

67341-6

67341-6

No. 67341-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RODNEY SUMMERS,

Appellant.

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 JAN -4 PM 4:06

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

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APPELLANT'S SUPPLEMENTAL BRIEF

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A. ARGUMENT.

**The in-court inquiry into juror misconduct was a critical stage in the trial at which Summers had the right to be physically and personally present**

1. An accused person's right to be present during an inquiry into juror misconduct and subsequent re-instruction of the jury is evident as a matter of history and the values inherent in trial proceedings.

The Supreme Court recently employed the “experience and logic” test to ascertain whether an accused person’s right to a public trial was violated. State v. Sublett, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2012 WL 5870484 (2012). This test is drawn from First Amendment precedent and has not been used to define the scope of rights that derive from the Sixth or Fourteenth Amendments. Id. at \*15 (Madsen, J., concurring). It is also distinct from the right to be present that is guaranteed by article I, section 22’s protection of the right “to appear and defend in person or by counsel.” Although the experience and logic test does not control the result of Summers’ case, it underscores the violation of Summers’ rights when he was held in custody but not brought to court, or informed of his right to be present in court, during the inquiry into misconduct by deliberating jurors.

The experience and logic test asks first “whether the place and process have historically been open to the press and general public.” Sublett, at \*5 (quoting Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). Second, it asks whether public access plays a significant positive role in the functioning of the particular process in question.” Id. The test rests on whether openness to the public enhances the basic fairness of the criminal trial and the appearance of fairness essential to public confidence in the trial process. Id.

In Sublett, the deliberating jury sent a written question to the judge about the meaning of the court’s instruction defining accomplice liability. Id. at \*2, 9. After an unrecorded in-chambers conference between the lawyers and judge, the court sent the jury an agreed upon answer to re-read the instructions. Id.

The defendants in Sublett complained on appeal that this part of the trial process should have been conducted in open court. Id. at \*4. They did not contend the process violated the right to be present. Id. at \*2 n.3. After applying the experience and logic test, the Supreme Court concluded that “[n]one of the values served by the public trial right is

violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists.” Id. at \*7.

In applying the experience and logic test, the Sublett court criticized a test that focuses on whether legal versus factual issues are stake. Id. at \*4 (“we reject the Court of Appeals’ formulation of the relevant inquiry” as resting on whether the issues were “purely ministerial or legal”). The legal/factual distinction is not irrelevant, however, because factual issues are more likely to implicate the values of the trial process, such as the involvement of witnesses, the risk of perjury, and the need to remind all present of their responsibility to the accused. Id. at \*5.

In Summers’ case, the hearing at which he was not personally present involved whether a juror conducted independent research, how many other jurors learned about that research, and whether any were tainted by such knowledge. 5/20/11RP 2-10, 19-26. The judge offered to dismiss and replace any juror whose ability to serve seemed compromised. 5/20/11RP 7, 20.

Resolving this inquiry requires assessing the credibility of the jurors as they assured the court they remained impartial and able to follow instructions, and this assessment rested both on what the jurors

said and their demeanor as they responded to questions about their conduct. In addition to questioning the juror foreperson and the individual juror who used his legal dictionaries at home, the court questioned the jury panel as a whole and then re-instructed the panel, without Summers' presence in court. The juror foreperson and juror 3, who went home and used dictionaries, gave somewhat conflicting explanations of what information juror 3 shared with the other jurors. 5/20/11RP 6, 10.

Historically, jury instructions are given by the judge orally, in open court, as part of the trial. See CrR 6.15(d) ("The court shall read the instructions to the jury."). During jury deliberations, when the jury rehears or replays evidence, "the defendant should be present," in the courtroom. Sublett, at \*42 n.2 (Stephens, J., concurring).

CrR 3.4 mandates the presence of the accused throughout the trial. "The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict." CrR 3.4(a). CrR 3.4 and CrR 6.15(d) demonstrate Summers' right to be present as historically understood.

Logically, the presence of the accused in court serves as a significant reminder of the importance of the issues to the accused and

discourages perjury, just as at trial. See Sublett, at \*5. The defendant's presence in court is inherent in the right to confront witnesses "face to face" as guaranteed by article I, section 22 and the Confrontation Clause of the Sixth Amendment. See State v. Foster, 135 Wn.2d 441, 464, 957 P.32d 712 (1998) ("live testimony, under oath, subject to cross-examination, and under the watchful eye of the jury maximizes the accuracy of the truth-seeking process in criminal trials"). The accused's presence underscores the presumption of innocence, and the meaning of the presumption of innocence was one of the very issues being investigated and debated by the deliberating jurors that prompted them to seek information outside the record. 5/20/11RP 8. By relegating Summers to the jail while the jurors were brought to court to discuss their outside investigation, Summers was not afforded the presumption of innocence to which he was entitled and which he would have received if he was free on bail.

Both as a matter of experience and logic, Summers had the right to be present for this stage of the trial involving the inquiry into juror misconduct and re-instruction of the jury.

2. Sublett does not address the right to be present under article I, section 22.

The defendant's right to be present was not at issue in Sublett, and consequently, the right to be present as defined in article I, section 22 was also not discussed. In a concurring opinion, Justice Stephens mentioned that the defendant's right to be present is "grounded in due process principles." Sublett, at \* 41 (Stephens, J. concurring). But Justice Stephens was referring to the federal right, while the state constitutional right to be present is interpreted "independently of federal due process jurisprudence." State v. Irby, 170 Wn.2d 874, 885, 246 P.3d 796 (2011).

Irby explained that, "as early as 1914," it has been "a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel . . . at every stage of the trial when his substantial rights may be affected." Id. (quoting State v. Shutzler, 82 Wn. 365, 367, 144 P. 284 (1914)). Summers' substantial rights may be affected by the inquiry into the nature and extent of the jurors' independent research and discussions of it, accordingly, he had the right to be present.

3. Summers did not invite the violation of his right to be present.

A person does not waive his right to a public trial by being present and failing to object. State v. Wise, \_ Wn.2d \_, \_P.3d \_\_, 2012 WL 5870396 at \*6 (2012); State v. Paumier, \_ Wn.2d \_, \_P.3d \_\_, 2012 WL 5870479 at \*3 (2012). Summers was not present in the courtroom, although there was a speakerphone through which he tried to listen to the proceedings. There was no effort to verify that he could hear what was said in the courtroom through the speakerphone and no offer to bring him into the courtroom to personally observe the proceedings. Summers did not waive his right to be present.

4. The deprivation of Summers' right to be present requires reversal.

In Wise, the court explained that when part of jury selection is conducted in private, the remedy for violating the public trial right is a new trial. 2012 WL 5870396, \*5, 8. A new trial is the necessary remedy because the public trial violation cannot be cured by simply “redoing” voir dire. Id. at \*8.

Although the court in Irby did not treat the violation of the right to be present as a structural error, it concluded that denying the

defendant his ability to participate in the selection of some jurors in cannot be remedied and requires a new trial. 170 Wn.2d at 886-87.<sup>1</sup>

For similar reasons, the violation of Summers' right to be present undermined his ability to receive a fair trial. The jurors' verdict may not be impeached by after-the-fact explanations of their deliberative process. Gardner v. Malone, 60 Wn.2d 836, 840, 376 P.2d 651 (1962). Their deliberations cannot be redone and they cannot justify their verdict at this late stage.

After excluding Summers from being personally present when the nature and extent of jury misconduct was investigated, and when the court tried to assess whether the jury remained impartial and unbiased, it is impossible to redo this hearing or know how his presence may have altered the result. See Wise, at \*7 ("we cannot know what the jurors might have said differently if questioned in the courtroom" where the public could have been present).

If he had been present, he could have tried to resolve the conflicting statements of the jurors about what information was shared

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<sup>1</sup> As explained in Summers' Opening Brief, the Irby Court's contention that the error is not automatically presumed prejudiced is based on a misreading of the federal due process analysis of State v. Caliguri, 99 Wn.2d 501, 664 P.2d

by Juror 3. His presence would have reminded them of the importance of honestly and completely answering the judge's questions, and the consequences of a conviction. See Sublett, at \*5 (public trial right exists when openness would "remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury"). Instead, Summers' absence diminished the importance of the court's inquiry, as it made the proceedings seem less like part of the trial.

Under article I, section 22, Summers' exclusion is presumptively prejudicial, while under the Sixth and Fourteenth Amendments it is a constitutional error. Under a constitutional harmless error test, the State must prove beyond a reasonable doubt that the exclusion of Summers could not have affected the outcome of the case. United States v. Marks, 530 F.3d 759, 812 (9<sup>th</sup> Cir. 2008); Irby, 170 Wn.2d at 885-86. Under both tests, the erroneous denial of Summers' right to be present cannot be redone or excused and requires a new trial.

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466 (1983), because the issue had not been briefed in that case, and it should not control the remedy under article I, section 22.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening and Reply Briefs, Mr. Summers respectfully requests this Court order that he receive a new trial.

DATED this 4th day of January 2013.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67341-6-I
	)	
RODNEY SUMMERS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL 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:

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| [X] | RODNEY SUMMERS<br>349585<br>CLALLAM BAY CORRECTIONS CENTER<br>1830 EAGLE CREST WAY<br>CLALLAM BAY, WA 98326 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 4<sup>TH</sup> DAY OF JANUARY, 2013.

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