A juror called in sick before opening statements. Did the trial judge properly exercise her discretion to substitute the alternate juror and proceed with trial?

2. The trial judge misread one word of the accomplice liability instruction; however, the written instructions correctly stated the law. Should Mujo's claim of error be rejected because Mujo failed to preserve the error; no identifiable and practical consequences resulted; and any error was harmless because Mujo was guilty as a principle?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ediberto Mujo-Hernandez (hereafter Mujo) and Jayro Munoz-Monterroso¹ (hereafter Jayro) were charged with robbery in the second degree, alleging that they committed the crime "each of them, and together with another." CP 1-6. Mujo was convicted by a jury. CP 31. He received a standard-range sentence, from which he appeals. CP 21-26, 63-70.

¹ The second volume of the Report of Proceedings and the Brief of Appellant misspell the co-defendant's name as "Hiro."

2. SUBSTANTIVE FACTS

Mujo and his friends Jayro and Kiki drove through Pioneer Square after drinking and dancing at a nightclub. Ex. 3. Jayro said that he wanted to “do something bad” or “kick someone’s ass.” 2RP 101; Ex. 3.² Aaron Palmer had also been drinking with friends in Pioneer Square that night; he sat on the stairs at 83 South King Street, sending a text message to a friend with whom he intended to share a taxi. 2RP 72-73. Jayro and Mujo ran up to Palmer; Mujo grabbed the hood of Palmer’s jacket and dragged him down the stairs. 2RP 73; Ex. 4. While Jayro kicked Palmer in the torso and head, Mujo tore Palmer’s cellular telephone from his hand. 2RP 73; Ex. 3. Both men ran back to Jayro’s car and Kiki drove them away. Ex. 3. The robbery was captured on surveillance video. 2RP 73-83; Ex. 4.

Another car pulled up and the occupants asked Palmer what happened; they followed Jayro’s car and called 911 to report the license plate number. 2RP 76; Ex. 4. Using the license plate number, Seattle Police Detective Michael Magan located Jayro and then Mujo. 2RP 61. Mujo was arrested a few weeks later and gave

² The State adopts Mujo’s convention for references to the Report of Proceedings.

a complete confession, which was video recorded. 2RP 96-98; Ex. 3.

At Mujo's trial, the jury was selected on the morning of January 10, 2012, after which, the court adjourned. 2RP 21. The next morning, the trial judge advised the parties that Juror 28³ had called in sick. 2RP 22-23. The judge advised the parties that, absent an objection, the trial would proceed. 2RP 31-32. Defense counsel stated:

My objection would be that Juror No. 28 is an African-American woman which is not a rarity in King County juries and that my client is a person of color and that I don't know if that's enough for a Batson challenge, but she's one of the few sitting people that we have that is African-American.

2RP 32.

The court noted that Juror 2 was also African-American and that no one had challenged Juror 28; rather, she had called in sick. 2RP 32. Defense counsel acknowledged that it would be a one-day trial and proposed setting the case over for one day, apparently assuming Juror 28 could return. 2RP 32. The court refused to delay the trial, citing her promise to the jury that they would not be

³ Juror 28 is also referred to as Juror 13; it appears that she was Juror 28 in the venire, then seated as Juror 13 on the jury. 2RP 23.

needed after Friday (January 13, 2012) and the approaching long weekend.⁴ 2RP 33. The court further stated:

I understand your concern about the racial issue, but one, she's not the only African-American juror, and secondly, for the record, your client is not African-American, and thirdly, no one has challenged her. She called in sick.

2RP 33.

The jury of 12 was then sworn and heard evidence, including a portion of the 911 call, the surveillance video, and Mujo's videotaped confession. 2RP 36-113; Ex. 2, 3, 4.

At the conclusion of the trial, the court's instructions to the jury included the accomplice liability instruction. 2RP 159; CP 46 (WPIC 10.51). The court misread a word of the instruction:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either, one solicits, commands, encourages, or requests another person to commit a crime, the crime; or two, aids or agrees to aid another person in planning or committing the crime.

⁴ The Dr. Martin Luther King, Jr. holiday fell on Monday, January 16, 2012.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

2RP 159-60 (emphasis added).

Mujo did not object to the misread instruction.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN PROCEEDING WITH TRIAL AFTER JUROR 28 CALLED IN SICK BECAUSE THE COURT IS REQUIRED TO RELEASE AN UNFIT JUROR.

This Court reviews a ruling excusing a juror for abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986); State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993).

Mujo claims that the trial court violated his right to a fair trial by excusing a seated juror who was African-American over his objection without conducting an inquiry. Mujo's argument must be rejected because the trial court is required by statute to excuse an ill juror and because Mujo has no right to any particular juror.

The court has a statutory duty to excuse a juror who is too ill to serve. RCW 2.36.110⁵ requires the court to excuse from service any juror who, in the judge's opinion, is unfit or unable to serve for a number of listed reasons, including ill health. Criminal Rule 6.5 similarly mandates the discharge of an ill juror, when a juror is deemed unfit before deliberations. "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court *shall* order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury." CrR 6.5 (emphasis added); State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).

Thus, an evidentiary hearing is not required when a juror is unable to participate because of illness before the case is submitted to the jury. Although this Court has stated that "CrR 6.5 contemplates a formal proceeding, which *may* include brief voir dire" before substituting a juror, that applies where the case has already gone to the jury and the alternates have been temporarily excused. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981

⁵ "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110.

(1998) (emphasis in original); see also Ashcraft, 71 Wn. App. at 462. The purpose of a “formal proceeding” is to verify that the juror is unable to serve⁶ and to demonstrate that the alternate has remained impartial after being temporarily dismissed.⁷

In contrast, no such formal inquiry is necessary when a juror is discharged as unfit prior to deliberations. Jorden, 103 Wn. App. at 227. In Jorden, a juror was inattentive and had fallen asleep several times during the trial. The trial judge heard argument from both parties, allowed both sides to call witnesses, and read his notes about the juror's conduct. But no inquiry into the alternate's impartiality was necessary because the case had not yet gone to the jury; hence, the alternates had not been identified or temporarily dismissed. Id.

In this case, the trial court heard Mujo's objection, but overruled it, noting that it was a very short case and that the juror had not been stricken, but had called in sick. No testimony had been taken, so there was no basis for any further inquiry.

Nonetheless, Mujo argues that the trial court was required to create a record supporting adequate cause for dismissal of the

⁶ Johnson, 90 Wn. App. at 73.

⁷ Ashcraft, 71 Wn. App. at 462.

juror. Mujo now asserts that the trial court should have inquired of Juror 28 to see if she could return the next day, but that claim is waived. RAP 2.5(a). Although Mujo objected to the discharge of Juror 28, he never asked the court to contact Juror 28 to determine the nature of her illness or whether it was likely that she would be able to serve if the case was held to the next day; Mujo simply asked that the case be held, speculating that the juror would return. 2RP 32. He cannot now claim that the court should have conducted further inquiry that he did not request.

Mujo relies on Ashcraft, but that case is inapposite. In Ashcraft, a juror was excused during deliberations because the juror had become unavailable due to prescheduled travel abroad. Ashcraft, 71 Wn. App. at 461-62. The trial court erred by making an *ex parte* decision to replace an initial juror with an alternate juror after deliberations had commenced and then failed to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew; this Court held that the latter was reversible error of constitutional magnitude. Id. at 464. Ashcraft simply does not apply to this case and Mujo's argument should be rejected.

Similarly, Mujo claims that the trial court failed to apply the correct evidentiary standard in dismissing a juror. See State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005). But the standard adopted in Elmore is inapplicable here. In Elmore, the court held that a deliberating juror accused of refusing to follow the law cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence. Id. at 778. The court emphasized that “this standard is applicable only in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law.” Id. Here, the jury was not deliberating and the juror was excused for illness. The trial court’s decision here was mandated by statute and is reviewable only for an abuse of discretion.

Mujo further claims that the discharge of Juror 28 violated his right to a fair trial because the juror was a person of color. This claim fails for two reasons. First, this Court has explicitly rejected the application of a Batson⁸-type analysis when a juror is discharged prior to deliberations. See Jorden, 103 Wn. App. at 229. Second, Mujo has a right to be tried by an impartial jury, but

⁸ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

he has no right to be tried by a particular juror. Id. at 230 (citations omitted).

The State did not exercise a peremptory challenge to the juror; rather, the juror was selected for the jury and had to be released because she became ill before the State had started presenting evidence. Batson, which deals with peremptory challenges before the jury is sworn, does not apply. See State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000); State v. Vreen, 99 Wn. App. 662, 994 P.2d 905, review granted, 141 Wn.2d 1018, 10 P.3d 1074 (2000). There is no evidence that the juror was excused because of her race. Nor does Mujo articulate how the lack of a second African-American juror, when he is not African-American, affected his right to a fair trial. Even the absence of any particular group of people on a jury does not violate a defendant's right to a jury of his peers, unless there are circumstances indicating purposeful discriminatory exclusion. State v. Barron, 139 Wn. App. 266, 280, 160 P.3d 1077, 1083 (2007). No such exclusion exists here; Mujo's claim must be rejected.

In summary, the trial court's discharge of an ill juror before the jury had even heard opening statements was mandated by RCW 2.36.110 and CrR 6.5. The trial court was not required to

inquire further or to delay the one-day trial to see whether the juror would be well enough to return the following day and Mujo's right to a fair trial was not implicated. There was no abuse of discretion and Mujo's conviction should be affirmed.

2. THE TRIAL COURT'S SINGLE MISSTATEMENT IN THE ACCOMPLICE LIABILITY INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROOF.

Mujo claims that his conviction should be reversed because the trial judge misread a single word in the accomplice liability instruction. This argument should be rejected for three reasons. First, Mujo did not preserve the error. Second, the written instructions were correct. Finally, any error was harmless because there was only one crime alleged and there was overwhelming evidence that Mujo was guilty of that crime as a principle or as an accomplice.

A party must preserve an objection and cannot be heard to raise a new theory on appeal when that theory was not advanced below. The purpose of this rule is to afford the trial court an opportunity to correct any error when it arises, to avoid preventable appeals, and preserve judicial resources. State v. Scott, 110

Wn.2d 682, 685-86, 757 P.2d 492 (1988). Therefore, before the appellate court may consider a theory on appeal, the party must raise it below. Id.

A constitutional claim may be raised for the first time on appeal but only if that claim is "manifest error affecting a constitutional right." RAP 2.5(a)(3); Scott, 110 Wn.2d at 686-87; State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not meant to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised in the trial court. "The constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" Scott, 110 Wn.2d at 688 (quoting State v. Valladares, 31 Wn. App. 63, 76 (1982), aff'd in part, rev'd in part, 99 Wn.2d 663 (1983)). An alleged error is "manifest," when the error had "practical and identifiable consequences in the trial of the case." State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007) (citing State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)); Lynn, 67 Wn. App. at 345. A purely formalistic error is insufficient to justify appellate consideration of a belated claim. Lynn, 67 Wn. App. at 345.

Mujo failed to object to the misread instruction and waived his right to appeal it. Moreover, he fails to show how the single error in the reading of the otherwise correct written instruction had practical and identifiable consequences in his trial.

Second, it is undisputed that the written instructions were correct and did not contain the error at issue in Cronin and Roberts.⁹ In those cases, the accomplice liability instruction required proof of a defendant's knowing participation in "a crime" instead of "the [charged] crime." State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). Such erroneous accomplice liability instructions may unconstitutionally relieve the State of the burden of proving a defendant's knowing participation in the charged crime. Cronin, 142 Wn.2d at 580-82; In re Wilson, ___ Wn. App. ___, 279 P.3d 990, 996 (2012). The culpability of an accomplice as defined in the statute does not extend beyond the crimes of which the accomplice has knowledge. Roberts, 142 Wn.2d at 511. To be an accomplice, a person must have knowledge that he or she was promoting or facilitating the crime charged. Cronin, 142 Wn.2d at 579.

⁹ State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).

Mujo has made no plausible showing that the trial court's single misstatement had practical and identifiable consequences in his trial; rather, he simply asserts that the error diluted the State's burden of proof. Here, it is undisputed that the written jury instructions on accomplice liability were proper. Moreover, the trial court encouraged the jury to follow along as she read the instructions. 2RP 152. Mujo fails to show how the court's misstatement in any way detracted from its proper written instructions to the jury. Jury instructions satisfy a defendant's right to a fair trial if, taken as a whole, they accurately inform the jury of the applicable law, are not misleading, and allow the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). That is the case here.

Nonetheless, Mujo claims that the single misread word diluted the State's burden of proof. Mujo's reliance on cases where the court's written instructions to the jury are erroneous or where an instruction was not read at all is misplaced. See, e.g., State v. Sanchez, 122 Wn. App. 579, 591, 94 P.3d 384 (2004) (failure to read instruction on definition of assault essentially removed the essential element of specific intent from the jury and was reversible

error); Wilson, 279 P.3d at 996-97 (counsel was ineffective for offering erroneous instruction with the Roberts/Cronin error).

Further, any error caused by the court's misreading was harmless because the evidence against Mujo as a principle was overwhelming. The inquiry into whether an error in WPIC 10.51 omits an element or lowers the State's burden is inextricably interwoven with the question of whether it was harmless under the facts of a particular case. State v. Israel, 113 Wn. App. 243, 266, 54 P.3d 1218, 1232-33 (2002). In Israel, this Court held that the erroneous WPIC 10.51 instruction was harmless if there were no other crimes with which the jury could have been confused. Id. at 267. See also State v. Mangan, 109 Wn. App. 73, 79, 34 P.3d 254 (2001) (holding similar instruction harmless because "there was nothing to suggest [the defendant's accomplice] (or anyone else) had committed some other crime of which Mangan was possibly unaware.").

Similarly, in Brown, the court held that the error in former WPIC 10.51 is harmless when the defendant is also guilty as a principle. 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002). In Brown, the court accepted review of three codefendants' convictions for multiple crimes, including rape, assault, murder, and robbery, to

determine whether the erroneous version of WPIC 10.51 could be harmless beyond a reasonable doubt. The court reversed only the convictions in which the defendants were liable solely as accomplices. Id. at 341-44.

Here, Mujo dragged Palmer down the stairs by his hood and stole Palmer's cell phone while Jayro kicked Palmer in the torso and face. Mujo confessed to doing so, and his actions were caught on surveillance video. Ex. 3, 4. Mujo was guilty as an accomplice because his taking of Palmer's cell phone was aided by Jayro's assault on Palmer; but he was also guilty as a principle because he initially assaulted Palmer by dragging him down the stairs and then forcibly took the phone from Palmer's hand while Palmer was vulnerable on the ground. Further, there were no crimes other than robbery alleged, so there is nothing to suggest that there was some other crime of which Mujo was unaware, and there was overwhelming evidence that Mujo committed the sole crime alleged. His arguments should be rejected and his conviction affirmed.

Nonetheless, Mujo speculates that the single misspoken word in the jury instruction allowed the jury to find that Mujo's knowledge and intent to aid Jayro in assaulting Palmer satisfied the

elements of accomplice liability. Mujo's argument must be rejected. Any error here is harmless under Brown and Israel. It matters not what Mujo believed Jayro would do when they saw Palmer, because Mujo formed the intent to take the phone by force, after using violence against Palmer, and was guilty as a principle in the robbery. Mujo's conviction should be affirmed.

D. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm Mujo's conviction.

DATED this 5 day of September, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. EDIBERTO MUJO-HERNANDEZ, Cause No. 68308-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

9/5/12
Date