

NO. 45112-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Trial Testimony</u>	2
2. <u>Bailiff Communication</u>	3
C. <u>ARGUMENT</u>	5
THE TRIAL COURT ERRED IN DENYING BROWN’S MOTION FOR NEW TRIAL BECAUSE THE BAILIFF’S COMMENTS PREVENTED JURORS FROM PROPERLY CONSIDERING ALL ADMITTED EVIDENCE	5
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Marriage of Littlefield</u> 133 Wn.2d 39, 940 P.2d 1362 (1997).....	6
<u>O'Brien v. City of Seattle</u> 52 Wn.2d 543, 327 P.2d 433 (1958).....	7
<u>State ex rel. Carroll v. Junker</u> 79 Wn.2d 12, 482 P.2d 775 (1971).....	5
<u>State v. Balisok</u> 123 Wn.2d 114, 866 P.2d 631 (1994).....	5
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	6
<u>State v. Caliguri</u> 99 Wn.2d 501, 664 P.2d 446 (1983).....	6, 8
<u>State v. Christensen</u> 17 Wn. App. 922, 567 P.2d 654 (1977).....	7
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	5
<u>State v. Jackson</u> 75 Wn. App. 5373, 879 P.2d 307 (1994) <u>rev. denied</u> , 126 Wn.2d 1003 (1995).....	5
<u>State v. Momah</u> 167 Wn.2d 140, 217 P.3d 321 (2009).....	6
<u>State v. Moore</u> 38 Wn.2d 118, 228 P.2d 137 (1951).....	7, 8
<u>State v. Rundquist</u> 79 Wn. App. 786, 905 P.2d 922 (1995) <u>rev. denied</u> , 129 Wn.2d 1003 (1996).....	6

OTHER AUTHORITIES

People v. Simpkins
16 A.D.3d 601, 792 N.Y.S.2d 170 (N.Y. App. Div. 2005) 6

State v. Turner
186 Wis.2d 277, 521 N.W.2d 148 (Wis. App. 1994) 6

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. V 5

U.S. Const. amend. VI 5

Wash. Const. art. I, § 3..... 5

Wash. Const. art. I, §, 22..... 5

A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion for new trial.

Issue Pertaining to Assignment of Error

During appellant's trial, a juror asked the bailiff whether the jury would see photographs presented during the trial. The bailiff responded the jury would see all admitted evidence but she was not certain whether the photos had been admitted. Before deliberation the bailiff delivered a bag containing the photographs and other exhibits to the jury room and told the jury all the evidence was in the bag. Appellant was convicted of two counts of third degree rape of a child. After the verdict jurors told the prosecutor they had not looked at the photographs because the bailiff told them they could not. Where the bailiff's comments prevented the jury from properly considering all the evidence admitted at trial, did the trial court err in denying appellant's motion for a new trial?

B. STATEMENT OF THE CASE

1. Trial Testimony

Appellant Joshua Brown met A.B. in September 2011. 2RP¹ 150. A.B. told Brown she was 14 years old. Brown was 24. 2RP 151.

Two days after meeting, Brown went to A.B.'s house. 2RP 152-53. They had sexual intercourse twice. 2RP 154-55. Brown asked A.B. to keep their relationship "on the low." 2RP 156. The next day, Brown told A.B. they could not see each other anymore because his parents had learned about the relationship. 2RP 156.

About six months later, Brown contacted A.B. again. 2RP 156-58. They agreed to meet. Brown and A.B. went to a hotel and had sexual intercourse. 2RP 158-61. Some time later, A.B. told Brown she was pregnant. Brown told A.B. not to call him again. 2RP 161, 173.

After learning about the pregnancy, A.B.'s parents confronted Brown. 2RP 136-38, 162. Brown said he knew A.B. was 15 years old and had sex with her in the "heat of the moment." 2RP 138-39, 162. Brown acknowledged the child was his. 2RP 139. Brown went with A.B. to her first doctor's appointment. 2RP 139-40, 163, 174. Brown and A.B. lost contact after the appointment. 2RP 147-48, 163-64, 174.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – May 22, 2013; 2RP – May 28, 29, 30 & June 3, 2013; 3RP – June 10, 2013; 4RP – June 14, 2013; 5RP – July 12, 2013.

The child was born in November 2012. 2RP 143. DNA testing revealed a 99.99 percent probability that Brown was the father. 2RP 196-97.

Based on this evidence, Brown was charged with two counts of third degree rape of a child resulting in pregnancy. CP 19-21. After hearing the above, a Kitsap County jury found Brown guilty as charged. CP 49; 2RP 239-40. The jury also found the crime caused A.B.'s pregnancy. CP 50; 2RP 239-40. The trial court sentenced Brown to concurrent standard range prison sentences of 50 months on each count. CP 70-79; 5RP 12-13, 16. Brown timely appeals. CP 81.

2. Bailiff Communication

During its case-in-chief, the State introduced photographs of A.B. and her child. One of the photographs was published to the jury, and all were admitted as exhibits. CP 53-60; Ex. 3-6; 3RP 3-4.

During the trial, one of the jurors asked the bailiff whether the jury would get to see the photographs presented in the courtroom. The bailiff responded the jurors would get to see all admitted evidence, but stated she was not certain "whether the pictures had been admitted to evidence." CP 53-60, 66-69; Supp. CP __ (Declaration of Gwen Brentin, filed 6/5/13).

Before deliberation, all admitted exhibits were placed in a bag and taken to the jury room. The bailiff told the jury all of the exhibits were in

the bag and left. CP 53-60, 66-69; Supp. CP __ (Declaration of Gwen Brentin).

After the verdict, the jurors said they had not looked at the photographs because the bailiff told them they could not. The bailiff responded that she thought the photographs were not admitted. CP 53-60, 66-69; Supp. CP __ (Declaration of Gwen Brentin); Supp. CP __ (Advisory Memorandum Re: Joshua Brown Trial, filed 6/4/13).

Brown moved for a new trial, arguing the effect of the bailiff's comments was to prevent the jury from properly considering all the evidence admitted at trial. CP 51-52, 61-65; 4RP 2. The State maintained the photographs were only minimally relevant and therefore Brown was not prejudiced. CP 53-60; 3RP 3-4; 4RP 3-4.

The trial found the bailiff erred in communicating to the jury her personal belief about whether exhibits were admitted. CP 69. The court noted that had the bailiff's comment been made during deliberations, "the Court would find reversible error." CP 69. The court concluded, however, that because the statement was made before the parties rested their case and because the exhibits were sent to the jury room, the error was harmless. The trial court denied Brown's motion for a new trial. CP 66-69.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING BROWN'S MOTION FOR NEW TRIAL BECAUSE THE BAILIFF'S COMMENTS PREVENTED JURORS FROM PROPERLY CONSIDERING ALL ADMITTED EVIDENCE

Both the United States and Washington constitutions guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. I, §§ 3, 22. The failure to provide defendant with a fair trial violates minimal standards of due process. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995).

Under CrR 7.5, trial courts are authorized to grant a new trial in several circumstances, including whenever a trial irregularity prevented the defendant from receiving a fair trial. CrR 7.5(a)(5). A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d

1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)).

An essential element of a fair trial is a jury capable of deciding the case based on the evidence before it. State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). A defendant is denied due process, for example, when a juror cannot hear all the relevant evidence. State v. Turner, 186 Wis.2d 277, 284, 521 N.W.2d 148 (Wis. App. 1994). “A juror who has not heard all the evidence in the case is grossly unqualified to render a verdict.” People v. Simpkins, 16 A.D.3d 601, 792 N.Y.S.2d 170 (N.Y. App. Div. 2005).

Here, the trial court abused its discretion by denying Brown’s motion for a new trial because the jury did not properly consider all the admitted evidence in reaching a verdict. The jury’s mistaken understanding of what evidence it was to consider was based on comments made by the bailiff. 3RP 9-10; 4RP 5-6.

A trial court should not communicate with the jury in the absence of the defendant. State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 446 (1983). The bailiff is the “alter-ego” of the judge, and is therefore bound by the same constraints. State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). It is not what the bailiff said that is the determining factor, but rather, what the jurors heard. O’Brien v. City of Seattle, 52

Wn.2d 543, 548, 327 P.2d 433 (1958); State v. Christensen, 17 Wn. App. 922, 926, 567 P.2d 654 (1977).

State v. Moore² is instructive in this regard. Moore was convicted of burglary. Moore, 38 Wn.2d at 118-19. The State offered into evidence a right shoe identified as having been worn by Moore during the robbery. The State also introduced a photograph of an imprint of Moore's left shoe. Moore, 38 Wn.2d at 120-21, 124. Both exhibits were sent to the deliberating jury. No left shoe was offered as evidence. Moore, 38 Wn.2d at 121-22.

During deliberations, the jury requested the bailiff bring a magnifying glass and Moore's left shoe. The bailiff brought a magnifying glass but told the jury the left shoe was not available and the jury was to disregard any identifying writing on the picture of the left shoe. The bailiff further stated the left shoe had been returned to City Hall. Jurors stated the magnifying glass was used to examine the exhibits. Moore, 38 Wn.2d at 122-24.

The Supreme Court noted the bailiff had no authority to make such statements to the jury regardless of whether they were true or false. The Court concluded the bailiff's comments constituted serious error, entitling Moore to a new trial. Moore, 38 Wn.2d at 127.

² 38 Wn.2d 118, 228 P.2d 137 (1951).

Like Moore, here the bailiff's comment to the juror about her uncertainty whether the photographs had been admitted into evidence was an improper statement. Although the photographs were later given to the jury as exhibits, the effect of the bailiff's comment was to cause the jury to doubt what evidence it could properly consider during deliberations.

As in Moore, the bailiff's comments constituted serious error entitling Brown to a new trial. Once a defendant raises the possibility that he was prejudiced by an improper communication between the court and jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. Caliguri, 99 Wn.2d at 509. The State cannot meet its burden here. At least one juror determined the photographs were relevant to reaching a verdict as evidenced by the inquiry whether the jury would be able to see them during deliberations. Had the jury known it could have looked at the exhibits the verdicts could have been different. The State cannot show the error was harmless beyond a reasonable doubt.

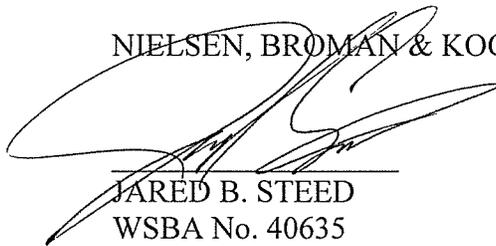
D. CONCLUSION

For the reasons discussed above, this Court should reverse Brown's convictions and remand for a new trial

DATED this 18th day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 45112-3-II
)	
JOSHUA BROWN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSHUA BROWN
DOC NO. 894887
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF FEBRUARY 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

February 18, 2014 - 2:15 PM

Transmittal Letter

Document Uploaded: 451123-Appellant's Brief.pdf

Case Name: Joshua Brown

Court of Appeals Case Number: 45112-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

kcpa@co.kitsap.wa.us