

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NO. 36853-6-II

STATE OF WASHINGTON

Respondent,

vs.

Melvin Morgensen,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 07-1-00139-1

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

I Statement of Facts

On July 14, 2007, Deputy Gordon Tamura was dispatched to a reported domestic violence assault that occurred approximately one-half hour before the victim; Angela J. Price reported it to 911. Ms. Price reported the assault took place at 230 Mason St., Port Hadlock, WA, and she was reporting it from 255 South Maple St., Port Hadlock, WA. Deputy Tamura met with Ms. Price who reported that Mr. Morgensen, her boyfriend, assaulted her during an argument that erupted over the recent death of Mr. Morgensen's father.

Deputy Tamura located Mr. Morgensen riding a motorbike nearby and arrested him for Assault 4 Domestic Violence. Mr. Morgensen resisted and, once handcuffed, had to be restrained until backup unit arrived. RP 80-81. Mr. Morgensen was very intoxicated. RP 71-79. Deputy Tamura placed Mr. Morgensen in the back of his patrol car and transported him to the hospital for a medical check to determine if he was fit to put in jail.

During the transport Mr. Morgensen told Deputy Tamura that he should "put one in his head" requesting the Deputy to shoot him if he did not, then in a year, when Mr. Morgensen was released, the Deputy and his family was dead. Mr. Morgensen said he knew

where the Deputy lived and continued to advise the Deputy that he would harm the Deputy and his family when released. Mr. Morgensen continued these threats the entire trip. RP 72.

Mr. Morgensen was charged with Felony Harassment. The case went to a jury trial. During pretrial discussions the trial judge instructed the prosecution that there could be no discussion of the fact that Deputy Tamura was responding to a domestic violence report on Mr. Morgensen at the time he was arrested, because that would be prejudicial. RP 42-43.

At trial Deputy Tamura testified followed by Mr. Morgensen. Deputy Tamura was recalled for rebuttal, and the case was submitted to the jury. RP 132.

During deliberations, the jury asked to hear the testimony again. The request was discussed by the trial court with the prosecution and defense. The trial court reviewed *State v. Koontz* and *State v. Frazier* with the parties. The defense objected to replaying the two testimonies, citing the time it would add to the jury deliberations. The trial court ruled that: (1) by replaying the audio tapes of the testimony from both Deputy Tamura and Mr. Morgensen no undue emphasis would be placed on any part of the testimony; and (2) by playing an audio recording of the entire testimony rather than giving the jurors written transcripts would

satisfy the rule against undue repetition and improper evidence. RP 132-136. The trial court then allowed the jury to listen to audio recordings of the testimony of Deputy Tamura and Mr. Morgensen. Mr. Morgensen was convicted as charged. CP 3-12.

A sentencing hearing was held on October 12, 2007. RP 150. The state requested Mr. Morgensen be sentenced to the top of the standard sentencing range, which, in this case, was eight months of jail, based on the seriousness of threats to kill a police officer's family. The prosecutor told the court that despite the seriousness of his threats, he had heard that Mr. Morgensen, "when he's not under the influence, is a really nice guy." RP 151. Mr. Morgensen's defense attorney reiterated, "you know, the Prosecutor's right, when Mel isn't drinking he's a pleasure to be around. He's not when he's had far too much to drink..."

Mr. Morgensen spoke to the court about his circumstances and behavior. RP 156-158. The court then addressed Mr. Morgensen:

"...I've known you for years and I think I've represented you before. I've sat where Mr. Davies [Defense Attorney] is before. And when, and Mr. DeBray is right, Mr. Davies is right, as long as you're not drinking you're a very decent human being. You are the worst alcoholic when you drink, you're the worst person you can be. I don't know why, you know, that's between you and whatever. But, you're a terrible drunk.

...
You always get in trouble. Everything that you've gotten in trouble for over the past ten years has always been when you get intoxicated, and you abuse people."

Mr. Morgensen was sentenced to eight months (240 days) incarceration with the last 3 months allowed to be in inpatient treatment if Mr. Morgensen got admitted to a program. RP 160-161. The trial court states its intention that this sentence run concurrently with any sentence resulting from a pending District Court Obstructing charge. RP 161. Mr. Morgensen served time in the Jefferson County Jail on this conviction from September 21, 2007 through January 18, 2008, a total of 121 days reflecting time already served awaiting trial and 80 days "good time" received from the jail. (Jail records).

Argument

II Standard of Review

We review a decision of the trial court to allow the jury to reread transcripts of trial testimony for an abuse of discretion. See *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983).

III The trial court's decision to play an audio tape of testimony did not violate Mr. Morgensen's right to a fair trial by an impartial jury

The Sixth and Fourteenth Amendments to the United States Constitution and Washington Constitution article I, section 22 guarantee a defendant the right to a fair and impartial jury. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). The right to a fair and impartial jury is protected by the procedures contained in chapter 4.44 RCW and by court rule. These protections govern not only the information that may be conveyed to a jury, but also the manner in which the information may be delivered. During deliberations, limitations on outside contact are especially restrictive because at that point the jury is engaged in judging the facts. See, e.g., 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). The pattern jury instructions reflect this concern. Prospective jurors are advised they will not be provided with a written copy of the testimony during deliberations. 11 Washington Pattern Jury Instructions: Criminal 1.01 (2d ed. 1994) (WPIC); WPIC 1.02. Other pattern jury instructions reinforce the manner in which questions of fact or law that the jury may have should be addressed once deliberations have begun. See

generally WPIC 4.67 (questions by jury addressed to court); WPIC 4.68 (additional instructions of law); WPIC 4.70 (probability of verdict).

Viewed in light of the principle that a jury must remain impartial as it determines the facts, reading back testimony during deliberations is disfavored. *United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir.1989). Whether a jury should reread transcripts is dependent upon the particular facts and circumstances of the case and must be weighed against the danger that the jury " 'may place undue emphasis on testimony considered a second time at such a late stage of the trial.' " *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir.1998) (*quoting United States v. Sacco*, 869 F.2d 499, 501 (9th Cir.1989)). The court determined that replaying a videotape of a trial was error, reversed a conviction and remanded for a new trial. *State v. Koontz*, 145 Wn.2d 650, 41 P.3d 475 (2002). In *Koontz*, the court identified several errors associated with the use of videotape replay of testimony:

"the jury was not limited to discrete portions of testimony. Instead, they were specifically looking for indications, "facial expressions and whatnot," of credibility. In essence, the jury sought an improper repetition of the complete trial testimony of three critical witnesses. The initial deadlock illustrates the difficulty the jury had making its determination without

what amounts to a retrial. The video replay was made worse by the fact that during the jury's review it was exposed to views of the defendant it did not have during the trial. The video transcripts were not limited to witness testimony, but included nontestamentary elements, such as isolated shots of the defendant and unnecessary views of the judge and nontestifying trial participants.”

Koontz is distinguishable. This case used only an audio recording of testimony, so none of the problems the *Koontz* court identified were present. In addition, the trial court here brought the jury back into court and played both witness' testimony in their entirety, one time, thus preventing undue repetition which might have occurred with transcripts. RP 132-142. By playing both witness' testimony, the court ensured fairness by giving both sides another opportunity to be heard. By playing the tape in the presence of the attorneys, they each had an opportunity to object if extraneous conversations intruded, just as they would have had during the original testimony and a curative instruction could have been used. In fact, no such objection was made during the replay. RP 142.

Replaying the audio of both witness' testimony did not impinge on Mr. Morgensen's constitutional rights and this appeal should be denied.

IV The trial court was impartial at trial and did not violate the appearance of fairness doctrine by reiterating, during the sentencing hearing, the prosecution and defense attorneys' statements that Mr. Morgensen behaved badly when drunk.

A decision may be challenged under the appearance of fairness doctrine for "partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy." *Buell v. City of Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972).

"The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972); *Brister v. Tacoma City Council*, 27 Wn.App. 474, 486, 619 P.2d 982 (1980). "The critical concern in determining whether a proceeding appears to be fair is how it would appear to a reasonably prudent and disinterested person." *Brister*, 27 Wn.App. at 486-87, 619 P.2d 982 (citing *Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976)). To prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge's or

decisionmaker's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 619 n. 9, 826 P.2d 172, 837 P.2d 599 (1992).

In this case the trial judge showed no trace of bias or partiality. The trial judge only repeated what both the prosecutor and defense counsel offered, with the observation that he may have previously represented Mr. Morgensen when the judge served as a public defender. An observation of a convicted defendant's tendency to behave badly when drunk, unanimously held by prosecution, defense, and judge, is not a showing of bias, but rather, a reflection of consistent behavior over a long period. Further, the trial judge made the sentence concurrent with other charges arising from the same behavior, and allowed Mr. Morgensen to substitute up to 3 months of treatment for incarceration. This sentence was a thoughtful, unbiased selection that both required Mr. Morgensen to take responsibility for his criminal behavior and to get treatment for his problems thereby lessening the chance of future bad behavior.

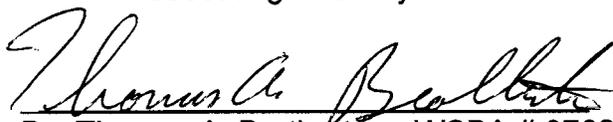
The trial judge showed no bias or partiality and this appeal should be denied.

CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 19th day of March, 2008

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton , WSBA # 37624
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Superior Court No.: 07-1-00139-1

DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 14th day of March, 2008, I mailed, postage prepaid, a copy of the State's Brief of Respondent as follows:

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

Dated this 14th day of March, 2008, at Port Townsend, Washington.


Janice N. Chadbourne
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DECLARATION OF MAILING
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