Filed
Washington State
Court of Appeals
Division Two

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DESHAWN DENTON, Appellant.	No. 49115-0-II consolidated with No. 49125-7-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted Michael DeShawn Denton of felony harassment and two counts of custodial assault after Denton, a Pierce County Jail inmate, threw liquid from his toilet on prison staff. Denton argues that the trial court erroneously excluded a defense witness, impermissibly commented on the evidence, and improperly instructed the jury. In a statement of additional grounds (SAG), Denton argues the jail limited his access to legal resources in violation of his right to a fair trial. We affirm.

FACTS

While incarcerated in the Pierce County Jail, on two separate occasions Denton threw liquid from his cell toilet on staff. On November 16, 2015, Denton threw an unknown liquid on Deputy Andy Powell as he arrived to deliver Denton a sack lunch. The liquid hit Powell's shirt, pants and left forearm. Powell testified that Denton, who remained locked in his cell throughout the incident, also verbally threatened to attack Powell. The State charged Denton with custodial assault against Powell and felony harassment.

On November 18, 2015, Denton again threw liquid at Deputies Matt Watson and Mario Moreno. During meal time, Moreno approached Denton's cell and discovered that Denton blocked the "trap door"[1] with his hand and arm. Moreno ordered Denton to remove his arm and radioed Watson for assistance. Watson arrived and also ordered Denton to remove his arm. Denton refused. Watson threatened to hit Denton's hand with his service flashlight if he did not. Watson attempted to clear Denton's arm from the trap door. Denton resisted, and Watson struck Denton's hand "medium" hard three times with his flashlight.

Denton withdrew his arm, picked up his cup, and announced that he was going to throw feces on the deputies. Denton dipped his cup in the toilet and two times threw the contents at the inner door of his cell. Watson backed away and did not get hit. However, liquid from Denton's second attempt passed through a gap in the Plexiglas inner door and contacted Moreno's back, left arm, and parts of his hair. The State charged Denton with custodial assault against Moreno, custodial assault against Watson, and felony harassment.

The two cases were consolidated for trial. Denton represented himself. On the first day of trial, Denton submitted a witness list that included a Pierce County Jail inmate, Anthony Cloud. Denton asserted that Cloud witnessed the Watson and Moreno incident from a nearby cell and would testify to Denton's innocence. Denton had not previously disclosed Cloud. Because of the late disclosure, the trial court did not allow Denton to call Cloud as a witness. The trial judge also expressed concern that Cloud might represent a security risk to courtroom staff, recalling that Cloud "charged" an officer during a prior proceeding before that judge. Report of Proceedings (RP) (May 9, 2016) at 71.

[1] The "trap door" is a port in the inner cell door used for cuffing people and delivering food.

As trial proceeded, Denton and the trial judge engaged in several exchanges regarding Denton's questioning of witnesses. One such exchange occurred during Denton's examination of Watson regarding the November 18 incident. Watson testified during direct examination that at the moment Denton threw feces at his inner cell door, the trap door was closed but not "secured". On redirect, Watson clarified that "secured" in this context means "fully closed and locked." RP (May 11, 2016) at 185.

Denton's questions on recross implied Watson had testified that the trap door was open and that he changed his testimony to later say it was closed. After the state objected, the trial judge corrected Denton and restated Watson's testimony. The following exchange occurred:

> [DENTON]: At the time the prosecutor just asked you when Officer Moreno was hit [with feces], was the trap door secured, you said yes; is that correct?
>
> [PROSECUTOR]: Objection, I think that's inaccurate . . .
>
> THE COURT: . . . I don't think that was the testimony.
>
> [WATSON]: No.
>
> DENTON: The prosecutor asked him, Your Honor, just then was the trap door secured, the actual door secured.
>
> THE COURT: He didn't answer the way that you're suggesting that he answered. He answered the door was closed, but it wasn't locked. In his view, it wasn't secured.
>
> DENTON: He said that the trap door was secured at the time that he said Officer Moreno was hit with the liquid above, when the prosecutor just asked him.
>
> THE COURT: That's not what his testimony was, Mr. Denton.
>
> . . . .
>
> THE COURT: Go ahead and ask him [whether the door was secured] just to clarify it.
>
> [DENTON]: At that time, was the trap door secured or unsecured[?]
>
> [WATSON]: I believe it was unsecured.
>
> . . . .
>
> DENTON: Unsecured. Okay. Okay. He said unsecured. Okay.

RP (May 11, 2016) at 186-87.[2]

[2] At oral argument before us, Denton's appellate counsel conceded the trial court judge accurately described Watson's testimony.

The jury found Denton guilty of custodial assault against Powell and Moreno. The jury also found Denton guilty of felony harassment arising from the November 18 incident. The jury found Denton not guilty of custodial assault against Watson and not guilty of felony harassment against Powell. Denton appeals.

ANALYSIS

I. EXCLUSION OF WITNESS

Denton argues that the trial court denied his right to present a defense by excluding a potential witness from testifying. Because the issue has not been properly preserved, we disagree.

The four part test for determining if a trial court erred in excluding a witness because of a discovery violation is contained in *State v. Hutchinson*, 135 Wn.2d 863, 882-83, 959 P.2d 1061 (1998). The factors to consider are "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." *Hutchinson*, 135 Wn.2d at 883. To apply these factors, the court must know the substance of the proffered testimony.

Although neither party raised ER 103 in its briefing, ER 103 is dispositive on this issue. ER 103 states:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . . .
>
> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

In order for us to determine that excluding Cloud was error, we must first know what Cloud's testimony would have been. Without this information, it is impossible to determine

whether the court abused its discretion, or whether exclusion affected a substantial right of the party, or influenced the case outcome in any way.

We emphasize that Denton refused to discuss Cloud's proffered testimony when asked directly by the trial court. The trial court asked about the substance of Cloud's testimony and Denton explained only that Cloud "was there at the time," "witnessed" the incidents, and would testify to Denton's "innocence." RP (May 9, 2016) at 69. This explanation is inadequate. As a result of this refusal, Denton made no offer of proof. Nor is the substance of Cloud's testimony "apparent from the context." ER 103(a)(2).

Without some knowledge of Cloud's testimony, we cannot determine whether Cloud's exclusion complied with *Hutchinson*. For example, we cannot evaluate the effect of witness preclusion on the evidence and the outcome of the case. We also cannot analyze whether Cloud's testimony would prejudice the prosecution without first knowing what Cloud intended to say. Cloud cannot benefit from his refusal to respond to the trial court's inquiry.

Because the substance of the evidence was neither made known to the court nor apparent from the context within which questions were asked, error cannot be predicated on the exclusion of Cloud's testimony. Denton's claim fails.

II. THE TRIAL COURT DID NOT IMPERMISSIBLY COMMENT ON THE EVIDENCE

Denton argues that the trial judge's comments during cross-examination of Watson violated Washington's Constitution by impermissibly commenting on the evidence. We disagree.

Article 4, section 16 of the Washington State Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The constitutional prohibition on judges commenting on evidence serves to prevent the trial court from unduly influencing the jury. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Judges

are not expected to remain silent. The Constitution only prohibits commentary "which conveys to the jury a judge's personal attitudes towards the merits of the case or allows the jury to infer . . . that the judge personally believed [or did not believe] the testimony in question." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). Within these guidelines, trial courts retain broad discretion to regulate testimony and witness examination. ER 611. This exercise of discretion is guided in part by Washington rules of evidence, which require trial courts to "exercise reasonable control" over witness examination to assist the jury in "ascertainment of the truth." ER 611(a).

During trial, Watson testified that the inner cell trap door was shut but not "secured" when Denton threw feces during the November 18 incident. Denton's questioning suggests that Denton either misheard Watson's testimony or believed "unsecured" meant "open." The trial court intervened to correct Denton's apparent misunderstanding of Watson's testimony. At oral argument before us, Denton's appellate counsel conceded the trial court judge accurately described Watson's testimony.

Clarifying a witness' testimony during cross-examination prevents a party's confusion from spreading to the jury, and is consistent with the court's duty to ensure witness interrogation is "effective for the ascertainment of the truth." ER 611(a). A trial court does not exceed its authority simply by clarifying witness testimony, because such clarification neither prejudices the defendant nor communicates the judge's personal opinions. *See State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). In this context, the court would err only if, in clarifying the testimony, the court also communicated its views on the merits of the case. "To constitute a comment on the evidence . . . the attitude of the court toward the merits of the cause must be reasonably inferable from the nature or manner of the questions asked and things said." *Dennis v. McArthur*, 23 Wn.2d

33, 38, 158 P.2d 644 (1945), *overruled on other grounds by State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1952).

Denton's brief argues that the trial court "improperly influenced the jury's opinion of Denton's credibility by openly and repeatedly contradicting him." Br. of Appellant at 12. Denton provides no evidence as to the jury's assessment of his credibility. However, even assuming Denton's assertion is true, his argument misses the point. A trial court violates article 4, section 16 of the Washington State Constitution by communicating an opinion of the underlying testimony or the merits of the case. *State v. Brush*, 183 Wn.2d 550, 565, 353 P.3d 213 (2015).

Here, the trial court's comments do not express any assessment of the reliability of Watson's testimony or the merits of the case. In fact, the court's language carefully distinguished Watson's testimony from the opinion of the court: "He answered the door was closed, but it wasn't locked. In his view, it wasn't secured." RP (May 11, 2016) at 187. The court simply repeated what Watson said, without comment as to whether the court found the testimony to be credible. The trial court did not impermissibly comment on the evidence.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON UNANIMITY

Denton next argues that the trial court's instructions to the jury deprived Denton of his right to a fair trial by failing to guarantee a unanimous verdict. Denton did not to object to the relevant instruction at trial, and therefore has not preserved this issue for appeal.

In order to raise the argument for the first time on appeal, Denton must show "manifest error affecting a constitutional right." RAP 2.5; *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Denton does not satisfy this burden; however, we must perform the analysis to show why.

Criminal defendants have a right to a unanimous jury verdict. WASH. CONST. ART. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). In this context, "unanimity"

means a consensus reached through rational and persuasive argument amongst the jurors. *Lamar*, 180 Wn.2d at 584. At trial, the court instructed the jury in relevant part, that they must return a unanimous verdict:

> 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, but only after you consider the evidence impartially with your fellow jurors.

Clerk's Papers at 62. The jury instruction is the relevant pattern jury instruction. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.04, at 18 (3rd Ed. 2018).

Denton now argues that failing to affirmatively state that "deliberations must involve all twelve jurors at all times" constituted manifest constitutional error. Br. of Appellant at 15, 20. However, Denton presents no actual evidence of non-unanimity, and therefore cannot show prejudice. Contrary to Denton's assertion, the evidence in the record indicates that the jury returned a unanimous verdict. After the jury announced its verdict, the trial court polled all twelve jurors to confirm their unanimity. Because Denton presents no evidence of non-unanimity or prejudice, he cannot demonstrate manifest constitutional error and cannot raise this argument for the first time on appeal.

IV. SAG ISSUE

TEMPORARY LIMITATIONS TO LEGAL RESOURCES DID NOT VIOLATE DENTON'S RIGHT TO A FAIR TRIAL

In his SAG, Denton separately asserts that the Pierce County Jail denied him access to legal materials to prepare his defense and violated his due process rights. Specifically, Denton asserts that he was not allowed access to legal books and the prison library law computer. Because the record contradicts Denton's assertions, we disagree.

It is true that Denton's aggressive behavior towards prison staff and pattern of feces-related incidents led to Denton being placed on security alert, which resulted in being temporarily denied access to the prison library and hardbound books. However, the trial court ordered the jail to reinstate Denton's access to legal materials. The court warned Denton that use of the materials for purposes other than preparing his defense could result in further restrictions.

We affirm.

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.

Melnick, J.

We concur:

Worswick, J.

Bjorgen, C.J.