Filed
Washington State
Court of Appeals
Division Two

December 24, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PATRICK O'MEARA, Appellant.	No. 52088-5-II UNPUBLISHED OPINION

WORSWICK, J. — Patrick O'Meara appeals from his residential burglary and second degree theft convictions, contending that the trial court erred by failing to grant his CrR 7.5 motion for a new trial based on the allegation that a bailiff improperly responded to a juror's question during deliberations. O'Meara also contends that the trial court improperly imposed a $200 criminal filing fee as part of his legal financial obligations. We affirm O'Meara's convictions but remand to the trial court to strike the criminal filing fee.

FACTS

In June 2017, Gary and Andrea Lanthrum left their house in Port Hadlock to go for a walk. As they were returning, they saw a woman in their yard who told them she was looking for a lost dog. While speaking with the woman, the Lanthrums saw a man in their yard who was running away from them. The Lanthrums became suspicious, walked around their house, and saw that a window had been broken. Gary[1] called 911 while Andrea ran back toward the woman

[1] For clarity, this opinion refers to Gary and Andrea Lanthrum by their first names.

who claimed to be looking for a lost dog and took photographs of her. As Andrea walked back toward her house, she encountered a second woman whom Andrea did not know.

Within minutes, police responded to the scene and saw a man who matched the description of one of the burglary suspects walking away from the Lanthrum's house. Police identified the suspect as Donald Green and detained him. Green was transported to the Lanthrums' house and directed police to a duffle bag on adjoining property, which contained items taken from the Lanthrum's house. Police quickly located and identified the two women implicated in the burglary.

Later that same evening, police located and spoke with O'Meara. Police told O'Meara that other suspects had implicated him in the burglary. O'Meara initially denied any involvement in the burglary. The officers arrested O'Meara.

After officers arrested O'Meara, he admitted participating in the burglary. O'Meara led officers to a bedroom and pointed to a shirt that had some of the Lanthrums' property wrapped inside of it.

The State charged O'Meara with residential burglary and second degree theft. The matter proceeded to trial, at which witnesses testified consistently with the facts above. Additionally, Green testified about O'Meara's involvement in the burglary. The jury returned verdicts finding O'Meara guilty of residential burglary and second degree theft.

Before sentencing, O'Meara filed a CrR 7.5 motion for a new trial, alleging that a court bailiff had improperly communicated to jurors during deliberations. In support of the motion, O'Meara attached an affidavit from juror 7. The affidavit stated that juror 7 had heard juror 10 ask a bailiff named Monty if information specific to the trial would be made available to the jury.

After the bailiff told the juror "no," the juror clarified that he was asking whether "transcripts, recordings[,] or anything of that nature" would be made available to the jury. Clerk's Papers (CP) at 165-66. In response, "[t]he bailiff then answered that indeed we could make a request to the judge but that he would not recommend doing that as it takes a long time; maybe even up to an hour." CP at 166. The affidavit went on to list problems with the "unfair" jury deliberations, including how juror 12 would not allow the jury to seek help with transcripts, law, evidence, and charges. CP at 166. Juror 7 also stated that other juror's views were "squelched," "ignored," "circumvented," and "thwarted." CP at 166.

The trial court held a hearing to address O'Meara's motion for a new trial. Bailiffs Monty McCormick and Dennis Gilmore testified at the hearing. McCormick testified that he remembered jurors asking Gilmore whether trial transcripts would be provided with the jury instructions. McCormick said he then interjected to tell the jurors that transcripts were not typically provided with the instructions and exhibits. McCormick also said that he referred the jury to the trial court's instruction that stated "testimony will rarely be, if ever, repeated." CP at 812. McCormick did not remember making any statement to the jury regarding the time it would take for the court to respond to a jury inquiry.

Gilmore testified that he remembered a juror asking him a question and that Monty answered the juror's question, but he could not remember the specific question asked. Gilmore did not remember either bailiff telling the jury about the time it would take for the court to respond to a jury question or request.

The trial court denied O'Meara's motion for a new trial, reasoning:

> In this case, based on the Affidavit of the Witness, these conversations with the Bailiffs took place immediately upon them going into the jury room and they were

> excused to the jury room to begin deliberating at 10:41 a.m. and they didn't come back until 3:29 p.m., so the length of their deliberations was almost five hours. And there weren't any recesses or anything in-between that where they had any occasion or any reason to come back to Court.
>
> So, first of all—first of all, I'm not convinced that any statement about dealing with a jury question and about taking an hour or anything like that—I'm not convinced that that statement was ever made by a Bailiff. I don't know if possibly some other juror said that to the jury—jurors or something, who had other jury experience or something, I don't know. So, I'm not convinced that either one of these Bailiffs made that statement. I cannot think of a question during a jury trial where it's taken an hour or anything close to an hour to deal with that.
>
> But secondly, even if—even if that statement was made, in my opinion, as I say, it's distinguishable from [*State v. Christensen*, 17 Wn. App. 922, 567 P.2d 654 (1977)]. It was an innocuous statement. It was before they started deliberating. And in my mind, beyond a reasonable doubt, it did not impact the jury, it did not prejudice the jury, it did not affect their verdict, it didn't affect their deliberations, in my opinion. And I'm making that finding beyond any reasonable doubt, that was the case.

Report of Proceedings at 834-36.

At sentencing, defense counsel requested the trial court to impose only mandatory legal financial obligations, noting O'Meara's indigence and disability. The trial court agreed to impose only mandatory legal financial obligations. It imposed legal financial obligations that included a $200 criminal filing fee. O'Meara appeals from his convictions and sentence.

ANALYSIS

I. MOTION FOR A NEW TRIAL

O'Meara first contends that the trial court abused its discretion by denying his CrR 7.5 motion for a new trial. We disagree.

CrR 7.5(a)(5) provides a trial court with authority to grant a new trial based on an "[i]rregularity in the proceedings" that prevented the defendant from having a fair trial. A new trial in a criminal proceeding "is necessitated only when the defendant 'has been so prejudiced

that nothing short of a new trial can insure that the defendant will be treated fairly.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). The mere possibility of prejudice is insufficient. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

The decision to grant or deny a motion for a new trial is a matter within the trial court's discretion, and we will not disturb the decision absent a clear abuse of discretion. *Bourgeois*, 133 Wn.2d at 406. "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" *Bourgeois*, 133 Wn.2d at 406 (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)).

In general, a trial court is prohibited from communicating with the jury in the absence of the defendant. *Bourgeois*, 133 Wn.2d at 407. "The bailiff is in a sense the 'alter-ego' of the judge, and is therefore bound by the same constraints." *Bourgeois*, 133 Wn.2d at 407. Additionally, RCW 4.44.300[2] prohibits a bailiff from communicating with the jury during deliberations except to inquire if they have reached a verdict or to make innocuous or neutral statements. *State v. Yonker*, 133 Wn. App. 627, 634-35, 137 P.3d 888 (2006). Although an improper communication between a bailiff and the jury may constitute a constitutional error, "the communication may be so inconsequential as to constitute harmless error." *Bourgeois*, 133 Wn.2d at 407. Therefore, "[o]nce a defendant raises the possibility that he or she was prejudiced

[2] RCW 4.44.300 provides in part:

> The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

by an improper communication between the court and jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt." *Bourgeois*, 133 Wn.2d at 407.

In examining whether an improper communication influenced the jury, we may consider only the improper remarks themselves for their potential prejudicial impact. *State v. Booth*, 36 Wn. App. 66, 69, 671 P.2d 1218 (1983). We cannot consider a juror's statements regarding the communication's impact on the jury because such matters inhere in the verdict. *Christensen*, 17 Wn. App. at 925-26.

> "The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict."

State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989) (quoting *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)).

Here, the trial court indicated in its ruling denying O'Meara's motion for a new trial that it was not convinced that either of the bailiffs had communicated to the jury that it could take up to an hour for the trial court to respond to a jury question or request. O'Meara argues that the trial court failed to provide any rationale for believing the testimony of bailiffs McCormick and Gilmore over the statements in juror 7's affidavit. But O'Meara does not provide any authority supporting the proposition that a trial court must give reasons in support of its credibility determinations. And "'[c]redibility determinations are for the trier of fact' and are not subject to review." *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017) (quoting *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). Because the trial court found that neither bailiff communicated to the jury that it could take an hour for the court to respond to jury

questions or requests based on its credibility determinations, we address only whether Bailiff McCormick's statement to a juror that trial transcripts are not typically provided with jury instructions necessitated a new trial. We conclude that it did not.

Bailiff's McCormick's statement to a juror that trial transcripts are not typically provided with the jury instructions was innocuous and would not have any impact on jury deliberations. Whether trial transcripts and recordings were going to be provided with the jury instructions would have been made apparent to the jury when it received the instructions at the start of its deliberations. Because McCormick's statement was innocuous and did not prejudice the jury's deliberations, any impropriety in making the statement was harmless beyond a reasonable doubt and does not support a new trial. *Bourgeois*, 133 Wn.2d at 407; *Yonker*, 133 Wn. App. at 634-35.

O'Meara argues that the juror's affidavit shows the jury's deliberations were prejudiced even absent a finding that bailiff McCormick had communicated to the jury a time frame for the court to respond to inquiries. But the affidavit showed no such thing. O'Meara relies on statements in the affidavit that reveal the thought process of jurors, which neither this court nor the trial court may consider because such matters inhere in the verdict. *Jackman*, 113 Wn.2d at 777-78; *Christensen*, 17 Wn. App. at 925-26. Accordingly, we do not consider the statements, and we conclude that the trial court did not abuse its discretion when denying O'Meara's CrR 7.5 motion for a new trial.

O'Meara also argues that the bailiff's communication with a juror violated CrR 6.15(f), which rule sets forth the proper procedure for the court to address questions submitted by the jury *during deliberations*. O'Meara's argument overlooks the trial court's finding that the

bailiff's communication with a juror occurred prior to the start of jury deliberations. Moreover, as discussed above, the bailiff's communication did not result in prejudice and, thus, does not support reversible error.

II. LEGAL FINANCIAL OBLIGATIONS

Next, O'Meara argues, and the State concedes, that we should remand for the trial court to strike the $200 criminal filing fee from his judgment and sentence. We agree.

The State concedes that the criminal filing fee is improper under recent legislative amendments and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). We accept the State's concession and remand to the trial court to strike the criminal filing fee.

We affirm O'Meara's convictions and remand to the trial court to strike the criminal filing fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Sutton, J.

Cruser, J.