

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-030

MAY TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No 3, Washington Circuit
Corydon Cochran	}	
	}	DOCKET NO. 1231-10-02 Wncr
		Trial Judge: Patricia Zimmerman

In the above-entitled cause, the Clerk will enter:

Defendant Corydon Cochran appeals from his conviction of felony unlawful trespass after a jury trial. He argues that the trial court erred by: (1) repeatedly questioning a juror who was reluctant to announce a guilty verdict when the jury was polled; and (2) admitting a hearsay statement that the victim had made before trial. We affirm.

In October 2002, defendant was charged with felony unlawful trespass and lewd and lascivious conduct, among other charges, after Jessica Moseley allegedly found him masturbating in her bedroom. Ms. Moseley indicated in her sworn statement to police that she recognized defendant from the community, and she described him as having straight dark hair, dark eyes, and a dark mustache.

At trial, defendant relied on an alibi defense, and argued that Ms. Moseley had mistakenly identified him as the perpetrator, noting that he had a full beard at the time of the incident. Ms. Moseley testified that she knew defendant, and had recognized him on the evening in question. She described his appearance that night, testifying that he had a mustache but no beard, although she stated that he had “[l]ooked like he needed a shave.” On cross-examination, defense counsel pointed out that in her sworn statement to police and in her deposition testimony, Ms. Moseley had stated that defendant did not have a beard. Ms. Moseley reiterated her belief that defendant did not have a beard that evening; she emphasized that she had no doubt that it had been defendant in her bedroom. At the close of defendant’s case, the State moved to admit Ms. Moseley’s sworn statement to police. Defendant objected on hearsay grounds, and the court reserved its ruling until the close of the rebuttal case. After closing arguments, the State renewed its request, and defendant again objected, asserting that the statement was inadmissible hearsay, and should not be admitted as a prior consistent statement. The court acknowledged that the statement was hearsay, but concluded that there was no information in the affidavit that was contrary to Ms. Moseley’s testimony. It thus found that the statement was admissible as part of her testimony.

The court then charged the jury, informing them that it was their duty to determine the facts and to accept the law as instructed by the court. During deliberations, the jury sent out the following question: “When was [defendant] actually arrested and read his Rights (Miranda)?” After a discussion with counsel, and without objection, the court instructed the jury that “the issue of Miranda is not a legal or factual issue for your deliberations. It just isn’t an issue.” The jury later submitted another question: “We have one juror who is stuck upon the point of the Defendant’s Rights and due process and is not convinced his Rights, [defendant’s], were met. Why is the Miranda Right a non-issue for us the jury and due process of law not followed. . . . The juror wants assurance that the Defendant’s Rights were followed.” The court reiterated to the jury that these issues were legal issues for the court and they were not matters for the jury. The jury then returned a guilty verdict on the unlawful trespass charge and the driving under the influence

charge, and a not guilty verdict on the lewd and lascivious conduct charge.

Defendant asked to have the jury polled, and the following colloquy occurred with the eighth juror, Mr. McMann:

Court: Mr. McMann, what is your verdict on unlawful trespass?

McMann: Um, could I make a preface before I say anything?

Court: No. Have you deliberated with the jury?

McMann: Yes.

Court: Okay. And have you made a vote with the jury on all three charges?

McMann: Yes; but I have qualifications on that.

Court: Then I'm sending you back to the jury room—

McMann: All right. I take it back. I'll go along with the jury.

Court: Mr. McMann, have you had an opportunity to consult with members of the jury?

McMann: Yes.

Court: Okay. And during your consultation with the jury, have you had an opportunity to discuss your thoughts with the jury?

McMann: Yes.

Court: You understand your verdict has to be unanimous, which means you all have to be in agreement?

McMann: Yes.

Court: Does your qualification have anything to do with your verdict?

McMann: Would you please repeat that?

Court: What I want to know is, I know that during a jury deliberation there is some give and there is some take. People have discussions and they may change their mind on certain things and they may not change their mind on certain things. What I'm asking you is, you've indicated that you have some qualifications. What I want to know is do your qualifications have anything to do with the verdict? You may have entered into discussions that you didn't want to enter into, which is not for any of us to know. What I want to know is if your qualifications have anything to do with the verdict.

McMann: Well, what I believe—

Court: No. Mr. McMann, I'm not trying to give you a hard time. This is a serious case. You've had an opportunity to deliberate. Your foreperson has indicated that the jury has a verdict, what I need to know is what your verdict is, and if you agree with the jury's verdict on each one of the counts.

McMann: Okay.

Court: What is your verdict on unlawful trespass?

McMann: Guilty.

Court: What is your verdict on lewd and lascivious conduct?

McMann: Not guilty.

Court: And what is your verdict on driving under the influence of intoxicating liquor?

McMann: Guilty.

The final four jurors then indicated their assent to the verdict.

Defense counsel then asked the court if it would like to make one last inquiry as to whether the jury was truly unanimous and whether anyone had had to abandon firmly held beliefs merely to go along with the group. Counsel suggested that inquiries not be made of the entire group because juror McMann might feel pressured. He asked that the court give McMann an opportunity to voice his reservations or concerns, or at least express whether the verdict was indeed unanimous. The following exchange then occurred between the court and juror McMann:

Court: Mr. McMann, why don't you sit where you had been sitting. Mr. McMann, we're not trying to give you a hard time; okay? I don't want you to think that either myself or either one of the attorneys are trying to pressure you in any way, and that the difficulty that we face is that we have no right to know, nor are we asking you, what it is you spoke about in the jury room. Do you understand what I mean? Your deliberations in the jury room are between the twelve of you. We have no right to know that. We don't want to know that; and we're not asking you to tell us that. Do you understand that?

I just need you to say yes or no verbally?

McMann: I understand.

Court: Okay. You had indicated that you agreed with the verdict, but you also said that you had some reservations. I want to be real clear. Do your reservations have something to do with your decision on the verdict or do you have some reservation about some questions or issues that you discussed while in the jury room?

McMann: I don't know how to characterize this, but from what my experience is, um, the defendant has certain rights under law.

Court: Uh-hum.

McMann: And one of those rights is due process of law. I don't believe that due process was followed in this case.

Court: And did you hear my instruction when you had that question?

McMann: I think I remember it, but I don't know how it applies to my feelings on this.

Court: Okay. Your feelings are one thing, and I gave you jury instruction on that. You may not agree with the law as I gave it to you. I mean, you have an absolute right to disagree with it, but issues regarding due process are not for your consideration. There's nothing before you on that issue. That's a legal issue. It's not an issue for the jury. You only deal with the facts, so while you may disagree with that, you've indicated that you can follow the court's instructions.

McMann: Well---

Court: Right?

McMann: I can follow the court's instructions. I understand that but when you're a juror you have a certain responsibility to the defendant. It could be any one of us. I believe that all persons must have due process of law, especially under the Miranda Rights. Now I don't recall reading anywhere where Miranda was outlawed or disqualified from jury trials, so that's why I couldn't understand why the process of questioning the defendant without advising him of a right to a lawyer beforehand. The State trooper used leading questions to intimidate---

Court: Okay. Let me stop you right there. That question came out to us by the jury at 10:35, and I'll read the question again to make sure you understood the question, which is exactly what you're telling me. [Reads earlier question from jury]. My answer to you: As a matter of law was that Miranda is a legal issue, that the judge is the trier of the law and that you as a jury are the trier of the facts. That if it were an issue, Miranda or due process, if it were an issue it would have been dealt with by the court, by me, prior to trial, and that under no circumstances would the issue of due process or Miranda be decided by a jury, because it's not a factual issue. And that's all the jury hears, is factual issues. And that's why I told you that it was not a factual issue for your consideration or deliberation. Do you understand that?

McMann: Well, yes, I do now. That the Court, the Judge, will rule on due process and Miranda Rights.

Court: It's all done before trial. It's not before you.

McMann: Oh. If I'd known that I wouldn't have objected so much. I thought that the decision would involve all aspects of the case.

Court: No. That's why you only hear the facts. That's why when we had some breaks in the trial and the lawyers came up to the bench, there were legal issues. Do you understand that?

McMann: Oh, I see.

Court: Okay. Based on that, what is your verdict on unlawful trespass?

McMann: Guilty.

Court: What is your verdict on lewd and lascivious conduct?

McMann: Not guilty.

Court: What is your verdict on driving under the influence of intoxicating liquor?

McMann: Guilty.

Defendant did not object during this exchange. At its conclusion, however, defense counsel noted that he "wouldn't say that [he didn't] have any concerns" about the unanimity of the verdict but he couldn't "think of anything we can do to address it at this time." The court then concluded,

Based on Mr. McMann, I asked for more clarification, and based on Mr. McMann's responses, I can't find that there's any jury irregularity or that their verdict was not unanimous. It appears that perhaps Mr. McMann didn't quite understand my answer to the second juror question, but based on further inquiry the Court will find that Mr. McMann is in agreement with the jury's verdict and will enter a verdict of guilty on unlawful trespass, not guilty on lewd and lascivious conduct; and guilty while driving under the influence of intoxicating liquor.

Defendant appealed.

Defendant first argues that the trial court violated V.R.Cr.P. 31(d) and his constitutional rights to an independent unanimous jury verdict by repeatedly questioning juror McMann. According to defendant, McMann expressed reluctance to assent to the guilty verdict on the unlawful trespass charge, and the court's response exerted undue pressure on him to accede to the majority's verdict. Defendant maintains that the "unique circumstances of this case" make it even more apparent that the trial court's lengthy and repeated questioning of the juror had a coercive effect on his ultimate acquiescence in the guilty verdict.

A defendant cannot be found guilty of a crime unless the jury renders a unanimous verdict. Vt. Const. Ch. I, art. 10; V.R.Cr.P. 31(a). Rule 31(d) provides that when the jury has returned a verdict, but before it is recorded, a party or the court may request that the jury be polled. If the poll does not reveal unanimous concurrence in the verdict, "the jury may be directed to retire for further deliberations or may be discharged." V.R.Cr.P. 31(d). The trial court has discretion in conducting a jury poll, and in questioning jurors during or after a jury poll. See United States v. Gambino, 951 F.2d 498, 501 (2d Cir. 1991) (explaining that courts have interpreted analogous federal rule, F.R.Cr.P. 31(d), as leaving the method of conducting jury poll to trial judge's discretion, and because rule entrusts judge with a measure of discretion, "the reasonable exercise of this discretion should be accorded proper deference by a reviewing court" (quotations omitted)); see also State v. Holloway, 740 P.2d 711, 715 (N.M. Ct. App. 1987) (recognizing that "trial court has considerable discretion regarding the manner in which the poll and subsequent questioning are conducted").

Defendant has not demonstrated that the court abused its discretion here. The purpose of a jury poll "is to ascertain that each of the jurors has given a verdict uninfluenced by coercion or inducement." Reporter's Notes, V.R.Cr.P. 31; see also Gambino, 951 F.2d at 502 (explaining that jury poll serves to "test the uncoerced unanimity of the verdict by requiring each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman" (quotations omitted)). As the Holloway court explained, "[w]here a juror's response indicates uncertainty concerning unanimity, a jury poll requires exploration of the uncertainty or dissent." 740 P.2d at 715. The case on which defendant primarily relies, United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972), illustrates this point. In Edwards, the court found reversible error where the trial court failed to properly respond to a juror's statement that, "It's my verdict, but I am still in doubt." Id. at 1366. The trial court responded, "All right, it's your verdict" and continued polling the jury. Id. When defendant objected, the following exchange occurred:

The Court: The juror stated that this is her verdict. Is that what you said?
[Juror]: Yes, sir.
The Court: All right.

[Defense Counsel]: Your Honor, I believe she said it was her verdict but she was still in doubt.
The Court: She has said that this is her verdict. Is that correct?
[Juror]: Yes, sir.
The Court: All right. The verdict will be received.

In reversing and remanding the defendant's conviction, the court of appeals rejected the government's contention that the trial judge's questioning had clarified the juror's response, making further deliberation unnecessary. The court noted that at no time had the juror stated unequivocally that she concurred in the verdict, and moreover, the trial judge had refused to inquire into the meaning of the phrase "but I am still in doubt." Id. at 1367. The court concluded the trial court's conduct had been coercive, and it held that "where a poll indicates a lack of unanimity the trial court must

refrain from attempting to extract unanimity by questioning from the bench and must either order the jury to retire for further deliberations or dismiss them.” Id.

In contrast to Edwards, and the other cases on which defendant relies, there is no suggestion of coercion in this case, nor any attempts by the trial court to “extract unanimity by questioning from the bench.” As the colloquy between the juror and the court reveals, the trial court sought to clarify the juror’s concern, and to ensure that he was considering only the issues that were properly before the jury. The court’s conduct was reasonable, and the record does not support defendant’s assertion that the trial court exerted undue pressure on McMann to concur in the guilty verdict. The trial court acted within its discretion, and we find no error.

Defendant next asserts that the court committed reversible error in admitting Ms. Moseley’s statement to police. He maintains that the statement was not admissible as a prior consistent statement under V.R.E. 801(d)(1)(B), and it served to improperly bolster her trial testimony with inadmissible hearsay. According to defendant, in light of the split verdict and Ms. Moseley’s erroneous physical description of him, the error was not harmless beyond a reasonable doubt.

We reject this argument. Even assuming that the court erred in admitting this evidence, any error was harmless beyond a reasonable doubt. See State v. Oscarson, 2004 VT 4, ¶ 29, 176 Vt. 176, (explaining that court may uphold conviction if error in admission of hearsay testimony was harmless beyond a reasonable doubt); State v. Sweeney, 2005 VT 11, ¶¶ 12-14, 869 A.2d 137 (concluding that any error in trial court’s admission of prior consistent statement was harmless beyond a reasonable doubt). In this case, the evidence challenged by defendant was cumulative. See Oscarson, 2004 VT 4, ¶ 32 (setting forth factors to be considered in harmless error analysis, including the importance of the testimony in the prosecution’s case, and whether the testimony was cumulative). Ms. Moseley’s statement to police contained her account of the incident; Ms. Moseley testified at trial to all of the material contained in the statement without objection from defendant. Defense counsel cross-examined Ms. Moseley regarding the evening’s events, including her identification of defendant and the description of defendant that she had provided in her police statement. Moreover, as the State points out, Ms. Moseley’s physical description of defendant in her sworn statement—as at trial—supported defendant’s, rather than the State’s, case. The statement itself was of little corroborative value, and any error in its admission was harmless beyond a reasonable doubt. See Sweeney, 2005 VT 11, ¶ 14 (reaching same conclusion where hearsay testimony was cumulative, and trial court made no mention of hearsay statement in its judgment order).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice