

NO. 64874-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
DAVID P. FENDICH,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MARY ROBERTS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DOUGLAS K. YOUNG
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

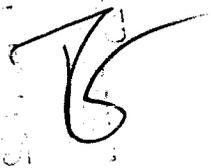


TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED.....	1
B. STATEMENT OF THE CASE	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. ARGUMENT.....	3
THE DEFENDANT'S RIGHTS WERE NOT VIOLATED WHEN THE COURT FOLLOWED THE AGREED-UPON PROCESS FOR REPLAYING THE 911 RECORDING; EVEN IF HIS RIGHTS WERE VIOLATED, ANY RESULTING ERROR WAS HARMLESS	
D. CONCLUSION.....	11

TABLE OF AUTHORITIES

Page

Washington Supreme Court cases

<u>State v. Bourgeois</u> , 133 Wash.2d 389, 945 P.2d 1120 (1997)	7,8
<u>State v. Caliguri</u> , 99 Wash.2d 501, 664 P.2d 466 (1983)	6,7,8
<u>State v. Koontz</u> , 145 Wash.2d 650, 41 P.3d 475 (2002)	9

Washington Court of Appeals cases

<u>State v. Allen</u> , 50 Wash.App 412, 749 P.2d 702, <i>rev denied</i> , 110 Wash.2d 1024 (1988).....	8
<u>State v. Langdon</u> , 42 Wash.App. 715, 713 P.2d 120, <i>rev. denied</i> , 105 Wash.2d 1013 (1986).....	8
<u>State v. Russell</u> , 25 Wash.App. 933, 611 P.2d 1320 (1980).....	8
<u>State v. Safford</u> , 24 Wash.App. 783, 604 P.2d 980 (1979), <i>rev. denied</i> , 93 Wash.2d 1026 (1980).....	8
<u>State v. Walker</u> , 13 Wash.App 545, 536 P.2d 657 (1975).....	4,5

Washington Statutes

RCW 9A.36.021.....	1
RCW 9A.36.031.....	1,2
RCW 9A.56.030.....	1

Washington Court Rules

CrR 6.15	4,5,6,7
----------------	---------

A. ISSUES PRESENTED

When the defendant is present with counsel during an on-the-record conversation between the court and the parties about potentially replaying a 911 tape for the jury during deliberations and when the court follows the agreed-upon process, has the court adequately protected the defendant's rights?

If the court has not adequately protected the defendant's rights, is the error harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Based on an incident which occurred on February 2, 2009, David P. Fendich was charged by Information on February 11, 2009, with the crime of Assault in the Third Degree (RCW 9A.36.031(1)(d)). CP 1-4. On July 31, 2009, the Information was amended: Count 1 became the alternative charges of Assault in the Third Degree (RCW 9A.36.031(1)(f)) and Assault in the Second Degree (RCW 9A.36.021(1)(a)), and Count 2 (Theft in the First Degree (RCW 9A.56.030(1)(b))) was added. CP 5-6. On August 10, 2009, the Information was amended yet again, but the sole change was to the prong of Assault in the Third Degree. Instead of

RCW 9A.36.031(1)(f), the State was now proceeding under RCW 9A.36.031(1)(d). CP 7-8.

A jury trial was conducted before Judge Mary Roberts on August 10-12, 2009. 8/10/09RP, 8/11/09RP, 8/12/09RP (for clarity, the respondent is adopting the appellant's nomenclature regarding the reports of proceeding even though 8/12/09RP contains information from August 11, 12, and 13, 2009). On August 13, 2009, the jury returned verdicts of guilty regarding Assault in the Third Degree (CP 16) and not guilty regarding Assault in the Second Degree (CP 15); the Theft in the First Degree charge had previously been dismissed. 8/12/09RP 24-25.

The defendant appealed his convictions. CP 53-58.

2. SUBSTANTIVE FACTS

For the purposes of this appeal, the State adopts the Statement of the Case as written by defendant's counsel in the Brief of Appellant with only the following alteration / addition.

After the jury left the courtroom to begin deliberations, the court proposed that, if the jury desired to hear the 911 tape again, the bailiff could replay it one time for them. The court asked the parties whether that proposal was acceptable so that a future

hearing could be avoided. Both parties readily agreed, and the defendant, present with counsel throughout this discussion, did not raise any objection. The court then continued by requesting that the attorneys review the tape to make sure that only the admitted portions of the tape would be available to the jury. 8/12/09RP 80-81, Sub #45A at 6. While the record provides no indication that the court explained to Mr. Fendich his rights regarding this issue, the record is likewise silent regarding any explanation or advice provided to Mr. Fendich from his inches-away attorney.

Additional facts from the trial are included in the argument sections to which they pertain.

C. **ARGUMENT**

THE DEFENDANT'S RIGHTS WERE NOT VIOLATED WHEN THE COURT FOLLOWED THE AGREED-UPON PROCESS FOR REPLAYING THE 911 RECORDING; EVEN IF HIS RIGHTS WERE VIOLATED, ANY RESULTING ERROR WAS HARMLESS.

The defendant argues that he had a right to be present when the deliberating jury listened again to the 911 recording and that the court's failure to include him when this replaying occurred rises to the level of constitutional error and requires reversal of his conviction. But the record below is clear: the defendant was

present with counsel and did not raise any objection when the parties agreed to the court's proposal that the 911 tape could be played once for the jury by the bailiff, and the bailiff did in fact play the less-than-two-minute recording one time for the jury without the presence of the judge, the attorneys, or the defendant. Sub #45A at 7. The court's decision and actions were well within the confines of CrR 6.15(f) and the applicable case law. There was no error.

However, even if the trial court's decision is found to have been erroneous, the decision should be viewed as harmless. The defendant was not prejudiced in any way by the court's actions; indeed, there was not even the possibility of prejudice.

The defendant initially argues that he had a constitutionally protected right to be present when the jury listened to the 911 recording. The defendant cites State v. Walker, 13 Wash.App. 545, 536 P.2d 657 (1975), in support of this proposition. Walker had not been present at a post-conviction hearing where testimony was taken regarding his previous competence to stand trial. His presence had been requested by his attorney, but this request was denied. The Walker court noted that Walker's absence deprived him of his right to examine witnesses "whose testimony can affect substantial rights of a defendant." Id. at 557. The court pointed out

that the defendant alone may possess information that will assist his counsel to present or refute essential matters. Id. at 557-58. Unlike Walker, the trial court below was not engaged in fact-finding with an eye towards a material decision that, for Mr. Fendich, might "mean the difference between life and death, freedom or confinement, innocence or guilt." Id. Rather, the trial court was taking measured and reasonable steps, in conformance with CrR 6.15 and with the previously agreed-upon procedure, to allow the jury to hear again the 911 call made by the victim. There would have been no opportunity for Mr. Fendich to propose questions, tactics, or information for counsel's use; there would have been no testimony, no cross-examination, and no argument. The replaying of the already-admitted 911 recording was only that and no more. Unlike Walker, the defendant's presence could not have made any difference at all.

CrR 6.15(f)(1) provides in part that

In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.

The trial court's thoughtful approach to the replaying of the 911 call in this case and its execution of this replaying once the jury made its request show the court's high regard for fairness to the defendant, which is the thrust of the requirements of CrR 6.15(f)(1). With the defendant present in open court, the trial judge anticipated the jury's rehearing request, proposed a process to handle that request should it come, provided the parties the opportunity to comment on this proposal, and, confident in the parties' stated agreement to the proposal, replayed the 911 recording for the jury with apparently only the bailiff and clerk present in the courtroom. This deliberate and careful approach comports with the cited criminal rule.

The defendant relies on State v. Caliguri, 99 Wash.2d 501, 664 P.2d 466 (1983), to conclude that the court's process here was improper, but the defendant's reliance on this case is misplaced. In Caliguri, the court made the mistake of replaying the tapes without prior notice to, and therefore without the presence of, the defendant. While the Caliguri court did find the process there to be "highly improper," that process was markedly different from the one employed in Mr. Fendich's case. In Caliguri, an FBI agent, not a representative of the court, replayed the recordings to the jury, and

the defendant was not notified until later. Moreover, that agent played for the jury portions of the tapes not admitted at trial; this is in sharp contrast to the trial judge for Mr. Fendich directing the attorneys to review the recording before any such error could occur. Finally, in Caliguri, the judge was present for the replaying of the recordings. Id. at 505. Mr. Fendich's trial judge was not present when the jury listened again to the 911 call from the victim, thus avoiding any appearance of commenting on the evidence or giving it undue weight. In the end, despite the Caliguri's court's "highly improper" procedure that involved excluded evidence to be revealed to the deliberating jury, the reviewing court concluded that any error was harmless. Id. The State points out that if the "highly improper" procedure employed in Caliguri was viewed as harmless error, how much more harmless is the alleged error here where the trial court took pains to establish a fair and agreed method to address the jury's likely request.

A trial judge may not communicate with the jury about a case in the absence of the defendant and without hearing from both sides. CrR 6.15(f); State v. Bourgeois, 133 Wash.2d 389, 407, 945 P.2d 1120 (1997); Caliguri at 508. The State argues that the trial court's proposed and agreed-to method for handling the jury's likely

request was executed in a manner that was sufficient in this case to protect the defendant's rights and fulfill the requirements of Caliguri and Bourgeois.

However, if a trial court violates this rule in a criminal case, the State must show beyond a reasonable doubt that the violation was harmless. Bourgeois at 407; Caliguri at 509. The State meets this burden by showing that the trial court responded to a jury inquiry in a way that does not emphasize particular information already given to the jury and that does not communicate information not already given to the jury. State v. Allen, 50 Wash.App. 412, 419, 749 P.2d 702, *rev. denied*, 110 Wash.2d 1024 (1988); State v. Langdon, 42 Wash.App. 715, 717-18, 713 P.2d 120, *rev. denied*, 105 Wash.2d 1013 (1986); State v. Russell, 25 Wash.App. 933, 948, 611 P.2d 1320 (1980); State v. Safford, 24 Wash.App. 783, 794, 604 P.2d 980 (1979), *rev. denied*, 93 Wash.2d 1026 (1980). Here, the State easily meets that burden. The jury was allowed to listen to a short 911 recording that they had already heard. Nothing new was provided.

The 911 recording was only a part of the evidence against the defendant, and in fact was partly inconsistent with the State's in-person witnesses. Vitaliy and Romana Lakotiy testified that

Romana had been hit by a can of beer thrown by the defendant (8/11/09RP 22-23, 37-38), but as the defendant points out in his brief of appellant, Ms. Lakotiy stated on the 911 tape that the defendant "beat" her. Replaying the 911 tape for the jury would more likely result in the jury being less convinced, not more convinced, of the defendant's actions. The replay of the 911 recording was controlled by the bailiff, not by the jury, so there was no possibility of replaying certain portions repeatedly.

The defendant points to State v. Koontz, 145 Wash.2d 650, 41 P.3d 475 (2002), for the proposition that replaying evidence is not harmless if it unduly emphasizes testimony directed at a case's central issue. In Koontz, the jury was allowed to view videotape from the trial, and the videotape did not just display a continuous feed of witness testimony, but instead afforded the jury an opportunity to see the trial from various perspectives. These perspectives included views of the defendant seated alone at counsel table, and views of the judge, the prosecutor, the defendant counsel, as well as the testifying witness. Id. at 652-53. The court pointed out that these shifting perspectives did not duplicate the perspectives of the jurors but instead provided a different view that could emphasize previously disregarded events

from the courtroom. Id. at 654-55. Here, the replaying of the 911 recording replicated the jurors' experiences exactly. There was no shifting of perspectives and no emphasis on issues that the jurors might have ignored during the trial: the precise same recording was replayed one time.

As to the defendant's claim that the 911 recording improperly focused the jurors' attention on the central issues of his mental state and his use of the beer can to inflict the assault, the State respectfully argues that these are the only issues from this simple and straightforward assault trial. There was no real question about whether Ms. Lakotiy was injured or whether a beer can was used to inflict that injury, just as there was no real question that the defendant ran from the scene after the assault: two eyewitnesses testified that he did so. 8/11/09RP 24, 39. What is left is whether the defendant acted intentionally, and the 911 recording does not produce particularly powerful evidence on that score. He might have run due to guilty knowledge, or he might have run out of fear. The 911 recording does not answer those questions.

The motivation for the jury's desire to listen again to the 911 recording is unknown. But the State has shown that any error committed by allowing them to listen to it without the presence of

the defendant is harmless beyond a reasonable doubt: there was no new information and the court did not emphasize any particular evidence.

D. CONCLUSION

Mr. Fendich was present in court, represented by counsel, and silent when the trial judge proposed a method for replaying the 911 recording should the jury so desire during deliberations. The defendant's attorney agreed to this procedure without reservation. On the following day, when the jury made the anticipated request, the trial court adhered to the agreed-upon procedure. Because the defendant did not voice an objection, individually or through counsel, this court should find that the defendant's rights were not violated.

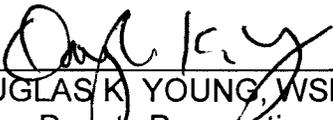
If the court concludes otherwise, then this error should be seen as harmless. The trial court did not comment on the evidence or emphasize it in any way, and the court did not reveal new evidence to the jury. The defendant was not prejudiced; the State has shown that the error was harmless beyond a reasonable doubt.

The defendant's conviction should be affirmed.

DATED this 1st day of November, 2010.

RESPECTFULLY submitted,

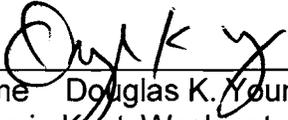
DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
DOUGLAS K. YOUNG, WSBA 23586
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I personally served on the offices of Maureen M. Cyr, 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. DAVID P. FENDICH, Cause No. 64874-8-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 Douglas K. Young
Done in Kent, Washington

Date 11 / 1 / 10

2010 NOV - 1 PM 4:05

RECEIVED
COURT OF APPEALS
DIVISION ONE

RECEIVED
COURT OF APPEALS
DIVISION ONE
NOV 01 2010

RECEIVED
NOV - 1 2010
Washington Appellate Project