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NO. 52088-5-II

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

PATRICK O'MEARA,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent.

**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR JEFFERSON COUNTY**

Brief of the Respondent

Jefferson County Superior Court No. 17-1-00112-6

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I. STATEMENT OF THE CASE

On June 29th, 2018, the Appellant was sentenced for one count of Residential Burglary and one count of Theft in the Second Degree having been recently found guilty of both counts at trial. VRP at 779-80, 843-44. At the sentencing, the parties argued a motion for mistrial based on a declaration that a juror had made to the Appellant's trial attorney after the trial had concluded. VRP at 809. According to her affidavit, she and another juror asked the superior court bailiff (identified as Monty) if information such as transcripts, recordings, or "anything of that nature" would be made available for the jurors. CP at 166. This request was made following closing arguments and after the jury had retired, but before any actual deliberating had commenced. CP at 165-66. According to the affidavit, the bailiff responded that the exhibits were available to the jury and that the jury could request additional material from the judge, but that it could take a long time, "maybe even up to an hour". CP at 166. The affidavit goes on to imply that other jurors decided not seek out transcripts and continues to air other grievances directed at her fellow jurors and the deliberation process in general. CP at 166-67.

At sentencing, the issue of improper bailiff contact was addressed. VRP 809-810. Bailiff "Monty" McCormack testified that jurors asked the other bailiff, Dennis, if transcripts were provided with the jury instructions. VRP at 812. Bailiff McCormack testified that he told the jurors that

typically the jurors are only provided with exhibits and jury instructions. *Id.* He also testified that he referred the jurors to the jury instructions that read “testimony will rarely be, if ever repeated¹”. Bailiff McCormack also testified that he did not recall ever referring to any length of time concerning how long it would take to gather materials. *Id.* Nor did Bailiff McCormack recall being asked about making requests to the judge or making comments to discourage the jurors from making such requests. VRP at 813-14. The other bailiff, Dennis Gilmore, had little memory of the event but did recall that Bailiff McCormack told the jurors that they would be able to view whatever was admitted into evidence. VRP at 818-19.

After listening to both parties make their argument, the Jefferson County Superior Court Judge, the Honorable Keith Harper, denied the Appellant’s motion for a mistrial. VRP at 836. The court held that “a new trial is not required for every technical violation of statute²”. VRP at 833. The court mentioned that if the court was convinced beyond a reasonable

¹ Bailiff McCormack was referring to WPIC 151.00, which reads “Testimony will rarely, if ever, be repeated for you during your deliberations”. CP at 096; VRP at 726.

² The Court appears to be referring to RCW 4.44.300, which reads: During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

doubt that the error had no prejudicial consequence it was not required to order a new trial. *Id.* The court further noted that erroneous statements do not require reversal when they are harmless. *Id.* After reviewing the record the court observed that the conversation with the bailiff occurred immediately after the jury was sent to deliberate – before any actual deliberation occurred – and that the jury deliberated for nearly 5 hours without a break. VRP at 835. The court was not convinced that Bailiff McCormack ever told the jurors that requests would take a long time or an hour, but that if he did it was innocuous. *Id.* Ultimately the trial court held “beyond a reasonable doubt, it did not impact the jury, it did not prejudice the jury, it did not affect the verdict, it didn’t affect their deliberations”. *Id.* The court denied the Appellant’s motion and proceeded to sentencing.

After the court denied the Appellant’s motion it proceeded to sentencing. As part of the sentence the court assessed a \$200 filing fee but did not inquire as to the Appellant’s ability to pay. VRP at 844.

II. ISSUES PRESENTED

1. Whether the trial judge committed an abuse of discretion when he denied the Appellant’s motion for a mistrial when the bailiff told jurors before deliberations had commenced that transcripts were not available, only the exhibits and jury instructions?

2. The State concedes that an analysis to determine that Appellant's ability to pay was not properly done and without that the court should not have assessed \$200 in court costs.

III. ARGUMENT

1. **The trial court judge did not commit an abuse of discretion by denying the Appellant's motion for a mistrial.**

A court's denial of a mistrial motion is reviewed for an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). An abuse of discretion occurs when "no reasonable judge would have reached the same conclusion". *Id.* (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). A court also abuses its discretion when it makes its decision on untenable grounds or for untenable reasons. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court's decision to deny a motion for a mistrial will be overturned only when there is a "substantial likelihood" that prejudice affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70 (emphasis added).

Washington has long rejected the common law rule requiring reversal for every trial error committed, no matter how trivial. *State v. Shearer*, 181 Wn.2d 564, 577, 334 P.3d 1078 (2014) (Gonzalez, J. dissenting). This notion has been codified to read "[t]he court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no

judgment shall be reversed or affected by reason of such error or defect.”
RCW 4.36.240.

A defendant is not entitled to a perfect trial, but rather a fair trial for there are no perfect trials. *In Re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007). A major component of a fair trial is “a jury capable and willing to decide the case solely on the evidence before it”. *Id.* (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)). The court rules specifically require that it be established that a defendant was denied a fair trial before declaring a mistrial. CrR 7.5(a)(5). “*A strong, affirmative showing of misconduct is necessary* in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *State v. Balisok*, 123 Wn.2d 114, 117–18, 866 P.2d 631 (1994) (emphasis added).

In a criminal proceeding a defendant requires a new trial only when he has been so prejudiced that “nothing short of a new trial” can insure the defendant will be treated fairly. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *State v. Russell*, 125 Wn.2d. 24, 85, 882 P.2d 747 (1994)). Something more than the mere possibility of prejudice must exist to warrant a new trial. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). Once a defendant raises the possibility that he or she was prejudiced by an improper communication between the court and the jury

the State bears the burden of showing that the error was harmless beyond a reasonable doubt. *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005).

A bailiff is not permitted to communicate with the jury during deliberation except to inquire as to whether the jury has reached a verdict or to make neutral or innocuous statements. *Id.* (citing *State v. Booth*, 36 Wn. App. 66, 68, 671 P.2d 1218 (1983)). In *Johnson*, the bailiff had numerous contacts with the jury foreperson throughout the deliberations. 125 Wn. App. at 454. At times the bailiff would stand in the deliberation room with the jury during deliberations, at other times the bailiff would inquire as to how deliberations were proceeding and would offer advice to the foreperson on how to make them run more smoothly. *Id.* Additionally, the bailiff informed the foreperson that the jury was not allowed to be deadlocked and sat in with the foreperson and another juror in the bailiff's office away from the other jurors while the two discussed the deliberation process. *Id.* Moreover, the defense attorney was not apprised of any of this contact. *Id.* at 455. Based on these circumstances the court ruled that the trial court should have granted the defendant's motion for a mistrial as the numerous contacts between the bailiff and jury, appearance of the bailiff actively influencing deliberations, and the fact that the defense counsel was never informed of the contact prejudiced the defendant. *Id.* at 461. Likewise, in *Booth*, the bailiff caused prejudice by informing the jurors that a co-

defendant jumped bail resulting in her absence from her at trial. 36 Wn. App. at 68. On appeal, the court noted that RCW 4.44.300 prohibits the bailiff from communicating with the jury to protect the jury from information that may prejudice the verdict. *Id.* The court also observed that courts are not permitted to determine whether improper statements influenced a jury's verdict but rather must examine the remarks by themselves for their prejudicial impact. *Id.* at 69. With that rule in mind the court, viewing the record, could not rule that the statements were not prejudicial beyond a reasonable doubt and ruled that the trial court abused its discretion in not ordering a mistrial. *Id.* at 70.

While communication between the bailiff and the jury may be constitutional in magnitude it may be so inconsequential as to constitute harmless error. *Bourgeois*, 133 Wn.2d at 407. In *Bourgeois*, the defense moved for a mistrial based on a communication between the bailiff and a juror regarding spectators that appeared to be threatening a witness. *Id.* The Washington State Supreme Court ruled that a bailiff speaks for the judge and communication between the court and the jury should not generally occur in the absence of the parties, and that should it occur the defendant is to be informed. *Id.* The court also held that the trial court failed to promptly inform the defendant of the communication and that the communication itself was improper. *Id.* at 408. However, the State Supreme Court

ultimately ruled that the communication was harmless as no harmful communication was passed on to the jury warranting a reversal. *Id.*

Communication between the bailiff and jurors that is otherwise error can still be deemed harmless thereby avoiding the necessity of a new trial. *State v. Saraceno*, 23 Wn. App. 473, 475, 596 P.2d 297 (1979). During deliberations following a rape trial the jurors asked the bailiff for a definition of “resistance”. *Id.* at 474. The judge provided the definition, followed by the jurors asking for a definition of ‘passive resistance’ which was also provided by the judge. *Id.* The bailiff then provided his own analogy explaining the term to the jurors. *Id.* None of this communication occurred in the presence of the defendant, who was not informed of it until a verdict had been reached. *Id.* The court of appeals held that it was error to provide definitions to the jurors without the parties present. *Id.* The court noted, however, that the presumption of error was not conclusive and that the judge’s instructions were neutral while the bailiff’s analogy was “innocuous at best”, consequentially the error was harmless as the defendant did not suffer prejudice. *Id.* at 475-76.

Even if a bailiff’s comments to a jury in deliberation are “unfortunate and inexcusable” they will not justify a new trial unless it can be shown that those comments can be shown to have prejudiced a jury’s verdict. *State v. Duhaime*, 29 Wn. App. 842, 859, 631 P.2d 964 (1981). In *Duhaime*, the defendant was tried for multiple felony counts including rape

and murder. *Id.* at 844. While the jury was deliberating, the jury foreman asked the bailiff how the jury should consider the charges. *Id.* at 847. The bailiff responded “step by step”. *Id.* Later during deliberations the jurors asked the bailiff two questions: if the jury could not reach a verdict would they be a hung jury and if so would that mean that the jury would be dismissed and a new jury chosen to deliberate the same matter? *Id.* The bailiff answer “yes” to both. *Id.* On appeal, the court of appeals agreed with the trial court which held that the bailiff’s statement that the jury should proceed “step by step” was “by no stretch of anyone’s imagination capable of being interpreted as a prejudicial remark”. *Id.* at 858. As to the other remarks, the trial court judge concluded that they were similar to information provided to the jurors in juror handbooks and therefore not prejudicial. *Id.* The court of appeals agreed, although it frowned upon the bailiff’s remarks, the court held that “they could not have coerced the jury’s verdict or prejudiced the defendant in any way”. *Id.* at 859.

In contrast, comments designed to hasten the jury’s verdict can be viewed as prejudicial. *State v. Crowell*, 92 Wn.2d 143, 148, 594 P.2d 905 (1979). In *Crowell*, the bailiff informed the jury during deliberations that there was no lodging available for the jurors, that they would be required to deliberate until they reached a verdict, and that if they did not by a certain time that evening the court would considered the jury hung. *Id.* at 147. On appeal, the Washington State Supreme Court held that communications by

the bailiff designed to hasten the jury's verdict could have reasonably prejudiced the verdict and required a mistrial to be declared. *Id.* at 148.

In the present case the actions of the bailiff were de minimis and do not constitute a strong affirmative showing of misconduct. Following a hearing with testimony, the court concluded that bailiff's actions did not result in a substantial likelihood that jury was prejudiced, rather that they were harmless beyond a reasonable doubt. The record fails to indicate that the trial judge made a ruling that no reasonable judge would have made, nor does it indicate that he made a ruling that was untenable or made for untenable reasons. Instead, the court made a ruling that was consistent with statute and case law.

Rather than present a strong affirmative showing of misconduct, the facts indicate that the bailiff told the jurors that there were not any transcripts, which was true. The bailiff also directed them to the court's own instructions regarding testimony. Both of these actions occurred before the jury actually started deliberating, a process which ultimately took nearly 5 hours. The bailiff's conduct was nothing like what occurred in *Johnson* or *Booth* where the bailiffs actively interfered by providing personal and extra-judicial factual information to the jurors. Nor was the bailiff's conduct anything like that in *Crowell* where the bailiff made statements designed to hasten deliberations. While the superior court judge in the present case found that the bailiff did not make statements to that effect – even if he did

allegedly say that gathering materials might take an hour – that statement would have been made before deliberations commenced. Given that the jury deliberated for nearly five hours it is exceedingly unlikely that those statements, if made, had *any* impact on the jury whatsoever.

Because the statements made by the bailiff were innocuous, had no discernable impact of the jury deliberations that occurred over the next five hours, and because the trial court judge found that the conduct was harmless beyond a reasonable doubt the State respectfully requests that the Court of Appeals find that the trial court did not commit an abuse of discretion in denying the Appellant’s motion for a new trial and affirm.

2) The \$200 in court costs were improperly assessed because the court did not inquire as to the Appellant’s ability to pay as required by statute

Under RCW 10.73.160(3), an ineffective inquiry into a defendant’s ability to pay discretionary legal financial obligations (LFOs) can result in a defendant from being relieved of having to pay LFOs without the need of additional inquiry. *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018).

In the present case the court made no inquiry as to the Appellant’s ability to pay discretionary LFOs during sentencing. VRP at 844. Therefore the Court of Appeals should remand the Appellant’s case, on this

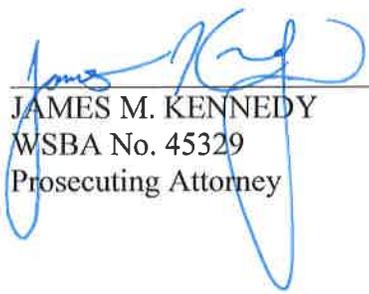
assignment of error only, for resentencing and instruct the Superior Court to strike the \$200 in LFOs.

IV. CONCLUSION

For the aforementioned reasons the Respondent respectfully requests that the Court of Appeals affirm the Superior Court's decision denying the motion for mistrial, and remand for removal of discretionary LFOs.

Dated this 20 day of March, 2019

Respectfully submitted,



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