STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0066

State of Minnesota,
Respondent,

vs.

Latell Jerome Chaney,
Appellant

Filed July 8, 2008
Reversed and remanded
Toussaint, Chief Judge

Martin County District Court
File No. 46-CR-06-451

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Terry W. Viesselman, Martin County Attorney, Michael D. Trushenski, Assistant County Attorney, 123 Downtown Plaza, Fairmont, MN 56031 (for respondent)

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Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellant Latell Jerome Chaney, who was found guilty of two counts of first-degree criminal damage to property and two counts of second-degree assault, challenges the district court's denial of his motion for a mistrial. Because we conclude that the jury's access to a police report that was never admitted into evidence did not constitute structural error but was prejudicial, we reverse and remand for a new trial.

FACTS

The complaint alleged that appellant rammed two occupied vehicles after a dispute with his former girlfriend. The dispute centered on where L.W., appellant's daughter from another relationship, would spend the night.

Appellant dropped L.W. off at the apartment of his former girlfriend, where L.W. was supposed to spend the weekend. But appellant later returned to the apartment in an angry mood, pounding on the door and demanding to see L.W. According to the former girlfriend, when she and L.W. went to the door, appellant swung at them, almost hitting L.W. They retreated into the apartment, with appellant pounding on the window. Tederian Hughes, a male acquaintance of the former girlfriend, then confronted appellant over the disturbance. Hughes' roommate, Josh Kunz, stepped between the two men.

Hughes later left, driving Kunz's vehicle. Meanwhile, police had been called. When Officer David Runge arrived at the scene, he questioned appellant, who is deaf, using a notepad and some sign language. Runge told appellant that because L.W. said that she did not want to leave with appellant and because the hour was late, appellant

should go home for the night. Appellant then left. Sometime later, however, a friend of appellant's appeared to pick up L.W., who left with her. But L.W. later called the apartment, stating that she was frightened because appellant was still angry and that she wanted to return to the apartment.

Kunz and appellant's former girlfriend left to pick up L.W. They encountered appellant on the highway. L.W. got out of appellant's car and ran across the highway to the other car. Appellant then threw something at the other car. He also threw something at the car driven by Hughes, who had returned to offer assistance.

What followed was described as a "high speed chase," with appellant pursuing his former girlfriend's car, as well as the car driven by Hughes. When the other cars both stopped at a stop sign, appellant rammed Hughes's car, then struck the other car, which was occupied by appellant's former girlfriend, Kunz, and L.W. Appellant then drove off, and police, who had been called during the chase, arrived shortly after. Police observed significant damage to the car Hughes had been driving and some damage to the other car. They also found the license plate for appellant's car, as well as a steel spare-tire tie-down, which later turned out to be missing from appellant's vehicle. Inside appellant's vehicle, police found a note in appellant's handwriting threatening to kill Hughes.

Officer Runge wrote a report of the incident. Defense counsel used that report to cross-examine two witnesses but did not seek admission of the report. The jury convicted appellant on all four counts, but it was later learned that the report, as well as two other documents not introduced into evidence, had been present in the jury deliberation room and that the jury had consulted the police report. Defense counsel

moved for a mistrial.

The trial court held a *Schwartz* hearing at which all but one of the jurors were questioned about their access to the police report and other documents that had not been admitted. All of the jurors questioned testified that the police report was in the jury room and was consulted by at least some members of the panel.

The trial court denied appellant's motion for a mistrial, noting that all 11 jurors who testified stated "that they had arrived at three of the four verdicts before discovery of the two exhibits in the jury room." The court found that the jurors were unanimous that "the exhibits were not read in detail by each and every juror" but that parts of the police report were read aloud by one or two jurors. The court also found that it was clear from the jurors' responses that the references to the police report during deliberations "were only cumulative and had no decisive impact on formulation of the jury's verdict in the fourth and final count."

D E C I S I O N

Appellant argues that the mistaken introduction of the police report into the jury room, where it was accessible during jury deliberations, is structural error requiring a new trial without any showing of prejudice.[1] We disagree.

The supreme court has distinguished between "trial errors," which "occur during the presentation of the case to the jury" and "may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was

[1] The jury attendant also erroneously allowed a request for a restraining order against Hughes to go into the jury deliberation room. But appellant does not claim any prejudice from this error.

harmless beyond a reasonable doubt," and "structural errors." *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1264 (1991)). The court has defined "structural errors" as "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* (quoting *Fulminante*, 499 U.S. at 310, 111 S. Ct. at 1265).

Appellant argues that because the error in furnishing the jury with the police report did not occur "during the presentation of the case" it was structural error. But in a more recent case, the United States Supreme Court has indicated that the single factor of whether the error occurs during trial is not "the touchstone for the availability of harmless-error review." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 2564 n.4 (2006). The Court outlined the importance of two other factors: (1) "the difficulty of assessing the effect of the error"; and (2) "the irrelevance of harmlessness." *Id.*

Here, it is not difficult to assess the effect of the jury attendant's error, nor does it seem irrelevant whether or not that error was harmless. If the trial court had erroneously admitted the police report, that judicial error would have had virtually the same impact on the verdict as the error here. This court would have to determine whether there was a reasonable possibility that the report significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

Our conclusion is supported by *State v. Winningham*, 406 N.W.2d 70 (Minn. App. 1987), *review denied* (Minn. July 15, 1987), in which letters from the defendant that had been ruled inadmissible were nevertheless delivered to the jury room. In *Winningham*,

the error was discovered quickly, and the jurors were questioned before they had returned their verdict but after they had each viewed the letters. *Id.* at 71. The trial court questioned the jurors individually concerning their exposure to the letters, eventually denying the defendant's motion for a mistrial. *Id.* But this court reversed on appeal, relying particularly on the "inflammatory" nature of the letters, which spoke "in vulgar and graphic terms" of the defendant's fondness for child pornography. *Id.* at 71-72. This court had the benefit of the jurors' testimony about the impact of the letters on their deliberations and concluded that the trial court's instruction to disregard the letters was inadequate to cure the prejudice. *Id.* at 72.

Winningham notes that the presence of prejudicial, inadmissible evidence in the jury room may deprive a defendant of his right to a fair trial. *Id.* at 71. But it does not hold that such an error is structural error, and, in fact, applies a four-part test of prejudice. *Id*. at 72 (applying test from *State v. Cox*, 322 N.W.2d 555, 559 (Minn. 1982)). In another bailiff-error case, this court also applied a harmless-error analysis, using the *Cox* four-part prejudice test. *State v. Hanke*, 712 N.W.2d 211, 214 (Minn. App. 2006) (holding that bailiff's comments on pervasive meth problem in county were presumptively prejudicial and not shown by state to be harmless). Neither *Winningham* nor *Hanke*, in which the jurors were also questioned about the effects of the bailiff's comment, found any difficulty in assessing the harmlessness of the error or concluded that it was irrelevant to try to do so.

In applying the second *Gonzales-Lopez* consideration, the harmlessness of the jury attendant's error here does not seem irrelevant. This is not a case, like the denial of the

right to choose one's own retained counsel or the denial of the right to self-representation, in which the nature of the right at stake makes prejudice irrelevant. Appellant was denied his right to be tried based on evidence properly admitted at trial. But the error in introducing the police report into the jury room does not call into question the impartiality of the jury. *Cf. Dorsey*, 701 N.W.2d at 253 (concluding that judge's independent investigation of factual assertion made by defense witness deprived defendant of "basic protections" of impartial judge and factfinder). The jury could have equally been exposed to the police report by a judicial decision admitting it as by a jury attendant's inadvertently introducing it into the jury room.

Appellant also argues that it is possible the jury attendant intentionally introduced the police report into the jury room and that appellant should have been allowed to question the jury attendant. He argues in his reply brief that the jury attendant's error was "judicial misconduct" (as opposed to "jury misconduct"). But appellant cites no authority classifying a court employee's error as "judicial" misconduct. We therefore conclude that the error committed by the jury attendant was not structural so as to require a new trial without any showing of prejudice.

Appellant argues that, even assuming that harmless-error analysis applies, the error here was not harmless. In particular, appellant argues that a statement in the report about L.W.'s fear of him was *not* cumulative to properly admitted evidence.

Appellant argues that this court should apply the four-factor prejudice test applied in *Cox*, 322 N.W.2d at 559. Those factors are "the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly

before the jury, and the likelihood that curative measures were effective in reducing the prejudice." *Id.* Because this is the test applied in *Winningham* and *Hanke*, which are discussed above, we apply it here.

The first factor weighs against granting appellant a new trial. The jurors were exposed only to a police report largely confined to reciting statements made by witnesses who testified consistently with those statements at trial and summarizing other evidence that was also presented at trial. *Cf. Winningham*, 406 N.W.2d at 71 (jurors exposed to defendant's "vulgar and graphic" letters about child pornography, described by one juror as "garbage"). This investigative document, although not admitted into evidence and containing hearsay, is not comparable to the sheriff's remark in *Cox* implying an opinion that the defendant was guilty. *Cox*, 322 N.W.2d at 558; *see also Hanke*, 712 N.W.2d at 214-15 (holding new trial required, in part because bailiff's statements to some jurors about meth problem having some relevance to case could have helped confuse jury about whether drugs were issue). Appellant emphasizes that the police report was inadmissible and that it contained statements of L.W., who did not testify. But inadmissibility under the rules of evidence is not a measure of the degree of prejudice. We therefore conclude that this first factor weighs against granting appellant a new trial.

The remaining factors, however, all favor granting appellant relief. With respect to the second and fourth factors, all of the jurors were exposed to the police report and, because the error was discovered after the verdict was reached, no curative measures could be taken.

Finally, with respect to the fourth factor, the evidence that appellant intentionally struck at least one occupied vehicle with his car was strong but not overwhelming. Defense counsel argued at trial that appellant would not have driven his vehicle into a car occupied by his daughter, L.W., whom he loved. Although there was a note in appellant's handwriting expressing an intent to kill Hughes, a reasonable jury could have viewed the note as a momentary expression of anger, similar to an oral expression that a person with unrestricted ability to communicate might have uttered in anger. The defense theory that appellant would not have struck a car occupied by his daughter was consistent with the evidence that appellant's car struck the other car first, not the car occupied by L.W., which may have been damaged incidentally. Thus, the evidence is not strong that appellant intended to strike the car occupied by L.W., as charged in the fourth count.

The trial court relied heavily on two aspects of the jurors' responses at the *Schwartz* hearing to determine that the jury attendant's error did not prejudice appellant's right to a fair trial: (1) the jurors' testimony that verdicts in three of the four counts had been reached before they realized the police report was in the pile of exhibits; and (2) the jurors' testimony that the police report had no impact on their verdict – even as to the fourth count. But these considerations are not proper.

A jury's verdict is not final until it has been read in open court with no disagreement being expressed by the jury. *State v. Crow*, 730 N.W.2d 272, 278 (Minn. 2007) (citing Minn. Stat § 631.17 (2006)). The jury, therefore, could have reconsidered any tentative verdicts they may have reached on the first three counts. But to consider those tentative verdicts in assessing whether prejudice exists we would be relying on

juror testimony as to their thought processes, which is barred by Minn. R. Evid. 606(b).

Jurors may be questioned "whether extraneous prejudicial information was improperly brought to the jury's attention." Minn. R. Evid. 606(b). But they may not be questioned about the effect of any matter, whether properly or improperly considered "upon that [juror] or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict." *Id.* We are troubled by the trial court's questioning of the jury about the impact of the police report on their verdict. *See State v. Hill*, 287 N.W.2d 918, 921 (Minn. 1979) (holding that under rule 606(b) jurors should not be questioned on actual effect of prejudicial material on their deliberations); *cf. Cox*, 322 N.W.2d at 559 n.1 (allowing such questioning but only as conducted *before* deliberations and only as to *likely effect* of prejudicial outside material). We recognize that defense counsel also asked probing questions of the jurors during the *Schwartz* hearing that may have had the effect of inquiring into their thought processes. But defense counsel did not clearly violate rule 606(b)'s prohibition of questioning about the effect of any matter upon the juror's state of mind and assent to the verdict. *See* Minn. R. Evid. 606(b).

We conclude that the police report was not cumulative to the properly admitted evidence. As appellant points out, the statement in the report that L.W. "did not want to go with [appellant] because she was scared of him" was not duplicated by any trial testimony. The state's evidence, especially as to the fourth count involving the collision with the car occupied by Kunz, L.W., and appellant's former girlfriend, was certainly not overwhelming. Based on an application of the *Cox* factors, we conclude that the error in introducing the police report into the jury's deliberations was not harmless error.

Accordingly, we reverse the conviction and remand for a new trial.

Reversed and remanded.