

66169-8

66169-8

NO. 66169-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN TODD RAINEY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence that is not relevant is not admissible.

Evidentiary rulings are within the discretion of the trial court. At trial, Rainey sought to admit statements that he made three days after the charged assault, during transport to the precinct, in order to establish that his general state of mind was disturbed. No evidence provided a link between those statements and Rainey's state of mind at the time of the assault. Did the trial court properly exercise its discretion in excluding those statements as irrelevant?

2. A defendant cannot be deprived of the right to present a defense. However, that right does not extend to the introduction of irrelevant evidence or evidence that is inadmissible under the rules of evidence. The court excluded evidence of statements Rainey made three days after the assault, during transport, as irrelevant. Was exclusion of those irrelevant statements a denial of due process?

3. A defendant cannot be deprived of the right to present a defense. However, there can be no deprivation of due process in the exclusion of evidence when that evidence was not offered at trial or that evidence is inadmissible under the rules of evidence. Rainey did not seek to admit statements that he made at the

precinct three days after the assault, describing his version of events. Has Rainey waived any argument relating to a right to admission of those statements, which would have been properly excluded as self-serving hearsay?

4. A criminal defendant has the right to be present during critical stages of proceedings and has the right to a public trial. Conferences between the court and counsel concerning legal matters are not a critical stage of trial nor are they required to be public proceedings. The trial court conferred with counsel for the parties by conference call before making written responses to jury questions during deliberations. Was this procedure constitutionally adequate?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Brian Rainey, was charged with assault in the second degree. CP 1-3. Rainey was tried in King County Superior Court, the Honorable Jim Rogers presiding. 9/1/10RP 1,

5.¹ A jury found Rainey guilty as charged on September 9, 2010. CP 59, 90. The court imposed a standard range sentence of 25 months based on Rainey's offender score of five. CP 59-63; 10/22/10RP 4-5. That sentence was ordered to run concurrently with sentence imposed on King County No. 10-1-02361-1 SEA, an assault in the fourth degree that was not part of the trial in this case, but for which Rainey was sentenced at the same hearing. 10/22/10RP 4-5.

2. SUBSTANTIVE FACTS

On August 8, 2009, defendant Brian Rainey threw a roundhouse punch to Bill Hall's face, knocking him backward to the sidewalk. 9/7/10RP 19, 23, 26. The punch broke Rainey's nose and caused four facial bone fractures. 9/7/10RP 50; 9/8/10RP 16-17. That assault was the basis of the charge in this case.

Bill Hall was having a cigarette outside the Crescent Lounge, a neighborhood tavern in Seattle, when Rainey asked him for a

¹ The verbatim report of proceedings will be referred to in this brief by citation to the date. The proceedings of September 1, 2010, are reported in the volume also containing September 2 and again in the volume containing September 7, 2010. References in this brief will be to the pagination in the volume with September 2, 2010.

light. 9/7/10RP 21-22, 44, 46. Hall was a thin man in his early 60's, and had visible tremors. 9/7/10RP 22, 42, 77; 9/8/10RP 15; Ex. 1. Hall loaned Rainey a lighter and when Rainey turned and started to leave with the lighter, Hall asked for the lighter back. 9/7/10RP 22-25, 32, 49, 94. Hall tapped Rainey on the shoulder with one finger to get his attention. 9/7/10RP 24-25, 94.

Rainey did not verbally respond. 9/7/10RP 26, 57-58, 110. Instead, he quickly punched Hall in the face, knocking him to the sidewalk. 9/7/10RP 24-26, 50, 94, 97-98. Hall's head hit the sidewalk, dazing him and causing a laceration to the back of his head. 9/7/10RP 26-27, 50, 99, 148. Hall's nose was obviously broken. 9/7/10RP 77-79, 148. Medics arrived, treated Hall, and offered to take him to the hospital, but he declined. 9/7/10RP 51.

Rainey quickly left the scene on foot. 9/7/10RP 26, 100. Although police soon arrived and obtained a description of the assailant from witnesses, they could not locate the assailant that night. 9/7/10RP 149, 156, 159.

Within a couple of hours, Hall was vomiting blood and went to the hospital for treatment. 9/7/10RP 61. Doctors identified multiple fractures of his nose and four fractures of facial bones.

9/8/10RP 16-17. Hall was hospitalized for three days² and returned to the hospital 10 days later for surgery to repair his broken nose and the broken bones in his face. 9/7/10RP 53.

Michael Henzler and Dale Rierson both saw the assault and testified at trial. 9/7/10RP 22-24, 94. They both identified Rainey as the man who punched Bill Hall in the face. 9/7/10RP 23-24, 93, 103. They both observed that Hall had not said or done anything aggressive or threatening. 9/7/10RP 30, 95-97.

The Crescent manager, Scott Hembree, came outside immediately after the assault and saw a man walking swiftly away, carrying an old Army duffel bag. 9/7/10RP 73-74. Henzler and Rierson pointed to the man and said, "That's the guy." 9/7/10RP 85. Hembree recognized the fleeing man as a man who had stopped in the tavern a few days earlier for a glass of water. 9/7/10RP 73-74. Hembree also identified Rainey as the man who he saw leaving the scene of the assault. 9/7/10RP 72, 85, 90.

Three days after the assault, Seattle Police (SPD) Officer Stankiewicz saw Rainey about six blocks away from the Crescent

² The evidence did not reflect whether the length of the hospitalization was related solely to the injuries caused by this assault. See 9/7/10RP 53; 9/8/10RP 14, 19-20.

Lounge. 9/8/10RP 37. Rainey matched the description of the man who assaulted Bill Hall, including his clothing and the green duffel bag he carried. 9/7/10RP 100, 149, 160; 9/8/10RP 36.

Stankiewicz stopped Rainey and told him that he matched the description of a suspect in an assault a couple of days earlier. 9/8/10RP 40. Rainey provided his name and birth date and Stankiewicz had Rainey sit on a step as Stankiewicz tried to confirm Rainey's identity. 9/8/10RP 37-39.

Rainey jumped up and fled on foot and Stankiewicz gave chase. 9/8/10RP 39. Within minutes, SPD Officer Bunge found Rainey crouching in a stairwell in an apartment building nearby. 9/7/10RP 125-27. Bunge arrested Rainey, advised him of his constitutional rights, and transported him to the SPD East Precinct. 9/7/10RP 128-29.

At the precinct, Rainey told SPD Officer Chin that during the original incident, he was in front of the Crescent and asked the victim to use his lighter. 9/2/10RP 38-39. Rainey said that the man grabbed his shoulder and would not let go, even when Rainey told him to let go, so Rainey punched him. 9/2/10RP 39. Rainey declined to give a written statement. 9/2/10RP 38. Rainey's

statements at the precinct were not offered or admitted at trial.

9/7/10RP 154-63; 9/8/10RP 24-31.

Hall described the incident at trial. 9/7/10RP 46-55.

However, he did not notice the physical characteristics of the man who asked him for a light. 9/7/10RP 48. Hall did not see the punch coming. 9/7/10RP 49, 58. By the time he got up and his mind was focused, the man was gone. 9/7/10RP 54-55.

Rainey's criminal history included five prior convictions for crimes of dishonesty during the five years previous to the trial in this case. CP 77. The State informed the court that it intended to offer evidence of these convictions to impeach Rainey's credibility if he testified at trial. CP 77; ER 609. Rainey conceded those convictions would be admissible to impeach him if he testified. 9/2/10RP 55-56. Rainey did not testify at trial. 9/8/10RP 44.

C. ARGUMENT

1. RAINEY HAS NOT ESTABLISHED A DENIAL OF DUE PROCESS IN THE TRIAL COURT'S EXCLUSION OF EVIDENCE OF HIS STATE OF MIND THREE DAYS AFTER THE ASSAULT.

Rainey claims that he was deprived of the opportunity to present his defense when the trial court precluded him from eliciting

evidence of his statements about the assault. This argument is without merit. Rainey did not attempt to offer his statements about the assault. The statements that Rainey did offer, relating to his general mental state three days after the assault, were properly excluded because they were irrelevant. That ruling did not constitute a denial of due process.

- a. Two Separate Sets Of Statements By Rainey Were At Issue At Trial And Rainey Sought To Admit Only One Set.

Rainey made two separate sets of statements on August 11, 2009, after he was arrested on that day, three days after this assault occurred: the first set to Officer Bunge during transport to the precinct, the second set to Officer Chin at the precinct.
9/2/10RP 23-26, 34-40.

Some of the statements Rainey made during his transport to the precinct by Officer Bunge were strange and suggested Rainey's mental state might not be normal, but none of the statements

during transport referred to the assault.³ 9/2/10RP 24-27; Pretrial Ex. 3 (Trial Ex. 7). The statements Rainey made at the precinct to Officer Chin described Rainey's version of the assault. 9/2/10RP 38-39.

During pretrial motions, the State indicated that it intended to introduce only the statements about the assault. 9/2/10RP 45. The prosecutor argued that the statements during transport were irrelevant and should be excluded. 9/2/10RP 45, 51-52. The prosecutor argued that they were offered to suggest a mental defense, but no mental defense was being presented. 9/2/10RP 51.

During pretrial motions, Rainey argued that the statements during transport were necessary so that the jury could evaluate the credibility of the officer's description of Rainey's statements at the precinct, describing the assault. 9/2/10RP 48-50. The trial court agreed, ruling that if the State introduced the statements made at the precinct about the assault, the statements made during transport would be admissible. 9/2/10RP 53-54.

³ The trial court briefly described Rainey's statements during transport. They included stating that he wanted to go to the hospital because he had a brain injury and comments about trying to contact the counterterrorism unit and the United Nations. Rainey also talked about a lawsuit he had against certain newscasters. 9/2/10RP 52.

At trial, the State decided not to introduce Rainey's statements at the precinct.⁴ 9/7/10RP 118. Rainey then argued that the statements made during transport should be admissible independently, to show Rainey's perception of reality. 9/7/10RP 118-20. Rainey stated that the statements were not being offered for the truth of the matters asserted. 9/7/10 119. The trial court observed that because these statements were made three days after the assault, and there was no evidence to suggest that Rainey's state of mind was similar three days before, the statements were irrelevant. 9/7/10RP 120-21.

On appeal, Rainey asserts that the trial court "refused to let Rainey elicit any of his statements to the police at trial," but the citations to the record are to arguments relating only to the statements during transport. App. Brief at 10.⁵ The cited defense arguments at trial regarding the admissibility of Rainey's statements also relate only to statements during transport. See App. Br. at 11,

⁴ Rainey appears to suggest that this decision was improper in some way, but cites no authority for the proposition that the State is under an obligation to introduce all statements of the defendant at trial. App. Br. at 12. The State is aware of no such rule.

⁵ The final citation is to the trial court's recitation of a discussion at sidebar. 9/7/10RP 164. The only sidebar that afternoon was during the testimony of Officer Bunge, and occurred during Rainey's questions about his statements during transport. 9/7/10RP 141.

citing 9/7/10RP 119-21. Finally, Rainey asserts that the trial court made the following ruling:

The court also ruled that Rainey's statements to Chin or Bunge could only be admitted if the State elected to offer them, and then Rainey might be able to introduce his statements to give context to State's witnesses' testimony. 9/7/10RP 121.

App. Br. at 11. However, the ruling of the trial court was a ruling on the State's objection to Rainey's introduction of his statements during transport, even after the State decided not to introduce his statements to Officer Chin at the precinct. 9/7/10RP 118. The Court's ruling was as follows:

[H]is statements three days later, statements which are about conspiracy and how he's viewing the world, I can't find evidence that would link those three days later.

They would be admitted if the State offers the other statements of Officer Chin. They would be admitted to evaluate the credibility of those statements. But as to the state of mind on the day of the assault -- the alleged assault, it's sustained.

9/7/10RP 121. Defense counsel's argument was specifically that the statements during transport were admissible even though his statements to Officer Chin were not being introduced. 9/7/10RP 118, 120-21.

Rainey did not attempt to introduce the statements he made to Officer Chin at the precinct. 9/7/10RP 154-63; 9/8/10RP 24-31.

b. The Trial Court Did Not Abuse Its Discretion In Excluding Statements Made By Rainey During Transport To The Precinct Three Days After The Assault.

The court's decision to exclude testimony about Rainey's statements during transport was an evidentiary ruling. Evidentiary rulings will be reversed only for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id. If grounds for the objection to a ruling were specified, the claim of error on appeal may only be based on the specific ground stated below. State v. Mak, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986) (as to objections to evidence admitted).

The trial court properly concluded that the evidence of Rainey's general state of mind three days after this assault on a stranger was irrelevant and thus inadmissible. 9/7/10RP 119-20. Irrelevant evidence is inadmissible. ER 402. Trial counsel argued that Rainey's statements during transport indicated that he was out of touch with reality, but could point to no evidence that Rainey's state of mind was the same three days earlier. 9/7/10RP 119-21. Defense counsel referred to reports from Western State Hospital

that addressed Rainey's competency, but the trial court noted that those reports did not connect any particular state of mind with the time of the assault. 9/7/10RP 120-21.

Moreover, Rainey's statements to Officer Chin at the precinct indicated that Rainey understood the incident quite well, indicating his state of mind at the time of the assault was not significantly disturbed. Facts that Rainey provided that were consistent with the trial testimony included that the assault occurred in front of the Crescent tavern, that Rainey had asked Hall for a lighter, that Hall put his hand to Rainey's shoulder, and then Rainey punched Hall in the face. 9/2/10RP 38-39. Rainey also stated that he punched Hall only once and that he had never met Hall before this incident. 9/2/10RP 39. The only inconsistent fact that Rainey related was the exculpatory claim that Hall grabbed Rainey's shoulder and would not let go when Rainey asked him to. 9/2/10RP 39.

There was no evidence that Rainey was out of touch with reality at the time of the assault, or that any disturbed perception was relevant to the elements of assault in the second degree. The statements made during transport did not tend to establish Rainey's state of mind at the time of the assault and were properly excluded.

Even if the court's ruling as to the statements made during transport was error, it was harmless. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). In the context of the overwhelming evidence of Rainey's unprovoked assault on Hall, the evidence that three days later he made strange remarks, without any explanation of what might have caused him to make those remarks (including possible intervening use of hallucinogens), would not have changed the outcome.

c. Exclusion Of Rainey's Statements Three Days After The Assault Was Not A Denial Of Due Process.

Rainey claims that the evidentiary rules should have been ignored because exclusion of this testimony concerning his statements to police deprived him of the ability to put on a defense. This argument is without merit. The defendant does not have the right to admit otherwise inadmissible evidence simply by invoking a claim of deprivation of due process. Further, as to the statements at the precinct, because Rainey never offered them, the trial court

did not act to exclude them, and no state action can be identified as depriving Rainey of his rights.

The right to present evidence in one's defense is a fundamental element of due process. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). But the defendant's right to present evidence is not unlimited. Id. at 15. A defendant has no right to present irrelevant or inadmissible evidence. Id.; State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967 (1999); State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

The cases upon which Rainey relies involve the complete deprivation of the ability to address a critical issue. In one case, the defendant was precluded from offering evidence that another person had repeatedly confessed to a murder. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In another, a defendant who asserted an insanity defense could not afford a psychiatrist to support it, and the court refused to appoint any expert. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

The decision of the Washington Supreme Court in State v. Jones⁶ does not support Rainey's argument that he should have been allowed to present irrelevant evidence or self-serving hearsay, the two types of statements at issue in this case. In Jones, the defendant was charged with rape and proffered testimony that the sexual intercourse that was alleged had occurred during a sex party at which the victim engaged in consensual intercourse with three males. 168 Wn.2d at 717. The trial court excluded any reference to the sex party, citing the rape shield statute. Id. at 717-18. The Court concluded that the evidence was improperly excluded because the rape shield statute does not apply to conduct during the charged incident, and even if it did, exclusion of that evidence was error because it deprived Jones of his ability to testify to his version of the incident, which was very highly probative evidence. Id. at 721-23. The proffered evidence in Jones was not barred by the rules of evidence but by the trial court's conclusion that it was irrelevant sexual activity under the rape shield statute.

In contrast with Jones, the trial court in the case at bar did not preclude Rainey from presenting his version of the incident.

⁶ 168 Wn.2d 713, 230 P.3d 576 (2010).

Rainey was free to testify to his state of mind when he punched Hall and his motivation for punching Hall.

The statements during transport proffered by Rainey in this case were properly determined to be irrelevant by the trial judge. Rainey does not argue how the exclusion of the statements made during transport prevented him from establishing self defense. Because those statements did not refer to the assault, such an argument is difficult to conceive.

Rainey has not established a deprivation of due process related to the statements at the precinct for two reasons: (1) he never offered those statements; and (2) the statements were inadmissible under the rules of evidence and were simply his own version of events, which he could have provided at trial, subject to the normal rules of cross-examination and impeachment.

Because Rainey never offered the statements that he made to Officer Chin at the precinct, there is no state action to which he can point that would be a deprivation of due process related to those statements. The trial court was not asked to rule as to the admissibility of those statements if they had been offered by Rainey, and cannot be faulted for a ruling that did not occur.

Even if Rainey had attempted to introduce his statements at the precinct, those statements would properly have been excluded as hearsay. ER 801, 802. An out-of-court admission by a party-opponent, if relevant, may be admissible although it is offered for the truth of the matter asserted; however, self-serving hearsay (statements that tend to aid a party's case), is not admissible under this rule. ER 801(d)(2); Finch, 137 Wn.2d at 824-25. Allowing such testimony would put that party's version of events before the jury without subjecting the party to cross-examination. Finch, 137 Wn.2d at 825.

In a criminal case, permitting a defendant to admit self-serving hearsay "deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence." Id. (citation omitted). When faced with the argument that excluding self-serving hearsay violated a defendant's right to compulsory process, the Supreme Court concluded, "the right to compulsory process does not allow the defendant to escape cross-examination by telling his story out-of-court." Id.

Rainey does not argue that his statements at the precinct are admissible under the rules of evidence. His argument is that

the statements were necessary to establish self defense. They are relevant to self defense only if they are admitted for the truth of the statements, that Hall grabbed Rainey and would not let go and Rainey punched Hall to defend himself. Rainey argues that they should have been admitted for the truth of the statements - "why he acted as he did." App. Br. at 13. Thus, they are inadmissible hearsay.

Apparently conceding that the evidence was inadmissible under the rules of evidence, Rainey asserts that a trial court cannot exclude any evidence that is relevant to a defense theory, unless it would undermine the fairness of the trial. App. Br. at 7. This radical proposition is not supported by the case cited, State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002). In Darden, the issue was the scope of cross-examination: whether Darden was properly prevented from cross-examining a police officer about the location of his observation post, from which the officer testified that he observed Darden's drug dealing. 145 Wn.2d at 615-17. The scope of cross-examination also was the issue in Hudlow, supra, another case upon which Rainey relies.

The holdings in Darden and Hudlow address whether the defendant properly was precluded from raising a particular subject

(the observation post in Darden and the victims' prior sexual activity in Hudlow), not whether the rules of evidence are inapplicable to defendants. The Darden court explained the importance of the right to test the perception, memory, and credibility of a witness by cross-examination, as ensuring the ultimate integrity of the fact-finding process. 145 Wn.2d at 620. Rainey's argument that his version of events should be admitted without any opportunity for cross-examination by the State flies in the face of that rationale.

Rainey's argument has a parallel in the argument that was recently rejected by the Court of Appeals in State v. Phillips, 160 Wn. App. 36, 246 P.3d 589 (2011). Phillips was charged with theft from five elderly victims. Id. at 38. The State sought to admit evidence of Phillips' prior thefts from elderly victims and the trial court ruled that the prior thefts would be admissible if Phillips testified that the victims consented to lend her money. Id. at 42-43. On appeal, Phillips argued that this decision denied her right to present a defense. Id. at 47. The Court of Appeals found no infringement on her right to present a defense: "The right to present a defense guarantees that the defendant may present relevant, admissible evidence in her own defense, not that this evidence will stand unrebutted." Id. at 48, citing State v. Tracy, 128

Wn. App. 388, 398, 115 P.3d 381 (2005), aff'd, 158 Wn.2d 683, 147 P.3d 559 (2006). Likewise, Rainey does not have a right to present his version of events through otherwise inadmissible evidence in order to avoid cross-examination.

Rainey's argument that the best source of his version of events is a disinterested police officer illustrates the fallacy of his position. The best description of the assault might have come from the officer if the officer had seen the assault. However, what Rainey wanted the officer to do was present Rainey's story, while shielding Rainey from cross-examination. The due process clause provides no such weapon. Rainey was not deprived of his right to present a defense.

2. THE COURT DID NOT COMMIT REVERSIBLE ERROR IN RESPONDING TO THE JURY QUESTIONS.

Rainey contends that the trial court committed reversible error in responding to jury questions, alleging that the questions were answered without consulting the parties, without Rainey's presence, and in violation of his right to a public trial. The record now reflects that the court did consult with the attorneys for both parties before answering the questions. This consultation was not

a critical stage requiring Rainey's presence nor does it fall within the range of proceedings subject to the right to a public trial.

a. Relevant Facts

After deliberating about two hours, the jury asked two questions, using one inquiry form: "(1) Can we open the green duffel and examine contents?" and "(2) Can we take the defendant's behavior in the courtroom into account (as evidence) in our deliberation?" Within minutes of sending the first question, the jury sent a third question to the court: "(3) Can we see the police reports from the Crescent Tavern on August 8, 2009?" The court sent the following written responses to the jury: (1) "No"; (2) "No. Please refer to the instructions as to what is evidence"; and (3) "No." CP 52-55.

No proceedings were recorded related to the jury questions or answers. CP 88. The clerk's minutes reflect the questions and answers, with times noted, and at least one time noted is obviously error, because the answer to question (3) is noted to have been provided an hour before the question was sent out. CP 88.

On July 8, 2011, a hearing was held before the trial court, with trial and appellate counsel present, to settle the record

pursuant to RAP 7.2(b). The trial court entered an agreed report of proceedings that reflects that the court consulted with the attorneys for both parties by conference call prior to responding to the jury's questions. CP 91-92. The court read all three questions to the attorneys and asked the parties for input. CP 92; 7/8/11RP 3, 6.⁷ The court and counsel discussed all three questions. CP 92. All agreed to the responses to questions (1) and (3). CP 92; 7/8/11RP 9. During this call, as to question (2), defense counsel commented that although a jury might consider the defendant's behavior in court and never mention that, because the jury asked the question, the court had to tell them they could not consider it. 7/8/11RP 3-4.

b. The Trial Court Complied With CrR 6.15(f)

A trial judge should not answer a jury's inquiry without consulting the parties. CrR 6.15(f) provides that "the court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response." The trial court should give counsel an opportunity to address the court. State v. Johnson, 56 Wn.2d 700, 709, 355 P.2d 13 (1960). CrR

⁷ A motion to supplement the record on appeal with the Verbatim Report of Proceedings of the hearing on 7/8/2011 is pending before the court.

6.15(f) provides that the court "shall respond to all questions from a deliberating jury in open court or in writing."

The trial court in this case arranged a conference call and during that call informed the parties of the questions and allowed the parties an opportunity to provide input. CP 91-92. All of the responses to the jury were in writing. CP 52-55. There was no violation of CrR 6.15(f).

c. Consultation Between The Trial Court And The Attorneys For The Parties Concerning Responses To Jury Questions Does Not Require A Defendant's Personal Presence.

Rainey argues that the trial court not only violated CrR 6.15(f), but also his right to be present under the federal and state constitutions. The confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and article I, section 22 of the Washington Constitution establish that a criminal defendant has the right to be present during all critical stages of a proceeding. U.S. Const. amend. VI, XIV; Wa. Const. art. I, § 22. Under well-established Washington law, Rainey's right to be present was not violated in the present case.

A criminal defendant has the right to be present at all critical stages of the criminal proceeding but not at every point in the proceeding. In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (right to be present not violated when defendant absent for motion for continuance); In re Pers. Restraint of Lord, 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994) (right to be present not violated when defendant absent for motions on legal matters); In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). A critical stage is one where the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charges." In re Benn, 134 Wn.2d at 920 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). Bench conferences on legal matters are not a critical stage of the proceedings if the issues involve no disputed facts. Id. See also State v. Irby, 170 Wn.2d 874, 881-82, 246 P.3d 796 (2011) (citing Benn, Lord, and Pirtle with approval).

State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010), rev. granted, 170 Wn.2d 1025 (2011), is directly on point. In that case, the court responded to a jury question without notifying the parties of the question or providing them with an opportunity to

comment on what the court's response should be. 158 Wn. App. at 540-41 & n.13. The court's response was "Please re-read your instructions and continue deliberating. No further instructions will be given to this question." Id. at 542. This Court held that the court violated CrR 6.15(f), but did not violate Jasper's constitutional right to be present at a critical stage of the proceedings. Id. at 539-42.

The court of appeals in State v. Sublett also held that a conference in response to a jury question is not a critical stage of the proceedings. 156 Wn. App. 160, 182-83, 231 P.3d 231, rev. granted, 170 Wn.2d 1016 (2010). The court observed that such a conference involves only the purely legal question of how to respond to the jury's question. Id. at 183.

Rainey cites two cases for the general proposition that discussion of a jury inquiry requires a defendant's presence. App. Br. at 17. Both are inapposite. The first, Rogers v. United States, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975), establishes only that the defendant has the right to meaningful representation of counsel at a discussion of a jury question. 422 U.S. at 38-39; State v. Koss, 158 Wn. App. 8, 18, 241 P.3d 415 (2010). The second, State v. Thomson, 123 Wn.2d 877, 872 P.2d

1097 (1994), relates to the propriety of continuing a trial after the defendant voluntarily absented himself during voir dire.

Even if the trial court's actions were held to violate Rainey's constitutional right to be present, the error is harmless. Violation of the right to be present at a portion of the trial is trial error that is subject to harmless error analysis under both the federal constitution and the state constitution. Irby, 170 Wn.2d at 885-86.

Rainey asserts that violation of the right to be present is conclusively presumed to be prejudicial under the Washington Constitution. App. Br. at 26-28. He relies on the holding of State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914). Rainey claims that the Court in Irby affirmed this holding of Shutzler, but the Court in Irby explicitly held that, "it is clear that in this respect Shutzler is no longer good law." Irby, 170 Wn.2d at 886. The Court in Irby applied the constitutional harmless error analysis, that is, whether the error is harmless beyond a reasonable doubt. Id.

As to questions (1) and (3), defense counsel agreed to the responses given. Any error in the response therefore would be invited error, and not grounds for reversal. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049

(1999). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

As to question (2), whether the jury could consider the defendant's behavior in court, defense counsel commented during the conference call that the answer given ("No") was the proper response. 7/8/11RP 3-4. It does not appear that he agreed that the court should give that response, as the trial court gave the parties the opportunity to submit further authority. 7/8/11RP 4, 6. However, the trial court could not have given an instruction to consider the defendant's behavior because supplemental instructions cannot go beyond matters that could have been argued to the jury. Jasper, 158 Wn. App. at 542-43. The State is not permitted to comment on the defendant's demeanor during trial, or argue that the jury may draw inferences from that behavior.⁸ United States v. Schuler, 813 F.2d 978, 981 (9th Cir. 1987); State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039, rev. denied, 141 Wn.2d 1004 (2000). Therefore, the judge could not have instructed the jury that

⁸ Rainey appears to argue that a jury may rely upon a non-testifying defendant's behavior in the courtroom in reaching its verdict, App. Br. at 23-24, but cites no legal authority for that proposition and does not address the authority to the contrary.

it could draw inferences, positive or negative, from that behavior. While appellate counsel assumes that the inferences to be drawn would be in the defendant's favor, there is no basis in the record to establish that.

This Court can conclude beyond a reasonable doubt that any improper communication was harmless. As to two questions, Rainey's counsel agreed to the responses, and as to the third, no other response could have been given. As the Court held in Johnson, supra, improper communication with the jury is harmless beyond a reasonable doubt when "the court communicated no information to the jury that was in any manner harmful to the appellant." 56 Wn.2d at 709. In this case, there has been no prejudice suggested as to two of the answers, and as to the third, no other answer could have been given. Any error was harmless.

d. Consideration Of Responses To The Jury Questions Was A Purely Legal Matter As To Which Public Trial Provisions Do Not Apply

Rainey argues that his right to an open and public trial was violated because the trial court did not consider and respond to the jury questions in open court. This argument should be rejected.

Consideration of the response to a jury question is a purely legal matter, to which the public trial provisions do not extend.

A criminal defendant in Washington has the right to a "speedy and public trial." WA Const. art. I, § 22. The Washington Constitution also requires that justice be administered openly. WA Const. art. I, § 10. Similar rights also are recognized under the federal constitution. U.S. Const. amend. VI; Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated and a new trial may be required. State v. Marsh, 126 Wash. 142, 217 P. 705 (1923); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). A court must consider five factors set out in Bone-Club before ordering any closure. Bone-Club, 128 Wn. 2d at 258-59.⁹ A claim of violation of the right

⁹ The analysis requires (1) the proponent of sealing must make a showing of a compelling interest, and if the need is other than an accused's right to a fair trial, a "serious and imminent threat" to that interest; (2) anyone present when the closure motion is made must be given an opportunity to object; (3) the limitation on access must be the least restrictive means available; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-59.

to a public trial is a question of law, reviewed de novo. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

The public trial right applies whenever evidence is taken, during suppression hearings, and during voir dire. State v. Rivera, 108 Wn. App. 645, 652-53, 32 P.2d 292 (2001), rev. denied, 146 Wn.2d 1006 (2002). However, a defendant does not have a right to a public hearing on "purely ministerial or legal issues that do not require the resolution of disputed facts." State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008); see also State v. Castro, 159 Wn. App. 340, 343-44, 246 P.3d 228 (2011) (motion to exclude witnesses and discussion of admissibility of defendant's prior convictions not public part of trial); In re Det. of Ticeson, 159 Wn. App. 374, 383-87, 246 P.3d 550 (2011) (in-chambers consideration of evidentiary rulings not public part of trial for purposes of public's right to open proceedings); Koss, 158 Wn. App. at 16-17 (in-chambers instruction conference was not part of public trial).

Two courts of appeal have concluded that a conference concerning the response to a jury question is a purely legal matter to which the right to a public trial does not apply. Koss, supra, 158 Wn. App. at 16-17; Sublett, supra, 156 Wn. App. at 181-82. The

court in Sublett observed that jury questions concerning the trial court's instructions are part of jury deliberations and not historically a public part of the trial. 156 Wn. App. at 182.

There were no factual or credibility determinations at issue in the consideration of the jury questions in this case. There were no disputed factual matters to be resolved and no evidence was taken. Thus, consideration of the jury questions was a purely legal matter to which the right to public trial and the public's right to open proceedings did not attach.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Rainey's conviction and sentence.

DATED this 21st day of July, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRIAN RAINEY, Cause No. 66169-8-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington

07-22-11

Date