

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27609-1-III

Respondent,

)

)

) **Division Three**

v.

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)

DENISE LUCILLE SMITH,

) **UNPUBLISHED OPINION**

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Appellant.

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)

Kulik, C.J. — Denise Smith appeals her conviction for vehicular assault. Ms. Smith contends the trial court erred by denying her motion to arrest judgment and her motion for a new trial based on juror misconduct. The trial court talked with the juror and found no misconduct. We review these motions for an abuse of discretion.

We affirm the trial court’s denial of the motion to arrest judgment and the motion for a new trial. Accordingly, we affirm Ms. Smith’s conviction for vehicular assault.

FACTS

On the evening of June 29, 2007, Ms. Smith and Arthur Lemon were involved in a head-on car accident. Mr. Lemon was hospitalized with fractured ribs, a broken nose,

and a facial laceration. Sergeant Joe Riggers, the first officer to arrive on the scene, observed that Ms. Smith smelled of alcohol. Ms. Smith admitted to drinking prior to driving. She failed sobriety tests; her blood alcohol concentration tested over the legal limit. Ms. Smith was arrested for driving under the influence of alcohol.

The State charged Ms. Smith with one count of vehicular assault. During jury selection, the jury pool was asked whether anyone had problems hearing. Both juror 21 and juror 38 indicated they had problems hearing, but both felt they could hear fine from the jury box. Later, the prosecutor told these two jurors that if they had any problems hearing during trial, they were to notify someone immediately.

At trial, the primary issue was fault. While Mr. Lemon testified his vehicle never crossed the center line, both Ms. Smith and Samuel Smith, who was a passenger in Ms. Smith's vehicle during the crash, testified that the accident occurred in their lane.

Washington State Patrol Trooper Mark Boardman analyzed the crash scene and created a reconstruction of the accident. According to Trooper Boardman, Ms. Smith was at fault because her vehicle crossed the center line and collided with Mr. Lemon in his lane. Sergeant Riggers agreed that, based on the evidence, the accident occurred in Mr. Lemon's lane.

A jury found Ms. Smith guilty of vehicular assault. Following the verdict, but prior to sentencing, Ms. Smith moved to arrest judgment or, in the alternative, grant a new trial based on several alleged errors, including juror misconduct. Ms. Smith's trial attorney argued he was confronted after the verdict by a juror who notified him that she did not hear large parts of the trial.

The court denied the motion and made the following statement regarding the alleged misconduct:

As far as the misconduct of the juror, I also talked to the same juror. And she did not tell me that she could not hear. She said she had some problems hearing [defense counsel] when he turned his back on her, and perhaps some other things, but she did not indicate that she missed the whole trial because she couldn't hear. And besides, I don't have any affidavit from a juror to that—to the effect of that. I talked to the same juror extensively, probably as much as counsel did. And she also did not indicate that she found Ms. Smith guilty just because of her high [blood alcohol concentration] BAC. I think that's stretching the facts as far as what this juror indicated, at least to me. Perhaps she indicated something different to you, [defense counsel], but that's not what she indicated to me.

Actually, I can say there's probably nobody in this courtroom that hears every word that is said in this courtroom. And the fact that a juror might have missed a word here and there does not certainly rise to the level of being misconduct.

Report of Proceedings (RP) at 562.

Ms. Smith appeals the denial of the motions to arrest judgment and for a new trial.

ANALYSIS

Motion for a New Trial. “A trial court’[s] ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion.” *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). The court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

“As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict.” *Balisok*, 123 Wn.2d at 117. “A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *Id.* at 117-18.

We will grant a new trial only where juror misconduct prejudiced the defendant. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). “Once juror misconduct is established, prejudice is presumed.” *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). “[T]hat presumption can be overcome by an adequate showing that the misconduct did not affect the deliberations.” *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). “To assess whether prejudice has occurred, it is necessary to compare the particular misconduct with all of the facts and circumstances of the trial.” *State v.*

Tigano, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991). “[T]he trial judge is in the best position to make this comparison.” *Id.*

Ms. Smith contends that one of the jurors committed misconduct by failing to notify the court or counsel that she could not hear large portions of the trial. When the trial court spoke with the juror, she indicated that she only had problems hearing defense counsel when he turned his back on her. The court, after conducting its own investigation and speaking with the juror, found that a new trial was not required because no misconduct had occurred. Given the record here, we cannot conclude that the court abused its discretion by denying Ms. Smith’s motions. Ms. Smith has not shown this court how juror misconduct, if there was any, contributed to the verdict. *See Depaz*, 165 Wn.2d at 856.

The record shows Ms. Smith operated a motor vehicle while under the influence of alcohol. *See* RCW 46.61.522(1)(b).¹ The jury heard testimony from multiple witnesses indicating that Ms. Smith’s vehicle crossed the center line in the road and collided head-on with Mr. Lemon’s vehicle. The jury also heard testimony from Mr. Lemon and Dr. Patrick Grimsley that, as a result of the accident, Mr. Lemon suffered several broken ribs,

¹ “A person is guilty of vehicular assault if he or she operates or drives any vehicle . . . [w]hile under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another.” RCW 46.61.522(1)(b).

a broken nose, and a laceration to his face. Mr. Lemon testified he was in severe pain for approximately eight weeks after the accident. These injuries satisfy the definition of “substantial bodily harm.” *See* RCW 9A.04.110(4)(b).² Consequently, there was sufficient evidence for the jury to find Ms. Smith guilty beyond a reasonable doubt of vehicular assault. *See State v. Treat*, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001).

Ms. Smith also contends the court erred by failing to hold an evidentiary hearing. This court reviews “the denial of a post-verdict evidentiary hearing for an abuse of discretion.” *United States v. Saya*, 247 F.3d 929, 934 (9th Cir. 2001). ““ An evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias.”” *Id.* at 934-35 (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993)). ““ Although it is usually preferable to hold [an evidentiary] hearing, ’ it is not necessary where ‘the court [knows] the exact scope and nature of the . . . extraneous information.’”” *Id.* at 935 (quoting *United States v. Halbert*, 712 F.2d 388, 389 (9th Cir. 1983)). Here, the record shows the court understood the exact scope and nature of the alleged misconduct and determined it could make a determination without holding an evidentiary hearing. The court did not abuse its discretion by ruling on the motions without holding

² “Substantial bodily harm” is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

an evidentiary hearing.

STATEMENT OF ADDITIONAL GROUNDS

In her statement of additional grounds, Ms. Smith contends: (1) the court erred by refusing to admit certain photographs into evidence, and (2) she did not receive a fair trial due to the trial court's lack of impartiality.

“[T]he trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when its decision is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Before a photograph may be considered admissible, there must be evidence of when, where, and under what circumstances the photograph was taken. *State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961). And there must be an indication that the photograph accurately portrays the subject as illustrated. *Id.* “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a).

Here, Ms. Smith contends the court erred by refusing to admit photographs into evidence. However, the record shows that the defense only moved to admit one

photograph into evidence. Defense counsel did not move to offer any of its remaining photographs. The photograph that was offered, and subsequently denied, depicted Ms. Smith's vehicle—six months after the accident—after the vehicle had been hauled away and impounded. When asked if it was fair to assume the vehicle in the picture was in the same condition as it had been on the night of the accident, Trooper Boardman responded, “No.” RP at 382. The court refused to admit the photograph into evidence because there was no testimony or evidence showing that the photograph of Ms. Smith's vehicle accurately portrayed how the vehicle looked at the time of the accident. The court did not abuse its discretion by refusing to admit the photograph into evidence. *See Tatum*, 58 Wn.2d at 75; ER 901(a).

Ms. Smith's second contention, that the trial court was not impartial, is unsupported by the record. Ms. Smith highlights several evidentiary rulings to support her assertion that the trial court was biased. She fails to cite to any other part of the record or to any legal authority to support her assertion. A trial court is not automatically a biased court because its evidentiary rulings are sometimes unfavorable to one party. Evidentiary rulings are often unfavorable to one party. Based on this record, this court cannot conclude that the trial court was biased.

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We affirm the trial court's denial of the motions to arrest judgment and for a new trial. Accordingly, we affirm the conviction for vehicular assault.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.