

DA 16-0448

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 185N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LARRY ELLER,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC 15-553
Honorable Karen Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate
Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant
Attorney General, Helena, Montana

Kirsten Pabst, Missoula County Attorney, Andrew Paul, Deputy County
Attorney, Missoula, Montana

Submitted on Briefs: June 27, 2018

Decided: July 24 2018

Filed:



Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Larry Eller (Eller) appeals from a Fourth Judicial District Court order sentencing him to fifteen years in the Montana State Prison after a jury found Eller guilty of three counts of assault with a weapon, a felony.

¶3 On September 27, 2015, around 9:20 p.m., Missoula City Police Officers responded to a call from three individuals who reported that a neighbor had pointed a gun equipped with a laser at them. Kera Rivera, Brett Michell, and Roxann Jackson had just returned from a concert and were sitting in a vehicle in Michell's apartment parking lot when Eller came out of his house from across the street and began yelling at them. Eller testified that he stepped out on his porch and motioned for the vehicle to turn its lights off because they were shining into his home. Jackson, the driver of the vehicle, testified that she turned her lights off after noticing Eller gesturing towards her. Eller testified that Jackson did not turn her headlights off at this time. Eller went back into his home and came outside a few moments later holding a gun and pointed it at the vehicle. Eller used the laser attached to his gun to signal that the vehicle's headlights were still on. Jackson testified that the laser moved across her body as well as her passengers. Frightened,

Jackson pulled her vehicle out of the parking lot and parked it nearby where passenger Rivera called the police.

¶4 On October 13, 2015, the State charged Eller with three counts of assault with a weapon. During jury selection, prospective juror Mr. Zeimet asked

If you're going to be asking us to make a decision, to me, anybody that has a lot of alcohol in them, there's no reason they should have a gun in their hand. I don't care what the incident is unless somebody else is [in] front of them with another gun, and I want to know if we're going to be able to know that.

You have to let me know that you do have—alcohol, you know, what he had. I don't need to know it now, I just need to know that you do have it because he's going to be wanting me to believe that he was sober enough but he had had a few beers and I can't tell you because I wasn't there. But if the law has proof of certain things, I can feel better about it.

You're wanting us to be a hundred percent, and what I'm trying to do is if the law has an alcohol content, you know, he blew into something or he did a blood test, and that can tell me how bad it was, then I'll be able to make a better judgment on, you know, should he have had a gun in his hand.

¶5 Eller's attorney, Mr. Daly and the District Court discussed the importance of Eller's level of intoxication with Mr. Zeimet.

MR. DALY: Then following up on that, Mr. Zeimet, depending on what that level is, what you're saying to me is from the get-go you would not be able to judge that matter objectively. Your position is that guns and that level of alcohol just simply couldn't mix; is that what you're saying?

PROSPECTIVE JUROR: Yeah, you can't. You know, somebody gets super drunk, you know.

MR. DALY: Your honor, I challenge Mr. Zeimet for cause.

PROSPECTIVE JUROR: The only thing I'm asking is if he knew the level. I'm willing to sit through the whole thing and make judgment, but I just want to know if you have that level if you're going to ask me to make a

judgement (sic) down the road, if you have it, I honestly, I'll give it the best judgment I can, but I just wanted to know that part.

THE COURT: So I think the question, the bottom line question, Mr. Zeimet, if it's at a certain level you'll say the guy never should have had a gun in the first place and I'm going to hold that against him, but if it's so sort of below this level, it's not going to bother me so much.

PROSPECTIVE JUROR: Yeah.

PROSPECTIVE JUROR: Somebody that has a lot of alcohol, there's no reason why he should have a gun. Right there is bad judgment.

THE COURT: Okay. So I have to tell you that I don't know what the level is. Right.

PROSPECTIVE JUROR: But what I was wondering was just if they knew what it was, so we can make our judgment when it comes to it.

THE COURT: All right. You're saying that if it's above a certain level as you understand the way they measure blood alcohol –

PROSPECTIVE JUROR: I would have to hear all the evidence. That's what we're here for. I want to be a hundred percent with that. I just want to know if they had it so we would have that evidence too.

THE COURT: But assuming that it's at a certain level and it might be a high level, that you would really have a tendency to hold that against him?

PROSPECTIVE JUROR: No, because I don't know the whole situation yet.

THE COURT: Okay.

PROSPECTIVE JUROR: You're giving us little bits and pieces as it's going along.

THE COURT: That's right.

PROSPECTIVE JUROR: We're supposed to make the best judgment we can. I just want to know if they have that, you know.

THE COURT: Okay. So you know that they have it. Okay.

PROSPECTIVE JUROR: Yeah.

THE COURT: But then question No. 2 really is that if it's at a certain level which you might consider high, would you hold that against Mr. Eller and have a tendency to reach a conclusion that you might not if it wasn't that high?

PROSPECTIVE JUROR: I don't know the situation yet.

The District Court denied Eller's challenge of Mr. Zeimet for cause.

¶6 After jury deliberation, the following exchange occurred in open court between the District Court and the foreperson regarding the jury's verdict:

THE COURT: Did you not reach a verdict on Counts II and III? I only see a verdict on Count I. There were three separate counts.

FOREPERSON: We must have misread. We thought that the verdict we put on Count I.

THE COURT: Count I really referred to the first victim that was listed on the elements instruction. I think you need to—I'm sorry—go back. And indicate your verdicts for the other two individuals. I'm assuming if you were intending this to apply to all of them, then that should be fairly quick, but I do need to have you do that. So Pat, would you give the verdict back to the foreman and then if you would return with Pat to the jury room, get that filled out, then I'll see you back in a few minutes. Okay.

Following further deliberation, the jury found Eller guilty of all three counts of assault with a weapon. The jury was polled; each confirmed that his or her verdict was guilty on each count.

¶7 On June 8, 2016, Eller was sentenced to a total of fifteen years in the Montana State Prison with fifteen years suspended and received credit for time served in the amount of nine days. The District Court imposed a fine of \$2,500, an \$800 public defender fee, \$100 in prosecution costs, and a \$50 presentence investigation fee. Eller

appeals his conviction, arguing that the District Court abused its discretion when it denied his motion to remove Mr. Zeimet for cause, and violated his right to due process when the District Court placed undue pressure on the jury to reach a guilty verdict on all three counts. Eller also asks for clarification regarding inconsistencies between the oral pronouncement of his sentence and the written judgment.

¶8 This Court reviews a denial of a challenge to dismiss a juror for cause for abuse of discretion. *State v. Russell*, 2018 MT 26, ¶ 10, 390 Mont. 253, 411 P.3d 1260. This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection was made, under plain error review. *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. We exercise plain error review where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Lackman*, ¶ 9.

¶9 A juror may be challenged for cause by either party if the juror has “a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.” Section 46-16-115(2)(j), MCA. A district court must decide whether a juror can be fair and impartial based on the totality of the circumstances, reviewing the challenged juror's responses as a whole. *State v. Allen*, 2010 MT 214, ¶ 26, 357 Mont. 495, 241 P.3d 1045; *State v. Harville*, 2006 MT 292, ¶ 9, 334 Mont. 380, 147 P.3d 222.

¶10 Eller argues Mr. Zeimet’s insistence on knowing the amount of alcohol Eller drank the night in question establishes a serious doubt that Mr. Zeimet would be an impartial and unbiased juror. However, our review of the record does not dictate that conclusion. Mr. Zeimet wanted to know whether evidence regarding Eller’s level of intoxication would be presented at trial, and stated “honestly, I’ll give it the best judgment I can, but I just wanted to know that part.” He repeatedly stated that he would have to “hear all the evidence” and “know the whole situation” before making his decision. *See State v. Normandy*, 2008 MT 437, ¶ 22, 347 Mont. 505, 198 P.3d 834 (holding that if a prospective juror “expresses concern about impartiality but believes he can fairly weigh the evidence, the court is not required to remove the juror”). Considering Mr. Zeimet’s comments as a whole, it is clear that declining to excuse the juror for cause was not an abuse of the District Court’s discretion.

¶11 The United States Constitution and Montana Constitution guarantee a defendant an uncoerced verdict. *State v. Norquay*, 2011 MT 34, ¶ 32, 359 Mont. 257, 248 P.3d 817. A trial court “cannot place undue pressure upon the jury to reach a verdict.” *Norquay*, ¶ 32. Eller asserts that the District Court violated his right to an uncoerced verdict, and requests that this Court review the District Court’s remarks for plain error, as Eller’s counsel did not object during trial. Here, the jury failed to complete the verdict form and assumed it could write the verdict once. Understanding this possible mistake, the District Court directed the jury to clarify the form, commenting that it “should be fairly quick” considering the jury had already made its decision. We decline to apply plain error

review. We do not see a manifest miscarriage of justice, or question the fundamental fairness of the proceeding.

¶12 When oral and written judgments conflict, the oral pronouncement of a sentence controls. Section 46-18-116(2), MCA; *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843. Both Eller and the State assert that the following fees were included in the written judgment but not included in the oral pronouncement: (1) a \$30 court information technology surcharge; (2) a \$3 victim witness administration fee; (3) a \$60 county attorney surcharge; and (4) a \$147 victim witness surcharge. On remand, these fees should be stricken from the written judgment because they were not included in the controlling oral pronouncement. The District Court should also clarify in the written judgment whether the nine days of credit for time served applies to reduce Eller's fine of \$2,500 in addition to his suspended sentence. The State does not object to Eller's request for this clarification.

¶13 The District Court did not abuse its discretion when it denied Eller's motion to remove Mr. Zeimet for cause, and did not place undue pressure upon the jury to reach a verdict. The issues regarding fees and the nine days of credit for time served are remanded to the District Court to prepare a revised written Judgment.

¶14 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶15 Affirmed and remanded for revisions to the Judgment consistent with this Opinion.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR