

FILED
COURT OF APPEALS
DIVISION II

NO. 41472-4-II

11 MAR -4 AM 11:53

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

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

JOSEPH ALLEN EDINGTON, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00616-8

RESPONSE TO PERSONAL RESTRAINT PETITION

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the defendant. Where additional information is needed it will be supplied in the argument section of the brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error raised by the defendant deal with the jury instructions and specifically Instruction No. 18, which the defense claims was an incorrect statement of the law. A copy of the Court's Instructions to the Jury is attached hereto and incorporated herein. At the time of the trial of this defendant, the case law appeared to be accurate and correct and had been followed for many years by the Superior Court. That was recently changed in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

The State submits that if there is error involved in this, it is harmless error.

A personal restraint petition is not a substitute for a direct appeal. In re Pers. Restraint of Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn.2d

802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); In re Pers. Restraint of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); In re Pers. Restraint of Stockwell, ___ Wn.App. ___, No 37238-0-II (February 17, 2011).

In evaluating personal restraint petitions, we can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. Cook, 114 Wn.2d at 810-11; In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983); In re Pers. Restraint of Stockwell, ___ Wn.App. ___, No 37238-0-II (February 17, 2011).

The violation alleged in this personal restraint petition is non-constitutional error which cannot be raised for the first time on appeal. State v. Nunez, ___ Wn.App. ___, No. 28259-7-III (February 15, 2011).

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the

record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995).

-(Strickland, 466 U.S. at 689).

But, even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." Strickland, 466 U.S. at 693. "In doing

so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland*, 466 U.S. at 694).

When a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final? The Supreme Court answered this question in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and the answer was no. A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

In Goldberg, the jury convicted the defendant of first degree murder but answered "no" on a special verdict form regarding an aggravating factor. Goldberg, 149 Wn.2d at 891. Yet when the trial court polled the jury, only one person indicated voting "no" on the aggravating factor. Goldberg, 149 Wn.2d at 891. The trial court concluded the jury was deadlocked and ordered continued deliberation, after which the jury returned with a "yes" verdict. Goldberg, 149 Wn.2d at 893. On appeal, our

Supreme Court held this was error because a trial court has no authority to request a jury to continue deliberations on a special verdict, unlike when the jury is deadlocked on a general verdict. Goldberg, 149 Wn.2d at 894. The supplemental instruction expressly informed the jury that it had to be unanimous in order to answer "yes" and to find the "additional fact" that the defendant had committed the charged crime within 1,000 feet of a school bus route stop. In contrast, the trial court did not include a similar instruction informing the jury that it had to be unanimous in order to answer "no" if it could not unanimously answer "yes," implying that the unanimity requirement does not apply to a "no" finding. See State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

In Goldberg, the trial court instructed the jury:

In order to answer the special verdict form "yes[.]" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no[.]"

-(Goldberg, 149 Wn.2d at 893).

The Supreme Court held that this instruction did not require unanimity for a "no" answer and that the jury had "performed as it was instructed" when it returned a verdict of "no," despite the fact that some jurors had disagreed. Goldberg, 149 Wn.2d at 893.

Neither the instruction in *Goldberg* nor the instruction the trial court gave here specifically informed the jury that it need not be unanimous to answer "no" to the special verdict question.

Instead, both instructions focused on the need for unanimity beyond a reasonable doubt in order to answer "yes." Thus, the logical inference from both the *Goldberg* instruction and the supplemental instruction here was that unanimity was not required for a negative finding.

Here, the State submits that even if the instruction were erroneous, the error was harmless. The jury unanimously answered the special verdict "yes" and when polled, each juror confirmed the verdict. There is no indication that the jury was confused or that they were initially deadlocked. Unlike in *Goldberg*, the trial court did not order the jury to continue deliberating. The defendant in our case argues that the jury might not have unanimously answered "yes" if the trial court had specifically instructed them that "not unanimous" was an option. But this is speculation and insufficient to show prejudice. See *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P.3d 164, 171 (2010) (noting that "any confusion about a negative verdict [is] purely hypothetical"). In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the

error.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (*quoting* Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Because the defendant here received a unanimous verdict, he does not demonstrate harm from the instruction. The manifest error affecting a constitutional right must also be subject to a harmless error analysis. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Brown, *supra*; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The constitutional error analysis—requiring the error to be both manifest and not harmless—ensures that criminal defendants may not obtain new trials whenever it is possible to identify a constitutional issue not raised below. Scott, 110 Wn.2d at 687-88.

The State submits that, if this is error, it is harmless.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this _____ day of _____, 2011

Respectfully submitted:

ANTHONY F. GOLIK

Prosecuting Attorney
Clark County, Washington

By: *Michael C. Kinnie #27944 for*
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

FILED
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JOSEPH ALLEN EDINGTON,

Defendant.

No. 07-1-00616-8

COURT'S INSTRUCTIONS TO THE JURY

G.A. Lewis

SUPERIOR COURT JUDGE

June 13, 2007

DATE

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

INSTRUCTION NO. 8

Joseph Edington is not compelled to testify, and the fact that Joseph Edington has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 9

It is a crime for any person to deliver a controlled substance that the person knows to be a controlled substance.

INSTRUCTION NO. 10

To convict the defendant of the crime of delivery of a controlled substance as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 6th day of March, 2007, the defendant delivered a controlled substance;

(2) That the defendant knew that the substance delivered was a controlled substance;

and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

To convict the defendant of the crime of delivery of a controlled substance as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 15th day of March, 2007, the defendant delivered a controlled substance;

(2) That the defendant knew that the substance delivered was a controlled substance;

and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

To convict the defendant of the crime of delivery of a controlled substance as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of March, 2007, the defendant delivered a controlled substance;

(2) That the defendant knew that the substance delivered was a controlled substance;

and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

To convict the defendant of the crime of delivery of a controlled substance as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 28th day of March, 2007, the defendant delivered a controlled substance;

(2) That the defendant knew that the substance delivered was a controlled substance;

and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

Deliver or delivery means the actual transfer of a controlled substance
from one person to another.

INSTRUCTION NO. 15

Cocaine is a controlled substance.

INSTRUCTION NO. 16

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 17

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdicts.

INSTRUCTION NO. 18

If you find the defendant guilty of delivering a controlled substance as charged in any of the Counts 1, 2, 3 or 4, it will then be your duty to determine whether or not the defendant delivered the controlled substance in that Count, within one thousand feet of a school bus route stop designated by a school district. You will be furnished with a Special Verdict Form A on each Count, for this purpose.

If you find the defendant not guilty of Delivery of a Controlled Substance - Cocaine, as to any of Counts 1, 2, 3 or 4, do not use the Special Verdict Form for that Count. If you find the defendant guilty in any Count, you will complete the Special Verdict Form for that Count. Since this is a criminal case, all twelve of you must agree on the answer to a Special Verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant delivered the controlled substance within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the Special Verdict "yes" as to that Count.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "no" as to that Count.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

In re Personal Restraint of:

No. 41472-4-II

JOSEPH ALLEN EDINGTON,
Petitioner.

Clark Co. No. 07-1-00616-8

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Feb 28, 2011, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	JOSEPH ALLEN EDINGTON, DOC #993281 Washington State Penitentiary 1313 N 13 th Avenue Walla Walla, WA 99362-1065
Steven Witchley Attorney at Law Ellis Holmes & Witchley PLLC 705 2nd Ave Ste 401 Seattle WA 98104-1718	

DOCUMENTS: Response to Personal Restraint Petition

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

[Signature]
Date: Feb 28, 2011.
Place: Vancouver, Washington.