

FILED
Court of Appeals
Division III
State of Washington
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NO. 35705-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY ZIMMER,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
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A. ARGUMENT.

1. A change in the law governing imposition of LFOs cements the court’s lack of authority to impose non-mandatory financial costs on Mr. Zimmer.

In *State v. Ramirez*, __ Wn.2d __, __ P.3d __, S.Ct. No. 95249-3, 2018 WL 4499761, *6 (Sept. 20, 2018), the Supreme Court ruled that recent changes to the statutes governing the imposition of legal financial obligations apply to cases pending on direct appeal. Slip op at 18-19, citing Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783).

The trial court agreed Mr. Zimmer was indigent. RP 155. It found Mr. Zimmer’s “financial status” made him “unable to reasonably pay more than what the mandatory assessments are in this case.” *Id.* But it believed the mandatory assessments included the \$200 filing fee and the \$100 DNA fee. *Id.*

As *Ramirez* explains, the newly enacted LFO statute “amends the criminal filing fee statute, former RCW 36.18.020(h), to prohibit courts from imposing the \$200 filing fee on indigent defendants. *Laws* of 2018, ch. 269, § 17(2)(h).” 2018

WL 4499761 at *6. Because the court appropriately ruled Mr. Zimmer is indigent and unable to afford court costs, the \$200 filing fee may not be imposed. This change in the law applies to Mr. Zimmer as his case is on direct appeal at the time of this change in the law. *Id.*

Additionally, as explained in the Opening Brief and as *Ramirez* underscores, the court must conduct a mandatory and adequate inquiry into the defendant's individual circumstances before imposing LFOs. 2018 WL 4499761 at *3-4. The failure to make an adequate inquiry is reviewed de novo on appeal. *Id.* at *4. Here, the court imposed a DNA fee despite Mr. Zimmer's indigence and without regard for plain evidence of his mental health illness, including his treatment by neurological psychologist. 6/15/17RP 10; *see* Opening Brief at 24-25; RCW 9.94A.777. The court's inquiry was inadequate.

Ramirez dictates reversal of the non-mandatory LFOs imposed upon Mr. Zimmer, if his conviction is not vacated due to the errors in the trial.

2. Where polling shows only 11 jurors agree with verdict, Mr. Zimmer's right to a unanimous 12 person verdict was denied.

The prosecution agrees, as it must, that the verdict was not unanimously endorsed by 12 jurors, but it misleadingly recasts the flawed jury verdict as merely an instance of “skipping” over Juror 6 when polling the jury. Yet there is no evidence Juror 6 took part in jury deliberations and agreed upon the verdict. In fact, given the court reporter's careful transcription of events, the evidence shows this juror was not part of the polling, and no evidence shows the juror was part of the verdict or not part of the deliberations.

The jury instructions do not demonstrate the validity of the verdict, because while the jury was instructed to be unanimous, they were not told this unanimity required 12 jurors. CP 36. The polling shows only 11 jurors agreed with the verdict and the court made no notation otherwise. RP 149-53. The careful record made of the jury polling indicates there were only 11 jurors who agreed with the verdict. *Id.*

Article I, sections 21 and 22 strongly and expressly guarantee a 12-person unanimous verdict for a valid conviction. Polling the jury is “essential to a criminal defendant’s constitutional right to a unanimous verdict.” *State v. Pockert*, 49 Wn. App. 859, 861, 746 P.2d 839 (1987). Polling safeguards the defendant’s rights by requiring “each juror individually state his or her verdict in [the defendant’s] presence.” *Id.* The verdict is not final “until rendered in open court.” *Id.*

In *Pockert*, the court refused the defendant’s request to poll the jury and accepted the verdict without polling. 49 Wn. App. at 859. This Court reversed and remanded for a new trial. *Id.* at 860. Failing to poll the jury denied the defendant “a right” that is “so fundamental as to require a retrial,” regardless of whether the trial otherwise was fairly conducted. *Id.*, quoting *Commonwealth v. Martin*, 109 A.2d 325, 327 (Pa. 1954).

Pockert demonstrates that contrary to the prosecution’s effort to paint the flawed polling here as a mere bureaucratic step, it is a critical component of assuring the constitutionality of a conviction. The error here is manifest in the record, because the plain record shows only 11 jurors joined in and vouched for

the verdict, it affects a constitutional right and is properly presented on appeal under RAP 2.5(a).

When the jury is polled, it is a mandatory step for ensuring “that the verdict was unanimous and was the result of each jurors individual determination.” *State v. Havens*, 70 Wn. App. 251, 257, 852 P.2d 1120 (1993). For example, in *State v. Badda*, 63 Wn.2d 176, 182, 385 P.2d 859 (1963), the only record of the jury polling was a clerk’s notation but the notation did not indicate specifically that each juror agreed with each charged count against the two defendants. The Supreme Court ruled that, “[i]n a criminal case we must be certain that the verdict is unanimous . . . here we are not.” *Id.* at 182.

Whatever the reason for the missing juror, this Court “must be certain” the 12th juror agreed with the verdict and would have endorsed it. *Badda*, 63 Wn.2d at 182. No such certainty is available here.

This lapse is not speculative, as occurred in the case the State tried to analogize, *State v. St. Peter*, 1 Wn. App. 2d 961, 963, 408 P.3d 361 (2018). In *St. Peter*, the appellant spun a theory that without an instruction demanding all jurors

deliberate together, a juror might have stepped out for part of the deliberations, and because the defense choose not to poll the jury, unanimity was not assured. *Id.* Unlike *St. Peter*, the undisputed record shows only 11 jurors were polled and only 11 agreed with the verdict. No speculation about the lack of unanimity is required.

After the jury is discharged, and the verdict received and recorded, it can no longer function as a jury. *Beglinger v. Shield*, 164 Wash. 147, 152, 2 P.2d 681 (1931). Twelve jurors did not declare they joined the verdict individually and collectively and this error cannot be otherwise remedied. Because a criminal conviction requires a unanimous jury verdict and one was not clearly obtained here, reversal is required. *See In re D.F.F.*, 172 Wn.2d 37, 44, 256 P.3d 357 (2011), citing with approval, *Duffy v. Vogel*, 12 N.Y. 169, 177, 905 N.E.2d 1175 (N.Y. 2009) (polling jury is “an entitlement closely enmeshed with and protective of the right to trial by jury” and it “defie[s] harmless error analysis”).

3. Defense counsel's fundamental missteps denied Mr. Zimmer his constitutional right for effective assistance of counsel.

This Court need not reach defense counsel's failure to provide effective assistance of counsel due to the structural error of a non-unanimous jury verdict. But review of the record reveals that Mr. Zimmer was unfairly deprived of his right to meaningfully present his defense by his own lawyer's obstruction and lack of advocacy.

As explained in the Opening Brief, defense counsel did not meaningfully assist Mr. Zimmer. He would not offer into evidence or even let Mr. Zimmer view the portion of the videotape that documented his mental collapse during the incident. He did not propose available instructions or elicit Mr. Zimmer's defense when he testified. Counsel's numerous failures are reasonably likely to have affected a juror's view of the case, and require reversal for proceedings at which Mr. Zimmer received his constitutional right to a fair trial.

B. CONCLUSION.

For the foregoing reasons and as explained in Mr. Zimmer's opening brief, reversal is required due to the lack of juror unanimity and the deprivation of Mr. Zimmer's right to effective assistance of counsel. If his convictions are not reversed, the discretionary LFOs should be stricken.

DATED this 11th day of October 2018.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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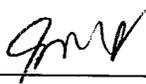
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35705-8-III
)	
BRADLEY ZIMMER,)	
)	
APPELLANT.)	

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