

FILED
Mar 31, 2016
Court of Appeals
Division I
State of Washington

NO. 74044-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JIMMY WHITE,

Appellant.

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

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

1. The trial court erred when it failed to investigate a juror who had violated the court's instructions and was unable to maintain impartiality.

2. The court's failure to remove the offending juror violated appellant's state and federal constitutional rights to trial by jury.

Issue Pertaining to Assignments of Error

The state and federal constitutions guarantee the right to be tried before an impartial jury free of disqualifying misconduct. During appellant's trial, a sitting juror expressed concern appellant might get his hands on a firearm and use it on those present in the courtroom. This revealed the juror's failure to follow the court's instructions, which required the presumption of innocence, resistance to the effects of emotion, and an open mind. Despite this revelation, the trial judge never investigated the matter and the juror ultimately decided appellant's fate. Does this violation of constitutional rights require a new trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged Jimmy White with Burglary in the First Degree, two counts of Unlawful Possession of a Firearm in the First Degree, and two counts of Possessing a Stolen Firearm. CP 69-71. Prosecutors later agreed to dismiss the Burglary charge because they could not locate D.W., a key witness for that charge. RP¹ 49-50.

A jury acquitted White on the charges of Possessing a Stolen Firearm, but convicted him on both counts of Unlawful Possession of a Firearm. CP 22-25. The Honorable Anita L. Farris imposed a standard range 70-month sentence. CP 10. White timely filed his Notice of Appeal. CP 1-2.

2. Substantive Facts

a. *Evidence of the alleged crimes*

Just after 2:00 p.m. on the afternoon of February 1, 2012, 14-year-old T.J. arrived home from school to find that someone had burglarized the Monroe apartment he shared with his grandfather, Jimmy Jordan. RP 77, 79-80. The apartment had been left locked

and, based on the location of mud found inside, it appeared the burglar had gained access through T.J.'s bedroom window. RP 78-79, 81-82.

A survey of the apartment revealed that Xbox equipment, including a controller and some games, were missing from T.J.'s bedroom. RP 80-81. Two firearms – a shotgun and a .22 rifle – were missing from Jimmy Jordan's bedroom, along with a cell phone and some keys. RP 82, 90-91. Jordan had not recorded the serial number for either of the missing firearms. RP 97, 121. But the .22 rifle was somewhat distinctive in that its safety did not work. RP 95, 97-98, 121.

Monroe Police responded to the scene. Officers spoke to T.J. and his grandfather and were provided the names of two juveniles to whom they might wish to speak – D.W. and L.E. RP 102-103. Officers located both juveniles at L.E.'s home. D.W. was found hiding in a closet and in possession of items matching some of those stolen from the Jordans' apartment. RP 103-105.

¹ "RP" refers to the two-volume, consecutively paginated verbatim report of proceedings for May 10, 2013, July 1-3, 2013, and September 23, 2015.

While officers were still present at L.E.'s home, a cell phone began ringing and the caller ID displayed the name "Jimmy White," a name that had already come up during the investigation. RP 105-106. An officer answered the phone, explained the circumstances of the investigation, and asked White if he would be willing to meet at the Monroe Police Department for an interview. RP 105-106. White agreed, although he stated that he did not know anything about a burglary or the stolen weapons police were seeking. RP 106-107.

White arrived at the station at 9:35 p.m. and provided a recorded statement beginning at 10:00 p.m. RP 109-110. White told officers that D.W. had sent him a text message earlier that day, which he had received while at work and since deleted, asking if White "would get rid of something for him" and indicating that D.W. had some firearms. RP 111-112, 191-193.

White told officers he thought the guns to which D.W. had referred belonged to D.W.'s mother or her boyfriend. RP 194. But he told police he never saw D.W. that day and had no knowledge about the firearms that had been stolen from the Jordan residence. RP 110, 116-118, 143. White also explained his whereabouts that day, indicating he was at work all morning, left there around 1:30

p.m., drove through Monroe and arrived at his mother's home in Sultan around 3:00 p.m., and then headed home to Goldbar around 7:00 p.m. RP 112-115, 140-141, 214.

Following the 10:00 p.m. interview, police asked White to wait at the station while they conducted additional investigation and he agreed to do so. RP 155. Shortly thereafter, officers placed White under arrest. RP 144, 155. During a second interview, White admitted that he had picked up D.W. that day and driven him to the apartment complex where the Jordans lived, that D.W. obtained two guns while there and put them in the trunk of White's car, and White then drove away with them. RP 148. He also indicated he knew the guns were in the trunk. RP 153.

White told police both firearms were currently at his mother's home and he offered to arrange their pickup. RP 146. Officers were dispatched to the home, where they retrieved the guns. RP 146, 195-199. Mr. Jordan subsequently examined the two firearms and identified them as the two taken from his apartment. RP 118-121. Both were test fired and found to be operational. RP 201-202.

White's mother, Susan Clayton, testified that her son arrived at her house in Sultan on February 1, 2012 shortly after 3:00 and

intended to work on his sister's Honda automobile, which was not running. RP 215-216. Sometime before 5:00 p.m., White went out to his car to retrieve his tools. RP 217, 230. When he returned, he was agitated and upset and informed her that there were firearms in his trunk. RP 230-231. She and her husband (White's stepfather) retrieved them and secured them in a shed. RP 232. White left for home, and the firearms remained in the shed until police arrived after midnight to confiscate them. RP 233-234.

White's stepfather, John Clayton, testified he took a nap after White arrived on February 1 to work on his sister's car. RP 236-237. Later, his wife woke him up and explained the situation. RP 237-238. The two of them then took the guns from White's car and stored them in the shed until police eventually arrived. RP 238-239. According to Clayton, the guns were in the trunk of White's car underneath what he believed to be a bag of tools; only the stocks were showing and they may not have been visible until White moved some items. RP 238-240. White told Clayton he did not know where the guns came from, although he indicated he had a good idea. RP 240.

White stipulated he was ineligible to possess firearms because of a prior conviction for a serious offense. RP 212-213. The defense argued White was not guilty of Possessing Stolen Firearms because there was no evidence he knew the guns in his trunk had been stolen. RP 291-292. The defense argued White was not guilty of Unlawful Possession of Firearms because the prosecution failed to prove exactly when he knew the guns were in his trunk and, as the jury instructions explained, a “momentary handling” was insufficient to demonstrate knowing possession beyond a reasonable doubt. RP 289-290, 292-293; CP 47 (instruction defining “possession”).

b. Juror 2 worried White might shoot someone

During trial, the .22 rifle and the shotgun were handled and/or identified by several witnesses. See RP 95-96, 119-120, 196-198, 201-202. At some point on July 2, 2013 – the second day of testimony – the firearms apparently were placed on a table somewhere in White’s vicinity because juror 2 (Brent Sanchez) wrote on a juror inquiry form, “IS IT APPROPRIATE TO HAVE THE WEAPONS LAYING UNSECURE IN FRONT OF THE DEFENDANT?” Supp. CP ____ (sub no. 65, Inquiry From the Jury). Sanchez subsequently decided not to submit his concern for a

response, but he gave the form to Judge Farris's law clerk, who then passed it on to Judge Farris and counsel for the parties. RP 298-299.

Although Sanchez had revealed his concern before jury deliberations had begun, the issue was not discussed on the record until July 3, after deliberations were in progress. RP 295 (jury begins deliberations); RP 297-298 (issue first placed on record while discussing a different question from jury). By then, defense counsel indicated he did not think a response was necessary and Judge Farris agreed, particularly since Sanchez had decided not to submit his question for a response. RP 299.

C. ARGUMENT

1. WHITE WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

The federal and state constitutions guarantee every criminal defendant the right to a fair and impartial jury.² Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516

² The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" Article I, sec. 21 provides that "[t]he right of trial by jury shall remain inviolate." Article I, sec. 22 guarantees "a speedy public trial by an impartial jury"

U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); State v. Gonzales, 111 Wn. App. 276, 277, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003). “The right to trial by jury means trial by an unbiased and unprejudiced jury, free of disqualifying juror misconduct.” Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989) (quoting Smith v. Kent, 11 Wn. App. 439, 441, 523 P.2d 446 (1974)).

Juror misconduct warrants a new trial where it results in prejudice. State v. Depaz, 165 Wn.2d 842, 856, 204 P.3d 217 (2009); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968); State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). “The party alleging juror misconduct has the burden to show that misconduct occurred.” State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2006) (citing State v. Hawkings, 72 Wn.2d 565, 434 P.2d 584 (1967)), review denied, 164 Wn.2d 1027, 195 P.3d 958 (2008). Once that burden is met, prejudice may be presumed and that presumption can be overcome only “by an adequate showing that the misconduct did not affect deliberations.” Depaz, 165 Wn.2d at 856 (citing State v. Murphy, 44 Wn. App. 290, 721 P.2d 30 (1986); State v. Barnes, 85 Wn. App. 638, 932 P.2d 669 (1997); State v.

Tigano, 63 Wn. App. 336, 818 P.2d 1369 (1991)). Any doubt must be resolved against the verdict. Briggs, 55 Wn. App. at 55.

At White's trial, Judge Farris failed to fulfill her duty to adequately investigate whether juror Sanchez's expressed fear that White might threaten or harm someone in the courtroom with one of the rifles required his dismissal from the jury. Judge Farris had a duty to excuse any unfit juror:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. Moreover, under CrR 6.5, "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged" and replaced by an alternate.

"RCW 2.36.110 and CrR 6.5 place a 'continuous obligation' on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating." State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (quoting State v. Jordan, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)). A trial court's misconduct investigation is reviewed for

abuse of discretion. Earl, 142 Wn. App. at 774. Investigations are appropriate where a juror refuses to follow the law or fails to act impartially. Id. Moreover, trial judges should interview a juror upon learning of that juror's violation of the court's jury instructions. State v. DeLeon, 185 Wn. App. 171, 218, 341 P.3d 315 (2014), review granted, 184 Wn.2d 1017, 360 P.3d 819 (2015). Jurors unable to maintain impartiality must be excused. State v. Hopkins, 156 Wn. App. 468, 476-477, 232 P.3d 597 (2010).

At White's trial – prior to the beginning of deliberations – juror Sanchez revealed that he was neither impartial nor able to follow the court's instructions.

At the beginning of voir dire, jurors would have received standard instructions, including those pertaining to the presumption of innocence:

The defendant is presumed to be innocent. The presumption of innocence continues throughout the entire trial. The presumption means that you must find the defendant not guilty unless you conclude at the end of your deliberations that the evidence has established the defendant's guilt beyond a reasonable doubt.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.01, Advance Oral Instruction (Before Voir Dire) (3d ed. 2014). "This constitutionally guaranteed presumption is the bedrock foundation in every criminal

trial.” State v. Gonzalez, 129 Wn. App. 895, 900, 120 P.3d 645 (2005) (citing Morissette v. United States, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952)).

Immediately after jurors were sworn, Judge Farris instructed jurors they were to base their decision only on the evidence presented and solely in accordance with her instructions. RP 61. They also were told to maintain open minds:

Throughout this trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for your deliberation.

RP 63.

Just prior to opening statement, Judge Farris reminded jurors of their duty to accept and apply the law provided to them in her instructions. RP 72. And she impressed upon them that they must not let their emotions overcome their rational thought processes and they must act impartially rather than based on prejudice. RP 74.

Despite the court’s instructions, and the constitutional presumption of innocence, juror Sanchez clearly was unable to presume White innocent, keep an open mind until the close of evidence, or resist the effects of emotion and prejudice. That he

feared White posed a threat to those in the courtroom because the firearms had been set down somewhere in his vicinity reveals the absence of a presumption of innocence and an unwillingness to follow the court's legal directives. This was misconduct and revealed his unfitness to continue jury service.

While Sanchez revealed his unfitness to serve during the presentation of evidence on July 2, and his written inquiry was filed that same day, the matter was not discussed with the parties on the record until the following day, after jurors had begun deliberating. RP 298. At that point, defense counsel indicated he did not think a written response addressed to Sanchez was necessary. RP 299. Judge Farris agreed, particularly since Sanchez decided not to request a response. RP 22. But neither counsel's position on a written answer, or anything else, excused Judge Farris from her duty to investigate the matter the prior day.

White has demonstrated prejudice, i.e., that Sanchez had failed to follow the court's instructions, including a failure to presume White innocent. Therefore, prejudice is presumed and a new trial required because the State cannot show the absence of any impact on jury deliberations. See Depaz, 165 Wn.2d at 856.

Jurors acquitted White of Possessing A Stolen Firearm because the State utterly failed to prove White knew the guns were stolen, a difficult task in D.W.'s absence. But the question of White's guilt for Unlawful Possession of Firearms would have been a closer call. Jurors ultimately rejected the defense argument that evidence suggesting White did not know the guns were in his trunk until he retrieved his tools and/or White's momentary handling of the firearms was insufficient to prove possession. But the State cannot show Sanchez's misconduct played no role in this result.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

White is serving a 70-month prison sentence. Judge Farris properly declared him indigent and entitled to appointment of appellate counsel at public expense. See Supp. CP ____ (sub no. 99, Order Authorizing Appeal In Forma Pauperis). If White does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, ____ P.3d ____, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning."

Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose 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, White's ability to pay must be determined before discretionary costs are imposed. Judge Farris made no such finding. Indeed, she court waived all discretionary LFOs. See CP 12. Without a basis to determine that White 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.

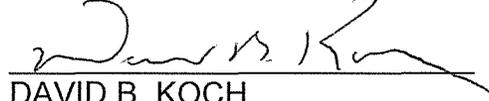
D. CONCLUSION

White was denied his constitutional right to jury trial. His convictions should be vacated and the matter remanded for a new trial. If White is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the State ask for them.

DATED this 31st day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 74044-0-1
)	
JAMES WHITE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE DESIGNATION OF CLERK'S PAPERS -- SUPPLEMENTAL TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES WHITE
DOC NO. 314529
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2016.

X Patrick Mayovsky