

NO. 44104-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

JAMES BARTHOLOMEW,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. The court's response was harmless error because it was negative and conveyed no affirmative information. The response simply re-stated an instruction. Defendant has failed to show any prejudice. (Response to assignment of error #1.)
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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Defendant led police on a high-speed crash while high on methamphetamine. His sister, who was also high on methamphetamine, was in the car with him. Defendant crashed the car, which turned out to be stolen. He was charged with Possession of a Stolen Motor Vehicle in Count 1 and Attempting to Elude a Pursuing Police Vehicle in Count 2. The matter was tried to a jury. The owner of the stolen car testified that she did not know Defendant. Defendant testified in his own defense, claiming that he went to school with the owner of the car, and that she lent him the car, and that she was denying it so her boyfriend would not find out about their "secret relationship." Defendant did not specify when they were at school together, but testified that their "secret relationship" lasted three months and culminated in her loaning him the car three weeks before the incident in September.

During their deliberations, the jury sent out a handwritten question, which read,

“11-1-362-3
Where they [*sic*] in summer
school at the college?
Summer school:
July, Aug, Sept.
Juror 9.”

There is no record of a proceeding concerning this inquiry. The trial judge apparently returned a typed response, which read,

”To: Jury
From: Judge Godfrey
You may only consider the evidence presented to you
during trial.”

The response was signed by the judge.

The jury convicted Defendant, and found that he had endangered someone other than himself and the pursuing officer, a sentence enhancement He was sentenced to 41 months plus one day for Attempting to Elude, and 57 months for Possession of a Stolen Motor Vehicle, to be served concurrently. On the Judgment and Sentence, the two counts were listed in reverse order in several places. Specifically, on page 1, Section 2.1, the felony class for each count is transposed. Clerk’s Papers at 0026. On page 3 of 9, section 2.3 (sentencing data) Count II is listed as Count 1, and Count I is listed as Count 2. CP at 0028. On the same page, in Section 4.1(a), where the actual confinement is specified, both counts are numbered “I” but the sentence for Count II as charged in the information is listed first, consistent with the numbering on that page. *Id.* at 0028.

ARGUMENT

1. To constitute a comment on the evidence the jury would have to infer the judge believed or disbelieved some evidence. The response was a re-statement of an agreed instruction and was the only response that could have reasonably been given. It was harmless error for the court to respond without conferring with the parties.

The Court's reply to the jury inquiry was not a comment on the evidence.

“To fall within the ban of Const. art. 4, s 16, the jury in a given case must be able to infer from the actions or expressions of the trial judge that he personally believes or disbelieves the evidence relative to a disputed issue.” *State v. Louie*, 68 Wash.2d 304, 413 P.2d 7 (1966) (citing *State v. Browder*, 68 Wash.2d 304 (1966).)

Defendant assertion that the court's response somehow implied a belief or disbelief in evidence is a non sequitur. The note did not reference any evidence or witness. The court's response simply reiterated Jury Instruction #1's admonition to rely solely on the evidence introduced at trial. CP at 0009.

By Defendant's argument, a court's admonition to jurors not to research the case on the internet is a comment on the evidence because it implies there *is* something to research about the case on the internet. The court's note was not a comment on the evidence, but instead was a proper response which simply re-stated a jury instruction.

Defendant was not prejudiced and the failure to consult with counsel on the response was harmless error.

“Communications between judge and jury in absence of the defendant or defense counsel are clearly prohibited and therefore constitute error.” *State v. Allen*, 50 Wash.App. 412, 419, 749 P.2d 702, 706 (1988) (citing *State v. Caliguri*, 99 Wash.2d 501, 508 (1983).) “[T]he defendant must first raise at least the possibility of prejudice.” *Caliguri* at 509. Then, “[t]he burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt.” *Id.* (citing *State v. Saraceno*, 23 Wash. App. 473, 475-76 (1975).

Defendant correctly states the law; he must first make a showing of prejudice, then the burden falls on the State to prove harmlessness. However, Defendant has failed to prove prejudice because his argument that the note was a comment on the evidence fails. Even assuming, *argendo*, that Defendant was prejudiced, case law is clear that a court’s response to a jury inquiry with a admonition that conveys no affirmative information is harmless error.

In *State v. Allen*, *supra*, the defendant was on trial for murder. *Allen* at 416. During their deliberations the jury set the judge a written inquiry. *Id.* at 419. “In response, the trial court directed the jury to ‘[r]ead your instructions and continue with your deliberations.’” *Id.* (alteration in original.) The defendant appealed, contending that if her attorney had been notified a new instruction might have been crafted. *Id.*

The Court of Appeals disagreed, stating that, “Where the trial court's response to a jury inquiry is ‘negative in nature and conveys no affirmative information’, no prejudice results. *Id.* at 419 (quoting *State v. Russell*, 25 Wash.App. 933, 948 (1980) and citing *State v. Safford*, 24 Wash.App. 783, 794 (1979), review denied, 93 Wash.2d 1026 (1980).) The communication was held to be harmless error. *Id.* at 420.

In the instant case the response was “negative in nature,” in the words of the *Allen* court, because it did not convey any affirmative information, but simply restated an instruction. As in *Allen*, this is harmless error.

Even if counsel and Defendant had been contacted there would have been no other reasonable response that could have been given. Although the State may be allowed to reopen it’s case in order to answer jury questions (*see State v. Brinkley*, 66 Wash.App. 844 (1992),) the State’s witness testified that she did not know Defendant. *Verbatim Report of Proceedings* at 37:11-18.

Because the court’s response constitutes only harmless error and resulted in no prejudice this Court should deny the first assignment of error.

2. The transposed count numbering in the Judgment & Sentence is non-substantive scrivener’s error.

Defendant claims that the incorrectly numbered counts on the sentencing section of the judgment requires the matter be remanded. However, the intent of the judgment is clear. Additionally, there is no

prejudice because the sentences are concurrent. Defendant will serve 41 months plus one day on one count and 57 months on another count regardless of how they are listed on the judgment & sentence.

Defendant cites to *State v. Moten* for the proposition that the matter must be remanded. In *Moten* the scrivener's error was an incorrect citation to the law defining "Solicitation." The defendant was sentenced for Solicitation to Deliver Cocaine, but the judgment & sentence referred to Solicitation in Title 9A instead of Title 69, which governs solicitations under the Uniform Controlled Substances Act. *Moten*, 95 Wash.App. 927, 929, 976 P.2d 1286, 1287 (1999). Here, both counts are labeled count one, but from the rest of the document, the intent is clear. Unlike in *Moten* the error here is non-substantive. This Court should deny Defendant's request to remand.

CONCLUSION

Both assignments of error are harmless. Defendant received a fair trial and was convicted. This Court should uphold the verdict.

DATED this 23 day of January, 2014.

Respectfully Submitted,

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JFW/jfa

GRAYS HARBOR COUNTY PROSECUTOR

January 23, 2014 - 11:10 AM

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