

NO. 36041-1-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN JON SCOTT,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. In violation of Appellant’s federal and state constitutional rights to due process of law and to a fair trial, the trial court erred in denying Appellant’s motion for dismissal of the case.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Consistent with the due process right to a fair trial, a dismissal is properly granted for egregious government misconduct, even absent a showing of prejudice. The State’s lead officer, Chief of Police David Eastham, was permitted to remain the courtroom during the testimony of other witnesses. During a recess, Chief Eastham discussed a portion of the testimony of the State’s first witness—Willapa Harbor Hospital nurse Renee Clements—with Officer Chuck Spoor, who had not yet testified. Chief Eastham told Officer Spoor that Clements had testified she had “seen [them] dragging” Scott across a room at the time of his arrest. Chief Eastham also told Officer Spoor he did not remember dragging Scott across the room and asked Officer Spoor if he remembered dragging Scott. Did the trial court err in denying the Appellant’s motion to dismiss the case?

C. STATEMENT OF THE CASE

1. **Procedural history:**

A jury convicted Dustin Scott of one count of third degree assault, as

charged in an information filed by the State in Pacific County Superior Court, contrary to RCW 9A.36031(1)(g). Clerk's Paper [CP] at 4-5. Scott was acquitted of a second count of third degree assault. CP at 39.

a. CrR 3.5 suppression hearing.

Police alleged that after they entered the examination room at the Willapa Harbor Hospital in South Bend, Washington, Scott was swearing, yelling that the doctor had not given him enough drugs, and that he was going to sue the police. 2RP (January 16, 2007) at 6, 9, 10. Scott was not read his *Miranda*¹ warnings.

The defense moved to suppress his statements pursuant to Criminal Rule 3.5. The motion was heard by Judge Sullivan on January 16, 2007.

The court found that Scott was arrested at the moment that he was taken to the ground, handcuffed, and told that he was under arrest, and that prior to that point he was free to leave. Judge Sullivan also found that Scott's *Miranda* rights attached at the time of the arrest, and that the arrest was lawful. CP at 9-14.

The court concluded that all of the statements Scott made prior to the time he was placed into handcuffs were admissible in the State's case-

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

in-chief. CP at 14.

The court entered the following findings of fact and conclusions of law on January 26, 2006:

UNDISPUTED FACTS

1. On November 4, 2006, Chief David Eastham of the South Bend Police Department and Officer Chuck Spoor of the Raymond Police Department were dispatched to the Willapa Harbor Hospital in response to a complaint concerning a patient, Dustin J. Scott, who was refusing to leave.
2. During Mr. Scott's treatment at the hospital, he had been administered 4 milligrams of Dilaudid, a very fast-acting form of Morphine. Prior to that time, Mr. Scott may have taken his usual dosage of Morphine for that day, but he was not certain. Mr. Scott takes Morphine as a baseline drug for maintaining regular living functions.
3. Upon the arrival of Chief Eastham, a doctor and nurse were present. Chief Eastham learned from the doctor and nurse that they had discontinued treatment of the defendant.
4. Chief Eastham and Officer Spoor contacted the defendant in one of the examination rooms at the hospital. This was a fairly small room with one examination table.
5. Some type of conversation took place between the defendant and Chief Eastham. Chief Eastham was standing a small distance away from Dustin Scott, approximately one foot away or less.
6. At some point during the encounter, the defendant

made a comment in which he indicated that he might sue the police.

7. At some point during the encounter, the defendant was taken to the ground, handcuffed, and placed under the arrest.
8. Chief Eastham did not have any drugs or alcohol in his system at the time of the incident.
9. The defendant was never read Miranda rights.

DISPUTED FACTS

1. Chief Eastham stated that he had tried to inform the defendant in a professional way that he needed to leave, and that the doctor and nurse had also told the defendant that he needed to leave. The defendant disputed these contentions.
2. Chief Eastham further stated that Mr. Scott broke into profanity, threatening to sue the officers. Chief Eastham stated that, several times, when he asked the defendant to leave the hospital, there was no response, other than profanity. The defendant disputed these contentions.
3. Chief Eastham stated that he placed his hand on Mr. Scott's shoulder without applying pressure, and at that point Mr. Scott lunged with his hand at Chief Eastham's throat area. Chief Eastham testified that the defendant had been sitting up immediately prior to lunging at his throat. The defendant disputed these contentions.
4. Chief Eastham stated that the lunge was deflected and that Mr. Scott was then [set down on the bed and] taken to the ground by both Chief Eastham and Officer Spoor. Chief Eastham's testimony was that

the process of taking the defendant down took about a minute; they then handcuffed him, stood him up, and transferred him to the patrol car. The defendant disputed these contentions.

5. Chief Eastham explained that the procedure used by him in placing Scott into the police care was consistent with his training; and he denied striking Mr. Scott's head against the police car door during the process of placing the defendant into the police car. He added that he had placed his hand around the defendant's head, while guiding him into the patrol car, specifically to protect the defendant's head from being struck. The defendant disputed these contentions.
6. Eastham stated that, in the elevator on the way up to the jail, the defendant kicked him in the leg. The defendant disputed this contention.
7. Mr. Scott stated that Chief Eastham, upon arriving in the examination room, stated, "We're here to take you for a ride in a police car," or words to that effect. The defendant stated that he responded by saying, "If you try to take me out of here, I'll own the police station," or words to that effect. Chief Eastham disputed these contentions.
8. Mr. Scott denied lunging at the officers. Chief Eastham disputed this contention.
9. Mr. Scott stated that after he made this comment, he was attacked by the officers while he was still lying on the examination table. Chief Eastham disputed this contention.
10. Mr. Scott stated that the officers threw him to the floor and beat his head on the ground a few times. Chief Eastham disputed this contention.

11. Mr. Scott also testified that Chief Eastham struck Mr. Scott's head against the police car door immediately prior to placing Mr. Scott inside of the police car. Chief Eastham disputed these contentions.
12. Mr. Scott stated that his recollection of events became diminished after his head was slammed against the floor and after his head struck the police car door. Mr. Scott stated that he did not have any recollection of kicking Chief Eastham in the elevator going up to the jail. Chief Eastham indicated that the defendant knew what he was doing.

RESOLUTION OF DISPUTED FACTS

The court that Chief Eastham's recollection of the events is reliable, based upon two considerations: first, he did not have any drugs or alcohol in his system which might impair his memory; secondly, Chief Eastham had written a report of the incident either the same day or shortly afterwards. The court accepts Chief Eastham's assertion that he wrote his report carefully to preserve his recollection for any courtroom proceedings. Chief Eastham testified in a professional manner and his entire testimony was believable. On the other hand, the court finds that the defendant's recollections likely were impaired by drug usage. Therefore, the court rejects the contentions of the defendant which pertain to disputed facts.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter herein.
2. Any question an officer asks a defendant is meant to elicit some type of response, either an action or a verbal response. The fact that a response is elicited is not improper unless it is designed to elicit an incriminating response, in which case Miranda

warnings would be necessary. An officer may request a person to leave an area; such questioning does not constitute interrogation. Therefore, Chief Eastham did not need to read Miranda warnings to Mr. Scott when the defendant was asked to leave the hospital.

3. The arrest of Dustin Scott occurred at the moment that he was taken to the ground, handcuffed, and told that he was under arrest. Prior to that time, the defendant was free to leave, but chose not to leave. The defendant's Miranda rights attached at the time of the arrest. The arrest was lawful.
4. All of the statements of Mr. Scott prior to the time he was placed into handcuffs are admissible in the State's case-in-chief.

CP at 9-14.

b. Jury Instructions.

Neither counsel noted exceptions to instructions not given or objected to instructions given. 1RP at 169. CP at 19-37. The court gave an instruction on self-defense. Instruction No. 12. CP at 33.

c. Verdict.

On February 2, 2007 the jury found Scott guilty of third degree assault, as alleged in count 1 of the information. CP at 38. He was acquitted of count 2. CP at 39.

d. Sentencing.

The matter came on for sentencing on February 9 and March 9, 2007.

Trial court Judge Michael Sullivan sentenced Scott under the First Time Offender waiver.² CP at 47.

Timely notice of this appeal followed. CP at 56-57.

2. Substantive facts:

Police were called to Willapa Harbor Hospital in South Bend on November 4, 2006, in response to a complaint by hospital staff that a patient—Dustin Scott—refused to leave the facility. 1Report of Proceedings [RP] at 62.³ Scott was taken to the hospital on November 4, 2006, by his mother due to a severe headache. 1RP at 139, 140. Scott was prescribed morphine for maintaining pain on a day to day living, and asked the doctor to "double his normal protocol" because of his headache. 1RP at 141. He said that he received "about a third of it" and then the doctor returned to the room and said it did not look like it was going to help him very much and then left. 1RP at 141. He said a nurse came back in and said that the doctor was not going to do anything else for him. 1RP at 141.

² The first-time offender waiver allows the court to impose up to 90 days of confinement for some first-time offenders who have never been previously convicted of a felony in this state, federal court, or another state. RCW 9.94A.650(1),(2). The trial court has the discretion to waive the imposition of a standard range sentence and sentence a defendant under the first time offender option. RCW 9.94A.650(2).

³ The verbatim report of proceedings consists of two volumes:

1 RP February 1, 2007 Jury trial

2 RP February 2, 2007 Jury trial, November 6, 2006 Probable cause hearing, November 17, 2006 Arraignment, January 16, 2007 CrR 3.5 Suppression hearing, January 26, 2007 Entry of findings and conclusions, February 9, 2007 Sentencing, March 9, 2007 Entry of Judgment

David Eastham, Chief of the South Bend Police Department, and Officer Chuck Spoor, of the Raymond Police Department, responded to the call. 1RP at 62, 63, 117. After arriving at the hospital, Chief Eastham learned from a doctor and a nurse—Renee Clements—that they had stopped Scott’s treatment and discharged him from the hospital, but that he refused to leave. 1RP at 64. The hospital staff informed Chief Eastham that they wanted Scott removed. 1RP at 64.

Chief Eastham and Officer Spoor contacted Scott, who was in one of the examination rooms, on a hospital bed. 1RP at 64, 88. Chief Eastham testified that he told Scott that he needed to leave.

The doctor and nurse Renee Clements had previously told Scott that he needed to leave. 1RP at 64, 85. Clements testified that Scott was yelling and swearing and would not leave the facility. 1RP at 31.

He said that Scott started swearing and threatened to sue the police and the hospital. 1RP at 65. Chief Eastham stated that he placed his hand on Scott’s shoulder told him that he would have to leave or that he was going to assist him in leaving. 1RP at 67-68. Chief Eastham said that at that point Scott lunged at his throat. 1RP at 70, 93. Chief Eastham and Officer Spoor

and Sentence.

forced Scott to the floor and put him in handcuffs. 1RP at 71. Eastham testified that he then got Scott to his knees and walking him out of the room. 1RP at 73.

Scott denied that that he was yelling or swearing at the doctor or nurse. 1RP at 143. Scott stated that Chief Eastham, upon arriving in the examination room, stated, “We’re here to take you for a ride in a police car[.]” 1RP at 145. He responded by saying, “If you take me out of here, I’ll own every inch of that police station,” 1RP at 147. He said that at that point he was “rushed” by the police. 1RP at 145. He denied lunging at or grabbing Eastham’s neck, but thought it was possible that he grabbed onto Eastham or Spoor when they forced him to the floor. 1RP at 146. Scott stated that the officers threw him to the floor and bounced his head off the tile three or more times. 1RP at 149. Scott said that he was dragged out of the room, and that he was dragged about 50 percent of the way when they took him out of the emergency room area. 1RP at 152. Clements testified that the police “kind of drag[ed] him out.” 1RP at 39.

Chief Eastham testified that the procedure used by him in placing Scott into the police car was consistent with his training and he disputed that he hit Scott’s head against the police car door. 1RP at 79.

Chief Eastham testified that while taking Scott in the elevator up to

the jail, Scott kicked him in the leg. 1RP at 80, 109. Scott did not remember being in the elevator when he was taken to the jail. 1RP at 154.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING SCOTT'S MOTION TO DISMISS THE CASE.

a. Chief Eastham discussed Clements' Testimony With Spoor, who had not yet testified.

On February 1, 2007 Scott's mother—Marilyn Kaplan—was in the rotunda of the Pacific County Courthouse. She had been subpoenaed to testify at her son's trial and was waiting to be called into the courtroom. While in the rotunda, he overheard Chief Eastham talking to Officer Spoor during a recess in her son's trial.

The court addressed the situation at the end of the day. Judge Sullivan inquired about the incident outside the presence of the jury. In response to the court's question, Kaplan stated:

I heard them talking about dragging somebody and I looked up and caught Dave Eastham's eye and I said, "You're not talking about this, are you? Sshh, sshh, sshh."
And then I got up and moved closer and sat there and his face was beet red and he came in. And then before Officer Spoor came in, I said, "Was he talking to you about the trial? Was he talking to you about stuff we're not supposed to be talking about?" And he kind of shrugged his shoulders and looked at me, you know, chagrined. And I said, "He's not supposed to do that, is he?" And he said, "No". And I

looked directly at Officer Eastham when he was doing it and he turned beet red and I said, "What are you talking about?" And I moved over to the chair right directly -- because I told my mother-in-law, I said, "Sshh, sshh, sshh. I want to hear what they're saying", and came over because I had a suspicion of that.

1RP at 172-73.

When asked about the incident by the prosecution, Kaplan stated that she heard Chief Eastham say to Officer Spoor: “[d]id we drag him that way?” or “[a]nd we drug him like this out.” 1RP at 175.

Chief Eastham told the court that he remembered asking Officer Spoor “[d]id he come up under his own power out of there or did we drag him?” 1RP at 177. Chief Eastham said that he had already testified when he talked to Spoor. 1RP at 177. Chief Eastham denied telling Officer Spoor what to say during his testimony. 1RP at 178.

She stated that this incident took place “right after Renee Clements had testified and gone and then I believe we took a break and it was before Officer Spoor came in to testify. 1RP at 173-74.

Officer Spoor acknowledged that he spoke with Chief Eastham in the rotunda during the afternoon break on February 1, prior to his testimony. 2RP at 3, 4. He stated that Chief Eastham told him that “the nurse had been asked a bunch of times about us dragging him through the emergency room

and he said, [‘]I don’t remember dragging him through the emergency room. Did you? [‘] And I said “No.” 2RP at 4.

Based on the statements, defense counsel moved to dismiss the case. 2RP at 11. The court denied the motion, but permitted the defense to reopen its case in order to present the testimony of Kaplan. 2RP at 13, 20.

The State called three witnesses. The first was Renee Clements, and Chief Eastham testified next. Following Eastham’s direct examination, the court recessed for its afternoon break. 1RP at 82. Cross-examination of Eastham occurred after the break. 1RP at 83. Officer Spoor was called as the State’s final witness in its case-in-chief. 1RP at 116. After his direct testimony, Chief Eastham discussed the Clements’ testimony with Officer Spoor. Chief Eastham told him his recollection regarding Clements’ testimony that they dragged Scott out of the room, and asked Spoor what he remembered. 2RP at 31-39.

Scott’s counsel moved for a dismissal, contending Eastham had deliberately violated the court’s *in limine* ruling excluding witnesses. 2RP 11, 12. The trial court disagreed that Eastham had violated the pretrial ruling excluding witnesses. Judge Sullivan found that that was “no direct order by the Court not communicate between the witnesses.” 2RP at 18. Judge Sullivan stated “I think an order has to be more specific than that to find

someone violated a court order so I'm not agreeing with that." 2RP at 20.

Instead, the court ordered that an adequate remedy was for Scott's attorney to introduce the testimony of Kaplan, and cross-examine Eastham and Spoor about the conversation in the courthouse rotunda. 2RP 26-40.

Eastham subsequently characterized the incident with Spoor as "[j]ust general conversation[.]" "small talk conversation[.]" and "such a general conversation[.]" 2RP at 32.

b. **Where Chief Eastham Apparently Attempted to Influence Witness Officer Spoor's Testimony and, at the Very Least, Violated the Spirit and purpose of ER 615, the Trial Court Erred in Denying Scott's Motion for Dismissal.**

Due process guarantees accused persons a fair trial. U.S. Const. amends. V, XIV; Const. art. I, § 3. Consistent with due process, a new trial is properly granted for egregious government misconduct, even absent a showing of prejudice. *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1962) (reversing where sheriff eavesdropped on conversations between defendant and his counsel;) *State v. Granacki*, 90 Wn. App. 598, 604, 90 P.2d 667 (1997).

A presumption of prejudice arises when the adversarial process loses its integrity because of affirmative state interference. *Osborn v. Shillinger*,

861 F.2d 612, 626 (10th Cir. 1988). “It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. . .” *Cory*, 62 Wn.2d at 378 (quoting *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905 (1955)).

In *Granacki*, the prosecutor designated a police officer as a “lead detective” who was permitted to remain in the courtroom to assist counsel during trial. 90 Wn. App. at 600. The detective was present when the Court admonished the parties to have no contact with the jurors. *Id.* During a recess, the detective covertly read defense counsel’s notes containing confidential communications with her client and her trial strategy and tactics. He was also witnessed during the lunch hour engaged in “earnest” conversation with a juror. *Id.*

In *Granacki*, Division 1 of this Court found the detective had abused the trust placed in him by the trial court in permitting him to remain to assist the prosecutor. *Id.* at 603. On appeal, the State conceded a mistrial was proper but objected to dismissal of the prosecution. *Id.*, at 601-02. In affirming both the mistrial and dismissal with prejudice, Division 1 noted a presumption of prejudice was proper in the case of egregious misconduct. *Id.* at 604.

A trial court's ruling on a motion to dismiss is reviewed for manifest

abuse of discretion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Rohrich*, 149 Wn.2d at 654. The trial court here abused its discretion in denying Scott's motion for dismissal.

As in *Granacki*, the trial court had demonstrated its confidence in Eastham's integrity and ability to abide by the court's pretrial rulings by permitting him to remain in the courtroom. *Granacki*, 90 Wn. App. at 603. Furthermore, Eastham was aware of the motion to exclude witnesses and, by virtue of his 22 years of experience in law enforcement, including four years as Chief of Police in South Bend, certainly understood its import. 1 RP at 60.

At a minimum, Eastham should have been aware that his comments to Spoor could have been reasonably construed as witness tampering. *See*, RCW 9A.72.120. Thus, it was beyond the pale for Eastham to engage in a conversation that not only relayed the contents of testimony of Clements, but told Spoor how he had testified regarding the issue of whether Scott was dragged, and gave the implication that Spoor should testify in a similar fashion. *Cory*, 62 Wn.2d at 678.

In response, the State may attempt to argue that *Cory* and *Granacki* concerned violations of the rights to counsel and to the effective assistance of

counsel and should be distinguished from the instant case. Any difference between the scenarios, however, is a difference in form, not kind, given the seriousness of Eastham's misconduct.

c. **The Sanction Imposed by the Trial Court Was Inadequate Given the Gravity of Chief Eastham's Misconduct.**

In *Granacki*, Division 1 acknowledged that while dismissal was proper, a lesser sanction would also have been appropriate. 90 Wn. App. at 604. In describing a suitable lesser sanction, the Court stated, "Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion." 90 Wn. App. at 604.

Here, the court permitted Scott the lesser remedy of cross-examination of Eastham and Spoor about the misconduct. Although the court had granted a motion to exclude witnesses pretrial, Chief Eastham was permitted to remain in the courtroom, pursuant to ER 615.

ER 615 provides:

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which

is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

Eastham not only violated the purpose of ER 615 by relaying the nature of a witnesses' testimony to a witness who had not yet testified, but apparently attempted to influence a witnesses' testimony.

On cross-examination, Eastham's testimony was entirely self-serving. He added a new twist to the incident that he did not mention when he was questioned outside the presence of the jury on February 1. He testified that after saying to Spoor "I don't remember dragging him out," that he "noticed the Defendant's mother staring at me and I thought, well, she's—she's bothered by this conversation and we changed the subject to I think a drunk driver I had arrested years ago." 2RP at 32. He then claimed that "[w]e did change the subject because it dawned on me then that —that she might be taking offense to what I was talking about." 2RP at 32. The new version of the story headed off cross-examination regarding why he turned "beet red," as Kaplan testified he had done. 2RP at 29.

The court rendered its sanction toothless by permitting Chief Eastham to remain in the courtroom—conveying to the jury that the violation was not particularly serious. 2RP 22

In sum, Chief Eastham's conversation with Officer Spoor about the content of a material portion of Clements' testimony, his recollection of his own testimony, and inquiry as to what Officer Spoor remembered—all immediately prior to Officer Spoor's own testimony—constituted serious misconduct for which a dismissal should have been granted. Moreover, the sanction of a dismissal would have served not only as a remedy for the defendant, but as a deterrent to the government. *Granacki*, 90 Wn. App. 603. This Court should reverse the conviction.

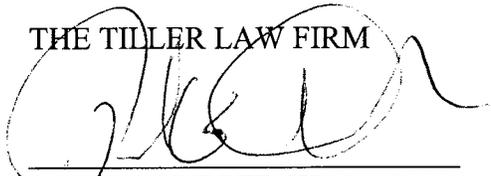
E. CONCLUSION

Based on the foregoing argument, Dustin Scott respectfully requests that this Court reverse his conviction.

DATED: August 28, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line. The signature is stylized and somewhat cursive.

PETER B. TILLER-WSBA 20835
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN JON SCOTT,

Appellant.

COURT OF APPEALS NO.
36041-1-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Dustin Jon Scott, Appellant, and David J. Burke, Pacific County Prosecuting Attorney, by first class mail, postage pre-paid on Tuesday, August 28, 2007, at the Centralia, Washington post office addressed as follows:

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