

NO. 35215-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

GIOVANNI KINSEY,
Appellant.

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

The Honorable Vic L. Vanderschoor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to a fair trial by the trial judge violating the appearance of fairness doctrine.
2. Appellant was denied his due process right to a fair trial by the judge commenting on the case.
3. Appellant was denied his due process right to the presumption of evidence by the judge commenting on the case.
4. Appellant was denied his right to effective assistance of counsel by his attorney arguing guilt in closing.

ISSUES PRESENTED ON APPEAL

1. Was Appellant denied his right to a fair trial by the trial court commenting on the evidence by informing the jury that he did not want to preside over Kinsey's trial but would rather be playing with his grandchildren?
2. Was Appellant denied his right to the presumption of innocence by the trial court commenting on the evidence by informing the jury that he did not want to preside over Kinsey's trial but would rather be playing with his grandchildren?
3. Did the trial court violate the appearance of fairness doctrine by the trial court commenting on the evidence by informing

the jury that he did not want to preside over Kinsey's trial but would rather be playing with his grandchildren?

4. Was Appellant denied his right to effective assistance of counsel by his attorney arguing that Kinsey was guilty as charged where the evidence was equivocal and there were no other charges or lesser offenses?

B. STATEMENT OF THE CASE

Giovanni Kinsey was charged by amended information and convicted of violating a misdemeanor no contact order under. RCW 26.50.110(1), RCW 10.99.020. CP 48, 73. Kinsey presented a diminished capacity defense. RP 162-207. The trial court declared a mistrial in two former trials for the same matter. RP 61, 78.

a. Trial Facts.

Shannon Duran, Kinsey's ex-girlfriend and protected party with a no contact order naming Kinsey, went to a Chevron gas station at 1:25 am to make purchases. RP 89-90. Duran unexpectedly ran into Kinsey at the gas station. RP 94. Duran stopped her car when the police arrived with lights and sirens directed towards her vehicle. RP 93, 134. Kinsey never got into her car and Duran did not remember Kinsey ever touching her car or

approaching her. RP 93- 95, 97-98. Duran saw Kinsey when the police started to chase him and she left because she was driving with a suspended driver's license and was out on bail. RP 93- 95, 99.

The police were sitting in their cruiser across the street from the Chevron. RP 46. Officer Joshua Riley, testified that he heard an engine rev and heard a woman yell as she backed a red car out of the gas station. Riley also saw a man hanging on to the back of the car. RP 112. Riley testified that the man jumped into the car and "he was obviously in the car to retrieve a weapon or something like that". RP 116. Defense counsel did not object or move for a mistrial.

James Scott, another officer interviewed Duran who stated that Kinsey never entered Duran's car and that she drove away when he, the police, approached her car. RP 148. Duran told Scott that Kinsey grabbed her car. RP 149.

Riley believed he was witnessing a car-jacking. RP 116. Kennewick police officer Keith Schwartz was working with Riley the night of this incident and heard a woman yelling while a man ran along side of her red car. RP 133. Schwartz testified that the car

stopped and the man briefly got into the car which remained stopped, and the man fled when the police activated their emergency lights and siren. RP 133-134.

Schwartz chased Kinsey and tased him. RP 117, 137-38. Kinsey seemed exhausted and had a difficult time walking and could not respond to questions. RP 140. Schwartz testified that Kinsey did not smell like alcohol and seemed "as stable as normal". RP 139. Riley too testified that Kinsey did not smell of alcohol or exhibit any signs of intoxication but that when he entered the hospital, Kinsey:

became very lethargic, dead weight. I recall moving him physically, me and a nurse physically picking him up on a, you know, moving bed to different rooms, I mean totally dead weight."

RP 118, 120. Kinsey was lethargic and unresponsive during the entire time he was in the hospital. RP 120, 140-41.

The nurses and attending doctor, Robert Johnson, who each treated Kinsey, smelled alcohol and described Kinsey as "intoxicated". RP 154, 160. Dr. Johnson diagnosed Kinsey with "intoxication with complications". RP 151, 154.

b. Appearance of Fairness.

During Duran's testimony she expressed her frustration in front of the jury by stating: "How many trials", I have "been here how many weeks now?" RP 96. In response, the trial judge, in front of the jury stated the following:

THE COURT: No, I don't want to be here. I'd rather be at home with playing with my grandkids than being here dragging on and on and on. I want this over with.

RP 96.

Duran also testified that Kinsey had been in prison in August 2016. RP 89. Defense counsel moved for a mistrial based on Duran stating that Kinsey had been in prison but not based on the judge informing the jury that he did not want to be presiding over Kinsey's case. RP 96, 101. The court denied the mistrial:

Well, her testimony after she indicated something about previous trials or about him being in prison clearly showed that he wasn't in prison at the time. I'm not going to grant a mistrial.

RP 102. Two prior trials ended in mistrial. CP 33, 50.

c. Ineffective Assistance of Counsel.

During closing argument, without a jury instruction to support his argument, defense counsel argued that Kinsey got into Duran's

car, but that this was not a violation of the no-contact order because he did not linger. RP 232.

And it's important that we recognize that when Giovanni did get inside the vehicle, he exited immediately” And Shannon wasn't clear about her recollection of what happened. But the officers were pretty clear that Giovanni got into the vehicle. And at that point what do you do? I mean if you remain in the vehicle longer, that's clearly a violation. In fact, that's further stronger evidence of a violation. So at that point Giovanni basically has a choice. He can remain in the car and further violate the order or get out, and that's what the officer said that he did immediately

RP 232.

This timely appeal follows. CP 76.

C. ARGUMENTS

1. THE TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.

The trial court judge violated the appearance of fairness doctrine by informing the jury that he did not want to be presiding over the trial that was “dragging on and on” but would rather be with his grandchildren. RP 96.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, §§ 1, 22; U.S. Const.

Amends. VI, XIV; *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The Due Process Clause “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’ ” *Murchison*, 349 U.S. at 136 (citation omitted). Impartial means the absence of actual or apparent bias.” *In re PRP of Swenson*, 158 Wn. App. 812, 244 P.3d 959 (2010), *citing*, *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002).

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citing *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). Accordingly, an individual need only demonstrate evidence of a judge's potential bias for an appearance of fairness claim to succeed. *Gamble*, 168 Wn.2d at 187–88; *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141 (1996).

The test for determining whether the judge's impartiality

might reasonably be questioned is an objective one. *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022, 157 P.3d 404 (2007).

The appearance of fairness doctrine can be violated by the trial judge making disparaging comments. *In re Welfare of J.B., Jr.*, 197 Wn. App. 430, 387 P.3d 1152, 1158 (2016) (judge acknowledged that grandparents loved child but called grandmother and potential guardian a “stunning” liar) (*citing In re Welfare of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997)) (judge acknowledged mother loved child but told mother her children would be “handicapped” if left in her care).

In cases where a judge is challenged for actual bias or prejudice, and is asked to recuse him or herself, ordinarily a judge’s comments to the litigants outside the presence of the jury that he or she is frustrated with the lack of resolution will not constitute actual bias or prejudice. *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); *Sharkey v. J.P. Morgan Chase & Co.*, ___ F.Supp.3d ___ (2017 WL 1386350).

Here however, the comments were made in front of the jury and the challenge was to the appearance of fairness, not a

challenge for recusal based on actual bias or prejudice.

In both *J.B., Jr.*, and *O.J.*, the Courts determined that the trial judges “potentially disparaging comments” towards the parents were mitigated by a semblance of “awareness and sympathy” as well, which in context, ameliorated the impact of the “potentially disparaging remarks”. *J.B. Jr.*, 387 P.3d at 1158; *O.J.*, 88 Wn. App. at 697.

By contrast, here, in context, the trial judge did not express an awareness or understanding of the nature of the issues confronting Kinsey. Rather the judge expressed his opinion that Kinsey had no right to trial by stating to the jury that he did not want to preside over the trial that was dragging on and on and that he wanted to be playing with his grandchildren. RP 96.

These comments violated the appearance of fairness and were grossly inappropriate because telegraphing to the jury that a defendant is wasting the court’s time inferred that Kinsey did not have a valid right to trial. The trial court’s comments to the jury more than established evidence in which the trial judge’s impartiality “might reasonably be questioned.” *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007).

Accordingly, Kinsey's conviction must be reversed and the case remanded for a new trial in front of a different judge.

2. KINSEY WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT IMPUGNED KINSEY'S PRESUMPTION OF INNOCENCE.

a. Presumption of Innocence.

As previously stated, the United States and Washington State Constitutions entitle every criminal defendant to a fair trial by an impartial jury. U.S. Const. Amends. VI, XIV. Criminal defendants have a due process right to a fair trial by an impartial judge. Art. I, §§ 1, 22. The right to a fair trial includes the right to the presumption of innocence. *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005).

Central to the right to a fair trial is the principle that a defendant is "entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial," not "official suspicion, indictment, continued custody, or other circumstances" short of proof. *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)).

The trial court has the duty to protect the presumption of innocence, and ensure the fairness of the proceeding. *Gonzalez*, 129 Wn. App. at 900. In *Gonzalez*, the trial court undermined the presumption of innocence by informing the jury that: (1) the defendant was in jail because he could not post bail; (2) the Department of Corrections was transporting him back and forth; and (3) the defendant would appear in the courtroom in restraints and under guard. *Gonzalez*, 129 Wn. App. at 898. The Court granted Gonzalez a new trial.

Here, the trial court also undermined the presumption of innocence by informing the jury that the trial was a waste of time. RP 96. This communication with the jury denied Kinsey the right to the presumption of innocence because it telegraphed to the jury that the judge personally believed that trial was a wasteful formality. The trial court abused its discretion by denying the motion for a new trial. The remedy is to grant a new trial. *Gonzalez*, 129 Wn. App. at 902, 905.

b. RAP 2.5(a)(3) Permits Review.

Generally, reviewing courts do not review unpreserved claims of error. RAP 2.5(a). However, a “manifest error affecting a

constitutional right” is an exception to the rule. RAP 2.5(a)(3). A judicial comment on the evidence is a “manifest error affecting a constitutional right” that this court will consider for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006) (citing *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968)). This court will review for the first time on appeal a comment on the evidence that invades a constitutional provision. *Id.* This is so even if the evidence is undisputed or overwhelming. *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

Here, the judge’s comments constituted manifest error affecting the due process right to a fair trial. Accordingly, this Court should decide this issue on the merits.

3. THE TRIAL COURT’S COMMENT ON THE EVIDENCE DENIED KINSEY HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

The trial court improperly commented on the evidence when he informed the jury that he did not want to be presiding over the case but would rather be playing with his grandchildren. RP 96.

Art. IV, § 16 of the Washington State Constitution provides that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” *Id.*

A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999); *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974); *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Wash. Const. art. IV § 16).

“Even if the evidence commented upon is undisputed, or ‘overwhelming,’ a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.” *Bogner*, 62 Wn.2d at 258. All remarks and observations as to the facts before the jury are positively prohibited, and if any such are made the judgment will be reversed, unless the appellate court can see that the accused was no wise prejudiced thereby. *State v. Walters*, 7 Wash. 246, 250, 34 P. 938 (1893).

“The burden is not upon appellant to prove prejudice in this situation because prejudice is presumed. Reversible error has been committed unless it affirmatively appears from the record that appellant could not have been prejudiced by the trial judge's comments.” *Bogner*, 62 Wn.2d. at 259.

In *Bogner* the Court stated that the defense counsel suggestion that the state needed to prove if a robbery occurred and who committed the robbery was “getting a little ridiculous”. *Bogner*, 62 Wn.2d. at 249. The Supreme Court held that this comment conveyed to the jury, the judge’s personal opinion that a robbery had in fact occurred. *Bogner*, 62 Wn.2d. at 250. The comment violated the constitutional prohibition against a judge expressing his opinion. *Bogner*, 62 Wn.2d. at 255-56.

Here, the judge’s comment that he did not want to be in court presiding over Kinsey’s trial but would rather have been playing with his grandkids and not sitting through a trial that was dragging on an on, was far worse than the statement that the defense was getting a little ridiculous because here, the judge not only inferred that the crime had been committed, but also inferred that Kinsey committed the crime and there was no need for the

judge to waste his precious time presiding over the trial of a guilty defendant.

These comments were not declarations of law. They were improper expressions of the judge's personal attitude toward the merits of the case that denied Kinsey his due process right to the presumption of evidence and unconstitutionally relieved the state of its burden to prove all essential elements of the crime charge. *Lane*, 125 Wn.2d at 838; *Bogner*, 62 Wn.2d. at 255-56. The remedy is to remand for a new trial. *Id.*

4. COUNSEL RELIEVED THE STATE OF PROVING THE ELEMENTS OF THE CRIME CHARGED AND COMMITTED PREJUDICIAL INEFFECTIVE ASSISTANCE FOR ARGUING IN CLOSING THAT KINSEY WAS GUILTY AS CHARGED.

- a. Ineffective Assistance of Counsel.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). The Sixth Amendment and art. I, s§ 22 guarantee a

defendant the absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. Amend. VI; art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004);

State v. Aho, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). “The remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective.” *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). In this case, counsel was ineffective when he argued Kinsey was guilty of the single charge against him where the evidence of guilt was equivocal.

b. Elements of Crime Charged.

Kinsey was charged with a gross misdemeanor violation of a

no contact order under RCW 26.50.110(1) and RCW 10.99.020 (domestic violence). CP 48. The elements the state was required to prove were the existence of a valid no contact order and that Kinsey violated that order. *Id.* Kinsey stipulated to the existence of the valid no contact order. CP 62. Subsequently, the only element the state had to prove was that Kinsey violated the order. RCW 26.50.110(1).

Assault in the fourth degree is also a gross misdemeanor. RCW 9A.36.041(2).

c. No Sound Trial Tactics.

Entering a not guilty plea preserved Kinsey's right to a fair trial and his right to hold the state to its burden of proof. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477, *review denied*, 145 Wn.2d 1012 (2001). Conceding guilt in closing argument on a particular count can be a sound trial tactic when the evidence on that count is overwhelming and when the count is a "lesser count" and there may be an advantage gained by winning the confidence of the jury. *Silva*, 106 Wn. App. at 596; *State v. Hermann*, 138 Wn. App. 596, 605, 158 P.3d 96 (2007) (evidence of guilt overwhelming).

In *Silva*, defense counsel's decision to concede guilt in closing was a sound trial tactic where the evidence on that count was overwhelming but permitted acquittal on less serious charges. *Silva*, 106 Wn. App. at 597.

By contrast to *Hermann* and *Silva*, here, counsel argued guilt on the sole count against Kinsey. The defense did not and could not have requested a lesser included offense instruction because counsel stipulated to the existence of the valid no contact order leaving the state to only prove contact. RCW 26.50.110. When counsel volunteered that got into Duran's car, he conceded the issue of Kinsey violating the no contact order, the only disputed issue in the case.

Unlike in *Silva* and *Hermann*, counsel's concession here relieved the state of its burden of proving each element beyond a reasonable doubt. There was no lesser count to consider, and admitting that Kinsey got into the car admitted guilt on the sole charge against Kinsey. Under these circumstances trial counsel's decision was not sound trial tactics, but rather prejudicial ineffective assistance of counsel which requires reversal and remand for a new trial.

D. CONCLUSION

For the reasons presented herein, Mr. Kinsey respectfully requests this Court reverse and remand for a new trial based on denial of the right to a fair trial and denial of the right to effective assistance of counsel.

DATED this 22nd day of August 2017.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Benton County Prosecutor's Office prosecuting@co.benton.wa.us and Giovanni Kinsey, 802 North 24th Avenue, Pasco, WA 99301 a true copy of the document to which this certificate is affixed on August 22, 2017. Service was made by electronically to the prosecutor and Giovanni Kinsey by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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