IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES ANTHEL WEBB, Appellant.	No. 67059-0-I DIVISION ONE UNPUBLISHED OPINION FILED: July 30, 2012

Leach, C.J. — Charles Anthel Webb appeals his conviction for malicious harassment, arguing that the court denied his constitutional right to a unanimous and impartial jury. He claims that by providing the reconstituted jury with evidence requested by the original jury, the trial court signaled to the reconstituted jury freedom to disregard the court's instruction to begin deliberations anew and impermissibly commented on the evidence. The instruction given to the reconstituted jury to disregard previous deliberations and begin deliberations anew was constitutionally sufficient. The trial court's instructions also averted any potential misinterpretation of the court's actions as a comment on the evidence by the reconstituted jury. We affirm.

Background

The State charged Webb with one count of malicious harassment. Webb pleaded not guilty and went to trial.[1] During the trial, the jury viewed a store

[1] The trial lasted for three days, March 14, 2011, through March 16, 2011.

surveillance video recording and heard a 911 audio recording. After the court temporarily excused the alternate juror and the jury began deliberating, the jury asked the court, "Can the 911 tape and the store video be made available to us in the jury room? And written transcript of the 911 call at least?" The court agreed to allow the jury to view the video and hear the recording one time but rejected the request for a written transcript.

The next morning, before hearing the 911 recording and viewing the store surveillance video, the jury informed the court that juror 12 recalled encountering the defendant on a previous occasion. After questioning, the court, with the parties' agreement, decided to excuse juror 12. The court recalled and questioned the alternate juror to determine whether she remained impartial in the case. The court determined that the alternate remained impartial and seated her on the jury. The court then instructed the reconstituted jury that because the court had seated an alternate juror, the jury must disregard all previous deliberations and begin the process anew in order to give the new juror the chance to participate fully in the deliberations. After so instructing the reconstituted jury, the court then played the 911 tape and store surveillance video for the jury. Later that day, the reconstituted jury found Webb guilty as charged. Webb appeals.

Analysis

Webb first claims that the trial court violated his constitutional right to a unanimous and impartial jury because it did not ensure that deliberations began

anew with the alternate juror. A criminal defendant has a constitutional right to an impartial 12-person jury and a unanimous verdict.[2] When the court replaces a juror during deliberations, CrR 6.5 protects this right by requiring the court to instruct the reconstituted jury to begin deliberations anew. We presume a jury followed a trial court's instructions to begin deliberations anew.[3] A trial court's failure to instruct the reconstituted jury on the record to disregard previous deliberations and begin deliberations anew constitutes a manifest constitutional error,[4] which can be raised for the first time on appeal.[5]

Webb also contends that when the trial court played the 911 tape and store surveillance video for the reconstituted jury immediately after instructing it to begin deliberations anew, it signaled to the jury that it did not need to begin deliberations anew. We disagree. No error occurs if a reviewing court can ascertain from the record that jury unanimity was preserved.[6] Thus, to uphold the conviction, the court's record must show that the reconstituted jury was instructed to disregard previous deliberations and begin the process anew.[7]

Here, the court instructed the reconstituted jury that it "must disregard all previous deliberations . . . and start over again so that juror number 8 will of course have a chance to participate fully in those deliberations." This instruction

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[2] State v. Ashcraft, 71 Wn. App. 444, 463, 859 P.2d 60 (1993).

[3] State v. Wirth, 121 Wn. App. 8, 13, 85 P.3d 922 (2004) (citing State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994)).

[4] Ashcraft, 71 Wn. App. at 467.

[5] RAP 2.5(a)(3).

[6] State v. Stanley, 120 Wn. App. 312, 316, 85 P.3d 395 (2004) (quoting Ashcraft, 71 Wn. App. at 466).

[7] Ashcraft, 71 Wn. App. at 464.

sufficiently protected Webb's constitutional right to an impartial and unanimous jury.

Webb relies on two cases decided by this court: (1) State v. Ashcraft[8] and (2) State v. Stanley.[9] In Ashcraft, the defendant claimed that the trial court erred by failing to instruct the jury to begin deliberations anew when the new juror was seated. We held that the reviewing court must be able to determine from the record that jury unanimity has been preserved and that the court's failure to instruct the reconstituted jury on the record was manifest constitutional error.[10]

Similarly, in Stanley, the defendant claimed, and the State conceded, that the trial court committed error when it failed to instruct the reconstituted jury on the record to begin deliberations anew.[11] But the State argued that because the evidence on the record suggested that the reconstituted jury began new deliberations and because the evidence against the defendant was overwhelming, the trial court's error in not instructing the jury on the record was harmless.[12] The State also noted that because the reconstituted jury deliberated on the single count for over an hour, there was no risk that the reconstituted jury did not deliberate anew.[13] The Stanley court rejected this argument and found

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[8] 71 Wn. App. 444, 859 P.2d 60 (1993).

[9] 120 Wn. App. 312, 85 P.3d 395 (2004).

[10] Ashcraft, 71 Wn. App. at 464-65.

[11] Stanley, 120 Wn. App. at 316 (The State bears the burden of proving beyond a reasonable doubt that the error is harmless. (citing Ashcraft, 71 Wn. App. at 466)).

[12] Stanley, 120 Wn. App. at 316.

[13] Stanley, 120 Wn. App. t 316-17.

that the State failed to prove the error harmless. We held that a reasonable possibility existed that the reconstituted jury concluded that it need not begin deliberations anew as to any of the issues discussed by the original jury.[14]

Here, unlike Ashcraft and Stanley, the court explicitly stated on the record that the reconstituted jury should disregard all previous deliberations and begin anew. Once the trial court instructs the reconstituted jury to begin deliberations anew, we presume that the jury followed that instruction.[15] Webb cites no authority supporting his claim that the court's subsequent actions signaled to the jury that it could or should ignore the instruction just given. He points to nothing in the record supporting this claim. We find the argument unpersuasive.

Second, Webb claims that by immediately providing the reconstituted jury with the 911 recording and the store video, without any new request from the reconstituted panel, the court imbued those exhibits with special importance, thus impermissibly commenting on the evidence. Article IV, section 16 of the state constitution prohibits words or actions that have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight, or sufficiency of evidence introduced during trial.[16] An impermissible comment conveys to the jury a judge's personal attitude toward the merits of the case or allows a jury to infer from the judge's action or inaction that judge's view on an

[14] Stanley, 120 Wn. App. at 317.
[15] Wirth, 121 Wn. App. at 13 (citing Johnson, 124 Wn.2d at 77).
[16] State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

issue.[17]

Article IV, section 16 prevents a jury from being influenced by knowledge conveyed to it by the court in regard to evidence.[18] For example, in State v. Elmore,[19] the defendant claimed that the court impermissibly commented on the evidence by having him appear before the jury in shackles because this made the defendant appear guilty. However, the trial court made no actual comment or statement regarding the shackles, and the reviewing court held that any possible comment on the evidence was averted by a jury instruction requiring the jury to disregard any words or conduct conveyed by the trial judge that may appear as a comment.[20] Thus, if any misinterpretation did exist among the jurors, then the jury instruction would have cured it.

Webb has not persuaded us that the trial court commented on the evidence. He acknowledges that the record does not reflect that the reconstituted jury resumed deliberations where the original jury left off. But, like Elmore, the trial court avoided any possible misinterpretation of its actions by giving the reconstituted jury the following instruction:

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any

[17] Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

[18] State v. Elmore, 139 Wn.2d 250, 275-76, 985 P.2d 289 (1999) (citing State v. Lord, 117 Wn.2d 829, 862, 822 P.2d 177 (1991)).

[19] 139 Wn.2d 250, 275-76, 985 P.2d 289 (1999).

[20] Elmore, 139 Wn.2d at 276.

> way, either during trial or in giving these instructions, you must disregard this entirely.

Thus, even if the reconstituted jury was inclined to misinterpret the court's action, this instruction averted the misinterpretation.[21]

Conclusion

The trial court sufficiently instructed the reconstituted jury to begin deliberations anew on the record. Webb fails to show that the trial court impermissibly commented on the evidence. We affirm.

Leach, C.J.

WE CONCUR:

[21] Elmore, 139 Wn.2d at 276.