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Oct 20, 2016
Court of Appeals
Division I
State of Washington

NO. 75293-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCHE NASH,

Appellant.

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

The Honorable Ken Schubert, 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?

Potential Issue Presented¹

In the event Appellant does not substantially prevail on appeal, should this Court exercise its discretion to deny a State's motion for costs?

B. STATEMENT OF THE CASE

The King County Prosecutor charged appellant Marche Nash attempted second degree burglary. CP 1-2. The prosecution alleged that in the early morning of August 21, 2015, Nash and a companion attempted to burglarize "Metro PCS (a.k.a. "DM Wireless"), a store in the Rainier Beach neighborhood that sells cellular phones and accessories, by

¹ The second argument presented herein pertains to the potential for the assessment of the costs of the appeal under RCW 10.73.160 and RAP 14.4.

unsuccessfully trying to pry open an outside security door. CP 5-7; RP² 263, 269, 314.

A jury trial was held March 21-31, 2016, before the Honorable Ken Schubert. RP 1-499. The jury found Nash guilty as charged. CP 15; RP 491-93. Following imposition of a standard range sentence, Nash appeals. CP 39-54; RP 517-18.

At trial, the prosecution case turned on the credibility of Armondo Zarate Chavez. Chavez lives in an apartment across the street from DM Wireless. RP 314; Ex 15. In an early morning 911 call on August 21, 2015, Chavez claimed "[t]here's a woman and a man with a bat trying to get in and breaking all the windows with a bat." RP 323; Ex. 15. Chavez described the male suspect as "black," about "22-years old, more or less," wearing "a black shirt and a black [baseball] cap." RP 324; Ex 15. Chavez described the female suspect as "black," "maybe 22 as well," and wearing "[g]rey and black pants. RP 324-25; Ex. 15. Still on the phone with the operator when police arrived, Chavez told the operator that police had detained the right people. RP 326; Ex. 15. Chavez admitted at trial, however, that he did not have a view of the suspects for the entire time he was on the phone with 911. RP 347, 352.

² There are six consecutively paginated volumes of verbatim report of proceedings referenced collectively herein as "RP."

The police had detained Nash and his companion, Charlie Dale, who they saw walking near DM Wireless as they arrived at the scene. RP 357, 372. Neither was in possession of a baseball bat, they did not run when police approached, did not appear to be sweaty or winded, and both had cash and cell phones in their possession. RP 376-77. Nash was 30 years old at the time, not 22. RP 258.

The defense called no witnesses. In closing, defense counsel argued "This case is pure and simply about an unreliable eyewitness identification and bias[.]" RP 444.

C. ARGUMENTS

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

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Nash's right to a fair trial and unanimous verdicts. Because the State cannot show this error was harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22³; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element 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.

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. 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 his 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 (emphasis added).

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 jurors, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishments, 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 court did provide to Nash'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.

The trial court's first on-the-record admonishment of Nash's jurors occurred following their swearing in. That admonishment included the follow:

Finally, you'll be taken back to the jury room by the bailiff where you'll 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 may 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

emailing, text messaging, blogging, or any other form of electronic communications. All phones, PDAs, laptops and other communication devices must be turned off while you're in Court and while you are in deliberations.

RP 144-45.

Despite the Committee's recommendation to give the full WPIC 4.61 before every recess, it was never provided at Nash's trial. In fact, the court did not provide any relevant admonishment to the jury during any recess or break taken during the two-day evidentiary portion of the trial. See RP 209, 226, 237, 272, 295, 362, 367, 387 (no admonishment given). Only after the defense rested did the court provide anything close to the jury admonishment recommended by the WPIC Committee, and it did not conform to any of the suggested instructions, providing instead;

So thank you so much [jurors] for your attention so far and, again, the same instruction that I've been giving you this entire time[sic] -- don't talk to each other about the case yet, it's not time to deliberate, you don't have instructions. Don't talk to anyone else, don't do any research, don't go near the scene of anything.

RP 390-91.

The written instructions the court read the jurors stated, "During your deliberations, you must consider the instructions as a whole." CP 22 (Instruction 1); RP 425. 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 24 (Instruction 2); RP 425.

Instruction 14 instructed the jury on how to initiate and carry out the deliberative process. CP 37-38; RP 430-31. Like the first two instructions, Instruction 14 also reminds the jurors they each have the right to be heard during deliberations. CP 37; RP 430.

The court gave no further instruction on how to deliberate. Missing are any written or oral instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present, and only as a collective. Nor does the court ever admonish 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 Nash's jurors had opportunities for improper deliberations is not just theoretical. For example, the court's minutes show "The jury retires at 10:30:51 to deliberate upon a verdict." *CP 83*⁴ (page 12 of the trial minutes). It also shows the jury submitted a jury question at 11:44 am asking to hearing the 911 recording again, and it took until 1:05 pm to

⁴ Counsel has filed a supplemental designation of clerk's papers designating the 12 pages of trial minutes, sub no. 23A. Based on past experience counsel anticipates the King County Superior Court Clerk's office to assign index numbers 72-83 to this document. The italicized "*CP*" cite provided is what counsel expects to be the index number for that page.

convene the parties and allow the jury to hear it again. *Id.*; RP 481-88. Thereafter the jury reached a verdict by 2:41:53 pm. *Id.*; RP 492-93.

What is not clear from the record is whether the jurors deliberated the entire four-plus hours, or instead broke for lunch or breaks. If they did take breaks, there is a reasonable probability that some jurors took those breaks with only some other jurors and that they discussed the case apart from other jurors. Such deliberations would clearly violate the "common experience" requirement for constitutionally valid unanimity, but not the instructions provided by the court. Lamar, 180 Wn.2d at 585. No instruction told the jury such deliberations were not allowed.

There is also the very likely scenario of one or more jurors simply leaving the jury room briefly to use the bathroom while the remaining jurors continued to discuss the case. Once again, this would clearly violate the "common experience" requirement, but not the court's instructions. Lamar, 180 Wn.2d at 585. The jury was never instructed not to engage in such improper deliberations. As such, the jury was left ignorant about 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 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 their 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 constitutionally "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 Nash "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 59-60. If Nash 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, Nash's ability to pay must be determined before discretionary costs are imposed. Without a basis to rebut the trial court's determination that Nash 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 Nash's jury about the deliberative process required to reach constitutionally valid verdicts requires reversal and remand for a new trial.

DATED this 20th day of October 2016.

Respectfully submitted,

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