

67341-6

67341-6

NO. 67341-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RODNEY SUMMERS,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

2012 JAN 23 PM 4: 55
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. INTRODUCTION.

The deliberating jury sent a note to the judge indicating that one juror had independently researched the meaning of the presumption of innocence and beyond a reasonable doubt. The judge investigated by speaking first with the presiding juror, then the offending juror, and finally all the jurors together about this issue. After further instructing the jury, the court permitted the same jurors to deliberate on the case.

Rodney Summers was not present in the courtroom when the court conducted this investigation and reinstructed the jury. The court let Summers listen to the in-court proceedings from a telephone at the jail. He could not speak privately with his lawyer or see the jurors as they answered the court's questions about whether they had violated the court's instructions. Likewise, the jurors could not see him and did not know why he was not in the courtroom. The jury reached its verdict convicting Summers of all charges shortly after the in-court proceedings held in Summers's absence.

By conducting a factual inquiry into the extent of juror misconduct and reinstructing the jury without affording Summers his right to be present in the courtroom, the court violated

Summers's right to appear and defend in person, as guaranteed by the state constitution, his right to be present for a critical stage of the proceedings as protected by the federal constitution, as well as his right to be present "at every stage of the trial" as dictated by CrR 3.4. This error as well as several unauthorized sentencing conditions require reversal and remand for further proceedings.

B. ASSIGNMENTS OF ERROR.

1. The court violated Summers's right to be present under the state and federal constitutions, and CrR 3.4, by conducting an investigation into juror misconduct and re-instructing the jury without Summers's physical presence in the courtroom.

2. The court acted without statutory authority by sentencing Summers to pay a domestic violence penalty when the penalty was enacted after the offenses occurred.

3. The court violated Summers's right to privacy by ordering he submit to plethysmograph examinations at the discretion of the Department of Corrections rather than his treatment provider.

4. The court's sentencing order impermissibly invaded Summers's right to privacy by ordering him to submit to polygraph examinations without requiring that they occur only for the purpose of monitoring compliance with conditions of community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to be present in the courtroom during trial proceedings includes the court's investigation of potential juror misconduct. The judge investigated whether a juror committed misconduct and whether it tainted any members of the deliberating juror without bringing Summers into the courtroom so he could observe, participate and confer with his lawyer privately. Did the court violate Summers' right to be present by interviewing and re-instructing the jurors without letting Summers see the jurors face to face and participate in person?

2. A court may impose a sentence only if it is authorized by a statute that was in effect at the time the offense occurred. Summers was convicted of offenses that occurred before the statute authorizing a domestic violence penalty was enacted. Did the court lack authority to impose a domestic violence penalty because the penalty did not exist at the time of the offenses?

3. Penile plethysmograph examinations are invasive tests that may be ordered as a condition of community custody only when needed for treatment, as directed by the treatment provider. Did the court impermissibly invade Summers's right to privacy by requiring him to submit to penile plethysmograph examinations at

the direction of his community custody officer and not his treatment provider?

3. Due to the unreliability and invasiveness of polygraph examinations, they may be required as a condition of community custody only to monitor a person's compliance with community custody conditions. The court ordered Summers submit to polygraphs at the discretion of his community custody officer. Did the court's sentencing order improperly require Summers take polygraph examinations for reasons other than monitoring his compliance with sentencing conditions?

D. STATEMENT OF THE CASE.

Rodney Summers's former stepdaughter J.J. claimed that years earlier, Summers had sexually abused her and she never told anyone about it because the first person she told did not believe her. 1RP 68-71; 2RP 113-14, 143.¹ She also said was afraid of Summers even though he and her mother had divorced and he moved to another state. 3RP 297, 300. Summers denied

¹ The verbatim report of proceedings (RP) from trial and sentencing are consecutively paginated and are referred to herein by the volume designated on the cover page.

The May 20, 2011 proceeding involving juror misconduct is contained in a separate volume and is referred to as "5/20/11RP."

the allegations. 3RP 301. There was no physical evidence and none of J.J.'s family members corroborated the accusations. 2RP 176, 188; 3RP 287, 291.

While the jury was deliberating, Juror 3 was dissatisfied with the court's instructions explaining the meaning of proof beyond a reasonable doubt. 5/20/11RP 8. Juror 3 had an "old law book" at his house. Id. at 9. He searched his old books for other explanations of these terms. Id. at 8-9. He returned to jury deliberations and told the other jurors what he had done. Id. at 10. The presiding juror sent a note to the court asking whether this juror should be dismissed. Id. at 4.

The judge brought the prosecutor and defense attorney into the courtroom and read this note and another jury note to the attorneys. 5/20/11RP 2, 4; CP 58.² The court then sent for the presiding juror, who came into the courtroom and explained that another juror had researched the definitions of certain terms. Id. at 5-6. The court sent for the offending juror, Juror 3. Id. at 7.

² The jury's other note asked the court to explain why a detective testified as a witness and sat at counsel table as if he was an attorney. CP 59.

Juror 3 told the court that he could not remember the names of the books he looked at but described them as old. 5/20/11RP 8-10. He did not explain what he read when he looked up the definitions of presumption of innocence and proof beyond a reasonable doubt. Id. at 9-10. He told the judge that the definitions he found were “consistent” with the instructions given by the court. Id. at 9. He admitted that he told the other jurors that he looked up these terms and told them what he found was not different from what the court said in its instructions. Id. at 10.

After a discussion between the judge and lawyers, the court decided to reinstruct the jury on the importance of deciding the case based on the evidence at trial and free from outside influence. 5/20/11RP 19-21. The court asked all of the jurors whether any had heard anything that would affect their abilities to deliberate based on the evidence and instructions. Id. at 26. None of the jurors volunteered that they felt unable to serve. Id. The jury reached a verdict shortly thereafter, finding Summers guilty of all charged offenses. Id. at 27.

Summers was not in the courtroom during any of the proceedings discussing the jury’s questions, including the court’s investigation into the nature of the juror misconduct, or the

reinstruction of the jury as a whole. The record indicates that Summers was listening to at least some of the proceedings over a telephone provided to him at the jail by a corrections officer. 5/20/11RP 13, 18, 22. The court offered no explanation for why Summers was not brought into the courtroom from the jail.

Pertinent facts are addressed in more detail in the relevant argument sections below.

E. ARGUMENT.

1. **Summers was denied his right to appear and defend in person when the court conducted a critical stage of the proceedings without Summers's presence in the courtroom**

a. An accused person has the right to be present when his substantial rights may be affected.

The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to be present. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); U.S. Const. amends. 5, 6, 14; Const. art. I, §§ 3, 21, 22. Under the federal constitution, an accused person is entitled to be personally present in court when a stage in the trial process offers a defendant, if present, the opportunity to “give advice or suggestion or even to supersede his lawyers altogether.” State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011) (quoting

Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

The right to be present at trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings, can be seen by the jury, and can participate in the presentation of his rights.

Bustamante v. Eyman, 456 F.2d 268, 274 (9th Cir. 1972). The due process right to be present includes proceedings that involve whether particular jurors are qualified to serve on a case. Irby, 170 Wn.2d at 802.

An accused person's right to "appear and defend" is more broadly protected by the Washington Constitution than its federal constitutional counterpart. Irby, 170 Wn.2d at 883.³ The Washington Constitution expressly guarantees all accused persons the right to "appear and defend in person." Const. art. I, § 22. The

³ The Supreme Court has explained that the right "to appear and defend" in article I, section 22 is broader than the federal right in a number of cases. See e.g., State v. Martin, 171 Wn.2d 521, 528, 252 P.3d 872 (2011) (article I, section 22 right to appear and defend bars prosecution from implying accused tailored testimony unless factual basis for tailoring elicited at trial); State v. Rafay, 167 Wn.2d 644, 650, 222 P.3d 86 (2009) (right to appear and defend underscores right to self-representation); see also State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (article I, section 22 right to confront witnesses "face to face" broader than Sixth Amendment).

“right to appear and defend in person” is a personally held right that is not satisfied merely by counsel’s participation in the proceedings. State v. Rafay, 167 Wn.2d 644, 650, 222 P.3d 86 (2009).

The right to be present as protected by the federal constitution extends to all critical stages of the trial. Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); U.S. Const. amends. 5, 6, 14. In Washington, the right to be present is not limited to whether the proceedings involve a “critical” factual issue. Irby, 170 Wn.2d at 885. Instead, this state’s constitution guarantees an accused person 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)).

In Irby, the judge, prosecutor, and defense attorney exchanged e-mails at the start of jury selection in which they agreed to excuse several prospective jurors who had scheduling conflicts that seemed to make them unqualified to serve. 170 Wn.2d at 878. The record did not show the defendant was personally consulted before the court accepted the agreement. Id.

The prosecution claimed that the “hardship” stage of jury selection was not one in which the defendant has a right to be

present. Id. at 881. The Irby Court rejected this contention, explaining that both the state and federal constitutional rights to be present at trial include stages where an individual juror is being evaluated and potentially dismissed based on his or her qualifications for service. Id. at 882, 885. Irby further explained that under the state constitution, the critical inquiry is whether a defendant's substantial rights may have been affected at the proceeding in which he was absent. Id. at 885 (citing Shutlzer, 82 Wash. at 367.

b. The court's investigation of a juror who violated its instructions was a stage of the proceedings at which Summers had the right to appear in person.

A violation of the right to an impartial jury occurs where the jury considers extraneous evidence in its deliberations. Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The jury may not consider "information that is outside all the evidence admitted at trial, either orally or by document." State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Thus, consulting a dictionary constitutes jury misconduct. Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 137, 750 P.2d 142 (1988) (jury committed misconduct by consulting law dictionary for definition of

“negligence” and “proximate cause”). A judge must dismiss a juror who is unfit to serve, including a juror who has not followed the practices required of jury service. State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009).

A juror’s failure to obey the court’s instructions may show the juror is unfit to serve, but this inquiry is fact-specific. Depaz, 165 Wn.2d at 856. When a juror commits misconduct, the court must determine whether the juror is unable to deliberate or consider the evidence impartially. Id. In Depaz, the prosecution urged the court to adopt an automatic dismissal rule for any juror who failed to follow the courts instructions. Id. The court rejected such a standard, and instead ruled that the trial court must evaluate whether the jurors’ ability to deliberate impartially has been compromised. Id. When confronted with a deliberating juror who has not followed the court’s rules, the court must make the factual determination as to whether the juror can still deliberate fairly. Id. at 857.

Here, upon discovering that Juror 3 had researched definitions for the presumption of innocence and beyond a reasonable doubt, the court indicated its willingness to dismiss that juror or any other juror whose ability to serve was compromised by

the information conveyed by Juror 3. 5/20/11RP 7, 20. The court explained it would replace the deliberating juror with one of the two alternates. 5/20/11RP 7.

The court held a hearing first with the presiding juror; then with Juror 3, who had conducted his own research; and finally with all deliberating jurors. For no reason explained on the record, Summers was not personally present during any of these proceedings. The first mention of Summers's absence was in the middle of the hearing -- after the court spoke to the presiding juror and Juror 3 -- when the court bailiff mentioned that Summers was on the telephone with a corrections officer. 5/20/11RP 13. After a recess, the proceedings resumed and part way through the next portion of the hearing, the judge said, "I think I forgot to indicate, Mr. Summers is on the phone again." 5/20/11RP 18. The record does not explain whether Summers was listening to all of the proceedings or how well he could hear.

At the hearing, the court asked the presiding juror and Juror 3 what information had been conveyed to the jurors. 5/20/11RP 5-6, 8-10. The presiding juror said Juror 3 had not told the others what he learned from looking in the dictionary; Juror 3 countered that he did tell the other jurors about what he found, but he

explained what he found was not different from the instructions the court provided. 5/20/11RP 6, 10.

Juror 3 said that he “tried to find out if any of the old books that I had” at home “shed some light on the difference between the definition of beyond a reasonable doubt and beyond a shadow of a doubt.” 5/20/11RP 8. He was prompted to do this research because of some disagreements that jurors were having over the meaning of proof beyond a reasonable doubt. Id. He found a definition of presumption of innocence but “saw nothing in the books” that altered his understanding of the presumption of innocence. Id. at 8-9. He also found a definition of beyond a reasonable doubt and said it was “consistent” with the court’s definition. Id. at 9. He did not describe what information he found or say how it was consistent with the instructions. Id. He did not say the information was identical. Id. He did not know the name of the book or books he used. Id.

After the juror left the courtroom, the judge and defense attorney expressed concern about the juror’s violation of the court’s instruction not to conduct outside legal research. 5/20/11RP 11. Neither of the attorneys asked the court to remove that juror nor asked further questions of any other jurors. Instead, the attorneys

agreed that the court should reinstruct the jury about its obligation to rely on the evidence and law as explained by the court.

5/20/11RP 18-22.

After the court concluded its inquiry of Juror 3 and that juror left the courtroom, the judge asked Summers if he wanted to talk to his lawyer. 5/20/11RP 14. Summers said he did, which required Summers to hang up the telephone and wait for his lawyer to go into a different room and call Summers on another telephone line. Id. While the court accommodated Summers's request to talk to his lawyer, it was a cumbersome process that required extra time and effort and could not be accomplished during the in-court proceedings.

The court decided to re-instruct the jury and ask whether any would have trouble following the court's instructions but without explanation it did not bring Summers into the courtroom. 5/20/11RP 20, 22 ("we'll leave Mr. Summers on the phone and we'll bring the jury out."). Again Summers was not able to look the jurors in the eye when the court asked whether any were affected by Juror 3's independent research or had any reason to doubt their abilities to follow the court's instructions.

Summers was not able to confer privately with his attorney during the proceedings without requesting a recess so the attorney could use another telephone in a different room. See Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct 1057, 25 L.Ed.353 (1970) (ability to communicate with counsel is one of the “primary advantages” of being present). He was not able to see the demeanor or judge the credibility of the juror who violated the prohibition against independent research. See Irby, 170 Wn.2d at 894 (Madsen, J., dissenting) (agreeing that “if jurors are being questioned about matters specific to the defendant's case, then the defendant has the right to be present”). Summers was not able to ask additional questions of Juror 3. He was not allowed to sit next to his lawyer when the jury was re-instructed or personally evaluate whether any jurors might have been affected by the juror’s out-of-court research into legal terms. See CrR 3.4(a) (“the defendant shall be present . . . at every stage of the trial, including the empaneling of the jury and the return of the verdict”).

c. Summers did not waive his right to be present.

The right to be present at trial may be waived, but any such waiver must be knowingly and voluntarily executed. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Courts

“must indulge every reasonable presumption against” the loss of the constitutional right to be present. Allen, 397 U.S. at 343.

At the least, a defendant must be aware of his right to be present in the courtroom in order to waive that right. See State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988) (while a waiver may be inferred, there cannot be “a knowing and intelligent waiver unless it is shown that the defendant knew of his right. Unless the defendant is informed of his right, he cannot be presumed to know it”); see United States v. Gordon, 829 F.2d 119, 125 (D.C. Cir. 1987) (holding that in order for a defendant to waive his constitutional right to be present he must be advised of the right and then permitted to make an on-the-record waiver in open court).

Summers was in the jail’s custody, in the presence of a correction’s officer, during these proceedings. 5/20/11RP 13. He could not control whether or when he came to court. See Gordon, 829 F.2d at 125 n.7 (in-custody defendant may not have power to waive right to be present because his presence is not within his control). Summers did not ask to remain in the jail during the proceedings and had not been disruptive during the trial such that he forfeited his right to be present.

The record contains no mention of Summers's right to be present. No colloquy occurred to explore whether Summers understood he had the right to be present. He was not offered the opportunity to appear in person. He was not told he could ask to be present in court. Thus, although Summers did not object to the court's failure to bring him to court so he could participate in person, he did not knowingly, intelligently, and voluntarily waive his right to be present for the court proceedings.

Furthermore, his access to a telephone does not satisfy his right to be present in the courtroom. CrR 3.4(a) requires that "[t]he defendant shall be present at every stage of the trial including the empaneling of the jury and the return of the verdict." This mandatory court rule requires a showing of "good cause" to proceed without the accused. CrR 3.4(a). CrR 3.4 permits videoconferencing for certain proceedings, but videoconferencing is defined as an audio and visual mechanism in which the "judge, counsel, all parties, and the public" [are] able to see and hear each other" simultaneously. CrR 3.4(d)(1), (3). Summers was only offered a telephone and could not see what was occurring in court.

Videoconferencing is only permitted in specified non-jury trial proceedings, such as arraignment or a bail hearing. CrR

3.4(d)(1), (3). For other proceedings, videoconferencing may occur “only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.” CrR 3.4(d)(2). Summers did not have a videoconference, even if it one could have been allowed by express agreement.

The right to be present “means physical presence.” United States v. Lawrence, 248 F.3d 300, 303 (4th Cir. 2001); see also United States v. Navarro, 169 F.3d 228, 236 (5th Cir. 1999) (right to be present means defendant “must be in same physical location as judge”); see also United States v. Williams, 641 F.3d 758, 764 (6th Cir. 2011) (adopting reasoning of Lawrence and Navarro).⁴ The

⁴ Lawrence and Navarro construe Fed.R.Crim.P. 43, which is similar to CrR 3.4. As summarized in Lawrence, the rule states in pertinent part:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a

requirement of physical presence “reflects a firm judgment . . . that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.” Lawrence, 248 F.3d at 304. In Lawrence, the court reversed a sentence where the defendant participated by video teleconference, because it violated the express requirements of the court rule. Id. Washington’s express guarantee of the right to “appear and defend in person or by counsel” confers a right of personal participation that is broader than the federal constitutional right to be present. See Rafay, 167 Wn.2d at 650.

The right to be physically present serves similar purposes as the right to confront witnesses face to face. It enhances the accuracy of the fact-finding process in part because it is more

defendant, initially present at trial, or having pleaded guilty or nolo contendere,
(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),
(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or
(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

difficult to lie to the accused's face than behind his back. Gray v. Moore, 520 F.3d 616, 626 (6th Cir. 2008) (citing Coy v. Iowa, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts")). Moreover, the fact-finding process rests on subtleties such as facial expressions, body language, demeanor, and nervousness. Gray, 520 F.3d at 626. Just as placing a witness under the scrutinizing gaze of the accused is fundamental to face-to-face confrontation, Summers's gaze would have enhanced the fact-finding inquiry the court conducted to analyze the nature and extent of the juror misconduct. Summers was denied his right to be physically present without good cause, and without an explicit waiver of his right, at a stage in the proceeding when his presence may have had an effect on the proceedings.

- d. Excluding Summers from personally participating in the questioning and evaluation of juror misconduct requires reversal.
- i. The Washington Constitution treats the error as presumptively prejudicial.

In Irby, the court explained that Washington case law historically treated a violation of the accused's right to be present as presumptively prejudicial. 170 Wn.2d at 885. The right was strictly enforced and not cured by the attorney's presence. Id.; see Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury with counsel but 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. 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 re-instructing the jury with defendant present, because the right to be personally present is mandatory for all substantive trial proceedings and is strictly enforced); Shutzler, 82 Wash. at 367 (where court urged deliberating jury to try to reach a verdict in

absence of attorneys or defendant, court's violation of accused's right to be personally present at trial requires reversal).⁵

The Irby Court was under the impression that State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) overruled these earlier cases. 170 Wn.2d at 886. However, in Irby, the state constitutional right had not been briefed by the parties and no one explained the evolution of the case law. Id. at 885.

In Caliguri, the court recognized that Washington had long held that improper communications between the judge and jury without the accused's presence were deemed prejudicial. 99 Wn.2d at 508. The error in Caliguri was the court's replaying of tapes admitted into evidence without notifying the defendant, which the Court agreed was "highly improper." But the court departed from this precedent and adopted the "modern view" of the federal courts and other jurisdictions, which used a constitutional harmless error test. Id. at 509.

⁵ A Gunwall analysis is unnecessary when the court has already determined that the state constitution warrants an inquiry on independent state grounds, as the Court indicated in Irby. See State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1996).

Caliguri contained no analysis of the broader protections required by article I, section 22. It simply decided to follow the “modern view” of other jurisdictions, even though this Court interprets our constitution based on the intent of the constitutional provision at the time of its framing and not the evolution of modern views on fundamental rights. In re Runyan, 121 Wn.2d 432, 441, 853 P.2d 424 (1993). Accordingly, Caliguri rested on an unpersuasive reason for departing from the independent interpretation and application of article I, section 22.

When the Framers drafted the state constitution, it was the prevailing understanding that an accused person had a personal right to be present when issues arose during jury deliberations. Linbeck, 1 Wash. at 338-39, Beaudin, 76 Wash. at 308; Shutzler, 82 Wash. at 367. A violation of this right was conclusively prejudicial.

Since it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected, it is no answer to say that in the particular proceeding nothing was done which might not lawfully have been done had he been personally present. The excuse, if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all. The wrong lies in the act itself, in the violation of the constitutional and statutory right of the

accused to be present and defend in person and by counsel.

Shutzler, 82 Wash. at 367-68.

In the context of article I, section 22's explicit protection of the public trial right, the court does not look to whether the courtroom closure was de minimis unless the defendant himself expressly sought this departure from constitutional norms. See State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009) (in Washington, "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis."). A courtroom closure is not "trivial" unless it is inadvertent. State v. Lormor, 172 Wn.2d 85, 96, 257 P.3d 624 (2011). Similarly, the constitution expressly guarantees an accused person the right to be present at trial if his substantial rights may be affected. Summers was not inadvertently excluded from the substantive proceedings that pertained to the qualifications of the jury, and thus, the violation of his right to be present requires reversal.

Summers's presence would have furthered the truth-seeking function of the trial. He had a personal role to play in the factual inquiry before the court and he could not fulfill this role when he

could not observe the demeanor of the juror, communicate confidentially with his lawyer during the proceedings, or by his presence remind the jurors of the importance of holding the prosecution to its burden of proof. The violation of Summers's right to be present during a portion of the trial at which his substantial rights may be affected should be treated as a presumptively and conclusively prejudicial error.

- ii. Under the federal constitution, the State bears the burden of proving the error is harmless beyond a reasonable doubt.

When there is a violation of the right to be present, the federal constitution places "the burden . . . on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Marks, 530 F.3d 759, 812 (9th Cir. 2008); Irby, 170 Wn.2d at 885-86.

Applying this constitutional harmless error test in Irby, the court held that the prosecution was required to show that all of the dismissed jurors "had no chance to sit on Irby's jury," and the State could not meet this heavy burden. Id. at 886. Those dismissed jurors had not had their ability to serve tested by Irby. Id. While the attorneys and judge had agreed those jurors should be excused, the defendant himself had not probed their qualifications. The Irby

Court reasoned that “had they been questioned in Irby’s presence,” they may have been found qualified to serve. Id.

Similarly, had Summers been permitted to take part in the factual inquiry of the jurors, the jurors may have given different answers to the judge’s questions. Summers may have seen grounds to dismiss jurors that others did not. The court expressed its willingness to dismiss any juror involved in the inappropriate research or tainted by it. 5/20/11RP 7, 20.

If Summers had been present in the courtroom during these proceedings, he may have noticed facial expressions or other body language indicating that the jurors were not being forthright. Summers would have been able to judge the credibility of Juror 3, who admitted to violating the court’s instructions by researching legal terms but minimized his misconduct by claiming that he had not learned anything of substance. No one probed this juror to find out what precise information he learned. 5/20/11RP 9-10. No one figured out what books he was using. Id. His lawyer asked no questions of this or any other jurors. Id. Rather than simply accepting Juror 3’s impression that the definitions he located were not different from the court’s instructions, Summers could have asked for the specific definitions Juror 3 found, enabling the court

to decide whether the juror's belief that the information was not different was accurate and complete. Summers could have assessed the credibility of all jurors who, upon inquiry from the court, did not volunteer that they had been affected by the juror's investigation into the legal terms. 5/20/11RP 26.

Additionally, the mere fact that Juror 3 was seeking additional information about the meaning of the fundamental concepts of presumption of innocence and beyond a reasonable doubt due to a disagreement among the jurors showed that the jurors were struggling to decide whether the prosecution had proved its case and they felt the instructions were inadequate or incomplete. The fact that the juror looked to outside information would have been a reasonable basis to excuse this juror. If Summers had asked to have the juror excused based on his independent research, it is likely that the court would have granted that request. 5/20/11RP 7, 20. And because "reasonable and dispassionate minds may look at the same evidence and reach a different result," the error in excluding Summers from personal participation in this portion of the trial cannot be deemed harmless. See Irby, 170 Wn.2d at 886-87.

Finally, the jurors were questioned and reinstructed without Summers's presence in the courtroom. His absence would likely cause the jurors to speculate about where he was during the deliberations. They did not know he was listening on the telephone, but may have thought he was no longer interested in the outcome or the case, or that this stage of proceedings was less important to him and he did not bother to attend. Again, he was not able to view the jurors face to face, to ascertain whether any showed signs of not being able to follow the court's instructions.

The court's unexplained failure to include Summers in the factual inquiry regarding juror misconduct during deliberations denied Summers his right to be present at a critical stage of the proceedings and to appear and defend where his substantial rights may be affected. The violation of his right to be present requires reversal.

2. **The court entered sentencing conditions not authorized by law or involving overly broad regulations**

- a. The SRA authorizes the sentencing court to impose only specified sentencing conditions**Error! Bookmark not defined.**

When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The sentencing court must look to the statutes in effect at the time the defendant committed the crime. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

Logically, the burden is on the State to demonstrate a sentencing order is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); see United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to

demonstrate discretionary supervised release condition is appropriate in a given case).

b. The domestic violence fee is not authorized for a 1999 offense.

The charging period for the offenses underlying Summers's convictions was September 6, 1999 to November 30, 2003. CP 10. In 2004, the legislature enacted a new penalty for domestic violence offenses, which authorizes a trial court to impose an additional \$100 fine for domestic violence convictions. RCW 10.99.080(1); Laws 2004, ch. 15 § 2 (effective June 10, 2004). This specific fine was not authorized at the time of Summers's offense.

The court was not authorized to impose the \$100 domestic violence penalty in Summers's case. The judgment and sentence on its face notes that the fine may be imposed only "for offenses committed after 06-04-2004."⁶ CP 17. The face of the judgment and sentence also shows that Summers was convicted of offenses that were committed sometime between September 6, 1999 to November 30, 2003. CP 10.

⁶ The effective date of "June 4, 2004," as listed on the judgment and sentence appears to be a typographical error, because the chapter enacting the new law provides for an effective date of June 10, 2004. Laws 2004, ch.15.

Penal statutes, including the imposition of penalty assessments, are presumed to operate prospectively and are triggered by the date of the offense. State v. Humphreys, 139 Wn.2d 53, 60, 983 P.2d 118 (1999); RCW 10.99.080 contains no provision indicating the statute was intended to apply retrospectively to offenses committed before its effective date. *Id.* This interpretation of the statute is consistent with the judgment and sentence, which on its face directs the court to consider imposing the fine only for offenses that occur after June 2004, i.e. the effective date of the statute. CP 17. Accordingly, the court did not have authority to impose this fine upon Summers because he was not convicted of any offense occurring after the effective date of the new statute authorizing the domestic violence penalty assessment. CP 10.

c. The plethysmograph order violates Summers' rights to be free from discretionless invasion of his bodily integrity.

The trial court ordered Summers to undergo plethysmograph examinations as required by his community corrections officer. CP 25 (Additional Community Custody Condition 16). Penile plethysmograph testing may be used on occasion in the diagnosis and treatment of sexual offenses, but it is not a monitoring tool to

be used by a community corrections officer. Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Summers's constitutional right to be free from bodily intrusions.

- i. Summers has a fundamental privacy interest in freedom from government intrusions into his body and private thoughts.

The due process clauses of the state and federal constitutions include a substantive component providing heightened protection against government interference with certain fundamental rights and liberty interests.⁷ Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn.App. 515, 527, 154 P.3d 259 (2007) (citing O'Hartigan v. State Dep't of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odesloo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex

Offenders,” 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004).

Additionally, both the Fourth and Fourteenth Amendments protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952); In re Marriage of Parker, 91 Wn.App. 219, 224, 957 P.3d 256 (1998).

The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). People convicted of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Weber, 451 F.3d at 570-71 (Noonan, J., concurring) (“[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line

⁷ In addition to the due process protection found at Article I, section 3, Article I, section 7 of the Washington constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The enumeration of certain rights in the state constitution “shall not be construed to deny others retained by the people.” Wash. Const. art. I, § 30.

at which the government must stop. Penile plethysmography testing crosses it.”).

ii. Penile plethysmograph testing implicates the constitutional right to freedom from bodily restraint.

The freedom from bodily restraint is at the core of the interests protected by the Due Process Clause. Parker, 91 Wn.App. at 222-23. Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of this testing is questionable. In re Marriage of Ricketts, 111 Wn.App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Parker, 91 Wn.App. at 226 (test violated father’s constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); Weber, 451 F.3d at 562, 564 (explaining that plethysmograph testing is not a “run of the mill” medical procedure and studies have shown its results may be unreliable); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004) (concluding the “highly invasive nature” of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005); Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (stating there has been “no showing” regarding the test’s reliability or that other less intrusive means are not available for obtaining the

information); see United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding trial court did not abuse its discretion by refusing to admit plethysmograph test results as evidence because test fails to satisfy “scientific validity” prong of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)), cert. denied, 516 U.S. 1077 (1996); see Odeshoo, 14 Temp. Pol. & Civ. Rts. L. Rev. at 43.

The Ninth Circuit’s opinion in Weber is instructive. Weber pled guilty to possession of child pornography, and the district court ordered special conditions of supervised release that included participation in mental health counseling and/or a sexual offender treatment program. Weber, 451 F.3d at 555. The court further ordered Weber to comply with all conditions of his treatment program, including submission to risk assessment evaluations and physiological testing, including but not limited to polygraph, plethysmograph and Abel testing. Id. Weber objected only to the requirement that he undergo plethysmograph testing. Id.

Under the federal statute governing supervised release after a prison term, the district court has wide discretion to impose special conditions of supervised release, even conditions that infringe upon fundamental rights. Weber, 451 F.3d at 557. Conditions of supervision, however, must be rationally related to

the “goal of deterrence, protection of the public, or rehabilitation of the offender.” Id. at 558 (quoting United States v. T.M., 330 F.3d 1235, 1240 (9th Cr. 2003), citing 18 U.S.C. §§ 3553(a), 3583(d)). Special conditions may involve “no greater deprivation of liberty than is necessary for the purposes of supervised release.” Id. (quoting T.M., 330 F.3d at 1240, in turn quoting 18 U.S.C. § 3583 (d)(2)).

The Weber Court reviewed psychological studies both critical and supportive of plethysmographic testing of sex offenders. Although the court concluded that it could not categorically rule out plethysmograph testing for all offenders, it noted problems with the test. Weber, 451 F.3d at 566. The American Psychiatric Association, for example, has expressed reservations concerning the reliability and validity of plethysmograph testing. Id. at 564 (citing Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-R 567 (4th ed. 2000)).

The Court explained that the relevant question is whether plethysmograph testing will promote the goals of rehabilitation and deterrence in an individual case, because supervised release conditions must be “‘reasonably related’ to ‘the nature and circumstances of the offense and the history and character of the

defendant.” Weber, 451 F.3d at 566 (quoting 18 U.S.C. § 3583 (d)(1), 3553(a)(1)). “Only a finding that plethysmograph testing is likely given the defendant’s characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant’s significant liberty interest in his own bodily integrity.” Id. at 567. Even then, the district court must consider if other less invasive alternatives are open, as there are several alternatives available in the treatment of sexual offenders. Id. at 567-68. The Court therefore remanded Weber’s case for an evidentiary hearing. Id. at 570.

- iii. Summers’s constitutional right to freedom from bodily intrusion is violated by the requirement that he submit to penile plethysmograph testing at the sole discretion of his community corrections officer.

Plethysmograph testing may be used in the diagnosis and treatment of sex offenses, and therefore may be required as part of court-ordered sexual deviancy therapy, but it is not permitted for general monitoring of a defendant while on community custody.

State v. Riles, 135 Wn.2d 326, 343-46, 957 P.2d 655 (1998).

“[P]lethysmograph testing does not serve a monitoring purpose . . .

It is instead a treatment device that can be imposed as part of crime-related treatment or counseling.” Id. at 345.

Here, the court required Summers to submit to such testing “as directed by the supervising Community Corrections Officer” rather than at the direction of his sexual deviancy treatment provider. CP 25 (Condition 16).

This testing is not connected to sexual deviancy diagnosis or treatment, but can be ordered by the CCO for any reason. The community custody condition thus violates Summers’s constitutional right to be free from bodily intrusions. This Court should strike the requirement that Summers submit to plethysmograph testing as required by his CCO. Riles, 135 Wn.2d at 353.

- d. The court’s requirement that Summers submit to polygraphs violates Summers’s right to privacy because it is not expressly connected to monitoring compliance with community custody conditions

Polygraph tests are disfavored in the law and courts have consistently recognized their unreliability. In re Det. of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). “[P]olygraph examinations are also invasive, both physically and of one’s private affairs.” Id. Compulsory polygraph examinations “implicate privacy concerns,” and even if they are permitted, the authority to demand

a person submit to such an examination must be narrowly circumscribed. Id.

One circumstance in which polygraph examinations may be ordered by a court is in the context of community custody, but only in limited circumstances. Riles, 135 Wn.2d at 342-43. Courts may not bestow unbridled discretion upon the State to require offenders submit to polygraph examinations. See State v. Combs, 102 Wn.App. 949, 952-53, 10 P.3d 1101 (2000). Polygraphs may not be used as a fishing expedition to probe the defendant's mind and ascertain whether he has any incriminating information to offer. Id. Instead, polygraph examinations must be used only to monitor conditions of community custody.

In Combs, the court faulted the court for using a sentencing form that did not explicitly limit the State's authority to require a polygraph examination to the circumstance of monitoring compliance with conditions of community custody. 102 Wn.App. at 953. The court warned that explicitly setting forth the circumstances in which the State may demand a polygraph serves the important purposes of "inform[ing] offenders of their rights, insur[ing] protection of those rights, and prevent[ing] confusion amongst

judges, defendants and community corrections officers regarding the applicable legal standard.” Id. at 953.

Summers was ordered to submit to polygraph examinations at the discretion of his CCO. CP 25 (Condition 16). The court did not limit the use of such examinations to the permissible purpose of monitoring compliance with community custody conditions.

As written, this condition allots unjustifiable discretion to the CCO to demand Summers submit to a polygraph for reasons unconnected to monitoring his compliance with court-ordered restrictions. The impermissibly broad condition of community custody must be stricken.

F. CONCLUSION.

For the foregoing reasons, Rodney Summers respectfully requests this Court reverse his convictions due to the violation of his right to be present, and reverse the unauthorized sentencing conditions imposed by the court.

DATED this 23rd day of January 2012.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant