

68649-6

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NO. 68649-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

ORIGINAL

Respondent,

v.

STEVEN FAAUSU,

Appellant.

APR 19 11:10 AM '22

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Was the defendant's right to a fair trial violated where he was convicted by a unanimous jury that may have comprised thirteen fully deliberating and voting jurors rather than twelve?

B. STATEMENT OF THE CASE

Steven Faausu was charged by amended information with Possession of Cocaine, contrary to RCW 69.50.4013, with a special allegation that Faausu committed the offense while in a county jail, pursuant to RCW 9.94A.533(3). CP 5. The case proceeded to trial by jury on April 2, 2012, and thirteen jurors were empaneled. RP 2; CP 46. The trial lasted a single day. RP 2. At the end of closing statements, immediately before the jury retired to deliberate, the court announced that Juror Number 10 had been randomly selected as the alternate juror. RP 67-68. The court stated to Juror Number 10, "[w]e appreciate your service here. You get to go home a little earlier than the others." RP 67. The court then stated, "[w]e are going to let you all go back in the jury room. You have the instructions. Let us know if and when you reach a verdict. You may retire to the jury room at this time." RP 67-68. The record does not indicate whether Juror Number 10 in fact departed the courtroom

and went home prior to the judge instructing the remaining jurors to retire, or instead retired into the jury room with the rest of the jury.

Later the same afternoon, the jury returned to the courtroom and delivered a verdict of guilty and answered “yes” to the special verdict question regarding whether Faausu committed the offense while in a county jail. RP 68. The jury was then polled. RP 69-71. At no point did the Court, defense counsel, or the prosecutor make any observation or comment indicating that Juror Number 10 remained with the jury. However, the transcript of the proceedings indicates that when the clerk polled the jury after the verdict, the clerk posed the standard two polling questions thirteen times. RP 69-71. The record indicates that, in between polling Juror Number 9 and Juror Number 11, the clerk asked, “Juror Number 10, are these your individual verdicts?” and “[a]re these the verdicts of the jury?” and that a person responded “yes” to each question. RP 70-71. There is no other indication in the record that thirteen jurors were actually present in the jury box when the verdict was returned.

C. ARGUMENT

Faausu argues that an unauthorized person was present during the jury’s deliberations, violating his right to a fair trial.

Neither the facts nor the law support this claim. If the record is accurate in appearing to reflect that thirteen jurors remained at the time the verdict was returned, then all thirteen jurors fully participated in deliberations and reached a verdict, and no “unauthorized” person was present. Instead, Faausu simply received the benefit of a verdict by a unanimous jury of thirteen of his peers, rather than twelve, and his right to a fair trial was in no way violated.

1. THIS ISSUE MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Faausu raises his objection to the number of jurors who participated in the verdict for the first time on appeal. To do so, he must demonstrate that “(1) the error is manifest, and (2) the error is truly of constitutional dimension.” State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009); RAP 2.5. If the court determines that “the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis.” O’Hara, 167 Wn.2d at 98.

In analyzing assertions of constitutional error, the courts do “not assume the alleged error is of constitutional magnitude. Id.; State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492, 495 (1988).

Instead, the court must “look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error.” O'Hara, 167 Wn.2d at 98. Where the defendant alleges that he was denied a fair trial, “the court will look at the defendant's allegation of a constitutional violation, and the facts alleged by the defendant, to determine whether, if true, the defendant's constitutional right to a fair trial has been violated.” Id. at 99; see Scott, 110 Wn.2d at 689-91 (holding that because nothing in the constitution requires particular terms in a jury instruction to be specifically defined, the defendant's unpreserved claim regarding the jury instructions did not constitute constitutional error and, thus, was not properly preserved for appellate review).

As argued below, Faausu has failed to establish that his assertion that thirteen jurors participated in the verdicts in this case raises a manifest error, and that such error is truly of constitutional dimension.

2. THE RECORD IS INSUFFICIENT TO ESTABLISH THIRTEEN JURORS WERE PRESENT DURING DELIBERATIONS AND DURING THE VERDICT.

Although the clerk's poll of what appears to be thirteen jurors seems to indicate that Juror Number 10 remained with the other jurors when they were polled after returning a verdict of guilty, it is by no means certain that this was in fact the case. One would expect that if such an irregular thing had occurred as to have thirteen jurors present when a verdict was returned, then either the court, the bailiff, the clerk, the prosecutor, or defense counsel would have noticed it and brought it to the court's attention. However, there is no indication in the record that anyone who was present in the courtroom as the verdict was returned observed anything irregular in the composition of the jury that returned the verdict.

It is easy to imagine a scenario wherein the clerk moves naturally from polling Juror Number 9 to addressing the next questions to "Juror Number 10," without realizing that Juror Number 10 is no longer present. And in such a situation, it is easy to imagine that Juror Number 11, knowing that the clerk meant to address him or her rather than the absent Juror Number 10, might answer the questions anyway, even though the clerk said the wrong number. If the clerk then realized his error and rephrased the

questions to properly address Juror Number 11, Juror Number 11 would naturally answer again. Unless it occurred to the Court or one of the parties to put the clerk's mistake on the record, the record would appear to indicate, as it appears to do in this case, that thirteen jurors were present when the verdict was returned.

When confronted with a record indicating that either this hypothetical scenario occurred, or thirteen jurors returned a verdict and no one noticed, it seems more likely that the former occurred than the latter. Because Faausu would need to rely on facts outside the record to establish his claim, it should be brought in a personal restraint petition.

3. FAAUSU'S CONVICTION BY A UNANIMOUS JURY OF THIRTEEN JURORS DID NOT VIOLATE HIS RIGHT TO A FAIR TRIAL.

The right to trial by jury is protected by both the U.S. and Washington State Constitutions. U.S. Const. amend. 6; Wn. Const. art. I, § 21. The state Constitution requires a unanimous verdict and prohibits juries of less than twelve people in criminal cases in courts of record, but does not impose a maximum on the number of jurors allowed. Wn. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231, 234 (1994). The federal

Constitution also does not impose a required number of jurors, and allows for criminal juries of fewer or more than twelve. Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893 (1970); United States v. Reed, 790 F.2d 208 (2d Cir. 1986). In fact, the Supreme Court has observed that “the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance” Williams, 399 U.S. at 102.

It is a “cardinal requirement” that juries must deliberate in private, where there is no possibility of influence by persons not responsible for the verdict. State v. Cuzick, 85 Wn.2d 146, 149, 530 P.2d 288, 290 (1975). This is because the possibility that a person might influence the verdict who is not herself accountable for the verdict undermines the “fundamental underpinning of our jury system . . . that accountability should exist with each of the decision-makers.” Jones v. Sisters of Providence in Washington, Inc., 140 Wn.2d 112, 118, 994 P.2d 838, 842 (2000). As a result, it violates the requirement of private deliberations for a person to be present during deliberations who is not a full, voting member of the jury. Cuzick, 85 Wn.2d at 149. Whether such a person merely observes without participating in deliberations, or deliberates

without having a vote, he or she is considered an “unauthorized” juror. See id.; Sisters of Providence, 140 Wn.2d at 118-19.

In this case, assuming that Juror Number 10 was in fact part of the jury when it was polled after the verdict, he was not an “unauthorized” juror. Instead, under that assumption, Juror Number 10’s answers to the clerk’s questions establish that he participated both in deliberations and in the verdict, and that he joined the rest of the jurors in unanimously voting to convict the defendant. RP 70-71. Thus, Juror Number 10 participated as a normal, full-fledged member of the jury, and the defendant was simply convicted by a unanimous jury of thirteen, rather than twelve.

Fausu relies on cases like State v. Fisch, 22 Wn. App. 381, 588 P.2d 1389 (1979), for the proposition that exactly twelve jurors are constitutionally required. However, in Fisch the court was not faced with the issue of whether a jury of more than twelve people was problematic. That court was faced only with the question of whether the defendant was entitled to a mistrial when one of the twelve jurors had to be excused due to illness after the jury had reached a verdict as to Fisch but before they had reached a verdict as to his co-defendant. Id. Fausu cites to no authority that holds

that the Washington State Constitution prohibits a jury of more than 12 persons, and the State is aware of none.

Faausu also contends that there is a presumption of prejudice here, as in Cuzick, due to the presence of an unauthorized juror. Were Juror Number 10 an “unauthorized” juror within the meaning of Cuzick, there would indeed be a presumption of prejudice. As discussed above, however, this case does not present the circumstance of an “unauthorized” influence in the jury’s deliberative process, but rather simply a jury of more than twelve persons. As such, there is not only no presumption of prejudice, but no prejudice at all. See Cuzick, 85 Wn.2d at 148 (“[I]t would be difficult to see how [a defendant] would be prejudiced by the use of a jury of 13 instead of 12.”); Reed, 790 F.2d at 210 (“[T]here is no likelihood whatever that a thirteen-man jury would convict more readily than would a twelve-man jury.”). Thus, any error in Juror Number 10’s participation in the deliberations and verdict was harmless beyond a reasonable doubt.

Because the defendant was convicted by a unanimous jury of thirteen fully-participating and -voting jurors, his right to a fair trial was not violated.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Faausu's conviction.

DATED this 16th day of November, 2012.

Respectfully submitted,

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