

No. 34372-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

BRANDON VANWINKLE,

Appellant

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

NO. 16-1-00008-1

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court correctly denied the defendant's motion to dismiss when it ruled that the State had complied with the signage posting requirements under the statute.
- B. The jury instructions properly advised the jury of the law and the elements of the offense based on the evidence presented at trial.
- C. The trial judge properly exercised discretion by removing Juror 10 and offering four precautionary measures to ensure an untainted verdict based upon the actions of Juror 10.

II. STATEMENT OF FACTS

A. Procedural Facts

The defendant was charged by information with one count of Assault in the Third Degree pursuant to RCW 9A.36.031(1)(k). CP 1-2. The defendant filed a pre-trial motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d. 346, 729 P.2d 48 (1986), which was denied. CP 3; RP 02/10/2016 at 12. The court found that the State had complied with the letter of the law and that actual notice was not a requirement of the crime. RP 02/10/2016 at 11-12. The case went to jury trial and the defendant was

found guilty. RP¹ at 200. The defendant received an exceptional sentence downward of 26 months. RP 04/20/2016 at 43.

B. Substantive Facts

On December 17, 2015, the defendant was in the Benton County Jail being held on a pending charge and was brought to Benton County Superior Courtroom B for a court appearance. RP at 156, 163-64. The defendant did not enter courtroom B through the public entrance to the courtroom. RP at 73-75. During his court appearance, the defendant assaulted a man who had just been sentenced for assaulting a child and was taken into custody to serve a jail sentence. RP at 39, 42, 48, 55, 94.

At the time of the assault, there was a sign posted on the public entrance to Courtroom B that advised the public that an assault inside the courtroom constituted Assault in the Third Degree. CP 25; RP at 69. There is only one public entrance to Courtroom B. RP at 36, 67, 74. Attorney Ryan Swinburnson testified that he has practiced law in Benton County for 16 years and has practiced in Courtroom B for all of those years. RP at 36. Mr. Swinburnson testified that there are four entrances to Courtroom B but only one is open to the public and the other three entrances require a security badge to access. RP at 36. Defense witness and investigator Daniel Couture testified that he followed the route that the defendant took

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings of the jury

to the courtroom from the jail. RP at 73. Couture also testified that there is only one public entrance to Courtroom B. RP at 74-75.

Defense called a psychologist and the defendant's mother in an effort to argue that the defendant had diminished capacity and did not have the ability to form the intent necessary to commit the assault. RP at 75-76, 98, 103, 107.

Prior to the close of the defendant's case, the bailiff brought the concerns of Juror 10 to the court's attention. RP at 120. The bailiff advised that the juror was concerned for her safety and had expressed this concern to the bailiff and other jurors. RP at 125. Based on the information relayed by the bailiff, the trial court dismissed Juror 10 but denied the defendant's motion for a mistrial. RP at 137, 151. After a recess and some time researching the issues, the trial court determined that four precautionary measures would be considered based upon the actions of Juror 10. RP at 137-41. After the verdict was announced, the court polled the jurors. RP at 200-02. The court then brought all 12 jurors back into court individually and questioned them about Juror 10's actions and the impact it had on their ability to deliberate and decide the case fairly and impartially. RP at 203-17. None of the jurors advised that Juror 10 had any impact on their ability to be fair and impartial when deciding the verdict. The court also

trial held March 28-30, 2016.

found that there was no evidence that any of the jurors had discussed the facts or subject matter of the case prior to beginning deliberations. RP at 223. The court found there was no jury misconduct. RP at 223.

III. ARGUMENT

A. The trial court correctly denied the defendant's motion to dismiss when it ruled that the State had complied with the signage posting requirements under the statute.

The Benton County courtroom had signage that strictly complied with the exact language of the statute by having signage at the only public entrance to the courtroom. The defendant argued before trial and now on appeal that because signage was not posted on the door from which he entered the courtroom, the County did not comply with the statute. This argument ignores the law and facts of the case. The defendant's Assault in the Third Degree conviction was based upon RCW 9A.36.031(1)(k), which reads:

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: ... Assaults a person located in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This section shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the assault.

RCW 2.28.200 reads:

Signage concerning assaults in court facilities during court proceedings.

(1) Signage shall be posted notifying the public of the possible enhanced penalties under chapter 256, Laws of 2013.

(2) The signage shall be prominently displayed at any public entrance to a courtroom.

(3) The administrative office of the courts shall develop a standard signage form notifying the public of the possible enhanced penalties under chapter 256, Laws of 2013.

It was undisputed at trial that there was only one public entrance to the courtroom. Defense attorney Ryan Swinburnson testified that he was very familiar with the courtroom and that while there were four doors to the courtroom, the public only had access to one. RP at 36. Superior Court Bailiff Staci Vannoy testified that it is her job to unlock the courtroom doors to the public entrance and that the required signage was posted on the public entrance to the courtroom on the day the assault occurred. RP at 67, 70. Even the defendant's own expert, Mr. Couture, testified about the signage on the only public entrance to the courtroom. RP at 74. The defendant cites to no authority for the position that the statute required actual notice. The defendant does cite to an unpublished case in *State v. Tapia*, 190 Wn. App. 1007 (2015), for persuasive authority but misses the point of the case. The court in *Tapia* held that because there was no evidence introduced at trial of fencing or a sign posted in a conspicuous manner as required under former RCW

9A.52.010(5),² there was insufficient evidence to support the conviction.

In the case at hand, there is no dispute that the sign was posted in compliance with the statute.

The trial court correctly denied the defendant's motion to dismiss when it found that the State had complied with the signage requirement and found that actual notice was not required under the statute.

B. The jury instructions properly advised the jury of the law and the elements of the offense based on the evidence introduced at trial.

While the court's to-convict instruction did have the word "the" instead of "any," the undisputed evidence showed that there was only *the* one public entrance to the courtroom. CP 74. A defendant is not entitled to an instruction that inaccurately represents the law or is not supported by the evidence. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The court's to-convict instruction and contemporaneous ruling that prevented defense counsel from arguing that other entrances to the courtroom were "public" was supported by the uncontroverted evidence that had been presented during the trial. The court's ruling was proper and preempted defense counsel from arguing a theory of the case that was clearly not supported by the evidence at trial.

² Recodified in 2016.

Furthermore, the claimed error in the jury instruction would be subject to a harmless error analysis as recognized in *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. U.S.*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). When applied to an element misstated in a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Id.* Again, it was clear from the uncontroverted evidence at trial that there was only one public entrance to the courtroom and that signage was properly posted on that entrance. The claimed error would be harmless beyond a reasonable doubt.

C. The trial judge properly exercised discretion by removing Juror 10 and offering four precautionary measures to ensure an untainted verdict based upon the actions of Juror 10.

An appellate court reviews a trial court's investigation into jury misconduct for abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 761, 123 P.3d 72 (2005); *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The party alleging juror misconduct has the burden to show that misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). Furthermore, a new trial should only be granted where juror misconduct has prejudiced the defendant. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740, *review denied*, 158 Wn.2d 1011, 145 P.3d 1214 (2006); *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). In the

present case, the defendant fails to show that actual misconduct occurred. The record does not show that jurors had any discussions regarding the facts of the case. The record shows that Juror 10 expressed concerns regarding her safety based on the possible publication of her name and address in the public record. While she expressed her concerns to two or three other jurors, those other jurors did not share her concerns and they advised the court after the verdict that Juror 10's actions had no impact on their ability to render a fair and impartial verdict. The trial judge's use of a post-verdict poll and interview of the jurors provided assurances that the deliberating jurors rendered a fair and impartial verdict based on the facts of the case and the law provided to them in the jury instructions.

IV. CONCLUSION

The trial court's denial of the defendant's motion to dismiss, the jury instructions, and the denial of the mistrial were all proper decisions based on the law and the defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 11^m day of July, 2017.

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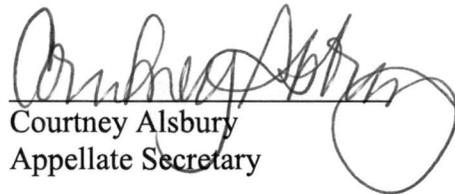
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on July 11, 2017.


Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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