

66169-8

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No. 66169-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN T. RAINEY,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. RAINEY WAS DENIED HIS RIGHT TO PRESENT A
 DEFENSE..... 1

 a. The State misconstrues and distorts Rainey’s efforts to
 introduce statements material to his defense 1

 b. The court violated Rainey’s right to present a defense. 5

 2. THE COURT DENIED RAINEY HIS RIGHT TO BE
 PRESENT AND PARTICIPATE IN A CRITICAL STAGE
 OF THE TRIAL 9

B. CONCLUSION..... 13

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993) 12

Linbeck v. State, 1 Wash. 336, 25 P. 452 (1890) 11

State v. Beaudin, 76 Wash. 306, 136 P. 137 (1913)..... 11

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983)..... 11, 12

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011)..... 10, 12

State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011)..... 6, 9

State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980) 5, 6, 7

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) 4

State v. Shutzler, 82 Wash. 365, 144 P. 284 (1914)..... 10

State v. Wroth, 15 Wash. 621, 47 P. 106 (1896) 11

Washington Court of Appeals Decisions

State v. Hartzell, 156 Wn.App. 918, 237 P.3d 928 (2010) 7

State v. Jasper, 158 Wn.App. 518, 245 P.3d 228 (2010), rev. granted, 170 Wn.2d 1025 (2011) 9

State v. Sublett, 156 Wn.App. 160, 231 P.3d 231, rev. granted, 170 Wn.2d 1016 (2010)..... 9

United States Constitution

Sixth Amendment..... 10

Washington Constitution

Article I, section 22..... 9, 12, 13

Court Rules

ER 105 7

ER 803 5

A. ARGUMENT.

1. RAINY WAS DENIED HIS RIGHT TO PRESENT A DEFENSE

a. The State misconstrues and distorts Rainey's efforts to introduce statements material to his defense. The court instructed the jury that the State was required to disprove Rainey's belief that he was justified in hitting the complainant one time because he was acting under a subjective and objectively reasonable belief that he was defending himself. CP 48-49. But the court did not permit Rainey to elicit the most pertinent statements available demonstrating Rainey's state of mind close in time to the incident, and this denied Rainey his constitutional right to present a defense, as discussed in Appellant's Opening Brief.

The prosecution tries to minimize the error by claiming Rainey did not want to introduce his statements to both police officers at trial. But this contention is a false portrayal of the trial court developments and incomprehensible when the purpose of the evidence was to present his claim of self-defense.

Upon his arrest, Rainey told arresting officer Jonathan Chin that the complainant "grabbed him on his shoulder and wouldn't let go" and "so I punched him." 9/2/10RP 39. Rainey's statement to

Chin was evidence relevant to and supportive of Rainey's self-defense in a case involving a single punch as the sum total of force used.

The prosecution initially claimed it intended to introduce "all" statements Rainey made to the police, but at the CrR 3.5 hearing, it stated that it would offer Rainey's statement to Chin and not his earlier statements to Bunge. 9/2/10RP 48; CP 75-76 (State's trial memorandum objecting to Rainey introducing any his own statements through police officers). The court ruled that Rainey's statement to Chin was admissible, and ruled that if admitted, Rainey could elicit the background in which he made this statement, which included some incoherent discussions about Rainey made to the transporting officer Bunge, after Miranda warnings. 9/2/10RP 53-54.

However, the State decided not to elicit Rainey's statement to Chin because it did not want Rainey to elicit testimony about his rambling discussions with Bunge or his claim he acted in self-defense to Chin. 9/7/10RP 118; CP 75-76.

It was the prosecutor who framed the issue of what Rainey wanted to introduce as statements made during transport, on which the State's Response Brief rests. 9/7/10RP 118. Rainey

presented the issue to the trial court more broadly, explaining that the prosecution objected to “any statements by the defendant” being introduced by Rainey. Id. at 119. Rainey did not limit his interest in eliciting his statements to the police to those made during transport. Such a limitation would have been unreasonable and inconsistent with the purpose of offering Rainey’s statements, since his explicit remark to Chin that he acted in self-defense was the central corroborating evidence probative of his defense. But Rainey was also trying to introduce his statements to officer David Bunge, and his comments about their admissibility in the course of his arguments to the court were based on those statements as well. Id. at 119.

The court repeatedly warned Rainey that he could not elicit the substance of his statements to the police unless the State first offered them. 9/7/10RP 118-121, 143. When the State decided against admitting any of Rainey’s statements to the police, the court issued a clear ruling that Rainey could not elicit those statements. Id.

The State’s parsing of words to assert that Rainey did not want his statements to Chin introduced misconstrues the nature of the discussion of the admissibility of Rainey’s statements to police

and the importance of those statements. Rainey told Chin that he hit the complainant because he feared the complainant would hit him. His statement to Chin was an explanation of his belief he was acting in self-defense and it is exactly what Rainey wanted to introduce. Rainey was trying to introduce his statements to both Bunge and Chin. But Bunge testified first and when Rainey tried to elicit any statements by Rainey, the court explicitly refused to let Rainey. 9/7/10RP 120-21, 141, 143. The made the finality of its ruling plain. When Rainey made several efforts to elicit his statements to Bunge, the court said "I've ruled on this already," 9/7/10RP 143, and at a sidebar also ordered that Rainey could not ask about "the actual substance of the hearsay statements" Rainey made. 164. The court's rulings applied to Rainey's statements to both officers, and the court's clear rulings demonstrate the futility of further objection as well as the harm that could come to Rainey's perception before the jury if he kept trying to circumvent the court's ruling. The court's ruling was not tentative, ambiguous, or indicative of the ability to revisit the issue. See State v. Powell, 126 Wn.2d 244, 257, 893 P.2d 615 (1995). On the contrary, when Rainey tried to elicit his statements to the police, the court stated two times, "I've ruled on this already." 9/7/10RP 143. The court's

ruling barred Rainey from eliciting his statements to both police officers once the prosecution decided not to elicit his statements.

b. The court violated Rainey's right to present a defense. Rainey was not attempting to introduce inadmissible evidence. He wanted to offer his statements under the rules of evidence.

ER 803(a)(3) permits the admission of a hearsay statement that shows the "declarant's then existing state of mind, emotion, sensation, or physical condition." In State v. Parr, 93 Wn.2d 95, 98, 606 P.2d 263 (1980), the Supreme Court explained that a long established exception to the rule excluding hearsay applies to statements indicative of a person's state of mind. This exception permitting the court to admit such out-of-court statements applies if there is (1) "some degree of necessity to use out-of-court, uncross-examined declarations, and (2) if there is circumstantial probability of the trustworthiness" of the statements. Id. at 98-99.

Here, there is "some degree of necessity" to Rainey's statements to the police, close in time to the incident, when no other relatively contemporaneous explanation for his state of mind could be offered. Although Rainey could have testified at trial, his testimony would have been offered more than one year after the

incident, during the course of a trial at which he could be cross-examined about his ability to tailor his testimony to the trial evidence. See State v. Martin, 171 Wn.2d 521, 252 P.3d 872, 879 (2011) (prosecutor may cross-examine defendant about whether he tailored his testimony to respond to testimony by other witnesses or police reports). Thus, the testimony would lack credibility without the testimony from the officers who had no personal interest in the outcome of the case.

Additionally, the statements were obtained under trustworthy circumstances. See Parr, 93 Wn.2d at 98. The statements made in the police car were videotaped, so the court could review the circumstances in which they were made. 9/2/10RP 52; 9/7/10RP 139-41. The statements followed Miranda warnings and valid, voluntary waivers of the right to remain silent. 9/2/10RP 52-53. The court found the statements voluntarily and non-coercively elicited. Id.

As the court held in Parr,

where it is relevant to an issue, has considerable probative value and because it may be unobtainable except through the avenues of hearsay, courts have generally approved its admission, surrounding it with such safeguards as they are able to provide and trusting in the exercise of a sound discretion on the part of the trial courts.

93 Wn.2d at 99. If the out-of-court statements should not be considered for their truth, the court may provide a limiting instruction to alleviate the potential for misuse of the evidence. See State v. Hartzell, 156 Wn.App. 918, 937, 237 P.3d 928 (2010) (“trial court *must* give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction.” (emphasis in original); ER 105.

The Parr Court also noted that in a self-defense case, state of mind evidence may be relevant even though it might be too prejudicial to admit in other circumstances. Id. at 103. Parr is instructive because it involved and discussed cases where a witness’s statement is used to show the intent or state of mind of the accused person, which is a far more disfavored endeavor than using an accused’s own statement. Id. at 102. Parr demonstrates that when it is the accused who wishes to offer evidence, the right to present a defense is at stake and there is no countervailing concern that the accused is unable to confront the person making the out-of-court statement, the courts should focus on the necessity of the necessity of the evidence and the trustworthiness of the

statements.

Here, the evidence was necessary and obtained in trustworthy circumstances. It was pertinent and the most probative evidence of Rainey's state of mind – an element of self-defense – that was available. Although the statements were not contemporaneous to the incident, they were relatively close in time and made when his attention was focused on the incident. There is no factual basis to argue that his state of mind had changed, and the prosecution did not assert that was the case. Even the prosecution agreed that Rainey's statements "as to the assault itself," are "the relevant statements." 9/2/10RP 51-52. They were relevant explanations of Rainey's conduct at the time of the incident, both the fact that he hit Hall and why he did it. The prosecution conceded they were relevant statements to Rainey's state of mind. Id. The court's refusal to admit these statements denied Rainey his right to present a defense.

2. THE COURT DENIED RAINEY HIS RIGHT TO BE PRESENT AND PARTICIPATE IN A CRITICAL STAGE OF THE TRIAL

At a recent hearing, the court supplemented the record with information absent from the record at the time Rainey filed his Opening Brief. The essence of the newly gathered information is that the trial court judge told the attorneys about the jury's questions before, or at the same time as, the court responded. 7/8/11RP 3-4. Rainey was not included in any of these conversations or apprised that they were occurring. 7/8/11RP 8. This procedure violates Rainey's right to be present.

The cases cited by the State are not dispositive. In State v. Sublett, 156 Wn.App. 160, 182, 231 P.3d 231, rev. granted, 170 Wn.2d 1016 (2010), and State v. Jasper, 158 Wn.App. 518, 539, 245 P.3d 228 (2010), rev. granted, 170 Wn.2d 1025 (2011),¹ the decisions focused on the federal constitutional right to be present. They did not separately analyze the right to be present under article I, section 22. Yet in State v. Irby, 170 Wn.2d 874, 884-85, 246

¹ The Court of Appeals decision in Jasper relied on its ruling in Martin, in which it found no broader right to be present under Article I, section 22, but the Supreme Court disagreed and abrogated that analysis after granting review in Martin, 252 P.3d at 877. See Jasper, 158 Wn.App. at 539 n.12. Jasper is presently pending on Supreme Court review.

P.3d 796 (2011), our Supreme Court ruled that the right to be present under the state constitution is broader and requires independent analysis.

Irby reached this decision even though the parties had not asked the Court to consider the independent application of the state constitution. 170 Wn.2d at 885. The Irby Court explained that in Washington, the right to be present is not defined as a “critical” factual stage of proceedings, but instead it grants the right to appear and defend in person “*at every stage of the trial when his substantial rights may be affected.*” Id. at 885 (emphasis added in Irby, quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)).

Here, Rainey’s substantial rights may be affected when the court discusses jury notes about the substance of the evidence admitted at trial and whether the jury may consider it. Under this state standard, Rainey was entitled to be present.²

In its harmless error analysis, however, Irby, departed from precedent based on the limited briefing available. Rather than applying the presumption of prejudice historically imputed at the

² Additionally, Rainey explained his right to be present under the federal constitution in his Opening Brief, at 21-24.

time of the framing of the constitution, the court was under the impression that State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) overruled earlier cases in regard to the assessment of the harm. 170 Wn.2d at 886. But in Irby, no party explained the evolution of the case law, because the state constitutional right had not been briefed.

When the Framers drafted the state constitution, it was the prevailing understanding that an accused person had a personal right to be present when discussing instructions with a deliberating jury. Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury without defendant's presence is error "and we do not think this error was cured by the fact that defendant's attorney was present and made no objection."); State v. Wroth, 15 Wash. 621, 623, 47 P. 106 (1896) (judge's assurances that he said nothing to jury in response to request for additional instruction insufficient to satisfy accused's right to be present); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) ("[t]he giving of an instruction in appellant's absence constituted prejudicial error, which was not cured" by later reinstructing the jury with defendant present, because the right to be personally present is mandatory during any instructions to jury).

In Caliguri, the judge improperly replayed tape recordings admitted into evidence without notifying the defendant. 99 Wn.2d at 508. The court acknowledged that historically, our state courts used a strict standard of reversal when the court communicated with the jury without notifying the accused. Id. But it decided to apply a constitutional harmless error test because federal courts and other jurisdictions no longer strictly construed such an error. Id. at 508-09. The Caliguri Court did not acknowledge that this Court does not interpret our constitution based on modern trends in other courts, rather, it looks at the law at the time the constitutional provision was enacted. In re Runyan, 121 Wn.2d 432, 441, 853 P.2d 424 (1993). Thus, the Irby Court was under the mistaken impression that Caliguri purposefully disavowed the prior rule presuming prejudice under a state constitutional analysis when none occurred. The presumptively prejudicial import of the violation of an accused's right to be present is dictated by Article I, section 22 and should apply.

In any event, the unexplained and purposeful exclusion of Rainey from the court proceedings violated his right to be present at a portion of the trial in which his rights may be substantially affected as well as his right to a public trial. Communication with

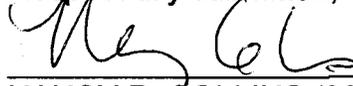
the deliberating jury is a critical time in the case and information should not be provided to the jury without informing the accused. There was no reason to hold these proceedings in secret, rather than in open court, with Rainey present and informed of the issues presented. The procedures employed violated Rainey's rights under Article I, section 22 and the Sixth Amendment.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Rainey respectfully requests this Court remand his case for further proceedings.

DATED this 25th day of August 2011.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 66169-8-I
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)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF AUGUST, 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:

<input checked="" type="checkbox"/> DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> BRIAN RAINEY 1726 SUMMIT AVE SEATTLE, WA 98122	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF AUGUST, 2011.

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