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May 11, 2016
Court of Appeals
Division I
State of Washington

NO. 74044-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JIMMY J. WHITE,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. During the testimonial portion of the trial, Juror 2 used a pre-printed "Inquiry from the Jury" form to write a question regarding unsecured firearms in the courtroom. He changed his mind and decided not to ask the question. Instead, he gave the form to the law clerk, telling her he did not want an answer and no longer had a question for the court. All parties agreed simply to file the unasked and unanswered question.

a. Does misconduct occur when a juror decides not to ask a question?

b. Should the trial court investigate a juror for misconduct based upon a question the juror has not asked?

c. When defense asks that a court take no action on juror's unposed question, has he invited error and waived the issue on appeal?

2. The 32-year old defendant made no argument and presented no evidence that he will not be capable of employment when released from custody. Should the court prohibit the imposition of appellate costs when there is a realistic possibility the defendant will have the future ability to pay?

II. STATEMENT OF THE CASE

On February 1, 2012, 14-year old T.J. lived with his grandfather in an apartment on Blueberry Lane, Monroe. Just after 2 p.m., he came home from school and found the front door ajar. He saw mud on his bedroom floor and windowsill. Someone had broken in and stolen his Xbox and computer games, his grandfather's cell phone, other small items, and two long guns, a Winchester 12-gauge shotgun and a Savage .22 caliber rifle. Police responded within hours to the 911 call. 1 RP 77-86, 90¹.

In talking with T.J., police developed a lead and decided to interview two teenagers, children, L.E. and 13-year-old D.W. They found D.W. hiding in a closet at L.E.'s house. D.W. still had T.J.'s grandfather's cell phone and other items with him. He did not have the firearms. 1 RP 103-04.

As police were speaking to him, D.W.'s cell phone rang. It was 28-year old Jimmy White, the defendant. When police told him they wanted to interview him about the burglary and stolen firearms, he said he knew nothing about them but agreed to meet

¹ The report of proceedings consists of three volumes which are not consecutively paginated. 1 RP and 2 RP contain the May hearing, the July jury trial, and the September sentencing. The third, unnumbered volume was not cited in this brief.

at the police station. 1 RP 106-107; 2 RP 9.

The defendant arrived at the station and was interviewed at around 10 p.m. In his initial interview, the defendant said he knew both D.W. and T.J. He said that D.W. had texted with him that day about some firearms he wanted to get rid of. D.W. suggested they belonged to his mother. The defendant said he knew he could not legally possess firearms, did not see D.W. that day, and knew nothing about the stolen guns, their whereabouts, or who had them. 1 RP 110-17; 141-42; RP 190-93.

At 1 a.m., police arrested the defendant and interviewed him for a second time. The defendant then admitted that after texting with D.W., he picked up D.W. and drove him to an apartment on Blueberry Lane. There, D.W. retrieved the firearms and put them in the defendant's trunk. The defendant was aware that he was then in possession of firearms, "the minute I like let him put them in the car." The defendant then drove to his parents' house. He told police that the stolen firearms were still there. 1 RP 146-51.

Police went to the defendant's parents' house and retrieved the stolen Winchester 12-gauge shotgun and Savage .22 caliber rifle. 1 RP 196-97.

The State eventually charged the defendant with five felonies, one count of burglary and two counts each of first degree unlawful possession of a firearm and possession of a stolen firearm. CP 69-71. His jury trial began on July 1, 2015.

During pretrial motions, defense moved to dismiss the burglary count because the State had been unable to secure the presence of a necessary witness, D.W. The State agreed because D.W. still was unavailable despite several agencies seeking him and the court having issued a warrant for his arrest. 1 RP 49-50.

Following pretrial motions, the parties selected thirteen jurors with Juror 13 designated as the alternate. 1 RP 54; 2 RP 90.

The testimony lasted two days. T.J., his grandfather, and several officers testified for the State as outlined above. The defendant's parents testified during the defense case.

The defendant's parents testified that the defendant had arrived home on the afternoon of February 2. He became upset after he looked in his trunk and realized there were firearms in it. He asked them to remove the firearms which they did. They later turned the Winchester 12-gauge and Savage .22 over to the police. 2 RP 27, 34.

Before the jury began deliberating on July 3, the court excused the alternate, Juror 13. The court told her to be available in case she was needed to deliberate. 2 RP 90.

After deliberations began, the jury sent out a question written on an "Inquiry from the Jury and Court's Response" form available in the jury room. The bottom of the form contained the pre-printed words, "SAVE – MUST BE FILED". On the form was a question about exhibits which the court and parties quickly answered. 2 RP 92; CP 67.

At the same time, the court addressed a second "Inquiry from the Jury and Court's Response" form. The form was dated and date-stamped as filed in open court on July 2. CP 65. However, the Clerk's Minutes reflect that the form was received and filed on July 3. CP __ (sub.no. 65, Trial Minutes). The record is unclear as to when copies were provided to the State and defense.

The question on the second form was, "Is it appropriate to have the weapons laying unsecure in front of the defendant?" 2 RP 93; CP 65.

The court explained what had occurred. Juror 2 had given the form to the law clerk and said he did not want to submit the question to the court. He was turning the form over to the law clerk,

“because he wrote on it and thought if you wrote on it, he had to give it to her.” The law clerk gave the form to the court. The court filed it because, “once I have it, I think I have to file it.” 2 RP 93-4.

Both parties agreed that no further action should be taken. The court concurred, “[e]specially since [Juror 2] said he decided not to submit it.” Id.

The jury convicted the defendant of two counts of first degree unlawful possession of firearms and acquitted him of two counts of possession of stolen firearms. CP 22-25.

III. ARGUMENT

A. NO CONSTITUTIONAL ERROR OCCURRED BECAUSE THERE WAS NO JUROR MISCONDUCT, NO INVESTIGATION WAS NECESSARY, AND NO ERROR WAS PRESERVED.

A trial court’s investigation into claims of juror misconduct is reviewed for an abuse of discretion. State v. Elmore, 155 Wn.2d 758, 761, 123 P.3d 72 (2005); State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). The party alleging misconduct has the burden of showing it occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). A new trial is warranted only when the misconduct has prejudiced the defendant. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740, review denied, 158 Wn.2d 1011 (2006).

1. There Was No Evidence Of Juror Misconduct Or Juror Unfitness To Investigate.

There is no evidence of misconduct or unfitness. The record shows that Juror 2 wrote a question that he decided did not need to be answered. Instead of merely throwing it away and because it was on a form that said, "SAVE – MUST BE FILED", the juror believed he was required to give the form to the law clerk to dispose of, saying he did not want to ask the question.

The defendant has cited no case that suggests that a juror's unstated question can be the basis for a claim of misconduct or unfitness. Any argument unsupported by authority should not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The defendant claims that the unposed question illustrates Juror 2's disregard of the court's instructions. On the contrary, it just how seriously Juror 2 took the court's instructions.

Juror 2 scrupulously followed instructions. The judge told jurors to keep an open mind. 1 RP 63. Juror 2 did just that. Although he had a question about courtroom safety, he set that question aside and kept an open mind. He did not need the judge to remind him to do so. Jurors would have been instructed to

presume the defendant innocent. BOA p. 11. Juror 2 followed that instruction when he rejected the notion that the defendant might pose a danger and, in effect, threw away his question. The judge instructed the jury to accept and apply the law. 1 RP 72. Juror 2 desire to do just that is illustrated by what he did with the inquiry form. The form said, "SAVE – MUST BE FLIED". Juror 2 was so attentive to instructions that he did not simply throw his question away but gave it to the law clerk, following the instructions on the bottom of the form.

Even if the record were less clear, jurors are presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). There is nothing in the record that shows Juror 2 did anything other than follow them.

The trial court properly did not question Juror 2 about his unposed question. An individual juror's mental processes, including his motives and the effect evidence has on him, inhere in the verdict. State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). Because Juror 2 never voiced his question to the court, and, in fact, sought not to, his question was part of his mental process which correctly was not explored by the court.

The court's duty to investigate juror misconduct arises only after a juror has "manifested unfitness by reason of bias, prejudice, indifference, inattention or any physical or mental defect..." RCW 2.36.110; State v. DeLeon, 185 Wn. App. 171, 216, 341 P.3d 315 (2014), review granted, 184 Wn.2d 1017 (2015). By statute and court rule, the obligation is ongoing. Id.; CrR 6.5 (procedure for discharging unfit juror for alternate after deliberations have begun). The trial court has broad discretion to determine the appropriate way to investigate a claim of misconduct. Id.

Although the issue of unfitness or misconduct never arose in the trial court, the steps the court took in dealing with Juror 2's unposed question would have sufficed as an investigation appropriate under the circumstances.

In DeLeon, the court and parties became aware of juror misconduct when a deliberating juror violated the court's order not to discuss the case with third parties. The court reviewed a printout of the juror's tweets, posted during both testimony and deliberations. The tweets were not case-specific, were critical of law enforcement, and were at times incoherent. All three defense attorneys expressed concern but agreed that the juror did not need

to be interviewed. Post-trial, one defendant moved for a new trial based on the lack of investigation. 185 Wn. App. at 214-15.

The appellate court affirmed the denial of motion for a new trial. Id. at 218-19. While most judges would have interviewed the juror upon learning of the misconduct, under the facts of the case the court did not abuse its discretion when it decided not to do so. The trial court's acting appropriately when it looked at the Twitter printout and determined that it did not need to do further investigation. Id.

That reasoning applies in the instant case. If Juror 2's unposed question rose to the level of potential misconduct, the court conducted the only investigation necessary. It provided the question to the parties. It read and analyzed the circumstances of the disclosure. It followed the direction of the parties and simply filed the form. That was a reasonable investigation under the circumstances of this case. No more was required.

2. Any Issue With The Court's Investigation Into Alleged Juror Misconduct Was Invited, Waived, And Not Prejudicial.

A defendant may not seek appellate review of an error, even a constitutional error, if he helped create it. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Mercado, 181 Wn.

App. 624, 629-31, 326 P.3d 154 (2014). To determine if the doctrine of invited error applies, the court should consider whether the defendant assented to the error, materially contributed to it, or benefited from it. The defendant must have engaged in affirmative action through which he knowingly and voluntarily set up the error. Id. Invited error is a strict rule and applies in every situation where a defendant's actions, at least in part, caused the error. Studd, at 547.

In Mercado, the State could not show that the defendant had benefited from language in her sentencing that imposed HIV testing. Thus, the invited error doctrine did not apply. Id. at 631. Nor did the doctrine apply where a defendant invited the court to exceed its sentencing jurisdiction. State v. Phelps, 113 Wn. App. 347, 354, 57 P.3d 624 (2002). However, the doctrine does apply when a defendant complains of an instruction that is identical to one he also proposed. Studd, 137 Wn.2d 547.

The invited error doctrine applies here. The defendant complains that the court did not conduct a more thorough investigation into juror unfitness. However, defense affirmatively agreed to just that. He cannot now complain of the court's lack of investigation which he approved at trial.

If the doctrine of uninvited error does not apply here, the defendant still waived the issue when he did not object. Generally appellate courts will not address an issue raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). An appellate court may refuse to consider an unpreserved constitutional issue unless the error was manifest and prejudicial. The defendant has the burden of showing how in the context of the trial the error actually affected his rights. If the facts necessary to adjudicate the claim are not in the record, the error is not manifest. Id. at 333-34.

The defendant in the present case did not meet his burden because there no record supporting the need for a hearing. The record shows that defense agreed that Juror 2's note merited no response. He did not ask the court to take any action and did not object to the court's merely filing the form.

If misconduct is established, it is presumed to be prejudicial. Boling, 131 Wn. App. at 333. The State must show that, viewed objectively, it is unreasonable to believe the misconduct could have affected the verdict. Id.

Even Juror 2's unposed question was evidence of unfitness or misconduct, it did not affect the verdict. The evidence was overwhelming and for the most part uncontroverted.

The jury's guilty verdicts on the unlawful possession counts rested squarely on the defendant's own statements. The defendant confessed (and stipulated) that he was a felon and not lawfully permitted to possess firearms. He confessed that D.W. told him he had firearms he needed to get rid of. He confessed that he drove D.W. to Blueberry Lane where T.J. lived. He confessed that D.W. brought a case to his car and that he knew the case held two firearms. He confessed that he took the firearms to his parents' house. He told police they would find the firearms there and they did. The jury convicted on those two counts based on the defendant's statements.

The jury's acquittals on the possession of stolen firearms counts also rested squarely on the defendant's own statements. The defendant told police he was unsure if the firearms were stolen and thought they might have belonged to D.W.'s parents. The jury acquitted on those counts. The jury rejected other evidence that showed that the defendant knew the firearms were stolen. There is simply no evidence of prejudice.

Thus, the split verdicts themselves show that it is unreasonable to believe that Juror 2 was unfit, had prejudged the defendant, or engaged in any misconduct. If there was misconduct or unfitness, it did not prejudice the defendant and the convictions should be affirmed.

B. THE COURT SHOULD IMPOSE APPELLATE COSTS.

The defendant was born in 1984. He has a history of five adult and three juvenile felony convictions. CP 18-21. He was not sentenced until two years after the verdict was rendered because he had fled the State. 2 RP 106-07. The defendant provided no information about his financial situation or future employment prospects at sentencing. The court imposed concurrent 70 month sentenced and imposed only mandatory legal financial obligations. CP 7-17.

The defendant moved for public funds for his appeal citing his previously-determined indigence. He provided no documentation or information about his future ability to pay appellate costs. CP __ (sub.no.98, Motion for Order Authorizing Appeal). The order authorizing public funds addressed only his current ability to finance his appeal. CP __ (sub.no.99, Order). The record is devoid of any suggestion that the defendant is

disabled.

The authority to recover costs stems from the legislature. State v. Nolan, 141 Wn.2d 620, 627, 8 P.3d 300 (2000). The Rules of Appellate Procedure (RAP) direct courts of appeal to determine costs after filing a decision that terminates review (except for voluntary withdrawals). RAP 14.1(a). The panel of judges deciding the case has discretion to refuse to impose costs in the opinion or order. RAP 14.1(c) and RAP 14.2.

Under RCW 10.73.160(1), this court “may require an adult offender convicted of an offense to pay appellate costs.” As this court has recognized, the statute gives this court discretion concerning as to the award of costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000).

Any argument that costs should be presumptively denied because the trial court found the defendant indigent ignores both the language and the history of RCW 10.73.160.

First, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is “An Act Relating to Indigent Persons.” Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for “recoupment of fees for court-appointed counsel.”

Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. "Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." RCW 10.73.160(3). "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, the rule was that "[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs." Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National

Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case. The court refused to award costs because “this appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved.” NECA, 66 Wn.2d at 23.

In Moore, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal.” Moore, 66 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those

connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis also makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders. See Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

In the present case, this analysis should lead the court to impose costs. The case presents a routine issue of juror misconduct. The defendant is litigating the case for his own benefit, not for any public interest. The equities favor the State because the defendant did not raise an objection to the imposition of costs in the trial court, something that could have obviated appellate issues. Nothing in this case supports permanently shifting

the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

The current ability to pay costs is not the only relevant factor. State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). The court may consider whether the defendant will have the ability to pay if and when the State attempts to sanction. State v. Blank, 131 Wn.2d 230, 246-47, 930 P.2d 1213 (1997). If costs are imposed and a defendant is unable to repay in the future, the statute contains a mechanism for relief. Id. at 250.

In the present case, the trial court authorized an appeal at public expense based only the defendant's current ability to pay. It had no information about his past work history or his financial future. The defendant is in his early 30's. It is unclear whether he supports anyone except himself, whether he has education or job training, whether he can anticipate 30 more years of work when he is released from prison. Because there is no reason to believe he will not be able to work, the court should not waive appellate costs.

In Sinclair, the defendant was 66-years old and sentenced to a minimum of 280 months in custody. 192 Wn. App. at 393. Sinclair was indigent at sentencing and there was no finding that his indigence was likely to improve. The court said there was "no

realistic possibility” that Sinclair would ever be released and be able to find “gainful employment that will allow him to pay appellate costs.” Id.

The present case is entirely different. The defendant was sentenced to 70 months in prison. Even if he serves every day of his sentence, he will be released before he is 40 years old with many productive work-years ahead of him. It is entirely realistic to assume that he will be able to find gainful employment that will allow him to pay appellate costs. Therefore, there is no basis to deny the imposition of appellate costs. Appellate costs should be imposed.

IV. CONCLUSION

No juror misconduct occurred and appellate costs should be imposed.

Respectfully submitted on May 3, 2016.

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DECLARATION OF DOCUMENT
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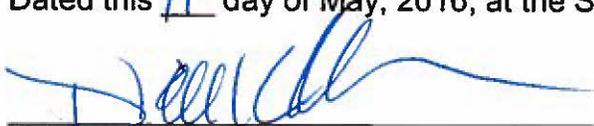
The undersigned certifies that on the 11th day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary Swift, Nielsen, Broman & Koch, kochd@nwattorney.net; and Sloanej@nwattorney.net.

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

Dated this 11th day of May, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office