

No. 45077-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Troy Akin,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01413-0

The Honorable Judge Marilyn Haan

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Akin's conviction was entered in violation of his rights under the Sixth and Fourteenth Amendments.
1. Mr. Akin's conviction was entered in violation of his rights under Wash. Const. art. I, § 22.
2. The trial court infringed Mr. Akin's right to participate in his defense.

ISSUE 1: An accused person has a right to participate in his own defense. Here, the trial court admonished Mr. Akin not to react, respond, agree, or disagree during *voir dire* and testimony. Did the trial court violate Mr. Akin's right to participate in his defense, in violation of the state and federal constitutions?

3. The evidence violated Mr. Akin's right to confrontation.
4. The trial court erred by allowing the state to introduce a videotape containing testimonial hearsay.

ISSUE 2: An accused person has the right to confront adverse witnesses. Here, the prosecution introduced testimonial hearsay in the form of videotaped statements from Mr. Akin's own attorney. Did the admission of testimonial hearsay violate Mr. Akin's Sixth and Fourteenth Amendment right to confrontation?

5. Mr. Akin was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel was hampered by a conflict of interest.
7. Defense counsel should have withdrawn as Mr. Akin's advocate when it became clear he was likely to be a necessary witness at Mr. Akin's bail jumping trial.
8. Mr. Akin was prejudiced by defense counsel's conflict of interest because defense counsel failed to pursue a plausible defense strategy.

ISSUE 3: An accused person has a Sixth and Fourteenth Amendment right to the effective assistance of counsel. Here, counsel failed to pursue a plausible defense strategy as a result of a conflict of interest. Was Mr. Akin denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

9. The court's conflicting instructions misled the jury and prejudiced Mr. Akin.
10. The trial court erred by giving Instructions Nos. 5 and 7.

ISSUE 4: Where a court's instructions provide inconsistent decisional standards or stem from a clear misstatement of law, prejudice is presumed. Here, the court gave inconsistent instructions defining bail jumping. Did the court's inconsistent instructions mislead the jury and violate Mr. Akin's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Troy Akin was charged by the state with theft in the second degree. CP 1. While that charge was pending, he became confused about his court dates and missed court April 4, 2013. RP 59-62. He called his attorney the same day as court and was told to call again the next day. RP 60-61. By that time, the court had issued a warrant. The state added a charge of bail jumping. RP 1, 10; CP 1-2.

Before the case went to trial, the state dismissed the charge of theft. The fact of the charge came out at trial, and the defense sought to admit evidence that the charge had been dismissed. RP 15-18, 29, 45-49. The court denied the request. RP 49.

At the start of the trial, the judge admonished Mr. Akin:

Mr. Akin, I just want to advise you not to have any contact with any of the jurors and when there is testimony or during the voir dire, you are not to show any reaction, responses, or agreement or disagreement with anything.
RP 3.

The state played two different videos for the jury. The first was of the court appearance where Mr. Akin was told when to come to court. RP 34. The second was of the hearing that he missed. In it, his attorney was seen telling the court: "I represent him, but I can't represent his

whereabouts.” RP 36. This was the same attorney that represented Mr. Akin at his trial. RP 36.

The court reiterated its admonishment to Mr. Akin after the closing arguments were completed:

Mr. -- Mr. Akin, you may not be in agreement with what has gone on or how it has gone on. I -- but I have to direct you again that you're not to be vocal, you're not to be demonstrative in your nature, especially when a verdict does get returned. I -- I'm going to tell you, again, you need to sit there quietly and listen and nothing more.
RP 84.

The jury convicted Mr. Akin as charged. After sentencing, he timely appealed. CP 3-27.

ARGUMENT

I. THE COURT PROHIBITED MR. AKIN FROM PARTICIPATING IN HIS DEFENSE IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ART. I, § 22.

A. Standard of Review.

Constitutional claims are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). Violation of the accused's constitutional rights requires reversal unless the state can show that the

violation was harmless beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).¹

B. The court denied Mr. Akin his rights to be present, to due process, to confront adverse witnesses, and to “appear and defend in person” when it forbade him from reacting to, responding to, agreeing with, or disagreeing with testimony or with comments made during *voir dire*.

An accused person has a fundamental right to be present for all critical stages of trial. *Irby*, 170 Wn.2d at 880-81 (citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)). This right is rooted in the Sixth Amendment confrontation clause. *Id.*; U.S. Const. Amend VI, XIV; art. I, § 22. Additionally, due process guarantees the right to be present even when the accused is not confronting adverse witnesses. U.S. Const. Amend XIV; *Irby*, 170 Wn.2d at 881 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

The Washington State Constitution guarantees an accused person the right to “appear and defend in person.” art. I, § 22. This right is interpreted separately from the federal due process clause. *Irby*, 170 Wn.2d at 885.

¹ Manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

The right to be present guarantees more than the opportunity to sit in the courtroom. *Irby*, 170 Wn.2d at 883. A primary purpose of the right is to afford the accused the opportunity to participate in his/her defense by communicating with counsel, making suggestions, or even “supersed[ing] his lawyers altogether.” *Snyder*, 291 U.S. at 106; *see also Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Irby*, 170 Wn.2d at 883.

Before his trial began, the court admonished Mr. Akin not to speak or react to anything a witness or prospective juror said:

... when there is testimony or during the voir dire, you are not to show any reaction, responses, or agreement or disagreement with anything. Do you understand that?
RP 3.

The court’s admonition prohibited Mr. Akin from participating in his defense in violation of his rights to be present, to confront adverse witnesses, to due process, and to appear and defend in person. The court prohibited Mr. Akin from speaking or reacting during *voir dire* and trial. This prevented him from communicating with his attorney, making suggestions, correcting any mistakes counsel made, or “superseding” his attorney, if necessary. *Snyder*, 291 U.S. at 106; *Allen*, 397 U.S. at 344; *Irby*, 170 Wn.2d at 883. It is impossible to determine what, if anything, Mr. Akin may have said if he had not been admonished by the court. The

state cannot show that the court's error was harmless beyond a reasonable doubt. *Irby*, 170 Wn.2d 874, 886.

The trial court violated Mr. Akin's rights to be present, to confront adverse witnesses, to due process, and to appear and defend in person when it prohibited from participating in his own defense. *Irby*, 170 Wn.2d at 886. Mr. Akin's conviction must be reversed. *Id.* at 887.

II. THE COURT VIOLATED MR. AKIN'S RIGHT TO CONFRONT ADVERSE WITNESSES.

A. Standard of Review.

A denial of the Sixth Amendment right to confront adverse witnesses is reviewed *de novo*. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). Such an error requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 117.²

B. The court erred by admitting a video containing testimonial statements by Mr. Akin's counsel.

The state and federal constitutions guarantee an accused person the right to confront adverse witnesses. U.S. Const. Amend. VI, XIV; art. I, § 22. The Confrontation Clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable

² Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

and the accused has had a prior opportunity to cross-examine. *Jasper*, 174 Wn.2d at 109 (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51. A statement is testimonial if it is “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Jasper*, 174 Wn.2d at 115 (citing *Crawford*, 541 U.S. at 52.)

At Mr. Akin’s trial, the state played a video of the hearing at which Mr. Akin had allegedly failed to appear. Ex. 2; RP 36. On the recording, Mr. Akin’s attorney – the same attorney who represented him at trial – says that he represents Mr. Akin but “cannot represent his whereabouts.” RP 36. Defense counsel was never cross-examined about the statement. He was never asked, for example, whether he had looked for Mr. Akin in the other courtrooms, the courthouse hallway, the building’s restrooms, or any designated smoking area.

Defense counsel’s statement on the video was testimonial. *Crawford*, 541 U.S. at 51. It was made under circumstances which would have led a reasonable person to believe that it would be available for later use at trial. *Id.* at 52. The statement was used to establish Mr. Akin’s

failure to appear. The admission of defense counsel's video-recorded statement violated Mr. Akin's right to confront the witnesses against him.

Id. The state cannot show that the violation of Mr. Akin's constitutional right was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117.

The court violated Mr. Akin's right to confront adverse witnesses by admitting a video-recorded testimonial statement by his defense attorney. *Crawford*, 541 U.S. at 51. Mr. Akin's conviction must be reversed. *Id.* at 69.

III. MR. AKIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY HAD AN ACTUAL CONFLICT OF INTEREST.

A. Standard of Review.

Whether circumstances create a conflict of interest under the ethical rules governing lawyers is a question of law reviewed *de novo*. *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008).

B. Defense counsel provided evidence against Mr. Akin.

The Sixth Amendment entitles an accused person to a defense attorney who adheres to the duty of loyalty. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The right to counsel also includes the right to an attorney free from conflicts of interest.

Regan, 143 Wn. App. at 425. A Sixth Amendment claim is properly analyzed under the conflict of interest rules. *Id.* at 427. If an actual conflict of interest exists, representation is ineffective even absent a showing of prejudice. *Id.* at 427. Rather, reversal is required if “some plausible alternative defense strategy or tactic might have been pursued but was not” as a result of the conflict. *Id.* at 428 (internal citations omitted).

When a conflict of interest arises, the Rules of Professional Conduct require counsel to move to withdraw from further representation of the client. RPC 1.7(a)(2); RPC 1.16(a)(1); RPC 1.7 comment 4. Likewise, the RPCs prohibit an attorney from acting as an advocate in a trial in which s/he is likely to be a necessary witness. RPC 3.7(a).

In *Regan*, the court found that the accused was denied the effective assistance of counsel when the court required his defense attorney’s supervisor to testify that he had informed the client of the time and date of trial. *Regan*, 143 Wn. App. at 430.

Similarly, here, Mr. Akin’s defense attorney made a testimonial statement indicating that his client was not present in court. Ex. 2; RP 36. That recorded statement was admitted as evidence against Mr. Akin to prove his bail jumping charge. Ex. 2; RP 36. Defense counsel became a

prosecution witness. This circumstance created an actual conflict of interest between Mr. Akin and his attorney. *Regan*, 143 Wn. App. at 430.

The Rules of Professional Conduct required defense counsel to withdraw from representation of Mr. Akin when the conflict arose. RPC 1.7(a)(2); RPC 1.16(a)(1); RPC 3.7(a). Mr. Akin's counsel never moved to withdraw.

Defense counsel's conflict of interest requires reversal because counsel failed to pursue a "plausible" strategy or tactic. *Regan*, 143 Wn. App. at 425, 438. Specifically, counsel failed to assert Mr. Akin's confrontation right so he could cross-examine the witness (himself). Mr. Akin should have had representation able to challenge the thoroughness of counsel's search for his client on the day he allegedly missed court.

The actual conflict of interest between Mr. Akin his lawyer violated Mr. Akin's right to counsel. *Id.* at 430. The conflict requires reversal because it prevented defense counsel from pursuing a plausible strategy: inquiring whether the witness had done a thorough search of the courthouse for Mr. Akin before concluding that he was not present. *Regan*, 143 Wn. App. at 428. Mr. Akin's conviction must be reversed. *Id.*

IV. MR. AKIN’S CONVICTION MUST BE REVERSED BECAUSE THE INSTRUCTING DEFINING BAIL JUMPING CONTRADICTED THE TO-CONVICT INSTRUCTION.

A. Standard of Review.

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

B. Mr. Akin was denied due process because court provided the jury with inconsistent instructions on the definition of bail jumping.

A trial court’s instructions to the jury should not contradict each other. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If the inconsistency relates to a material point, the error is presumed to be prejudicial because “it is impossible to know what effect [such an error] may have on the verdict.” *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 483, 804 P.2d 659 (1991) (citing *Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 803-04, 498 P.2d 844 (1972)). Instructions providing “inconsistent decisional standards” require reversal.³ *Dever v. Fowler*, 63 Wn. App. 35, 41, 816 P.2d 1237 (1991) amended, 824 P.2d 1237 (1992) (citing *Renner v. Nestor*, 33 Wn. App. 546, 550, 656 P.2d 533 (1983)). Such errors “are rarely cured by giving

³ Reversal is also required if the inconsistency is due to a “clear misstatement of the law.” *Walden*, 131 Wn.2d at 478 (quoting *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (citations omitted)).

the stock instruction that all instructions are to be considered as a whole.”

Donner v. Donner, 46 Wn.2d 130, 137, 278 P.2d 780 (1955).

In order to convict for bail jumping, the state must prove that the accused was held for, charged with, or convicted of an offense when s/he failed to appear. RCW 9A.76.170; *State v. Green*, 101 Wn. App. 885, 890, 6 P.3d 53 (2000).

At Mr. Akin’s trial, the court instructed the jury that:

A person commits the crime of Bail Jumping when he fails to appear as required after having been released by court order or admitted to bail with the knowledge of the requirement of a subsequent court appearance.
CP 39.

This instruction omits an essential element. It does not include the requirement that Mr. Akin had been charged with a crime (theft).

The court’s to-convict instruction listed the elements of bail jumping as:

- (1) That on or about the [sic] April 4, 2013, the defendant failed to appear before a court;
 - (2) That the defendant was charged with Theft in the Second Degree;
 - (3) That he defendant had been released by court order or admitted to bail, with the knowledge of the requirement of a subsequent personal appearance before that court; and
 - (4) That the acts occurred in the State of Washington.
- CP 41.

The to-convict instruction and definitional instruction provide inconsistent decisional standards. *Fowler*, 63 Wn. App. at 41. It is

impossible to speculate as to which instruction the jury relied upon when it convicted Mr. Akin. For this reason, the error must be presumed prejudicial. *Koker*, 60 Wn. App. at 483.

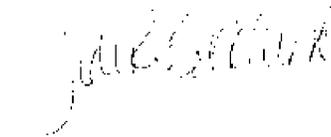
The court's instructions to Mr. Akin's jury contradicted one another. *Koker*, 60 Wn. App. at 483. His conviction must be reversed. *Id.* at 485.

CONCLUSION

The trial court prohibited Mr. Akin from participating in his defense in violation of his rights to confront adverse witnesses, to due process, to be present, and to appear and defend in person. The admission of video-recorded testimonial statements by defense counsel violated Mr. Akin's right to confront adverse witnesses. Trial counsel had an actual conflict of interest, which violated Mr. Akin's right to counsel. The court's instructions provided inconsistent decisional standards for the jury. Mr. Akin's conviction must be reversed.

Respectfully submitted on November 4, 2013,

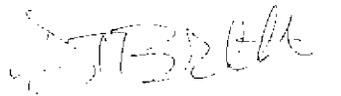
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CERTIFICATE OF SERVICE

I certify that on today's date:

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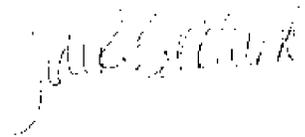
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 4, 2013.



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