

65774-7

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COA No. 65774-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVEN NYSTA,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Richard McDermott

REPLY BRIEF

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A. REPLY ARGUMENT

1. **State's Concessions of Error.** Appellant Mr. Nysta acknowledges the State's concession of error regarding the need for the scrivener's error in the judgment to be corrected to note that the rape offense of conviction was not "rape of a child." BOR at pp. 2, 38.

Appellant also acknowledges the State's concession of error regarding whether his right to be free from Double Jeopardy was violated where felony harassment was proved solely by the same evidence used to prove the "forcible compulsion" element of the second degree rape conviction. BOR at pp. 1, 28-32.

Mr. Nysta respectfully urges this Court of Appeals to conclude that the assignments of error, arguments, and the Respondent's concessions of error thereon are well taken.

2. **Arguments in Reply.** Mr. Nysta will address the State's response to ***Assignment of Error 1***, presenting the question whether the defendant's request to speak with his lawyer was unequivocal, and thus required cessation of interrogation, regardless of the reason he made the request.

Appellant will also address the State's response to ***Assignment of Error 2***, presenting the question whether the sealing of the jury questionnaires, without conducting a Bone-Club analysis, was structural error requiring reversal (rather than remand for after-the-fact closure analysis).

1. WHERE A SUSPECT WAS ADVISED PER MIRANDA OF HIS RIGHT TO HAVE A LAWYER PRESENT, AND HE THEN UNEQUIVOCALLY REQUESTS TO HAVE A LAWYER PRESENT USING THE REQUIRED WORDS OF LEGAL UTTERANCE, ALL QUESTIONING MUST CEASE.

Following his arrest and transport, Daven Nysta was taken to an interrogation room by Detective Jones of the Auburn Police Department. Prior to commencement of the interrogation, Mr. Nysta executed an initial waiver of his Miranda rights; however, as questioning progressed, Detective Jones conveyed to the defendant the seriousness of the accusation against him for the crimes at issue, when he inquired of Mr. Nysta if he would be willing to take a polygraph test. 5/5/10RP at 40; Pre-trial 1 (at p. 16); CP 87-90 (finding no. 6).

The detective ominously informed Mr. Nysta that a scientific polygraph exam would be "very very accurate" and would "tell me if

you are being truthful or not” as to Mr. Nysta’s previous answers of denial. 5/5/10RP at 40-41. Mr. Nysta then stated:

“Shit man I got to talk to my lawyer, someone.”

5/5/10RP at 41; Pre-trial 1 (at p. 17).

At the CrR 3.5 hearing before the trial court, Detective Jones testified that he ‘interpreted’ the above invocation by Mr. Nysta as not being a request to have his attorney present at that time, because after the request for his lawyer, Jones questioned Mr. Nysta further about whether he wanted to take a voluntary polygraph, and Mr. Nysta then said, “Well I really need to talk to my lawyer first.” 5/5/10RP at 41-42; Pre-trial 1 (at p. 17).

The detective again continued questioning Mr. Nysta further, and subsequently elicited damaging or inculpatory statements from him regarding the rape allegations; these were held admissible and were used at trial. Pre-trial 1 (at pp. 18-23); CP 87-90 (finding no. 6); 5/5/10RP at 43, 5/6/10RP at 3-6 (oral ruling); 6/10/10RP at 55-60 (Detective’s trial testimony).

On appeal, the State, in order to defend against Mr. Nysta’s challenge to the trial court’s CrR 3.5 ruling, endorses the interrogating officer’s effort to engage in every presumption

possible against the conclusion that the interrogee has requested the presence of an attorney, requiring cessation of questioning.

Yet in this constitutional realm, there is no case law establishing such presumption in any form. No case law provides that the interrogating police officer shall or may indulge in a presumption or series of presumptions that the suspect has not effectively requested the presence of an attorney when the required unequivocal language has been used.

There is something deeply troubling about the mode of analysis proposed by the Respondent for purposes of determining whether a criminal suspect has effectively invoked his right to have a lawyer present. If the Respondent were to have its way, a defendant's request for an attorney by the proper, exacting utterance of the words (for example) "I got to talk to my lawyer," would be interpreted in the most narrow and limited manner possible, so as to defeat the validity of the invocation in most cases if the officer could describe the context of the request as being something different than what the wording of the request indicates.

Specifically, the State appears to be following a police procedure manual which an officer is provided a laundry list of all

possible reasons to reject a lawyer request, so as to find some possible colorable reason that the trial court will be willing to accept as disqualifying, and to justify continued interrogation by the officer.

However, in this case, the trial court's ruling should be reversed because it squarely conflicts with several important, already existing rules and principles governing the defendant's right to invoke his right to have a lawyer present.

Upon arrest, no one informs the defendant, when advising him pursuant to Miranda, that the requirements for invoking his right to have a lawyer present must meet the exacting standards of unequivocalness at the cost of the request being allowed to be ignored. Rather, the suspect is told only that if he requests a lawyer one will be given to him. Indeed, the Miranda Supreme Court stated that if the accused then subsequently indicates a desire for an attorney "in any manner and at any stage" of custodial interrogation, officers must immediately stop the interrogation. (Emphasis added.) Miranda v. Arizona, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).

However, the harsh reality turns out to be that under the case law, successfully requesting the presence of a lawyer during

interrogation -- and holding one's police inquisitors at abeyance while such lawyer is secured – is in fact an almost Herculean task for a suspect to accomplish. It is far more difficult a feat than the above language of Miranda would seem to have intended it to be. This difficulty centers on the strictness with which the trial and appellate courts judge the *wording* of the attorney request.¹

For example, in State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), the suspect/defendant stated during police questioning, "Maybe I should call my attorney." State v. Robtoy, 98 Wn.2d at 32. The Supreme Court characterized Mr. Robtoy's request for counsel as "equivocal" and thus inoperative, condoning the police interrogators' refusal to honor the suspect's obvious and genuine wishes for the help of counsel – apparently because his words were too meekly expressed to entitle him to such assistance. Robtoy, 98 Wn.2d at 41.

¹ After a crime suspect has been advised per Miranda, it must come as a particularly nasty surprise for any defendant when he learns later, at his CrR 3.5 hearing, that a far stricter set of requirements actually applies to govern the invocation and its effectiveness. These secret rules, requiring a certain precise phrasing under the rubric of "unequivocality," are not revealed to the defendant until the time they are employed, at the suppression hearing, to disqualify any lawyer request that in any way deviates from the narrow set of words that are deemed necessary to invoke the right.

And in State v. Malicoat, 126 Wn. App. 612, 106 P.3d 813 (2005), the suspect stated, "If you are accusing me of murder, then maybe I should get an attorney." State v. Malicoat, 126 Wn. App. at 617. The surrounding *context* of this utterance was the defendant's growing awareness that he was being seriously accused of a grave crime by officers who were increasing the pressure of criminal allegation upon him. However, the defendant's failure to hew strictly to the requirement of an unequivocally *worded* demand, with no qualifiers permitted, dashed this suspect's hope for the assistance of a legal professional upon the shoals of his own milktoast phrasing. Malicoat, at 617.

And in State v. Lewis, 32 Wn. App. 13, 645 P.2d 722 (1982), the defendant stated:

I believe gentlemen that if this is going to get into something deep where you're attempting to get me to incriminate myself then I should have an attorney present. If there is any questioning on that particular subject.

State v. Lewis, 32 Wn. App. at 20. The Court of Appeals concluded that this request for a lawyer was equivocal and therefore ineffective, because it did "not indicate whether Lewis wanted an attorney present at that time or was only reserving his

right to terminate the interview and request counsel when he felt the questioning dictated it." State v. Lewis, 32 Wn. App. at 20. Once again, the context was clear – a man accused of a serious offense did precisely what the original Miranda warnings had seemingly suggested to him moments earlier that he had a right to do – request an attorney and simply get one, as requested.

Mr. Lewis, as most persons will do in police interrogation, came slowly to the realization that he was actually being accused of a crime and that his circumstances were not a bad dream or a joke. Upon this reality sinking in, he asked for a lawyer if he was questioned on the serious matter, facing officers intending to elicit inculpatory statements.

Although this is precisely the circumstance of jeopardy for which the rule of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (allowing a mid-stream request for a lawyer, following initial Miranda waiver) was constitutionally designed, Lewis's language was inadequately artful. The foregoing *context* was unable to remedy the deficiency in wording. Had the words been uttered without the fatal qualification of two disastrous "if's," interrogation would be required to have ceased, just as eliminating the surplusage of "maybe" would have saved Mr.

Malicoat's and Mr. Robtoy's cases. The lesson learned is that phrasing and the use of the "magic words" is everything, and context is not pertinent.

Here, Mr. Nysta stated that he needed to talk to his attorney, per the original advice of Miranda rights informing him he had a right to do so. He uttered his desire for a lawyer, understandably, at the moment that he was slowly being made aware, by introduction of the topic of a lie detector that would reveal the truth, of the seriousness and graveness of the matter being leveled at him. The trial court would err in entering a finding of fact that the lawyer request was merely a contemplation of a future 'plan' to consult with his lawyer about a lie detector test. No such language indicating anything of that sort was included in the words of defendant's clear utterance.

Rather, given the absence of language or phrasing supporting the prosecutor's fanciful "*future* consultation" theory, the only tenable finding is that the detective's ominous warnings that a polygraph would expose any lies were the circumstances that caused the defendant to perceive his peril, understand the danger of uncounseled questioning, and request a lawyer.

In the present case, where the words uttered by Daven Nysta corresponded to the specific indication and warning that he had a right to a lawyer, and he then later requested one, the police officer's contextual analysis improperly narrowed the circumstances in which the defendant would be entitled to cessation of questioning until the presence of a lawyer, as requested, was granted. The defendant was told to ask for a lawyer if he wanted one, and he would get one. Here, he asked for one, and did not get one.

Importantly, contrary to the Respondent's analysis, a suspect's unequivocal request for counsel may not be 'rendered' equivocal (and thus legally ineffective) by means of examining the suspect's answers to continued, improper, post-invocation questioning and so obtain the result of casting retroactive doubt upon the clarity of his original expressed desire for a lawyer.

The State can cite no case where this technique is tolerated. *Breaking* the rule that interrogation must cease following an unequivocal request for a lawyer is not a permitted manner of showing that the original invocation was inadequate.

Yet this is precisely the case law rule that must be ignored in order to uphold the CrR 3.5 ruling below. Smith v. Illinois, 469 U.S.

91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (an accused's responses to further interrogation following an initial request for counsel may not be used to cast retrospective doubt on the unequivocalty of the initial request itself); Robtoy, 98 Wn.2d at 39-40. The defendant's police statement should have been suppressed.

**2. SEALING THE JUROR QUESTIONNAIRES
"CLOSED" VOIR DIRE TO PUBLIC SCRUTINY,
VIOLATED THE DEFENDANT'S PUBLIC TRIAL
RIGHT GUARANTEED BY ARTICLE 1, SECTION
22, AND CAUSED STRUCTURAL ERROR THAT
REQUIRES REVERSAL OF MR. NYSTA'S
CONVICTIONS.**

The State of Washington has provided the Court with no response to Mr. Nysta's argument that the written juror questionnaires in a criminal case constitute a part of the *voir dire* jury selection process -- conducted on paper for reasons of expediency and/or to assuage privacy concerns.² Juror questionnaires are subject to state law, General Rule 31 and the Superior Court's local rules for public access to court records. Those rules manifestly do not allow any member of the public to inspect the juror questionnaires by obtaining them from the court or

² Assuming Mr. Nysta's counsel solely requested that a confidential questionnaire be used in selection of the jury, counsel did not invite the error of the trial court failing in its responsibility to engage in the proper analysis under Bone-Club before employing a procedure that constituted courtroom closure. There was no invitation of error.

counsel while they are in use in the courtroom during jury selection, prior to their filing.

The State's arguments in response, and this Court's decisions in State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009), and State v. Tarhan, 151 Wn. App. 614, 214 P.3d 158 (2009), depend on an assumption to the contrary. Mr. Nysta therefore holds to his contention that a portion of *voir dire* in his case was closed to the public, without the trial court having first conducted the required analysis of State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Furthermore, the error was structural. An error is structural when it renders a criminal trial "fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Washington v. Recuenco, 548 U.S. 212, 218–19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Here, there was no "quasi-public access" to the written portion of jury selection that renders the Bone-Club error less than structural, or any different from the structural error of conducting *voir dire* questioning in chambers. The Coleman and Tarhan Courts reason, as does the Respondent, as follows:

Coleman contends that sealing the questionnaires without conducting the *Bone-Club* analysis amounted to structural error, from which prejudice is presumed and for which a new trial is warranted. On these

facts, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not "create 'defect[s] affecting the framework within which the trial proceeds.'" The error was not structural.

State v. Tarhan, 151 Wn. App. at 828 (citing State v. Coleman, 151 Wn. App. at 623-24).

As argued in the Appellant's Opening Brief, Mr. Nysta disagrees that this analysis shows that non-structural error occurred. First, the fact that the questionnaires were used "only" for the selection of the jury does not weigh against structural error. The improper conducting of *voir dire* in chambers, which is structural error, is of course similarly conducted "only" for jury selection purposes. Jury selection is supposed to be open to the public – when it is conducted on paper, it is not, if the questionnaires are then filed in the Clerks' Office under seal.

Second, the fact that jury selection occurred in "open court" is entirely incorrect. When jurors are questioned for selection purposes by means of written questions and answers on paper, either for privacy or expediency purposes, this questioning – which

is voir dire – is plainly not occurring in open court such that the public knows what questions are asked and how they are answered by potential jurors. Unless the completed questionnaires are each read out into the record in their entirety, jury questionnaires constitute *voir dire* that is hidden from the public.

Finally, and relatedly, the Respondent State of Washington concedes in its brief that the trial court, as part of the jury selection process in Mr. Nysta's case, employed the use of a "confidential" jury questionnaire, which was referred to *thereas* by the court. BOR at p. 23.

Respondent also concedes that the trial court and the parties, when communicating with the potential jury pool regarding the matter, referred to the questionnaire similarly, as "confidential." BOR at p. 26, 31.

Further, the State concedes that all of the potential jurors were expressly assured by the court that the questionnaire and their answers thereto would be "confidential." BOR at p. 26, 31.

It is thus beyond cavil that the judge, and the parties' attorneys, were fully aware that the potential jurors had been so assured -- that their jury questionnaires would be kept "confidential." Therefore, to suggest that "there is nothing to

indicate that the questionnaires were not available for public inspection during the jury selection process” is simply fanciful. As extensively argued in the Opening Brief, it would have been impossible for a member of the public to learn the contents of the questionnaires during the time of jury selection. The trial court implied that such viewing should not occur by referring to the questionnaires as “confidential.”

Even if it had not done so, it is simply untenable to contend that a member of the public could view the questionnaires by asking the lawyer during court proceedings to see them, or buttonholing the lawyer on the courthouse steps and convincing him to let them make copies, or see the documents. The scenario may seem silly – but the Court’s analysis in Coleman and Tarhan (rejecting structural error) depends precisely on the assumption that a member of the public can do this.

In this regard, it is notable in the State's Response Brief that the Respondent has either failed, or has chosen not to, respond to the following assertions by the appellant, Mr. Nysta:

1. Public access to court documents filed in a trial court case occurs by a member of the public requesting to view such documents at the Clerk's Office (not during trial in the courtroom by

convincing the judge or the lawyers to allow viewing);

2. Documents filed "under seal" are not so available for public access at the Clerk's Office; and

3. The jury questionnaires in this case were ordered to be sealed by the court and were then filed as sealed documents, and were thus never at any time available for public access at the sole and exclusive location where that public access occurs, as provided for under State law and court rule.

Yet -- remarkably -- after all of this, and in virtually the same breath as the foregoing concessions, the Respondent contends by summary pronouncement that the jury questionnaires were available to the public during the time they were employed by the court and counsel in the courtroom during jury selection, before they were filed and sealed (the latter event occurring before the former). As the Respondent puts it:

"there is nothing in the record indicating . . . that any and all documents or court records used in court were not open to the public."

BOR at p. 23. But merely announcing that the questionnaires were publicly available does not make it so.

Just as conducting *voir dire* in the judge's chambers renders a trial an unreliable vehicle for determining guilt,

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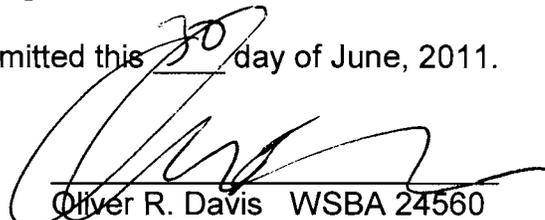
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conducting *voir dire* on paper by means of questionnaires that are never available at the Clerks' Office for public viewing is structural error. This Court should find structural error in the trial court's order sealing the juror questionnaires in this case, and order reversal of Mr. Nysta's convictions.

B. CONCLUSION

Based on the foregoing and on the arguments presented in his Appellant's Opening Brief, Mr. Nysta respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 30 day of June, 2011.



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY		U.S. MAIL
KING COUNTY PROSECUTING ATTORNEY	(X)	HAND DELIVERY
APPELLATE UNIT	()	_____
KING COUNTY COURTHOUSE	()	
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2011.

X _____ 

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