IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARIO MARTINEZ, Appellant.	No. 41476-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Mario Martinez guilty of second degree assault with a deadly weapon following an altercation that occurred between Martinez and a friend, Michael Pena. RCW 9A.36.021; RCW 9.94A.825. At trial, neither party proposed a jury instruction defining assault. During jury deliberations, the presiding juror sent the trial judge a note requesting the legal definition of assault. Over Martinez's objection, the trial court provided a written response defining assault in the language of 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.50, at 547 (3d ed. 2008) (WPIC).

Martinez moved for a new trial, arguing that the trial court had erred in not reading aloud the instruction defining assault. At sentencing, the trial court denied the motion for a new trial and sentenced Martinez to the low end of the standard range, 3 months, plus an additional 12-month deadly weapon enhancement. On appeal, Martinez maintains that the trial court committed

reversible error when it did not read aloud the definition of assault to the deliberating jury. Martinez also contends that the trial court erred in instructing the jury that it needed to agree unanimously on the answer to the deadly weapon special verdict. Because court rules require that a trial court respond in writing to a deliberating jury's questions and do not require that such answers be read aloud, the trial court did not err and we affirm. Moreover, because the Supreme Court recently overturned *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), *overruled by State v. Nunez*, No. 85789-0, 85947-7, 2012 WL 2044377 (Wash. June 7, 2012), and overruled the "nonunanimity rule" for special verdicts, the trial court did not err—as a matter of law—in informing the jury that it needed to agree unanimously on the answer to the special verdict. *Nunez*, 2012 WL 2044377, at *6.

FACTS

Background

Martinez, Efraim "Scott" Pena, and Michael[1] all lived together on property in Brady, Washington. Scott and Martinez were roommates, sharing a trailer on the property. Michael lived in another trailer on the property, about 50 or 60 feet away. On August 15, 2010, the three were spending time at Schafer State Park with friends. When Martinez began acting "rude" and "belligerent" to strangers, presumably because he was drunk, friends took him home. Report of Proceedings (RP) (Oct. 26, 2010) at 48. Scott and Michael returned from the park about an hour later and stayed outside Martinez and Scott's trailer talking with friends. Martinez came outside and, according to Michael, said he was going to kill him.

[1] For the sake of clarity, Efraim "Scott" Pena and Michael Pena are referred to, respectively, as Scott and Michael with no disrespect intended.

Martinez proceeded to chase Michael with a knife.[2] To ward off the knife attack, Michael "smacked" Martinez in the face with a stick. RP (Oct. 26, 2010) at 66. Martinez then briefly turned on Scott, who avoided any serious harm by slamming Martinez to the ground. Martinez put the knife away, picked up a cinder block, and began breaking the windows of Michael's cars. Michael grabbed a baseball bat and swung it at the cinder block Martinez was then holding. The baseball bat forced the cinder block back into Martinez's head and caused him to turn toward Michael. Michael hit Martinez in the head with the bat and Martinez fell to the ground bleeding. Michael then took the knife from Martinez, ending the altercation.

Having received a 911 call from Michael during the incident, police arrived at the scene shortly after the fight had ended, around 5:00 pm, and found Martinez sitting in a lawn chair, bleeding from his head. A breath test indicated that Martinez's blood alcohol level was .173. Police arrested Martinez and took him by ambulance to the hospital for treatment. After hospital staff cleared Martinez for incarceration, police transported him to the Grays Harbor County jail. Around 10:40 pm, Martinez gave a statement to police after being advised of his *Miranda*[3] rights; in it, he admitted chasing Michael with the knife.

Procedure

On August 26, 2010, the Grays Harbor Prosecuting Attorney charged Martinez with second degree assault of Michael, RCW 9A.36.021, and alleged that Martinez was armed "with a

[2] This knife is variously described as being either a bread knife or a butter knife. The clearest description in the record is that it is similar to a "bread knife from the Outback" Steakhouse. RP (Oct. 26, 2010) at 40. In his statement to police, Martinez describes it as "a kitchen type meat knife with a wooden handle. I would say it is about 12 inches long." Ex. 17.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

deadly weapon, to wit: a knife with a blade in excess of 3 inches" during commission of the crime.[4] Clerk's Papers (CP) at 1; RCW 9.94A.825. At trial, neither the State nor the defense proposed a jury instruction defining assault and the trial court did not initially define assault for the jury.

Initially, the jury received the following instructions related to assault:

> [Instruction No. 4]: A person commits the crime of assault in the second degree when he or she intentionally assaults another with a deadly weapon.
>
> [Instruction No. 5, in part]: To convict Mr. Martinez of the crime of Assault in the Second Degree 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 August 15, 2010, Mario Martinez intentionally assaulted Michael Pena with a deadly weapon;
>
> (2) That the acts occurred in Grays Harbor County, Washington.

CP at 24-25.

During deliberations, the jury sent an inquiry asking for the legal definition of assault. The State asked the court to give the jury the definition in WPIC 35.50. The defense suggested the court tell the jury to reread its instructions. After debate over the matter, the trial court sent the jury a written instruction defining assault. The trial court noted Martinez's objections to this procedure: that the jury instructions "as argued, they become the law of the case" and "the Court should instruct the jury that they must look to the jury instructions as given, and nothing further." RP (Oct. 26, 2010) at 156-57.

The trial court's response to the jury stated,

> An assault is an intentional striking or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A striking or cutting is offensive, if the striking or cutting would offend an ordinary person who is not unduly sensitive.

[4] The State also charged Martinez with second degree assault for the altercation with Scott. The jury acquitted Martinez of this charge.

> An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 21.[5]

On October 26, the jury found Martinez guilty of second degree assault of Michael. The jury also found by special verdict that Martinez committed the assault while armed with a deadly weapon. After the trial, Martinez moved for a new trial in light of *State v. Sanchez*, 122 Wn. App. 579, 94 P.3d 384 (2004), and CrR 6.15(d), arguing only that a trial court must read aloud all jury instructions. The trial court denied the motion for a new trial and distinguished *Sanchez* and CrR 6.15(d) as inapposite to instructing a *deliberating* jury. The trial court, despite expressing misgivings that a deadly weapon enhancement was appropriate in Martinez's case, imposed the 12-month deadly weapon enhancement and sentenced Martinez to the low end of the standard range, for a total of 15 months confinement. Martinez timely appeals.

DISCUSSION

Instructing a Deliberating Jury

On appeal, Martinez does not challenge the substance of the trial court's mid-deliberation instruction. He argues only that the trial court abused its discretion in failing to grant him a new trial because CrR 6.15(d) requires that the trial judge read aloud all jury instructions. Because the trial court complied with applicable court rules and did not abuse its discretion in denying Martinez's motion for a new trial, we affirm.

[5] This instruction mirrors WPIC 35.50.

We review a trial court's denial of a motion for a new trial for an abuse of discretion. *See, e.g.*, *State v. Marks*, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967) ("The trial court is invested with broad discretion in granting motions for a new trial, and the trial court's determination will not be disturbed on appeal absent an abuse of discretion."). A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law." *State v. Lamb*, 163 Wn. App. 614, 625, 262 P.3d 89 (2011), *review granted*, 272 P.3d 851 (2012). To determine whether the trial court based its ruling on an erroneous view of the law, we review the alleged error of law itself de novo. *Lamb*, 163 Wn. App. at 625.

Here, Martinez filed a motion for a new trial after the jury returned its verdict arguing that in light of Division Three's reasoning in *Sanchez*, a new trial should be granted because a trial court was required to read aloud all jury instructions. The trial court denied the motion, holding both that *Sanchez* is distinguishable and that CrR 6.15(d) does not mandate that a trial judge read aloud its response to the questions of a deliberating jury.

We first note that at trial, Martinez objected to the trial court's giving any instruction defining assault to the jury during its deliberations. Martinez argued to the trial court only that the law of the case doctrine precluded the giving of any such instruction. He did not ask that the instruction, if given over his objection, be read aloud. Accordingly, Martinez failed to notify the trial court of his objection in a timely manner to allow it an opportunity to avoid committing any alleged error and has thereby failed to preserve his challenge to the trial court's failure to read aloud the instruction for review.[6] The trial court considered the merits of Martinez's "all jury

instructions must be read aloud" argument in the context of his motion for a new trial. Accordingly, we review its decision refusing to grant a new trial on this basis for an abuse of discretion.

CrR 6.15 governs the procedures by which a trial court instructs a jury on matters of law. We review construction of a court rule de novo because it is a question of law. *See State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). When interpreting court rules, we approach the rules "as though they had been drafted by the Legislature." *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). Accordingly, we apply rules of statutory construction to interpret court rules. *City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003).

If the meaning of a statute is plain on its face, we give effect to that plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To determine the plain meaning of a statute, we look to the text, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and an appellate court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

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[6] Martinez appears to argue that *Sanchez* established that an appellant may raise this issue for the first time on appeal pursuant to RAP 2.5(a)(3) as a "manifest error affecting a constitutional right." Unlike in *Sanchez*, as we further explain in this opinion, the trial court committed no error in this case, let alone a manifest error. Moreover, had the trial court granted Martinez's motion for a new trial, it would have arguably abused its discretion. CrR 7.5(a) dictates when a trial court may grant a new trial. CrR 7.5(a)(6) clearly indicates that a new trial may be granted if an "[e]rror of law" occurred at trial that was "objected to *at the time* by the defendant." (Emphasis added.)

At issue here are CrR 6.15(d) and (f)(1):

> **(d) Instructing the Jury and Argument of Counsel.** The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal.
>
> . . . .
>
> **(f) Question from Jury During Deliberations.**
>
> (1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. . . . Any additional instruction upon any point of law shall be given in writing.

Martinez argues that when read together, these provisions require "the court to read instructions aloud to the jury on a point of law even if the instruction is given after the jury begins deliberations" and that failure to do so is reversible error. Br. of Appellant at 10. Martinez cites to *Sanchez* for support of this proposition. But a plain reading of CrR 6.15 in its entirety does not support Martinez's contention that a failure to read all additional jury instructions aloud is reversible error and *Sanchez* is distinguishable.

CrR 6.15, in its entirety, directs the trial court as to the proper procedures *for each stage of jury instruction and deliberation*: CrR 6.15(a) addresses each party's proposed instructions, clearly envisioning that both parties submit any proposed instruction prior to trial;[7] CrR 6.15(c) addresses the making of proper objections to the court's proposed instructions and requires that arguments over the trial court's final instructions take place outside the presence of the jury; CrR 6.15(d) directs the court to read its final instructions to the jury prior to deliberation followed by closing arguments from both parties; CrR 6.15(e) addresses jury deliberation following closing

[7] CrR 6.15(b) is reserved.

argument; and, finally, CrR 6.15(f) details the procedures the trial court should follow when answering questions from a deliberating jury. The rule provides a temporal roadmap for dealing with jury instructions over the course of a trial; as such there is no need to "harmonize" CrR 6.15(d) and (f)—as Martinez contends. The various provisions of the rule address different circumstances and are intended to apply sequentially, not simultaneously. Accordingly, a trial court is required in the final stage of the process, jury deliberation, to include in the record written questions from the jury, any response and any objection to its response. When the jury's question involves the giving of an additional instruction "upon any point of law," it "shall be given in writing." CrR 6.15(f)(1). The trial court is not required go beyond CrR 6.15(f)(1)'s requirement that the "court shall respond to all questions from a deliberating jury in open court or in writing." Especially, as here, when no party has made a request that it do so, the rule does not require that the trial judge reconvene the jury in open court to read aloud its written response.

In *Sanchez*, Division Three of this court was presented with different facts. In *Sanchez*, the trial court "skipped over" the jury instruction defining assault when it orally instructed the jury on the law. 122 Wn. App. at 585. Thus, having followed CrR 6.15(a) and (c), the trial court then failed to read aloud (for whatever reason) a final instruction agreed upon by both parties, as contemplated by CrR 6.15(d). In contrast, at Martinez's trial, the trial court read every instruction agreed upon by both parties and satisfied CrR 6.15(d). The *Sanchez* opinion may be instructive regarding CrR 6.15(d) but it is inapposite to a situation governed by CrR 6.15(f).

Here, the trial court followed the CrR 6.15 roadmap and did not err by failing to sua sponte read aloud an additional instruction responding to the question submitted by the deliberating jury. Accordingly, we deny Martinez's request that we reverse the trial court's ruling

denying his motion for a new trial. There being no error, the trial court did not abuse its discretion in denying Martinez's new trial motion on this ground.

Special Verdict Unanimity Instruction

Martinez also contends that the trial court erred in instructing the jury that it must unanimously agree on an answer to the special verdict related to the deadly weapon enhancement. The Supreme Court recently overturned *Goldberg* and overruled the "nonunanimity rule" for special verdicts; the trial court did not commit reversible error—as a matter of law—in informing the jury that it needed to agree unanimously on the answer to the special verdict. *Nunez*, 2012 WL 2044377, at *6.

Accordingly, we affirm Martinez's sentence and conviction.

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.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

WORSWICK, C.J.