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Summary of Manning v. State, 131 Nev. Adv. Op. 26 (May 7, 2015)

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CONSTITUTIONAL LAW: JURY INSTRUCTIONS

Summary

The Court held that it is a constitutional error when the district court fails to notify and confer with the parties when the court receives and responds to a note from the jury indicating that they are deadlocked. The Court further held such error will be reviewed for harmlessness beyond a reasonable doubt.

Background

Malcolm Manning was arrested and charged with burglary, battery with intent to commit a crime with a victim 60 years of age or older, and robbery with a victim 60 years of age or older, all stemming from the robbery of an ABC Beer and Wine Store in Las Vegas. At trial, the jury retired for deliberations late in the day. An hour later, the jury sent the judge a note stating that they were deadlocked 10-2 in favor of conviction. The judge instructed the marshal to tell the jury they were to come back the next day and continue deliberating. The court did not tell the parties of the note until the next day after the jury returned a guilty verdict.

Upon learning of the jury's note, Manning filed a motion for a new trial. He argued the court's failure to provide him with notice that the jury considered itself deadlocked deprived him of his right to request a mistrial. The court denied Manning's motion. Manning was found guilty and sentenced to 6 to 15 years. Manning appealed.

Discussion

Manning argued that the district court's failure to notify the parties after receiving the jury's note was a constitutional error. The Court reviewed these constitutional issues de novo.

First, the Court looked to recent Ninth Circuit and Third Circuit cases involving similar issues. The Ninth Circuit has held, "that a district court's failure to notify defense counsel about a jury's inquiry during deliberations violates the defendant's constitutional right to counsel during a critical stage of trial."² The Third Circuit has also held that this is a constitutional violation.³ The Court agreed with the Ninth Circuit and Third Circuit, holding that, "the court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a note from the jury."

¹ By Scott Lundy.

² See *Musladin v. Lamarque*, 555 F.3d 830, 840–43 (9th Cir. 2009) (holding the presence of the defendant and counsel is required when formulating a response to a jury's inquiry, the importance of which is heightened in instances of a deadlocked jury.); *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) (holding that a constitution gives defendants the right to participate in a district court's decision to communicate back to the jury and the communication itself.); *United States v. Frazin*, 780 F.2d 1461, 1468–69 (9th Cir. 1986) (concluding, "the failure of the court to notify appellants or their counsel of the jury's deadlock vote, and the court's ex parte message to the jury to continue its deliberations, violated appellants' constitutional rights.").

³ See *United States v. Toliver*, 330 F.3d 607, 616–17 (3d Cir. 2003) (holding a defendant's Fifth and Sixth Amendment rights are violated when a judge fails to notify defense counsel of a note from the jury and fails to allow counsel to argue prior to a response to the jury.).

However, the Court said Manning is incorrect in arguing that such a constitutional violation requires an automatic reversal. Following the Ninth Circuit's rule, the Court held that, "when a district court responds to a note from the jury without notifying the parties or counsel or seeking input on the response, the error will be reviewed to determine if it was harmless beyond a reasonable doubt." The Court used the Ninth Circuit's three-factor test in determining the harmlessness of the error: (1) the probable effect of the message actually sent; (2) the likelihood that the court would have sent a different message had it consulted with appellants beforehand; and (3) whether any changes in the message that appellants might have obtained would have affected the verdict in any way.⁴

The Court concluded that the district court's error was harmless beyond a reasonable doubt. The district court's message back to the deadlocked jury was "simple and did not contain any legal instructions." The Court did not believe that the involvement of the defendant or his counsel would have resulted in any substantive differences. Finally, the Court concluded that the marshal was unlikely to have altered the message in any prejudicial manner. Because the court was simply informing the jury it would continue deliberations the next day, the error does not warrant reversal.

The Court then briefly dealt with Manning's other claims and concluded they all lacked merit. First, the trial court did not err in allowing the State to use four of its five peremptory challenges to exclude females from the jury. Second, Manning's rights under the Confrontation Clause were not violated when the court admitted evidence of the State's efforts to locate a nontestifying witness who made out-of-court testimonial statements about Manning because the evidence did not refer to any testimonial statement. Third, Manning's rights under the Confrontation Clause were not violated when the court admitted hearsay statements from prison phone calls because Manning had waived his Confrontation Clause argument when he waived redaction of the phone calls. Fourth, the trial court did not err in admitting Manning's phone calls from jail because they "evidenced consciousness of guilt." Fifth, the prosecutor's statements during closing arguments regarding the nontestifying witness did not constitute a plain error because the prosecution was making inferences from admitted evidence and testimony. Sixth, the trial court's refusal to correct the prosecution's insinuation that Manning essentially admitted guilt during the course of his jail phone calls did not need to be addressed because the Court had previously held the phone calls were properly admitted. Seventh, the trial court did not err in admitting the in-court identification. Eighth, the trial court did not abuse its discretion in allowing Eric Sahota, a forensic scientist who reviewed the fingerprints in this case, to also testify about the surveillance video from the store. Ninth, Manning's rights under the Confrontation Clause were not violated when an officer testified that he was "informed" Manning was a possible suspect, rather than stating the police "developed" him as a possible suspect.

Conclusion

The Court held the district court's failure to notify Manning or his counsel about the deadlocked jury's note was a constitutional error. The Court, however, concluded the error was harmless beyond a reasonable doubt. Thus, the Court affirmed the judgment of conviction on all counts.

⁴ See *Barragan-Devis*, 133 F.3d at 1289; *Frazin*, 780 F.2d at 1470.