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STATE OF WASHINGTON

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Court of Appeals No. 40087-1-II
Cowlitz County No. 07-1-00811-7

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS ROY PULASKI

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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III. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A MISTRIAL.

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I. THE TRIAL COURT ERRED IN ADMITTING MR. PULASKI'S BLOOD ALCOHOL TEST WHERE THE STATE FAILED TO ESTABLISH THAT THE GRAY TOPPED VIALS USED TO STORE HIS BLOOD CONTAINED BOTH AN ANTI-COAGULANT AND AN ENZYME POISON.

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III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BASED UPON JUROR MISCONDUCT.

C. STATEMENT OF THE CASE

1. FACTUAL SUMMARY

On June 17th, 2007 there was a traffic collision on Grade Street in Kelso. RP I, p. 160. Mr. Pulaski was determined by the Kelso Police to be at fault for the collision because his car "T-boned" the other car, driven

by Clayton Jagoo, on the driver's side. RP 1, p. 162-64. Mr. Jagoo had been traveling in a lane of travel that Mr. Pulaski's car was entering. RP 1, p. 162. Mr. Pulaski's blood was drawn four hours after the collision and found to be a .21 blood alcohol level. RP 2B, p. 258, RP 3, p. 380. Mr. Jagoo was driving with a .12 blood alcohol level. RP 2B, p. 366. Officer Christianson, who contacted Mr. Jagoo, did not smell alcohol on Mr. Jagoo despite his excessive blood alcohol level. RP 2B, p. 312.

2. PROCEDURAL FACTS

Prior to trial, Mr. Pulaski was appointed two attorneys and had at least one retained attorney. Report of Proceedings. Mr. Pulaski had many traits he was looking for in an attorney, and had difficulty hiring an attorney. RP I, p. 115-17. Trial was set to commence on October 28th, 2009. RP I, p. 125. On October 22nd, Mr. Pulaski asked the trial court to appoint counsel once again because his financial circumstances had changed and he believed he was now indigent. RP I, p. 126-128. Mr. Pulaski was adamant that he did not want to try the case pro se because he had no legal experience or expertise. RP I, p. 126-131. Among the factors that had changed since he had previously declared he was not indigent, Mr. Pulaski was now supporting a family of five and had depleted his entire savings by paying for dental care. RP I, p. 126-27. He made merely sixteen dollars an hour. RP I, p. 126. He was preparing to file for

bankruptcy. RP I, p. 127-28. He had to pay \$1500 to hire an attorney for the bankruptcy. RP I, p. 128. The trial court, without further inquiry, that Mr. Pulaski was not indigent, and that Mr. Pulaski was “dilatory” for declaring indigency “three days before the trial.”¹ RP I, p. 129. The trial court denied Mr. Pulaski’s request for counsel and told him he would have to hire a lawyer or proceed pro se. Id. He also had witnesses whose attendance he wanted to compel for trial but he didn’t know how to issue subpoenas. RP I, p. 130. Judge Warning told Mr. Pulaski it was his responsibility to figure out how to issue the subpoenas, and that he would not be able to seek assistance from the clerk’s office. RP I, p. 130-31.

On October 27th, a mere twenty-two hours before the trial was set to commence, defense attorney Robert Brungardt appeared on Mr. Pulaski’s behalf. RP I, p. 145. Mr. Brungardt informed the trial court that he did not intend to seek a continuance of the trial. RP I, p. 146. The trial began at 1:30 the next day. RP I, p. 151. Mr. Brungardt was unable to start the trial at 9:00 a.m. because he had a court hearing in Clark County in the morning. RP 1, p. 147.

During trial, the bailiff informed the trial court that one of the jurors complained that another juror was making derisive comments about Mr. Brungardt. RP 2B, p. 305. After allowing the trial to proceed again

¹ This hearing occurred on October 22nd, which was actually six days before trial.

for a period of time, the trial court paused the proceeding to question the juror who brought the issue to light. RP 2B, p. 347-49. The trial court questioned this juror and she revealed that the juror sitting to her left was making comments such as “yeah right” when Mr. Brungardt spoke, and was “scoffing.” RP 2B, p. 350-51. Ms. Culligan said this behavior would not influence her decision in any way. RP 2B, p. 351. The trial court then brought out the juror who was sitting on the other side of the offending juror, and she told the court she had not heard the offending juror make any comments. RP 2B, p. 354.

At this point, Mr. Brungardt made a motion for a mistrial based on juror misconduct. RP 2B, p. 355. At that point the trial court decided to dismiss the offending juror, Ms. Hatch, and to question the entire panel together to ascertain whether the panel had been tainted. RP 2B, p. 356. The trial court asked the panel whether any of them had heard a juror make remarks about the case. RP 2B, p. 357. A woman named Ms. Winans raised her hand and the trial court then had the remaining jurors removed and questioned Ms. Winans. RP 2B, p. 358. Ms. Winans said she heard the offending juror say that one could already tell, based on what they heard already, that Mr. Pulaski was guilty. RP 2B, p. 358. Ms. Winans heard the remark inside the jury room when all of the jurors had convened in the morning. RP 2B, p. 361. Ms. Winans had been sitting at

the table and the offending juror was standing up near the other end of the table. RP 2B, p. 361. Ms. Winans said that she could nevertheless remain objective. RP 2B, p. 359. The trial court denied the motion for a mistrial, finding that the misconduct of the excused juror had not tainted the panel. RP 3, p. 409.

Mr. Pulaski testified that he had been drinking at the Wild Grizzly Casino on Ash Street. RP 3, p. 410. He had dinner there with a friend. RP 3B, p. 411. On a dare from his friends, he chugged three Long Island ice tea drinks right before he left the Wild Grizzly at 5:30 p.m. Mr. Pulaski testified he was trying to get home before the effects of the alcohol took hold. RP 3, p. 427. He believed he was not yet intoxicated by the time he got in his truck, which was just before the collision. RP 3, p. 427. Mr. Brungardt did not call any other witnesses or present any other evidence. Report of Proceedings.

The State elicited, through the testimony of Mr. Brian Capron of the Washington Toxicology Laboratory, that Mr. Pulaski had a blood alcohol level of .21. Officer Brown testified that he provided two gray-topped vials to the phlebotomist at St. John's Hospital. RP 2A, p. 274. Brown testified that there was white powder in the vials, and that the powder was an anti-coagulant. RP 2A, p. 274. The prosecutor asked "And, what do they contain in them?" Brown replied "It's an

anticoagulant. It is a little powder substance inside the vial. It prevents the blood from solidifying or clotting.” The prosecutor asked “Is there also an enzyme poison?” Brown replied “It’s an enzyme. Yes.” RP 2A, p.276.

The phlebotomist, Brenda Brown, testified that Officer Brown handed her two gray topped vials with white powder in them but that she didn’t know what the white powder was. RP 2B, p. 342.

The toxicologist, Brian Capron, offered no testimony about what was contained in the gray-topped vials prior to the insertion of Mr. Pulaski’s blood. RP 3, p. 366-403. Mr. Capron was permitted to testify, without objection, that Mr. Pulaski’s blood alcohol concentration was .21. RP 3, p. 380.

The jury returned a verdict of guilty after thirty-three minutes. CP 19, RP 3, p. 465. Ms. Winans was the presiding juror. RP 3, p. 466.

Mr. Pulaski was given a standard range sentence. CP 25. This timely appeal followed. CP 34.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING MR. PULASKI’S BLOOD ALCOHOL TEST WHERE THE STATE FAILED TO ESTABLISH THAT THE GRAY TOPPED VIALS USED TO STORE HIS BLOOD CONTAINED BOTH AN ANTI-COAGULANT AND AN ENZYME POISON.

In order for a blood alcohol test to be admissible at trial, the State must prove that both an anti-coagulant *and* an enzyme poison were present in the gray topped vials used to store the defendant's blood. *State v. Bosio*, 107 Wn.App. 462, 466-67, 27 P.3d 636 (2001). In *Bosio*, the Trooper testified that the gray topped vials used to store the defendant's blood contained an anti-coagulant but offered no testimony about whether it also contained an enzyme poison. *Id.* The Court stated:

In *State v. Garrett*, 80 Wash.App. 651, 653, 910 P.2d 552 (1996), we held that “[t]he language of WAC 448-14-020(3)(b) is mandatory.” In *Garrett*, it was undisputed that an anticoagulant was not added to the blood sample and this court affirmed the vacation of the defendant's conviction. *Garrett*, 80 Wash.App. at 653, 910 P.2d 552. Here, there was evidence that the anticoagulant was added to the blood sample. The trooper and the nurse saw the powder in the blood vial and the blood was not coagulated. However, there is no evidence that an enzyme poison was added to the blood sample. WAC 448-14-020(3) unambiguously requires that both an anticoagulant and an enzyme poison be added to the blood sample. We conclude that the State failed to make a prima facie showing that Ms. **Bosio's** blood sample was properly preserved.

Bosio at 468.

Here, the facts are analogous to those in *Bosio*. Officer Brown's testimony, viewed in its proper context, demonstrated that he believed the gray topped vials contained only anti-coagulant, and that the anti-coagulant was all that is required. His testimony showed that he believed the anti-coagulant is “an enzyme.” He didn't testify that both of these

items were contained in the vials, or even appear to believe both needed to be present. The State failed to make a prima facie showing that the requirements of the Washington Administrative Code had been followed, and the trial court erred in admitting the result of the blood alcohol test.

Should the State argue that defense counsel's failure to object to the admission of the result constituted a waiver of this issue by Mr. Pulaski, defense counsel was ineffective for failing to object, argued in Part II, below. Mr. Pulaski was prejudiced by the admission of this test, obviously, because it showed his blood alcohol to be nearly three times the legal limit. Mr. Pulaski should be granted a new trial.

II. MR. PULASKI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FIRST APPEARED ON HIS BEHALF ONLY TWENTY-TWO HOURS BEFORE THE TRIAL BEGAN, AND WHERE THE TRIAL COURT IGNORED MR. PULASKI'S CLAIM OF INDIGENCY AND DENIED HIM COURT APPOINTED COUNSEL.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127

Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. “Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

The right to effective assistance of counsel includes a reasonable time for counsel to consult and prepare. *State v. Hartzog*, 96 Wash.2d 383, 402, 635 P.2d 694 (1981). “[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how to best represent [the] client.” *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 873, 16 P.3d 601 (2001) (alternations in original) (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994)). Moreover, financial concerns should not be used as a justification for inhibiting the constitutional rights of criminal defendants. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); *Stone v. City & County of San Francisco*, 968 F.2d 850, 858 (9th Cir.1992).

State v. Wilson, 144 Wn.App. 166, 180, 181 P.3d 887 (2008).

Here, the error was set into motion when the trial court failed to conduct an adequate inquiry into Mr. Pulaski’s indigency. The trial court was clearly angry at Mr. Pulaski, repeatedly calling him dilatory. The

judge's personal animus toward Mr. Pulaski interfered with his objectivity in deciding whether Mr. Pulaski was indigent. Mr. Pulaski articulated several things which had changed in his life since he last told the court he was not indigent, including the depletion of his savings account, numerous new dependents and a low paying job. The court didn't ask Mr. Pulaski how many hours per week he worked, what his assets were and what his debts were, or whether his spouse earned an income. The court had made up its mind before the inquiry, such as it was, even began. Had the court granted Mr. Pulaski counsel at that time, his counsel would have had at least six days to prepare for the trial, as opposed to the twenty-two hours (minus the night of sleep Mr. Brungardt presumably indulged in and his morning hearing in Clark County) that Mr. Brungardt had.

Mr. Brungardt did not object to the admission of Mr. Pulaski's blood alcohol test despite the State's failure to prove that the gray topped vials contained *both* an anti-coagulant and an enzyme poison. It defies credulity to believe that Mr. Brungardt could have prepared to defend Mr. Pulaski on a charge of vehicular assault after appearing for the first time only twenty-two hours prior to the beginning of the trial, particularly when he spent the morning of the trial conducting a hearing in a different county.

Mr. Brungardt was required, at a minimum, to conduct a reasonable investigation prior to trial and to apprise himself of the relevant law pertaining to the charge against Mr. Pulaski. Mr. Brungardt clearly should have objected to the admission of the blood alcohol test result and his failure to do so prejudiced Mr. Pulaski. In a case such as this, where the so-called victim had a blood alcohol level of .12 at the time of the collision, there is a strong inference that the result of the trial would have been different had Mr. Pulaski's blood alcohol test result not been admitted.

Although Mr. Pulaski wanted to issue subpoenas, Mr. Brungardt presented no witnesses on Mr. Pulaski's behalf. Just sitting next to Mr. Pulaski while having an active Bar number does not constitute representation by counsel. Advocacy is required as well, and Mr. Brungardt failed to provide it. Mr. Pulaski should be granted a new trial.

III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL BASED UPON JUROR MISCONDUCT.

Both the Washington and United States constitutions guarantee a defendant the right to a fair trial by an "impartial jury." U.S. Const. Amends. 5, 6; Wash. Const. Art. 1, Sec. 3, 22. Failure to provide a fair and impartial jury violates minimal standards of due process. *State v.*

Jackson, 75 Wn.App. 537, 543, 879 P.2d 307 (1994). A constitutionally valid jury trial is “a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” *State v. Tigano*, 63 Wn.App. 336, 341, 818 P.2d 1369 (1991) (quoting *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989)). In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the “evidence developed” against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross examination, and of counsel. *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 549 (1965).

When the jury considers extrinsic evidence it constitutes misconduct and can be grounds for a new trial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). A new trial should be granted where there is a showing of reasonable grounds to believe that a defendant has been prejudiced. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). One reason the jury’s exposure to extrinsic evidence is prejudicial and denies a defendant a fair trial is the evidence is not subject to objection, cross-examination, explanation, or rebuttal. *Halvorson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). In determining prejudice, the question is whether the extraneous information could reasonably have affected the jury’s deliberations, not whether it actually

did. *State v. Barnes*, 85 Wn.App. 638, 669, 932 P.2d 669, *rev. denied*, 133 Wn.2d 1021 (1997); *State v. Briggs*, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989). Any doubt that the misconduct affected the verdict is resolved against the verdict. *Briggs* at 55.

Here, the trial court's inquiry was wholly inadequate. The judge asked Ms. Winans leading questions that clearly communicated the desired answer, rather than open ended questions which would have indicated whether Ms. Winans agreed with the removed juror. As defense counsel argued, it is unbelievable that no other jurors heard the removed juror opine on Mr. Pulaski's guilt when Mr. Winans heard it from the other side of the room. The behavior of the removed juror was highly improper and prejudicial.

If there is a reasonable basis to believe the defendant was prejudiced by the jury's consideration of extraneous evidence, the trial court must grant a new trial. *State v. Cummings*, 31 Wn.App. 427, 430, 642 P.2d 415 (1982), citing *State v. Rinke*, 70 Wn.2d 854, 425 P.2d 658 (1967). Even if only one juror is improperly influenced, the defendant is denied a fair trial. *State v. Stackhouse*, 90 Wn.App. 344, 350, 957 P.2d 218, *rev. denied*, 136 Wn.2d 1002 (1998).

Here, Ms. Winans heard the removed juror opine that Mr. Pulaski was obviously guilty. Mr. Brungardt moved for a mistrial and the motion

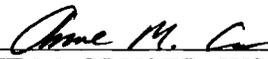
was denied. Then, Ms. Winans served as the presiding juror and the jury returned a verdict of guilty in thirty-three minutes. It is difficult to imagine stronger evidence that Ms. Winans was affected by the predetermination of guilt expressed by the removed juror. Mr. Pulaski should be granted a new trial because the trial court abused its discretion in failing to grant the motion for a mistrial.

E. CONCLUSION

Mr. Pulaski's conviction should be reversed and he should be granted a new trial.

RESPECTFULLY SUBMITTED this 23rd day of July, 2010

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CERTIFICATE OF MAILING

I certify that on 07/23/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Susan Baur, Cowlitz County Prosecutor, 312 S.W. 1st, Kelso, WA 98626; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Mr. Mr. Thomas Pulaski, 1111 10th Ave., Longview, WA 98632.