NO. 33714-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

DALE TUCKER, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PEND ORIELLE COUNTY

The Honorable Patrick Monasmith, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court's failure to properly instruct the jury deprived Appellant of a fair trial and constitutionally unanimous jury verdicts.

Issue Pertaining to Assignment of Error

Was Appellant deprived of his constitutional right to a fair trial and unanimous jury verdicts where the court failed to instruct that deliberations must include all jurors at all times?

B. STATEMENT OF THE CASE

The Pend Oreille County Prosecutor charged appellant Dale Tucker, Jr., (Tucker) with residential burglary and second degree theft. CP 1-3. The prosecutor alleged Tucker unlawfully entered the home of his recently deceased grandmother, Betty Durfee, with intent to commit a crime, and thereafter removed over $750 in property. CP 3-7.

At Tucker's jury trial before the Honorable Patrick Monasmith, the prosecution presented the testimony of Pend Oreille County Court Clerk Rachel Johnson, the trustee for the irrevocable trust created by Betty Durfee's passing - Marie Clifner, two of Durfee's grandchildren - Cheyenne and Robert Bradbury (Cheyenne and Robert), and the

investigating officer - Deputy Travis Stigall. RP[1] 69-248. Tucker did not testify.

Clerk Johnson was called to introduce a certified copy of a stipulation of facts and 24-month order of continuance entered on October 29, 2014, and which expires October 26, 2016. RP 71-72. Tucker is the named defendant in the exhibit, and it provides for him to abstain from entering Durfee's property for the duration of the order. Ex. 1.

Trustee Clifner testified Durfee passed away April 6, 2015, and that thereafter her estate became the property of an irrevocable trust, the beneficiaries of which were Durfee's children and grandchildren, except Tucker. RP 76, 82-83. Clifner indicated she was in control of the trust, and that as such had never given Tucker permission to enter or remove anything from the Durfee property or residence. RP 77, 82. Clifner noted the trust would not be dispersed to those who were beneficiaries until on or after September 27, 2015. RP 82.

According to Cheyenne, she went to the Durfee property on May 17, 2015, and noticed several things missing or out of place, so she called her brother, Robert. RP 98-99. When Robert joined Cheyenne at the property, they entered the home and discovered several items missing,

[1] There are two consecutively paginated volumes of verbatim report of proceedings for the dates of July 9, 16, 23, 30, 31 & August 20, 2015, referenced herein as "RP."

including several heaters, a radio, a set of antlers and the memory cards from two motion-sensitive video surveillance cameras mounted inside the residence. RP 99-100, 106-07.

Robert confirmed Cheyenne's recall of the condition of the Durfee property on May 17th. RP 138-39. In addition to the missing memory cards, Robert noted the cameras had also been unplugged, but not before recording the intruder and transmitting that footage to a laptop he had set up in case the memory card got removed. RP 141, 178-80. Robert determined the final recordings on the cameras were from May 8, 2015, which depict Tucker inside the house removing meat from a freezer in the kitchen. RP 142.

In addition to the interior video cameras, there was a motion-sensitive "game camera" set up outside to capture still images of any motion in the driveway/parking area outside the home. RP 100. Like the video footage, still images from the game camera appeared to show Tucker carrying a bucket towards the house, in addition to pictures of an SUV very similar to Tucker's girlfriend, and other unidentified vehicles and people coming and going during the period between May 7-17, 2015. RP 102-03, 129-30, 143, 187, 191-93, 240-41, 245-47.

Deputy Stigall responded on May 17th to the Bradbury's report of a break in at the Durfee property. RP 204-05. Stigall noted that in

addition to the items missing from the residence, it appeared someone had also broken into or simply entered several of the outbuildings on the property, including a motorhome. RP 206-07, 210, 212-13. According to Stigall, it appeared as if someone had possibly been living in the motorhome, and possibly using drugs, as suspected methamphetamine was found inside. RP 207.

Stigall agreed that someone other than Tucker could have been living in the motorhome and therefore were responsible for the missing items, and not Tucker. RP 233, 248. Stigall noted, however, that the missing antlers and one of the missing heaters were recovered from the home of Tucker's mother. RP 223-24, 226.

In closing argument, Tucker's counsel conceded it was Tucker depicted in the videos from inside the home, but argued the prosecution failed to meet its burden to proved the charged crimes beyond a reasonable doubt, and that if the jury was inclined to convict Tucker of any crimes, it should only be the lesser included offenses of first degree criminal trespass and third degree theft. RP 285-86, 290, 292-93.

Thereafter the jury acquitted Tucker of second degree theft, but found him guilty of residential burglary and the lesser included offense of third degree theft. CP 46-48: RP 303.

Tucker was sentenced to five months incarceration and he agreed to pay $930 in restitution. CP 61-71. Tucker appeals at public expense, having been deemed indigent. CP 59-60; ***CP 92-93***.[2]

C. ARGUMENTS

1. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY DELIBERATIONS MUST INCLUDE ALL TWELVE JURORS AT ALL TIMES DEPRIVED TUCKER OF A FAIR TRIAL AND UNANIMOUS JURY VERDICTS.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Tucker's right to a fair trial and unanimous verdicts. This Court should therefore reverse and remand for a new trial.

[2] These are the Clerk's Papers index numbers counsel anticipates will be assigned to the Order of Indigency (sub no. 51, filed August 20, 2015), which is included in a supplemental designation of clerk's papers filed April 29, 2016.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22[3]; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential elements of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

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[3] Wash. Const. art I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

The Washington Supreme Court recently concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

> ”The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew, as occurred here. 2RP 1199; State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of her right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally required format for deliberating towards a

unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they "'must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011).("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

> During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61.

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

> Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

> You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as a juror, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishment, if provided, make clear that deliberations may only occur after all the evidence is in, and only then

when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must involve all twelve jurors. Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding that the other nine jurors will adopt the conclusion of those three on that count for purposes of the unanimous verdict requirement. Such a process violates the constitutional requirement that deliberations leading to verdicts be "the common experience of all of [the jurors]." State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the record shows the court did provide to Tucker's jury, failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present, and only as a collective.

As an initial matter, neither the minutes nor the verbatim report of proceedings specifically indicate any pretrial on-the-record admonishment of Tucker's jury. See ***CP 71-91***[4]; RP 1 et. seq. It is possible the jury was given the admonishments in WPIC 1.01 and 4.61, but the record does not bear this out directly. See RP 149 (at the end of the day July 30, court tells jury, "because we are separating tonight I'm obliged to tell you much

[4] These are the anticipated Clerk's Papers index numbers for the Court Minutes (Sub no. 47, filed July 31, 2015), which are included in a supplemental designation of clerk's papers was filed on April 29, 2016.

the same as you probably heard from me this morning and that is please do not discuss the case among yourselves or with anybody else. . .").

What the record does show is that the trial court gave no pre-recess admonishment not to discuss the case twice during the proceeding. RP 132, 249. The court did admonishments the jury from discussing the case among themselves or with others at the end of the day on July 30th, and again at the lunch break on July 31st, after both sides had rested, but neither time was the admonishment as thorough as set forth in WPIC 4.61. RP 149-50, 253-54.

In the written instructions provided at the conclusion of trial, the court informed the jury "During your deliberations, you must consider the instructions as a whole." CP 21 (last page of Instruction 1). And the following instruction informs the jury that they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 22 (Instruction 2).

Instruction 19 instructed the jury on how to initiate and carry out the deliberative process. CP 39-41. Like the first two instructions, Instruction 19 also reminds the jurors they each have the right to be heard during deliberations. CP 39.

Missing from the record, however, are any written or oral jury instructions informing the jury of its constitutional duty to deliberate only

when all 12 jurors are present, and only as a collective. Nor does it reveal the court ever admonishing the jurors that they were precluded from discussing the case with anyone during any recess, as recommended by WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends.").

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present and only as a collective constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588 (citing State v. Lynch, 178 Wash.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when

confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here because the prosecution cannot meet its burden to show harmlessness.

That Tucker's jurors had opportunities for improper deliberations is not just theoretical. For example, the record shows the jury deliberated for less than one hour to reach verdicts on two counts. See ***CP 89-90*** (minutes show jury excused to begin deliberation at about 2:52 pm on July 31st, and the verdicts were read approximately 53 minutes later at about 3:45 pm). In light of the brief period of deliberation, and that they began late on a Friday in the middle of summer, there is a reasonable probability that to speed up the process so they could all start their summer weekend, the presiding juror divided the jury in two and had six jurors decide each count, with each group agreeing to follow the recommendation of the other. Such a process would clearly violate the "common experience" requirement for constitutionally valid unanimity. Lamar, 180 Wn.2d at 585.

There is also the very likely scenario of one or more jurors leaving to briefly use a bathroom while the remaining jurors continued to discuss the case. The record fails to show the jury was ever properly instructed

not to engage in such improper deliberations. As such, the jury was ignorant as to how to reach constitutional unanimity.

In light of the court's written and oral instructions, which only limited their ability to discuss the case to fellow jurors, there is a reasonable possibility some jurors discussed the case without the benefit of every other juror's presence, whether by phone, over lunch, simply walking to and from the jury room, or even in the jury room itself. Nothing informed them such discussions were not allowed. There was nothing provided to inform them there verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one of the jurors was deprived of deliberations shared by the other eleven, then the resulting verdict is not "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Tucker "lacks sufficient funds to prosecute an appeal" and was therefore indigent and entitled to appointment of appellate counsel and production of an appellate record at public expense. ***CP 92-93***. If Tucker does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. 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 legal financial obligations (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, Tucker's ability to pay must be determined before discretionary costs are imposed. Without a basis to rebut the trial court's determine that Tucker is indigent, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

The trial court's failure to properly instruct Tucker's jury about the deliberative process required to reach constitutionally valid verdicts requires reversal and remand for a new trial.

DATED this 29th day of April 2016.

Respectfully submitted,

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State v. Dale Tucker, Jr.

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Certificate 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 29th day of April, 2016, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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