

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62459-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
TONY SMITH,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 27, 2011
_____)	

Becker, J. — Appellant Tony Smith was convicted on three counts of murder. He challenges the procedure used by the trial court in responding to a juror’s request to be replaced during deliberations. We find no abuse of discretion. The court carefully avoided invading the privacy of jury deliberations, and nothing in the record suggests that the juror’s request stemmed from doubts about the sufficiency of the evidence. We also reject Smith’s assertion that the court closed the courtroom during trial.

JUROR DISMISSAL

Smith’s trial by jury began on May 27, 2008, the Honorable George T. Mattson presiding. On the morning of the third day of deliberations, Juror 8 sent a note to the court asking to be dismissed:

Sorry for any undue burden this may cause the court. I ask (Beg!) that I be excused from this jury for reasoning that is beyond my control. I do not – no – I know that I will never be able to reach a verdict in this case. No amount of instructions to return to this jury and come to a consensus will ever happen. I know that you don't know me personally, but please be advised that my word (which I've given freely from the beginning of this case) is bond. And my request is justifiable and true and correct. In the end this action is to ensure that my actions are totally to ensure that the defendant in this case gets the best and the fairest that I can give. Please replace me with an alternate.

After a hearing to discuss with counsel how best to proceed, the court brought Juror 8 into court by herself and asked her if she was able to follow the court's instructions. The juror answered, "No."^[1] According to findings later entered by the court, her answer was clear, unhesitating, and emphatic. Over Smith's objection, the court dismissed Juror 8 without further questioning of any kind and replaced her with an alternate the next morning. The jury convicted Smith as charged a few hours later. Smith argues on appeal that the dismissal

¹ The court first advised Juror 8 not to say anything about the votes or deliberations of the jury. The court then asked the question in this fashion:

Judge: Okay Miss Juror 8, . . . Okay, your message was pretty long, but the core of the message that we're concerned about is that you say I asked and in parenthesis begged that I be excused from this jury for reasoning that is beyond my control. I do not, no, I know that I will never be able to reach a verdict in this case. I don't really actually want to know precisely what the, what is meant by reasoning beyond your control but I'm going to ask a more narrow question. And the question is through up throughout this process and up until this point have you been able and moreover in the future do you continue to be able to follow the Court's instructions that were given you?

Juror 8: No.

Judge: and that's a yes or no.

Juror 8: No.

Judge: The answer's no. Okay.

of Juror 8 violated his rights to an impartial jury and a unanimous verdict because the trial court did not comply with State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005).

In Elmore, the trial court received two notes, one from the presiding juror and one from another deliberating juror, each of them indicating that a third juror was refusing to follow instructions. Elmore, 155 Wn.2d at 763. After interviewing the two accusing jurors, the court concluded the third juror was refusing to follow the law and refusing to deliberate and had to be excused as unfit. Elmore, 155 Wn.2d at 764. Before actually dismissing the juror, however, the court questioned him “to supplement the record.” Elmore, 155 Wn.2d at 764. Over the defendant’s objection, the court adhered to its decision to disqualify the juror and replace him with an alternate. The reconstituted jury convicted the defendant of first degree murder and other charges. Elmore, 155 Wn.2d at 766.

The Court of Appeals reversed the conviction. The Supreme Court affirmed the decision of the Court of Appeals. In doing so, the court set forth some general guidelines for a trial court faced with the need to investigate accusations of juror misconduct, with particular attention to the special problems that come with an accusation that a juror is engaging in nullification. “Such a case is relatively rare, but it presents special problems, in part because the line between a refusal to follow the law and a decision based on the juror’s perception of the facts is often a fine one.” Elmore, 155 Wn.2d at 770.

The guidelines set forth by the court in Elmore begin as follows: “First, if

a juror or jurors accuse another juror of refusing to deliberate or attempting nullification, the trial court should first attempt to resolve the problem by re-instructing the jury.” If that is ineffective and problems continue, any inquiry by the court “should remain as limited in scope as possible,” focusing on the process of deliberations rather than the content. “Finally we recognize that if inquiry occurs, it should reflect an attempt to gain a balanced picture of the situation; it may be necessary to question the complaining juror or jurors, the accused juror, *and* all or some of the other members of the jury.” Elmore, 155 Wn.2d at 774. The trial court in Elmore, upon receiving notes from two jurors, immediately investigated by interviewing them. The Supreme Court regarded this as a misstep. Any investigation of alleged nullification by a particular juror “risks violation of the cardinal principle that juror deliberations must remain secret.” Elmore, 155 Wn.2d at 770. The better practice is to begin with the more cautious step of simply re-instructing the jury and then allowing them to continue with deliberations. Elmore, 155 Wn.2d at 775.

In the present case, after receiving Juror 8’s note asking to be dismissed, Judge Mattson questioned her and decided to replace her without any preliminary step involving the jury as a whole. Appellant Smith, attempting to liken his case to Elmore, argues that the trial court committed error by failing to re-instruct the jury as a first step. We reject this argument. The general guidelines in Elmore are expressly for the situation where one or more jurors “accuse another juror of refusing to deliberate or attempting nullification.” The

purpose of reinstructing the jury as a whole is to remind them of their duty to deliberate together and follow the law, without singling out any particular juror's point of view in a way that might be taken as approval or criticism. So far as the court was aware, no other juror had accused Juror 8 of anything. Juror 8 singled herself out. She gave no indication of being pressured by other jurors, nor did her note indicate that she or any other juror was engaging in nullification.

Elmore did not require the trial court to assume that Juror 8's desire to be excused necessarily involved a refusal to deliberate or an attempt at nullification, either on her part or by any of the other jurors. The record reflects that Judge Mattson was thoroughly familiar with Elmore and the line of federal cases preceding it. As emphasized in Elmore, "the trial court retains discretion to investigate accusations of juror misconduct in the manner most appropriate for a particular case." Elmore, 155 Wn.2d at 774. We conclude it was not an abuse of discretion for the court to question Juror 8 without first reinstructing the jury as a whole.

In Elmore, after setting forth the general guidelines for investigating allegations of juror nullification, the court addressed the issue of the evidentiary standard a trial court should apply when considering whether a juror is unfit to continue deliberating. Ultimately, the court adopted a heightened evidentiary standard developed in a line of federal circuit court cases: "a deliberating juror must not be dismissed where there is any reasonable possibility that the impetus for dismissal is the juror's views of the sufficiency of the evidence." Elmore, 155

Wn.2d at 761. So long as the trial court has applied the proper standard to the evidence, the trial court's decision deserves deference. Elmore, 155 Wn.2d at 768-69.

A footnote in Elmore addresses a situation where, instead of one juror accusing another, the juror herself asks to be excused. "Where a juror asks to be dismissed, the court must be equally careful that the request does not stem from the juror's wish to avoid the unenviable position of holdout juror, even though the juror has doubts as to the sufficiency of the evidence." Elmore, 155 Wn.2d at 772 n.5. Smith claims that Juror 8's note "strongly supports the conclusion that she was a hold-out juror whose motivation for seeking replacement was a disagreement over the sufficiency of the evidence." He fails to identify any portion of the juror's note that would support such a reading of it.

Juror 8 emphatically stated that she was unable to follow the court's instructions. The court determined that her confession of inability to follow the court's instructions rendered her unfit to serve as a juror. Smith fails to identify any part of the record that should have suggested to the court a reasonable possibility that Juror 8's desire to leave stemmed from her views about the sufficiency of the evidence. Therefore, the trial court's decision deserves deference. We affirm it.

PUBLIC TRIAL

During the testimony of Kay Sweeney, an expert witness for the defense,

a question arose as to whether the defense had fully disclosed Sweeney's notes. Judge Mattson examined the notes to determine whether any of them were privileged as attorney work product. Since the notes were not fully legible, the judge decided it would be necessary to question Sweeney. "Here is what I want to do. I want to clear this courtroom and make this an in camera courtroom and I want Sweeney in here and I want him to read his notes, so I can make sure I understand what he is saying."

Smith asserts that the trial court's decision to "clear" the courtroom triggered the necessity for an analysis under State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995), followed by entry of findings justifying the closure order. State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010). Because the court did not conduct a Bone-Club analysis or make findings, Smith contends he is entitled to a new trial.

Smith's argument rests on a faulty premise. The courtroom was not closed. What actually happened after Judge Mattson made the remarks quoted above is that he changed his mind and decided to question the expert in the courtroom, with the prosecutors voluntarily absent. Judge Mattson asked the prosecution team if they would mind leaving while "everybody" else remained:

COURT: . . . So, the defendant has got to go, just like everybody else, if it is an in camera proceeding, right?

DEFENSE COUNSEL: Right. We're leaving.

COURT: Unless you are okay with me dealing with these guys in an in camera hearing and we can keep him here then.

PROSECUTOR: So everybody but us in the room?

DEFENSE COUNSEL: Yeah, that's pretty much it.

COURT: I mean I suppose that is a way to deal with it.

PROSECUTOR: We are fine with that Your Honor.

IN CAMERA PROCEEDING

COURT: Okay. That means you have to go too, Detective. And Mr. Sweeney, would you come up here. Okay, now I want this declared to be an, you can just sit down, an in camera proceeding. It is sealed, at least for the time being. It will be unsealed if I learn that there is nothing to seal. You are still under oath Mr. Sweeney. Have a seat and start reading your notes from there out loud to me.

...
COURT: Okay. I think we are okay. And you can tell the counsel they can come back in.

The minute entry for the day states that an in camera hearing was held. It does not say the courtroom was closed, the public expelled, or the defendant removed.

It is true that “once the plain language of the trial court’s ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed.” State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005). But here, the initial decision to “clear” the courtroom was not the entirety of the court’s ruling. The transcript indicates that Judge Mattson changed his mind and found it possible to conduct the “in camera” proceeding in open court, with only the prosecutors and the police detective excluded. This overcomes any presumption of closure that arose from the court’s initial remarks. Smith does not argue that excluding the two prosecutors and the case detective violated his or the public’s right to public trial or his right to be present. We conclude the trial court did not commit error under Bone-Club.

STATEMENT OF ADDITIONAL GROUNDS

Smith filed a statement of additional grounds under RAP 10.10. He identifies a concern that Juror 238, the alternate juror who eventually was seated to replace Juror 8, should have been dismissed for implied bias. Nothing learned about this juror during voir dire satisfies the criteria for implied bias as found in RCW 4.44.180 or case law. Smith also contends that statements made by Juror 8 after the trial, considered by the trial court in connection with Smith's motion for a new trial, compel a new trial. The record of the court's inquiry into these statements satisfies us that further review is unwarranted. Finally, Smith questions a ruling permitting an expert witness to testify on ballistics issues. The same issue was argued as a basis for Smith's motion for a new trial. The trial court's memorandum denying that motion satisfactorily explains why the argument was rejected, and Smith identifies no basis for revisiting that ruling.

Affirmed.

Becker, J.

WE CONCUR:

Edmonton, J.

Grosse, J.