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NO. 52088-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK O'MEARA

Appellant.

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

The Honorable Keith Harper, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the defendant's motion for a mistrial, based upon an irregularity involving a bailiff during the jury's deliberations.

2. The \$200 criminal filing fee should be reversed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. According to an affidavit submitted by a juror, filed by defense counsel in conjunction at the beginning of deliberations, another juror asked bailiff Monty McCormick if information from the trial would be available. According to the affidavit, the bailiff responded that jury could make a request to the court but would not recommend doing so because it takes a long time, possibly up to an hour, and implied that it would cause a delay in deliberation.

The appellant was convicted of residential burglary and second degree theft as charged. After the verdict the juror contacted defense counsel. At a hearing brought pursuant to counsel's motion for new trial, the bailiff denied the statement that it could take up to an hour, but acknowledged that he directed the jurors to the Court's Instructions to the Jury in response to the juror's questions. Did the improper communication of the trial court with the jury during deliberations, through the actions of the bailiff, and without the knowledge or consent of the defendant, constitute misconduct that prejudiced the verdict? Assignment of Error 1.

2. Recent changes to Washington's statutory scheme prohibit

the imposition of discretionary costs and criminal filing fees on indigent defendants. The Supreme Court recently held in *State v. Ramirez*¹ that these statutory changes apply retroactively to cases that were pending on direct appeal when the statutes were amended. Here, the appellant was previously found to be indigent. Should the \$200 criminal filing fee be reversed and the matter remanded for resentencing? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural facts:

Patrick O'Meara was charged by information filed in Jefferson County Superior Court on June 29, 2017 with residential burglary and second degree theft. Clerk's Paper (CP) 1-2.

a. CrR 3.5 suppression hearing

Deputy Tamura investigated a burglary in progress at 110 Maple Street in Port Hadlock, Washington. 1Report of Proceedings²(RP) at 49-64.

Police responded and three individuals in the vicinity of the house were taken into custody. 1RP at 52. Based on information they received, police also sought Patrick O'Meara as a suspect. 1RP at 52. After being

¹191 Wn.2d 732, 426 P.3d 714 (2018).

²The record of proceedings consists of the following transcribed hearings: 1RP – June 7, 2017, August 25, 2017, September 15, 2017, November 22, 2017, February 9, 2018, April 27, 2018, May 4, 2018, May 25, 2018, May 29, 2018 (CrR 3.5 motion), and June 4, 2018 (continuation of CrR 3.5 argument, motions in limine, voir dire); 2RP – June 4, 2018 (voir dire, jury trial, day 1); June 5, 2018 (jury trial, day 2); 3RP – June 5, 2018 (jury trial, day 2); 4RP – June 5, 2018 (jury trial, day 2); June 6, 2018, (jury trial, day 3); and 5RP – June 13, 2018; June 29, 2018 (Motion for new trial, sentencing).

contacted by Mr. O'Meara, police arranged to meet him at 231 Cedar in Port Hadlock. 1RP at 52, 65-66. While talking with police on the front porch of the house, Mr. O'Meara initially denied being involved in the burglary said that there was someone who could "vouch" for him. 1RP at 52-57, 71. He said that scratches that police noticed on his arms and legs were from his backyard. RP at 56-57.

After being given his constitutional warnings, Mr. O'Meara continued to deny that he was involved in the burglary. 1RP at 57-61. After questioning him about the scratches, Deputy Tamura placed him under arrest and put him in his patrol car. 1RP at 72-73. Deputy Tamura stated that he told Mr. O'Meara that information had been provided by other suspects in the case alleged that "he was involved in making entry into the residence," and the he had thrown a jewelry box into blackberry bushes located near the residence. 1RP at 61-62. Detective Tamura stated that Mr. O'Meara told him that some of the jewelry was located in a bedroom at the house at 231 Cedar, which was then recovered by police. 1RP at 63-64.

Mr. O'Meara testified that he had learned that police were looking for him and that he called him to the house at 231 Cedar, and that he was "bewildered [and] amazed" that they would be searching for him. 1RP at 86, 87.

Mr. O'Meara stated that police arrived "four deep" at the house and that they called him a "liar" and wanted to know where he got the scratch

marks. 1RP at 87. He said that he denied involvement in the burglary. 1RP at 89. Mr. O'Meara testified that he was not read his *Miranda* warnings. 1RP at 89. The court denied the motion to suppress statements obtained but limited the admissible statements to what Deputy Tamura testified that he heard said by Mr. O'Meara regarding his denial of involvement, that no one who could "vouch" for him was produced or identified, that he threw a jewelry box into blackberry bushes, and that he made statements inculcating him in the burglary. 1RP at 120-21.

The court heard further argument regarding the CrR 3.5 motion on June 4. 1RP at 138-159. After additional argument, the court stated that Deputy Tamura could testify to statements that were made to him or that he heard, but that Sgt. Pernsteiner or Deputy Newman could not testify to statements they heard because the court did not know what statements were made and the circumstances under which any such statement was made. 1RP at 157-58.

b. Verdict, motion for new trial, and sentencing:

The jury found Mr. O'Meara guilty of residential burglary and second degree theft as charged. 4RP at 779-80; CP 138, 139.

After conviction on June 6, 2018, defense counsel received an email message on June 8, 2018 on her firm's webpage from juror Cynthia Huffman regarding conduct by a court bailiff during deliberation that concerned her. 5RP at 801-03, 823. Counsel called the juror regarding the

message and subsequently prepared an affidavit for the juror to sign, and informed the court of the communication with the juror regarding the bailiff on June 13, 2018. 5RP at 802. Defense counsel moved for a new trial under CrR 7.5(a)(2), (5), arguing that the rule regarding post-trial jury commination contained at RCW 4.44.300 had been violated and, consequently, Mr. O'Meara's right to a fair trial. 5RP at 802-831; CP 159-167. The court heard testimony from two bailiffs, Monty McCormick and Dennis Gilmore, on June 29, 2018. 5RP at 809-821. Mr. McCormick, a bailiff during the trial, stated that jurors asked the other bailiff about obtaining transcripts. 5RP at 812. Mr. McCormick stated:

They didn't ask me, that they asked Dennis, the other Bailiff that was here. And I believe I—and I'm not sure if he was sure about if there was transcript provide with the Jury Instructions. And I think I interjected and told them then that there—typically, there's not transcripts provided with the Jury Instructions and the Exhibits. That's what you get, was the—I think that was how it went.

5RP at 812.

When asked further, Mr. McCormick stated:

I remember that question and I remember telling them that they're typically not—there's not transcripts provided to them with that. And I also believe I referred them to the Judge's Instructions that—where their—where they say that testimony will rarely be, if ever, repeated.

5RP at 812.

Bailiff Dennis Gilmore was also questioned regarding a question from a juror during deliberation. The following exchange took place:

[Mr. Gilmore]: They wanted to see—I believe they wanted to

see the pictures. I'm trying to recall. I don't recall specifically. But and as I recall, Monty said that they would be able to view whatever was admitted into evidence—or perhaps I said that, I don't remember who actually addressed that.

[Defense counsel]: Do you recall if either of you made any kind of comment as to how long it might take or that it might take a long time to do something like that?

[Mr. Gilmore] About a—about the evidence or?

[Defense counsel]: Yes, about obtaining or getting more evidence or asking a question of the Court?

[Mr. Gilmore]: I don't recall specifically, no.
5RP at 818.

Ms. Huffman's affidavit stated that after deliberation began, another juror if information specific to the trial would be provided, and gave as an example, transcripts or recordings. CP 166, (Affidavit of Cynthia Huffman, at 1-2. Ms. Huffman's affidavit states that Bailiff McCormick told her that the jurors could make request to the judge, but that he would not recommend doing that because it would cause delay of up to an hour. CP 166; 5RP at 824. Ms. Huffman states in her affidavit, "He outlined the process a request goes through and made it sound like it would only cause delay in deliberation." CP 166. Juror No. 10 made a second request for transcripts or other materials during deliberation, and Ms. Huffman replied that "perhaps we need to do that." CP 166.

The trial court judge denied the motion for new trial. 5RP at 835-

36. In its ruling, Judge Harper stated that he was not convinced that either bailiff made a statement about “taking an hour or anything like that---I’m not convinced that that statement was ever made by a Bailiff.” 5RP at 835. Judge Harper said that he was “not convinced that either one of these bailiffs made that statement” and “I cannot think of a question during a jury trial where it’s taken an hour or anything close to an hour to deal with that.” 5RP at 835.

The trial court judge also stated that even if the statement was made, it was “an innocuous statement” made “before they started deliberating” and that “beyond a reasonable doubt, it did not impact the jury,” and did not affect deliberations. 5RP at 835.

The court then proceeded to sentencing. 5RP at 836-44. Defense counsel filed a presentence report and request for downward exceptional sentence on June 28, 2018. CP 175-188. Mr. O’Meara had an offender score of “1” and standard range of 6 to 12 months. 5RP at 836. The State argued for 9 months, and defense counsel argued for a downward departure of 30 days of electronic home monitoring based on Mr. O’Meara’s medical condition of stage 3 congestive heart failure requiring daily medications and regular blood pressure checks, and appointments with his primary doctor and a specialist to monitor the condition. 5RP at 836, 837-39; CP 182-188, (Defense Presentence Report and Request for Downward Exceptional Sentence).

The court noted that Mr. O'Meara could receive his medications while in custody and he could request a furlough for medical appointments, and imposed a standard range sentence of 9 months. 5RP at 844; CP 191-98. The court imposed legal financial obligations including \$500.00 crime victim penalty assessment, \$200.00 criminal filing fee and \$100.00 DNA collection fee. 5RP at 844; CP 195.

Timely notice of appeal was filed on June 29, 2018. CP 65, 71. This appeal follows.

2. Trial testimony:

The matter came on for trial on June 4, 5, and 6, 2018, the Honorable Keith Harper presiding. 1RP at 134-200; 2RP at 206-400; 3RP at 406-600, and 4RP at 605-796.

Gary and Andrea Lanthrum left their house at 110 North Maple Street in Port Hadlock, Washington to go for a short evening walk on June 28, 2017. 3RP at 465. When returning, they encountered a woman near their house who stated that she was looking for a lost dog. 2RP at 339. While talking with her they saw a man in their yard who was running away from them. 2RP at 340, 3RP at 408. As he approached the house he saw that a window had been broken, and he called 911. 3RP at 409. In the meantime, Mrs. Lanthrum ran back to the woman who claimed to have a lost dog, who was now walking away, and took three pictures of her using her cell phone. 2RP at 344.

Police responded to a call of an interrupted burglary at the Lanthrum's residence at approximately 7:30 p.m. 3RP at 496, 543. While proceeding to the house, Deputy Adam Newman and Deputy Gordon Tamura saw a man running toward a house at 231 Cedar Street who matched the description of one of the suspects given by Mr. Lanthrum. 3RP at 498, 500. The man, who was identified as Don Green, was placed under arrest. 3RP at 503.

Andrew Pernsteiner, a sergeant with the Jefferson County Sheriff's Office, was dispatched to the Lanthrum residence and contacted the homeowners. 4RP at 636. When he arrived he noted that a kitchen sliding window was opened and the screen was outside the house on the ground by a barbeque grill. 4RP at 636. After Sgt. Pernsteiner talked to the Lanthrums, Deputy Tamura arrived at the scene with Mr. Green. 4RP at 643. Mr. Green showed Sergeant Pernsteiner and Deputy Tamura where a duffle bag containing aviation and electronic equipment from the house was "ditched" on the adjoining property. 3RP at 545, 4RP at 614, 643, 649.

Deputy Newman went to the Lanthrum's house where he was shown the cell phone picture of the woman Mrs. Lanthrum had seen in front of the house when they returned from their walk. 3RP at 506. Deputy Newman identified the person in the photograph as Jennifer Lorecki, who was subsequently taken into custody. 3RP at 506, 509. Deputy Newman later contacted Victoria Brown, who was also a suspect in the burglary. 3RP at

510-11.

Approximately three hours later, at 10:40 p.m., Mr. O'Meara contacted the police and indicated that he was at 231 Cedar Street. 3RP at 524, 549-50, 4RP at 655. Deputy Tamura and Deputy Newman went to that address and contacted Mr. O'Meara at the front door. 4RP at 676. Sgt. Pernsteiner arrived at the house after that. 4RP at 656. Sgt. Pernsteiner said that Mr. O'Meara had "little cuts all over his arms and his legs and his hands." 4RP at 666. He testified that the cuts appeared to be fresh and "some of them were actually still bleeding." 4RP at 666. Police also contacted a woman named Billy Daily, who lived at the house, along with Donald Green. 3RP at 524-25, 550, 551.

After police talked with Mr. O'Meara, he initially denied involvement in the burglary. Mr. O'Meara denied that he was involved in the burglary when contacted by police and told that others had implicated him. 3RP at 551. When questioned about the visible scratches, he said that he got them in his backyard. 3RP at 552. Deputy Tamura said that Mr. O'Meara said that he had someone who could "vouch" for him. 3RP at 553.

Deputy Tamura placed him in custody and advised him of his *Miranda* warnings. 3RP at 555. Deputy Tamura testified that after being placed under arrest but before being transported, Mr. O'Meara stated that he was involved in the burglary and that he was at the house with Ms. Brown and that they had both entered the residence. 3RP at 558. Defense counsel

objected on the basis that the court's CrR 3.5 ruling limited Deputy Tamura's testimony to four statements and moved for mistrial. 3RP at 561.

The court denied the defense motion and gave a cautionary instruction to disregard testimony regarding Ms. Brown. 3RP at 570.

After testimony resumed, Deputy Tamera stated that Mr. O'Meara implicated himself in the burglary and that he had thrown a jewelry box from the burglary into blackberry bushes near the property of the house. 3RP at 571.

Mr. Green said that he and Ms. Brown, Ms. Lorecki, and Mr. O'Meara were hanging out and getting high at a park near the Lanthrum's house, and then, walking toward the Lanthrum's house, Ms. Brown knocked on the door to the house. 3RP at 599. Mr. Green stated he gave a flat pry bar to Mr. O'Meara, who tried to pry open the window, breaking it in the process. 4RP at 605, 626. He testified that he handed Mr. O'Meara a pry bar that has "always been in my backpack just in case." 4RP at 625. Mr. Green testified that he saw Mr. O'Meara go into the house through the front door, which was opened from the inside. 4RP at 606. Mr. Green testified that he left when Mr. O'Meara broke the window, and then encountered the Lanthrums on the road in front of their house. 4RP at 609, 627. He said the Lanthrums took out a cell phone and that at that point he ran back toward the house and then went into woods adjacent to the house. 4RP at 609, 627. He stated that he saw Vicki Brown and Mr. O'Meara leave the house through the

front door. 4RP at 611, 613. Mr. Green stated that Vicki Brown had a bag with her and that she went into the woods behind him. 4RP at 611. Mr. Green said that they went in a neighbor's yard and then walked down their driveway, and that Ms. Brown "ditched" the duffle bag "somewhere along the way out the driveway." 4RP at 611. Mr. Green ran back to his house on Cedar Street and was arrested by officers who were already at his house. 4RP at 412.

Mr. Green testified that he entered a guilty plea to residential burglary and was sentenced in that case. 3RP at 587. He also pleaded guilty in another case and was waiting for sentencing on that matter. 3RP at 587-88.

Deputy Tamura stated that after notifying Sgt. Pernsteiner regarding the location of jewelry near the Lanthrum's house, he took Mr. O'Meara back inside the Cedar Street house and in a back bedroom, Mr. O'Meara directed police to a balled up shirt and said that jewelry and other items were inside the shirt. 3RP at 573.

Sgt. Pernsteiner testified that the back bedroom in which the t-shirt and items were found was used by a woman named Billy Daily. 4RP at 678. Mr. O'Meara asked Ms. Daily to retrieve items in the balled up t-shirt located next to a bed. 4RP at 662, 678. Inside the shirt, police found jewelry, coins, foreign currency watches, a lighter, and other items. 4RP at 659.

Sgt. Pernsteiner returned to the Lanthrum's house at approximately 11:30 p.m. with the items from the shirt. 3RP at 453. These items were

identified by the Lanthrums as being from their house. 4RP at 659. Mr. Lanthrum identified a “fake Rolex,” a Bulova watch, jewelry, a five Euro note, Claritin tablets, polished opals, and currency from Hungary and other items brought back to their house. 3RP at 454-62.

Sgt. Pernsteiner went with Mr. Lanthrum on the portion of the property leading toward the water [3RP at 435-38] and noted that tall grass and blackberry vines was disturbed and it appeared as if “someone had ran through that area cause it was [. . .] all pushed down.” 4RP at 650. Sgt. Pernsteiner and Mr. Lanthrum found a jewelry box and smaller boxes and paper “strewn about the area.” 3RP at 437-39, 4RP at 652. Blackberry vines and scotch broom were located on both sides of the trail where the jewelry box was recovered. 3RP at 440.

Mr. Lanthrum, a pilot, testified regarding the value of aviation and electronic equipment contained in the duffle bag. 3RP at 446-47. He stated that some items were taken that were not recovered included two pearl necklaces. 3RP at 448-50. A black pearl necklace was valued at \$422.45 and a turquoise necklace at \$170.94. 3RP at 451. A tablet device was not recovered and was valued at \$583.90 by Mr. Lanthrum. 3RP at 450, 452.

The defense rested without calling witnesses. 4RP at 685, 690.

D. ARGUMENT

1. TRIAL COURT ERRED IN DENYING MR. O'MEARA'S MOTION FOR NEW TRIAL BECAUSE THE BAILIFF IMPROPERLY RESPONDED TO A JURY QUESTION DURING DELIBERATIONS

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 a 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)).

“It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant.” *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983); *State v. Wroth*, 15 Wash. 621, 47 Pac. 106 (1896). This prohibition includes responses, either written or oral, to jury inquiries. *State v. Allen*, 50 Wn. App. 412, 749 P.2d 702 (1988); *State v. Robinson*, 84 Wn.2d 42, 523 P.2d 1192 (1974). An improper communication between the court and jury is an error of constitutional magnitude. *State v. Rice*, 110 Wn.2d 577, 575 P.2d 889 (1988).

Here, the trial court abused its discretion by denying the appellant’s motion for a new trial because the jury, and in particular Juror No. 10, was discouraged by the bailiff from making an inquiry to the judge regarding transcripts or other materials, and because the bailiff, by his own admission, told the juror to look at the jury instructions in response to the juror’s question rather than direct that the question be presented in written form to the court. SRP at 812.

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). During the deliberation process, the bailiff is the judge’s agent and is subject to the same restrictions as the court regarding conversations with the jury;

neither a trial court nor a bailiff may communicate with the jury about a case in the absence of the defendant. RCW 4.44.300;³ *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). A trial court should promptly disclose any ex parte communication to the parties and determine if the communication requires a new trial. *Bourgeois*, 133 Wn.2d at 407 (quoting *Rushen v. Spain*, 464 U.S. 114, 119, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)). The bailiff is the “alter-ego” of the judge, and is therefore bound by the same constraints. *Bourgeois*, 133 Wn.2d at 407. When a judge delegates part of the judge's official duties to a bailiff, the bailiff becomes in effect the “alter ego” of the judge. *Adkins v. Clark County*, 105 Wn.2d 675, 678, 717 P.2d 275 (1986). The actions of the bailiff are the actions of the judge and the shortcomings of the bailiff are the shortcomings of the judge. *King Cy. v. United Pacific Ins. Co.*, 72 Wn.2d 604, 612, 434 P.2d 554 (1967).

An improper communication by the court or the bailiff violating

³ RCW 4.44.300 provides:

During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

RCW 4.44.300 is an error of constitutional magnitude. *Bourgeois*, 133 Wn.2d at 407. Unauthorized contacts with the jury are presumed to be prejudicial. *State v. Rose*, 43 Wn. 2d 553, 556, 262 P. 2d 194 (1953); *State v. Booth*, 36 Wn. App. 66, 671 P. 2d 1218 (1983). If any possibility exists that an improper communication prejudiced the jury, a new trial must be ordered. *State v. Robinson*, supra; *State v. Crowell*, 92 Wn. 2d 143, 594 P. 2d 905 (1979); *State v. Christensen*, 17 Wn. App. 922, 567 P. 2d 654 (1977). Once a defendant establishes such a communication took place, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. *State v. Johnson*, 125 Wn. App. 443, 460-61, 105 P.3d 85, 93 (2005). If it cannot meet this burden, a new trial must be ordered. *O'Brien v. City of Seattle*, 52 Wn.2d 543, 540, 327 P.2d 433 (1958) (ordering new trial where bailiff communicated with jurors in response to a jury question); *State v. Moore*, 38 Wn.2d 118, 127, 228 P.2d 137 (1951) (ordering a new trial where bailiff gave factual information and said the judge wanted them to disregard writing on the pictures); *Christensen*, 17 Wn. App. at 926 (ordering a new trial where the bailiff's comments dissuaded the jurors from asking the judge to clarify an instruction).

The record in this case demonstrates that improper communications occurred between Bailiff McCormick and the jury during deliberations. The

affidavit supplied by Ms. Huffman shows that Juror No. 10 was discouraged by the bailiff from making an inquiry requesting transcriptions, recordings or other materials from the judge. The court, without providing rationale for choosing to believe the testimony of the two bailiffs over Ms. Huffman's affidavit, inexplicably found that "possibly some other juror said that to the jury," despite any indication in the record that Ms. Huffman heard the statement from any person other than Bailiff McCormick. However, even leaving aside the question of whether Bailiff McCormick made the statement, it is clear that Juror 10 was dissuaded from making further inquiry to the court following the exchange. CP 166. Moreover, Bailiff McCormick volunteered that in response to the juror's question, he referred the juror the Court's Instructions "where they say that testimony will rarely be, if ever, repeated." 5RP at 812.

These actions are clearly improper; "a bailiff is forbidden to communicate with the jury during deliberations except to inquire if it has reached a verdict, or to make innocuous or neutral statements." *State v. Booth, supra*, at 68; CrR 6.7; *State v. Smith*, 43 Wn. 2d 307, 261 P. 2d 109 (1953).

In addition, the bailiff's action resulted in a violation of CrR 6.15(f)(1). Here, the parties were not notified about the question from the

juror and the parties were not given an opportunity to respond or object on the record. Although that rule specifically directs the actions of the trial court, it also applies to the actions of bailiff.

Had defense counsel been afforded the opportunity to participate in responding to the juror's question – as provided for in CrR 6.15(f) –there is a reasonable probability she would have advocated for something other than a “neutral” instruction that simply referred the jury back to the same instructions. However, this avenue of discussion and participation was foreclosed by the bailiff's improper communications to the juror and improper referral to the Court's Instructions.

The bailiff's comments constituted serious error entitling Mr. O'Meara 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. Had the juror not been dissuaded from requesting transcripts or other records, the verdicts could have been different.

The State cannot show the error was harmless beyond a reasonable doubt. This record establishes that the bailiff's improper communication with the jury violated RCW 4.44.300. Based on this record, it cannot be said beyond

a reasonable doubt that Mr. O’Meara’s right to a fair trial was not prejudiced. As such, reversal is required.

2. THIS COURT SHOULD REVERSE ALL DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS, INCLUDING THE \$200.00 CRIMINAL FILING FEE

In late 2018, the legislature passed amendments to the state's legal financial obligation system to prohibit the imposition of discretionary costs and criminal filing fees on indigent defendants. See Laws of 2018, ch. 269, §§ 6(3), 17(2)(h). Generally, RCW 10.01.160 discusses a court's authority to impose legal financial obligations (LFOs) on criminal defendants. Subsection .160(3) provides: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3).

In *State v. Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018).

In this case the trial court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). RCW 36.18.020(2)(h) states that “this fee shall not be imposed on a defendant who is indigent.”

Sentencing courts are required to conduct an individualized inquiry into a defendant's ability to pay before imposing discretionary costs. *Ramirez*, 191

Wn.2d at 744; *Blazina*, 182 Wn.2d at 839. “State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *Ramirez*, 191 Wn.2d at 744 (citing former RCW 10.01.160 (3)(2015)); *Blazina*, 182 Wn.2d at 839

Ramirez noted that the financial statement section of a motion for indigency asks defendants questions relating to five categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. *Id.* at 744. The Court held that “[t]o satisfy *Blazina* and RCW 10.01.160(3)’s mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs.” *Id.* The Supreme Court held that these statutory changes apply retroactively to cases that were “pending on direct review and thus not final when the amendments were enacted.” *Ramirez*, 191 Wn.2d at 747.

In this case, the filing fee should be reversed. The court made no inquiry into Mr. O’Meara’s ability to pay. 5RP at 842-45. The record shows, however, that Mr. Meara is indigent and that he qualified for court appointed trial and appellate counsel. CP 208.

Pursuant to *Ramirez*, this Court should reverse the imposition of the \$200 filing fee, and remand to the trial court for individualized inquiry into his ability to pay and to impose LFOs consistent with the recent amendments and

holding in *Ramirez*.

E. CONCLUSION

For the foregoing reasons, Mr. O'Meara respectfully requests this Court reverse his conviction and remand for new trial.

Last, Mr. O'Meara is indigent. Recent amendments to the LFO statute apply retroactively to prohibit the imposition of discretionary costs. Moreover, the sentencing court failed to conduct an adequate *Blazina* inquiry.

Mr. O'Meara respectfully requests this Court remand to the sentencing court with instructions to reverse the criminal filing fee.

DATED: January 30, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on January 30, 2019, that this Appellant's Opening Brief was filed and sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Michael Hass, Jefferson County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 30, 2019.



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