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NO. 67059-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHARLES WEBB,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court erred when it instructed a reconstituted jury panel to begin deliberations anew but then provided the new jury with an opportunity to review a surveillance video and 911 call requested during deliberations by the previous jury panel.

2. Whether this Court should consider the claim that having instructed a reconstituted jury to begin deliberations anew, the Court then provided the jury with a surveillance video and 911 call that the prior jury had requested constituted a comment on the evidence.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Charles Webb, was charged with one count of malicious harassment in violation of RCW 9A.36.080 for knowingly and maliciously threatening Nawal Al-Shiblawi based on his perception of her race, color, ancestry or national origin and placing her in reasonable fear of personal harm. CP 1. The trial began on March 14, 2011 with closing arguments on March 16,

2011.¹ 1RP-3RP. After closing arguments, juror # 8 was "temporarily excused" as the alternate juror. 3RP 108-109. The rest of the jury retired to deliberate on a verdict. 3RP 109-110. Shortly thereafter, a jury question was submitted in writing to the court at 3:23pm in which the jury asked if the 911 tape, store surveillance video and a transcript of the 911 would be available to them in the jury room. CP 54. At 3:45pm, after hearing from the parties, the court responded, "A playback machine and the tape/video will be made available tomorrow morning for jurors to view each tape and video once." CP 55.

The next morning at 8:48am, the jury submitted another question to the court, stating "One of the jurors (#12), has now recalled encountering the defendant on a previous occasion." CP 52. Juror #12 was questioned by the court with all parties present, about her ability to proceed as a fair and impartial juror. 4RP 3-5. After the *voir dire*, the court upon agreement of the parties excused juror #12. 4RP 2-3, 6-7. The alternate juror was recalled into the courtroom and questioned by the court to ensure she had not "been exposed to anything regarding this case". 4RP 8. The juror

¹ The Verbatim Report of Proceedings consists of five volumes, designated as follows: 1RP (3/14/11), 2RP (3/15/11), 3RP (3/16/11), 4RP (3/17/11), and 5 RP (4/15/11).

confirmed she had not. 4RP 9. The remaining 11 jurors were brought into the courtroom and instructed by the court to start deliberations anew. 4RP 9. The court gave the new panel the following instructions:

"As you can tell, we found it necessary to excuse juror number 12 and to now bring back in the juror who was selected as the alternate, juror number 8, to serve on your jury panel. Because she has --we have now brought in an alternate, you are --- you must disregard all previous deliberations. So any deliberations, any discussions you've had as a jury with regard to this case, you must disregard all those discussions and start over again so that juror number 8 will of course have a chance to participate fully in those deliberations. I hope that's clear.

I thank you very much for your attention. We're going to take you back to the jury room so you can start your deliberations anew, and John, who's filling in as our bailiff today, is getting -- has set up or will get set up in a moment the equipment so to play the recordings for you. All right. Thank you very much."
4RP 9-10.

That afternoon, the jury found Webb guilty as charged. CP 29; 4RP 13. Each juror was polled and asked whether the verdict was the verdict of the jury and their individual verdict. 4RP 13-15. Each juror answered in the affirmative. 4RP 13-15.

2. SUBSTANTIVE FACTS

Ms Nawal Al-Shiblawi is originally from Iraq and has lived in the city of Seattle for 17 years. On December 26, 2010, Webb

walked into the Grocery Outlet store in the city of Seattle. 2RP 32-33. Al-Shiblawi was working as a cashier behind the front desk when she noticed Webb standing at the checkout. 2RP-34. Al-Shiblawi went to help Webb at the checkout stand and asked him if he was ready. 2RP 33. Webb replied, "If you don't like working, why don't you go back to your country?" 2RP 35. Al-Shiblawi smiled at Webb and tried to finish the purchase by telling him the cost of the chips. 2RP 35. When she tried to give Webb back his change and his receipt, he wouldn't take the items from her hands. 2RP 35. She left the items on the counter and was about to give Webb the bag of chips he had purchased when he snatched the bag from her hands and started yelling profanities at her. 2RP 36-37.

Ms Zohra Raghozar was working in the back room of Grocery Outlet when she heard the commotion at the front of the store. 2RP 41; 3RP 23-24. When Raghozar asked what was going on, Webb told her to go back to her country and began yelling profanities at her. 3RP 26-28. Raghozar told Webb she would call 911 if he would not leave. 3RP 26. Raghozar called 911. 3RP 27-28. Mr. Mark Hedenblad, another employee at Grocery Outlet, assisted with the 911 call by describing Webb and giving the operator location information. 3RP 28, 46-47.

While Raghozar was on the phone with 911, Webb repeatedly walked in and out of the front door of the store. 2 RP 42. During one of the times he came back in, he looked at Al-Shiblawi and told her "I will get you when you get off work". 2 RP 42-43. Webb's actions and words placed Al-Shiblawi in fear of her personal safety. 2RP 42-43

C. **ARGUMENT**

1. THE TRIAL COURT FOLLOWED PROPER PROCEDURE WHEN IT INSTRUCTED THE RECONSTITUTED JURY TO START DELIBERATIONS ANEW

Webb argues the trial court committed error when it instructed the reconstituted jury to begin deliberations but then provided the new jury with an opportunity to view a store surveillance video and 911 call requested by the prior jury. Brief of Appellant, at 1. This claim should be rejected as Webb cites no authority which deems the trial court's actions as error. In the contrary, the trial court took every measure to ensure Webb received a fair trial. First, the trial court made all the proper inquiries to the alternate juror before seating her on the new jury. The trial court then instructed the new jury, "any discussions you've had as a jury with regard to this case, you must disregard all those discussions and start over again so that juror number 8 will of

course have a chance to participate fully in those deliberations.”

4RP 9-10.

Under CrR 6.5, an alternate juror may be recalled to replace a sitting juror if the sitting juror is unable to continue to serve. In accordance with this rule, if a sitting juror is replaced by the alternate during deliberations, the trial court must instruct the reconstituted jury to disregard prior deliberations and begin deliberations anew. State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004); State v. Ashcraft, 71 Wn. App. 444, 460-61, 859 P.2d 60 (1993). The failure to instruct the jury to begin deliberations anew is a manifest constitutional error that is not harmless unless the record demonstrates that jury unanimity was preserved. Stanley, 120 Wn. App. at 315-16.

Webb argues under authority that discusses the constitutional error in cases where a trial court did not instruct a reconstituted jury to start deliberations anew. The State does not dispute there would be error had the trial court not instructed the jury to begin deliberations anew, however, Webb’s jury was in fact directed by the trial court through clear and concise instructions to start over in their deliberations. Therefore, the legal authority in

Webb's arguments is distinguishable to the facts and circumstances in this case.

The court followed the proper procedures as laid out in CrR 6.5. A jury is presumed to have followed a trial court's instructions to start deliberations anew. State v. Wirth, 121 Wash. App. 8, 13, 85 P.3d 922 (citing State v. Johnson, 124 Wash. 2d 57, 77, 873 P.2d 514 (1994)), review denied, 152 Wn.2d 1018 (2004). There is nothing in the record that suggests the trial court's actions in granting the prior jury's request to review the surveillance video and 911 call affected any one juror's ability to decide the case fairly. This is noted in light of the fact that 11 of the 12 jurors had previously requested to view the evidence.

2. THE TRIAL COURT'S ACTIONS WERE NOT A COMMENT ON THE EVIDENCE.

Webb also makes a feeble claim that although the trial court "told the jury to disregard prior deliberations, its actions demonstrated to the jury that it need not actually start anew". Brief of Appellant at 10. The record shows the trial court's clear intentions in providing the jury with the surveillance video and 911 call was to grant a previous request by the jury.

Judges shall not charge juries with respect to matters of fact,

nor comment thereon, but shall declare the law. Washington State Constitution, Article IV, section 16. A trial judge's statement constitutes "a comment on the evidence only if the court's attitude toward the merits of the cause is reasonably inferable from the nature or manner of the judge's statement." State v. Carr, 13 Wash. App. 704, 710, 537 P. 2d 844 (1975). Although the personal opinion of a trial judge may be conveyed both directly or by implication, in determining whether words or actions amount to a comment on the evidence, the appellate court looks to the facts and circumstances of the case. State v. Jacobsen, 78 Wash. 2d 491, 495, 477 P. 2d 1 (1970).

Webb's assertions that due to the trial court's actions, "the reconstituted jury did not begin deliberations anew but instead resumed deliberations where the prior jury had left off" is completely unfounded and is unsupported by the record. Brief of Appellant at 12. The appellant admits his claims are unsupported by the record as he later states, "the record, of course, does not show what discussions took place in the jury room following the court's instructions." Brief of Appellant at 12-13. The trial court did not intentionally or impliedly display any significant importance to

these pieces of evidence which had been admitted in trial without objection by defense counsel.

D. CONCLUSION

The trial court followed proper procedures by instructing the reconstituted jury to begin deliberations anew. Also, the trial court did not comment on the evidence. For the reasons set forth above, this Court should affirm the defendant's conviction for malicious harassment.

DATED this 28th day of November, 2011.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

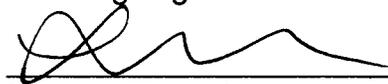
By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. CHARLES WEBB, Cause No. 67059-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Tuyen Lam
Done in Kent, Washington

11/28/11
Date