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NO. 36000-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY SHANE TRACY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00032-1

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Is a defendant denied a fair trial if the jury is allowed to separate for lunch in the absence of an order sequestering a jury?
2. Does speculation of the effects of polling a jury invade the secrecy of jury deliberations?
3. Should Appendix H, Condition 19, and the requirement that the defendant pay a \$200.00 filing fee and \$100.00 DNA fee be stricken from the defendant's judgment and sentence?

B. STATEMENT OF THE CASE

On February 22, 2018, following a jury trial, the defendant was found guilty of two counts of Rape of a Child in the First Degree. RP 433-34. The jury's decision was based upon two incidents which occurred between May 1, 2010 and February 1, 2011 where the defendant had sexual contact with a young female, D.L.D., while she was less than 12 years old. CP 1. The jury began deliberations on February 22, 2018 at 10:45 A.M. and returned a verdict, the same day, at 4:03 P.M, after deliberating for approximately 4 hours. RP 408-31. During the course of the jury's deliberations the jury was brought into the courtroom before the parties on two occasions. At 12:15 P.M. the jury was brought into court to allow the judge to answer two questions the jury had submitted. RP 409. After answering the questions presented and giving appropriate cautionary instructions the court allowed the jury to separate for lunch. RP 413-14. At 1:22 P.M. the jury returned to the courtroom and the court directed them to

resume deliberations. RP 416. At 2:22 P.M. the jury sent out a note advising that it was deadlocked whereupon the Court brought the jury back to the courtroom. The jury was polled, without objection, where it was determined that nine jurors did not believe a verdict could be reached while three jurors believed a verdict could be reached. RP 416-29. The jury was directed to continue further deliberations and, at 4:03 P.M. returned a verdict of guilty as charged. RP 431-37.

At no point throughout the pendency of this case, from filing to verdict, did any party request the jury to be sequestered during deliberations, nor did either party object to the court's response to the juror's questions or the court's polling of the jury.

The defendant was sentenced on April 2, 2018, and, amongst other portions of his sentence, was required to comply with Appendix H, Condition 19, which prevented him from frequenting playgrounds, parks, schools and locations where children are known to congregate. RP 455-56. The court also sentenced the defendant to pay various legal financial obligations, among which was \$300.00 for a filing and DNA fee. RP 453.

Despite a failure to request sequestration of the jury during the lunch hour and the plain meaning of the relevant statute and court rules, the defendant mistakenly claims he was denied a fair trial in violation of RCW 4.44.300 and/or CrR 6.7(b). The defendant also seeks to intrude into the details of the jury's deliberations by speculating as to the nature and effect

of legitimate jury polling, which was not objected to during trial.

The defendant's claim that the prohibition found in Condition 19 of Appendix H of his Judgment and Sentence and his request to strike the filing fee and DNA fee are well taken given recent case law and the State would concede these two issues.

C. ARGUMENT

1. **IN THE ABSENCE OF AN ORDER SEQUESTERING A JURY A DEFENDANT IS NOT DENIED A FAIR TRIAL IF THE JURY IS ALLOWED TO SEPARATE FOR LUNCH.**

Both RCW 4.44.300 and CrR 6.7 allow for the separation of the jury during deliberations unless good cause is shown for sequestration. RCW 4.44.300 provides that:

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.

CrR. 6.7(a) provides that:

Generally. During trial and deliberations the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury.

Read together, both RCW 4.44.300 and CrR 6.7 require good cause for sequestration of the jury. The defendant, however, turns the plain meaning of both on their head to argue that sequestration is the rule and good cause is actually required to separate the jury during deliberations.

In support of the defendant's theory, and conceded in his brief, the defendant relies upon a prior version of RCW 4.44.300 and *State v. Smalls*, 99 Wn.2d 755, 665 P.2d 384 (1983), a case which interpreted the older version of RCW 4.44.300. The defendant's reliance on this authority is outdated and misplaced.

RCW 4.44.300 was substantially changed when it was amended in 2003. The prior version of RCW 4.44.300 provided that:

After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire 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 ability, keep the jury thus separate from other persons, without drink, except water, and without food, except as ordered by the court. He must not suffer any communication to be made to them, nor make any himself unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

It is clear that this prior version of RCW 4.44.300 required sequestration without any provisions, as currently exist, for any separation of a deliberating jury. In fact, the former statute appears to require sober deliberation with minimal sustenance by a sequestered jury with no

provision for any jury separation regardless of cause. This is simply not the case under the current version of RCW4.44.300 which provides for a deliberating jury to be sequestered only upon a showing of good cause. Sobriety and nourishment appear to be assumed.

Neither party nor the court sought or even mentioned sequestering the jury during the deliberations in this case. The defendant's claim that allowing the jury to eat their lunch separately somehow denied him a fair trial is without merit, relying on an outdated version of the statute, and his claim should be rejected.

2. SPECULATION OF THE EFFECTS OF POLLING A JURY INVADES THE SECRECY OF JURY DELIBERATIONS.

A trial judge is accorded broad discretion in determining whether to declare a mistrial. *State v. Barnes*, 85 Wn. App. 638, 656, 932 P.2d 669 (1997). A deadlocked jury is one basis for doing so. *Id.* at 656. In determining whether a jury is deadlocked, the judge may consider the length of jury deliberations relative to the length of the trial and the complexity of issues and evidence. *Id.* at 656.

There are no particular procedures the court must follow in determining the probability of the jury reaching an agreement. *Barnes*, 85 Wn. App. at 657 (citing *State v. Boogaard*, 90 Wn.2d 733, 738-39, 585 P.2d 789 (1978)). The court may rely on the presiding juror's representations regarding whether the jury is deadlocked. *Barnes*, 85 Wn.

App. at 657, 932 P.2d 669. However, in questioning the jury, the court must avoid coercing or interfering with the deliberations and must reject instructions that might coerce an agreement. *Barnes*, 85 Wn. App. at 656, 932 P.2d 669; CrR 6.15(f)(2). The court may also rely on WPIC 4.70 and poll the jury on the probability of a verdict, such as what happened in this case.

The defendant has claimed the court's polling of the jury invaded the jury deliberations by causing speculation about how this alleged invasion occurred. The defendant has failed to propose any remedy to correct this error seen only in light of his speculation. Further, while the defendant has not assigned any error to the actual questions asked during the polling of the jury, he nonetheless speculates about the effect of the polling itself. There is no claim that the polling was in any way coercive by suggesting a need for agreement, the consequences of no agreement, or the length of time a the jury would be required to deliberate as prohibited in *State v. Boogaard*, 90 Wn.2d 733, 583 P.2d 789 (1978). What the defendant is really claiming is that any indication by the jury that it may be deadlocked is to be taken as a certainty, that the court should then declare a mistrial and no further inquiry is appropriate. This is simply not correct.

In the current case the court, at the request and agreement of the parties, merely polled the individual jurors on the question of a reasonable

probability of the jury reaching a verdict within a reasonable time as to all counts. The result of this polling revealed that nine jurors felt they were deadlocked and three did not. The question was about the individual juror's opinion on the benefits of continued deliberations. This polling, contrary to the defendant's claim, most certainly was not "indicative of how the jurors had voted." Appellant's Opening Brief at 8.

The result of the polling only revealed each individual juror's opinion as to the merits of further deliberations. Any other conclusions, such as those urged by the defendant, are pure speculation and invade the sanctity of the juror's deliberations. In fact, contrary to the defendant's speculation, one could speculate a lone holdout juror was preventing unanimity and nine of the jurors had forsaken this holdout ever changing his/her mind. One could also speculate that this one holdout surprised the nine of his/her fellow jurors when the polling revealed that he/she was one of the three jurors who indicated further deliberations would be beneficial. The fact of the matter is that while numerous scenarios can be read into the results of the polling, all would be speculation and all would be improper.

It is a cardinal principle that juror deliberations must remain secret. See *State v. Cuzick*, 85 Wn.2d 146, 149, 530 P.2d 288 (1975); *U.S. v. Thomas*, 116 F.3d, 606 618 (1997) ("The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system."). If a trial court

inquires into the reasoning behind ongoing deliberations, then it might be tempted to second-guess the jury and influence the jury's verdict. *U.S. v. Symington*, 195 F.3d 1080, 1086 (1999). More importantly, exposure of deliberations to public scrutiny would chill debate and “jeopardize the integrity of the deliberative process.” Thus, trial courts investigating such allegations must take special care not to delve into the substance of deliberations or the thought process of any particular juror.

“The individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3rd 944 (2003) (quoting *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)). Factors inhering in the jury's process, and thus in the verdict itself, include the “mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, (and] the jurors' intentions and beliefs.” *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 179-180, 422 P.2d 515 (1967). Statements concerning matters that inhere in the verdict “are inadmissible to impeach the verdict.” *Id.* at 180.

The defendant is seeking to impeach the verdict based on improper speculation on the meaning of legitimate polling. The defendant's argument should be rejected.

3. APPENDIX H, CONDITION 19, AND THE REQUIREMENT THAT THE DEFENDANT PAY A \$200.00 FILING FEE AND \$100.00 DNA FEE SHOULD BE STRICKEN FROM THE DEFENDANT'S JUDGMENT AND SENTENCE.

The state concedes that this case should be remanded to allow the trial court to remove both the \$200.00 filing fee and \$100.00 DNA fee. Further, the State concedes that Condition 19 of Appendix H should be removed from the defendant's sentence.

These concessions as to the defendant's legal financial obligations are made in light of recent legislative changes to sentencing of indigent defendant. *State v. Wallmuller*, 4 Wn. App.2d 698, 4 P.3d 282 (2018). The concession as to Condition 19 of Appendix H is based upon the recent decisions of *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015), *State v. Norris*, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), review granted, 190 Wn.2d 1002 (2018); and *State v. Wallmuller*, 4 Wn. App.2d 698 (2018).

D. CONCLUSION

The separation of the deliberating jury for lunch did not affect the fairness of the defendant's trial. The polling of the jury to determine if it was deadlocked did not, in and of itself, without improper speculation, intrude into the deliberation process. Finally this case should be remanded to the trial court for re-sentencing to remove the sentencing requirements of Condition 19 of Appendix H, and to waive the improperly imposed legal financial obligations.

Respectfully submitted this 28th day of January, 2019.

A handwritten signature in black ink that reads "David M. Wall". The signature is written in a cursive style with a large, sweeping flourish that starts above the first letter and arches over the rest of the name.

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