90793-5

Case # 313859

SUPREME COURT

OF THE STATE OF WASHINGTON

Daniel Dodd, Petitioner

v.

State of Washington, Respondent

MOTION FOR DISCRETIONARY REVIEW

Daniel Dodd, acting pro se, Petitioner

Appendix

Caldwell v U.S. (1953)
92 US App. D.C. 205 F.2d 879

Coplon v US (1951)
89 US App DC 103 191 F.2d 749

State v Cory 62 Wn 2d 371

State v Fuentes 318 P.3d 257
179 Wn 2d 808

State v Garza 99 Wn App 291
994 P.2d 868 (Div 3 2000)

State v Granacki 90 Wn App 598
959 P.2d 667 ~~(1998)~~ (1998)

Orman v US (DC Colo) 417 F Supp
1126

Issues for Review

Conduct of sheriff office in the systematic recording and listening to private telephone conversations between attorney and client violated the whole criminal proceeding. U.S.C.A. Const. Amends 5, 6; RCW 5.60.060 (2) and RCW 9.73.095 (4)

The violations of attorney-client privilege to wit; the repeated recording and listening to telephone conversations between the defendant and his attorney and the interception, opening and reading of "confidential and privileged" legal mail by the sheriffs office was an intrusion on the confidential relationship between the

defendant and his attorney. U.S.CA. Const Amend 6, 14; West's RCWA Const Art 1 section 22 Amend 10

The state has the burden to show beyond a reasonable doubt that the defendant was not prejudiced by eavesdropping on privileged attorney-client and legal mail tampering. USCA Const. Amend. 6

Statement of Case

On July 23 2012 Michael De Grassi the attorney for the defendant Daniel Dodd was notified by Gabriel Acosta Deputy Prosecuting Attorney that officers of the Walla Walla Police Department and the Walla Walla Sheriff's office had been intercepting and recording telephone calls made between the defendant and his attorney CP 128 occuring on June 22, July 3, July 16 and July 20 of 2012.

Plantiff Identification 3 is a 4 page report detailing each of calls that the defendant had with his attorney in June and July of 2012, what day they were recorded and each time they were accessed by

officers of the police department and each time the recording was "played back" by the officer who is identified by "user" name. CP 139

Plantiff Identification 3 page 1 shows details of a call that was recorded on June 22 to "dialed number" 509 522 2004, Dodd's attorneys office. RP 872 (20 thru 24) RP 869 (15 thru 24) by "user" M Wood of the Walla Walla Police Dept on July 9 "access time", RP 886 (2 thru 4) and RP 886 (22 thru 25). The "user" M Wood "accessed" the recorded conversation on June 28 RP 869 (25) RP 870 (1 thru 3). The same call was "access" by C Ruchart RP 892 (18 thru 21) for "playback" on June 26. RP 870 (4 thru 7) CP 139

Plantiff Identification 3

page 2 identifies a call made by Dodd to his attorney that was recorded on July 3. RP 870 (20 thru 25) The call was "accessed" on July 11 RP 871 (1 thru 3) by "user" M Wood RP 886 (2 thru 4) RP 886 (22 thru 25). The same call was "accessed" again by M Wood on July 9. RP 871 (4 thru 10). The call was accessed and played back by C Buttice RP 883 (1 thru 2) on July 4. RP 871 (11 thru 14) CP 139

Plantiff Identification 3

page 3 identifies a call recorded on July 16 to Dodd's attorney. RP 871 (15 thru 21). That call was accessed on July 17 and played back RP 871 (22 thru 24) by C Ruchart RP 871 (25) thru RP 872 (1 thru 2) of the Walla Walla Police Dept. RP 892 (18 thru 21).

The call was "accessed" and "played back" on July 18 and July 20 by M Wood. RP 872 (3 thru 5) RP 872 (6 thur 8) CP 139

Plantiff Identification 3 page 4 identifies a call recorded on July 20 to Dodd's attorney. RP 872 (9 thru 12). That call was "accessed" by M Wood and "playedback" on July 20. RP 872 (13 thru 15) CP 139

Plantiff Identification 1 page 1 is an email Matt Wood of the Walla Walla Police Dept sent to the prosecutors office advising them that some time in the last 30 days he suspected a call he accessed was to an attorney so he teminated the access. He was not positive it was to an attorney. The email was

sent July 20 at 11:07 am.
RP 887 (6 thru 10) CP 139

Plantiff Identification 2
This document is a 2 page email sent to Jail commander Keilen Harmon and Deputy Prosecutor Jim Nagle advising them that the defendant Dodd is calling his attorney Michael De Grassi at 509-522-2004. He also advises that he began listening to a call that day and immediatly realized it was to Dodd's attorney, so he disconnected. Email sent July 20 15:20. RP 887 (14 thru 21) CP 139

Plantiff Identification 1
At the bottom of the page is an email sent to Jail commander Harmon and Deputy prosecutor Acosta on July 20 2012 at 11:07 am where Sgt Matt Wood admites he listened

to a phone call made by defendant Dodd to his attorney probably within the last 30 days. CP 139, RP 861 (3 thru 17) Approximately 2 hours later Matt Wood accessed the jail phone system at 12:37 pm and listened to a phone conversation that was recorded at 11:32 am on July 16 2012 between Dodd and his attorney. Plantiff Identification 3 page 3 CP 139 and RP 872 (6+7). Approximately 3 hours later ~~also~~ also on July 20 at 15:30 pm Matt Wood sent an email to Jail Commander Harmon and prosecutor Jim Nagle advising them that he began listening to a call Dodd made to 509-522-2004 and immediately realized this call was to Dodd's attorney so he disconnected. CP 139 RP 862 (3 thru 6)

Approximately 2 hours later also on July 20 2012 Matt Wood accessed the jail phone recording system at 17:13 pm and listened to a phone conversation that was recorded earlier that day at 10:07 am on July 20 2012 between Dodd and his attorney. Plantiff Identification 3 page 4. CP 139 RP 872 (9 thru 15)

In the first three paragraphes of the letter dated Augest 1 2012 CP128 from Dodd's attorney to the prosecutors office informing them that the defendant Dodd's attorney/client privledge has been violated. An envelope that was delivered to the defendant by a jail employee that was clearly marked legal mail (confidential and privledged) had been slit open.

It had then been taped shut. CP 128, CP 129 declaration of Daniel Dodd

In the third paragraph of a letter from the prosecutors office dated Augest 28 2012 CP 128, the county jail disputes that it has been "systematically eavesdropping" on telephone conversations between the defendant and his attorney.

The prosecutors office states that they advised the defendants attorney of two instances where law enforcement believed they may have started to listen in on such convesations, only because Dodd failed to advise the jail of the defendants attorney phone number so they could block it.

The prosecutors office contends that there are only

2 occasions of possible telephone interceptions that they know of after asking.

In the same letter dated August 28 2012, CP 128 in the fourth paragraph; the jail disputes that they opened and then taped shut an envelope from the defendants attorney. See declaration of Daniel Dodd CP 129. The jail does not allow tape (including taped items) where the inmates reside. The jail does not "slit" envelopes open, but rather cut them. Jail policy is for inmate to open "confidential" envelope in front of jail staff.

Plantiff Id 3 pg 1 CP 139

Attorney/Client recorded call		Officer playback recorded call		Officer
6/22	14:53	6/26	12:37	C Ruchart
6/22	14:53	6/28	17:54	M Wood
6/22	14:53	7/9	17:31	M Wood

Plantiff Id 3 pg 2 CP 139

7/3	11:18	7/4	09:44	C Buttice
7/3	11:18	7/9	17:25	M Wood
7/3	11:18	7/11	15:28	M Wood

Plantiff Id 3 pg 3 CP 139

7/16	11:32	7/17	16:34	C Ruchart
7/16	11:32	7/18	15:15	M Wood

At 11:07 am on July 20 Sgt M Wood sent an email to the prosecutors office and Jail Commanders ~~requarding the subject of Dodd's jail phone calls.~~ He states that he began listening to a call probably within the last 30 days. He suspected the call was to an attorney so he teminated the access.

He is not positive the call was to an attorney. RP 862 (21+22) RP 861 (9+10) CP 139 Plantiff Identification 1 pg 1 email sent 11:07 am

After sending the email to the prosecutors office and the Jail Commander, CP 139 Plantiff Identification 1 email sent at 11:07 am. Sgt Wood stated that he began listening to a phone call from Dodd to his attorney, Sgt Wood accessed the jail phone records system at 12:37 pm on July 20 to listen to a phone call from Dodd to his attorney. Plantiff Identification 3 pg 3 RP 872 (6+7)

Plantiff Identification 3 pg 3 CP 139

Attorney call	Officer playback	Officer
7/16 11:32	7/20 12:37	M Wood

At 3:20 pm on July 20 M Wood sends an email to the prosecutors office and the jail commander Harman. The email states, Dodd is calling his attorney at 509-522-2004. He began listering to a call today and immediately realized this was a call to his attorney so he disconnected. RP 863 (1) RP 861 (9+10) RP 888 (6 thru 9) RP 888 (22) RP 890 (21 thru 24) RP 891 (23 thru 25) RP 892 (1+2). CP 139 Plantiff Identification 2 pg 3

M Wood then sends an email at 3:25 pm on July 20 to officers Klem, Ruchart, and Buttice advising them that 509 522 2004 is Michael De Grassi's number, who is Dodd's attorney. Plantiff Identification 2. CP 139, RP 862 (3 to 6)

At 17:13 pm on July 20 M Wood accessed the jail phone record system and listened to a phone call between Dodd and his attorney. CP 139 RP 872 (13 to 15) Plantiff Identification 3 pg 4.

Plantiff Identification 3 pg 4 CP 139

attorney/client recorded call	officer playback recorded call	officer
7/20 10:07	7/20 17:13	M Wood

We must assume that the information gained by the officers was transmitted to the prosecutor since the opportunity and the motive were there. The defendant was never aware that the jail was recording telephone conversations between defendant and his attorney.

In a letter dated Augest 1 2012 from Michael De Grassi the attorney for the defendant CP 128 and the Declaration from Daniel Dodd CP 129 address the intentional and systematic violation of the attorney client privilege by opening the defendants legal mail.

The jail had delivered to Dodd an envelope clearly marked "confidential and privileged" CP 128 that had been opened and taped shut by jail staff.

Mr De Grassi had encluded a photo copy of the envelope with the letter to the prosecutor CP 128 and advises that he has the original document in his office and invites the prosecutor to come and examine it

The prosecutors office responds in a letter CP 128

dated Augest 28 2012 paragraph 4 where he states that the jail disputes that they opened and then taped shut legal mail from the defendants attorney. They go on to say that the jail does not allow tape (including taped items) where the inmates reside. Jail policy is for inmates to open "confidential" envelopes in front of staff, and has no explanation other than it happened after the fact.

In addition to opening mail the defendants attorney addresses the systematic eavesdropping in a letter dated Aug 1 2012. CP 128 He was first informed that the jail had inadvertently intercepted a call between Dodd and

his attorney. He now believes that the sheriff's office has been regularly recording privileged communications between the defendant and his attorney.

The states response is outlined in paragraph 3 of CP 128 dated Augest 28 2012. The jail disputes that it has been "systematically & eavesdropping" on telephone conversations between Dodd and his attorney. The prosecutor contends that he told the defendants attorney previously of 2 instances where law enforcement may have listened in on such conversations, only because Dodd failed to advise the jail of his attorneys telephone number so they could block it.

He goes on to say that those are the only two occassions of possible telephone interceptions at least that he knows of after asking. He also adds that if the defendants attorney has any concrete information to the contrary to let him know so he can follow up, it should no longer be an issue.

In the defendants motion to dismiss and statement of counsel dated Dec 5 2012 CP 128 the defendants attorney states that he became counsel for the defendant in June 2012 and on July 23 2012 the prosecutors office called him to notify that jail officials had been monitoring telephone calls between the defendant and his attorney.

He also states that at no time was he aware of any recordings or interceptions of telephone conversations between the defendant and his attorney or any other inmate in the county jail. CP 128 pg 3

He is not aware of any policy of the sheriff office whereby the attorney-client privilege would be respected only if a request was made not to intercept, monitor or record conversations between jail inmates and legal counsel.

Dodd's attorney also states in a Declaration of Counsel dated December 7 2012 that crucial and privileged communications were initated by the defendant to his attorney in the course of telephone conversations prior

to trial while he was an inmate at the jail. He could not assure his client Dodd or himself that privileged matters were not discussed during calls intercepted by officials of the jail. all the conversations concerned the defense of Dodd.

The state failed to produce evidence that the jail had ever stopped recording telephone conversations between Dodd and his attorney and that the recording of attorney client conversations had occured before the States case against Dodd. RP 872 (16 to 18) RP 913 (6 to 18) RP 895 RP 896

Arguement

Sgt Matt Wood testimony was that it was a phone call that he listened to on July 20 that lead him to believe he was listening to calls made between Dodd and his attorney

The record shows that Wood sent ~~an~~ the email to jail commander ~~att~~ at 11:07 am on July 20, before listening to any calls on July 20

The phone records; Plantiff Id 3 show that Wood listened to 5 phone calls Dodd made to his attorney before sending email to Jail commander on July 20 at 11:07 requarding those phone calls.

After the email he sent at 11:07 am, he accessed the jail phone system at 12:37 and listened to call between Dodd and his attorney.

He waited ~~to~~ until 3:20 pm to email jail commander that calls he was listening to were definatelly from Dodd to his attorney

He also sent email to fellow officers advising them that Dodd is calling his attorney at ~~509-522~~ 509-522-2004

And then at 5:13 on July 20 Wood accessed jail phone system to listen to a phone conversation he knows if from Dodd to his attorney.

The systematic nature of officers of the sheriff's office in listening to phone calls from Dodd to his attorney and the opening of his legal mail denied the accused his constitutional right to effective assistance of counsel under the 5th and 6th amendment and privilege established in RCW 5.60.060 (2) and RCW 9.73.095 (4)

Conclusion

There is no way to isolate the prejudice resulting from the eavesdropping activity that occured. When the state intrudes on a defendants right to effective assistance of counsel and denying the attorney client privilege the only ~~fem~~ adequate remedy dismissal

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Daniel Dodd, declare that, on this 11 day of Sept, 2014 I deposited the forgoing documents:

~~Statement~~ of

Motion for Discretionary Review

or a copy thereof, in the internal legal mail system of

And made arrangements for postage, addressed to: (name & address of court or other party.)

Court of Appeals
Division III
N 500 Cedar
Spokane WA 99201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Clallum Bay WA 98326 on 9/11/14
(City & State) (Date)

Daniel Dodd
Signature

Daniel Dodd
Type / Print Name

AFFIDAVIT

STATE OF Washington)
~~COUNTY OF~~ _____) SS.
Court of Appeals)
Div III)

I, Daniel Dodd, declare under the penalty of of perjury, that the declaration attached to this affidavit are true and correct and to the best of my knowledge and have been sworn to me on this ~~10~~ 11 day of Sept 20~~12~~14

Daniel Dodd
PRINT NAME

Daniel Dodd
SIGNATURE OF AFFIANT

1830 Eagle Crest Way
Clallam Bay WA 98326
ADDRESS

(NOTARY)-Below , IN AND FOR THE STATE OF Washington

I certify that I know or have satisfactory evidence that the above person DANIEL DODD, is the person who appeared before me, and said person acknowledged that (he)/she signed this instrument and acknowledged it to be (his)/her free and voluntary act for the uses and purposes mentioned in the instrument.

DATED: 9-11-14

Barbara J Gronseth
SIGNATURE OF NOTARY

(SEAL OR STAMP)

BARBARA J GRONSETH
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES DECEMBER 1, 2017

BARBARA J. GRONSETH
PRINT NAME OF NOTARY

My Commission Expires:

Dec. 1, 2017

FILED
JUNE 12, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DANIEL DUANE DODD, Appellant.	)	No. 31385-9-III (consolidated with No. 31398-1-III) UNPUBLISHED OPINION

BROWN, J. — Daniel Dodd appeals his first degree murder and first degree unlawful possession of a firearm convictions involving the death of Kevin Myrick, a witness against Mr. Dodd's girlfriend, Tina Taylor. Mr. Dodd contends the trial court erred in denying testimony suggesting other perpetrators and by improperly commenting on the evidence. In his pro se statement of additional grounds for review, Mr. Dodd contends private conversations between him and his attorney were improperly recorded and evidentiary error. We find no error, and affirm.

FACTS

Mr. Myrick, a confidential informant for the Walla Walla Police Department, made a controlled buy from Ms. Taylor resulting in drug charges against her. Ms. Taylor was Mr. Dodd's live-in girlfriend. On June 12, 2011, Mr. Myrick was outside, fixing Kristina

Devaney's, car. She was sitting inside the car while he worked under the hood. Ms. Devaney saw a man dressed in black jump up outside the passenger side of the vehicle and rush to the front, heard a noise, and saw Mr. Myrick fall. Ms. Devaney found Mr. Myrick on the ground bleeding and saw the assailant running away. She called 911. Mr. Myrick died at the hospital from a gunshot wound to the face. Experts believed the bullet that killed Mr. Myrick was from either a .38 special or .357 magnum.

Passerby Manuel Ramirez heard a boom-like noise. About 10 seconds later, he saw someone run out of an alley and up the street who had wavy hair and was wearing a black sweater. Mr. Dodd had "longer hair." Report of Proceedings (RP) at 556.

A few weeks before Mr. Myrick's death, his house was fire bombed; Ms. Taylor's son-in-law, Charles Wilson, was suspected. The police believed Ms. Taylor had assisted Mr. Wilson by hiding evidence. Mr. Wilson, however, was in jail when Mr. Myrick was shot and was ruled out as a suspect. On the other hand, Ms. Taylor made several frantic phone calls from jail to Mr. Dodd prior to Mr. Myrick's death. Ms. Taylor was scheduled to plead guilty but changed her mind two days before Mr. Myrick's death. Based on data from nearby cell towers, officers learned Mr. Dodd's cell phone was used close to the shooting site near the time of the murder.

Officers arrested Mr. Dodd to serve work crew time. Officers asked Mr. Dodd about the murder and he claimed he was at home that time. After Mr. Dodd's brief escape from work crew, he unsuccessfully asked to view the investigative report on Mr. Myrick's murder and confess to the killing in exchange for a more lenient sentence for

Ms. Taylor. Officers learned that just prior to the shooting, Mr. Dodd borrowed a .357 Smith and Wesson from his roommate and returned it after the shooting. He told his roommate "it is a done deal." RP at 584. The gun was later retrieved in the Snake River.

The State charged Mr. Dodd with first degree murder and first degree unlawful possession of a firearm. Mr. Dodd defended by suggesting some other person committed the murder, either Clifford Fauver or Mr. Wilson. Mr. Fauver allegedly confessed to the murder to one of Mr. Dodd's cellmates, Sheyne Thrall. Instead of longer hair, Mr. Fauver was "just about bald." RP at 696. The State moved to limit the accusation against Mr. Fauver and the court ruled the accusation was inadmissible hearsay and uncorroborated.

During cross-examination of one of the investigating officers, defense counsel questioned whether police knew Mr. Myrick was involved in controlled buys with Mr. Wilson's mother in law to suggest Mr. Wilson's involvement in the shooting. The State objected, arguing because Mr. Wilson was known to be in jail, he could not have shot Mr. Myrick, and therefore, his motive was irrelevant. Defense counsel responded, "I don't think simply because Mr. Wilson himself was in jail and didn't pull the trigger, he could not have been responsible for the homicide." RP at 357. The trial court sustained the State's objection stating, "Well, I think in order to speculate that somebody else did it . . . you have to have some additional tying in or other evidence that would connect that. And unless you have got that, I think the objection is well taken." RP at 357.

Later, Defense counsel established through cross-examination of one of the investigating officers that one of Mr. Myrick's undercover buys involved Mr. Wilson's mother and as a result, Mr. Wilson threatened Mr. Myrick. Defense counsel then asked the officer how successful Mr. Myrick had been as a confidential informant. The State objected to the question as irrelevant. Defense counsel noted the question "has to do with the exposure of Mr. Myrick to other individuals, who threatened him." RP at 406. The trial court overruled the objection, but then stated, "But for instance, the question about Charles Wilson threatening Mr. Myrick, there has been testimony establishing that Charles Wilson was in custody in another county at the time of this incident. So whether or not he -- There wasn't an objection made, but whether or not he threatened him seems to me, unless you can tie that in to some other evidence is irrelevant." RP at 406. Defense counsel did not object to the comments nor request that the jury be instructed to disregard them.

A jury found Mr. Dodd guilty as charged. He appealed.

ANALYSIS

A. Right to Present a Defense

The issue is whether the trial court erred by abusing its discretion in granting the State's motion in limine, excluding evidence from Mr. Thrall that Mr. Fauver confessed to the murder. Mr. Dodd argues this denied him his right to present a defense.

We review a trial court's ruling on a motion in limine or the admission of evidence to determine whether it was manifestly unreasonable or based on untenable grounds or

reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). We review de novo whether a trial court's evidentiary ruling violated a defendant's Sixth Amendment right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

A criminal defendant has the right to present his or her defense, guaranteed by the Sixth Amendment to the federal constitution, as well as article I, section 22 of the Washington Constitution. *Wash. v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). A defendant's Sixth Amendment right to present a meaningful defense, however, is not unlimited and must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999). A defendant has no constitutional right to present inadmissible evidence. *Hudlow*, 99 Wn.2d at 15.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). In general, hearsay is inadmissible. ER 802. However, several exceptions exist. *See* ER 803, 804. Mr. Dodd argues the evidence is admissible under ER 804(b)(3), which provides that a statement against a person's interest is admissible if "a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." But, "[i]n a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Here, the trial court properly found no corroborating circumstances exist. No link exists between Mr. Fauver and the murder weapon, no history of contention between Mr. Myrick and Mr. Fauver, and Mr. Fauver did not meet Mr. Ramirez's description of the shooter. Moreover, Mr. Fauver denied the confession.

State v. Strizheus, 163 Wn. App. 820, 262 P.3d 100 (2011), *review denied*, 173 Wn.2d 1030 (2012) is instructive. There, Anatoliy Strizheus was charged with the attempted murder of his estranged wife. *Id.* at 821. When police arrived, the defendant had wounds he blamed on his wife. *Id.* at 823. At trial, the defendant attempted to blame his adult son, Vladimir, for the assault on his wife, although the son had not been present at the time. *Id.* at 825-26. The trial court found that the evidence did not tend to clearly point to someone other than the defendant as the guilty person. *Id.* at 827. The court of appeals upheld the ruling, noting that a defendant's constitutional right to a defense "is not absolute" and "does not extend to . . . inadmissible evidence." *Id.* at 830.

Here, like in *Strizheus*, the evidence was inadmissible. The trial court correctly concluded likewise.

B. Alleged Judicial Comment

The issue is whether the trial court denied Mr. Dodd a fair trial by commenting on the evidence. Mr. Dodd contends the court's comments about Mr. Wilson's whereabouts on the night of the murder invaded the province of the jury.

A trial judge may not convey his or her personal attitudes or opinion towards the merits of the case. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). When a judge comments on a fact in dispute, the State must show that no prejudice could have resulted. *Id.* at 723. The test, then, is whether the judge commented on a fact in dispute, and if so, whether the comment was prejudicial. *Id.* A judicial comment on the evidence is an error of constitutional magnitude, and as such, may be raised for the first time on appeal. *Id.* at 719-20; RAP 2.5.

Here, the judge commented "there has been testimony establishing that Charles Wilson was in custody in another county at the time of this incident." RP at 406. Based on this court's record, this was not a disputed fact. Because Mr. Wilson's location at the time of the murder was not in dispute, the judge's statement was not a judicial comment under *Levy*. Moreover, the statement was not prejudicial. The judge did not approve or disapprove of a witness's credibility, but only noted the uncontroverted and agreed evidence. Mr. Wilson was in custody at the time of the offense.

By comparison, in *State* v. *Bogner*, 62 Wn.2d 247, 249, 382 P.2d 254 (1963), the trial judge commented, "[D]on't you think we are getting a little ridiculous?" when defense counsel was questioning a police officer. Our Supreme Court reversed Mr. Bogner's conviction, holding the comment was prejudicial. *Id.* at 256. Here, because Mr. Wilson's incarceration was not in dispute, it is affirmatively proven that Mr. Dodd could not have been prejudiced by the judge's words. Thus, the judge's statement was

not a judicial comment, and even if it was, the comment would not amount to reversible error. Mr. Dodd received a fair trial.

C. Statement of Additional Grounds

Pro Se, Mr. Dodd contends jail staff improperly recorded his phone conversations with his attorney and the State failed to prove Mr. Dodd was carrying his cell phone on the night of the murder.

Inmates have a lesser privacy expectation while incarcerated. *State v. Modica*, 136 Wn. App. 434, 448, 149 P.3d 446 (2006). Attorney-client communication, however, is considered private. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). And, intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. *State v. Cory*, 62 Wn.2d 371, 374-75, 382 P.2d 1019 (1963). Mr. Dodd points to several places in the record where police note Mr. Dodd spoke to his attorney while incarcerated. This evidence is based on phone logs and not on recorded conversations. Without more, Mr. Dodd fails to show there was an intrusion on his right to private attorney-client conversations.

Mr. Dodd argues while the State provided evidence his cell phone was used near the crime scene, it did not prove he was the person using the phone. The State, however, did not have to prove he used his phone near the murder scene. The State is permitted to submit to the jury circumstantial evidence. Direct and circumstantial evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Furthermore, "'[t]he jury is permitted to infer from one fact[,] the existence of

another essential to guilt, if reason and experience support the inference.'" *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989) (quoting *Tot v. United States*, 319 U.S. 463, 467, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943)). Accordingly, it was the province of the jury to decide the weight of the cell phone evidence.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.