

NO. 49115-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL DENTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 15-1-04577-8

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court properly exercise its discretion when it excluded a defense witness disclosed the day of trial and that late disclosure was willful, resulted in surprise, and the record does not show that witness's testimony would have impacted the case? 1

2. Did the trial court properly direct the scope of cross-examination when it repeated a witness's answer to a question to defendant and defendant was allowed to ask the question again? 1

3. Did the trial court properly instruct the jury that their verdicts must be unanimous by including the unanimity requirement in both verbal admonishments and within the jury instructions? 1

4. Is the issue of appellate costs moot when the State will not be filing a cost bill? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts..... 2

C. ARGUMENT..... 3

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED DEFENDANT'S LATE DISCLOSED WITNESS..... 3

2. THE TRIAL COURT PROPERLY DIRECTED THE SCOPE OF CROSS-EXAMINATION AND DID NOT COMMENT ON EVIDENCE ADUCED AT TRIAL 8

3.	THE COURT PROPERLY INSTRUCTED JURORS ON UNANIMITY	11
4.	THE ISSUE OF APPELLATE COSTS IS NOT YET RIPE AS THE STATE HAS NOT REQUESTED SUCH AN AWARD, AND THE STATE WILL NOT BE SEEKING COSTS IN THIS CASE	14
D.	<u>CONCLUSION.</u>	14

Table of Authorities

State Cases

<i>Sanders v. State</i> , 169 Wn.2d 827, 851, 240 P.3d 120 (2010)	8
<i>State v. Elmore</i> , 139 Wn.2d 139, 276, 985 P.2d 289 (1999)	8
<i>State v. Austin</i> , 59 Wn. App. 186, 194, 796 P.2d 746 (1990).....	3
<i>State v. Ciskie</i> , 110 Wn.2d 263, 283, 751 P.2d 1165 (1988)	8
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011).....	11
<i>State v. Graham</i> , 59 Wn. App 418, 428, 798 P.2d 314 (1990).....	11
<i>State v. Huelett</i> , 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)	4
<i>State v. Hutchinson</i> , 135 Wn.2d 863, 959 P.2d 1061 (1998).....	4, 5, 7
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	13
<i>State v. Lamar</i> , 180 Wn.2d 576, 586 327 P.3d 46 (2014)	11
<i>State v. Linden</i> , 89 Wn. App 184, 190, 947 P.2d 1284 (1997).....	4
<i>State v. Nolan</i> , 141 Wn.2d 620, 628, 8 P.3d 300 (2000)	14
<i>State v. O’Hara</i> , 167 Wn.2d 91, 99, 217 P.3d 756 (2009).....	11
<i>State v. Stubsjoen</i> , 48 Wn. App. 139, 147, 738 P.2d 306, <i>review denied</i> , 108 Wn.2d 1033 (1987).....	4
<i>State v. Sublett</i> , 176 Wn.2d 58, 75-6, 283 P.3d 715 (2012).....	11
<i>State v. Venegas</i> , 155 Wn. App 507, 521-22, 228 P.3d 813 (2010)	4

Statutes

RCW 10.73.160.....	14
--------------------	----

Rules and Regulations

CrR 4.7.....4
CrR 4.7(h)(7)4
CrR 6.15.....11
ER 611(a).....8
RAP 14.214
RAP 2.5(a)(3)11

Other Authorities

WPIC 1.0412

A. ISSUES PERTAINING TO APPELLANT' S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it excluded a defense witness disclosed the day of trial and that late disclosure was willful, resulted in surprise, and the record does not show that witness's testimony would have impacted the case?
2. Did the trial court properly direct the scope of cross-examination when it repeated a witness's answer to a question to defendant and defendant was allowed to ask the question again?
3. Did the trial court properly instruct the jury that their verdicts must be unanimous by including the unanimity requirement in both verbal admonishments and within the jury instructions?
4. Is the issue of appellate costs moot when the State will not be filing a cost bill?

B. STATEMENT OF THE CASE.

1. Procedure

On February 26, 2016, Pierce County Prosecutors charged Michael Denton ("defendant") with three counts of Custodial Assault (Count I, Count III, and Count IV) and two counts of Felony Harassment (Count II

and Count V). CP 1, 30-1. The case moved to a jury trial before the Honorable James Orlando. 1RP 1.¹ Defendant proceeded pro se. 4RP 1. After careful consideration of all the evidence, the jury returned guilty verdicts on Count I, Count III, and Count V. CP 64-5; 4RP 268-70. The jury found defendant not guilty on Count II, IV. *Id.* The court sentenced defendant to 60 months on each Count I and Count III to be served consecutively.² 5RP 11. Defendant filed a timely notice of appeal. CP 82.

2. Facts

On November 16, 2016, defendant was in custody at the Pierce County Jail's maximum security unit. 4RP 99-101. That evening, Corrections Deputy Andy Powell came into defendant's cell to serve him dinner. 4RP 102. Defendant's cell contained two doors, a solid outer door and a barred inner door with a port to allow for feeding and cuffing. 4RP 102-3. As Deputy Powell opened the feeding port to pass defendant his sack lunch, defendant threw a cup full of an unknown liquid through the port hitting the deputy. 4RP 104-5. He then yelled at the deputy "I'm going to kick your ass." 4RP 106.

¹ For consistency the State will use the same designations for the verbatim transcripts of proceedings as the appellant which are 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.

² The Judgement and Sentence is silent as to the sentence for Count V. The proper remedy would be to remand for a clerical correction.

On November 18, 2016, Corrections Deputy Mario Moreno entered defendant's cell to serve lunch through the port in the inner cell door. 4RP 153-5, 191-2. Defendant blocked the feeding port with his arm and refused to move it. 4RP 192-3. Deputy Moreno radioed Corrections Deputy Matt Watson for assistance. 4RP 194. Both deputies repeatedly ordered defendant to remove his arm from the trap door. *Id.* Deputy Watson struck defendant's arm with his flashlight to encourage defendant to remove his hand from the trap door. 4RP 162-3, 197. Defendant moved his hand back, used a cup to scoop fecal liquid from his toilet, and then threw it, hitting the closed feeding port. 4RP 164-5, 198-9. Undeterred, he scooped a second cup and threw fecal liquid through a gap in the cell bars hitting Deputy Moreno. 4RP 165,-6, 199-201. Deputy Moreno had to decontaminate himself and change uniforms. 4RP 201.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED DEFENDANT'S LATE DISCLOSED WITNESS.

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). Nonetheless, the admission or refusal of evidence lies largely within the sound discretion of the trial court and its decision will not be reversed on appeal absent an

abuse of discretion. *State v. Stubsoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

A defendant has a “continuing obligation” to promptly disclose the names and addresses of intended witnesses and the substance of their testimony. CrR 4.7; *State v. Linden*, 89 Wn. App 184, 190, 947 P.2d 1284 (1997). A trial court is given wide discretion to enforce discovery violations under CrR 4.7. *Id.* at 189-90. A trial court may “grant a continuance, dismiss the action, or enter such order as it deems just under the circumstances” as a sanction for party’s failure to comply with a discovery rule. CrR 4.7(h)(7). The exclusion of a witness as a sanction for discovery violation is permitted, but “should be applied narrowly.” *State v. Hutchinson*, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998).

The *Hutchinson* court enumerated four factors that a trial court should consider in determining whether to exclude evidence as a discovery sanction: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness testimony; (4) whether the violation was willful or in bad faith. *Id.* at 883. These factors can be considered from the record developed at trial and do not require an express finding from the trial court. *State v. Venegas*, 155 Wn. App 507, 521-22, 228 P.3d 813 (2010).

Here, on the day of jury selection, defendant wished to subpoena Mr. Patrick Cloud, a fellow inmate, to testify. 3RP 71. The record is unclear about the potential subject of Mr. Cloud's testimony. 3RP 71-3. Mr. Cloud did not appear on any witness list and was disclosed only on the day of jury selection. *Id.* Under the four *Hutchinson* factors, the trial court did not abuse its discretion when it excluded Mr. Cloud's testimony.

- a. The trial court was best situated to determine the effectiveness of a less severe sanction.

A party's failure to identify witness in a timely manner can be "appropriately remedied by continuing a trial to give the non-violating party time to interview a new witness or prepare to address new evidence." *State v. Hutchinson*, 135 Wn.2d at 881. Defendant disclosed Mr. Cloud the day of jury selection and the State objected that it did not have time to prepare to interview the witness. 3RP 70. The State charged defendant on February 26, 2016, and hearings commenced on March 4, 2016. CP 1, 30-1; 1RP 1. Defendant disclosed Mr. Cloud as a witness on May 9, 2016, the day of jury selection. 3RP 70-1. The trial court is best situated to analyze the extent of the delay that would be required and could have concluded further delay would hinder the interests of justice. Therefore, the trial court did not abuse its discretion when it determined the exclusion of Mr. Cloud was the proper remedy.

- b. The record does not indicate the testimony of Mr. Cloud would have any impact on the outcome of the case.

Defendant did not offer an explanation of how Mr. Cloud's testimony would differ from the testimony of the other witnesses present at the time of the incident. 2RP 69-70. Defendant claimed Mr. Cloud was in a nearby cell at the time of the incident. 2RP 69. However, defendant was housed in a one man isolation cell behind two doors, making it highly unlikely another prisoner observed the conduct giving rise to these charges. 4RP 191. The jury heard from three witnesses present at the time of the incidents, who all testified that defendant threw a liquid containing urine and feces at corrections officers. 2RP 104-5; 3RP 164-5; 197-9. The jury also heard from two other witnesses involved in the reporting and aftermath of the incidents. 2RP 130-3; 3RP 213-5. Defendant did not testify. 4RP 236-7. Absence a showing that Mr. Cloud's testimony would have significantly contradicted the testimony provided, the exclusion of Mr. Cloud's testimony did not have a significant impact of the outcome of the trial.

- c. Defendant's late witness disclosure resulted in surprise and prejudice.

Defendant disclosed Mr. Cloud as a potential witness the day of jury selection. 3RP 70. The State knew only that Mr. Cloud was a fellow inmate.

Id. The State had no opportunity to interview the witness to uncover the subject of his testimony, nor did defendant make such a disclosure at trial. The late disclosure and lack of information about the potential witness resulted in a high level of surprise and prejudice for the State in preparing its case.

d. Defendant's late disclosure was willful.

Defendant did not disclose Mr. Cloud on his witness list at any time prior to the first day of trial. The record does not support a finding that defendant discovered Mr. Cloud as a potential witness at the last minute. Instead, it shows that he was a fellow prisoner in a cell near defendant's, a fact defendant was likely aware of at the outset of pre-trial preparation. 3RP 69-70. Additionally, contrary to defendant's brief, the record does not support a finding that defendant was "confused" about the discovery rules. Brief of Appellant at 9. Therefore, defendant's decision to leave Mr. Cloud off his witness list and provide only last minute notice was a willful action.

When viewed in light of all four *Hutchinson* factors, the record shows that the trial court acted within its wide discretion when it excluded the testimony of Mr. Cloud. Therefore, this Court should affirm the trial court's verdict.

2. THE TRIAL COURT PROPERLY DIRECTED THE SCOPE OF CROSS-EXAMINATION AND DID NOT COMMENT ON EVIDENCE ADUCED AT TRIAL.

For a judicial statement to constitute a comment on the evidence, it must appear that the trial court's attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court's statements. *State v. Elmore*, 139 Wn.2d 139, 276, 985 P.2d 289 (1999); *see also State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) (an impermissible comment on the evidence is an indication to the jury of the judge's personal attitudes toward the merits of the cause). Potential prejudice from a judicial statement can be cured by instructing the jury that the judge is not permitted to comment on the evidence and any misunderstood behavior did not intend to convey a personal opinion on evidence presented. *State v. Elmore*, 139 Wn.2d at 306. A trial court has considerable discretion to control the mode and scope of interrogating witnesses in a manner that encourages the effective ascertainment of the truth. ER 611(a); *Sanders v. State*, 169 Wn.2d 827, 851, 240 P.3d 120 (2010).

Defendant's claim the trial court judge impermissibly commented on evidence is without merit because the court made the statements to encourage the effective ascertainment of the truth during recross-examination and did not reveal the court's personal attitude towards the merits of the case. During defendant's recross-examination of Deputy Matt

Watson the following exchange took place:

MR. DENTON: Okay. When the prosecutor just asked you at the time Officer Moreno was hit, was the door secured, the trap door secured, did you answer yes?

MR. PETERS (DPA): I'm not sure the witness understands the question.

MR. DENTON: Okay. I'm going to ask you again.

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.

DEPUTY WATSON: 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.

MR. DENTON: I'm writing down exactly what he said, everything that he said. The prosecutor asked him, was the actual door --

MR. PETERS: Objection.

MR. DENTON: -- and the trap door on the actual door, and he said yes. And the prosecutor asked him, is the trap door, was it secured or was it unsecured at the time.

THE COURT: Go ahead and ask him that question just to clarify it.

MR. DENTON: At that time, was the trap door secured or unsecured when Officer Moreno got hit with the substance?

DEPUTY WATSON: I believe it was unsecured.

MR. DENTON: It was secured exactly? That's what I just said.

DEPUTY WATSON: I said unsecured.

MR. PETERS: He just answered unsecured.

MR. DENTON: What did he say?

THE COURT: He said unsecured.

MR. DENTON: Unsecured. Okay. Okay. He said unsecured. Okay.

4RP 186-8.

Here, the court did not comment on the merits of defendant's case, instead it ensured defendant's question was a truthful and accurate representation of the witness's previous statement. Defendant misspoke or misrepresented the deputy's testimony concerning the trap door. 4RP 186. The prosecutor objected, the court reminded defendant of the witness's testimony, and allowed defendant to question the deputy again. 4RP 186-8. The deputy answered the question consistent with his earlier testimony that the trap door had been unsecured at the time of the incident. 4RP 188.

Even if the court's statement was impressible, no prejudice resulted. The court correctly stated the witness's previous testimony, which the witness reiterated when asked again by defendant following the exchange between the court and defendant. 4RP 187-8. The jury was not unduly influenced by the court's recitation of the testimony because the court's statement was consistent with the testimony. Additionally, the court instructed the jury that:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 38-9.

It is presumed that the jury followed this instruction and disregarded any misunderstanding arising from the court's exchange with the defendant. *See, State v. Lamar*, 180 Wn.2d 576, 586 327 P.3d 46 (2014). Therefore, defendant's claim that the court impermissibly commented on evidence is without merit.

3. THE COURT PROPERLY INSTRUCTED JURORS ON UNANIMITY.

Normally to preserve an appellate challenge to a jury instruction defendant must object to the instruction at the trial court. CrR 6.15; *State v. Sublett*, 176 Wn.2d 58, 75-6, 283 P.3d 715 (2012). However, RAP 2.5(a)(3) permits a party to raise an issue for the first time on appeal when the issue involves "manifest error affecting a constitutional right." While failure to provide a required unanimity instruction could satisfy the constitutional right part of this standard, the failure to raise the issue in the trial court is manifest only when it had "practical and identifiable consequences" at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011), quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Jurors are presumed to follow instructions. *State v. Graham*, 59 Wn. App 418, 428, 798 P.2d 314 (1990).

Defendant's claim that the court improperly instructed the jury that their verdict must be unanimous cannot be challenged on appeal as it was

not properly preserved nor is it a manifest error affecting a constitutional right. Following jury selection, the court admonished the jury that:

After closing argument, you'll first go to the jury room to select a presiding juror. The presiding juror will preside over your discussions of the case, which is 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 other jurors or within hearing of anyone else discussing it. No discussion means also no emailing, text messaging, blogging, or using any other form of electronic communication regarding this case.

2RP 85-6.

The trial court instructed the jury that they must return a unanimous verdict in Jury Instruction 18:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 62; *See also*, WPIC 1.04.

Defendant did not object to Jury Instruction 18. Because defendant failed to object to the unanimity instruction, he has not preserved the issue for appeal and his claim fails.

Defendant claims that the court's unanimity instruction constitutes a manifest error of constitutional magnitude, prospectively allowing him to side-step his failure to preserve the issue for appeal. Brief of Appellant at 20. This argument is speculative at best. A manifest error requires an actual showing of prejudice. *State v. Kirkman*, 159 Wn.2d 918, 134, 155 P.3d 125 (2007). Here, defendant fails to show *any* negative effect from the court's instructions, let alone an actual showing of prejudice. Instead, defendant puts forward a number of speculative, hypothetical situations that, if shown to occur, could potentially give rise to a manifest constitutional error. Brief of Appellant at 21. There is no indication in the record that the jury deliberated separately in the evening, while other jurors were absent from the jury room, or any of the other speculative scenarios suggested in defendant's brief.

Instead, the record shows the jury received multiple admonishments to deliberate and reach a unanimous verdict. It shows the court polled the jury and each juror affirmed each verdict as not only their respective verdict, but also the verdict of the entire jury. 4RP 269-70. Any suggestion of prejudice resulting from the court's unanimity instruction is pure hypothetical speculation falling well short of the demonstrated prejudice required to constitute manifest error. Therefore, this Court should affirm the trial court on all counts.

4. THE ISSUE OF APPELLATE COSTS IS NOT YET RIPE AS THE STATE HAS NOT REQUESTED SUCH AN AWARD, AND THE STATE WILL NOT BE SEEKING COSTS IN THIS CASE.

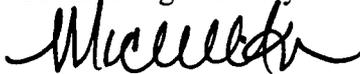
The State has not yet requested an award of appellate costs. The State agrees with defendant that this court has the discretion to grant or deny a request for appellate costs once a cost bill has been filed. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). The decision of whether to award appellate costs is the prerogative of this court in the exercise of its discretion under RCW 10.73.160 and RAP 14.2. In this case, in light of current RAP 14.2, the State will not be seeking appellate costs here.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests defendant's conviction be affirmed.

DATED: May 8, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Neil S. Brown
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.10.17 Shen Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 10, 2017 - 9:44 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49115-0
Appellate Court Case Title: State of Washington, Respondent v. Michael Denton, Appellant
Superior Court Case Number: 15-1-04577-8

The following documents have been uploaded:

- 3-491150_Briefs_20170510094210D2462756_3488.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Denton Response Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- SweigertJ@nwattorney.net

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Michelle Hyer - Email: PCpatcecf@co.pierce.wa.us (Alternate Email:)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20170510094210D2462756