

FILED
MARCH 29, 2017
Court of Appeals
Division III
State of Washington

NO. 34079-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON DARBY BURRILL,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has set forth two assignments of error, these are set out by Appellant as follows;

1. The trial court's failure to properly instruct the jury deprived appellant of a fair trial and constitutionally unanimous jury verdicts.
2. Appellate costs should not be imposed.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The jury was properly instructed.
2. Yakima County does not intend to asking for appellate costs.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed within the body of this brief.

III. ARGUMENT

Response to allegations one. The instructions given to the jury informed them and required that they come to their final decision as a group.

The sole allegation of substance in this appeal is based on pure supposition and speculation and has absolutely no factual basis in the record before this court. The basis for this claim is fairly summarized in one two paragraph section of Appellant's brief:

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.", 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. (Appellant's brief at 11.) (Emphasis added.)

Under the Washington Constitution, a unanimous jury verdict is required in all criminal trials. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see CONST, art. I, § 22. Reversal of a conviction may be warranted "where the jury were never told that the concurrence of all 12 of them was essential to a verdict." State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963). "[T]he right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal." State v. Holland, 77 Wn.App. 420, 424, 891 P.2d 49 (1995).

This issue was never raised in the trial court. Appellant cites Lamar as supportive of his allegation, but Lamar also addressed the standard for this court to determine if it should even address this issue for

the first time on appeal. See State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) “Under RAP 2.5(a)(3), an " appellate court may refuse to review any claim of error which was not raised in the trial court," but there are exceptions to this general rule. One exception is that " a party may raise ... manifest error affecting a constitutional right" for the first time on appellate review. *Id.* This exception recognizes that " [c]onstitutional errors are treated specially because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). However, the exception is not intended as a method of securing a new trial whenever there is a constitutional issue that was not raised at trial. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).”

Generally, an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is truly constitutional and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). This court should adhere to that general policy in this case. The allege error was not objected to because the actions of the trial court properly advised the jury of their obligation. “Failure to object deprives the trial court of [its] opportunity to prevent or cure the error.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This court should refuse to address this issue on this basis alone.

An allegation such as this, that the jury was not instructed that it

needed to be unanimous when it returned its verdict, is a Constitutional issue which is reviewed de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). However, even if there was error because an instruction that violates the defendant's right to unanimity is a constitutional error, the defendant must demonstrate actual and substantial prejudice to prevail. *See* Wash. Const. art. I, § § 21, 22; State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); State v. Watkins, 136 Wn.App. 240, 244, 148 P.3d 1112 (2006).

The problem with this allegation is that the jury was instructed on numerous occasion that it must come to a unanimous verdict and "[j]uries are presumed to follow instructions absent evidence to the contrary." Lamar, 180 Wn.2d at 586 (quoting State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013)). When the jury is given an appropriate unanimity instruction, jury unanimity may be presumed. *See* State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Further, "[p]olling a jury, when properly carried out, is generally evidence of jury unanimity." Lamar, 180 Wn.2d at 587; accord Badda, 63 Wn.2d at 182 (the record must be sufficient to determine unanimity based on "the questions asked and the answers given in the poll of the jury").

Even during jury selection, the trial court reminded the potential jurors of the need for them to wait to hear evidence and the instructions

prior to deliberating so that all jurors would have the same information:

Do not read, view, listen or look up any reports in any form of media, do not get on the internet and try to find out anything about the case, the parties, the attorneys, anybody. There's a reason for that. The reason is that when the jury makes its decision everybody has to be working with the same information. If somebody goes out and does some research and comes back in and knows something that the other people don't know, it's not fair to the people who don't know that. Also what you might find on the internet or in the newspaper or whatever might not be accurate. And if the other people involved in the case don't know that you have that information they don't have the opportunity to rebut that information. So we would not have a fair trial.
RP 107-8

The trial court, once a jury had been seated, spoke to the jury about the reason for the added jurors stating that "...we can call one of the alternates and have that person come back and start the deliberations over again, so that we haven't lost our twelve -- panel -- twelve-person jury... Every piece of information that you get pertaining to this case has to come to you in this courtroom, so that everybody is using the same information. That's what -- that's part of making a fair trial, is that everybody's working with the same information." RP 237, 238-9

The trial court took great care throughout the entire trial to safeguard Burrill's rights. The trial court from the very first instruction to the jury, even before it had been seated; after the jury had been seated; again at each and every break and, at the end of the trial when the written

instructions admonishing the jurors to work in a manner that would insure that its verdict was unanimous. The trial court in its final instructions to the jury, which were both read to and given to the jurors to take with them to the jury room for deliberations, instructed the jurors that they needed to be unanimous in their verdict. RP 499

The term unanimous or unanimously is used nine times during the reading of the jury nine times by the court as it is charging the jury. RP 542, 551, 552, 553,607

In Stephens, supra, the Supreme Court of Washington reversed a conviction when the defendant was charged with only one count of assault against two victims conjunctively, but the jury instruction listed the names of the victims disjunctively. Stephens, 93 Wn.2d at 189-90. The defendant was charged with one count of assault after he fired a shotgun into the front of a car the two victims were near. Id. at 188. After the jury returned a guilty verdict, the court held that the instruction violated jury unanimity as it "allowed conviction if, e.g., six jurors believed [the defendant] assaulted [the first victim] and six believed he assaulted [the second victim]." Id. at 190. The court noted that the jury instruction "in effect, split the action into two separate crimes (assault against [the first victim] and assault against [the second victim]), while the information charged only one." Id.

Similarly, in State v. Russell, the Supreme Court of Washington held a verdict form that failed to distinguish between the alternative means of committing second degree murder (either intentional murder or felony murder) violated jury unanimity. State v. Russell, 101 Wn.2d 349, 353-54, 678 P.2d 332 (1984). The court held that the jury unanimity was violated because the single verdict form makes it "impossible to know whether the jury determined unanimously that the crime of intentional second degree murder had been committed or whether they determined unanimously that the 'alternative' crime, improperly charged, had been proven." Id.

Clearly that was not the case here.

Here, based purely on speculation, Burrill argues that because “[t]here 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.” (Apps brief at 11)

This is complete and utter speculation with not one single fact or citation to the record to support it.

Burrill did not object to the instructions that charged the jury to work together nor does he challenge them now other than to challenge that they were sufficient.

These two instructions are, on their own, sufficient to notify the

jury how it was to act and as cited above the law presumes that the jury follows the instructions it is given;

No. 2.

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 reexamine 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.

RP 542

No. 18.

When you begin deliberating you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly and that each one of you has a chance to be heard on every question before you.

RP 550

Burrill argues that the jury may have deliberated while having lunch or while one of two jurors were using the bathroom. But even in State v. Fisher, 165 Wn.2d 727, 756 n.7, 202 P.3d 937 (2009) where there was an actual note from the jury that manifested Fisher's allegation that the verdict was not unanimous the Fisher court stated that although the note shows that the jury was confused by the prosecutor's charging decisions, "the note does not necessarily demonstrate that the jury did not

understand its instruction to find [the defendant] guilty beyond a reasonable doubt in unanimity." Id. Consequently, "[r]ead in conjunction, " the jury instructions sufficiently protected the defendant's right to jury unanimity. Id. at 756."

Here, Burrill's jury was instructed multiple times regarding unanimity. Additionally, jury instruction 22 explained, "[b]ecause this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision." RP 553, CP 66. "Juries are presumed to follow instructions absent evidence to the contrary." Lamar, 180 Wn.2d at 586 (quoting Dye, 178 Wn.2d at 556).

After the verdict was rendered the trial court polled the jury, this is further proof of jury unanimity, especially when read in conjunction with the jury instructions and separate second degree murder verdict form. See Lamar, 180 Wn.2d at 586.

So, ladies and gentlemen, we're going to take one additional step. We always to make -- be as certain as we can that we have a -- unanimous verdict. So I'm going to ask each one of you two questions. The first question will be is this your verdict, meaning did you vote consistently with these verdicts that I've read off. And the second question will be, are these the verdicts of the jury, meaning did everybody else vote the same way that you did, consistent with these verdicts. So if there's anybody who -- who says that this is -- these verdicts are not their verdicts we need to know 4

that. Okay? RP 607-8

Based on the unanimity instruction, this is not a situation where any less than all 12 jurors found Burrill guilty of the charges that had been submitted to them.

There is no other conclusion that this court can come to other than the jury instructions, especially when coupled with polling of the jury, sufficiently demonstrate that Burrill was convicted by a unanimous jury.

Response to allegation two - Appellate costs.

It has not been Yakima Counties position historically to requested reimbursement for cost assessed after having primarily prevailed on appeal. However, cases such as this where an appeal is filed based on speculation and nothing more suggests that the State should revisit that historical position. As this court is well aware State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) very decided, "The commissioner or clerk "will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court."

This is a 43-year-old citizen of this state who from the record before this court is able-bodied. To quote the defendant “I’ve actually had many years sober in the community. I’m a college student. I’m a tattoo artist -- I know that’s maybe not the greatest profession, but, you know, it’s money.”

The court did an individualized assessment of Burrill’s ability to pay and waived most costs but still found that based on what was presented to the court that he was not incapable of paying in the future but that,

Mr. 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.

This court should not waive the imposition of these costs at this time. There are means by which Mr. Burrill can address any and all costs, if incurred, at the time he begins to pay the financial obligation imposed by the trial court. Accordingly, this court should decline at this time to deny the State costs if the State is the prevailing party on appeal. RAP 14.2.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 28th day of March 2017,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on March 28, 2017, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Jared Steed and Eric Nielsen, at Sloanej@nwattorney.net

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

DATED this 28th day of March, 2017 at Spokane, Washington.

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