

NO. 44104-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BARTHOLOMEW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge
The Honorable Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by responding to the deliberating jury's written inquiry without notifying the parties and giving them a chance to be heard on how to respond.

2. The trial court violated appellant's rights under article 4, § 16 of the Washington Constitution.

3. The judgment and sentence fails to properly set forth the sentences imposed for appellant's two counts of conviction.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible constitutional error by responding to a jury inquiry without first notifying the parties and giving them a chance to be heard on how to respond?

2. Is reversal required because the trial court violated appellant's right under article 4, § 16 by responding to the jury's inquiry in a manner that implied it believed there was no evidence about a particular factual matter when in fact there was?

3. Is remand for entry of a corrected judgment and sentence necessary when the current judgment and sentence indicates the sentence imposed on "Count 1" was actually imposed on "Count 2", and that the sentence imposed on "Count 2" was actually imposed on "Count 1"?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged appellant James Bartholomew with possession of a stolen vehicle ("Count 1") and attempting to elude ("Count 2"). CP 1-3; RCW 9A.56.068; RCW 46.61.024. Count 2 includes the special allegation that during its commission Bartholomew placed someone other than himself and law enforcement in danger. CP 2; RCW 9.94A.834.

A jury trial was held January 10, 2012, before the Honorable Gordon Godfrey. RP.¹ Bartholomew was found guilty as charged, including the special allegation. CP 18-20. Concurrent sentences of 41 months and day and 57 months were imposed. CP 26-34; 2RP 97.² An agreed restitution order of \$8,832.40 was entered. CP 37-38. Bartholomew appeals. CP 39-43.

2. Substantive Facts

On the afternoon of September 13, 2011, Aberdeen police officer Steven Gonzalez was on patrol in his fully marked police cruiser when he saw a car reported stolen stopped at a red light. 2RP 5-6. As he engaged

¹ There are two volumes of verbatim report of proceedings referenced as follows; 1RP - 1/5/12 (CrR 3.5 hearing), 1/9/12 (preliminary hearing), & 3/19/12 (restitution hearing before the Honorable F. Mark McCauley); and 2RP - 1/10/12 (trial) & 1/30/12 (sentencing).

² At sentencing, the court stated that it was imposing "43 months and a day" for "Count 1". 2RP 97. The judgment and sentence, however, lists "41 months plus one day on Count 1." CP 28.

in a u-turn to get behind the car and pull it over, the car drove through the red light and sped off. 2RP 6-7, 14. Gonzalez immediately activated his lights and siren and gave chase, but eventually gave up because of how fast the car was going and concern that the chase was endangering others on the roadway. 2RP 6-11. Gonzalez subsequently responded to the scene where the car eventually crashed near some railroad tracks. 2RP 11. The key to the car's ignition was still in the car. 2RP 40. Gonzalez helped set up containment around the area because there were reports the occupants of the car fled on foot. 2RP 12.

Both Bartholomew and his sister Misty Bartholomew ("Misty") were eventually apprehended by law enforcement after the crash. 2RP 12, 18-19, 21. According to one officer, Bartholomew admitted driving the car, which he initially said he had borrowed from a friend, and said he fled because he had no license and got scared. 2RP 30-31. The same officer said Bartholomew later admitted knowing who stole the car, but refused to identify the person because "he didn't want to be a rat." 2RP 31-32, 34.

The owner of the car was Ashley Dion, a student at Grays Harbor Community College. 2RP 35-36, 38. Dion testified her car was stolen September 6, 2011, from the parking lot of her apartment complex. 2RP 36. Dion said she spotted it at a Walmart on September 13, 2011, and had

her boyfriend call police to report the sighting, and she later responded to the scene where it was found crashed near the railroad tracks. 2RP 36-37.

Dion denied ever meeting Bartholomew, or ever lending or giving him permission to use her car. 2RP 37, 39, 41. Dion could not explain how her only key to the car's ignition was lost until discovered in the crashed car. 2RP 40.

Misty testified at trial. 2RP 42-52. According to Misty, Bartholomew told her he had borrowed the car from a girl he was seeing. 2RP 52. Misty admitted encouraging her brother to flee from police because he had warrants. 2RP 43, 49. Misty denied being injured in the crash, and said she fled the scene of the accident because she was on methamphetamine, as was her brother. 2RP 47-49.

Bartholomew also testified at trial. 2RP 53-67. According to Bartholomew, he met Dion at the library at Grays Harbor Community College, where they both attended. 2RP 54. They became intimate and planned to be together once Dion broke up with her boyfriend. 2RP 55.

Bartholomew recalled that after they had been seeing each other for about three months he stopped by her apartment one day after he had been drinking and Dion came out, told him he should not be there and that she had decided not to break up with her boyfriend. 2RP 56-57. Bartholomew got upset, and asked to borrow her car, claiming he wanted

to go to the store to buy beer. 2RP 57. Bartholomew recalled reasoning at the time that if he had her car, and he kept it long enough, Dion would have to reveal her relationship with him to her boyfriend. 2RP 58. Bartholomew recalled Dion was hesitant at first, but eventually relented and gave him her key, presumably to get him away from her apartment. 2RP 57-58.

Bartholomew also testified that he fled from Officer Gonzalez because the first thought that comes to his mind when he sees police is to run. 2RP 58. Bartholomew admitted his sister was in the car at the time and that he had been using methamphetamine that day and every day since he got the car, despite several years of sobriety up to that point. 2RP 59.

With regard to his alleged statements to police, Bartholomew denied stating he knew who stole the car, and insisted instead that he told police he had borrowed it, but refused to give them Dion's name because of the secret nature of their relationship. 2RP 61.

In closing argument, the prosecutor claimed the jury could find Bartholomew guilty even if they believed his testimony about borrowing the car, arguing that even if Dion gave him permission to take her car to the store to buy beer, his failure to return the car in the subsequent week constituted a theft of the car. 2RP 77-79. In contrast, the defense emphasized that the ignition key was found in the car after it crashed, and

that this fact lent substantial credibility to Bartholomew's claim that he had a relationship with Dion and that he had the car, not because he stole it, but because she let him borrow it. 2RP 86.

During deliberation, the jury submitted the following inquiry:

Where [sic] they in summer school at the college?

Summer school:

July, Aug, Sept.

Juror 9

CP 16.

Neither the verbatim report of proceedings nor the court minutes indicate the parties were notified of the inquiry or given a chance to state how they thought it should be handled. See *CP 44-47*³ (sub no. 32, Court Minutes, filed 1/10/12) (does not note a jury inquiry was submitted)⁴; 2RP 94 (nothing more transcribed on January 10, 2012, following closing arguments).⁵ The record does show, however, that the trial court gave the jury the following written response:

To: Jury

³ The Clerk's Papers pages cited here and in the subsequent quote are those counsel predicts based on past experience will be assigned once the Grays Harbor Superior Court Clerk's office processes the supplemental designation of clerks' papers filed November 18, 2013.

⁴ It is worth noting the minutes meticulously document the exact time the court convened or went into recess, and there is no entry between the 2:42 p.m. recess taken after the jury retired to deliberate and when it reconvening at 3:37 p.m. to receive the jury's verdicts.

⁵ By e-mail received on November 20, 2013, the court reporter informed counsel that there is nothing available to transcribe regarding the jury inquiry or the court's response.

From: Judge Godfrey

You may only consider the evidence presented to you during trial.

-s-
Judge

*CP 48*⁶ (sub no. 37, filed 1/10/12).

C. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO GIVE BARTHOLOMEW NOTICE OF THE JURY INQUIRY AND A CHANCE TO BE HEARD ON HOW TO RESPOND, AND THE FACT THAT THE COURT'S RESPONSE TO THE INQUIRY CONSTITUTED AN IMPROPER COMMENT ON THE EVIDENCE, REQUIRES REVERSAL.

A judge in a criminal case should not communicate with the jury in the absence of the accused. State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Such communications violate the constitutional right of the accused to appear and defend in person and by counsel. U.S. Const. amend. V, VI; Const. art. I, §§ 3, 22; State v. Rice, 110 Wn.2d 577, 613-614, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). More specifically, the trial court must notify the parties of the contents of a deliberating jury's inquiry and provide an opportunity to remark upon a response. CrR 6.15(f)(1); State v. Jasper, 158 Wn. App. 518, 540-41, 245 P.3d 228 (2010),

⁶ See note 3, supra.

affirmed, 174 Wn.2d 96, 271 P.3d 876 (2012); State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60 (1993).

Here, the trial court violated these well-established rules by answering the jury's question without first requesting the parties' input. Caliguri, 99 Wn.2d at 508 (trial court erred in replaying tapes in response to jury's request outside defendant's presence); Ashcraft, 71 Wn. App. at 464 (trial court erred by replacing an initial juror with an alternate juror after deliberations began). The issue then is whether the court's error can be excused as harmless. It cannot.

Once a defendant raises a possibility of prejudice in such circumstances, the State has the burden of proving the error harmless beyond a reasonable doubt. Caliguri, 99 Wn.2d at 509. The State cannot meet its burden here, particularly when considered in light of the trial court's other related error of commenting on the evidence in its response to the jury.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P. 2d 929 (1995).

Judicial comments are manifest constitutional errors that may be raised for the first time on appeal. Levy, 156 Wn.2d at 719-20. The failure to object or move for mistrial at the trial level does not bar appellate review. Id.; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In

deciding whether a comment on the evidence is harmless, courts look to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at

Bartholomew's defense to the possession of a stolen vehicle charge was that the car was not stolen. He claimed he borrowed it from Dion, with whom he was having a clandestine intimate relationship after they had met while attending Grays Harbor Community College. 2RP 54-58.

The jury inquiry, which asked if Bartholomew and Dion were attending summer quarter at the college together, shows the jury was giving due consideration to Bartholomew's defense, and that it had some reservations about whether Dion was being truthful when she claimed she did not know Bartholomew. CP 16. The court's reply, "You may only consider the evidence presented to you during trial[.]" could reasonably be interpreted to imply the court believed there was no evidence presented at trial of when Dion and Bartholomew were at college together. **CP 48**. Not only was the trial court's response improper because it was given without first consulting the parties as required by CrR 6.15(f)(1), but it was also constitutes an improper comments on the evidence, and an erroneous one at that.

Neither Dion nor Bartholomew testified about precisely when they attended Grays Harbor Community College, but they both testified they attended. 2RP 38, 54. Bartholomew testified he and Dion had an intimate relationship that lasted about three months, ending the day she loaned him the car when she explained she made a mistake getting involved with him. 2RP 55-57. Dion denied any relationship existed and claimed instead her car was stolen on September 6, 2011. 2RP 36. Based on the combined testimony of Dion and Bartholomew, a reasonable juror could conclude both were students at the college in the summer of 2011, because the three months prior to September 6th encompasses the summer months of June, July and August. CP 16. If the jurors came to this conclusion, it would lend strength to Bartholomew's claim that he and Dion knew each other and had a relationship. And if they were in a relationship, it is more likely Dion loaned Bartholomew her car instead of him stealing it, a factual scenario supported by the fact that the ignition key was found with the crashed car. 2RP 40.

By wrongly implying in its response that there was no evidence of when they attended, the court made the defense theory less likely to prevail. As such the State cannot meet its burden to prove the trial court's constitutional errors were harmless beyond a reasonable doubt. This Court should therefore reverse and remand for a new trial.

2. REMAND IS REQUIRED TO CORRECT SCRIVENER'S ERRORS IN THE JUDGMENT AND SENTENCE.

Sections 2.3 and 4.1 of Bartholomew's judgment and sentence erroneously transpose the standard range sentences for each of the two counts (section 2.3), and also the actual sentences imposed (section 4.1). CP 28. These scrivener s errors require remand for correction.

Under CrR 7.8(a), clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative or on the motion of any party. If this Court affirms Bartholomew's convictions, then it should still remand to correct these errors in the judgment and sentence. See State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal); State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form).

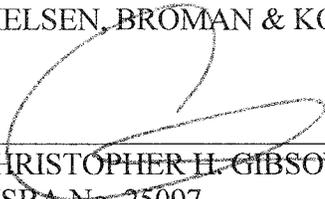
D. CONCLUSION

The improper judicial comment on the evidence contained in an improperly generated judicial response to a jury inquiry requires reversal and remand for a new trial. In the alternative, remand is necessary to correct errors contained in the judgment and sentence.

DATED this 2th day of November 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 44104-7-II
)	
JAMES BARTHOLOMEW,)	
)	
Appellant.)	

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 26TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] JAMES BARTHOLOMEW
DOC NO. 789147
AIRWAY HEIGHTS CORRECTION CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2013.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 26, 2013 - 2:40 PM

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