

NO. 49115-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DENTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to present a defense when it refused to permit defense witness Anthony Cloud to testify.

2. The court impermissibly commented on the evidence in violation of article 4, section 16 of Washington's Constitution.

3. The trial court's failure to properly instruct the jury deprived appellant of a fair trial and a constitutionally unanimous jury verdict.

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's constitutional rights to present witnesses for his defense when it prevented a defense witness from testifying on the grounds that the witness was disclosed too late, the witness was an inmate charged with custodial assault, and the inmate had recently been sentenced by the same judge who was presiding over the trial?

2. Did the trial court comment on the evidence in violation of article 4, section 16 of the Washington Constitution when, during appellant's pro se cross examination of a State's witness, the court repeatedly corrected appellant's summary of the witness' previous testimony?

3. The constitutional right to a jury trial requires that the verdict be the product of deliberations that are the common experience of

all jurors. Was appellant's right to a fair trial and a unanimous jury verdict violated when the court failed to instruct the jury it could not deliberate unless all twelve were present?

B. STATEMENT OF THE CASE

1. Procedural Facts

In two cause numbers that were consolidated for trial, the Pierce County prosecutor charged appellant Michael Denton with three counts of custodial assault and two counts of felony harassment. CP 30-31, 99-100. Denton represented himself. 3RP¹ 45. The jury found Denton guilty of two counts of custodial assault and one count of felony harassment, acquitting him on the remaining counts. CP 64-65, 101-03. Because Denton's offender score was 10, the court imposed consecutive 60-month sentences on the two custodial assaults, with a standard range sentence for harassment to run concurrently. CP 69, 72, 110. Notice of appeal was timely filed. CP 82, 120.

2. Substantive Facts

While incarcerated at the Pierce County Jail, Denton became upset when he was given a sack lunch instead of a hot meal. 4RP 156-57, 160-61.

¹ There are eight volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 4, 2016; 2RP – Mar. 8, 2016; 3RP – Mar. 15, 16, 2016; 4RP – May 5, 9, 11, 12, 2016; 5RP – June 17, 2016.

He placed his hand in the food slot in the inner door of his cell and refused to remove it so the slot could be closed and locked. 4RP 158, 193.

Instead of addressing Denton's grievance in any way, Deputy Matt Watson told Denton only a sergeant or higher-ranked officer could change the food order. 4RP 161. Then he threatened to hit Denton's hand with a flashlight. 4RP 158. After a second threat, he struck Denton's hand with his flashlight, right above the knuckles. 4RP 162-63. When Denton did not react, Watson struck him again. 4RP 162-63. Watson described the blows as "medium hard." 4RP 163.

Denton announced he was going to throw feces on Watson and his partner, Deputy Mario Moreno, who was trying to close the food slot. 4RP 163-64. Denton then pulled his arm back in, turned around, scooped his cup into his toilet, and threw the contents at the inner door of the cell. 4RP 164-66. In his second attempt, some of the contents passed through the gaps in the plexiglass cell door and contacted Moreno's back, the back of his left arm, and his hair. 4RP 199-201. Watson backed away and was not hit with anything. 4RP 165, 172. The jury convicted Denton of custodial assault against Moreno and harassment of Moreno and/or Watson. CP 101-03. It found him not guilty of custodial assault against Watson. CP 102.

In a separate incident two days earlier, Denton threw an unknown liquid on Deputy Andy Powell after Powell handed Denton his sack lunch.

4RP 104. The liquid hit the front of Powell's shirt as well as his pants and sleeve on the left side. 4RP 104. Denton then told Powell he was going to kick his ass. 4RP 104. The jury found Denton guilty of custodial assault against Powell, but found him not guilty of harassment. CP 64-65.

At trial, Denton attempted to cross-examine Watson about his statement that the food slot was unsecured. The following argument with the trial judge ensued:

Q. [By Mr. Denton] At the time the prosecutor just asked you when Officer Moreno was hit, was the trap door secured, you said yes; is that correct?

MR. PETERS: Objection, I think that's inaccurate also.

THE COURT: Again, the jury will need to rely on that. I don't think that was the testimony.

A. No.

MR. DENTON: The prosecutor asked him, Your Honor, just then was the trap door secured, the actual door secured.

THE COURT: He didn't answer the way that you're suggesting that he answered. He answered the door was closed, but it wasn't locked. In his view, it wasn't secured.

MR. DENTON: He said that the trap door was secured at the time that he said Officer Moreno was hit with the liquid above, when the prosecutor just asked him.

THE COURT: That's not what his testimony was, Mr. Denton.

4RP 186-87. Ultimately, the court permitted Denton to ask a clarifying question. 4RP 187.

Denton sought to present testimony from another inmate, Anthony Cloud, explaining that Cloud had witnessed the entire incident from the next cell over. 4RP 69-70, 73. The court refused to allow Denton to call Cloud as a witness, citing four grounds: late disclosure of the witness on the day of trial; the fact that Cloud was also an inmate at the Pierce County Jail; the fact that Cloud was alleged to have committed custodial assault in a courtroom; and the judge had sentenced Cloud for first-degree assault. 4RP 71, 73.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED DENTON'S RIGHT TO CALL WITNESSES FOR HIS DEFENSE WHEN IT EXCLUDED THE TESTIMONY OF A DEFENSE WITNESS.

Denton sought to call Anthony Cloud as a defense witness. Denton explained that Cloud, an inmate housed in the cell next door, witnessed the incident and would testify for the defense. 4RP 70-73. The court refused to let Cloud testify. 4RP 71, 73. No compelling interest warranted limiting Denton's due process right to defend against the State's accusations. Reversal is required because, by excluding this evidence, the trial court denied Denton's constitutional right to present his defense.

a. Denton Has a Fundamental Constitutional Right to Present Witnesses for His Defense.

Criminal defendants have the constitutional right to present evidence in their own defense. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI, XIV. The right to call witnesses for one's own defense has long been recognized as essential to due process. Chambers, 410 U.S. at 294. In Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the United States Supreme Court explained a defendant's right to compel the attendance of witnesses is "in plain terms the right to present a defense." This right to present witnesses to establish a defense is "a fundamental element of due process of law." Id.

Further, a criminal defendant's right to present witnesses is an "essential attribute of the adversary system itself." Taylor v. Illinois, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). Thus, a trial court order entirely excluding the testimony of a material defense witness directly implicates not only the defendant's constitutional right to offer testimony on his own behalf, but also the integrity of the adversary system itself. Thus, courts must jealously guard a criminal defendant's right to

present witnesses in his defense. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

In light of this essential constitutional due process protection, the trial court's exclusion of defense evidence is subjected to a high level of scrutiny. Jones, 168 Wn.2d at 719-20. Courts review de novo whether exclusion of defense evidence violated the right to present a defense. Id.

b. Mere Late Disclosure of a Witness Does Not Warrant the Drastic Remedy of Denying a Criminal Defendant the Right to Present his Case.

To protect the right of accused persons to defend themselves, relevant defense evidence must be admitted unless the State can show a compelling interest to exclude it. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). If the court believes defense evidence is barred by evidentiary rules, "the court must evaluate whether the interests served by the rule justify the limitation." Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Id. Once it is shown that the evidence is even minimally relevant, the jury must be allowed to hear it unless the State can show it is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622.

Cloud's testimony was relevant defense evidence that could not be excluded without a compelling interest. Evidence is relevant when it has any tendency to make any fact in issue more or less likely. ER 402. Testimony by an eyewitness to the alleged offense is generally deemed relevant, even if its reliability is questioned. See, e.g., State v. Gosby, 85 Wn.2d 758, 760-61, 539 P.2d 680 (1975) (testimony of employee who was robbed at gunpoint admissible despite numerous inconsistencies); State v. Ames, 89 Wn. App. 702, 707-08, 950 P.2d 514 (1998) (testimony of eyewitness to assault was relevant and admissible despite witness' inability to identify defendant). Denton clearly explained that Cloud was in the next cell and was an eyewitness to the events. 4RP 71-73.

Late disclosure is not a compelling interest that could justify depriving Denton of his fundamental due process right to call witnesses for his defense. Even in civil cases, well-established Washington case law strictly limits the court's ability to exclude witnesses as a sanction for late disclosure. Jones v. City of Seattle, 179 Wn.2d 322, 343, 314 P.3d 380, 391 (2013), (discussing Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). "A trial judge must perform a specific, on-the-record analysis before excluding witnesses for late disclosure." Jones, 179 Wn.2d at 337. Late disclosed testimony is presumptively admissible unless the court finds 1) violation of the discovery rules was willful, 2)

there would be substantial prejudice to the other party, and 3) other sanctions less drastic than exclusion would be insufficient. Id. at 343. The trial court must explicitly consider these factors and the record must show they exist. Id. at 338 (citing Burnet, 131 Wn.2d at 494 and Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 688, 132 P.3d 115 (2006)).

The court here failed to analyze the Burnet factors. 4RP 69-73. More importantly, the record fails to provide any support for the court's decision to exclude the witness.

First, there was no willful violation of the discovery rules. Denton was representing himself at trial after a confusing series of pre-trial proceedings which began with him being represented by counsel, then a motion to proceed pro se, then a withdrawal of that motion, then counsel withdrawing and standby counsel being appointed. 1RP 16; 2RP 14; 3RP 40. Denton also complained that the jail had twice taken all of his legal books and papers. 2RP 10; 4RP 6. These confusing and difficult circumstances suggest that late disclosure of a witness was inadvertent, not a willful violation of the discovery rules.

Permitting the witness to testify also would not have prejudiced the State. Denton's witness was an inmate housed in the very same building as the courthouse. 4RP 71. A short delay would, likely, have sufficed to

permit the State a chance to interview the witness and prepare for cross-examination.

As for the third Burnet factor, there was no indication that the court considered or found insufficient other remedies such as a short recess to interview the witness. Nor did the court consider whether any possible security concerns could have been addressed.

“Trial courts have been required to perform the *Burnet* analysis before excluding witnesses for late disclosure since at least 2006.” Jones, 179 Wn.2d at 344 (citing Mayer, 156 Wn.2d at 688, 690). The trial court erred in excluding Cloud’s testimony as a penalty for late disclosure without conducting the inquiry required by Burnet and its progeny and without a record showing the existence of any of the Burnet factors. Jones, 179 Wn.2d at 340-41.

c. The Court’s Other Reasons for Excluding the Witness Are Invalid.

In addition to the late disclosure, the court appears to have excluded Cloud’s testimony on the grounds that Cloud was an inmate charged with custodial assault in a courtroom and who the court had previously sentenced. 4RP 71. This reasoning also fails to justify violating Denton’s constitutional right to present his defense. Witnesses with criminal records are competent to testify. See, e.g., State v. S.J.W.,

170 Wn.2d 92, 100, 239 P.3d 568 (2010) (“[E]very person is presumed competent to testify.”); RCW 5.60.020 (“Every person of sound mind and discretion . . . may be a witness in any action, or proceeding”); ER 601 (“Every person is competent to be a witness except as otherwise provided by statute or by court rule.”). A witness’ criminal record may be admissible on the question of his or her credibility, but it does not constitute grounds to exclude the witness’ testimony altogether. See, e.g., State v. Hardy, 133 Wn.2d 701, 706-07, 946 P.2d 1175 (1997); ER 609. Any security concerns based on Cloud’s inmate status or criminal history should have been addressed in the Burnet analysis that the trial court instead simply dispensed with. The record presents no evidence that security concerns could not have been sufficiently addressed to permit the witness to testify.

Courts must safeguard the right to present a defense “with meticulous care.” State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). The trial court failed to apply the requisite meticulous care, and Denton’s right to present his defense was violated. Error in excluding relevant defense evidence is presumed prejudicial unless no rational juror could have a reasonable doubt as to guilt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d

981 (1998). That is not the case here. Denton's conviction should be reversed.

2. THE COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE WHEN IT ARGUED WITH DENTON ABOUT THE TESTIMONY DURING CROSS EXAMINATION.

While Denton was attempting to cross-examine Watson, the court contradicted him three times about what Watson had said during his testimony on direct. 4RP 186-87. Article 4, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Here, the trial judge impermissibly commented on the evidence by arguing with Denton about what the witness said and improperly influenced the jury's opinion of the testimony and Denton's credibility by openly and repeatedly contradicting him.

The prohibition on judicial comments on the evidence is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). Even an implied comment indicating the court's opinion of the evidence violates the constitution. State v. Levy, 156 Wn.2d 709, 721,

132 P.3d 1076 (2006). “An impermissible comment is one which conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). “The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” State v. Lane, 125 Wn.2d 825, 838, 889 P. 2d 929 (1995).

Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. Levy, 156 Wn.2d at 719-20. A comment in violation of article 4, section 16 is presumed prejudicial, and the State bears the burden to show no prejudice resulted. Id. at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice).

[I]t is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

Lane, 125 wn.2d at 838-39 (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)). Jurors have a natural inclination to “grasp the words and manner of the judge as a guide,” in making the difficult determinations required in a criminal trial. State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (quoting State v. Jackson, 83 Wash. 514, 523-24, 145 P. 470 (1915)). Here, the words and manner of the judge clearly indicated that the judge believed Denton was misrepresenting the evidence. 4RP 187. It also clearly indicated the judge’s opinion of the import of Watson’s testimony about whether the food slot was open or closed, locked or unlocked. 4RP 187. The court said, in front of the jury, “I don’t think that was the testimony.” 4RP 187. When Denton disputed this, the court answered back by giving its view of the import of Watson’s testimony, “He didn’t answer the way that you’re suggesting that he answered. He answered the door was closed, but it wasn’t locked. In his view, it wasn’t secured.” 4RP 187. When Denton again responded with his view of the testimony, the court answered, again in front of the jury, “That’s not what his testimony was, Mr. Denton.” 4RP 187. It is the jury’s role, not the court’s to determine what facts the testimony establishes. These comments by the court were improper comments on the evidence in violation of article 4, section 16 of Washington’s constitution.

The record does not demonstrate the absence of prejudice. On the contrary, by arguing with Denton's summary of the testimony, the judge essentially informed the jury of not only his view of the evidence, but his opinion on Denton's credibility. The judicial comments on the evidence in violation of article 4, section 16 require reversal.

3. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY DELIBERATIONS MUST INCLUDE ALL TWELVE JURORS AT ALL TIMES DEPRIVED DENTON OF A FAIR TRIAL AND A UNANIMOUS JURY VERDICT.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Denton's right to a fair trial and a unanimous verdict. This Court should therefore reverse and remand for a new trial.

The Washington Constitution guarantees criminal defendants a jury trial and a unanimous verdict. Const. art. I, §§ 21 & 22²; State v.

² Article I, section 21 of the Washington Constitution provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Article I, section 22 of the Washington Constitution provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own

Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element of the right to a unanimous verdict is that the deliberations leading to those verdicts be “the common experience of all of them.” State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional “unanimity” is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

The Washington Supreme Court recently affirmed its agreement with the California Supreme Court that a unanimous jury verdict must be the result of shared deliberations, “The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them.” State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693). The court went on to explain, “It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11.” Id. The court explained that the verdict must be the result not just of each juror’s individual opinion, followed by a vote, but of the interactions between the jurors during deliberations:

behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

“Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member’s viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.” Id.

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of the right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court’s failure to properly instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where some juries are told they “‘must not discuss with anyone any subject connected with this trial,’ and ‘must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.’”

Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011) (“court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch.”). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61.

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in

the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. “No discussion” also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises jurors, “DON’T talk about the case with anyone while the trial is going on. Not even other jurors.” Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must involve all twelve jurors. Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding that the other nine jurors will adopt the conclusion of those three on that count for purposes of the unanimous verdict requirement. Such a process violates the constitutional

requirement that deliberations leading to verdicts be “the common experience of all of [the jurors].” Fisch, 22 Wn. App. at 383.

Here, the instructions the court gave the jury on the record failed to make clear the constitutional unanimity requirement that deliberations occur only collectively when all twelve jurors are present. The written and oral instructions given at the end of the trial do not mention the requirement of collective deliberations. 4RP 260-62; CP 36-63.

The court’s failure to instruct the jury that deliberation may only occur when all twelve jurors are present and deliberating collectively constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Id. at 588 (citing State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is “[w]hether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when

confidence in the outcome of the trial is undermined.” State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here because the prosecution cannot meet its burden to show harmlessness.

The minutes show the jury deliberated for part of two separate dates. Appendix at 6.³ Nothing informed jurors they could not deliberate in small groups, during the evening, or while one or two were absent using the bathroom. 4RP 260-62; CP 36-63. The jury was essentially ignorant of how to reach a constitutionally unanimous verdict.

There was nothing provided to inform them their verdict must be the product of “the common experience of all of them.” Fisch, 22 Wn. App. at 383. If even one juror was deprived of deliberations shared by the other eleven, then the resulting verdict is not “unanimous.” Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Denton indigent and entitled to appointment of appellate counsel at public expense. CP 88. If Denton does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP.

³ The trial minutes (Memorandum of Journal Entry) are attached as an appendix to this brief. A supplemental designation of clerk’s papers was filed on December 1, 2016. The anticipated clerk’s papers citation is CP 97.

RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Denton’s ability to pay must be determined before discretionary costs are imposed. At the time of his conviction, Denton declared under penalty of perjury he had no assets or income. CP 84-85. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f). Without a basis to determine that Denton has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

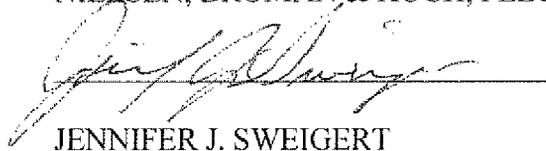
D. CONCLUSION

For the foregoing reasons, Denton requests this Court reverse his convictions.

DATED this 6th day of December, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

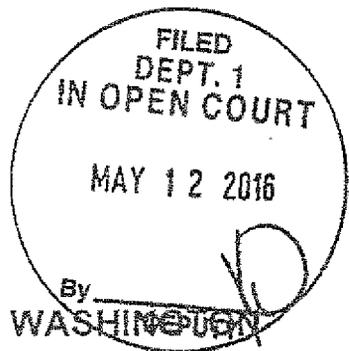
A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

Appendix

0107
12071
5/13/2016



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON

Cause Number: 15-1-04577-8

vs

Memorandum of Journal Entry

DENTON, MICHAEL DESHAWN

Judge/Commissioner: JAMES ORLANDO
Court Reporter: Shaun Linse
Judicial Assistant: KAREN LADENBURG

SCOTT R. PETERS

Prosecutor

Proceeding Set: JURY TRIAL

Proceeding Date: May 4, 2016 8:30 AM

Proceeding Outcome: HELD

Resolution: Convict JV After Trial

Clerk's Code: JTRIAL
Proceeding Outcome code: HELD
Resolution Outcome code:
Amended Resolucton code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

STATE OF WASHINGTON
 vs
 DENTON, MICHAEL DESHAWN

Cause Number: 15-1-04577-8
 Memorandum of Journal Entry

Judge/Commissioner: JAMES ORLANDO

MINUTES OF PROCEEDING

Start Date/Time: May 4, 2016 11:03 AM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

May 4, 2016 11:03 AM - This matter comes before the court for trial under cause numbers 15-1-03696-5, 15-1-04621-9 and 15-1-04577-8. Attorney Scott Peters is present on behalf of the State of Washinton and the defendant is present in custody pro se with stand by counsel Aaron Talney. Attorney Peters addresses the court as to witnesses and pre-trial motions. Court inquires if the two custodial cases can be heard together. **11:06 AM** - Attorney Peters responds and addresses a Stun Belt Motion. **11:06 AM** - Court inquires with the defendant as to what last name he goes by. Defendant Denton responds that he goes by the last name of Denton. Defendant Denton addresses the court as to discovery and motions. **11:09 AM** - Court. **11:10 AM** - Colloquy. **11:10 AM** - Court addresses scheduling. **11:11 AM** - Attorney Peters responds. **11:12 AM** - Defendant Denton responds. **11:12 AM** - Court. **11:13 AM** - Colloquy. **11:14 AM** - Court. **11:14 AM** - Defendant Denton addresses the court as to his pre-trial motions. **11:15 AM** - Court inquires. **11:15 AM** - Attorney Peters responds. **11:17 AM** - Defendant Denton responds. **11:17 AM** - Court accepts the Amended Information under cause 15-1-04621-9 and enters pleas of not guilty. **11:18 AM** - Attorney Peters addresses the court regarding Knapstad motions. **11:22 AM** - Defendant Denton responds. **11:24 AM** - Court. **11:25 AM** - Court denies the Defendant's Knapstad motions. **11:25 AM** - Defendant Denton responds. **11:27 AM** - Court. **11:27 AM** - Attorney Peters responds. **11:27 AM** - Defendant Denton responds. **11:28 AM** - Court. **11:28 AM** - Defendant Denton responds. **11:29 AM** - Court. **11:29 AM** - Court denies the motion to exclude. **11:30 AM** - Court addresses the defendants motion to change venue. Court denies the motion to change venue. **11:30 AM** - Defendant Denton responds. **11:32 AM** - Court. **11:33 AM** - Defendant Denton addresses the court as to the motions to dismiss. **11:33 AM** - Court. **11:34 AM** - Court denies the motions to dismiss. **11:34 AM** - Defendant Denton responds. **11:35 AM** - Court addresses the defendants motion regarding insanity. **11:36 AM** - Attorney Peters responds. **11:36 AM** - Defendant Denton responds. **11:37 AM** - Colloquy. **11:39 AM** - Court. **11:40 AM** - Defendant Denton responds. **11:40 AM** - The court will not rule on the request at this time regarding the mental status of the defendant in September 2015. **11:41 AM** - Defendant Denton responds. **11:42 AM** - Court. **11:42 AM** - Defendant Denton addresses the court regarding the restraint chair. **11:42 AM** - Court. **11:44 AM** -

0108 12071 5/13/2016

MINUTES OF PROCEEDING

Start Date/Time: May 4, 2016 11:03 AM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

Defendant Denton responds. 11:45 AM - Court. 11:46 AM - Defendant Denton addresses his investigator and his legal mail. 11:47 AM - Court inquires as to the Stun Belt Motion. 11:47 AM - Attorney Peters responds. 11:47 AM - Defendant Denton responds. 11:50 AM - Attorney Peters calls Larry White who is duly sworn and testifies regarding the Stun Belt Motion. 11:59 AM - Defendant Denton's cross examination of witness. 12:04 PM - Witness excused. 12:05 PM - Defendant Denton responds and requests to have the calf belt instead of the waist. 12:05 PM - Court's oral ruling. 12:07 PM - Court grants the motion. 12:08 PM - Defendant Denton responds. 12:08 PM - Court. 12:08 PM - Defendant Denton addresses the court as to his motion to continue all cases. 12:08 PM - Court indicates that Judge Rumbaugh denied those motions. 12:09 PM - Attorney Peters responds and indicates that not all of the witnesses have been interviewed. 12:11 PM - Court inquires. 12:11 PM - Defendant Peters responds. 12:11 PM - Court. 12:12 PM - Interviews will take place tomorrow and Friday. 12:13 PM - Defendant Denton responds. 12:13 PM - Court. 12:14 PM - Colloquy. 12:15 PM - Court denies the request for the continuance. Court will start Monday with a jury. 12:17 PM - Colloquy regarding Jury Instructions. 12:17 PM - Defendant Denton inquires as to the restraint chair. 12:18 PM - Court. 12:18 PM - Court at recess on these matters until Monday morning at 9:00 AM. (The two custodial assault cases will go first due to witness availability on the first cause number 15-1-03696-5.

End Date/Time: May 4, 2016 12:19 PM

Start Date/Time: May 9, 2016 9:27 AM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

May 9, 2016 09:26 AM - Court is reconvened on this matter. All parties are present. Trial will proceed under cause numbers 15-1-04577-8 and 15-1-04621-9. Court inquires with the defendant if he is ready for trial. Defendant Denton responds and indicates that he is not ready for trial and addresses the court regarding a motion for his detective to be allowed to investigate the jail door. Colloquy. 09:29 AM - Attorney Peter's responds. 09:30 AM - Defendant Denton responds. 09:30 AM - Court. Colloquy. 09:31 AM - Court denies the motion. 09:32 AM - Colloquy. 09:34 AM - Court. 09:35 AM - Colloquy regarding witnesses. 09:43 AM - Defendant Denton requests to go back to the jail. 09:43 AM - Court at recess. 09:50 AM - Court is reconvened. 09:51 AM - Court addresses jury selection. 09:52 AM - Colloquy. 09:52 AM - Judicial Assistant not present. In hallway waiting for jury venire. 10:03 AM - Judicial Assistant present. Jury venire seated and

MINUTES OF PROCEEDING

Start Date/Time: May 9, 2016 9:27 AM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

sworn. Parties and charges introduced to the jury venire. Court's preliminary instructions to the jury venire. **10:07 AM** - Court's preliminary voir dire. **10:22 AM** - Attorney Peter's voir dire. **10:43 AM** - Defendant Denton voir dire. **11:06 AM** - Court inquires with juror #1. Court. **11:07 AM** - Court inquires with juror #32. **11:07 AM** - Court inquires with juror #23. **11:07 AM** - Court cautions and excuses the jury for a break. **11:09 AM** - Court will excuse juror #10 for cause. **11:09 AM** - Colloquy regarding challenges for cause. **11:12 AM** - Court at recess. **11:19 AM** - Court is reconvened outside the presence of the jury venire. Peremptory challenges. **11:19 AM** - Judicial Assistant not present. In hallway waiting for jury venire. **11:36 AM** - Judicial Assistant present. Jury venire seated. **11:38 AM** - Jury venire sworn. **11:38 AM** - Court's preliminary instructions to the jury panel. **11:44 AM** - Judicial Assistant not present. With jury panel in jury room. **11:57 AM** - Judicial Assistant present. Court is currently at recess.

End Date/Time: May 9, 2016 11:58 AM

Start Date/Time: May 9, 2016 1:42 PM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

May 9, 2016 01:41 PM - Court is reconvened on this matter. All parties are present and ready to proceed outside the presence of the jury. Court addresses issues with juror #9 and indicates that the court will excuse juror #9 on this matter. **01:44 PM** - Defendant Denton addresses the court as to paperwork from the jail. **01:45 PM** - Attorney Talney addresses the court. **01:45 PM** - Attorney Peter's responds. **01:46 PM** - Defendant Denton responds. **01:47 PM** - Court grants the request. **01:52 PM** - Jury seated. Court addresses juror #9 being excused. **01:52 PM** - Attorney Peter's opening statement on behalf of the State of Washington. **01:58 PM** - Defendant Denton's opening statement on behalf of the Defense. **02:01 PM** - State's case. Attorney Peter's calls Andy Powell who is duly sworn and testifies under direct examination. **02:15 PM** - Defendant Denton cross examination of witness. **02:29 PM** - Attorney Peter's re-direct. **02:32 PM** - Witness excused but is subject to be recalled. Jury excused to jury room. Colloquy regarding paperwork outside the presence of the jury. **02:35 PM** - Court at recess. **02:40 PM** - Court is reconvened on this matter outside the presence of the jury. **02:40 PM** - Attorney Peter's addresses the court as to the documents from the jail. **02:40 PM** - Defendant Denton responds. **02:41 PM** - Court. **02:43 PM** - Jury seated. **02:44 PM** - Attorney Peter's calls Forrest Ake who is duly sworn and testifies under direct examination. **02:57 PM** - Defendant Denton cross examination. **03:08 PM** - Attorney Peter's re-direct. **03:11 PM** - Defendant

MINUTES OF PROCEEDING

Start Date/Time: May 9, 2016 1:42 PM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

Denton re-cross. 03:12 PM - Attorney Peter's re-re-direct. 03:12 PM - Witness excused. 03:13 PM - Court cautions and excuses the jury until Wednesday, May 11th @ 8:45 AM. 03:15 PM - Court addresses the last witness as to being re-called. Defendant Denton responds. 03:16 PM - Court. 03:16 PM - Court at recess on this matter.

End Date/Time: May 9, 2016 3:17 PM

Start Date/Time: May 11, 2016 9:14 AM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

May 11, 2016 09:14 AM - Court is reconvened on this matter. All parties are present and ready to proceed outside the presence of the jury. Defendant Denton addresses the court regarding documents and witnesses. 09:15 AM - Attorney Peter's responds. 09:15 AM - Colloquy. 09:18 AM - Jury seated. Attorney Peter's calls Matt Watson who is duly sworn and testifies under direct examination. Defendant Denton cross examination of witness. 09:59 AM - Jury cautioned and excused to the jury room. 10:01 AM - Colloquy regarding exhibit #3 outside the presence of the jury. 10:03 AM - Court at recess. 10:08 AM - Court is reconvened. 10:09 AM - Jury seated. Defendant Denton's cross examination of witness Watson resumes. 10:13 AM - Attorney Peter's re-direct. 10:14 AM - Defendant Denton re-cross. 10:18 AM - Witness excused. 10:18 AM - Attorney Peter's calls Mario Moreno who is duly sworn and testifies under direct examination. 10:36 AM - Defendant Denton cross examination of witness. 10:47 AM - Witness excused. 10:48 AM - Attorney Peter's calls Mike Heishman who is duly sworn and testifies under direct examination. 10:56 AM - Defendant Denton cross examination of witness. 11:03 AM - Attorney Peter's re-direct. 11:04 AM - Court. Jury excused to jury room. 11:06 AM - Court inquires with Defendant Denton regarding testimony regarding meals outside the presence of the jury. 11:06 AM - Defendant Denton responds. 11:07 AM - Colloquy. 11:10 AM - Attorney Peter's responds. 11:10 AM - Defendant Denton responds. 11:11 AM - Court. 11:11 AM - Witness excused. 11:12 AM - Court. 11:12 AM - Attorney Peter's responds. Court inquires with defendant Denton. 11:12 AM - Colloquy. 11:17 AM - Colloquy regarding jury instructions. 11:20 AM - Defendant Denton addresses the court. 11:20 AM - Court. 11:20 AM - Colloquy regarding jury instructions. 11:25 AM - Court. 11:27 AM - Jury seated. 11:27 AM - State rests. Defense rests. Court cautions and excuses the jury for lunch. 11:28 AM - Court inquires as to exhibits 5 and 6. 11:29 AM - Court at recess.

End Date/Time: May 11, 2016 11:29 AM

MINUTES OF PROCEEDING

Start Date/Time: May 11, 2016 1:30 PM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

May 11, 2016 01:30 PM - Court is reconvened. All parties are present and ready to proceed outside the presence of the jury. Court addresses the jury instructions. 01:31 PM - Court takes exceptions to the jury instructions. 01:31 PM - Court addresses closing arguments. 01:34 PM - Jury seated. Court. 01:34 PM - Court reads the jury instructions to the jury. 01:47 PM - Attorney Peter's closing argument on behalf of the State. 02:07 PM - Defendant Denton's closing argument on behalf of the Defense. 02:21 PM - Attorney Peter's rebuttal closing on behalf of the State. 02:26 PM - Court clarifies jury instructions with the jurors. 02:26 PM - Court cautions and temporarily excuses the alternate juror. 02:27 PM - Court addresses the jury panel. 02:28 PM - Jury excused to jury room. 02:33 PM - The felony harassment case - 15-1-03696-5 is returned to CDPJ along with a new case that has been filed. 02:40 PM - Not on record - Jury provided with original jury instructions. Jury deliberating. 04:16 PM - Not on record. Judicial Assistant releases the jury for the evening.

End Date/Time: May 11, 2016 4:17 PM

Start Date/Time: May 12, 2016 8:44 AM

Judicial Assistant: KAREN LADENBURG

Court Reporter: Shaun Linse

May 12th, 2016 8:44 AM - Not on record - Jury present. Jury deliberating. 09:21 AM - Not on record - Jury inform Judicial Assistant that they have reached a verdict. Parties called back to court. 10:05 AM - Court is reconvened outside the presence of the jury. Court addresses jury deliberations outside the presence of the jury. Court. 10:07 AM - Jury seated. Court addresses the jury. 10:08 AM - Court reads the verdicts of the jury. 10:08 AM - Jury polled. 10:09 AM - Court addresses the jury panel. 10:10 AM - Court excuses the jury. Judicial assistant not present. 10:13 AM - Judicial assistance present. Colloquy regarding other cases. 10:14 AM - Defendant Denton requests to have attorney Aaron Taleny represent him on current matters. Colloquy. Attorney Talney clarifies that defendant Denton only wants to be represented on the new case of 16-1-01709-8. Mr. Denton will continue to represent himself on 15-1-03696-5. Court signs order appointing counsel on 16-1-01709-8 and court signs Order for Examination by Western State Hospital or Qualified Expert under cause number 15-1-03696-5. Sentencing on cause numbers 15-1-04577-8 and 15-1-04621-9 are set over to Friday, October 3rd, 2016 @ 1:30 PM.

End Date/Time: May 12, 2016 10:28 AM

NIELSEN, BROMAN & KOCH, PLLC

December 06, 2016 - 1:24 PM

Transmittal Letter

Document Uploaded: 3-491150-Appellant's Brief.pdf

Case Name: Michael Denton

Court of Appeals Case Number: 49115-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

copy sent to: Michael Denton 898610 Stafford Creek Corrections Center 191
Constantine Way Aberdeen, WA 98520

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us

Sweigertj@nwattorney.net