

FILED
Jul 09, 2013
Court of Appeals
Division I
State of Washington

NO. 89060-9

COA No. 68148-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LONNIE C. LAMAR, Jr.

Respondent.

FILED
JUL 12 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

PETITION FOR REVIEW

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Petitioner

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER..... 1

II. COURT OF APPEALS DECISION 1

III. ISSUE PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 1

V. ARGUMENT 3

 A. BY FAILING TO CONSIDER WHETHER THE ALLEGED
 ERROR IS TRULY OF CONSTITUTIONAL MAGNITUDE, THE
 COURT OF APPEALS DECISION CONFLICTS WITH SCOTT..... 3

 B. BY FAILING TO REQUIRE THE DEFENDANT TO SHOW
 ACTUAL PREJUDICE, THE COURT OF APPEALS DECISION
 CONFLICTS WITH MCFARLAND..... 6

 C. BY ENCOURAGING DEFENSE COUNSEL TO REMAIN
 SILENT IN THE FACE OF ERROR, THE COURT OF APPEALS
 DECISION CREATES AN ISSUE OF SUBSTANTIAL PUBLIC
 INTEREST..... 8

VI. CONCLUSION..... 10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1983)..... 4, 5, 7, 9
State v. Barton, 28 Wn. App. 690, 626 P.2d 509 (1981) 5
State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009)..... 5
State v. McFarland, 127 Wn.2d 322, 899 P.3d 1251 (1995)4, 6, 7, 9
State v. Scott, 110 Wn.2d 682, 757 P.2d 429 (1968)..... 3, 4, 6, 8, 9
State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004)..... 4, 6, 9
State v. Strine, 176 Wn.2d 742, 293 P.3d 1177 (2013)..... 8
State v. Williams, 137 Wn.2d 746, 975 P.2d 963 (1999)..... 4, 5

COURT RULES

CrR 3.3..... 5
CrR 6.5..... 3, 4, 7, 8, 9
RAP 13.4(a)(1) 9
RAP 13.4(a)(4) 9

I. IDENTITY OF PETITIONER

The State of Washington asks this court to review the Court of Appeals decision identified in part II. The State was plaintiff in the trial court and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the defendant's conviction in an unpublished opinion filed June 10, 2013. A copy of the opinion is in the appendix.

III. ISSUE PRESENTED FOR REVIEW

During deliberations, the trial court excused a juror and seated an alternate. In instructing the jury on these events, the court did not tell them to begin deliberations anew. Defense counsel specifically stated that she had no objection to the instruction given by the court. After the jury returned a verdict, each of the 12 agreed that the verdict reflected his or her vote. Did the trial court's instruction constitute manifest constitutional error that can be raised for the first time on appeal?

IV. STATEMENT OF THE CASE

The defendant was charged with first degree rape of a child and first degree child molestation. CP 72-73. Deliberations began

on Friday afternoon, October 14, 2011. The jury deliberated for less than an hour that afternoon. 10/17 RP 429.

On Monday morning, a juror called in sick. The court held a hearing to address this problem. Both the defendant and his attorney were present at the hearing. The parties agreed that the juror could be excused and replaced by the alternative. The court said that it would "tell the other members of the jury that they should provide [the alternate] with a recap of what their deliberations had been on Friday." He asked defense counsel if she had any objections. She said no. 10/17 RP 428-29.

The jury was brought into the courtroom. The court informed them that a juror was ill and had been replaced by the alternate.

The court then stated:

What I will advise you to do is this When you go back to the jury room and begin your deliberations, you should some time reviewing, recapping with [the alternate] any discussion that you may have already had Friday in terms of the case, so that he's first brought up to speed in terms of whatever the deliberative process was.

Then once that's been done, resume your deliberations without any other hitches or anything else.

10/17 RP 430. No objection was made to this instruction.

Later that day, the jury returned verdicts finding the defendant guilty of first degree child molestation but not guilty of first degree rape of a child. The court informed the jury that it was “going to ask you is this how you voted on both of these counts.” Each juror, including the former alternate, answered “yes.” 10/17 RP 432-33.

The Court of Appeals held that failure to instruct the jury to begin deliberations anew was “reversible error of constitutional magnitude.” Slip op. at 4. The court rejected the State’s claim that the error was not “manifest.” Slip op. at 3 n. 1. Instead, the court placed the burden on the State to prove harmlessness beyond a reasonable doubt. Holding that this burden had not been met, the court ordered a new trial. Slip op. at 5-7.

V. ARGUMENT

A. BY FAILING TO CONSIDER WHETHER THE ALLEGED ERROR IS TRULY OF CONSTITUTIONAL MAGNITUDE, THE COURT OF APPEALS DECISION CONFLICTS WITH SCOTT.

CrR 6.5 provides that when a juror is replaced during deliberations, “the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.” The trial court failed to comply with this rule. The defendant, however, never requested such an instruction. A violation of a court rule cannot be raised for

the first time on appeal. State v. Williams, 137 Wn.2d 746, 755-56, 975 P.2d 963 (1999).

The Court of Appeals treated this rule violation as a “manifest error affecting a constitutional right,” which can be raised for the first time on appeal. This court has never considered whether a violation of CrR 6.5 establishes a constitutional violation. The Court of Appeals relied solely on two of its own prior decisions: State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004); and State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1983). These cases, and the current decision which relies on them, conflict with two decisions of this court: State v. Scott, 110 Wn.2d 682, 757 P.2d 429 (1968); and State v. McFarland, 127 Wn.2d 322, 899 P.3d 1251 (1995).

According to Scott, “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” Scott, 110 Wn.2d at 687. Rather, the court should “satisfy itself that the error is truly of constitutional magnitude.” Id. at 688. The Court of Appeals failed to do this.

The Court of Appeals reasoned that CrR 6.5 “relates to a defendant’s constitutional rights to a fair trial before an impartial jury

and to a unanimous verdict.” Slip op. at 3, citing Ashcraft, 71 Wn. App. at 463. This mis-states the issue. Numerous court rules “relate to” constitutional rights, without themselves being constitutionally required. For example, CrR 3.5 is “designed to enforce constitutional rights.” Williams, 137 Wn.2d at 750-51. Similarly, CrR 3.3 was “enacted for the purpose of enforcing the constitutional right to a speedy trial.” State v. Iniguez, 167 Wn.2d 273, 287 ¶ 30, 217 P.3d 768 (2009). Nevertheless, violations of these rules cannot be raised for the first time on appeal. Williams, 137 Wn.2d at 755-56; State v. Barton, 28 Wn. App. 690, 692-94, 626 P.2d 509 (1981).

In the present case, the issue is not whether the trial court violated a rule that “relates to a defendant’s constitutional rights” – the issue is whether the constitutional rights themselves were violated. The answer should be that they were not. With regard to an “impartial jury,” the trial court did nothing to impinge on that right. The instruction given by the court did not favor either party. It did not introduce bias or prejudice into the deliberations. It therefore did nothing to impinge on the right to an impartial jury.

With regard to jury unanimity, the court polled the jury after the verdicts were returned. Each juror affirmed that the verdict reflected his or her vote. 3 RP 432-33. The record thus shows that

the verdict was unanimous. In holding the polling insufficient, the Court of Appeals simply stated that “polling the jury cannot substitute for the procedural omissions in this record.” Slip op at 6, quoting Stanley, 120 Wn. App. at 318. The court did not explain how verdicts that are affirmed by each juror can be anything other than unanimous. The Court thus failed to determine whether the asserted error was “truly of constitutional magnitude,” as required by Scott.

B. BY FAILING TO REQUIRE THE DEFENDANT TO SHOW ACTUAL PREJUDICE, THE COURT OF APPEALS DECISION CONFLICTS WITH MCFARLAND.

McFarland limits the concept of “manifest error”:

The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error “manifest”, allowing appellate review.

McFarland, 127 Wn.2d at 333.

The Court of Appeals failed to apply this holding. Instead, the court hypothesized that the jury *might* have reached agreement on some determinative issue during the initial deliberations. The court assumed that the jury *might* then have failed to reconsider this issue after the alternative was seated. The court then put the burden on the State to prove that this did *not* happen. Slip op. at 6-

7. Rather than requiring the defendant to show “actual prejudice,” the court presumed prejudice and required the State to show its absence. Slip op. at 7.

The court disposed of the State’s “manifest error” argument in a footnote that cited to a footnote in Ashcraft. Slip op. at 3 n 1. In Ashcraft, the court stated that the requirements of CrR 6.5 “relate directly to a defendant’s constitutional right to a fair trial before an impartial jury and to a unanimous verdict.” Ashcraft, 71 Wn. App. at 463. The court then said:

For these reasons, we reject the State’s contention that the appellant has failed to preserve these issues for appeal by failing to timely objection and by failing to bring any posttrial motions. Manifest error affecting a constitutional right may be raised for the first time on appeal.

Ashcraft, 71 Wn. App. at 463 n. 7.

This footnote assumes that any constitutional error can be raised for the first time on appeal. It omits any additional requirement of showing “actual prejudice.” The reason is obvious – Ashcraft was decided almost two years before McFarland. Yet in the present case, the court adopted the reasoning of Ashcraft without any modification. In doing so, the court disregarded the holding of McFarland.

C. BY ENCOURAGING DEFENSE COUNSEL TO REMAIN SILENT IN THE FACE OF ERROR, THE COURT OF APPEALS DECISION CREATES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Court of Appeals decision relieves defense counsel from any need to object to a violation of CrR 6.5. To the contrary, counsel has every reason *not* to object. Ordinarily counsel has no way to know whether jury deliberations have been favorable to the defendant, unfavorable to him, or neutral. As a result, counsel has no reason to believe that the defendant will be benefited by an instruction requiring deliberations to begin anew.

The defendant will, however, be greatly benefited by the *absence* of such an instruction. If the jury acquits the defendant, the case will be over. If it convicts, the defendant can obtain reversal on appeal. This will give him a second chance with a new jury.

“The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” Scott, 110 Wn.2d at 682. This court has “consistently refused” to review such errors. State v. Strine, 176 Wn.2d 742, 750-51 ¶ 12, 293 P.3d 1177 (2013). In the present case, there is every reason to believe that the trial court would have

complied with CrR 6.5, if anyone had called that rule to the court's attention. The Court of Appeals did more than merely "sanction" the defendant's failure to point out the error. Its decision gives future defense counsel every reason to remain silent when such errors occur.

The Court of Appeals decision in this case is unpublished. The court, however, applied its two prior published decisions in Ashcraft and Stanley. The court made it clear that it will continue to apply those precedents rigidly, notwithstanding intervening decisions from this court. The Court of Appeals decision conflicts with the analysis of Scott and McFarland. By encouraging defense counsel to remain silent in the face of correctable errors, the decision creates an issue of substantial public interest. Review should be granted under RAP 13.4(a)(1) and (4).

VI. CONCLUSION

This court should grant review, reverse the Court of Appeals,
and reinstate the judgment of the trial court.

Respectfully submitted on July 9, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent

FILED
COURT OF APPEALS OF THE
STATE OF WASHINGTON

2013 JUN 10 AM 11:45

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 68148-6-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
LONNIE CURTIS LAMAR, JR.,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>June 10, 2013</u>

SPEARMAN, A.C.J. — Lonnie Lamar, Jr. was convicted of child molestation in the first degree. On appeal, he claims the trial court violated his constitutional right to an impartial jury and committed reversible error by failing to instruct the reconstituted jury, after deliberations had begun and an alternate juror had replaced an original juror, to disregard previous deliberations and begin deliberations anew. We agree with Lamar. We reverse his conviction and remand for retrial.

FACTS

The State charged Lamar with rape of a child in the first degree and child molestation in the first degree. The State alleged that on or about January 13, 1998 through July 1, 2000 Lamar had sexual contact and sexual intercourse with his daughter, a minor during that period.

No. 68148-6-1/2

The case went to trial and closing arguments were heard on Friday, October 14, 2011. Before the jury retired, the court excused the alternate juror, Juror 3, directing him to remain available and not talk about the case. The jury deliberated for 45 minutes to one hour that day. On Monday morning, Juror 4 called in sick. The trial court held a hearing with all parties present. The parties agreed to replace Juror 4 with Juror 3. The court told the parties it would "tell the other members of the jury that they should provide [the replacement juror] with a recap of what their deliberations had been on Friday." Report of Proceedings (RP) (10/17/11) at 429. The parties did not object. The jury was brought into the courtroom and the court told the jury:

Well, ladies and gentlemen, as you can see, Juror No. 4 has not been able to join us this morning. He called in early, I think about 6:00 o'clock, and then called a second time about 7:00 o'clock, indicated that he was ill and that he would not be able to come in. And as I explained to you Friday, that's the whole reason I didn't excuse Juror No. 3.

And so now Juror No. 3 is going to take Juror No. 4's spot so that all 12—we have 12 jurors again.

What I will advise you to do is this: When you go back to the jury room and begin your deliberations, you should spend some time reviewing, recapping with Juror No. 3 any discussion that you may have already had Friday in terms of the case so that he's first brought up to speed in terms of whatever the deliberative process was.

Then once that's been done, resume your deliberations without any other hitches or anything else.

RP (10/17/11) at 430. No objection was made and the jury was excused to begin deliberations.

No. 68148-6-1/3

The jury deliberated for approximately four hours that day. The jury delivered its verdict that afternoon, acquitting Lamar of rape of a child and convicting him of child molestation. The court informed the jury that it was "going to ask you is this how you voted on both of these counts." Each juror, including Juror 3, answered "yes." RP at 432-33.

Lamar appeals.

DISCUSSION

Lamar claims the trial court violated his constitutional right to an impartial jury through its instruction to the reconstituted jury.¹ He contends the court failed to instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew as required by CrR 6.5.

A defendant's right to an impartial jury is guaranteed by article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). Claims of constitutional error are reviewed de novo. State v. Stanley, 120 Wn. App. 312, 314, 85 P.3d 395 (2004).

CrR 6.5, governing the use of alternate jurors, relates to a defendant's constitutional rights to a fair trial before an impartial jury and to a unanimous verdict. State v. Ashcraft, 71 Wn. App. 444, 463, 859 P.2d 60 (1993). The rule provides, "If the jury has commenced deliberations prior to replacement of an

¹ The State contends this claim is not a "manifest error affecting a constitutional right" under RAP 2.5(a)(3) that can be raised for the first time on appeal. Its waiver argument is not well taken. We have held that a trial court's failure to instruct a reconstituted jury on the record to disregard previous deliberations and begin deliberations anew is a manifest constitutional error that can be raised for the first time on appeal. State v. Ashcraft, 71 Wn. App. 444, 463 n.7, 859 P.2d 60 (1993).

initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew." CrR 6.5. The purpose of such an instruction "is to assure jury unanimity—to assure the parties, the public and any reviewing court that the verdict rendered has been based upon the consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them." Ashcraft, 71 Wn. App. at 466 (quoting State v. Fisch, 22 Wn. App. 381, 381, 588 P.2d 1389 (1979)). It is "reversible error of constitutional magnitude to fail to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew." Id. at 464.

Ashcraft and Stanley are instructive. In Ashcraft, the jury had begun deliberations when the trial court replaced one juror with an alternate juror without consulting the defense or instructing the reconstituted jury to begin deliberations anew. Id. at 450. The jury returned a verdict of guilty for two counts of second degree assault and guilty of one count of the lesser included offense of simple assault. Id. at 448, 450. We reversed and remanded for retrial on the basis of the trial courts' failure to instruct the reconstituted jury on the record to disregard all previous deliberations and begin deliberations anew. Id. at 467. Similarly, in Stanley, after the original jury had deliberated for approximately one hour, the trial court replaced a juror with an alternate juror, and the record did not show what instruction, if any, was given to the reconstituted jury. Stanley, 120 Wn. App. at 313. Furthermore, the record did not show whether Stanley or his counsel was present when the alternate juror was seated. Id. at 313. The State conceded error under the circumstances, but argued it was harmless. Id. at 316.

No. 68148-6-1/5

We disagreed and reversed the defendant's conviction for felony harassment, noting that as in Ashcraft "[i]t is not beyond the realm of reasonable possibility that the reconstituted jury could have concluded that it need not begin deliberations anew as to any issues already considered by the original 12 jurors."² Id. at 317.

Here, we find nothing in the trial court's statements to the reconstituted jury that instructed it to disregard all previous deliberations and begin anew. In fact, the court told the reconstituted jury that the members of the original jury should review their previous deliberations with the replacement juror and bring that juror "up to speed" as to what the original jurors had discussed. The court's remarks suggested that the reconstituted jury should pick up where the previous jury had left off instead of beginning deliberations anew. The instruction was error.

Because the failure to reinstruct the jury raises an error of constitutional magnitude, it is initially presumed prejudicial and the State bears the burden of proving beyond a reasonable doubt that the error is harmless. Ashcraft, 71 Wn. App. at 465-66.

The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have

² The State seeks to distinguish Ashcraft and Stanley by pointing out that in those cases neither the defendant nor defense counsel were present when the jury was re-impaneled, so there was no opportunity to object. Its argument appears to be that a trial court's failure to properly instruct a reconstituted jury is not alone a sufficient basis for reversal. But in Ashcraft, while we held the trial court's failure to provide defense counsel the opportunity to object was error, we did not decide whether it was reversible error. We reversed solely on the basis of the trial court's failure to reinstruct the jury. Ashcraft, 71 Wn. App. at 464.

influenced the jury adversely to the defendant and did not contribute to the verdict obtained.

Id. at 465.

The State contends any error was harmless, first arguing that the record reflects jury unanimity because each juror was polled. This argument was rejected in Stanley, where the jury was polled and deemed unanimous. Stanley, 120 Wn. App. at 316-18. We stated that “[p]olling the jury cannot substitute for the procedural omissions in this record.” Id. at 318. The State also attempts to distinguish the form of polling in this case by pointing out that the jury in Stanley was asked whether “the verdict was both his or her individual verdict as well as the verdict of the jury as a whole,” id. at 317, whereas the jurors here were asked if “this is how you voted on both of these counts, . . .” RP 432-33. We see no meaningful distinction, and the State does not explain why the form of questioning in this case more clearly illustrates the unanimity of the jury than in Stanley. The State also notes that the original jury deliberated for only 45 minutes to one hour before the alternate juror replaced the juror who was sick. But the reconstituted jury’s entire deliberations took place over a period of only about four or fewer hours.³ The time the original jury spent deliberating was not insignificant in comparison to the time the reconstituted jury spent deliberating. We are not persuaded that the original jury did not reach agreement on any issues determinative to the two charged counts during the 45 minutes to one

³ The reconstituted jury was excused from the courtroom to begin deliberations at 9:24 a.m. and was back in the courtroom to announce its verdict by 1:34 p.m. The record does not indicate whether the jury deliberated for four hours and ten minutes or for a lesser period (if it took one or more breaks for lunch or another purpose).

No. 68148-6-1/7

hour in which it deliberated. Nor are we persuaded that the reconstituted jury concluded it needed to begin deliberations anew as to any such issues.

We are unable to express an abiding conviction, based on the record, that the error in the trial court's instruction was harmless. Accordingly, we reverse Lamar's conviction and remand for retrial.

Reversed.

Spearman, A.C.J.

WE CONCUR:

Vanderhoff

Cox, J.