

REC'D

MAR 31 2014

King County Prosecutor
Appellate Unit

NO. 71014-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH HAMMOND,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to declare a mistrial based on juror misconduct.

2. Alternatively, the trial court erred by failing to fully investigate the extent to which misconduct by one juror who was dismissed, may have rendered the remaining jurors unable to provide appellant with the fair and unbiased jury he was entitled to under the constitution.

3. Appellant was denied his right to effective assistance of counsel.

Issues Pertaining to Assignments Of Error

Juror 10 consistently asked inappropriate questions during court proceedings, argued with the judge about jury instructions and the propriety of outside research, expressed these frustrations with other jurors and discussed the case with them during recesses. Juror 10 was eventually dismissed, but no further inquiry was made as the impact of that juror's misconduct on the ability of the remaining jurors to provide appellant with a fair and unbiased jury.

1. Did the trial court err by failing to declare a mistrial in light of Juror 10's misconduct, or at least in failing to further investigate the impact of the misconduct?

2. After multiple jurors began expressing concerns about the evidence and outside research similar to those expressed by Juror 10, was appellant deprived of his right to effective assistance of counsel when trial counsel failed to move for a mistrial or further investigation into the extent of the impact of the jury misconduct?

B. STATEMENT OF THE CASE

Appellant Keith Hammond lives in a basement apartment of a home in Seattle. 8RP 23.¹ He rented the apartment from Robert Catton, who also lived onsite. 8RP 23. In the six years Hammond lived there, he was instrumental in helping Catton renovate the property and keep it in livable condition. 3RP 8.

Hammond's older brother, Greg Sullivan, separated from his long-time romantic partner in November 2012. 8RP 24. Sullivan was at the time unemployed and had nowhere to live. 8RP 24. Hammond spoke with Catton and they agreed to allow Sullivan to stay in the basement apartment rent-free for up to thirty days. 8RP 24. After thirty days,

¹There are eleven volumes of verbatim transcripts of proceedings referenced as follows:

1RP – June 21, 2013; 2RP – June 24, 2013; 3RP – June 25, 2013; 4RP – June 26, 2013; 5RP – June 27, 2013; 6RP – July 1, 2013 (a.m. session); 7RP – July 1, 2013 (p.m. session); 8RP – July 2, 2013; 9RP – July 3, 2013; and 10RP - two consecutively paginated volumes of verbatim reports of proceedings for the dates of July 30, 2013 and October 1, 2013.

Sullivan agreed to pay the landlord a \$200 storage fee to keep his possessions onsite while they were working on renovations. 8RP 24;

On December 1, 2012, Hammond called Sullivan and invited him to dinner at the Lake City Bar and Grill, near their apartment. 8RP 26. They were joined by Catton. 8RP 27. While at the bar, Catton did not drink alcohol, Hammond had a rum and coke, and Sullivan had at least two beers. 3RP 13; 8RP 26-29. After about an hour, Catton and Hammond left so Hammond could get back to the apartment and finish sheetrocking the ceilings. 8RP 29-30. Sullivan, who arrived separately from the other two men, said he was “right behind” them, which Hammond took to mean that he would be there soon to help with the work. 8RP 30. Three hours later, when Sullivan had not yet returned home, Hammond asked Catton to drive him back to the bar to look for his brother. 8RP 32-33. They found Sullivan still at the bar drinking beer and shooting pool. 8RP 33. He appeared highly intoxicated—he staggered as he walked, slurred words when he spoke, and his eyes were bloodshot. 8RP 33.

After locating Sullivan and getting an assurance that he would be home shortly, Catton and Hammond stopped at a nearby Fred Meyers to do some grocery shopping. 8RP 34-35. By the time Hammond returned to the apartment, Sullivan had already arrived and gone to his bedroom.

8RP 35. Hammond decided to continue the sheetrock project, but Sullivan yelled at him to turn the radio down. 8RP 35. Hammond refused and the two brothers began to argue—both over the music and over Sullivan not honoring his agreement to assist with the renovation work and pay Catton the agreed storage fee. 8RP 37-39.

The argument was loud, angry, and heated on both sides. 8RP 38. Sullivan made a sudden move to get up from his bed and come towards Hammond in an aggressive manner. 8RP 41-42. Hammond shoved him away, but Sullivan moved back in that same threatening manner. 3RP 26. Fearing for his safety, Hammond struck Sullivan in the left eye with a closed fist. 8RP 42. Sullivan fell to his bed, but immediately began to get up and come back toward Hammond, who struck him again. 8RP 43. They both fell to the bed where they continued to struggle as Sullivan reached for his cellular telephone. 8RP 43-44.

Upstairs in his apartment, Catton heard the brothers fighting and came downstairs to intervene. 3RP 18-19. He saw both brothers were angry and yelling. 3RP 19. He saw Sullivan get out of bed and move quickly and aggressively toward Hammond. 3RP at 74. He saw Hammond push Sullivan away, causing Sullivan to fall toward the closet, who then got up and came towards Hammond again, and then Hammond struck Sullivan. 3RP at 73-78. The physical altercation occurred very

rapidly, but Catton was at some point able to separate the two men. 3RP 28.

The police arrived and interviewed all three men separately. 2RP 39; 3RP 42-52. Sullivan was transported by ambulance to Northwest Hospital. 5RP 68-69. Hammond was arrested, read his Miranda² rights, and transported to King County Jail. 2RP 17. The State charged Hammond with second degree domestic violence assault. CP 51-54. A domestic violence no contact order was entered protecting Sullivan. Exh. 15. The State added a charge of misdemeanor violation of a court order after Sullivan reported that Hammond had violated this order by approaching him while grocery shopping at Fred Meyer. CP 51-54.

During trial, the jury was unusually active—so much so that both counsel and the judge remarked on it. 5RP 79-82. In particular, from the beginning, Juror 10, was very engaged. Early in the trial, he asked the judge for a copy of the jury instructions or a definition of assault. 4RP 35. Later, he argued with the judge about several illustrative exhibits that witnesses had drawn that were not admitted into evidence. 5RP 61-62. In protesting the judge's evidentiary ruling, the juror argued:

² Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974 (1966).

We expect middle schoolers to do their homework and they're allowed to look in books and look at best sources, and we teach them that the best sources are those most closely acquainted with the events, so it makes sense that the flip charts would be the closest associated to the defendant and the plaintiff and the witnesses, and I guess I fail to understand why we are not allowed to look at those during the decision-making process, with something as serious as this.

5RP 62.

Not long after, another juror made a substantially similar statement contesting the judge's ruling. 5RP at 65. The parties also noted that jurors were developing a habit of raising their hands and interrupting the trial. 6RP 11. The prosecutor expressed that given the substance and timing of these disruptions and the fact that they were coming from multiple jurors, she believed the jurors may have looked up information and were discussing the evidence during breaks. 5RP 82.

After enduring several days of these types of disturbances from the jurors, the court and counsel agreed to dismiss Juror 10. 6RP 3. The court advised the jury that Juror 10 was "unable to continue," but it did not advise them to disregard any comments or questions he might have posed, and it did not interview any of the remaining jurors to determine exactly what types of conversations had gone on inside the jury room. 6RP 10-12.

The jury subsequently convicted Hammond of all charges. CP 136-44. Hammond appeals. CP 148-49.

C. ARGUMENT

Given the ongoing misconduct by Juror 10 and the likelihood it had of rendering the remaining jurors unfit to serve, the court trial erred by merely dismissing Juror 10 without considering whether a mistrial was necessary to preserve Hammond's right to a fair and unbiased jury. At a minimum, the court should have investigated the situation more thoroughly and carefully instructed the jury that the type of discussions that had been occurring within the jury room were inappropriate and should not be engaged in. Failure to do so constitutes reversible error.

Similarly, trial counsel's failure to request a mistrial, or at least further investigation constituted ineffective assistance of counsel. This too warrants reversal of Hammond's conviction.

1. JUROR MISCONDUCT WARRANTED A MISTRIAL.

Article I, § 21 of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate...." The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989); Smith v. Kent, 11 Wn. App. 439, 443, 523 P.2d 446 (1974).

Juror misconduct warrants a new trial where prejudice has occurred as a result. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968); State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). When assessing whether prejudice occurred, the inquiry is objective rather than subjective. Briggs, 55 Wn. App. at 55. The question is whether the misconduct could have affected the jury's determinations, not whether it actually did. Briggs, 55 Wn. App. at 55; Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). Whether it actually did is a matter that inheres in the verdict and thus may not be delved into. Gardner, 60 Wn.2d at 841; Briggs, 55 Wn. App. at 55.

It is impossible to say with certainty that the misconduct that occurred in Hammond's trial did not prejudice the proceedings. Hammond's constitutional rights include a neutral jury willing to hear all the evidence before deliberating. That did not occur here. Although Juror 10, upon being removed from service, told the judge that he had stopped sharing his comments on the case with the other jurors, this necessarily implies that such improper conversations had been happening in the jury room. Although trial counsel acquiesced to the court's remedy of removing Juror 10, this was not sufficient to preserve the fairness of Hammond's trial.

A trial court has the ability to consider sua sponte declaring a mistrial based on trial irregularities such as the jury misconduct that occurred here. State v. Jones, 26 Wn. App. 1, 612 P.2d 404 (1980). A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Greiff, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000). Short of declaring a mistrial, the trial court also has discretion to conduct a fact-finding hearing to determine whether jury misconduct occurred. State v. Cummings, 31 Wn. App. 427, 431, 642 P.2d 415 (1982).

In determining the effect of a trial irregularity, the court should examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. Greiff, 41 Wn.2d at 921 (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The error here was not evidentiary, so only the first and third factors apply. Regarding the seriousness of the irregularity, the court and counsel both acknowledged the seriousness of the misconduct repeatedly throughout the first three days of trial, with the prosecutor even acknowledging that it appeared the jurors might be doing outside research or deliberating early. On the fourth day, the court determined the situation was serious enough to warrant dismissing Juror 10.

However, the trial court failed to instruct the jury regarding the situation and failed to investigate the extent to which Juror 10's behavior had already biased the rest of the jury. While this Court assumes jurors follow the instructions given, it cannot assume the jury will self-remedy misconduct in the absence of any instruction from the court. In State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010), the court found that inappropriate statements made by witnesses at trial may warrant a mistrial if the jury is not properly instructed to disregard them. Inappropriate statements and conduct by members of the jury are no less damaging and prejudicial. In other cases where a trial irregularity was found to be serious, it is generally the court's curative instructions that prevent a mistrial. See, e.g., Greiff, 141 Wn.2d at 922; Hopson, 113 Wn.2d at 284. The court's failure in this regard makes these cases distinguishable.

The record is clear that the court knew it had at least one problem juror on the jury, and the parties were concerned about other jurors engaging in inappropriate discussions as well. Despite being convinced that the jury's unusual level of engagement could lead to mistrial if it continued, convinced enough to dismiss the juror considered to be the ringleader of such behaviors, the court did not consider questioning other jurors or even giving them an instruction to cease any improper questioning or jury deliberations. Given this knowledge, the court erred by

not declaring a mistrial, or even conducting any further inquiry as to the impact of the misconduct on the remaining jurors. This Court should therefore reverse.

2. TRIAL COUNSEL'S FAILURE TO MOVE FOR A MISTRIAL, OR AT LEAST SEEK FURTHER INVESTIGATION INTO THE IMPACT THE JUROR MISCONDUCT HAD ON THE FAIRNESS OF THE TRIAL, DEPRIVED HAMMOND OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Trial counsel's failure to move for a mistrial, or at least request further factual inquiry into the impact of the juror misconduct that occurred deprived Hammond of this right.

To successfully raise an ineffective assistance of counsel claim, an appellant must meet the two-prong test laid out in Strickland v. Washington, 466 U.S. at 684-86. This requires showing (1) that defense counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness based on consideration of all the

circumstances; and (2) defense counsel's deficient representation prejudiced the defendant." State v. Thomas, 109 Wn.2d 222, 225-26, 743 P. 2d 816 (1987). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Thomas, 109 Wn.2d at 226. The United States Supreme Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

While there is a strong presumption that counsel's representation was effective, a party can "rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman, 477 U.S. at 384.

Both prongs of the test are met here. No legitimate trial strategy supported counsel's failure to move for a mistrial or to ask the court to inquire further into the extent of the jury misconduct. Unlike situations where it is considered a legitimate trial tactic to not object to evidence in order to deemphasize the error before the jury, see, e.g., State v. Gladden,

116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (failure to object to witness's unsolicited remark could be described as legitimate trial tactic to avoid drawing attention to information defense counsel sought to exclude), the jury here *created* the error. In light of Juror 10's parting comments about discontinuing his inappropriate discussion with other jurors and instead writing notes directly to the judge, counsel should have recognized that the entire jury could be compromised and therefore asked the court to conduct an inquiry into the ability of the remaining jurors to provide Hammond with his right to a fair and unbiased jury that could refrain from premature deliberation. Given the importance of Hammond's constitutional rights to an unbiased jury, counsel's failure to do so fell below the professional norms of legal representation.

Further, there is a reasonable probability the outcome of the trial would have been different but for counsel's deficient performance. Had counsel properly requested further investigation into the matter there is a distinct likelihood a mistrial would have been the result given the apparent premature deliberations. As discussed, improper deliberations while the trial was still ongoing constitute a serious trial irregularity. And while a curative instruction, if given, may have discontinued the activity, it could not eliminate the stain of prejudice that had already occurred.

Hammond did not receive a fair and impartial jury trial. Instead he was tried by a jury that had already begun its deliberations and weighing of evidence before the trial was even completed. Counsel's failure to request a mistrial, or at least seek further investigation, allowed for the misconduct that occurred to taint the entire trial, when it could have been remedied by a proper request for a mistrial.

D. CONCLUSION

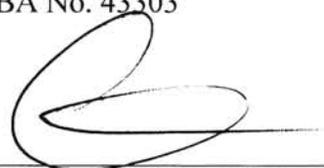
The ongoing jury misconduct was not cured by dismissing one juror, particularly not where the court failed to investigate the rest of the jury or even admonish them that their improper deliberations should cease. The misconduct likely warranted a mistrial. Counsel was deficient for failing to request a mistrial or jury investigation. And the improper jury actions denied Hammond his right to a fair trial. For all these reasons, this Court should reverse his convictions.

DATED this 31st day of March 2014.

Respectfully submitted,

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STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 71014-1-I
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KEITH HAMMOND,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH HAMMOND
DOC NO. 717189
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2014.

x *Patrick Mayovsky*