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STATE OF NEBRASKA, APPELLEE, V. MOHAMMED NADEEM, APPELLANT.

809 N.W.2d 825

Filed March 6, 2012. No. A-10-981.

1. **Trial: Juries: Appeal and Error.** A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard.
2. **Juries: Words and Phrases.** Generally, an "anonymous jury" describes a situation where juror identification information is withheld from the public and the parties themselves.
3. **Trial: Juries: Presumptions.** Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence.
4. **Juries.** A court should not impanel an anonymous jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected.
5. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. ____. An appellate court may consider an issue not raised to the trial court if such issue amounts to plain error.
8. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
9. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Motion for rehearing sustained. See 19 Neb. App. 466, 808 N.W.2d 95 (2012), for original opinion. Original opinion withdrawn. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth D. Elliott for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

SIEVERS, Judge.

INTRODUCTION

Mohammed Nadeem appealed his convictions and sentences in the district court for Lancaster County for attempted first degree sexual assault and attempted third degree sexual assault of a child. In our opinion released January 17, 2012, *State v. Nadeem, ante* p. 466, 808 N.W.2d 95 (2012), we concluded that the trial court abused its discretion in impaneling an anonymous jury, and we reversed the convictions and remanded the cause for a new trial. The State has filed a motion for rehearing, contending that our decision was incorrect in its reasoning and that as a consequence, our result was incorrect. We hereby grant the motion for rehearing, but we limit the rehearing relief to withdrawing our previous opinion in its entirety, and we replace it with the instant opinion. We reach the same result, but upon somewhat different reasoning.

BACKGROUND

On August 6, 2009, H.K., the victim in this case, was with a friend at a public library in Lincoln, Nebraska. H.K. was 14 years old at the time. While H.K. was sitting at a table in a reading room of the library using her laptop computer, she noticed Nadeem standing within a couple feet of her looking at a newspaper and glancing over at her. Shortly thereafter, Nadeem began talking to H.K. and asking her questions, including how old she was. Nadeem asked H.K. for her telephone number, and when she would not give it to him, he gave H.K. his telephone number and told her he hoped to hear from her.

When H.K.'s mother later picked up H.K. and her friend from the library, H.K. told her mother about her encounter with Nadeem. H.K. and her mother reported the incident to the library and then called the police. The next day, the police asked H.K. to make a controlled call to Nadeem from the police station, which she agreed to do. H.K. spoke with Nadeem and asked him why he wanted her to call. Nadeem indicated that he wanted to talk to her more and to see her. The conversation continued, and they began discussing what they would

do together, which led to Nadeem's indicating that he wanted to touch her and that he had a "grand collection of ideas" in regard to what type of touching. H.K. told Nadeem she was a virgin, and at that point, Nadeem asked H.K. if she wanted to lose her virginity and when she wanted to lose it. He suggested "sexual stimulation" such as "licking," "kissing," and "fingering" when H.K. told him that she did not know how to lose her virginity. When H.K. stated that she did not know what "fingering" meant, Nadeem volunteered to do it to her. Nadeem later explained that putting his penis into H.K.'s vagina would also be "stimulation." By the end of the conversation, Nadeem and H.K. agreed to meet at the library about 30 minutes later. Nadeem was arrested when he arrived at the library. Nadeem was 22 years old at the time.

Nadeem was charged by information with attempted first degree sexual assault and attempted third degree sexual assault of a child. A jury found him guilty on both counts. The trial court sentenced him to 3 to 6 years' imprisonment on the attempted first degree sexual assault conviction and not less than nor more than 1 year's imprisonment on the attempted third degree sexual assault of a child conviction.

ASSIGNMENTS OF ERROR

Nadeem assigns that the trial court erred in (1) impaneling an anonymous jury, (2) finding that there was sufficient evidence to support convictions for attempted first degree sexual assault and attempted third degree sexual assault of a child, (3) admitting testimony by library staff of prior "unusual behavior" exhibited by Nadeem in the library, (4) failing to give an entrapment instruction on the attempted first degree sexual assault charge, and (5) imposing excessive sentences. Nadeem also alleges that he received ineffective assistance of counsel. Because of the result we reach, we only discuss the first assignment of error.

STANDARD OF REVIEW

[1] A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard. *State v. Sandoval*, 280 Neb. 309, 788

N.W.2d 172 (2010), citing *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995).

ANALYSIS

Before voir dire began, each prospective juror had apparently been assigned a number. Throughout voir dire—including questioning by the court, the prosecutor, and defense counsel—each juror was referred to by his or her assigned number rather than his or her name. Our record concerning jury selection begins with remarks by the judge to all of the potential jurors, followed by the calling of each prospective juror into the jury box by his or her number. After counsel had made their peremptory strikes, the numbers of the jurors who would sit on the case were called.

At the outset, we emphasize that our record contains absolutely nothing about how a "numbers" jury or an "anonymous" jury came to be used in this case, including at whose instance or why. We can discern from the voir dire that juror questionnaires were used, but none of such are in our record, and thus, we are uncertain about exactly what sort of information was revealed on the questionnaires. However, a hearing on Nadeem's postverdict motion entitled "Motion to Release Jurors Information" suggests that the names of the jurors were withheld from defense counsel. At the September 3, 2010, hearing on this motion, defense counsel told the court:

> The second motion [is] to release juror information. My client and his family have some concerns as to whether or not the jurors were influenced by either his religion or national origin and wanted an opportunity to talk with the jurors and to interview the jurors.
>
> And if I understand Nebraska law correctly, in order to release the names of the jurors that we have to get court permission to do that. That's all that we're asking. So we can interview the jurors and find out what their reasoning was behind their verdict.

The trial court denied the motion without explanation.

[2] The term "anonymous jury" encompasses the withholding of a broad spectrum of information. *State v. Sandoval, supra.* Generally, an "anonymous jury" describes a situation

where juror identification information is withheld from the public and the parties themselves. *Id.* The least secretive form of an anonymous jury is where only the jurors' names are withheld from the parties. *Id.* At other times, names and other identification information are withheld, but limited biographical information is made available. See *id.* In the instant case, the above record concerning Nadeem's posttrial motion supports the conclusion that this was likely an "anonymous jury," rather than a "numbers jury," in that the identity of the jurors was withheld from Nadeem and his counsel. However, while this is the most secretive jury, in the end that difference does not affect our ultimate result. But hereafter, we will use the term "anonymous jury" in our discussion. Generally, impaneling an anonymous jury is a drastic measure that should only be undertaken in limited circumstances, and there is a danger that the practice could prejudice jurors against the defendants. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

[3] Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence. *State v. Sandoval, supra.* Also, during jury selection, a lack of information could prevent the defense from making intelligent decisions regarding peremptory strikes. *Id.* And, there is a risk that potential jurors will interpret the anonymity as an indication that the court believes the defendant is dangerous. *Id.*

State v. Sandoval, supra, is the first time either of the two Nebraska appellate courts has addressed the propriety of withholding personal information or names of potential jurors from the defendant. In *Sandoval*, the trial court announced in a preliminary hearing that it intended to identify jurors by number rather than by name. The court ordered defense counsel not to disclose the names of the potential jurors to anyone, including the defendant. As each juror entered the courtroom for voir dire, the court informed the juror that the court and attorneys would be referring to the juror by his or her juror number. No other acknowledgment or explanation of the action was given.

[4] Although *Sandoval* was the first time the issue of numbers or anonymous juries was addressed by a Nebraska

appellate court, the Supreme Court in that opinion cited 13 different state and federal appellate decisions that dealt with the issue dating back to 1991. From that authority, the *Sandoval* court adopted the two basic prerequisites, or a two-pronged test, for the use of such juries, saying that a court should not impanel an anonymous jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected. *Id.*

Our Supreme Court followed the lead of the other decisions it had cited with respect to the part of its discussion captioned as "Compelling Reason to Believe Jury Needs Protection." *Id.* at 328, 788 N.W.2d at 196. The factors to consider were held to be (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. The *Sandoval* court concluded that the trial court did not abuse its discretion in impaneling an anonymous jury under the circumstances of the case. In regard to the first part of the test, the court decided that there was a combination of factors to support the conclusion that the jury needed protection. Specifically, the court noted that the defendant was a member of a gang and had commanded a riot while in prison and preyed on other inmates. The court also noted that the murders with which he was charged generated significant media attention in Nebraska and that, if convicted, he faced life imprisonment or the death penalty. In the instant case, there is nothing in the record to even hint at a need for protection of the jury.

Although *Sandoval* articulated a second prerequisite to the use of numbers or anonymous juries—that precautions are taken by the trial court to prevent prejudice to the defendant—the record here reveals nothing on that subject. In any event, given the fact that the first prerequisite was obviously

not satisfied in the instant case, there is no need to discuss the second prerequisite for the use of such a jury any further.

In our view, the *Sandoval* court's adoption of the two-part test, or prerequisites as we have termed such, for the use of numbers or anonymous juries is the substantive law of that decision. However, the court also laid down what we consider to be a procedural directive when it said, "Henceforth, if the court decides to impanel an anonymous or numbers jury, we direct the court to follow the two-part test set forth herein and to articulate its specific findings of fact in support of such decision." *State v. Sandoval*, 280 Neb. 309, 328, 788 N.W.2d 172, 196 (2010). The significance of both the substantive and the procedural holdings of *Sandoval* for the present case is that this case was tried before the *Sandoval* decision was rendered. In short, the "henceforth" part of the decision was not applicable in Nadeem's case, and the trial judge did not need to make the specific findings required "henceforth" by *Sandoval*. Thus, we emphasize that our reversal does not flow from the fact that there were not specific findings by the trial judge. Rather, it flows directly from the complete and total absence of anything substantive in the record to justify what the *Sandoval* court called "a drastic measure that should only be undertaken in limited circumstances." 280 Neb. at 326-27, 788 N.W.2d at 195. Such circumstances are, of course, the two prerequisites discussed above. In other words, even though the trial judge, at the time of this trial, was not required to make specific findings on why such a jury was justified and on the precautions taken, the record still must contain those substantive elements that would justify taking such an unusual and drastic step. And this record simply contains nothing of the sort.

[5,6] However, we now turn to the State's arguments that Nadeem did not object to the use of an anonymous jury and raises the issue on appeal for the first time, but that any error is waived. The State reminds us of the firmly established proposition that failure to make a timely objection waives the right to assert prejudicial error on appeal. See *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). The rationale is that when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court

cannot commit error in resolving an issue never presented and submitted to it for disposition. *Id.* Additionally, one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Id.* The *Collins* court set forth numerous examples of the application of this rule, but none involved numbers or anonymous juries, as this case and *Sandoval* are the only cases in which such a jury was involved.

[7,8] In our original opinion in this case, we may have made an implicit suggestion that trial counsel did not have an opportunity to object. However, even though there is no record of how this anonymous jury came about, the entire jury selection process is on the record, and at the beginning of that process, trial counsel could have easily approached the bench and made a record of any objection out of the venire's hearing. Thus, counsel clearly had an opportunity to object. That said, we turn to the well-established exception to the waiver rule, which exception is that an appellate court may consider an issue not raised to the trial court if such issue amounts to plain error. See *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

We do note that in *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), the defendant claimed ineffective assistance of counsel because of his trial counsel's failure to object to the use of the anonymous jury and because counsel did not request a curative instruction. The Supreme Court quickly disposed of this claim by simply saying that the record showed the use of the anonymous jury was justified and appropriate precautions were taken and that therefore, counsel was not ineffective.

But this case is substantially different from *Sandoval* because here, there is absolutely nothing in the record that establishes either the existence of a compelling need to protect the jury or that precautions were taken to prevent prejudice to Nadeem. In short, there is a complete absence

of evidence that establishes the substantive prerequisites for the use of an anonymous jury. Therefore, the ultimate issue devolves to the question: Under such circumstances, was it plain error to use an anonymous jury? Given the high substantive requirements for the use of such a jury, coupled with the definition of plain error, we can only answer the determinative question posed above in the affirmative. We recall that an anonymous jury's use carries an obvious risk of disadvantaging the defendant in the jury selection process, as well as having a potentially adverse impact on the presumption of innocence. Thus, we must conclude that plain error exists. The record fails to show both a need to protect the jury and how Nadeem was protected from the potential prejudice to him from the use of this unusual procedure. Failure to correct this error would damage the integrity, reputation, and fairness of the judicial process. Thus, the use of this anonymous jury in Nadeem's trial, although unobjected to, constitutes reversible plain error, and it naturally follows that doing so was an abuse of discretion.

[9] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Nadeem's convictions. See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). If it was not, then double jeopardy principles would not allow a remand for a new trial. See *id.* The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.* Bearing in mind our recitation of the factual evidence at the outset of our opinion, we find that the sum of all the evidence was sufficient to sustain the verdicts. We therefore reverse the convictions and remand the cause for a new trial.

Given our determinations that the trial court abused its discretion in impaneling an anonymous jury and that such was plain error, we need not address Nadeem's remaining assignments of error. See *State v. Passerini*, 18 Neb. App. 552, 789 N.W.2d 60 (2010) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

CONCLUSION

For the foregoing reasons, we conclude that the trial court abused its discretion in impaneling an anonymous jury. Because the evidence presented by the State was sufficient to sustain Nadeem's convictions, we reverse the convictions and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHEN M. SAWTELL, JR., AND JULIA A. SAWTELL, HUSBAND AND WIFE, APPELLEES, V. BEL FURY INVESTMENTS GROUP, L.L.C., APPELLANT.

810 N.W.2d 320

Filed March 6, 2012. No. A-11-150.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Equity: Quiet Title.** A quiet title action sounds in equity.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
5. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
6. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
8. ____: ____. The burden to prove an exact and definite description of land adversely possessed is not met where the metes and bounds of the area claimed would rest on speculation and conjecture.