

63974-9

63974-9

NO. 63974-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GREGORY JORDAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG
AND GREG CANOVA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Whether the trial court properly exercised its discretion in denying the defendant's request for a fourth appointed attorney based on the defendant's refusal to cooperate with his third appointed attorney.

2. Whether the trial court properly exercised its discretion in refusing to excuse a juror based on the court's own observations that the juror did not fall asleep.

3. Whether the State impermissibly commented on the defendant's silence where the State did not elicit testimony that the defendant remained silent and did not draw any inferences from the lack of any statements by the defendant.

B. STATEMENT OF THE CASE.

Gregory Jordan was charged with the crimes of possession of cocaine and driving under the influence. CP 1-2. The facts presented at trial established that Trooper Dan McDonald of the Washington State Patrol responded to a 911 call reporting a

possible drunk driver on Interstate 405. RP 127.¹ Trooper McDonald found a car that matched the description and license plate given by the 911 caller driving north on Interstate 405 near State Route 522. RP 127. He followed the car for a quarter of a mile and observed it cross the fog line twice and the skip line² three times in that distance. RP 129. Trooper McDonald stopped the car. RP 130.

Gregory Jordan was driving the car. RP 132. Jordan began to exit the car, but Trooper McDonald instructed him to stay in his car. RP 131. As Trooper McDonald spoke to Jordan, he observed a glass pipe with burned residue lying on the driver's floorboard. RP 133. Jordan seemed drowsy and his speech was slow and slurred. RP 133. Trooper McDonald asked Jordan to perform some field sobriety tests. RP 134-43. Trooper McDonald formed the opinion that Jordan was not under the influence of alcohol but was nonetheless "extremely impaired." RP 138, 143. He placed Jordan under arrest. RP 143.

¹ The trial testimony, including the CrR 3.5 hearing, is contained in four consecutively paginated volumes dating from June 18, 2009 to June 25, 2009, and will be referred to herein as "RP." A pretrial hearing that occurred on May 8, 2009 will be referred to as "Pretrial RP." The sentencing hearing that occurred on July 17, 2009, will be referred to as "Sentencing RP."

² Trooper McDonald explained that the skip line was elevated, with "little turtles" or bumps. RP 130.

In a search of Jordan's person, Trooper McDonald found a plastic bag containing cocaine, four prescription bottles, three syringes, and several pieces of burned glass. RP 145, 218. In a search of Jordan's car, Trooper McDonald found three more prescription bottles and seized the crack pipe he had seen initially. RP 146. Two of the prescription bottles were labeled for narcotics. RP 148-50. Trooper McDonald twice read Jordan his Miranda³ rights and also read him the implied consent warning. RP 144, 161, 165. Jordan was at first belligerent after his arrest and during his transport to the Washington State Patrol office, and then had trouble staying awake. RP 161. Jordan refused to give a blood sample. RP 207-08.

The jury found Jordan guilty as charged. CP 11-12. The jury also found by special verdict that Jordan refused to submit to a blood test. CP 13.

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST FOR APPOINTMENT OF A FOURTH ATTORNEY.

Jordan contends that the trial court abused its discretion in denying his motion for appointment of new counsel on May 8, 2008. This claim is without merit. The court properly exercised its discretion in denying Jordan's motion to have a fourth attorney appointed to represent him based on his refusal to cooperate with his second and third appointed attorneys.

At a hearing on May 8, 2008, Jordan's attorney, Brian Todd, requested that he be allowed to withdraw as counsel because Jordan was refusing to cooperate with him. Pretrial RP 3-4. Jordan's history with appointed counsel was outlined at the hearing, which was held before Judge Armstrong. Mr. Todd was Jordan's third lawyer on this case. Pretrial RP 7. It is unclear from the record why Jordan's first lawyer withdrew. Pretrial RP 7. Jordan's second lawyer was allowed to withdraw, according to Judge Armstrong, because "Mr. Jordan refused to get along with him." Pretrial RP 7. Mr. Todd reported that upon visiting Jordan in the jail for the first time, "communications broke down within the first 25

seconds." Pretrial RP 4. Mr. Todd had represented Jordan in a past case, and according to Jordan, "he sent me to the joint before on something." Pretrial RP 5. Concluding that no attorney would satisfy Jordan, Judge Armstrong denied the motion to substitute new counsel. Pretrial RP 6-7; CP 6.

On the first day of trial, Judge Canova inquired as to whether Jordan wished to represent himself. RP 22. Jordan stated that he could not handle the case himself. RP 23.

The focus of any inquiry under the Sixth Amendment is the adversarial process, not the relationship between the accused and his attorney. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). The Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel. Morris v. Slappy, 461 U.S. 1, 3-4, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). Otherwise, a defendant could bring the proceedings to a standstill by refusing to cooperate with any counsel.

A criminal defendant who is dissatisfied with appointed counsel due to a breakdown of communication must show good cause to warrant substitution of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). The factors to

be considered are (1) the extent of the conflict, (2) the adequacy of the court's inquiry, and (3) timeliness of the motion. Id. at 724. The appellate court reviews trial court decisions relating to attorney/client differences for abuse of discretion. Id. at 733 (citing State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991)).

When a defendant fails to provide the court with legitimate reasons for the substitution of appointed counsel, the court may require the defendant to either continue with current counsel or represent himself. DeWeese, 117 Wn.2d at 376. A defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications when he simply refuses to cooperate with his attorney. State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007).

The present case resembles the facts of DeWeese. In DeWeese, conflicts developed between the defendant and his first court-appointed counsel and that attorney was allowed to withdraw. Id. at 372. When DeWeese had disagreements with his second court-appointed counsel, the court gave him the option of continuing with counsel or representing himself. Id. DeWeese chose to represent himself. Id. at 373. The state supreme court held that the court had properly denied DeWeese's request for new

counsel, noting that "unsubstantiated allegations" by the defendant are insufficient justification for substitution of counsel. Id. at 376, 379.

The factors set forth in Stenson support the trial court's decision not to allow the appointment of a fourth attorney for Jordan. First, Jordan gave no valid reasons for his dissatisfaction with Mr. Todd. Second, the court gave Jordan the opportunity to articulate the reasons for his dissatisfaction and he failed to do so. This is not surprising, since according to Mr. Todd, Jordan failed to cooperate with him from the beginning of his representation. Although the motion for a third substitution of counsel was brought more than a month before the start of trial, the facts indicate that it was brought in order to continue to disrupt the proceedings and thus was tantamount to an untimely motion. The record reflects that Jordan received effective representation from Mr. Todd, who succeeded in suppressing Jordan's statements to Trooper McDonald, and who competently cross-examined the State's witnesses. The court did not abuse its discretion in denying Jordan's request for appointment of a fourth new attorney to represent him based solely on his refusal to cooperate with his appointed attorney.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO EXCUSE A JUROR AND DECLARE A MISTRIAL WHERE THERE IS NO EVIDENCE THAT THE JUROR FELL ASLEEP.

Jordan contends that the trial court abused its discretion in denying his motion for a mistrial based on his allegation that one of the jurors was sleeping. This claim should be rejected. The record reflects that the trial court was observing the juror's behavior, and that based on those observations the juror did not fall asleep. The trial court's observations must be granted deference. Given the court's observations, the trial court did not abuse its considerable discretion in denying the defense motion.

The trial in the present case involved only two witnesses: Trooper McDonald and a forensic scientist. In the middle of Trooper McDonald's testimony, outside the presence of the jury, the court admonished Jordan about talking loudly during the trooper's testimony. RP 155. The court inquired whether Jordan had any questions, and Jordan responded "I'd like to question the juror -- the one that's sleeping through the whole thing." RP 156. Upon further inquiry, defense counsel moved for a mistrial. RP 156. The basis for the mistrial, as presented by counsel, was "Juror No. 9 *apparently* continuing to fall asleep through the trooper's

testimony." RP 156 (emphasis added). It is unclear whether defense counsel was basing his allegation on his own observations or on Jordan's observations. In response, the court explained that he had closely observed Juror No. 9's behavior and set forth his observations as follows:

She would catch herself, after closing her eyes just for a second or two, and would seem to stay awake and be paying attention for a period of time, and then would occasionally do the same thing all over again.

I noticed this; I made eye contact with Juror No. 8, who, on at least one occasion, nudged Juror No. 9 gently with an elbow to get her attention. And then I made eye contact with Juror No. 9, probably five minutes -- approximately five minutes before recess. And from that point forward, she remained alert and attentive. So I'm going to keep an eye on her at this point.

I'm not going to grant the motion for mistrial now; I don't believe there's sufficient basis for it. But I will pay particular attention to Juror No. 9 when we bring them back in; and we'll reconsider my ruling, depending on her conduct.

RP 157-58. The court thereafter cautioned the jury to stay attentive. RP 158-59. Testimony continued and no further mention was made of Juror No. 9's conduct by either party. The motion for mistrial was not renewed.

A trial court's decision whether to excuse a juror is reviewed for abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204,

721 P.2d 902 (1986); State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000). RCW 2.36.110 provides that a judge has a duty to excuse any juror "who in the opinion of the judge" has manifested unfitness by reason of inattention. Jorden, 103 Wn. App. at 226. The trial court has discretion to hear and resolve a misconduct issue in a way that avoids tainting the jury and avoids creating prejudice against either party. Id. at 229. The court is not required to hold a formal hearing or question the juror. Id. at 227-28.

In Jorden, Division II of this Court noted that questioning a juror risks putting the juror in an adversarial position with the party requesting removal. Id. at 228. Likewise, questioning other jurors risks putting the jurors in an adversarial position with each other. Id. at 228. In this situation, the judge acts as both observer and decision-maker, and the appellate court gives substantial deference to the court's observations, as with other factual determinations that are made by the trial court. Id. at 229. In Jorden, the court affirmed the trial court's dismissal of a minority juror without questioning the juror based on the court's own observations that the juror had been sleeping during testimony. Id. at 226, 229.

Jordan's reliance on United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983) is misplaced. The question of juror misconduct is primarily a question of state law, based on state statutes and court rules. See State v. Ashcraft, 71 Wn. App. 444, 461-62, 859 P.2d 60 (1993) (power to manage courtroom derived from statute and court rules).

In any event, Barrett is distinguishable. In that case, a juror asked to be removed from the panel because he had been sleeping. Id. at 1082. The trial court refused to remove him. Id. at 1083. In denying a post-verdict motion to interview the juror, the trial court took judicial notice that none of the jurors were sleeping. Id. at 1083 n.11. The appellate court held that under those particular circumstances--with credible evidence from the juror himself that he had been sleeping and where it was unclear whether the trial court's decision was based on his own observations--the trial court abused its discretion in not conducting a hearing to determine whether the juror was sleeping. Id. at 1083. The court added even if the juror was sleeping, the defendant's right to a fair trial would not have been prejudiced unless the juror missed essential portions of the trial. Id. at 1083 n.13.

As Division II stated in Jorden, "the test is whether the record establishes that the juror engaged in misconduct." 103 Wn.2d at 229. In the present case, the record establishes that there was no misconduct. Neither the prosecutor nor the defense attorney offered their own observations of the juror's behavior. Given Jordan's disruptive behavior, his comments are suspect. The only credible evidence in the record of the juror's actual behavior is the observations of the trial court that the juror closed her eyes "for a second or two" several times before the court made eye contact with her, after which she stayed attentive. The record does not support Jordan's claim that she was sleeping.

The trial court's observations are to be accorded deference. Based on his observations that the juror never fell asleep, the court properly exercised its discretion in not excusing the juror. No formal hearing was required.

3. THE STATE DID NOT USE CONSTITUTIONALLY PERMITTED SILENCE AS EVIDENCE OF GUILT.

Jordan contends that the State unconstitutionally commented on Jordan's silence in response to police questioning after the court ruled that Jordan's statements to the police were

inadmissible. This claim is not supported by the record. The State did not elicit testimony that Jordan was silent, and did not draw any inferences that the lack of admissible statements by Jordan was indicative of guilt. Even if the very brief challenged testimony by Trooper McDonald could be construed as a comment on silence, the error was harmless.

After a CrR 3.5 hearing, the trial court granted Jordan's motion to suppress all statements that he made to Trooper McDonald, finding that they were not made following a knowing and voluntary waiver of his constitutional rights. RP 53-56; CP 32-34. In particular, the court suppressed Jordan's statement prior to his arrest that he took methadone and "a bunch of other drugs." RP 32. The court likewise suppressed Jordan's statement, made after he was advised of his rights, that he had taken methadone and other drugs. RP 37-38. The court suppressed Jordan's response to whether he agreed to give a blood sample: "hell, no, man." RP 38. The court ruled, however, that these statements were voluntary and would be admissible for impeachment if Jordan testified. RP 54; CP 34.

The court initially suppressed the fact that Jordan refused to give a blood sample. RP 56; CP 34. Upon the State's motion for

reconsideration, the court altered its ruling and allowed the State to present evidence that he refused to give a blood sample, but ruled that his actual statement was still inadmissible. RP 61; CP 34.

At trial, the State did not elicit any of Jordan's statements from Trooper McDonald. The State did ask Trooper McDonald if he advised Jordan of his Miranda rights at the scene and at the Washington State Patrol office. RP 143-44, 161-63. Trooper McDonald testified that he did advise Jordan of his rights, and he read the rights to the jury. RP 143-44, 161-62. There was no objection to these questions. RP 143-44, 161-63. The State also asked, "Did the defendant ever convey to you that he wanted to exercise his rights?" RP 164. The defense objection to this question was overruled. RP 164. Trooper McDonald answered "No, he did not." RP 164. Trooper McDonald testified that Jordan did not ask for an attorney. RP 164. In closing argument, the State did not discuss the lack of statements by Jordan or draw any inferences from the lack of statements.

The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). However, it is not constitutional error for a police witness to make indirect reference to

the defendant's silence absent further comment from the witness or the State. State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.3d 235 (1996). Moreover, Division II of this Court has concluded that testimony that an officer advised a defendant of his Miranda rights, by itself, is not a comment on the right to remain silent. State v. Slone, 133 Wn. App. 120, 126, 134 P.3d 1217 (2006). An unconstitutional comment on the right to remain silent is harmless if the State shows beyond a reasonable doubt that any reasonable juror would have reached the same result absent the error. Easter, 130 Wn.2d at 242.

In Lewis, the state supreme court held that the detective did not comment on the defendant's silence where the detective testified to statements he made to the defendant, but did not testify that Lewis refused to talk to him and did not draw any inference that Lewis's silence was proof of guilt. Lewis, 130 Wn.2d at 703, 706. The court held that "a comment of an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Id. at 707. The court found that the detective's testimony was not used in that way and was not a comment on silence. Id.

In this case, as in Lewis, there was no comment on the defendant's silence. First of all, Jordan did not exercise his right to remain silent. Second, Trooper McDonald did not testify that Jordan refused to talk to him. There was no inference made in the testimony or in closing argument that the lack of statements by Jordan was indicative of guilt.

Even if the brief testimony of Trooper McDonald--that Jordan was advised of his rights and did not convey that he wished to exercise his rights and did not request an attorney--could be construed as a comment on the right to remain silent, it was harmless beyond a reasonable doubt. There was overwhelming untainted evidence of Jordan's guilt: his weaving on the highway, his failure to properly perform the field sobriety tests, his slurred speech, his erratic behavior after arrest, the crack pipe found on the floor of his car, the cocaine found in his pocket, the numerous prescription bottles found on his person and in his car, and Jordan's refusal to submit a blood sample. This Court can conclude beyond a reasonable doubt that any reasonable jury would have reached the same result absent the challenged testimony.

D. CONCLUSION.

Jordan's convictions should be affirmed.

DATED this 2nd day of February, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JORDAN, Cause No. 63974-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

02/22/2010

Date