

FILED

JUL 11, 2016

Court of Appeals
Division III
State of Washington

No. 34002-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Earl T. Clapper,

Appellant.

Spokane County Superior Court Cause No. 15-1-01223-2

The Honorable Judge Harold Clarke

Appellant's Opening Brief

Skylar T. Brett
Attorney for Appellant

Law Office of Skylar Brett
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 5

I. No rational jury could have found beyond a reasonable doubt that Mr. Clapper had been the driver of the Toyota..... 5

II. The court violated Mr. Clapper’s constitutional rights to appear and defend in person and to be present during all critical stages of his trial by considering and responding to several questions from the deliberating jury after only a three-way phone call with the attorneys..... 7

A. The court violated Mr. Clappers art. I, § 22 right to appear and defend in person. 7

B. The court violated Mr. Clappers Sixth and Fourteenth Amendment right to be present during all critical stages of his trial. 9

C. The court’s violation of Mr. Clapper’s constitutional rights was not harmless beyond a reasonable doubt. 10

III. If the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Clapper, who is indigent..... 12

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Illinois v. Allen</i> , 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)	10
<i>Larson v. Tansy</i> , 911 F.2d 392 (10 th Cir. 1990).....	7
<i>Malloy v. Hogan</i> , 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).....	9
<i>Snyder v. Massachusetts</i> , 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934)9, 10	
<i>United States v. Gordon</i> , 829 F.2d 119 (D.C. Cir. 1987)	8

WASHINGTON CASES

<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	12, 13
<i>State v. Burdette</i> , 178 Wn. App. 183, 313 P.3d 1235 (2013)	8, 11, 12
<i>State v. Garza</i> , 150 Wn.2d 360, 77 P.3d 347 (2003)	7
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011)	7, 8, 9, 10
<i>State v. Kindell</i> , 181 Wn. App. 844, 326 P.3d 876 (2014)	8
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015).....	6
<i>State v. Pruitt</i> , 145 Wn. App. 784, 187 P.3d 326 (2008).....	11
<i>State v. Ratliff</i> , 121 Wn. App. 642, 90 P.3d 79 (2004)	8, 11
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3 612 (2016).....	12
<i>State v. Stegall</i> , 124 Wn.2d 719, 881 P.2d 979 (1994).....	7
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 1, 9, 10
U.S. Const. Amend. XIV 1, 9, 10
Wash. Const. art. I, § 22..... 1, 7, 8, 9

WASHINGTON STATUTES

RCW 46.61.024 6

OTHER AUTHORITIES

GR 34..... 13
RAP 2.5..... 7

ISSUES AND ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to convict Mr. Clapper of attempting to elude a police vehicle.
2. No rational jury could have found beyond a reasonable doubt that Mr. Clapper was the driver of the car at issue.

ISSUE 1: The state presents insufficient evidence to convict when – taking the evidence in the light most favorable to the prosecution – no rational jury could have found each element proved beyond a reasonable doubt. Did the state present insufficient evidence to prove that Mr. Clapper was the driver of the car when the officer never saw the person driving the car, the officer did not see how many people were in the car, and the police did not search the area where the car was found for other potential occupants?

3. The court violated Mr. Clapper’s Wash. Const. art. I, § 22 right to appear and defend in person.
4. The court violated Mr. Clapper’s constitutional right by holding a hearing when his substantial rights were at stake without his presence.

ISSUE 2: The Washington Constitution guarantees accused persons the right to be present during every stage of a trial during which his/her substantial rights may be affected. Did the court violate Mr. Clapper’s right to appear and defend in person by considering and responding to several questions from the deliberating jury after only a three-way phone call with the attorneys?

5. The court violated Mr. Clapper’s Sixth and Fourteenth Amendment right to be present during all critical stages of his trial.

ISSUE 3: The Sixth and Fourteenth Amendments guarantee accused persons the right to be present during all critical stages of a trial, whenever his/her presence relates to “the fullness of his opportunity to defend against the charge.” Did the court violate Mr. Clapper’s right to be present by holding a hearing via telephone call with only the lawyers?

6. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 4: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Clapper is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Earl Clapper went to a barbeque at the house of an acquaintance.

RP 149. Before she went to bed, the hostess told her friends who remained that they were welcome to borrow her Toyota Camry to get home, if necessary. RP 151.

She did not make that offer to Mr. Clapper, because she did not know him well. RP 151.

Later, a police officer saw the Toyota driving the wrong way on a one-way street. RP 79. When the officer tried to stop the car, it sped off down an alley. RP 80. The driver went well over the speed limit and failed to stop at stop signs and flashing red lights. RP 80-85.

The officer who was chasing the vehicle did not see how many people were inside or who was driving. RP 88.

The police eventually found the Toyota parked in a driveway where it did not belong. RP 87, 98. A canine officer started trying to track for people who had fled the car. RP 89-94. Mr. Clapper came out and approached the officers. RP 96.

Mr. Clapper told the police that he had not been driving the Toyota but that his backpack was inside of it. RP 100.

The car was parked across the street from a large city park. RP 131. But the officers did not search the park or other residential yards for any other potential occupants of the Toyota. RP 131.

Instead, they arrested Mr. Clapper. RP 100. The state charged him with attempting to elude a police vehicle. CP 1.

At trial, the car's owner said that she did not believe that Mr. Clapper – who is 6'3" and weighs 407 pounds – would fit in the driver's seat of her small car. RP 153; CP 1. She said that her 290-pound father had tried to drive it once and been unable to do so.¹ RP 148-149.

The police found Mr. Clapper's backpack in the back seat of the Toyota. RP 143.

After deliberations began, the jury sent a note to the court asking several questions about the evidence in the case:

Was the driver's seat reclined?
Was Clapper charged with wreckless [sic] driving or DUI?
Do we know the position of the front passenger seat [sic]
Did police follow up on hotel and scanner [sic]
Where does Clapper live [sic]
CP 18.

Before responding, the court called the attorneys and discussed the issue in a three-way phone call. RP 196. The court responded to the

¹ In response to this, the state elicited evidence that the driver's seat of the car was fully reclined. RP 142. The prosecutor argued in closing that the position of the seat would have made it possible for Mr. Clapper to drive the car. RP 175, 179.

questions by telling the jury to rely on their instructions, memories, and notes. CP 18; RP 196.

The jury found Mr. Clapper guilty. RP 191. This timely appeal follows. CP 45-46.

ARGUMENT

I. NO RATIONAL JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT MR. CLAPPER HAD BEEN THE DRIVER OF THE TOYOTA.

The Toyota that failed to stop for the police had been offered for loan to several people at the end of a party, none of whom were Mr. Clapper. RP 151. The officer did not see the driver or even how many people were in the car. RP 88.

About five minutes passed between the officer's last sighting of the car while moving and when he found it parked in the driveway. RP 87. Still, the police did not search nearby yards or the park across the street for possible additional occupants of the vehicle. RP 131.

No rational jury could have found beyond a reasonable doubt that Mr. Clapper had been the driver of the car. The state presented insufficient evidence to convict him of attempting to elude.

To convict Mr. Clapper of attempting to elude, the state was required to prove beyond a reasonable doubt that he was the driver of the Toyota. RP 46.61.024.

Evidence is insufficient to prove an element of an offense when, taking the evidence in the light most favorable to the state, no rational jury could have found the necessary facts proved beyond a reasonable doubt. *State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015).²

An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013).

In Mr. Clapper's case, while a jury may have reasonably found that he had been in the car, no rational fact finder could have found beyond a reasonable doubt that he was the driver.

The state failed to present any evidence regarding what the driver looked like or, alternatively, that there was only one person in the car. The police also neglected to determine whether there was anyone else hiding in the neighboring yards or park who may have fled from the Toyota.

No rational jury could have found Mr. Clapper guilty of attempting to elude beyond a reasonable doubt. *Id.*; RCW 46.61.024. Mr. Clapper's conviction must be reversed. *Id.*

² The Court of Appeals reviews the evidence *de novo*. *Larson*, 184 Wn.2d at 855.

II. THE COURT VIOLATED MR. CLAPPER’S CONSTITUTIONAL RIGHTS TO APPEAR AND DEFEND IN PERSON AND TO BE PRESENT DURING ALL CRITICAL STAGES OF HIS TRIAL BY CONSIDERING AND RESPONDING TO SEVERAL QUESTIONS FROM THE DELIBERATING JURY AFTER ONLY A THREE-WAY PHONE CALL WITH THE ATTORNEYS.

- A. The court violated Mr. Clappers art. I, § 22 right to appear and defend in person.

The Washington Constitution explicitly guarantees the right to “appear and defend in person” in all criminal prosecutions. Art. I, § 22.³ This provision is interpreted independently from the federal due process right to be present. *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011).

The right to appear and defend in person protects an accused person’s right to be present “at every stage of the trial when his substantial rights may be affected.” *Id.* at 885.

Courts indulge every reasonable presumption against waiver of a constitutional right. *State v. Stegall*, 124 Wn.2d 719, 730, 881 P.2d 979 (1994). Any waiver must be knowing, intelligent, and voluntary. *Id.* at 725; *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). Defense counsel is not empowered to waive the right on the accused person’s behalf. *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990) (addressing

³ Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Constitutional issues are reviewed *de novo*. *Irby*, 179 Wn.2d at 799.

federal right); *United States v. Gordon*, 829 F.2d 119, 125 (D.C. Cir. 1987) (same).

The right to appear and defend in person is violated when a trial court considers and responds to a question from a deliberating jury without the accused present. *State v. Burdette*, 178 Wn. App. 183, 201, 313 P.3d 1235 (2013); *see also State v. Ratliff*, 121 Wn. App. 642, 646, 90 P.3d 79 (2004).

Here, the court violated Mr. Clapper's constitutional right by considering and responding to the jury's questions without him there – after only a three-way phone call with the attorneys. RP 196.

An accused person's substantial rights are at issue when a court communicates with a deliberating jury about a case. *See e.g. Burdette*, 178 Wn. App. 183 (defendant's substantial rights implicated when court considers and responds to question from deadlocked jury); *Ratliff*, 121 Wn. App. 642 (court engaged in improper *ex parte* communication and made unconstitutional comment on the evidence in answer to question from deliberating jury); *State v. Kindell*, 181 Wn. App. 844, 853, 326 P.3d 876 (2014) (court gave erroneous instruction in response to jury question).

Because it could have affected his substantial rights, Mr. Clapper had an art. I, § 22 right to be present when the court considered and responded to the jury's question. *Irby*, 170 Wn.2d at 885; *Burdette*, 178

Wn. App. at 201. His interest in the judge's decision gave him that right so he could observe the conduct of the hearing, provide input, and monitor his attorney's performance.

The court violated Mr. Clapper's art. I, § 22 right to appear and defend in person by considering and responding to a jury question without him present.

B. The court violated Mr. Clappers Sixth and Fourteenth Amendment right to be present during all critical stages of his trial.

The Sixth and Fourteenth Amendments also afford an accused person the right to be present during all critical stages of a trial. *Irby*, 170 Wn.2d at 880-881; U.S. Const. Amends. VI, XIV.

This right requires that the accused be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)).

A primary purpose of the right to be present is to afford the accused the opportunity to participate in his/her defense by communicating with counsel, making suggestions, or even "supersed[ing] his lawyers altogether." *Snyder*, 291 U.S. at 106; *See also Illinois v. Allen*,

397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Irby*, 170 Wn.2d at 883.

The court's consideration and answer of the jury's questions was a critical stage of Mr. Clapper's trial because his presence was related to the opportunity to fully defend against the charge and to participate in his defense. *Irby*, 170 Wn.2d at 880-881; *Snyder*, 291 U.S. at 106. As outlined above, Mr. Clapper's constitutional rights were at stake when the court was determining how to respond to the deliberating jury. Due process also afforded him the constitutional right to be present in order to monitor his attorney's performance, provide input, or supersede his lawyer if necessary. *Id.*

The court violated Mr. Clapper's Sixth and Fourteenth Amendment right to be present at all critical stages by considering and responding to a question from the deliberating jury without him there. CP 18; RP 196. Mr. Clapper's conviction must be reversed. *Irby*, 170 Wn.2d at 880-881; *Snyder*, 291 U.S. at 106.

C. The court's violation of Mr. Clapper's constitutional rights was not harmless beyond a reasonable doubt.

The violation of Mr. Clapper's constitutional rights to appear and defend in person and to be present during all critical stages of his trial requires reversal unless the state can show harmlessness beyond a

reasonable doubt. *Burdette*, 178 Wn. App. at 201; *Ratliff*, 121 Wn. App. at 648. The state cannot meet that burden in this case.

Violation of these rights can be harmless when untainted evidence of guilt is overwhelming. *State v. Pruitt*, 145 Wn. App. 784, 788, 187 P.3d 326 (2008). That is not the case here.

As argued above, the state did not present any evidence that Mr. Clapper was actually driving the car. The evidence against him was not extensive enough to overcome the violation of his constitutional rights. *Id.*

The state also cannot demonstrate that the court's answer to the jury's question could not have been different if Mr. Clapper had been present. The jury asked five very specific questions about evidence that the state failed to present in the case. CP 18. In response, the court told the jury to "review your instructions as to the law and your memories and notes as to the evidence submitted." CP 18.

Notably, the court did not specifically direct the jury to the instruction on the state's burden of proof, which would have reminded them of their duty to hold any evidentiary shortcoming against the state in determining whether the prosecution had met its burden. Had Mr. Clapper been privy to the hearing, he could have requested that the court do so.

The state cannot prove beyond a reasonable doubt that the violation of Mr. Clapper's rights to appear and defend in person and to be present at all critical stages of his trial was harmless. *Burdette*, 178 Wn. App. at 201. Mr. Clapper's conviction must be reversed. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS ON MR. CLAPPER, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).⁴

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. 380. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

⁴ Division II's commissioner has indicated that Division II will follow *Sinclair*.

The trial court found Mr. Clapper indigent at end of the proceedings in superior court. CP 43-44. That status is unlikely to change, especially with the addition of a felony conviction. CP 29-42. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations (LFOs). *Id.* at 839. Accordingly, the trial court ordered Mr. Clapper to pay only mandatory LFOs. CP 36-37.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The state presented insufficient evidence for any rational jury to find beyond a reasonable doubt that Mr. Clapper was the driver of the Toyota. The court violated Mr. Clapper’s constitutional rights to appear and defend in person and to be present during all critical stages of his trial by holding a hearing on several questions from the deliberating jury via three-way phone call with only the attorneys present. Mr. Clapper’s conviction must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Clapper who is indigent.

Respectfully submitted on July 11, 2016,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Earl T. Clapper
c/o Spokane County Detention Services
1100 W. Mallon Ave.
Spokane, WA 99260

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

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, 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 Seattle, Washington on July 11, 2016.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant