

FILED

**Dec 28, 2016**

Court of Appeals

Division III

State of Washington

NO. 34079-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON BURRILL,

Appellant.

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

The Honorable Blaine G. Gibson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

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

Issue Pertaining to Assignment of Error

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 History.

The Yakima county prosecutor charged appellant Jason Burrill by amended information with one count each of possession of methamphetamine with intent to distribute and possession of hydrocodone with intent to distribute for an incident that occurred on April 23, 2015. CP 27-28. The State also alleged that each of the possessions with intent to distribute occurred within 1,000 feet of a school bus stop. CP 27-28.

A jury found Burrill guilty of possession of methamphetamine with intent to distribute. RP<sup>1</sup> 606; CP 67. The jury also returned a special verdict finding that the possession of methamphetamine occurred within 1,000 feet of a school bus stop. RP 607; CP 71.

The jury was unable to reach a verdict on the charge of possession of hydrocodone with intent to distribute. RP 607; CP 69. The jury found Burrill guilty of the lesser charge of possession of hydrocodone. RP 607; CP 70.

Based on an offender score of 8, Burrill was sentenced to concurrent prison sentences of 14 months for possession of hydrocodone and 70 months for possession of methamphetamine with intent to distribute. Burrill was also sentenced to a consecutive 24 month school bus stop enhancement for a total prison term of 94 months. RP 635-37; CP 78-85.

The trial court imposed only mandatory legal financial obligations, agreeing that Burrill was indigent. RP 637-38; CP 81-82. Burrill timely appeals. CP 91-98.

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<sup>1</sup> This brief refers to the consecutively paginated verbatim reports of proceedings as follows: RP – October 30, 2015 and January 4-7 and 12, 2016.

2. Trial Testimony.

Armed with a search warrant for Burrill's motor home, officers with the Yakima Police Department and Drug Enforcement Agency, began surveilling Burrill in Spring 2015. RP 258-59, 350. Police believed Burrill was selling methamphetamine from the motor home based on two controlled buys from a confidential informant. CP 5-26.

On April 23, 2015 police watched Burrill leave the motor home with Courtney Friedrich. RP 262, 310-11, 351. Friedrich got inside the front passenger seat of a car. RP 351, 361. Burrill held a black backpack as he locked the motor home. RP 311, 351. He handed Friedrich the backpack before getting in the driver's seat of the car. RP 311-12, 351.

Police stopped the car a short distance from the motor home. RP 260-61, 360. The backpack was found in the rear seat of the car. There was "no indication" the backpack was in Burrill's possession at the time. RP 313. When questioned by police, Burrill said they would find drug paraphernalia and two "loaded" hypodermic needles inside the motor home. RP 263. When asked what was inside the backpack, Burrill responded "something" before explaining "that's not even my backpack." RP 264.

During a search of the motor home, police found drug paraphernalia, about one gram of methamphetamine, and two hypodermic

needles containing an unknown substance. RP 265-66, 283-84, 287, 295-96, 364-67, 369-72. Police obtained a search warrant for the car and searched it and the backpack the next day. RP 288, 301.

The main compartment of the backpack contained men's clothing. RP 288, 292. An exterior compartment contained a digital scale and small bag containing 3.0 grams of methamphetamine. Another pocket of the backpack held a bag containing 7.4 grams of methamphetamine. RP 288-89, 292-94, 336, 475. A jar inside the backpack held 28 pills containing 325 mg of Tylenol and 5 mg of hydrocodone. RP 289, 301-03, 337-38. A pipe was also found inside the backpack. RP 294-95, 476.

The backpack was never tested for fingerprints or DNA evidence. RP 314-15. Police "assumed" the backpack belonged to Burrill. RP 315. Police never asked Friedrich whether the backpack and its contents belonged to her. RP 314. After his arrest, two phone calls were made using Burrill's jail pin number. Police recognized Burrill's voice on the calls which discussed getting rid of the backpack. RP 471-73, 490-98, 596-604.

At trial, Burrill's defense was that he was only a user of drugs and did not sell them. RP 249, 577, 583. Police acknowledged that the items found in the motor home and backpack were not inconsistent with Burrell being a user of drugs. RP 308.

C. ARGUMENT

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

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Burrill' 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 & 22<sup>2</sup>; State v.

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<sup>2</sup> 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 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: . . .

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: “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, 70 (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 at least one jury was instructed 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, what instructions the court provided to 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 to the jury both at the beginning and end of the trial do not mention the requirement of collective deliberations. RP 237-244, 499, 538-54; CP 44-66.

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 approximately three hours, from 11:50 a.m. until 3:13 p.m., presumably including the lunch break that the court informed them they could take. Supp. CP \_\_\_\_ (Sub Clerk’s Minutes, Jan. 7, 2016). There is also the very likely scenario of one or more jurors leaving to briefly use a bathroom. Nothing informed jurors they could not deliberate in small groups over lunch, or while one or two were absent using the bathroom. 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 just 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.

## 2. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Burrill was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 89-90. If Burrill does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

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, Burrill's ability to pay must be determined before discretionary costs are imposed.

The existing record establishes that any award of appellate costs would be unwarranted in this case. The record is replete with evidence of indigency. For example, Burrill, is the parent of three young children that

he is financially responsible for. RP 627-28; CP 86-88. The trial court also waived all non-mandatory fees, finding that Burrill "...does not have the financial ability, and will not likely have much of a financial ability to pay anything, given his criminal history – and the fact that he’s going to be incarcerated for a long time. He’s not likely to be able to earn much income when he gets out.” RP 637.

Without a basis to determine that Burrill 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.

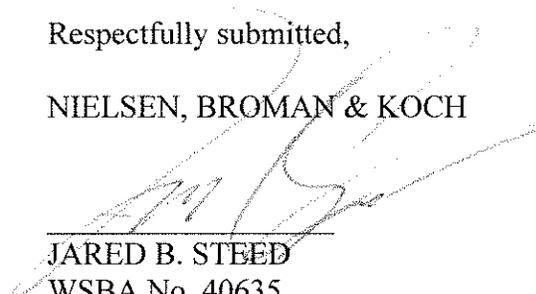
D. CONCLUSION

For the foregoing reasons, Burrill requests this Court reverse his convictions. This Court should also exercise its discretion and deny appellate costs.

DATED this 28<sup>th</sup> day of December, 2016.

Respectfully submitted,

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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12-28-2016

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Done in Seattle, Washington