

FILED  
Court of Appeals  
Division III  
State of Washington  
11/6/2018 8:00 AM

NO. 36000-8-III

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JEREMY SHANE TRACY,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## ASSIGNMENTS OF ERROR

1. Jeremy Shane Tracy was denied a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22.
2. The trial court committed reversible error when it allowed a deliberating jury to separate and go to lunch in violation of RCW 4.44.300 and/or CrR 6.7(b).
3. The trial court's actions involving a deadlocked jury created an impression that the jury was required to reach a verdict and placed pressure on those jurors who appeared to be the dissenters when the jury was polled.
4. The imposition of a \$200.00 filing fee and a \$100.00 DNA fee is in contravention of *State v. Ramirez, slip opinion 95249-3* (September 20, 2018).
5. Condition (19) of Appendix "H" is unconstitutionally vague as it has been imposed based upon the following language "and [*sic*] location where children are known to congregate." (CP 240)

## ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Was Mr. Tracy denied a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22 when
  - (a) the trial court allowed a deliberating jury to separate and go to lunch; and
  - (b) after being advised that the jury was deadlocked sending the jury back for continued deliberations following polling the jury and determining that there was a nine-three split?

2. Should Mr. Tracy be relieved of a \$200.00 filing fee and a \$100.00 DNA fee due to indigency?

3. Should condition (19) of Appendix “H” be removed from the Judgment and Sentence as being constitutionally vague?

### **STATEMENT OF THE CASE**

D.L.D. (DOB 3/28/2003) accused Mr. Tracy of sexual abuse. The State charged Mr. Tracy with one (1) count of first degree child rape on March 30, 2017. An Amended Information was filed on February 21, 2018 adding a second count of first degree child rape. (CP 1; CP 119; RP 244, l. 24)

The Amended Information indicates that the alleged offenses occurred between May 1, 2010 and February 1, 2011. Mr. Tracy had previously pled guilty to child molestation second degree, involving D.L.D., on June 20, 2011. (CP 54; RP 50, ll. 19-22)

Detective Anderson of the Klickitat County Sheriff’s Office met with Mr. Tracy on November 2, 2016 at the Grant County Jail. *Miranda*<sup>1</sup> warnings were provided. Mr. Tracy claimed that the matter was frivolous and that his prior guilty plea took care of the matter. He otherwise did not agree to talk to the detective. (RP 36, l. 25 to RP 37, l. 3; RP 37, ll. 8-18; RP 38, ll. 9-11; RP 39, l. 23 to RP 40, l. 2)

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)

The trial court conducted a CrR 3.5 hearing on February 5, 2018. It ruled that any statement made by Mr. Tracy to Detective Anderson would be admissible with the exception of the request for an attorney. Findings of Fact and Conclusions of Law were later entered on April 2, 2018. (CP 222)

Mr. Tracy was arraigned on September 5, 2017. A number of waivers and continuances were entered and trial commenced on February 21, 2018. (CP 6; CP 15; CP 16; CP 17; RP 8, l. 5 *et seq*)

At trial D.L.D. testified concerning two (2) incidents involving Mr. Tracy. The first involved a bunkbed. The second involved when her mother had gone to her grandfather's funeral. Kelli Bullock, D.L.D.'s mother, confirmed that a bunkbed had been purchased in June of 2010 and that D.L.D.'s grandfather died in August 2010. (RP 243, ll. 12-17; RP 255, ll. 21-25; RP 256, ll. 20-24; RP 275, ll. 8-10; RP 288, l. 16 to RP 289, l. 21)

D.L.D. described the bunkbed incident as Mr. Tracy inserting his penis into her vagina. (RP 288, l. 16 to RP 289, l. 21)

The funeral incident allegedly involved Mr. Tracy carrying D.L.D. down a hallway into her mother's bedroom. He took off her clothes. She was naked on the bed. He took off his pants and had her perform oral sex on him. He ejaculated but she did not swallow it. (RP 276, ll. 10-16; l. 24; RP 278, ll. 18-21; RP 279, ll. 4-18; RP 281, ll. 11-20)

D.L.D. also testified concerning the child molestation incident which Mr. Tracy pled to in June 2011. She denied that he touched her. She denied seeing his penis or any sperm during that incident. (RP 284, ll. 16-23)

D.L.D. did not reveal either the bunkbed or funeral incident to her mother until September 2016. She only told her mother because her mother kept asking her questions concerning whether anything else had happened after the child molestation incident. (RP 291, ll. 18-24; RP 292, ll. 16-21; RP 297, ll. 7-12)

Mr. Tracy testified at trial and denied both accusations. (RP 331, ll. 19-23)

The jury was released for its deliberations at 10:45 a.m. on February 22, 2018. They continued deliberating until 12:15 p.m. when jury questions were submitted. (RP 409, ll. 15-16)

The trial court had the jury return to the courtroom and read the answers to their two (2) questions to them. After reading the answers to the questions the trial court released the jury for lunch. Cautionary instructions were given; but the jury was allowed to separate without objection. (RP 413, l. 6 to RP 414, l. 23)

When the jury returned from lunch the Court advised them to recommence deliberations. The jury then deliberated from 1:22 to 2:22 p.m. (RP 416, ll. 1-19)

The jury sent another question to the trial court. The trial court was advised that the jury was deadlocked. The jury was brought back into the courtroom and polled. The split of the jurors indicated that three (3) felt a verdict could still be reached and nine (9) did not believe a verdict could be reached. (CP 202; RP 416, l. 20 to RP 417, l. 3; RP 425, ll. 1-16; RP 425, l. 23 to RP 429, l. 14; Appendix "A")

The trial court directed the jury to continue deliberations. The Court stated:

Alright. Alright. Ladies and gentlemen, at this point in time  
I am going to go ahead and excuse you back to the back room  
for a bit longer to continue with your deliberations at this

point in time. I appreciate the input at this point in time; but I am going to go ahead and excuse you into the backroom for further deliberations.

(RP 429, ll. 15-21)

The jury continued to deliberate from 2:35 p.m. to 4:03 p.m. when they returned with verdicts of guilty on both counts. (CP 203; CP 204; RP 431, ll. 13-18)

Judgment and Sentence was entered on April 2, 2018. Appendix H included condition (19) which states that Mr. Tracy is “not [to] frequent playgrounds, parks, schools, and [*sic*] location where children are known to congregate.”

The trial court also imposed a \$200.00 filing fee and a \$100.00 DNA fee. Mr. Tracy had previously been convicted of felonies in the State of Washington and DNA fees should have been collected.

Mr. Tracy filed his Notice of Appeal on April 3, 2018. (CP 241)

### **SUMMARY OF ARGUMENT**

Mr. Tracy was denied a constitutionally fair trial due to the trial court allowing the jury to separate during deliberations in violation of RCW 4.44.300 and/or CrR 6.7(b).

The fairness of the trial was further compromised when the trial court polled the jury after it declared itself deadlocked and then sent it back for further deliberations.

Since Mr. Tracy is indigent the imposition of the \$200.00 filing fee and \$100.00 DNA fee must be removed from the Judgment and Sentence.

Condition (19) in Appendix “H” is unconstitutionally vague per the rulings in: *State v. Irwin*, 191 Wn. App. 644, 650-51, 364 P.3d 830 (2015); *State v. Norris*, 1 Wn. App.2d 87, 95, 404 P.3d 83 (2017), *review granted*, 190 Wn.2d 1002 (2018); and *State v. Wallmuller*, 4 Wn. App.2d 698, 703 (2018).

## **ARGUMENT**

### **I. DENIAL OF FAIR TRIAL**

#### **A. Separation of Jury**

Mr. Tracy was denied a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22. The constitutional provisions provide that due process is inclusive of a fair and impartial trial.

It is Mr. Tracy’s position that the trial court violated both RCW 4.44.300 and CrR 6.7(b) when it allowed the jury to separate during deliberations.

RCW 4.44.300 provides:

During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of the deliberating jury are allowed to separate they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

The violation of RCW 4.44.300 occurred when the trial court failed to inquire, on the record, whether good cause for denying separation of the deliberating jury existed.

When the deliberating jury was allowed to separate, they were not under the charge of any court officer. Usually a bailiff is the person who is in charge of a deliberating jury.

By allowing the jury to go out in public, separate themselves, obtain lunch, and do whatever else they may have done during this time period, the trial court created a situation fraught with danger whereby individual jurors could be contaminated by information that they obtained and discussions they may have had with persons other than deliberating jurors.

CrR 6.7(b) provides, in part:

Unless the jury is allowed to separate, the jurors **shall** be kept together under the charge of one or more officers until they agree upon their verdict or are discharged by the court. The officer shall keep the jurors separate from other persons and shall not allow any communication which may affect the case to be made to the jurors, nor make any himself, unless by order of the court, except to ask the jurors if they have agreed upon their verdict. ...

(Emphasis supplied.)

The interplay of RCW 4.44.300 and CrR 6.7 was thoroughly discussed in *State v. Smalls*, 99 Wn.2d 755, 765-66, 665 P.2d 384 (1983). The *Smalls* Court ruled:

The Court of Appeals interpretation of CrR 6.7 curtails the application of RCW 4.44.300 to criminal trials despite interpretations to the contrary over sixty years or more. This is a substantial restriction on the application of the statute. CrR 6.7, on the other hand, is quite susceptible to the interpretation that it applies only to proceedings prior to submission of the case to the jury. Such an interpretation harmonizes CrR 6.7 and RCW 4.44.300 considerably more effectively than curtailing the statute's application to criminal cases altogether. ...

We hold, therefore, that CrR 6.7 applies only to proceedings prior to the beginning of deliberations by the jury. **Accordingly, RCW 4.44.300 continues to prohibit separation of the jurors during deliberations. If the jury is separated in violation of RCW 4.44.300, a presumption arises that defendant has been prejudiced.**

This conclusion is supported not only by authority, but by sound policy. Jurors might be subjected to any number of prejudicial influences whenever the jury is allowed to separate. A juror allowed to return to his home overnight might be prejudiced by any of the myriad influences on his life. Who can say how a juror might be influenced by contact with his family and friends, or exposure to the various news and entertainment media during an evening at home?

In our opinion, jurors are especially sensitive to prejudicial influence during deliberations. While still hearing evidence, it is probably easier for jurors to keep an open mind. Moreover, the impact of potentially prejudicial influences would be dissipated by subsequent evidence, the arguments, and instructions. But when the jurors have heard all the evidence, and have been focused onto the issues before them by the arguments of the parties and instructions, the potential for prejudice increases substantially.

Mr. Tracy recognizes that the statute was amended by LAWS OF 2003, ch. 406, § 17. However, the amendment merely adopted the language of CrR 6.7(b). The reasoning of *Smalls* does not change.

#### **B. WPIC 4.70**

The trial court, in response to the jury note saying it was deadlocked, attempted to comply with WPIC 4.70. (Appendix “B”)

If the trial court had not polled the jury, there may not have been any issue concerning its inquiry. However, the polling of the jury created a situation whereby three (3) of the jurors were placed in an untenable position. The nine (9) to three (3) split was indicative of how the jurors had voted.

When the trial court directed the jury to return and continue deliberations it subjected the three (3) jurors to unnecessary pressures to reach a verdict.

Mr. Tracy recognizes that the trial court did not impose a time limit on deliberations. However, that does not negate the implications that arise from the polling.

*State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) sets out the dangers involved with polling:

The questioning of individual jurors, with respect to each juror's opinion regarding the jury's ability to reach a verdict in a prescribed length of time, after the court was apprised of the history of the vote in the presence of the jurors, unavoidably tended to suggest to minority jurors that they should "give in" for the sake of that goal which the judge obviously deemed desirable - namely, a verdict within a half hour.

Polling the jury indicated the nature of the vote. What is not known is whether or not the vote in the jury room was by ballot or by hand.

If the vote was by ballot, the polling disclosed those jurors who were voting for acquittal. If it was by hand, then the other jurors already knew who the dissenting jurors were.

The *Boogaard* Court cited *Brasfield v. United States*, 272 U.S. 448, 450, 71 L. Ed. 345, 47 S. Ct. 135 (1926). In doing so it adopted the following language at 737-38:

We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose de-

liberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

If the trial court had stuck to the content of WPIC 4.70, and not conducted a poll, then the juror split would not have been revealed and undue pressures avoided.

As the *Boogaard* Court concluded at 740:

The polling of the jurors upon a question involving their deliberations threatens the prospect of a verdict free from outside influence. That sound procedure does not contemplate such questioning as manifest from the fact that neither the statutes of this state nor the rules of court make any provision for polling of the jury before the verdict is returned.

Even though both the prosecuting attorney and defense counsel agreed to have the trial court poll the jury, all of them were in error. It resulted in an invasion of the jury deliberations.

## **II. LEGAL FINANCIAL OBLIGATIONS (LFO'S)**

Mr. Tracy recognizes that the trial court would not have known that a decision concerning the \$200.00 filing fee and the \$100.00 DNA fee entered on September 20, 2018 would declare legislation prospective.

LAWS OF 2018, ch. 269, § 17 became effective June 7, 2018.

The new law amended RCW 36.18.020(2)(h) which provided for collection of a \$200.00 filing fee. The amendment now precludes collecting that fee if a defendant is determined to be indigent. *State v. Ramirez, supra*.

The trial court determined that Mr. Tracy was indigent. An order of indigency was entered in connection with this appeal. (CP 242)

Moreover, the *Ramirez* decision recognized that LAWS OF 2018, ch. 269, § 18 amended RCW 43.43.7541 which now prohibits collection of a DNA fee if it has previously been collected.

Mr. Tracy's DNA was collected in connection with his June 20, 2011 conviction for second degree child molestation. (CP 72)

The designated LFOs should be removed from the Judgment and Sentence if his convictions are not reversed and the case dismissed.

### **III. APPENDIX H**

Mr. Tracy contends that the language of Condition (19) set out in Appendix H is unconstitutionally vague due to inclusion of the language "and [*sic*] location where children are known to congregate."

The word "and" appears to be a misspelling of the word "any."

It is well established that that language is unconstitutionally vague as recognize in the following cases: *State v. Irwin, supra*; *State v. Norris, supra*; and *State v. Wallmuller, supra*.

### **CONCLUSION**

Mr. Tracy contends that he is entitled to have his convictions reversed on these jury issues and the case dismissed. Any further proceedings would be a violation of his right against double-jeopardy under the Sixth Amendment to the United States Constitution and Const. art. I, § 9.

In the event Mr. Tracy's convictions are not reversed the erroneous LFOs and condition (19) of Appendix "H" must be removed.

DATED this 6th day of November, 2018.

Respectfully submitted,

s/ Dennis W. Morgan

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## APPENDIX “A”



FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KLICKITAT COUNTY

FEB 22 2018

STATE OF WASHINGTON,  
Plaintiff,

Case No.: 17-1-00032-1 KLICKITAT COUNTY CLERK

vs.

JUROR QUESTION FOR THE COURT

JEREMY SHANE TRACY,  
Respondent

Presiding Juror: Write your question here. The court will review the question with the attorneys and decide whether the question is proper and determine what response if any can be given.

What should we do when we are unable to agree unanimously? We have jurors who will not change their vote, and claim nothing we can do/say will alter that belief.

Presiding Juror: LARSON, RALPH A Date: 22 FEB 18

Inquired of the parties. Inquired of the jurors per WPIC 4.70. Sent jurors back to continue deliberating.

Judge:  Date: 2-22-18 Time: 2:35 pm

Plaintiff's Attorney: David M. Wall

Defendant's Attorney: 

S20-000000202

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## APPENDIX “B”

### WPIC 4.70

#### PROBABILITY OF VERDICT

**I have called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. First, a word of caution: Because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are going. You must not make any remark here in the courtroom that may adversely affect the rights of either party or may in any way disclose your opinion of this case or the opinions of other members of the jury.**

**I am going to ask your presiding juror if there is a reasonable probability of the jury reaching a verdict within a reasonable time. The presiding juror must restrict [his] [her] answer to “yes” or “no” when I ask this question and must not say anything else.**

(Address the following question(s) to the presiding juror:)

**Is there a reasonable probability of the jury reaching a verdict within a reasonable time [as to all of the counts] [as to all of the defendants]? [Is there a reasonable probability of the jury reaching a verdict within a reasonable time as to any [count] [defendant]?]**

(The judge may wish to ask the other jurors for an indication as to their agreement or disagreement.)

**[The bailiff will now take you back to the jury room in order to continue your deliberations [and complete the verdict form or forms as to any [count] [defendant] on which you are able to reach a verdict].]**

**NO. 36000-8-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	KLICKITAT COUNTY
Plaintiff,	)	NO. 17 1 00032 1
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
JEREMY SHANE TRACY,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 6<sup>th</sup> day of November, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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**November 06, 2018 - 7:41 AM**

**Transmittal Information**

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