NO. 73026-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON BENSON,

Appellant.

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

The Honorable Leroy McCullough, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE CANNOT PROVE THE VIOLATIONS OF RCW 4.44.300 AND CrR 6.15(f)(1) WERE HARMLESS BEYOND A REASONABLE DOUBT.

In his opening brief, appellant Jason Benson asserts he was denied his constitutional rights to a fair trial and impartial jury when the bailiff – in violation of RCW 4.44.300 and CrR 6.15(f)(1) – improperly responded to a jury question during deliberations and the trial court never disclosed the ex parte contact to the parties upon learning of it. Brief of Appellant (BOA) at 7-20. In response, the State appears to concede error; however, it claims that the error was harmless. Brief of Respondent (BOR) at 7-10. However, the State cannot show harmless error on this record.

In order to hold these serious trial errors were harmless, this Court must be able to say beyond a reasonable doubt that the bailiff's and trial court's violations of RCW 4.44.300 and CrR 6.15(f)(1) had no possible prejudicial effect on the jury or the validity of this verdict. State v. Christensen, 17 Wn. App. 922, 926, 567 P.2d 654, 657 (1977). Specifically, this Court must conclude that there is no doubt that the jury unanimously convicted Benson only for the charged offense. Contrary to the State's assertion, the

record simply does not support such a conclusion. See, BOA at 15-20 (discussing prejudice in detail).

The State claims that the errors were harmless because the judge could not have answered the jury's question any differently than the bailiff did without making an improper comment on the evidence. BOR at 13. ("The only proper response was either no response at all or to refer the jury to the instructions.") However, the State's argument is predicated on its own misreading of the jury's question.

The State suggests the jury was asking the judge to tell it "what was the assault" – a question that the State claims would require the trial court to essential declare Benson guilty of assault. BOR at 13. However, as the juror declarations show, rather than asking the judge for a factual determination that there was assault, the jury inquiry asked for clarification as to which act was the single act that formed the basis of the State's assault charge.

The jury inquiry focused on the scope of the State's charge, not on whether the evidence proved that charge. When recalling the contents of the jury inquiry that was composed, one juror declared: "...we had a question regarding what part of the incident was the assault charge based on." CP 63. Another declared: "We

wanted to ask the judge something to the effect of if we could take another action besides the shoulder bump as the assault." CP 68. Another stated: "It's my recollection we had questions regarding the jury instruction regarding a 'specific action' and identifying what was the assault. We posed a question to the bailiff in writing about what should be considered as the assault." CP 69-70. Another juror stated the jury wanted to know "if the shoulder bump was the only thing we were to consider as assault." CP 71. Another juror declared: "We were discussing what part of the case had to be an assault ... We wrote down on a piece of paper asking the judge what part of the incident was an assault." CP 66. These statements show that the jury was asking for clarification of what act formed the basis of charge, not for a factual determination.[1]

The State also claims the record does not show jury confusion without impermissibly delving into the thought processes

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[1] Due to the bailiff's misconduct and the trial court's failure to properly handle the issue, there is no record establishing exactly what the written jury inquiry said. To the extent this Court determines that resolution of this matter is necessarily dependent on the exact wording of that written question and the declarations of jurors and testimony of bailiff do not sufficiently resolve this, then reversal is still required because the record lacks sufficient completeness to permit appellate review. State v. Larson, 62 Wn.2d 64, 381 P.2d 120 (1963).

of the jurors that led to the verdict. BOR at 15. This is not so. The juror declarations contain two types of information: (1) recollections regarding the content of the written jury inquiry; and (2) recollections about the deliberation process (individual and collectively), which indicate that at least some of the jurors convicted based on an act that was not charged. CP 61-72. Appellant has taken great care not to focus on the latter and to rely on the declarations only for the purpose of showing the jury was confused as to the scope of the assault charge. Thus, contrary to the State's claim, appellant has not asked this this Court to delve into the thought process leading to the verdict and resolution of this matter does not require this type of consideration on appeal.[2]

Next, the State claims the errors were harmless because the judge could not have answered the jurors' question without improperly commenting on the evidence. However, clarifying what the State had charged or what the State elected as the specific act

[2] Had appellant relied on the jurors' statements about their thought processes in reaching a guilty verdict, the issues raised here on appeal would have been entirely different. Indeed, the record could then support a direct challenge to the verdict as not being unanimous regarding the charged crime (i.e. at least some of the jurors convicted appellant based on uncharged acts). But Benson has not raised these claims precisely because that would involve delving in to the individual and collective thought processes of the jury.

to form the basis of the charge in no way would have conveyed to the jury the personal view of the judge. Indeed, an answer could have easily been constructed to outline only a dispositive issue in the case (i.e. what act the charge was based on), which is the type of instructional reference to evidence that has long been recognized as proper. State v. Galbreath, 69 Wn.2d 664, 671, 419 P.2d 800, 805 (1966).

The State also claims that "Benson could not have required the court to give an answer" to the jury question. BOR at 13. The State misses the point. The question is not whether Benson could require the Court to answer the jury's question with a supplemental instruction. The question is whether due process would have required such an answer. As explained in appellant's opening brief, the answer is yes. BOA at 16-18.

If the judge had been given the written question indicating that the jury did not understand the charges, it would have been required to consider very carefully how to instruct the jury so that it returned a verdict that pertained only to the charged offense and not some uncharged act. Indeed, it is well established that the trial judge has an obligation to instruct the judge as per the actual charges. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859

(2007). Hence, it was not an option for the trial court to sit idly by and let the jury potentially convict the defendant of an uncharged crime or without unanimity.

Next, the State quibbles over whether the two hypothetical supplemental instructions appellant referred to in his brief constitute improper judicial comments on the evidence. BOR at 15-16. Appellant submits these two examples could have served as a proper response. More importantly, however, it is appellant's position that had there been the required discussion among the parties and the trial court about the jury's question and how to respond, they certainly could have crafted acceptable language to clarify the charge for the jury. This did not occur below, however, so now this Court and the parties on appeal are left to create hypotheticals and argue over the wording of those hypothetical responses. This is simply not the forum to quibble over the details and the State's line of argument underscores the problems that arise when the trial court does not follow CrR 6.15(f)(1)'s express procedure for handling jury questions.

Finally, the State relies Waddington v. Sarausad, 555 U.S. 179, 195, 129 S.Ct. 823 (2009), for the proposition that referring the jury back to jury instructions was sufficient even where the jury

question demonstrates confusion. However, Waddington is easily distinguished from this case.

In Waddington, the jury wrote inquiries during deliberations that indicated it's confusion about convicting based on accomplice liability and asked whether a person's "willing participat[ion] in a group activity" makes "that person an accomplice to any crime committed by anyone in the group." Id. at 186. The trial court referred the jury back to a specific instruction which expressly stated that, to be convicted as an accomplice, a person must take action "in the commission of the crime" "with knowledge that it will promote or facilitate the commission of the crime." Id. at 191.

The United States Supreme Court determined that under these circumstances, the trial court did not need to further instruct the jury beyond telling them to look back at original instructions. In so holding, it concluded:

> Where a judge "respond[s] to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry," and the jury asks no followup question, this Court has presumed that the jury fully understood the judge's answer and appropriately applied the jury instructions.

Id. at 196 (emphasis added).

Benson's case is fundamentally different than Waddington in several important ways.[3] First, unlike in Waddington, the judge and bailiff did not follow proper court procedures and the judge and parties did not jointly discuss what would constitute a proper response to the specific questions asked by the jury. Second, the bailiff/judge never pointed the jurors to precise language or paragraph in the original instructions. Third, the specific language in Benson's jury instructions would not have answered the jury inquiry because the instructions did not on their face specify the elected act upon which the charge was based. Fourth, this Court cannot presume from the fact that there is no follow up question that the jury understood the judge's (bailiff's) answer and properly applied the jury instructions. This is because the jury was told the judge could not answer its question about what constituted the specific charged act. Essentially, the bailiff's response chilled any further efforts to ask for clarification on this matter. Hence, the State's reliance on Waddington is misplaced.

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[3] It should be noted Waddington was a case being reviewed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and, thus, had a different set of standards than this case does on direct appeal. Id. at 190.

In sum, as explained in detail in appellant's opening brief, the trial process was seriously compromised when the bailiff and judge violated RCW 4.44.300 and CrR 6.15. As explained above, based on this record, the State cannot show these errors were harmless. Indeed, there is a strong possibility that these errors led to a verdict that was predicated upon something other than the charged offense. As such, reversal is required.

B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 24th day of November, 2015.

Respectfully submitted,

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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 24TH DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON BENSON
650 S. 198TH STREET
SEATTLE, WA 98148

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF NOVEMBER 2015.

X Patrick Mayovsky