

64874-8

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No. 64874-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID P. FENDICH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

David Fendich's constitutional right to be present at his criminal trial was violated where the court permitted the jury to rehear a 911 tape during deliberations in Mr. Fendich's absence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A criminal defendant has a constitutional right to be present at trial, which includes the right to be present when the court communicates with a deliberating jury and allows the jury to rehear evidence in open court. Was Mr. Fendich's constitutional right to be present violated, where the court permitted the jury to rehear a 911 tape during deliberations in Mr. Fendich's absence, and Mr. Fendich did not waive his right to be present?

C. STATEMENT OF THE CASE

The State charged David Fendich with one count of third degree assault, RCW 9A.36.031(1)(f).¹ CP 5-6.²

¹ RCW 9A.36.031(1)(d) provides:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

.....
(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm

² Mr. Fendich was also charged, in the alternative, with one count of second degree assault, but the jury acquitted him of that charge. CP 5-6, 15-16. In addition, Mr. Fendich was charged with one count of first degree theft, but the

At the jury trial, Romana Lakotiy testified that, on February 2, 2009, she was living in an apartment in Kent with her 17-year-old son, Vitaliy. 8/11/09RP 32. When she came home that day, Vitaliy was sitting on the front steps talking to a man, Mr. Fendich, whom she did not know. 8/11/09RP 33-34. She said hello and went inside the apartment. 8/11/09RP 33. Soon afterward, she heard a knock on the door, opened the door, and saw Mr. Fendich standing on the stoop with Vitaliy behind him. 8/11/09RP 35. Mr. Fendich said Vitaliy owed him \$50 and asked her to give it to him. 8/11/09RP 36. She asked Vitaliy if he owed Mr. Fendich the money and Vitaliy said no. 8/11/09RP 36. She told Mr. Fendich to go away or she would call the police, but he would not leave. 8/11/09RP 36-37. She then called 911. 8/11/09RP 37-38. As she was talking to the 911 operator, Mr. Fendich took a can of beer out of his jacket and threw it at her, and then ran away. 8/11/09RP 38-39. The can hit Ms. Lakotiy on the chin, causing it to bleed and causing her a lot of pain. 8/11/09RP 38.

A tape recording of Ms. Lakotiy's 911 call was played for the jury during her testimony. 8/11/09RP 43; Exhibit 13. Defense counsel objected to admission of the tape on the grounds of

dismissed that charge after the State rested its case, due to a lack of evidence. CP 5-6; 8/11/09RP 24-25.

hearsay, but the court overruled the objection, finding it was admissible as either an excited utterance or a present sense impression. 8/11/09RP 9-11.

After the jury retired to deliberate, the court and the attorneys discussed how to proceed if the jury asked to replay the 911 tape. 8/12/09RP 80. The court proposed that if the jury asked to hear the tape, the bailiff would play it for them in the courtroom, without the presence of the judge or the attorneys. 8/12/09RP 80. The attorneys agreed to waive their presence, but Mr. Fendich did not. 8/12/09RP 80-81. The record contains no indication that Mr. Fendich was made aware of his right to be present if the tape was replayed for the jury, or that he ever waived that right.

The jury retired to begin deliberating on August 12, 2009, at 10:35 a.m. Sub #45A (minutes), at 6.³ At 12:00 p.m., the jury submitted a written inquiry: "May we listen to the 911 tape[?]" Sub #45A, at 7; CP 21. The judge responded in writing, "Ms. Tye [the bailiff] will escort the jury into the court room and play the tape (Exhibit 13) once for the jury. You must not discuss the case in Ms. Tye's presence." CP 21-22. Accordingly, at 1:24 p.m., the jury returned to the courtroom and the 911 tape was played for the jury

³ A supplemental designation of clerk's papers has been filed for this document.

without the presence of the defendant, respective counsel, or the court. Sub #45A, at 7. On the following day at 10:34 a.m., the jury reached a verdict, finding Mr. Fendich guilty of third degree assault. Sub #45A; CP 15-16.

D. ARGUMENT

MR. FENDICH'S CONSTITUTIONAL RIGHT TO BE PRESENT WAS VIOLATED WHERE THE COURT PERMITTED THE JURY TO REHEAR A 911 TAPE DURING DELIBERATIONS IN OPEN COURT IN MR. FENDICH'S ABSENCE

1. A criminal defendant has a constitutional right to be present when the judge communicates with a deliberating jury and permits the jury to rehear evidence in open court. A criminal defendant's right to be present at trial derives from the federal and state constitutions and court rule. Const. art. 1, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"); U.S. Const. amend. 14 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); CrR 3.4(a) ("The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.").

The constitutional right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights might be affected." State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975); see also Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (defendant must "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge").

A defendant has a constitutional right to be present whenever the judge communicates with a deliberating jury and permits the jury to rehear evidence in open court, as such proceedings affect the defendant's substantial rights. "It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983) (citing State v. Shutzler, 82 Wash. 365, 367-68, 144 P. 284 (1914) and State v. Smith, 85 Wn.2d 841, 853, 540 P.2d 424 (1975) (criticizing court's exclusion of counsel during replaying of tapes for jury, even though counsel were given opportunity to comment and proceedings were recorded)). In Caliguri, during deliberations at the jury's request, the court permitted an FBI agent to replay tapes of conversations

between a federal agent and the defendant. Id. at 505. Only the court, the FBI agent, and the jury were present, and Caliguri was not notified until afterward. Id. The Supreme Court held, "[r]eplay[ing] the tapes in the present case without prior notice to Caliguri was highly improper." Id. at 508.

A defendant has a constitutional right to be present whenever the court communicates with a deliberating jury, or permits the jury to rehear evidence in open court, due to the potential for prejudice that inheres in such proceedings. The Sixth and Fourteenth Amendments to the United States Constitution and Washington Constitution article 1, section 22 guarantee a defendant the right to a fair and impartial jury. State v. Koontz, 145 Wn.2d 650, 653, 41 P.3d 475 (2002). The right to a fair and impartial jury is protected by procedures that restrict the manner in which information may be conveyed to a jury. Id. Limitations on outside contact are especially restrictive during deliberations, because at that point the jury is engaged in judging the facts. Id. (citing RCW 4.44.300 (care of jury while deliberating); CrR 6.7 (custody of jury); CrR 6.15(f)(2) (jury instructions not allowed during deliberations)).

Although a judge has discretion to permit a deliberating jury to rehear evidence in open court, the judge must do so in a way that does not place undue emphasis on the evidence. Koontz, 145 Wn.2d at 654. CrR 6.15(f)(1) unequivocally requires:

In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.

In sum, when a court communicates with a deliberating jury, or permits the jury to rehear evidence in open court, the proceeding carries significant potential to influence the jury unfairly. Because a defendant's substantial rights may be affected, Walker, 13 Wn. App. at 557, the defendant has a constitutional right to be present.

Violation of a criminal defendant's right to be present at a criminal proceeding is an issue of constitutional magnitude that may be raised for the first time on appeal. State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006).

2. Mr. Fendich's constitutional right to be present was violated where the court permitted the 911 tape to be replayed for the jury during deliberations in open court in Mr. Fendich's absence, where Mr. Fendich did not waive his right to be present. Here, the court communicated with the deliberating jury and permitted the

jury to rehear evidence in open court, without first notifying Mr. Fendich or granting him an opportunity to be present. When the jury requested to listen to the 911 tape, the court responded in writing that the jury would be escorted into the courtroom and permitted to hear the tape. CP 21-22. The jury was then permitted to hear the tape in open court before resuming its deliberations. Sub #45A, at 7. As in Caliguri, the court's decision to permit the tape to be replayed without prior notice to Mr. Fendich "was highly improper." Caliguri, 99 Wn.2d at 508

Although a defendant's constitutional right to be present may be waived, the waiver must be voluntary and knowing. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). The court indulges every reasonable presumption against waiver. Id.

Here, Mr. Fendich did not knowingly and voluntarily waive his right to be present. The record contains no indication that Mr. Fendich was ever informed that he *had* a right to be present at these proceedings. Although defense counsel agreed to his own absence, Mr. Fendich did not. Therefore, Mr. Fendich's constitutional right to be present was violated.

3. The conviction must be reversed. Where a judge communicates with a deliberating jury in a defendant's absence but

in the presence of a third party, the error may be harmless.

Caliguri, 99 Wn.2d at 509. The State has the burden to prove the error was harmless beyond a reasonable doubt, but the defendant must first raise the possibility of prejudice. Id.

A court's error in replaying evidence for a deliberating jury is not harmless where the evidence unduly emphasizes testimony directed at a central issue in the case. See Koontz, 145 Wn.2d at 660.

Here, the central issues in the case were Mr. Fendich's mental state in throwing the can of beer at Ms. Lakotiy, and whether he used the can in a manner that was likely to produce bodily harm. See RCW 9A.36.031(1)(d) (person commits third degree assault when, "[w]ith criminal negligence, [he] causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm"); 8/12/09RP 67-68 (defense counsel urging jury to find Mr. Fendich had no intent to hit Ms. Lakotiy on chin); 8/12/09RP 69 (counsel urging jury to find Mr. Fendich did not know he would hit Ms. Lakotiy on chin when he threw can); 8/12/09RP 72 (counsel urging jury to find beer can not likely to produce bodily harm).

On the 911 tape, Ms. Lakotiy reported that Mr. Fendich "beat" her and that he was running away. 8/12/09RP 10; Exhibit 13. The State argued the tape was relevant in part to show Mr. Fendich's guilty conscience in running away. 8/12/09RP 10. Replaying the tape for the jury emphasized Ms. Lakotiy's in-court testimony describing the assault and Mr. Fendich's mental state at the time of the incident. The tape therefore emphasized in-court testimony directed at central issues in the case. The court's error in permitting the tape to be replayed in Mr. Fendich's absence was not harmless and the conviction must be reversed.

E. CONCLUSION

Mr. Fendich's constitutional right to be present was violated when the trial court communicated with the deliberating jury, and permitted the jury to rehear evidence in open court, in Mr. Fendich's absence. The conviction must be reversed.

Respectfully submitted this 11th day of August 2010.



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DIVISION ONE**

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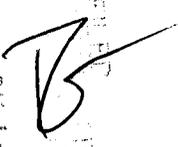
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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