

FILED
Court of Appeals
Division III
State of Washington
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No. 355811

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JESSE LEE CRISWELL,

Appellant.

BRIEF OF RESPONDENT

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PROSECUTING ATTORNEY

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
I. ASSIGNMENTS OF ERROR	1
1. The court erred in imposing \$500 in restitution.....	1
2. Juror misconduct resulted in an unfair trial.	1
II. ISSUES RELATING TO ASSIGNMENTS OF ERROR	1
1. Should the court dismiss the restitution issues as moot when the restitution order has already been amended?	1
2. Should the court review the allegations of juror misconduct when there is an insufficient record?.....	1
3. Did Mr. Criswell waive the issue of juror misconduct?	1
III. STATEMENT OF THE CASE	1
IV. ARGUMENT	2
A. Mr. Criswell has already received the relief he requested in regard to restitution	2
B. The court should not review the allegations of juror misconduct at this time	2
C. Mr. Criswell waived any claim of juror misconduct	2
V. CONCLUSION	3

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<i>Casey v. Williams</i> , 47 Wn.2d 255, 287 P.2d 343 (1955)	3
<i>Pacheco v. Safeco Ins. Co. of Am.</i> , 116 Idaho 794, 780 P.2d 116 (1989).....	3
<i>People v. Holloway</i> , 33 Cal. 4th 96, 91 P.3d 164, 14 Cal. Rptr. 3d 212 (2004)	3
<i>State v. Calvin</i> , 176 Wn. App. 1, 316 P.3d 496 (2013).....	2
<i>State v. Irby</i> , 170 Wn.2d 874, 246 P.3d 796 (2011)	3
 <u>STATUTES AND OTHER AUTHORITIES</u>	
CrR 7.8	2
RAP 7.2(e)	1

I. ASSIGNMENTS OR ERROR

1. The court erred in imposing \$500 in restitution.
2. Juror misconduct resulted in an unfair trial.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Should the court dismiss the restitution issues as moot when the restitution order has already been amended?
2. Should the court review the allegations of juror misconduct when there is an insufficient record?
3. Did Mr. Criswell waive the issue of juror misconduct?

III. STATEMENT OF THE CASE

The facts of the trial are not important to the issues raised. In summary Jesse Criswell was convicted of passing eight fake fifty dollar bills, although ten were found in the till. The Court ordered \$500 in restitution. In his regular appeal Mr. Criswell only argued that restitution should be \$400 instead of \$500. The State conceded the point, asked the trial court to enter an order correcting the issue, and the Court of Appeals Commissioner approved under RAP 7.2(e). Mr. Criswell also filed a statement of additional grounds alleging facts outside the record relating to juror misconduct.

IV. ARGUMENT

A. Mr. Criswell has already received the relief he requested in regard to restitution.

The restitution was reduced by \$100. That was all Mr. Criswell asked for in his primary appeal, thus this issue is moot and the court should not consider it.

B. The court should not review the allegations of juror misconduct at this time.

Mr. Criswell makes allegations outside the record that the State has not had an opportunity to respond to, nor has a trial judge vetted them for credibility or tested them in the adversarial process. Because the record has not been established as to this issue the court should not review it. Mr. Criswell can file a CrR 7.8 motion or Personal Restraint Petition.

“[I]ssues that involve facts or evidence not in the record are properly raised through a personal restraint petition, not a statement of additional grounds.” *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496, 508 (2013). Here the State does not have an interview with the juror in the record. The court should decline to review this issue for this reason.

C. Mr. Criswell waived any claim of juror misconduct.

Mr. Criswell waived this issue when he failed to raise it in the trial court in time to seat the other alternate juror. The universal rule is that a party with knowledge of juror misconduct waives any objection to it when

he knows about the misconduct but fails to speak, instead gambling on the verdict and only objecting after the fact. *Casey v. Williams*, 47 Wn.2d 255, 287 P.2d 343 (1955), *Pacheco v. Safeco Ins. Co. of Am.*, 116 Idaho 794, 780 P.2d 116 (1989); *People v. Holloway*, 33 Cal. 4th 96, 124, 91 P.3d 164, 183, 14 Cal. Rptr. 3d 212, 235 (2004).

Defendants are not potted plants, there is a reason voir dire and trials are critical stages of the proceedings, requiring the defendant's presence. *State v. Irby*, 170 Wn.2d 874, 882-84, 246 P.3d 796 (2011). Mr. Criswell could have told his attorney at any time that he knew a juror and had a conflict with him.

According to Mr. Criswell's own statement he had several confrontations with Mr. Melvin, and they knew each other well, although not cordially. Mr. Melvin was originally an alternate juror, seated in plain view of Mr. Criswell, and yet Mr. Criswell remained silent, even when the juror was seated on the panel. Mr. Criswell chose to gamble on the verdict. Mr. Criswell had an obligation to tell his attorney who the alternate juror was, and chose not to do so. He waived any claim of error regarding this issue.

V. CONCLUSION

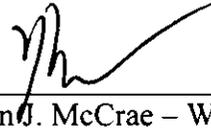
The court should not reach any of the issues involved in this appeal. The first issue is already resolved in Mr. Criswell's favor. His

issue from his statement of additional grounds is based on facts not in the record. The court should disregard it. Even if the court reaches this issue, it should dismiss based on the fact that Mr. Criswell had an opportunity to correct the issue and waived it.

Dated this 7th day of June 2018.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney

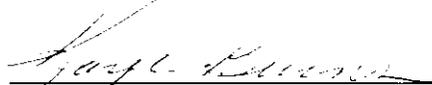
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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: June 7, 2018.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

June 07, 2018 - 10:57 AM

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