

66228.7

66228.7

NO. 66228-7

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT R. ABBETT,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JUN 22 AM 10:42

TABLE OF CONTENTS

I. ISSUES	1
A. ISSUES RELATING TO TIME-FOR-TRIAL	1
B. ISSUES RELATING TO JURY INQUIRY.....	1
II. STATEMENT OF THE CASE.....	2
III. ARGUMENT	5
A. THE DEFENDANT’S TRIAL WAS TIMELY.....	5
1. Facts.....	5
2. Since The Defendant Did Not Seek Dismissal In The Trial Court, He Cannot Raise A Time-For-Trial Issue On Appeal.....	7
3. If The Issue Can Be Raised, The Defendant’s Trial Was Held Within The “Buffer Period” Resulting From An Unchallenged Agreed Trial Continuance.....	8
4. If The Timeliness Of The Trial Depends On An Earlier Continuance, The Trial Court Properly Exercised Its Discretion In Granting The State’s Continuance Motion.....	9
B. THE TRIAL COURT ACTED PROPERLY IN RESPONDING TO A JURY INQUIRY.....	13
1. Facts.....	13
2. Since The Defendant Has Not Shown That The Trial Court’s Procedure Had Any Actual Impact On His Rights, Any Error Is Not “Manifest” And Cannot Be Raised For The First Time On Appeal.	14
3. A Colloquy Concerning A Purely Legal Issue Is Not A “Critical Stage” Of The Proceeding, So As To Give The Defendant A Constitutional Right To Be Present.	15
4. Since The Court’s Response To The Jury Inquiry Was Not Prejudicial To The Defendant, Any Error In Formulating That Response Was Harmless.....	21
IV. CONCLUSION	23

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Hurlbert v. Gordon</u> , 64 Wn. App. 386, 824 P.2d 1238 (1992).....	16
<u>In re Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994)	17
<u>State v. Barton</u> , 28 Wn. App. 690, 626 P.2d 509, <u>review denied</u> , 95 Wn.2d 1027 (1981).....	8
<u>State v. Brown</u> , 29 Wn. App. 11, 627 P.2d 132 (1981).....	17, 18, 19
<u>State v. Caliguri</u> , 99 Wn.2d 501, 664 P.2d 466 (1983)	19, 20, 21, 22
<u>State v. Grilley</u> , 67 Wn. App. 795, 840 P.2d 903 (1992).....	11
<u>State v. Iniguez</u> , 143 Wn. App. 845, 180 P.3d 855 (2008), <u>rev'd on other grounds</u> , 167 Wn.2d 273, 217 P.3d 768 (2009)	10
<u>State v. Irby</u> , 170 Wn.2d 874, 246 P.3d 796 (2011)	17
<u>State v. Jasper</u> , 158 Wn. App. 518, 245 P.3d 228 (2010), <u>review granted</u> , 170 Wn.2d 1025 (2011).....	17, 18, 19, 21
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992)	15
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<u>State v. Wake</u> , 56 Wn. App. 472, 783 P.2d 1131 (1989)...	10, 12, 13
<u>State v. Yuen</u> , 23 Wn. App. 377, 597 P.2d 401, <u>review denied</u> , 92 Wn.2d 1030 (1979).....	10

FEDERAL CASES

<u>Rogers v. United States</u> , 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975).....	18, 19, 20, 22
---	----------------

WASHINGTON CONSTITUTIONAL PROVISIONS

Const., art. 1, § 35.....	11
---------------------------	----

COURT RULES

CR 5	16
CR 5(b)(1)	16
CR 45(b)(1)	11
CrR 3.3	1, 7, 8, 10
CrR 3.3(a)(5)	1, 8, 9
CrR 3.3(e)(3)	9, 9
CrR 3.3(f)(1)	8
CrR 3.3(f)(2)	9
CrR 4.8	11
CrR 6.15	16, 18
CrR 6.15(f).....	15
CrR 6.15(f)(1)	16
CrR 8.4	16
RAP 2.5(a)(3)	14

I. ISSUES

A. ISSUES RELATING TO TIME-FOR-TRIAL.

(1) The defendant did not bring a motion to dismiss under CrR 3.3. On appeal, can he challenge the timeliness of his trial?

(2) If the issue can be raised, was trial timely under the “buffer period” of CrR 3.3(a)(5), when trial commenced less than 30 days after the end of an excluded period that resulted from an agreed trial continuance?

(3) If the timeliness of the trial depends on the propriety of an earlier continuance, did the trial court abuse its discretion in granting a continuance because a witness was working in Alaska on the scheduled trial date?

B. ISSUES RELATING TO JURY INQUIRY.

(4) During jury deliberations, the jury sent out a question about the terms used in one of the court’s instructions. At the request of defense counsel, the court told the jury to rely on the instructions as already provided. The defendant was not personally present during the colloquy regarding this response. Does this constitute “manifest error” that can be raised for the first time on appeal?

(5) If the issue can be raised, is it a “critical stage” of the proceedings when the court determines its response to a jury inquiry that raises purely legal issues?

(6) If the trial court’s action constitutes error, was the error harmless?

II. STATEMENT OF THE CASE

On the night of October 18-19, 2009, a car belong to David Foye disappeared from its parking place at his apartment in Everett. RP 156-57. At some time between October 25 and 26, there was an illegal entry of a house belonging to Robert Salmon in Stanwood. The house was posted with a “for sale” sign. Numerous items were taken, including cameras and video equipment. RP 204-06. On the exterior of a window, police found a fingerprint of the defendant, Robert Abbett. RP 187-88, 273-74.

At around 10:30 on October 26, a Snohomish County Sheriff’s Deputy saw Mr. Foye’s car drive by. Since it had no front license plate and was filled with items, he started to follow it. It accelerated. He activated his lights and siren and pursued the car. Because of the wet weather and slippery road, the pursuit became dangerous, and he discontinued it. RP 226-27.

A few minutes later, the car pulled into a residential driveway nearby. Two men got out and ran away. RP 168-72. When police examined the car, they found items that had been stolen from Mr. Salmon. The car's ignition had been damaged, so that it could be started with a screwdriver. RP 318-20.

Using a dog, police tracked the suspects. The track lasted for around 1½ hours, going through woods and heavy brush. They located and arrested Michael Coking. They continued searching for the other suspect. RP 235-44.

At 4:15 that afternoon, the defendant knocked on the door of a nearby house. He was wringing wet, even though it was no longer raining. Pieces of brush were stuck to his shirt. He was dirty and had fresh scratches on his arms. He said he was lost and wanted to call his mother for a ride. The homeowner let him in but contacted police, who arrived and arrested the defendant. RP 254-57, 263-64.

When questioned by police, the defendant initially said that he had been in a van with three people. They had beaten him up and tossed him out. He had been in a ditch for several hours. The officer told the defendant that he thought he was lying. The defendant then admitted that he had been in a car with another

person. They went to a house that was for sale and both went inside. RP 313-16.

Cocking gave a statement to police, which was admitted at trial as a statement against interest. He said that the defendant had picked him up and driven him to a house with a “for sale” sign. Both of them went inside, took property from the house, and loaded it into the car. As they were driving away, Abbett saw an officer pass them. He said “we got to go” and “took off down the road real fast.” They parked in someone’s yard and took off on foot. RP 328-32; see RP 217-21 (court’s ruling admitting statement). At trial, Cocking testified that he had no recollection of the events, because he’d “been up for 21 days straight on methamphetamine and heroin.” RP 301.

The defendant testified at trial that on the morning of October 26, he was going to a friend’s house. He rode in a van with three acquaintances. The conversation led to the discovery that the defendant’s new girlfriend was one of the other people’s “little girl toys.” The discussion “got heated.” The defendant was struck in the back of the head. He woke up in a ditch. After walking a half hour to find a road, he ended up at someone’s house. RP 344-38.

The defendant testified that he was not with Cocking at any time that day. He had not ridden in Mr. Foye's car and had not burglarized any house. RP 344-49. He denied having told an officer that he was at the house. He had no explanation for how his fingerprints could have been on the house window. RP 352-53.

The defendant was charged with residential burglary and second degree taking a motor vehicle without permission. A jury found him guilty as charged. 1 CP 58, 17-18.

III. ARGUMENT

A. THE DEFENDANT'S TRIAL WAS TIMELY.

1. Facts.

The chronology of events leading up to trial is as follows:

February 22, 2010. Information filed. 1 CP 66.

March 9, 2010. Defendant arraigned. Trial set for May 21. 4 CP 106-07. Court enters order releasing defendant.¹ 4 CP 108-10.

May 14, 2010. Agreed trial continuance. Trial continued to June 4. 4 CP 104-05.

¹ The defendant's brief claims that he was in custody. In fact, he remained out of custody through trial. 4 CP 52.

May 21, 2010. Agreed trial continuance. Trial continued to June 11. 4 CP 102-03.

June 4, 2010. Agreed trial continuance. Trial continued to June 18. 3 CP 85-86.

June 17, 2010. On State's motion, trial continued to August 13. 4 CP 100-01. (This is the continuance that the defendant is challenging on appeal.)

August 6, 2010. Agreed trial continuance. Trial continued to August 27. 4 CP 98-99.

August 30, 2010. Trial commences. 4 CP 52.

When the prosecutor moved for a continuance on June 17th, he gave the following explanation:

Your Honor, this case involves property crimes against two victims that are charged, one that we are going to add for trial.² The first victim, the owner of the stolen vehicle, is David Foye. Mr. Foye is in Alaska; he will not be back until the third week in August. So we are requesting the continuance to that August 20th date.

THE COURT: Is he in Alaska for fun, or because he works there, or what?

[PROSECUTOR]: He works there. He is working, fishing in Alaska.

...

² Ultimately, no third count was added.

As soon as I was able to get hold of him – we had some trouble tracking him down – I did call [defense counsel] and inform him of that. We did look into trying to find funds to fly him back, and we couldn't locate the funds to fly him back. He is unable to afford the air fare, which is about \$900.

RP 4.

In granting the continuance, the court stated:

In terms of [the defendant's] right to a speedy trial, I am required to conform to that unless there's a good reason not to. I am aware that the financial situation for the county, the State, and just about every state in the Union is dire. I don't believe there is any prejudice to [the defendant] to order a continuance regarding the count regarding the gentleman who is in Alaska and, quite frankly, I see no reason then to not continue the other count or the proposed third count because I see no reason in having two or three trials, from the standpoint of judicial economy.

So I will find good cause to continue the trial and do so until the third week in August.

RP 6.

2. Since The Defendant Did Not Seek Dismissal In The Trial Court, He Cannot Raise A Time-For-Trial Issue On Appeal.

The defendant claims that his trial was not held with the time allowed by the time-for-trial rule, CrR 3.3. In the trial court, he did not file any motion for dismissal on this ground. As a result, the issue has not been preserved for review.

With the exception of jurisdictional and constitutional issues, appellate courts will review only issues which the record shows have been argued and decided at

the trial court. CrR 3.3 does not create a constitutional right, nor is it jurisdictional. Although the right is to be strictly enforced, it is nonetheless a procedural rule.

State v. Barton, 28 Wn. App. 690, 693, 626 P.2d 509, review denied, 95 Wn.2d 1027 (1981) (citations omitted).

“The court’s obligation to dismiss a prosecution for violation of CrR 3.3 is triggered by a motion by the defendant.” Id. Absent such a motion, there is no trial error for an appellate court to review. Id. at 694. Here, the defendant never moved for dismissal, so he was not entitled to one. The timeliness of the trial is therefore not subject to review.

3. If The Issue Can Be Raised, The Defendant’s Trial Was Held Within The “Buffer Period” Resulting From An Unchallenged Agreed Trial Continuance.

Assuming that the issue can be raised, the trial was timely.

It fell within the “buffer period” of CrR 3.3(a)(5):

If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

Under CrR 3.3(e)(3), there is an exclusion for “[d]elay granted by the court pursuant to section (f).” CrR 3.3(f)(1) allows continuances to be granted “[u]pon written agreement of all the parties, which must be signed by the defendant.” Here, after the challenged continuance, the parties entered into a written

agreement to continue the case until August 27. The defendant signed this agreement. 4 CP 98-99. As a result, there was an excluded period under CrR 3.3(e)(3), which ended on August 27. The trial commenced on August 30, well within 30 days after the end of this period. Trial was therefore timely under CrR 3.3(a)(5).

4. If The Timeliness Of The Trial Depends On An Earlier Continuance, The Trial Court Properly Exercised Its Discretion In Granting The State's Continuance Motion.

Because of this rule, the earlier continuance of June 17th is irrelevant. Whether or not that continuance was proper, trial was timely because of the agreed trial continuance of August 6th, with its resulting "buffer period." If, however, this court reviews the June 17th continuance, it should determine that this continuance was proper.

Non-agreed continuances are governed by CrR 3.3(f)(2):

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance.

"The granting or denial of a continuance rests within the sound discretion of the trial court and is reviewable only for manifest

abuse of discretion.” State v. Yuen, 23 Wn. App. 377, 378-79, 597 P.2d 401, review denied, 92 Wn.2d 1030 (1979).

The defendant claims that the grant of a continuance in this case was an abuse of discretion.

The trial court does not abuse its discretion in granting a continuance when there is a valid reason for the witness’s unavailability, the witness will become available within a reasonable time, and the continuance will not substantially prejudice the defendant.

These requirements are not satisfied, however, unless the party whose witness is absent proves it acted with due diligence in seeking to secure that witness’s presence at trial.

State v. Iniguez, 143 Wn. App. 845, 853-54 ¶¶ 15-16, 180 P.3d 855 (2008), rev’d on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009).³

The defendant argues that the State failed to exercise due diligence because the witness was not under subpoena. Ordinarily, the issuance of a subpoena is necessary to establish due diligence. Iniguez, 143 Wn. App. at 854 ¶ 16; State v. Wake, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989). Here, however, the witness was

³ This court held that the defendant’s trial was timely under CrR 3.3. It nonetheless reversed the conviction based on a violation of the constitutional right to a speedy trial. The Supreme Court reviewed only the constitutional issue. It reversed this court and held that the trial was timely.

in Alaska continuously from the time that the prosecutor first contacted him until the continuance was granted. RP 4. If he resided in Washington, he might nonetheless have been served with a subpoena at his residence. See CR 45(b)(1); CrR 4.8. This, however, would have accomplished nothing. The problem was not the unwillingness of the witness to appear. Rather, the problem was the cost and inconvenience of requiring the witness to interrupt his work and make a special trip to Washington to testify.

A court can properly grant a continuance to accommodate a witness's previously planned vacation. State v. Grilley, 67 Wn. App. 795, 799, 840 P.2d 903 (1992). It should be equally proper to grant a continuance to accommodate a witness's employment. This is consistent with the constitutional requirement to accord victims of crime "due dignity and respect." Const., art. 1, § 35 (amend. 84).

In exercising its discretion, the trial court could consider the following facts:

1. Holding trial on the scheduled date would result in substantial cost to the county and inconvenience to a witness, who would have to leave his job in Alaska and make a special trip to Washington.

2. The witness was scheduled to return to Washington in 1½ months. By granting a 56-day continuance, trial could be held with no additional expense and no substantial inconvenience to the witness.

3. The defendant had previously shown no interest in a speedy trial. He had agreed to continuances totaling 28 days. He objected only when it appeared that the scheduled trial date might prevent a witness from testifying.

4. The defendant was out of custody. There was no indication at all that the delay would result in any prejudice to him.

The defendant seeks to rely on Wake. There, a continuance was necessitated by the unavailability of an expert witness who was employed by the State Crime Lab. This unavailability resulted from the State's failure to provide adequate staffing, thereby resulting in a "logjam" of cases. Because the problem was state-created, it did not provide an adequate justification for a continuance. Wake, 56 Wn. App. at 475.

The facts in the present case are different. The absent witness was not a public employee. His presence in Alaska resulted from his personal needs, not the action of any public official. There was no chronic mishandling of cases. Rather, there

was a single witness whose employment created an unavoidable conflict with the scheduled trial date. Wake does not say that witness inconvenience and expense cannot be considered in determining whether a continuance should be granted.

Under the circumstances of this case, the trial court could properly determine that a continuance would reduce the expense of the trial and minimize the harm to a crime victim, without causing any prejudice to the defendant. Granting a continuance was not an abuse of discretion.

B. THE TRIAL COURT ACTED PROPERLY IN RESPONDING TO A JURY INQUIRY.

1. Facts.

During jury deliberations, the jury sent out the following inquiry:

What is Law's meaning as to "upon" premises? Instructions (1) says entered or remained ... in dwelling (2) That this entering or remaining was with intent to commit a crime? seems to be different.

1 CP 19 (jury's emphasis). (A copy of this inquiry is in the appendix.)

The judge held a hearing to determine how to answer this question. Both counsel were present, but the defendant was not. The judge reviewed the instructions that the question referred to,

but he didn't see any difference between them. The prosecutor suggested that the judge refer the jury to the specific instructions. Defense counsel asked that the jury be told to follow the instructions, without mentioning any specific instruction. The judge agreed. He suggested responding, "You must rely on the court's instructions as already provided." Defense counsel agreed that this language was "perfect." RP 405-07. Accordingly, the judge gave that response to the jury in writing. 1 CP 19.

2. Since The Defendant Has Not Shown That The Trial Court's Procedure Had Any Actual Impact On His Rights, Any Error Is Not "Manifest" And Cannot Be Raised For The First Time On Appeal.

The defendant claims that he was entitled to be personally present when the court decided how to answer a jury inquiry. No objection on this basis was made in the trial court. Consequently, the defendant can raise the issue only if it involves "manifest error affecting a constitutional right." RAP 2.5(a)(3). To satisfy this standard, the defendant must "show how, in the context of the trial, the alleged error actually affected [his] rights." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the consequences of the alleged error are purely abstract and theoretical, the issue

cannot be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

Here, the trial court responded to a jury instruction that raised purely legal issues. The response took the form urged by defense counsel. RP 407. On appeal, the defendant suggests that he personally could have proposed “a more complete response.” Brief of Appellant 6. There is, however, no reason to believe that the defendant was personally more familiar with jury instructions than his attorney or more adept at explaining them. Even now, the defendant fails to suggest what other response might have been given. The possibility that he might somehow have known a better answer than his lawyer is purely abstract and theoretical. The defendant has failed to demonstrate how this incident had any actual affect on his rights. Consequently, any error in this record is not “manifest” and cannot be raised for the first time on appeal.

3. A Colloquy Concerning A Purely Legal Issue Is Not A “Critical Stage” Of The Proceeding, So As To Give The Defendant A Constitutional Right To Be Present.

If the issue can be raised, this court should conclude that there was no error. The procedure for responding to questions from the jury during deliberations is set out in CrR 6.15(f):

The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response, and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.⁴

CrR 6.15 requires that the court "notify" the parties. When a party is represented by counsel, notice to that party is normally accomplished by notifying counsel. See CR 5(b)(1) (service on a party accomplished by serving the party's attorney); CrR 8.4 (incorporating CR 5). This is consistent with general rules of agency, under which notice to an agent is imputed to the principal. Hurlbert v. Gordon, 64 Wn. App. 386, 824 P.2d 1238 (1992).

The court thus fully complied with CrR 6.15. It notified both parties through counsel. It provided an opportunity for both counsel to discuss an appropriate response. It made this colloquy part of the record. It responded to the jury in writing. RP 405-07; 1 CP 19. The defendant's rights under the rule were fully protected.

⁴ The defendant quotes CrR 6.15(f)(1) as stating that the court should respond "in the presence of, or after notice to the parties or their counsel." This is the former language of the rule, but it was deleted when the rule was amended in 2002.

Notwithstanding this compliance with the rule, the defendant claims that the court violated his right to be personally present. A defendant has a right to be present at all “critical stages” of the trial. A stage is “critical” if the defendant’s presence “has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” The defendant’s presence is not required if it “would be useless, or the benefit but a shadow.” State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). The defendant does not have a right to be present during conferences between the court and counsel on legal matters, unless those matters require a resolution of disputed facts. In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

This court has twice applied these principles to discussions of responses to jury inquiries. State v. Brown, 29 Wn. App. 11, 627 P.2d 132 (1981); State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010), review granted, 170 Wn.2d 1025 (2011).⁵ Brown involves a situation similar to the present case. During deliberations, the jury asked a question concerning the elements of the crime. The court discussed the question with both counsel, without the defendant

⁵ The Supreme Court has not yet set an argument date in Jasper.

being present. It then provided a substantive answer to the question. This court held that this action was proper. The defendant had no right to be present, because his presence did not bear any substantial relation to his opportunity to defend. His rights were adequately protected by his counsel's participation. Brown, 29 Wn. App. at 15-16.

In Jasper, the jury likewise sought clarification of the elements of the crime. Unlike the situation in Brown and the present case, the court did not notify either counsel or conduct any hearing. Instead, it responded by directing the jurors to re-read their instructions. Jasper, 158 Wn. App. at 525-26 ¶ 7.

As in Brown, this court held that the trial court's procedure did not violate the defendant's right to be present. Because the inquiry involved purely legal matters, the court's response was not a "critical stage" of the proceedings. Jasper, 158 Wn. App. at 538-39 ¶¶ 34-35. On the other hand, the trial court did err in failing to notify counsel as required by CrR 6.15. Because of the neutral nature of the court's response, however, this error was harmless. Jasper, 158 Wn. App. at 543 ¶ 43.

The defendant cites two cases in which a trial court's actions in responding to jury inquiries was held improper. Rogers v. United

States, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975); State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983). Neither of these cases sets out any rule contrary to Brown or Jasper. In both, the court responded to the inquiry without notifying defense *counsel* – not merely without the defendant being present. Furthermore, in both cases the jury’s inquiry was *not* limited to purely factual matters.

In Brown, the jury asked whether the court would accept a verdict of “guilty with extreme mercy.” Without notifying counsel, the court responded in the affirmative. Rogers, 422 U.S. at 36-37. The U.S. Supreme Court held that “petitioner’s *counsel* should have been given an opportunity to be heard before the trial judge responded.” Id. at 39 (emphasis added). This error was prejudicial because the judge’s answer to the question was improper: the judge should have advised the jury that its recommendation was not binding, and he should have warned the jury not to consider sentencing consequences. Id. at 40. Contrary to the defendant’s claim, Rogers does not hold that “[t]he discussion of a jury inquiry is a critical stage of trial at which the defendant has a right to be present.” Brief of Appellant at 5. Rather, it held that the trial court

erred in giving an *erroneous* answer to a jury inquiry that raised *discretionary* issues without notifying *counsel*.

In Caliguri, the jury asked to have tapes that were in evidence replayed. The court granted this request and replayed them in open court, without either counsel or the defendant being present. The court held it error for the court to communicate with the jury “in the absence of the defendant.” It then stated that it was improper for the court to replay the tapes “without prior *notice*” to the defendant. Caliguri, 99 Wn.2d at 508. The error was, however, harmless, because nothing prejudicial to the defendant occurred when the tapes were replayed. The Supreme Court reached this conclusion even though the replay included a portion of the tapes that had been excluded at trial. Id. at 509. As in Rogers, the error in Caliguri involved a communication that involved *factual* matters, and that occurred without notification to either the defendant or *counsel*.

The defendant claims that the jury’s question “went directly to the heart of the case.” It did not. The defense to the burglary charge was that the defendant had no involvement in the burglary. RP 348-49. The question had nothing to do with the key issues in the case. Nor is it apparent how the defendant’s presence could

have changed the trial court's answer. The defendant does not even suggest how the question may have been answered differently. Under these circumstances, any benefit from the defendant's presence would have been "but a shadow." The trial court's procedure for answering the question was proper.

4. Since The Court's Response To The Jury Inquiry Was Not Prejudicial To The Defendant, Any Error In Formulating That Response Was Harmless.

Finally, even if the issue can be raised, and even if the procedure used by the trial court was improper, the error was harmless. In determining whether an error of this nature is prejudicial, courts have focused on what information has been conveyed to the jury. "Generally, where the trial court's response to a jury inquiry is negative in nature and conveys no affirmative information, no prejudice results and the error is harmless." Jasper, 158 Wn. App. at 541 ¶ 38. In Jasper, for example, the trial court responded to a jury inquiry by instructing the jurors to re-read their instructions. Id. at 542 ¶ 39. Although the trial court erred in giving this response without consulting counsel, the error was harmless. Id. at 543 ¶ 43.

The Supreme Court followed similar analysis in Caliguri. There, the trial court improperly re-played evidence for the jury in

the absence of *both* the defendant and counsel. Nonetheless, since there was nothing prejudicial in that evidence, the error was harmless. Caliguri, 99 Wn.2d at 471.

In contrast, in Rogers the trial court's error in failing to inform counsel of the jury's inquiry was held prejudicial. This is because the answer provided by the trial court was improper. The court told the jury that they could recommend mercy, without informing them of the limited effect of such a recommendation. In the context of the case, this instruction had the likely effect of causing the jury to reach a compromise verdict. Rogers, 422 U.S. at 40.

As these cases indicate, the proper harmless error analysis focused on what the court did, not on speculation about what it might have done. Here, the trial court simply advised the jurors to re-read their instructions. Such advice is not prejudicial. Furthermore, even if this court is willing to speculate about other possible answers, it is hard to see what form such answer might have taken. Any error committed by the trial court was harmless.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June 21, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent



CL14338071

Filed in Open Court

9/1, 2010

SONYA KRASKI
COUNTY CLERK

By [Signature]
Deputy Clerk

**SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY**

State of Washington
Petitioner/Plaintiff(s)

NO. 10-1-00360-4

VS.

INQUIRY FROM THE JURY AND
COURT'S RESPONSE

Abbett, Robert Ray
Respondent/Defendant(s)

JURY INQUIRY: WHAT IS LAW'S MEANING
AS TO "UPON" PREMISES? INSTRUCTIONS
(1) SAYS ENTERED OR REMAINED... INDIVIDUALLY
(2) THAT THE INTENT OR MEANING WAS WITH INTENT
TO COMMIT A CRIME? SEEMS TO BE DIFFERENT.

DATE AND TIME RECEIVED BY THE COURT: 9/1/10 12:30 PM

COURT'S RESPONSE: You must rely on the court's instructions
as already provided.

[Signature]
JUDGE

DATE & TIME RETURNED TO JURY: 9/1/10 12:52 PM

SAVE - MUST BE FILED