

NO. 49196-6-II

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

STATE OF WASHINGTON, Respondent

v.

DONNA NOELLE JESMER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00372-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR	1
I. The trial court properly declined to instruct the jury on the definition of a quitclaim deed.....	1
II. The trial court properly instructed the jury on the requirement of unanimity and on how to deliberate.....	1
STATEMENT OF THE CASE	1
ARGUMENT	6
I. The trial court properly declined to instruct the jury on the definition of a quitclaim deed.....	6
II. The trial court properly instructed the jury on the requirement of unanimity and on how to deliberate.....	11
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>State v. Allen</i> , 161 Wn.App. 727, 255 P.3d 784 (2011).....	6
<i>State v. Davis</i> , 175 Wn.2d 287, 290 P.3d 43 (2012).....	12, 13
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	15
<i>State v. Gordon</i> , 172 Wn.2d 671, 260 P.3d 884 (2011).....	12
<i>State v. Hayward</i> , 152 Wn.App. 632, 217 P.3d 354 (2009)	8
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	15
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	13, 14, 15
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	12
<i>State v. Mriqlot</i> , 88 Wn.2d 573, 564 P.2d 784 (1977).....	7
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	13
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	8
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	7
<i>State v. Rice</i> , 102 Wn.2d 120, 683 P.2d 199 (1984).....	7
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	7

Rules

RAP 2.5(a)(3).....	12
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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly declined to instruct the jury on the definition of a quitclaim deed.**
- II. **The trial court properly instructed the jury on the requirement of unanimity and on how to deliberate.**

STATEMENT OF THE CASE

Donna Jesmer (hereafter 'Jesmer') was convicted of Robbery in the First Degree, Assault in the Second Degree, and Felony Harassment for an incident that occurred involving her mother, Sandra Rodewald. Jesmer was tried with her co-defendant, her son K.J.

At trial, Ms. Rodewald testified that she had lived with her husband for 20 years in her home on Bradford Drive in Vancouver, Washington. RP 50-55. Jesmer is Ms. Rodewald's daughter; K.J. is Jesmer's son. RP 54-55. By late 2008 or early 2009, Jesmer and her children were living with Ms. Rodewald in her home on Bradford Drive. RP 56, 109. Ms. Rodewald and her husband went to El Salvador in October 2008 for work, with the possibility of making it a permanent relocation if things went well. RP 56-57, 106. While Ms. Rodewald was in El Salvador, the heat pump on her house went out. RP 58-59. To facilitate the repair, Ms. Rodewald issued a quitclaim deed to Jesmer so that Jesmer

could have the heat pump repaired. RP 58-59, 108-10. Ms. Rodewald testified that her intent in issuing the quitclaim deed was only to facilitate the repair of the heat pump, and not to give Jesmer her house. RP 59, 110.

In late 2013, Ms. Rodewald and her husband moved back to Vancouver and back into their home on Bradford Drive. RP 58-60, 110. Jesmer and two of her children, including K.J., were living there at the time. RP 60. There was tension between Ms. Rodewald and Jesmer over bills and Ms. Rodewald testified about three incidents during which Jesmer assaulted her in the garage at the house. RP 62-67. In January 2016, Ms. Rodewald discovered she was missing some jewelry; she suspected Jesmer had taken it. RP 67-75. When Ms. Rodewald confronted Jesmer about taking the jewelry, Jesmer “went ballistic” and Ms. Rodewald picked up a bat to protect herself from Jesmer. RP 75-76, 121. Jesmer then approached her and grabbed the bat and hit Ms. Rodewald on her shoulder knocking her to the ground. RP 76-78. Ms. Rodewald then called the police and reported her jewelry missing and provided a list of other items she believed were missing as well. RP 76-78.

On January 29, 2016, Jesmer came back to the house with K.J. and entered with her key. RP 78-81. Jesmer told her mother that they were there to get their things. RP 82. Ms. Rodewald did not trust Jesmer, so she followed her upstairs. RP 83. Jesmer argued with her mother, and then

grabbed her by the hair and knocked her to the floor. RP 84. K.J. joined in and physically took Ms. Rodewald to the top of the stairs and told her to go downstairs. RP 84. Ms. Rodewald testified that K.J. was “trying to push me down the stairs a little bit.” RP 85. Ms. Rodewald briefly went downstairs, but then returned and went into K.J.’s room. RP 91. Ms. Rodewald picked up a laptop computer and threw it on the bed and left K.J.’s room. RP 91. K.J. then started punching holes in the wall of the house and yelled things to the effect of, “how do you like that, Grandma?” RP 92. Jesmer blocked Ms. Rodewald from stopping K.J. RP 92. Soon, K.J. went downstairs and Jesmer began assaulting Ms. Rodewald anew. RP 92-93. Jesmer punched Ms. Rodewald in the head, knocked her down and continued to hit her as she was on the ground. RP 93. Ms. Rodewald took her cell phone out, but Jesmer physically twisted it out of her hand and refused to return it to Ms. Rodewald. RP 93-94. Jesmer then hit Ms. Rodewald with a hard object in the back of the head and then on her back. RP 94-95. Ms. Rodewald was once again on the floor, and Jesmer got on top of her, continuing to hit her and threatening to “snap” Ms. Rodewald’s neck. RP 96-97.

After the assault ended, Ms. Rodewald waited until she thought Jesmer and K.J. had left her house. RP 97-98. However, they were still there, downstairs, taking a TV and the house phone. RP 99-100. K.J. told

Ms. Rodewald that she could find her cell phone “out in the forest – amongst the trees.” RP 98. The cell phone was later found two days later on the shoulder of a road in Camas, Washington. RP 155, 298-99.

After Jesmer and K.J. left her house, Ms. Rodewald went to her closest neighbor’s house and called police. RP 101-03. Ms. Rodewald was bleeding from the back of her head and travelled by ambulance to the hospital. RP 101-03.

Over a month later, in early March, Ms. Rodewald received text messages offering to return her jewelry if she dropped the charges against K.J. RP 104-05. Jesmer admitted at trial that she sent the text messages to her mother. RP 375.

At trial, Jesmer claimed her mother had gifted her the home in 2010, and executed a quitclaim deed. RP 334-36. Jesmer testified she never recorded the deed, but kept the document in a file box in her bedroom. RP 336. Jesmer has not seen the deed since the day of this incident. RP 336-37. Jesmer also claimed her mother told her that she could have all of the jewelry she left when she went to El Salvador. RP 384. Jesmer further claimed that when she came to get her belongings, her mother stood at her bedroom door and yelled at her, and then hit her several times before she lost her balance and fell down. RP 364-67. Jesmer claims her mother then tried to hit her with her cell phone, so Jesmer took

the phone away from her and tossed it on the floor. RP 399-402. Jesmer closed her door and kept packing. RP 366. Jesmer next heard K.J. yelling at Ms. Rodewald and saw Ms. Rodewald pick up a laptop and throw it at K.J, hitting him. RP 366-68. Jesmer then claims she dragged her mother out of K.J.'s room by her hair, threw her on the floor and hit her, telling her to stay on the floor until they left and agreed she may have told her that she would "snap her fucking neck" if she did not comply. RP 368-70.

K.J. testified that he and his mother went to the house on January 29, 2016 and entered with his mother's key. RP 511. As they entered, Ms. Rodewald told them they were not supposed to be there. RP 511-12. K.J. asked if they could come in just to get some of their things, Ms. Rodewald agreed. RP 512. K.J. testified that Ms. Rodewald followed him and his mother upstairs and yelled at Jesmer. RP 513. K.J. tried to get Ms. Rodewald to go downstairs, but claims he did not assault her in the process. RP 513-15. Ms. Rodewald then confronted K.J. in his room, threw a laptop at him, and then K.J. started punching holes in the walls of his bedroom. RP 515-16. K.J. then went outside to cool off. RP 516. K.J. did not see Jesmer and Ms. Rodewald strike each other at all, and testified that he did not take anything from the house that was not his, including Rodewald's cell phone or TV. RP 518-29.

The jury convicted Jesmer of Robbery in the First Degree, Assault in the Second Degree, and Felony Harassment. CP 93-99, 101-02. At sentencing, the parties agreed Jesmer's assault conviction merged with the robbery, and the trial court imposed a standard range sentence. RP 695-702; CP 106-20. Jesmer now submits this appeal. CP 121, 125-26.

ARGUMENT

I. The trial court properly declined to instruct the jury on the definition of a quitclaim deed.

Jesmer argues the trial court erred in failing to instruct the jury on the definition of a "quitclaim deed" as she requested at trial. *See* CP 39. Such an instruction was irrelevant to the crimes charged and did not prevent Jesmer from arguing her theory of the case to the jury. The trial court properly refused to give this instruction and Jesmer's convictions should be affirmed.

Due process requires that jury instructions allow the parties to argue all theories of their respective cases supported by sufficient evidence, fully instruct the jury on the defense theory, inform the jury of the applicable law, and give the jury discretion to decide questions of fact. *State v. Allen*, 161 Wn.App. 727, 734, 255 P.3d 784 (2011). However, a trial court should not give a requested instruction that erroneously states

the law or that is not supported by substantial evidence. *See State v. Mriqlot*, 88 Wn.2d 573, 578, 564 P.2d 784 (1977).

A trial court's refusal to give a requested jury instruction is reviewed *de novo* when the refusal is based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). When a trial court refuses to give a requested instruction for factual reasons, this Court reviews that decision for an abuse of discretion. *Id.* at 771-72. Under either standard of review, the trial court below did not err in failing to give an instruction on the definition of a quitclaim deed as it was irrelevant to the charges and defenses raised at trial. A defendant is entitled to jury instructions allowing it to argue its theory of the case, as long as sufficient evidence supports the instruction. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). The jury instructions also must correctly apprise the jury of the law. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). There is no requirement that irrelevant recitations of laws or statutes be included in jury packets. To do so could easily overwhelm and confuse the jury. It is the trial court's job to appropriately instruct the jury on the pertinent and relevant law.

This Court should "analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context." *State v. Hayward*, 152 Wn.App. 632, 642, 217 P.3d

354 (2009) (citing *State v. Pirtle*, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995)). To prove Jesmer guilty of Robbery in the First Degree, the State had to show that she unlawfully took personal property from another person, or in another's presence, that she intended to commit theft of the property, that Sandra Rodewald had a possessory, ownership, or representative interest in the property, that the taking was against the person's will by use or threatened use of force, violence or fear of injury, that the force or fear was used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and that the defendant inflicted bodily injury during the acts or in the immediate flight therefrom. RP 62. It was the State's burden to show that Ms. Rodewald had possessory, ownership, or representative interest in the property. RP 62. To be clear, the robbery concerned *personal property*. Jesmer's proposed jury instruction on a quitclaim deed concerned only *real property*. The court's decision not to instruct the jury on the definition of a quitclaim deed did not prevent Jesmer from arguing that Ms. Rodewald did not have possessory, ownership, or representative interest in the property she took as Jesmer now appears to claim on appeal. This argument was available to her and in fact Jesmer argued the significance of the quitclaim deed in her closing argument. RP 619-20, 634-36.

At trial, Jesmer's defense theory was general denial as to the robbery in that she claimed ownership in some of the property taken, denied taking other property, and denied physical force to overcome resistance to the taking. RP 619-36. The court's instructions to the jury as given did not prevent her from making this argument to the jury. The jury was properly instructed on the elements of the crime of robbery. CP 62. The proposed instruction on the quitclaim deed would have had no bearing on ownership of the property taken, or whether physical force was used in the taking. The proposed instruction clearly referenced only "real property" and thus would not have had any impact on the jury's consideration of the robbery charge. CP 39.

Jesmer also contends the proposed instruction on the quitclaim deed would have provided her a defense to the assault conviction by showing she had the right to stand her ground as she was in a place she had the right to be. The State never argued Jesmer did not have the right to be where she was or that Jesmer was guilty because she had a duty to retreat. RP 605-16, 658-69. This was not the issue involved in the assault allegation. The issue was whether Jesmer did assault her mother at all, and whether it was an assault that was necessary to defend herself or another person. The issue was never an argument of whether Jesmer should never have been in the residence in the first place, or whether she should not

have “stood her ground.” The instructions as given to the jury allowed the parties to argue their theories of the case. The proposed instruction on the quitclaim deed was confusing, unnecessary, and irrelevant. Jesmer’s attorney argued in closing that the victim was not to be believed, that she had a motive to get Jesmer out of the picture (theoretically by claiming robbery and assault against her and sending her to jail) because if Jesmer remained in the picture she could claim her house as her own. The instructions allowed Jesmer to argue this very theory, and in fact Jesmer did so argue. The proposed instruction on the quitclaim deed would have done nothing more to convince the jury that Jesmer had an interest in the *personal* property taken from her mother that day, nor whether she acted in self-defense. Simply put, the fact of whether a valid quitclaim deed was executed between Jesmer and her mother was irrelevant to a claim of robbery and assault. Had this been a burglary trial and defense wanted to argue Jesmer had a right to be where she was, that would have been a different story. However, whether Jesmer owned the house in which she robbed and assaulted her mother was of no moment. Furthermore, both the victim and Jesmer testified regarding the existence of the quitclaim deed and this fact was not in contention. *See* RP 59, 109-10, 334-37. In fact, Ms. Rodewald testified that the quitclaim deed was made, and it purported to convey all rights, title and interest to Jesmer. RP 109.

A quitclaim instruction was irrelevant and would have only confused the jury with its inclusion in the jury instruction packet. The trial court properly refused to give such an instruction. The trial court should be affirmed.

II. The trial court properly instructed the jury on the requirement of unanimity and on how to deliberate.

Jesmer claims the trial court erred by failing to further instruct the jury on how to deliberate, specifically, by failing to tell the jury they could only discuss the case when all twelve jurors were present and must stop whenever one juror was not in the room. Jesmer failed to request such an instruction at trial, and she fails to cite any authority to support that this type of instruction is required. The trial court properly instructed the jury and Jesmer's convictions should be affirmed.

Jesmer asserts the trial court's failure to instruct the jury that deliberation may only occur when all twelve jurors are collectively present is manifest constitutional error because it left the jury with opportunities for improper deliberations that may have violated the "common experience" requirement for constitutionally valid unanimity. Br. of Appellant, p. 27. Jesmer contends it is likely that one or more jurors left the jury room to use the restroom while the remaining jurors continued to discuss the case, or that some jurors discussed the case outside of other

jurors' presence, possibly over lunch or walking to and from the jury room.

Jesmer's arguments on this issue are based purely on speculation about potential juror conduct. There are no facts in the record to support her allegations that the jurors failed to follow the court's instructions or otherwise acted improperly. There are also no facts in the record to support the implication that deliberations were ever held without all twelve members present or that the verdicts were not that consensus of all twelve jurors. Jesmer has not shown any error, let alone manifest constitutional error. This Court should decline to address the merits of this claim as she did not preserve the issue at the trial court level.

RAP 2.5(a)(3) allows an appellate court to "refuse to review any claim of error which was not raised in the trial court..." RAP 2.5(a)(3). However, a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. *Id.* But every constitutional claim that was not raised at trial does not merit a reversal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). A defendant first must show that the constitutional error actually affected her rights at trial, and make a plausible showing the error resulted in actual prejudice. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d

In fact, the only value in *Lamar* as applied to this case is in support of the trial court's instructions to the jury. The Court in *Lamar* indicated the jurors were properly instructed on how to deliberate in the beginning, and that the error was only when the court failed to instruct the jury to begin anew after the alternate was seated. *Id.* In that case, the jury was instructed very similarly to how the jury was instructed in *Jesmer's* case.

In *Lamar*, the jury was initially instructed as follows:

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.

Lamar, 180 Wn.2d at 580. In the case at bar, the jury was instructed as follows:

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 49.

Thus, the two juries were instructed identically. And this instruction, the *Lamar* Court inferred, was constitutionally adequate on the issue of unanimity. *Id.* at 585. Thus Jesmer's reliance on *Lamar* is misplaced. *Lamar* does not stand for the proposition that following the WPIC instruction on deliberations is error as Jesmer suggests, but instead endorses this instruction and refers to it as constitutionally adequate.

Furthermore, "juries are presumed to follow instructions absent evidence to the contrary." *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013); *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Jesmer's jury was instructed that they had a duty to discuss the case with each other and to deliberate together in an effort to reach a unanimous verdict. CP 49. This Court should presume the jury followed this instruction and therefore, the only evidence before this Court is that the jury was instructed to deliberate together and must presume the jury did so. There is no evidence to suggest the jury excluded one or more jurors from deliberations or that Jesmer's right to a unanimous verdict was violated.

The trial court properly instructed Jesmer's jury on the requirement of a unanimous verdict and on how to deliberate. Jesmer has failed to show any error, much less manifest error affecting a constitutional right. The trial court should be affirmed.

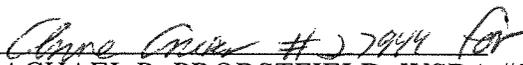
CONCLUSION

The trial court properly instructed the jury and Jesmer's convictions should be affirmed.

DATED this 17th day of April 2017.

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