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No. 52957-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cullen Thomas,

Appellant.

Clark County Superior Court Cause No. 17-1-00087-6

The Honorable Judge John Fairgrieve

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Thomas's right to testify and his right to present a defense under Wash. Const. art. I, §§3 and 22.
2. The trial court violated Mr. Thomas's right to testify and his right to present a defense under U.S. Const. Amends. V, VI, and XIV.
3. The trial court erred by excluding Mr. Thomas's testimony about the bail jump charge.
4. The trial court erred by excluding the testimony of Marty Thomas, Carol Thomas, and Mr. Thomas's former counsel about the circumstances surrounding the bail jump charge.
5. The trial court erred by excluding Exhibit 8.

ISSUE 1: The state and federal constitutions guarantee an accused person the right to testify and the right to present a defense. Did the trial court violate Mr. Thomas's constitutional rights by excluding evidence of the circumstances surrounding his bail jumping charge?

6. The trial court erred by allowing court staff to have ex parte contact with the deliberating jury.

ISSUE 2: Neither the judge nor any agent of the trial court may have improper ex parte contact with a deliberating jury. Must the case be remanded to determine the nature and extent of any inappropriate ex parte contact between court staff and the jury?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Cullen Thomas is a mechanic who does small jobs fixing cars and trucks. RP 290-291. He was taught his trade by his father, Marty Thomas. RP 288.

In early January of 2018, Cullen Thomas saw a pickup truck parked by the side of the road with the hood up. RP 244-245, 270. He stopped and offered to help the driver, who was standing in front of the truck shaking his head. RP 245.

Mr. Thomas identified the problem – a spark plug had blown out the coil pack on one of the cylinders. RP 245-247. He offered to fix the truck and explained that it would make sense to address the issue in all eight cylinders, even those that hadn't yet been damaged. RP 245-247.

They arranged for Mr. Thomas to get parts and repair the truck where it sat. RP 245-247, 273. They agreed to meet again the following day, after Mr. Thomas had a chance to start on the work. RP 247.

The job took a great deal of time, and when the two met in the early afternoon the next day, Mr. Thomas said it would take another 10-12 hours. RP 247-249, 274, 285. Mr. Thomas often worked on cars and trucks until the late hours of the night. RP 250, 256.

He finished work on the truck around 2:30 a.m. RP 249, 272. He handed over the receipts for the parts he'd purchased and received two

checks for his work. RP 249-250, 275. He was told that the payment was broken into two checks “for tax purposes.” RP 260.

Mr. Thomas put the checks in his pocket and went home. RP 250. The next day, he went to the iQ Credit Union, the bank on which the checks were drawn. RP 253. He cashed one of the checks. RP 148, 254, 276-277. He went to Portland for the day and played video poker before returning home to start work on another car. RP 255. He again worked until late in the night. RP 255.

The following day, he slept late, and went to cash the second check.¹ RP 256-257. He went to Rapid Cash and was told to wait while the cashier called the account holder to verify the signature. RP 224, 258, 278. He was able to hear her conversation with the account holder.² RP 258.

From what he overheard, Mr. Thomas could tell that the check would not be cashed. He remarked that the account holder “doesn’t know anything about this, does he.” RP 258. He told the teller he would wait,

¹ He mistakenly believed this was a weekday rather than a Saturday and was confused to find the banks closed. RP 257.

² The teller initially said that she made the call from “a small little room” that customers would be able to see into, but “[o]nly part of it.” RP 228. However, on redirect examination, she admitted that she did not remember if she’d called from her desk or from the little room. RP 233.

because he was “out seven hundred bucks,” having “just worked all day and night on this truck.”³ RP 258.

Mr. Thomas waited for the police to arrive and told them how he’d received the check. RP 157-163, 183-184, 259-260. He volunteered that he’d received and cashed another check one day earlier. RP 163, 184, 260-261. He later testified that he stayed and spoke to police “hoping it helps track the guy who did it so I can get my money out of him.” RP 260-261.

Police determined that the checks had been signed by the account holder, but that the payee had been altered. RP 120, 122160. Mr. Thomas was charged with two counts of forgery. CP 3.

At a hearing on May 3, 2018, the court set a trial readiness hearing for August 2. RP 215, 281; Ex. 4. Mr. Thomas went home with the pink copy of the scheduling order.⁴ RP 52-53, 263-267, 310, 312. He gave the pink copy to his father, Marty Thomas. RP 52-53, 310.

Marty Thomas put the pink copy on the refrigerator and wrote the date in the calendar. RP 54-55, 310. According to Mr. Thomas and both his parents, the handwriting on the pink copy appeared to say August 3rd, rather than August 2nd. RP 54-55, 310.

³ When defense counsel tried to ask the Rapid Cash teller about these comments, the court sustained the State’s hearsay objection. RP 230-231.

⁴ Ordinarily, defendants are given the yellow copy. However, both the prosecutor and Mr. Thomas’s former attorney agreed that he may have ended up with the pink copy. RP 218.

When Mr. Thomas went to court on August 3rd, he learned that the hearing had been the day before. RP 55. He immediately contacted his lawyer and went to court several days in a row to get the issue resolved. RP 55-58, 310-311. Despite this, he was charged with bail jumping. CP 3.

At trial, Mr. Thomas sought to tell jurors the circumstances surrounding the missed court date. RP 40-69; CP 15-17. He wanted to introduce into evidence the pink copy of the scheduling order (marked Exhibit 8)⁵ and to call his parents as witnesses to explain the family's confusion about the court date. RP 40-69, 263-267, 311, 314; CP 15-17. He also wished to call his former attorney, who would have confirmed that she received his call on August 3rd, and that the following Wednesday was the first day they could go to court because of her schedule. RP 312-313.

Defense counsel told the court that Mr. Thomas wished to “fill in the gaps as to what happened so the jury doesn't fill in the gaps incorrectly with a very negative inference.” RP 44; CP 16. Counsel argued that the evidence was relevant and admissible as “strictly background.” RP 64. He agreed the evidence did not raise an affirmative defense and promised not to appeal to jury nullification. 42, 44, 48, 64, 65.

⁵ After the court refused to admit the document, the clerk apparently returned it to defense counsel. *See* Receipt for Exhibits filed 11/20/2018, Supp. CP.

He reiterated that Mr. Thomas should be allowed to explain his mistake, so jurors wouldn't infer that he was "a bad guy," "a scofflaw," and "a bad man." RP 44, 64; CP 16. He pointed out that the State would not be "hampered one iota by allowing Mr. Thomas simply to testify as to background...as to what happened, the context surrounding the confusion as to the date and also what he did on the mistaken date of when he did show up." RP 44.

Counsel argued that Mr. Thomas had a constitutional right to testify and to present a defense, and that "fundamental fairness" required the court to admit the evidence. RP 44-45, 62,63. The prosecutor objected, and the court excluded the testimony and Exhibit 8. RP 40-41, 45, 50, 68-69.

When the prosecutor asked Mr. Thomas about the missed court date, he testified "I didn't know I had court." RP 281. He did not give any further explanation about why he missed court. RP 281.

In closing argument, the prosecutor sought to discredit Mr. Thomas's explanation of how he ended up with two forged checks. RP 339-345. She emphasized that he was "not presumed credible." RP 345. The jury convicted Mr. Thomas on all counts. CP 37-39.

Prior to receiving the verdict, the court referred to a jury question:

One question the jury apparently had was they were concerned about Exhibit No. 8. I note No. 8 was not admitted, so I'll probably mention that to them after I get their verdict and poll the jury. RP 382.

No further mention was made of this question, and it does not appear in writing in the trial court file. RP 382-392.

Mr. Thomas was sentenced to 29 months on each forgery conviction, and 51 months on the bail jumping conviction. CP 43. He appealed. CP 55.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. THOMAS'S CONSTITUTIONAL RIGHT TO TESTIFY AND TO PRESENT A DEFENSE.

Mr. Thomas explained to jurors that he did not know the two checks he'd received were forged. His attorney worried that jurors might see Mr. Thomas as a bad person who had intentionally skipped court and disregard his testimony about the forgery. To counter this, counsel sought to introduce evidence showing that Mr. Thomas (and his parents) made an honest mistake about his court date.

The trial court excluded all the evidence Mr. Thomas wished to introduce regarding the bail jumping charge. This violated Mr. Thomas's state and federal constitutional rights to testify and to present a defense. The error requires reversal of all three convictions and remand for a new trial.

- A. By excluding relevant evidence, the trial court violated Mr. Thomas’s state constitutional right to testify and to present his defense to the jury.

The state constitution guarantees an accused person the right to present a defense. Wash. Const. art. I, §§3 and 22; *State v. Martin*, 171 Wn.2d 521, 528, 252 P.3d 872 (2011); *State v. Jones*, 168 Wn.2d 713, 720-725, 230 P.3d 576, 580 (2010). This includes the right to introduce relevant and admissible evidence.⁶ *Jones*, 168 Wn.2d at 720.

In addition, the state constitution explicitly protects an accused person’s right “to testify in his own behalf.” Wash. Const. art. I, §22. This right is “fundamental, and cannot be abrogated... by the court.” *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

These rights under the state constitution are more protective than the corresponding federal rights. *Martin*, 171 Wn.2d at 528. This is confirmed by analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).⁷

⁶ Evidence is relevant “if it has any tendency to make the existence of any consequential fact more probable or less probable.” *Washington v. Farnsworth*, 185 Wn.2d 768, 782–83, 374 P.3d 1152 (2016) (citing ER 401). The threshold to admit relevant evidence is low; “[e]ven minimally relevant evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

⁷ Following *Martin*, it is likely “unnecessary to engage repeatedly in further *Gunwall* analysis simply to rejustify performing that separate and independent constitutional analysis.” *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007) (plurality). However, because *Martin* addressed multiple rights in addition to the right to testify, a brief analysis is provided here.

Gunwall factors one and two (the language of the text and differences from the federal language) establish a greater right under the state constitution. *Martin*, 171 Wn.2d at 529-530. The same is true under factor three (constitutional and common law history). *Id.*, at 530. Although not dispositive, the fourth factor (preexisting state law) “weighs in favor of an independent analysis.” *Id.*, at 532-533. Factor five always favors an independent state interpretation. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). Factor six also favors an independent interpretation, because any need for national uniformity “is outweighed in this case by overwhelming state policy considerations” governing the state constitutional rights of the accused. *See Gunwall*, 106 Wn.2d at 67 (addressing intrusions into a person’s private affairs).

Because an independent interpretation is warranted, the focus shifts to “the state constitutional provision as applied to the alleged right in a particular context.” *Am. Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 597, 192 P.3d 306 (2008). The right to mount a defense and to testify encompasses an accused person’s right to introduce *any* relevant evidence, even if it does not establish a defense to the charged crime.

Here, Mr. Thomas wished to admit facts supporting the bail jumping charge, and to provide what his attorney described as

“background” information about the offense. RP 40-69, 263-267, 311, 314; CP 15-17. He sought to do so through his own testimony, through the testimony of his parents and his prior attorney, and through the introduction of Exhibit 8, the pink copy of the scheduling order he was given.⁸ RP 40-69, 263-267, 311, 314; CP 15-17.

Conceding guilt to the jury “can be a sound trial tactic when the evidence of guilt overwhelms.” *State v. Hermann*, 138 Wn. App. 596, 605, 158 P.3d 96 (2007) (addressing ineffective assistance claim). Conceding guilt “may help the defendant gain credibility with the jury,” when other charges are also at stake. *Id.*; see also *State v. Silva*, 106 Wn. App. 586, 595-599, 24 P.3d 477 (2001).

Here, defense counsel hoped that conceding guilt and explaining the circumstances surrounding the missed court date would “help the defendant gain credibility with the jury.” *Hermann*, 138 Wn. App. at 605. This, in turn, would have supported acquittal on the two forgery charges. The strategy was clearly important to the defense theory; otherwise, Mr. Thomas could have offered to plead guilty to the bail jumping charge and removed any negative implication stemming from that charge.

⁸ As noted, Ex. 8 was returned to counsel after the court found it irrelevant. See Receipt for Exhibits filed 11/20/2018, Supp. CP.

The evidence of Mr. Thomas’s guilt on the bail jumping charge was overwhelming. Admitting guilt gave Mr. Thomas a better chance of acquittal on the forgery charge. But a bare concession without context undermined Mr. Thomas’s position.

Defense counsel’s concern was that jurors might judge his client as “a bad guy,” “a scofflaw,” and “a bad man” who deliberately skipped his court date. RP 44, 64; CP 16. He sought to introduce evidence of the surrounding circumstances, so the jury would have a complete picture of the reason Mr. Thomas missed court. As counsel put it, Mr. Thomas wished to “fill in the gaps as to what happened so the jury doesn’t fill in the gaps incorrectly with a very negative inference.” RP 44; CP 16.

This type of background information is admissible as “res gestae” evidence. *State v. Grier*, 168 Wn. App. 635, 646, 278 P.3d 225 (2012). Such evidence is relevant under ER 401 and admissible under ER 402.⁹ *Id.*

Res gestae evidence is admissible to “complete the story of the crime.” *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (internal quotation marks and citations omitted). The evidence is relevant and should be admitted because “the jury [is] entitled to know the whole

⁹ Although res gestae evidence was once framed as an exception to ER 404(b), the modern approach is to consider such evidence relevant under ER 401 and admissible under ER 402. *Grier*, 168 Wn. App. at 646-647.

story.” *State v. Tharp*, 27 Wn. App. 198, 205, 616 P.2d 693, 697 (1980), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981).

Res gestae evidence includes evidence that merely “establishe[s] background information.” *State v. Brown*, 132 Wn.2d 529, 579, 940 P.2d 546 (1997), *as amended* (Aug. 13, 1997). Such evidence provides “immediate context of happenings near in time and place.” *Id.*; *see also State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). As one judge put it:

The idea underlying res gestae is that the jury is entitled to have the complete “mosaic.” And each piece of the mosaic is, for that reason, admissible.

State v. Trickler, 106 Wn. App. 727, 735, 25 P.3d 445 (2001) (*Sweeney*, A.C.J., dissenting).¹⁰

Mr. Thomas wished to give the jury “the whole story.” *Tharp*, 27 Wn. App. at 205. He sought to introduce testimony showing that he received a copy of the court’s scheduling order, that the pink copy he received appeared to show a court date of August 3rd rather than August 2nd, that his father posted the notice on the refrigerator and marked the (erroneous) August 3rd date on the calendar, that Mr. Thomas appeared for

¹⁰ The Supreme Court has described res gestae evidence as “piece[s] in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615, 618 (1995) (citation and internal quotation marks omitted).

court on August 3rd, and that he repeatedly contacted his lawyer and diligently sought to return to court after realizing that he'd missed his court date. RP 40-69, 263-267, 311-314; CP 15-17.

The proffered evidence would have “complete[d] the story of the crime” of bail jumping. *Lane*, 125 Wn.2d at 831. It “established background information”¹¹ surrounding the offense. It was part of the “mosaic” that the jury was entitled to consider when assessing Mr. Thomas’s case. *Powell*, 126 Wn.2d at 263; *Trickler*, 106 Wn. App. at 735 (*Sweeney*, A.C.J., dissenting).

The evidence was relevant and admissible to “complete the story of the crime.” *Lane*, 125 Wn.2d at 831. Defense counsel was pursuing a strategy whose legitimacy has been recognized. *See Hermann*, 138 Wn. App. at 605; *Silva*, 106 Wn. App. at 595-599. By excluding the evidence, the trial court violated Mr. Thomas’s state constitutional right to testify and his right to present a defense under Wash. Const. art. I, §22.

B. The limitation imposed by the trial court violated Mr. Thomas’s right to testify and to present a defense under the federal constitution.

The federal constitution, like the state constitution, protects an accused person’s right to testify and to present a defense. *Jones*, 168

¹¹ *Brown*, 132 Wn.2d at 579.

Wn.2d at 720-725; *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708, 97 L. Ed. 2d 37 (1987). These rights are rooted in the Fifth, Sixth, and Fourteenth Amendments. *Rock*, 483 U.S. at 49-53; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Relevant evidence can only be excluded if the State proves that it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720. Similarly, limitations on the right to testify are improper if they are arbitrary or disproportionate to the purposes they are designed to serve. *Rock*, 483 U.S. at 55-56.

Here, the trial court excluded the evidence on relevance grounds.¹² RP 49-50, 66-69, 267, 311-314. The court also opined that the probative value was outweighed by the possibility that jurors would be confused. RP 267, 311, 314.

But evidence necessary to “complete the story” is relevant. *Lane*, 125 Wn.2d at 831; *Grier*, 168 Wn. App. at 646. The proffered evidence explained the circumstances surrounding the missed court date. It outlined what happened on the day Mr. Thomas received notice of his court date, it explained what happened on the day he missed court, and it provided

¹² The court also ruled that Mr. Thomas’s parents could not provide opinion testimony regarding Exhibit 8.

“immediate context of happenings near in time and place” on both dates.

Brown, 132 Wn.2d at 579.

In addition, there was little likelihood of confusion. Counsel made clear that he did not intend to argue in favor of nullification. RP 41-42, 48. His purpose in introducing the evidence was to provide background for the missed court date and eliminate the inference that Mr. Thomas was “a bad guy,” “a scofflaw,” and “a bad man” who deliberately skipped his court date. RP 44, 64; CP 16.

The trial court’s ruling apparently stemmed from the fact that the evidence did not establish a defense or dispute an element of the bail jumping charge. RP 49-50, 313-314. But evidence may be relevant even if it is not aimed at proving the elements of an offense or establishing a defense. Res gestae evidence is admissible to establish “background information.” *Id.*

Under the trial court’s logic, res gestae evidence is admissible if offered by the State to complete the picture of the crime but inadmissible if offered by the defense. There is no basis for this.

Because the evidence was relevant and admissible, it should not have been excluded unless it was “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720. Furthermore, Mr. Thomas’s testimony should not have been restricted, because any

limitation was arbitrary and disproportionate. *See Rock*, 483 U.S. at 55-56. By excluding the evidence, the trial court prohibited Mr. Thomas from pursuing a legitimate strategy.

The trial court's ruling excluding the proffered evidence violated Mr. Thomas's federal constitutional right to testify and his right to present a defense. *Id.*; *Jones*, 168 Wn.2d at 720-725; *Holmes*, 547 U.S. at 324-331.

C. The violation of Mr. Thomas's constitutional rights requires reversal of all three convictions.

Constitutional violations require reversal unless the State can establish harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The prosecution must show that any reasonable jury would reach the same result absent the error. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). Even a non-constitutional error requires reversal unless the State can show that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Here, the error requires reversal of all three charges.

Mr. Thomas's defense to the forgery charges rested entirely on his credibility. He testified that he received checks in payment for extensive

work he did on a stranger's car. RP 244-250, 260, 274-275. He also testified that he had no idea that the checks were forged. RP 260.

The prosecutor sought to attack his credibility, confronting him with apparent inconsistencies in his testimony and his statement to police. RP 268-280. The State also focused its closing argument on discrediting Mr. Thomas's account of the offense. RP 339-345.

Mr. Thomas sought to enhance his credibility by admitting the bail jumping charge and providing context for his failure to appear. RP 40-69, 263-267, 311, 314; CP 15-17. This is a legitimate defense strategy.

Hermann, 138 Wn. App. at 605; *see Silva*, 106 Wn. App. at 595-599.

Conceding guilt and offering context showing why he missed court "may [have] help[ed] the defendant gain credibility with the jury." *Hermann*, 138 Wn. App. at 605.

The State cannot show that the court's error was trivial, formal, or merely academic, that it did not prejudice Mr. Thomas, or that it in no way affected the final outcome of the case. *Lorang*, 140 Wn.2d at 32. Nor can the State show that any reasonable jury would have reached the same result absent the error. *Burke*, 163 Wn.2d at 222.

Had the court allowed Mr. Thomas to introduce the *res gestae* evidence surrounding the bail jumping charge, there is at least some chance that one or more jurors would have credited his testimony on the

forgery charge. The error is not harmless beyond a reasonable doubt.

Franklin, 180 Wn.2d at 382.

The error also requires reversal of the bail jumping conviction, even though Mr. Thomas's strategy involved admitting facts sufficient to sustain the conviction. If the forgery charges are retried without the bail jumping conviction, Mr. Thomas will not have the opportunity to pursue his strategy.

Instead, he will be in a worse position than he was at the start of trial. He will be unable to "gain credibility with the jury" on the forgery charges by conceding guilt on the bail jumping charge. *Hermann*, 138 Wn. App. at 605. As noted above, the credibility of his testimony was key to his defense on the forgery.

The bail jumping conviction may not be sustained. Instead, all three convictions must be reversed, and the case remanded for a new trial.

D. The Court of Appeals should review these constitutional errors *de novo*.

Constitutional issues are reviewed *de novo*, even where an abuse-of-discretion standard would apply in the absence of a constitutional claim. *Id.*; see also *State v. Buckman*, 190 Wn.2d 51, 57-58, 409 P.3d 193 (2018); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

The *de novo* standard ensures that the exercise of constitutional rights does not become a matter of trial court discretion.

By excluding evidence that was relevant and admissible, the trial court violated Mr. Thomas's constitutional right to testify and to present his defense to the jury. The Court of Appeals should review this error *de novo*.¹³ *Jones*, 168 Wn.2d at 719.

II. MR. THOMAS'S CASE MUST BE REMANDED FOR A HEARING TO DETERMINE THE NATURE AND EXTENT OF EX PARTE CONTACT BETWEEN THE COURT AND THE DELIBERATING JURORS.

It is improper for the trial judge to have ex parte communication with the jury. *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005). This prohibition covers contact between the jury and the bailiff, who is "the judge's agent and is subject to the same restrictions as the court regarding conversations with the jury." *Id.*; *see also* RCW 4.44.300.

Here, just prior to verdict, the court referred to communication with the jury:

One question the jury apparently had was they were concerned about Exhibit No. 8. I note No. 8 was not admitted, so I'll probably mention that to them after I get their verdict and poll the jury.
RP 382.

¹³ This issue relating to the appropriate standard of review is pending in the Supreme Court. *See State v. Arndt*, --- Wn.2d---, 438 P.3d 131 (2019) (granting review).

Nothing in the record shows how the jury's question was communicated to the court or what response was given at the time. There is no written question in the court file, and the judge gave no further explanation. Although jurors clearly had ex parte communication with the court (or the bailiff), the extent of the contact is unclear.

When ex parte communication occurs, "the trial court generally should disclose the communication to counsel for all parties." *Id.* Improper ex parte communication is a constitutional error, requiring reversal unless the communication is "so inconsequential as to constitute harmless error." *Id.*

Here, because the court did not disclose the circumstances surrounding the jury's question, the record is insufficient to allow review of any error. Because the court's comment raises a serious question regarding the validity of the verdict, the Court of Appeals should remand Mr. Thomas's case for a hearing to determine the nature and extent of any ex parte communication.¹⁴ *Id.*; see also *State v. Booth*, 36 Wn. App. 66, 69, 671 P.2d 1218 (1983).

¹⁴ RAP 12.2 authorizes the appellate court to take any action "as the merits of the case and the interest of justice may require." RAP 12.2.

CONCLUSION

Cullen Thomas sought to introduce res gestae evidence relating to his bail jumping charge. The evidence completed the story of the crime. The testimony would have allowed him to concede guilt while explaining the surrounding circumstances. This is a legitimate strategy which “may help the defendant gain credibility with the jury,” when other charges are also at stake. *Hermann*, 138 Wn. App. at 605.

Without the testimony, he risked having the jury consider him “a bad guy,” “a scofflaw,” and “a bad man” who deliberately skipped his court date. RP 44, 64; CP 16. Jurors were far more likely to disregard his testimony denying the forgery charges because of evidence suggesting that he intentionally missed his court date.

The trial judge should not have excluded the evidence. The error requires reversal of all three convictions, even though Mr. Thomas effectively conceded guilt on the bail jumping charge. This is so because without a reversal of that charge, he will not have the same opportunity to “gain credibility with the jury” by conceding guilt. *Hermann*, 138 Wn. App. at 605.

If the convictions are not reversed, the case must be remanded for a hearing to determine the nature and extent of any ex parte communication with the deliberating jury. The record suggests that such

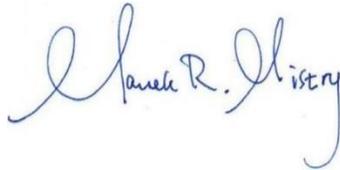
communication occurred; remand will give the trial court the opportunity to address the issue.

Respectfully submitted on May 28, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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Larch Corrections Center
15314 NE Dole Valley Road
Yacolt, WA 98675

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
rachael.rogers@clark.wa.gov;
cntypa.generaldelivery@clark.wa.gov

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 May 28, 2019.



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