



State v. Barnes

131 Wash.App. 1036 (2006) | Cited 0 times | Court of Appeals of Washington | February 13, 2006

JUDGES: Susan Agid, Marlin Appelwick and Ronald Cox.

UNPUBLISHED OPINION

If there is a reasonable basis to believe that the jury's consideration of extraneous evidence prejudiced the defendant, the trial court must grant a new trial. Because the trial court applied the correct legal standard and there was no reasonable likelihood that jury misconduct prejudiced Judy Barnes' right to a fair trial, the trial court did not abuse its discretion in denying her motion for a mistrial. We also reject Barnes' pro se arguments. Accordingly, Barnes' conviction for one count of intimidating a witness is affirmed.

Judy Barnes was charged in San Juan County with one count of intimidating a witness. At trial, the State presented evidence that Barnes threatened a confidential informant who had assisted police in a drug investigation. The investigation led to the arrest of Barnes' son. During jury deliberations, a juror approached the bailiff and requested to be excused. The bailiff contacted the trial judge, Judge Alan Hancock, who was sitting that day in Island County Superior Court. The bailiff informed him that juror Anne Ha was upset and afraid of 'repercussions' should Barnes be found guilty. Judge Hancock then conducted a telephonic hearing. At the hearing, Ha informed the court that she was experiencing a 'high degree of emotional distress and anxiety' and was unable to be impartial. She explained that the trial had reawakened memories of a childhood incident in which her father had threatened her mother's life. During questioning from defense counsel, Ha acknowledged that she had concerns for her personal safety. She referred specifically to an incident outside the courtroom during voir dire when Barnes had smiled at Ha and indicated 'you have a beautiful family.' Ha also explained that she became more upset following incidents of 'eye contact' and 'smiling' on the ferry that many of the jurors and the defendant took from Orcas Island to Friday Harbor. Ha indicated that she had discussed some of her concerns with the other jurors during deliberations, but did not communicate her fears while traveling on the ferry. She acknowledged that she was having difficulty separating her childhood experience from the circumstances of the case and recognized the level of fear she was experiencing was not rational.

At the conclusion of the hearing, the trial court excused Ha from the jury and ruled that it would be necessary to question the other jurors. Judge Hancock indicated that he had a lengthy calendar in Island County but would question the remaining jurors himself if necessary. He suggested that if the parties agreed, Judge Stewart Andrew could conduct the hearing. Judge Andrew, who was serving as an elected judge pro tempore under article IV, section 7 of the Washington Constitution, had been



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present in the courtroom during Ha's testimony.¹

Both parties agreed to the procedure, but defense counsel moved for a mistrial, arguing that no further inquiry was required because Ha's communications had impermissibly tainted the remaining jurors. The trial court denied the motion without prejudice, pending voir dire of the remaining jurors.

With the parties' consent, Judge Andrew then questioned each of the remaining jurors about what they had heard. All of the jurors had noticed Ha's concerns about her safety and possible retaliation. Each juror indicated sympathy for Ha but affirmed that her concerns did not affect their ability to be impartial.

At the conclusion of the hearing, Judge Andrew denied Barnes' motion for a mistrial, noting the limited nature of the contact between Barnes and Ha and that each juror had expressed the ability to be fair and impartial. Judge Andrew then seated the alternate juror and instructed the jury to start over with its deliberations. The jury found Barnes guilty as charged. At sentencing, Judge Hancock denied Barnes' motion for a new trial before imposing a standard-range term.

On appeal, Barnes first contends the trial court erred in allowing the pro tem judge to conduct the hearing to determine whether she had been prejudiced by Ha's comments to the other jurors. She argues that the pro tem judge lacked 'jurisdiction' to conduct the hearing because he did not view the witnesses or the jurors during the trial. But Barnes fails to cite any authority to support the proposition that the circumstances in this case divested the court of jurisdiction.

Barnes relies primarily on *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed. 2d 923 (1989), in which the United States Supreme Court held that a federal magistrate exceeded his jurisdiction by conducting jury selection in a felony trial without the consent of the parties. But the *Gomez* decision rested solely on the Court's analysis of congressional intent and the 'additional duties' provision of the Federal Magistrates Act. The Court expressly declined to reach any constitutional issues. See *Gomez*, 490 U.S. at 864. Indeed, the Supreme Court later held that the delegation of felony jury trial selection to a federal magistrate with the parties' consent raises no constitutional concerns. See *Peretz v. United States*, 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed. 2d 808 (1991). *Gomez* has no application to this case.

Barnes also suggests the voir dire procedure was invalid because she did not consent to have a pro tem judge conduct the questioning. Barnes asserts she did not consent to the procedure because she was not present when defense counsel initially agreed.

Generally, an attorney may not surrender a 'substantial right' of the client unless the client grants specific authority to do so. In *re Marriage of Maxfield*, 47 Wn. App. 699, 707, 737 P.2d 671 (1987). This court has held that consent to appointment of a judge pro tempore is a 'substantial right.' *Mitchell v. Kitsap County*, 59 Wn. App. 177, 184, 797 P.2d 516 (1990). The trial judge in this case, who was



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serving at the Island County Superior Court, questioned Ha via telephone. During the course of the telephonic hearing, defense counsel asked Barnes to leave so that Ha could answer freely. At the conclusion of the hearing, the trial judge indicated he was willing to conduct the questioning of the other jurors if necessary, but suggested that pro tem Judge Andrew, who was present in the courtroom, conduct the hearing. Both the deputy prosecutor and defense counsel consented to the procedure, apparently before Barnes returned to the courtroom.

But before Judge Andrew began the hearing, defense counsel asked that Barnes be excused from the questioning in order to promote full disclosure. She informed the judge that she had discussed the matter with Barnes and that Barnes was 'willing to be absent and allow me to represent her without her presence during this process.' Barnes then acknowledged on the record that it was her desire to be absent during the hearing and that she would have to rely on her attorney to relate what had happened. Under the circumstances, nothing in the record supports Barnes' bare assertion on appeal that she did not consent to the procedure.

Barnes' reliance on *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997), review denied, 134 Wn.2d 1020 (1998), and *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991), is equally misplaced. Both cases note that whether juror misconduct in introducing extraneous evidence affected the verdict is generally within the trial court's discretion because the trial court has observed the witnesses and trial proceedings. *Allyn*, 87 Wn. App. at 729-30; *Richards*, 59 Wn. App. at 271-72. But neither case supports the proposition that the procedure adopted in this case was invalid when undertaken with both parties' consent.

In summary, Barnes has failed to identify any deficiency with the voir dire procedure used in this case.

Barnes next contends the trial court erred in denying her motion for a mistrial. She argues that Ha's comments injected what amounted to extraneous evidence of juror intimidation into deliberations about a similar charge. Barnes maintains the likelihood of prejudice was therefore great.

We review the trial court's refusal to grant a mistrial based on juror misconduct for an abuse of discretion. *State v. Briggs*, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989). If there is a reasonable basis to believe the defendant was prejudiced by the jury's consideration of extraneous evidence, the trial court must grant a new trial. *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982).

In this case, any extraneous evidence injected into the jury deliberations was extremely limited. Ha apparently told some jurors that Barnes had made a single comment to her during a lunch break before jury selection was completed and that there was some form of eye contact on the ferry, while many of the trial participants were traveling from Orcas Island to Friday Harbor. Significantly, Ha recognized that her strong emotional reaction to the circumstances was not rational and was primarily the result of a childhood incident involving a threat to her mother. None of the jurors gave



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any indication that Barnes was attempting to intimidate Ha, and all of them informed the trial court that they could be fair and impartial. Under the circumstances, there was no reasonable basis to believe that Ha's remarks prejudiced Barnes. The trial court did not abuse its discretion in denying a mistrial.

Barnes next contends that Judge Andrew erred in asking the jurors about their ability to be fair and impartial and that he therefore applied the wrong standard in denying the motion for a mistrial. She also contends that Judge Hancock applied the same erroneous standard when denying her motion for a new trial prior to sentencing. Barnes relies on the general rule that the court 'must make an objective inquiry into whether the extraneous evidence, if indeed any existed, could have affected the jury's determination and not a subjective inquiry into the actual effect of the evidence on the jury, because the actual effect of the evidence inheres in the verdict.' Richards, 59 Wn. App. at 273.

Barnes' argument rests on decisions analyzing whether extraneous evidence prejudiced the defendant after the jury had already rendered its verdict. See, e.g., Richards, 59 Wn. App. at 269 (juror allegedly injected extraneous evidence); Allyn, 87 Wn. App. at 728 (realtor juror supplied evidence of land value). In such cases, the court should conduct an objective inquiry into whether the extraneous evidence could have affected the verdict, not a subjective inquiry into the actual effect of the evidence. Allyn, 87 Wn. App. at 729.

In this case, however, the inquiry occurred after deliberations had begun, but before the jury reached a verdict. The trial court had excused one juror and was about to seat an alternate juror, at which time the jury would be required to begin deliberations anew. See CrR 6.5; State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004). The court carefully avoided any questions into the status of the jury's deliberations. In such circumstances, an examination into the jurors' ability to be fair and impartial was similar to the determination that is made during jury selection and was entirely appropriate. Barnes has not cited any authority to the contrary. The trial court did not apply an erroneous standard when denying Barnes' motion for a mistrial and motion for a new trial.

Barnes raises two additional arguments in her statement of additional grounds for review. See RAP 10.10. She contends (1) that there were additional witnesses who could have testified and undermined the credibility of the State's primary witness; and (2) that evidence of her past achievements should have been presented to the jury. But both of these contentions involve circumstances and evidence that are not part of the record and therefore cannot be considered on direct appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Affirmed.

1. Article IV, section 7 of the Washington Constitution provides in part: 'A case in the superior court may be tried by a judge pro tempore . . . without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule.'

