

FILED
COURT OF APPEALS
DIVISION II

NO. 37788-8-II

09 MAR -4 PM 1:43

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

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON, Respondent

v.

FRANCISCO SALGADO ROJAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-01498-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF THE FACTS 1
II. RESPONSE TO ASSIGNMENT OF ERROR..... 1
III. CONCLUSION6

TABLE OF AUTHORITIES

Cases

<u>In re Personal Restraint of Howerton</u> , 109 Wn. App. 494, 36 P.3d 565 (2001).....	4
<u>Lewis v. Simpson Timber Co.</u> , 145 Wn. App. 302, 331-332, 189 P.3d 178 (2008).....	5
<u>State v. Allen</u> , 50 Wash. App. 412, 749 P.2d 702, review denied, 110 Wash. 2d 1024 (1988)	3, 4
<u>State v. Langdon</u> , 42 Wash. App. 715, 717-18, 713 P.2d 120, review denied, 105 Wash. 2d 1013 (1986).....	4
<u>State v. Lord</u> , 117 Wn.2d 829, 855, 822 P.2d 177 (1991).....	5
<u>State v. Russell</u> , 25 Wn. App. 933, 948, 611 P.2d 1320 (1980).....	2
<u>State v. Safford</u> , 24 Wn. App. 783, 604 P.2d 980 (1979).....	2, 4
<u>State v. Saraceno</u> , 23 Wn. App. 473, 475-476, 596 P.2d 297 (1979).....	2

I. STATEMENT OF THE FACTS

The State accepts, for the most part, the Statement of Facts as set forth by the defendant. If additional information is necessary, it will be supplied in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised in this appeal is a claim that the trial court deprived the defendant of his right to participate in answering jury questions during deliberation.

Specifically, the defendant maintains that the court responded to two written requests for information from the jury without contacting the parties. It is interesting to note that there is absolutely nothing in this record that has been produced by the defendant that would indicate that the parties were not contacted or that they were not aware of what the Judge was doing. Nevertheless, the State will respond as though there has been some type of violation.

During deliberations, two written requests were sent out for additional information from the jury. (CP 14 and 15). A copy of the two requests are attached hereto and by this reference incorporated herein.

The rule has evolved over time but appears now to be as set forth in State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980):

However, an ex parte judicial communication to a jury, while error, may be harmless if the appellate court can conclude that the error is harmless beyond a reasonable doubt. State v. Saraceno, 23 Wn. App. 473, 475-476, 596 P.2d 297 (1979). This court recently reached an analogous conclusion in State v. Safford, 24 Wn. App. 783, 604 P.2d 980 (1979), wherein we held that an ex parte communication by a trial judge to a jury which is negative in nature and conveys no affirmative information is not prejudicial and, hence, is not reversible error.

The State submits that the information being asked for by the jury and the responses being provided by the court are totally neutral in nature and thus, if there is any error, it is harmless. The first request in time is a request for the transcript of interrogation. The trial court indicated in writing to the jury that they could not supply a transcript, however the recording of the interrogation is available. This is of significance because it appears the trial court was setting this up to allow the jury to hear the interrogation, but that the jury changed its mind.

THE COURT: We never came out have that played. We had it all set up and everything, and they said they were going to look at another aspect –

THE CLERK: Something about an aspect.

THE COURT: Different aspect of the case, and then they never came out to listen to it. So we never played it.

-(RP 673, L13-20)

The transcript in this section also indicates that all the parties were present when this conversation was taking place between the court, the clerk, and the Deputy Prosecutor. (RP 673). So the jury may have requested it, but it never came to anything because the jury changed its mind and started reviewing something else in the case and never came out to listen to it.

The second question was a request to get Exhibit 58, which was described as a map of the crime scene. The trial court indicated to the jury that this was admitted for illustrative purposes only and thus would not go to the jury room. The State submits that this is totally neutral information and carries no taint as to the case itself. It appears to be an appropriate response by the trial court as to what constituted evidence and how that evidence was to be treated.

In State v. Allen, 50 Wash. App. 412, 749 P.2d 702, review denied, 110 Wash. 2d 1024 (1988), the jury sent the trial judge a written inquiry without notice to the defendant's counsel. The trial court responded by stating, "read your instructions and continue with your deliberations." 50 Wash. App. at 419. The Allen court held the communication was harmless because the "court's instruction was neutral and conveyed no affirmative information, merely directing the jury to refer to previous instructions." 50

Wash. App. at 420 (citing State v. Langdon, 42 Wash. App. 715, 717-18, 713 P.2d 120, review denied, 105 Wash. 2d 1013 (1986); State v. Safford, 24 Wash. App. 783, 794, 604 P.2d 980 (1979), review denied, 93 Wash. 2d 1026 (1980)); In re Personal Restraint of Howerton, 109 Wn. App. 494, 36 P.3d 565 (2001).

The question of the illustrative evidence in our case came up during the questioning of Howard Tikka. At that time the Deputy Prosecutor had marked for illustrative purposes only a diagram of an intersection. This procedure was approved of by the defense, the evidence was used with that witness, and was not referred to again.

QUESTION (Deputy Prosecutor): I'm going to show you this, which is marked Plaintiff's Exhibit 58. You've never seen this before, but do you recognize what that represents?

ANSWER (Howard Tikka): Exactly.

QUESTION: Okay.

ANSWER: The intersection where the shooting occurred.

QUESTION: All right. And does that appear to accurately reflect at least the intersection there?

ANSWER: It does.

QUESTION: Okay.

MR. JACKSON (Deputy Prosecutor): Your Honor, it's just for –

THE COURT: - illustrative purposes?

MR. JACKSON: -illustrative purposes I'd like to admit this at this time.

THE COURT: Okay. Any objection to that?

MS. CLARK (Defense Attorney): No.

-(RP 154, L16 – 155, L7)

Recently, Division II has approved of the use of demonstrative evidence, “if it accurately illustrates facts sought to be proved”. It knows that the foundational requirement for the illustrative material is less onerous than the foundation requirement for other exhibits and the use of this illustrative information is discretionary with the trial court. Lewis v. Simpson Timber Co., 145 Wn. App. 302, 331-332, 189 P.3d 178 (2008).

This case is in line with the earlier Supreme Court decision, which favor the use of illustrative evidence and gives the trial court wide latitude in determining whether to admit illustrative evidence. State v. Lord, 117 Wn.2d 829, 855, 822 P.2d 177 (1991). An appropriate illustrative piece of evidence aids the fact finder in understanding other evidence where the fact finder knows the limits on the accuracy of the evidence. Lord, 117 Wn.2d at 855.

In summary, the information supplied by the Appellant does not indicate whether or not the parties were present during the times that this was being discussed. However, assuming that the parties were not present,

there is absolutely nothing to indicate that this is prejudicial to the defendant. In fact, the State maintains that there is no reasonable doubt concerning it. The first question asked was never followed up on by the jury and thus nothing came of it. The second question asked by the jury was a discretionary call with the trial court as to how to allow that illustrative evidence to go to the jury. The Judge determined that it was not appropriate under the circumstances once the parties had agreed that it was for illustrative purposes only. This was totally neutral evidence and information and did not lead the jury astray, nor did it place any improper impediments to the jury's ability to render a fair decision in the case.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 2 day of March, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNE, WSBA#7869
Senior Deputy Prosecuting Attorney

DATE: 5/15/08

TIME: 12:05

FILED

MAY 15 2008

Sherry W. Parker, Clerk, Clark Co.

Do not disclose any information or state how the jury has voted.

JURY QUESTION

Can we get Ex. #58 Map of
Crime Scene

Ex. # 58 was not admitted into evidence, but was
used for "illustrative" purposes only. Thus it
cannot go into the jury room.

S-15-07 @ 12:10 pm 



FOREMAN/PRESIDING JUROR



DATE: 5-15-2008

TIME: 11:20 Am

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MAY 15 2008

Sherry W. Parker, Clerk, Clark Co.

JURY NOTE

Would Like Transcript of Interrogation.

S-15-07 @ 11:30 am.

We cannot supply you with the transcript, however
the recording of the interrogation is available.





FOREMAN/PRESIDING JUROR

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6

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Clark Co. No. 07-1-01498-5

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Mar. 2, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Lisa Tabbut Attorney at Law PO Box 1396 Longview, WA 98632-7822
Francisco Salgado Rojas DOC# 318749 Washington State Penitentiary 1313 N. 13 th Avenue Walla Walla, WA 99362-1065	

DOCUMENTS: Brief of Respondent

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

Jennifer Casley
Date: Mar 2, 2009.
Place: Vancouver, Washington.