

63974-9

63974-9

NO. 63974-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GREGORY JORDAN,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE
SEP 24 11 17 AM '93

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE COURT'S DELIBERATE REFUSAL TO EITHER DISMISS OR QUESTION A SLEEPING JUROR DENIED JORDAN HIS RIGHT TO FAIR TRIAL BY JUROR..... 1

 2. THE COURT'S FAILURE TO INQUIRE INTO THE ATTORNEY-CLIENT CONFLICT DENIED JORDAN HIS RIGHT TO MEANINGFUL ASSISTANCE OF COUNSEL . 3

 3. THE PROSECUTION'S EFFORTS TO ELICIT IMPROPER AND PREJUDICIAL INFORMATION COMMENTING ON JORDAN'S RIGHT TO SILENCE DENIED HIM A FAIR TRIAL.....5

B. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982) 1

In Re Personal Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1
(2001) 5

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008) 6

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) 6, 8

State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003)..... 1

State v. Williams-Walker, _ Wn.2d __, 2010 WL 118211 (2010). 1, 3

Washington Court of Appeals Decisions

State v. Jordan, 103 Wn.App. 221, 11 P.3d 866 (2000) 3

State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (1997) 7

State v. Knapp, 148 Wn.App. 414, 199 P.3d 505 (2009) 6

State v. Romero, 113 Wn.App. 779, 54 P.3d 1255 (2002)..... 6

United States Supreme Court Decisions

Dusky v. United States, 362 U.S. 402, 80 S.Ct 788, 4 L.Ed.2d 824
(1960) 4

Federal Decisions

United States v. Barrett, 703 F.2d 1076 (9th Cir. 1982) 3

United States v. Nguyen, 262 F.3d 998 (9th Cir. 2002)..... 5

United States v. Olano, 62 F.3d 1180 (9th Cir. 1995) 1

Statutes

RCW 2.36.110..... 1, 3

Court Rules

CrR 6.5..... 1, 3

A. ARGUMENT.

1. THE COURT'S DELIBERATE REFUSAL TO EITHER DISMISS OR QUESTION A SLEEPING JUROR DENIED JORDAN HIS RIGHT TO FAIR TRIAL BY JUROR

A sleeping juror is an absent juror. United States v. Olano, 62 F.3d 1180, 1189 (9th Cir. 1995). While both the state and federal constitutions protect the right to a fair trial by jury, Article I, section 21 specifically demands that “[t]he right of trial by jury shall remain inviolate.” This explicit constitutional mandate results in greater jury trial protection in Washington in some circumstances than under the federal constitution. State v. Williams-Walker, __ Wn.2d __, 2010 WL 118211, *2 (2010) (citing State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003); City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982)).

The trial judge has the unambiguous duty to discharge any juror who has “manifested unfitness.” RCW 2.36.110; CrR 6.5. Unfitness results from a juror’s “inattention” to the case. RCW 2.36.110.

There is no question that Juror 9 appeared to be sleeping during the testimony of the only fact witness in the case, despite the prosecution’s efforts to muddy the record. The court saw Juror

9 closing her eyes and presumed she was sleeping, even if only momentarily. 3RP 157-58. The court saw Juror 8 nudge Juror 9 “on at least one occasion,” to wake her, showing that the neighboring juror noticed Juror 9 needed to be awakened. 3RP 158. The trial prosecutor presumed the juror was sleeping when she asked the court to “inquire of Juror No. 9 if there are any issues going on that will make it difficult for the juror to remain awake and alert during the remainder of the - - the case.” 3RP 157. The court declined both the defense request to declare a mistrial and the prosecution’s request to inquire of the juror. Instead, the court told all jurors to stay awake and promising to make eye contact with neighboring jurors if any one seemed to be sleeping so the neighbor could wake up the dozing juror. 3RP 158-59.

The court’s reluctance to ascertain Juror 9’s fitness likely stems from the fact that the court did not select any alternate jurors. There were no replacement jurors, and thus, the court refused to ask a sleeping juror any questions about whether she missed any testimony while repeatedly dozing off during the testimony of the central State witness. The court’s failure to ask the juror whether she missed testimony while sleeping violates

Jordan's right to a fair trial by fit jurors and contravenes the explicit requirements of RCW 2.36.110 and CrR 6.5.

The prosecution alleges that the record does not establish misconduct by Juror 9. Response Brief at 12. Yet the record demonstrates the court disregarded its obligation to create a record, after inquiring of the juror, as to whether she was fit to proceed. Even the trial prosecutor asked the court to undertake an inquiry but the court refused. 3RP 157. Thus, Jordan was denied his right to a fair trial by jury. State v. Jorden, 103 Wn.App. 221, 227, 11 P.3d 866 (2000); see also United States v. Barrett, 703 F.2d 1076, 1082-83 (9th Cir. 1982); Williams-Walker, 2010 WL 118211 at *5 (harmless error does not apply to violation jury trial right under Article I, section 21).

2. THE COURT'S FAILURE TO INQUIRE INTO THE ATTORNEY-CLIENT CONFLICT DENIED JORDAN HIS RIGHT TO MEANINGFUL ASSISTANCE OF COUNSEL.

The fact that Jordan did not get along with his prior attorney and the court allowed that attorney to withdraw does not forever waive Jordan's right to conflict-free counsel. When the court appointed Brian Todd to replace his prior attorney, Jordan and Todd immediately advised the court that because of their prior

relationship in an unrelated case, they could not co-exist in an attorney-client relationship. 5/8/09RP 4-6. Jordan was not simply complaining for the thrill of it, rather he explained that Todd had “sent me to the joint before” and he could not work with Todd. Id. at 6. He told the court he would prefer the attorney who had been replaced. Id. He also told the court that he had mental health issues. Id.

The court neither inquired into the reason the prior attorney-client relationship made it impossible for the two to work together again nor questioned Jordan’s competence to stand trial. A person accused of a crime may not be competent to stand trial if he lacks “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct 788, 4 L.Ed.2d 824 (1960) (internal quotation marks omitted). At the least, the court was required to ascertain whether Jordan had a valid basis to refuse to cooperate or communicate with Todd, but the court did not do so.

The trial court did not ask any questions to Jordan or Todd about the reason for the conflict or why they felt it could not be remedied. The court made no inquiries into the nature of Todd’s prior representation of Jordan. The court simply refused to give

Jordan another attorney because Todd was Jordan's third attorney.
Id. at 4, 6-7.

The prosecution claims that the court gave Jordan the opportunity to explain the reason for his dissatisfaction, without citation. The court asked no questions when confronted with Jordan and Todd's joint protestations that their prior relationship made it impossible for them to communicate. The court's asked no questions and dismissed the complaint out of hand. This constitutes both an abuse of discretion and a violation of Jordan's right to counsel. In Re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

3. THE PROSECUTION'S EFFORTS TO ELICIT
IMPROPER AND PREJUDICIAL INFORMATION
COMMENTING ON JORDAN'S RIGHT TO SILENCE
DENIED HIM A FAIR TRIAL

The prosecution impermissibly implied that Jordan offered no credible defense or protestations of his innocence upon his arrest. It elicited Jordan's refusal to sign the form explaining his

rights to remain silent and details about Jordan's behavior after the officer arrested him. 3RP 163-67. This purposeful part of the prosecution's direct examination was an effort to show that Jordan did not explain his innocence upon his arrest. Not only was this tactic a flagrant violation of Jordan's right to remain silent, the court had ruled that Jordan was not properly advised of his rights and therefore, his statements to police were inadmissible. CP 24, 2RP 53-55; 3RP 66. The prosecution's efforts to undermine the court's clear pre-trial ruling by eliciting testimony that Jordan understood his Miranda rights requires reversal unless the State proves it is harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Knapp, 148 Wn.App. 414, 421, 199 P.3d 505 (2009); State v. Romero, 113 Wn.App. 779, 795, 54 P.3d 1255 (2002).

In State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008), the court reversed a conviction where the State invited the jury to infer guilt from the defendant's termination of an interview. In Knapp, the court reversed a conviction when the police testified that the defendant put his head down rather than deny his guilt when confronted, constituting an impermissible comment on the right to silence. Knapp, 148 Wn.App. at 420-21. In Keene, a

detective testified that the defendant failed to appear an an appointment and the prosecution argued that the jury could decide whether those were “the actions of a person who did not commit these acts,” thereby suggesting the defendant’s guilt from her silence. State v. Keene, 86 Wn.App. 589, 592, 938 P.2d 839 (1997).

Here, the prosecution argued it would be “nice” if she could explain more about what substances Jordan may have injected. 4RP 245. The prosecution argued that Jordan refused to cooperate by not submitting to a blood test, which itself could be permissible argument, but the prosecution encircled this claim with a broader claim that Jordan was read his rights, seemed to understand them, and refused to offer exculpatory evidence, thus cementing his guilt. The State impermissible circumvented the court’s ruling that Jordan had not been properly advised of his rights by insisting that its failure to present a stronger case had nothing to do with its own errors.

The prosecution intentionally elicited Jordan’s inadmissible statements to the police to bolster its claim that Jordan knowingly and intelligently refused to provide the State with evidence from a blood test even though the court had clearly ruled the State did not

prove he understood his rights when he refused the blood draw. The prosecution's reliance of Jordan's inadmissible statements and silence in direct violation of a court order requires reversal and cannot be proven harmless beyond a reasonable doubt, reversal is required. Easter, 130 Wn.2d at 242.

B. CONCLUSION.

For the foregoing reasons as well as those in the Opening Brief, Mr. Jordan respectfully requests this Court reverse his convictions and remand his case for further proceedings.

DATED this 24th day of March 2010.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

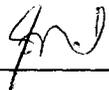
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63974-9-I
v.)	
)	
GREGORY JORDAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANN MARIE SUMMERS, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] GREGORY JORDAN	(X)	U.S. MAIL
12360 5 TH AVE NE #1	()	HAND DELIVERY
SEATTLE, WA 98125	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF MARCH, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710