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MAY 8, 2015

Court of Appeals
Division III
State of Washington

No. 32876-7-III

COURT OF APPEALS

DIVISION III

IN THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MATTHEW O. HASTINGS, Appellant

APPEAL FROM THE SUPERIOR COURT

OF WALLA WALLA COUNTY

THE HONORABLE SCOTT WOLFRAM

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Violated Mr. Hastings' Right To Be Present Under the State and Federal Constitutions, and CrR 3.4, After Receiving A Question From The Deliberating Jury And Responding To It Outside The Presence of Mr. Hastings and His Attorney, In Violation of CrR 6.15.
- B. The Trial Court Erred When It Denied A Timely Motion For Dismissal After Prejudicial Custodial Contact In The Presence of the Jury.

Issues Related To Assignments Of Error

- 1. Did the trial court violate Mr. Hastings' right to be present when it received and responded to a question from the deliberating jury outside the presence of Mr. Hastings and his attorney, requiring a new trial?
- 2. Did the trial court err when it denied a timely motion for a new trial after the jury observed Mr. Hastings being escorted out of the courtroom by a deputy, requiring a new trial?

II. STATEMENT OF FACTS

Matthew Hastings and Nancy Newman knew each other for approximately 35 years, and lived together on and off for about the

last seven years. (RP 13; 52). Mr. Hastings had been injured at work, and sometime within the first five years of their shared life, he was paid a settlement and began receiving SSI. (RP 53). He helped maintain the home by cleaning and landscaping, as well as contributing his food stamps, and sporadically paying her an agreed upon rent sum. (RP 21;54). In June 2007, Ms. Newman brought home a dog, which they shared. (RP 58).

In March of 2014, Ms. Newman filed for and was granted a restraining order against Mr. Hastings. (RP 15). On April 23, at a time when Ms. Newman was not present, Mr. Hastings returned to the home to retrieve some of his possessions and to pick up his SSI check. (RP 65). He removed his toolbox from the shed, and took his books and walking cane, and the dog from the home. (RP 66). He also took some of Ms. Newman's costume jewelry, later testifying he did so because she had a coat that belonged to him and he wanted to trade the jewelry for the coat. (RP 67).

Ms. Newman arrived home shortly before 7 p.m., in time to see Mr. Hastings drive away in his van. (RP 27). She called the police. (RP 26). Officer Edwards responded and easily located Mr. Hastings and his dog less than a mile away sitting on the porch of a

friend's cabin. (RP 28). The van was parked about 200 yards away, across the Washington border in Oregon. (RP 35).

Mr. Hastings was charged with violation of a protection order, domestic violence, residential burglary – domestic violence, and third degree theft- domestic violence. (CP 34-35).

The court gave jury instruction no. 12:

To convict the defendant of the crime of Count 1: Residential burglary, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of April, 2014, the defendant entered or remained unlawfully in a dwelling at 10246 Mill Creek Road;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 105).

After the jury had been instructed, and was making its way out of the courtroom to begin deliberations, Sergeant Garby approached Mr. Hastings and said, "Come here, let's go." (RP 113). The closest juror was less than two feet away. Mr. Hastings' attorney whispered to Mr. Hastings to "stay put, to try to wait until the jury [was] out." Id. She also tried to signal the sergeant that the

jury was still in the courtroom, but he repeated his directive to Mr. Hastings. (RP 113-114). Mr. Hastings stepped directly in the path of one of the jurors to move toward the sergeant. Id. The officer then physically took control of Mr. Hastings by the arm and escorted him out of the courtroom. Id. Defense counsel was able to get the sergeant's attention and instruct him he was supposed to wait until the jury was out. (RP 114). The sergeant physically held Mr. Hastings' arm and walked him about thirty feet to the bench outside the courtroom and waited until the jurors left. (RP 114;126).

Defense counsel returned to the courtroom and advised the court of the events. (RP 114). The following day counsel filed a motion to dismiss, which the court denied. (CP 86-90; RP 115). The jury found Mr. Hastings guilty on all counts. (CP 120-121).

On October 16, 2014, defense counsel filed a motion for a new trial under CrR 7.5. (RP 140-147). Defense counsel became aware of a written record showing that during its deliberations the jury submitted the following question to the court :

- Regarding "a crime" in Instruction no. 12, can that crime be:
- a. violation of restraining order
 - b. theft
 - c. both
 - d. just entering unlawfully

(CP 124).

Without contacting counsel, the court responded to the jury inquiry in writing, “You have the court’s instructions on the law. Please refer to your instructions and continue to deliberate.” (CP 124).

The hardcopy question and answer do not list the time the question was given to or returned by the court, but does contain a preprinted boilerplate note:

“Court’s Response: (After affording all counsel/parties opportunity to be heard.)” (CP 124).

At the sentencing hearing, November 4, 2014, the court agreed that he had not contacted counsel about the jury question, stating he had no idea why he did not follow CrR 6.15. (RP 127). Counsel pointed out to the court that had she been aware of the inquiry she would have objected to the court’s response and asked the court to tell the jury that option “d”, an unlawful entrance was not sufficient for a conviction of burglary. (RP 127).

The court denied the motion for a new trial. (RP 127). Mr. Hastings makes this appeal. (CP 196-215).

III. ARGUMENT

A. The Trial Court Erred In Denying A Motion For A New Trial After Violating Mr. Hastings' Right To Meaningful Representation At A Critical Stage of His Trial.

Under CrR 7.5, a trial court is authorized to grant a new trial 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. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Discretion is abused when the court's decision is manifestly unreasonable, that is, outside the range of acceptable choices given the facts and applicable legal standard, or it is based on untenable grounds. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A criminal defendant is guaranteed the right to be present at every critical stage of the proceedings against him, and to the assistance of counsel at critical stages of litigation. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); Wash. const. Art. 1 §22; *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). A critical stage involving the right to counsel exists when "a defendant's rights may be lost, defenses waived, privileges claimed or waived, or *in which the outcome of the case is otherwise*

substantially affected.” *State v. McCarthy*, 178 Wn.App. 90, 101, 312 P.3d 1027 (2013)(internal citations omitted)(Emphasis added).

This guaranteed right includes the right to have a jury message answered in open court and the defendant’s counsel should be given an opportunity to be heard prior to the judge responding to it. *Irby*, 170 Wn.2d at 880. Whether the constitutional right to be present has been violated is a question of law, subject to *de novo* review. *Rogers*, 422 U.S. at 39; *Irby*, 170 Wn.2d at 880.

CrR 6.15(f)(1) in part specifies the procedure to ensure a defendant’s rights are protected in the context of a jury question:

(f) Questions from Jury During Deliberations.

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated, and submitted in writing to the bailiff. The court *shall notify* the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court’s response and any objections thereto shall be made a part of the record. The court *shall* respond to all questions from a deliberating jury in open court or in writing....

Here, the deliberating jury asked a single question which

involved an essential element of the burglary charge. (CP 105;124). The record shows that the court did not notify defense counsel of the jury inquiry, despite the preprinted boilerplate language, “Court’s Response: (After affording all counsel/parties opportunity to be heard.)” (CP 124). The attorneys did not sign the court’s response and the court later stated on the record he did not know why he had not notified all the parties. (RP 127). By failing to notify counsel of the jury question, the court precluded Mr. Hastings’ defense counsel from providing meaningful representation for him. Counsel had no opportunity to assist in crafting the court’s response to a critical legal question that very likely affected the jury’s verdict.

In *Jasper*, the Court considered a similar question. *State v. Jasper*, 158 Wn.App.518, 245 P.3d 228 (2010). There, as here, the jury submitted a question to the court and the court failed to notify the parties of the contents of the jury’s question or provide them an opportunity to comment on an appropriate response, in violation of CrR 6.15(f)(1). *Id.* at 541. The *Jasper* Court held that the trial court erred, ruling it is well settled law that “[a]ny communication between the court and the jury in the absence of the defendant (or his counsel) is error.” *State v. Langdon*, 42 Wn.App. 715, 717, 713

P.2d 120 (1986); see also *State v. Ratliff*, 121 Wn.App. 642, 646, 90 P.3d 79 (2004)(The trial court is “communicate with a deliberating jury only with all counsel... present.”) (internal citation omitted).

Although in *Jasper* the Court found error, the Court’s analysis went further, stating that “where such an error occurs, the defendant must raise the *possibility* that the communication between the judge and jury was prejudicial and the State may demonstrate that the error was harmless.” *Id.* at 541. (Internal citations omitted; emphasis added). The defense argument there was that trial counsel could have participated in formulating a response, and would have requested that the trial court instruct the jury about an available statutory defense. *Id.* The Court found no prejudice, however, because neither party had raised the defense, and to give such an instruction would have been improper. *Id.*

Unlike *Jasper*, here the jury was confused by an essential element requirement. Defense counsel made a record that had she had an opportunity to assist in formulating the response, she would have objected to merely referring back to the instructions. (CP 144). While it is within the trial court’s discretion *whether* to give further instruction to a deliberating jury, fairness and the

appearance of fairness require the trial court to follow the court rules and allow meaningful representation of the defendant. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008); *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

Defense counsel here correctly raised the *possibility* of prejudice, because the neutral response by the court could not guarantee that the jury unanimously agreed that all the elements of burglary had been proved by the State beyond a reasonable doubt. The jury did not seem to understand that unlawful entry alone did not constitute burglary. (CP 144). If the jury relied on the unlawful entry alone, the State was relieved of the burden of proving the charges beyond a reasonable doubt. The State must prove the communication harmless beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 46 (1983).

It is the duty of the court to instruct the jury on the law. Wash. Const. Art. IV§ 16. It is also a duty of the court to notify the parties of the contents of the questions and provide them with an opportunity to comment upon an appropriate response. CrR 6.15(f)(1).

Mr. Hastings respectfully asks this Court to find that his constitutional right to be meaningfully represented at a critical stage of trial was violated and grant him a new trial.

B. The Trial Court Erred When It Denied A Timely Motion For A New Trial After Prejudicial Custodial Contact In The Presence of the Jury.

The defendant's right to be presumed innocent requires courts to guard against factors that may undermine the fairness of the trial process. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Further, the *Estelle* Court held that equal protection considerations prohibit the imposition of different conditions upon those defendants who have the wherewithal to post bail and secure their release from those who do not have the resources to post bail. *Id.* at 505-06.

The Washington Supreme Court also "encouraged the trial courts to maintain an impartial atmosphere during trials: While so-called laboratory conditions can never be realized, it is, nevertheless, the burden of the courts to strive for them and to try all cases in an atmosphere of complete impartiality, not only without any reservation whatever *but devoid of any such reservation.*" *State v. Hartzog*, 96 Wn.2d 383, 404, 635 P.2d 694 (1981).

It is well-settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). “Courts have recognized that restraining a defendant during trial infringes on this right to a fair trial for several reasons. The one most frequently cited is that it violates a defendant’s presumption of innocence.” *Id.* at 844.

Here, the appearance of fairness and presumption of innocence were disturbed when the jail staff physically and verbally took control of Mr. Hastings in front of the jury. The *Hartzog* court reasoned that use of restraints was historically viewed as an extreme measure to be used only when necessary to prevent disorderly conduct at trial, or to prevent an escape. *Hartzog* at 398. The Court reasoned that a judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. The discretion must be founded on an individualized factual basis. *Id.* at 401.

Whether Mr. Hastings was held in a physical restraint device such as handcuffs, or restrained by the sergeant’s verbal directive and physical interference with his freedom of movement is a distinction with little difference. The message to the jury was that

Mr. Hastings was being held in custody, and that he needed a guard. Neither message upheld the right to the presumption of innocence, but rather, that he was dangerous or untrustworthy. *Holbrook v. Flynn*, 475 U.S. 560, 568-69, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

This irregularity deprived Mr. Hastings of a fair trial within the meaning of CrR 7.5(a)(5).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hastings respectfully requests that this Court reverse his conviction and order a new trial at which he will be afforded his rule-based and constitutional right to be meaningfully represented and which is free from the prejudicial taint of custodial contact in the presence of the jury.

Respectfully submitted this 8th day of May 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Matthew Hastings, do hereby certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the Brief of Appellant was sent by first class USPS mail, postage prepaid to: Matthew Hastings, DOC # 788621, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362; and by electronic service by prior agreement between the parties, to Teresa J. Chen, Attorney at Law: tchen@co.franklin.wa.us.

Dated this 8th day of May 2014.

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