

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

THE STATE OF WASHINGTON,)	No. 81197-5-I
)	
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
MIGUEL TERRY BROWN)	
)	
Appellant.)	

BOWMAN, J. — Miguel Terry Brown appeals his conviction for residential burglary. He claims the trial court violated his right to a fair trial before an impartial jury when it neglected to identify and release an alternate juror before deliberations. Because an unauthorized juror was present in the jury room during deliberations and the record cannot overcome a presumption of prejudice, we reverse Brown’s conviction and remand for a new trial.

FACTS

A resident of a Seattle apartment complex saw Brown surrounded by partially opened packages in the building’s mail room.¹ The resident did not recognize Brown and asked if he lived in the building. Brown told the man he lived there but gave a “made up” unit number that did not exist and could not

¹ The mail room has a wall of locked mailboxes, on top of which sits a shelf to hold larger packages. The building is controlled access and requires a key fob to unlock all doors and elevators.

produce a key for the mailbox “he was pretending” to open. The resident eventually called 911 and detained Brown until police arrived. The property manager told officers that Brown was not a resident. Brown told officers that he did not touch or steal anything, but surveillance footage from the building’s security cameras showed him opening packages addressed to other people. The State charged Brown with one count of residential burglary.

Following voir dire, the court empaneled 13 jurors to hear Brown’s case. It did not designate an alternate juror. At trial, the State produced evidence that Brown did not live at the apartment building. It also showed the jury video footage of Brown opening boxes addressed to other people and examining their contents.

Before closing arguments, the court instructed the jury that to convict Brown of residential burglary, it must find:

No. 1, that on or about January 16, 2019, the defendant unlawfully entered or remained unlawfully in a dwelling; 2, that the entering or remaining was . . . with intent to commit a crime against a person or property therein; and 3, that this act occurred in the state of Washington.

At Brown’s request, the trial court also instructed the jury on the crime of first degree criminal trespass as a lesser included offense of burglary.²

After closing arguments, the court instructed all 13 jurors “to deliberate and take the instructions back to the jury room with you.” About 15 minutes after deliberations began, the court called the jurors back to the courtroom. It

² Defense counsel asserted that Brown’s statement to police that he was “[j]ust curious” about what was in the apartment building demonstrated Brown had no intent to commit a “crime against a person or property therein.” RCW 9A.52.025.

explained, “[W]e need to deselect the 13th juror and have him or her temporarily excused.” The court then randomly selected a juror as the alternate, temporarily dismissed that juror, and sent the remaining jurors back to the jury room to continue deliberations.

The jury convicted Brown of residential burglary.³ Brown appeals.

ANALYSIS

Unauthorized Juror

Brown argues the trial court violated his constitutional right to a fair trial before an impartial jury when it ordered 13 jurors to deliberate and did not “instruct the reconstituted jury to begin deliberations anew” after it excused one of the jurors as an alternate. We review claims of constitutional error de novo. State v. Blancaflor, 183 Wn. App. 215, 222, 334 P.3d 46 (2014).

“A criminal defendant in superior court has a right to be tried by 12 jurors.” State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994) (citing WASH. CONST. art. I, § 21; CrR 6.1(b) (“the number of persons serving on a jury shall be 12”); State v. Lane, 40 Wn.2d 734, 736-37, 246 P.2d 474 (1952)). Without specific statutory authorization, a verdict by a jury of other than 12 members is unlawful and void. State v. Cuzick, 85 Wn.2d 146, 148, 530 P.2d 288 (1975) (citing State v. Ellis, 22 Wash. 129, 60 P. 136 (1900), overruled in part on other grounds by, Lane, 40 Wn.2d at 734).⁴ Under CrR 6.5, alternate jurors who do not replace a regular juror are “discharged or temporarily excused after the jury retires to

³ During the second half of the bifurcated trial, the jury returned a special verdict finding Brown guilty of rapid recidivism.

⁴ A defendant may waive the right to a jury trial or may stipulate to a jury of fewer than 12 members but no less than 6. Cuzick, 85 Wn.2d at 148; CrR 6.1(b).

consider its verdict.” “Once the prescribed number of jurors becomes ‘the jury,’ then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury.” United States v. Beasley, 464 F.2d 468, 470 (10th Cir. 1972).

In Cuzick, the trial court allowed an alternate juror to remain in the jury room with the 12-member panel during deliberations but instructed the alternate not to participate in deliberations. Cuzick, 85 Wn.2d at 147. Our Supreme Court concluded the juror’s presence in the jury room during deliberations violated the requirement that juries must deliberate in private. Cuzick, 85 Wn.2d at 149.⁵ In Jones v. Sisters of Providence in Washington, Inc., 140 Wn.2d 112, 113-14, 994 P.2d 838 (2000), the trial court ordered an alternate juror to remain with the 12 panel members “and actively participate” throughout deliberations but restricted him from voting on the verdict. Our Supreme Court held that allowing the alternate to participate in the jury’s deliberations was error under CR 47(b).⁶ Jones, 140 Wn.2d at 117.

Similarly, the trial court here permitted an alternate juror to remain in the jury room during deliberations. Because the alternate juror was not statutorily authorized to be there, the juror’s presence violated “[t]he secrecy of jury

⁵ The court later distinguished Cuzick in State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999). In Elmore, “the alternate jurors were not in the jury room during deliberations,” but they returned to the jury room to join the voting members of the jury after deliberations so that they could enter the courtroom as a group when they announced their verdict. Elmore, 139 Wn.2d at 299. The alternates did not discuss the case with the venire or know its verdict and were not privy to any of its private conversations about the case. Elmore, 139 Wn.2d at 299. The Elmore court determined there was no error because “no unauthorized person was present in the jury room during deliberations.” Elmore, 139 Wn.2d at 299-300.

⁶ CR 47(b) is the civil counterpart to CrR 6.5 and the two rules are identical in relevant part.

deliberations [which] is a ‘cardinal principle’ of the [United States Constitution] Sixth Amendment right to an impartial jury.” State v. Magnano, 181 Wn. App. 689, 700, 326 P.3d 845 (2014) (quoting State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005)).

The State argues that any error from the alternate’s presence in the jury room was harmless. But “prejudice will be presumed to flow from a substantial intrusion of an unauthorized person into the jury room unless ‘it affirmatively appears that there was not and could not have been any prejudice.’ ” Cuzick, 85 Wn.2d at 150 (quoting State v. Carroll, 119 Wash. 623, 624, 206 P. 563 (1922)). While the alternate juror here remained in the jury room for a short amount of time before being discharged, “it is impossible, or at least overly burdensome, to determine what occurred in the jury room and what effect the alternate had on the other jurors.” Jones, 140 Wn.2d at 118-19.

We also must assume the alternate juror participated in deliberations. The court instructed the panel:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself and only after you consider the evidence impartially with your fellow jurors. . . .

. . . . The presiding juror’s duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. Deliberations are to occur only in the jury room when all 12 jurors are present.

We presume that jurors follow the court’s instructions absent evidence to the contrary. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). And

deliberating necessarily involves a process where “each juror examines the evidence and the parties’ arguments about what the evidence means, in light of the jury instructions, and all of the jurors exchange their individual perceptions, experiences, and assessments.” State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014). The record does not overcome a presumption of prejudice.⁷

Essential Element of Residential Burglary

Brown argues that the information charging him with residential burglary “is constitutionally deficient for failure to include the essential element of knowing unlawful entry.”⁸ We disagree.

Under RCW 9A.52.025(1), a person is guilty of residential burglary “if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” Brown argues that “inherent in the element of unlawful entry is not only that a person is somewhere he has no right to be, but that he knows he has no right to be there.” We recently rejected Brown’s argument in State v. Moreno, 14 Wn. App. 2d 143, 155, 470 P.3d 507 (2020), review granted in part, 481 P.3d 547 (2021), concluding that knowledge of the unlawfulness of entering or remaining in a building is not an element of burglary because the legislature made a “deliberate choice” not to

⁷ Brown argues that the State could only overcome a presumption of prejudice here by instructing the jury to “disregard all previous deliberations and begin deliberations anew” under CrR 6.5. He is mistaken. CrR 6.5 applies if the court replaces a deliberating juror with an alternate juror after deliberations begin. But here, the court did not replace a deliberating juror with an alternate. Instead, it instructed all 13 jurors to deliberate and later removed one juror as an alternate. While an instruction to disregard previous deliberations and begin anew may have been enough to overcome a presumption of prejudice here, it was not the trial court’s sole cure.

⁸ Charging instruments that fail to set forth the essential elements of a crime in such a way that the defendant has notice of both the illegal conduct and the crime with which he is charged are constitutionally defective and require dismissal. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

include the word “knowingly” in the burglary statute. Brown presents no compelling reason for us to reach a different result.

Because an unauthorized juror was present in the jury room during deliberations and the record does not overcome a presumption of prejudice, we reverse Brown’s conviction and remand for a new trial.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Chun, J.", written above a horizontal line.

A handwritten signature in cursive script, appearing to read "Mann, C.J.", written above a horizontal line.