

NO. 65519-1-I

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

REC'D
MAR 03 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH JONES,

Appellant.

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

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King County
Appellate Unit
3/3/11

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to be present at all critical stages of trial.

Issue Pertaining to Assignment of Error

Criminal defendants have a constitutional right to be present whenever the court communicates with the jury. In appellant's case, the trial court repeatedly replayed critical evidence for jurors in appellant's absence without informing him of his right to be present or obtaining a waiver of that right. Where the State cannot demonstrate this error was harmless beyond a reasonable doubt, is appellant entitled to a new trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Joseph Jones with two counts of Rape of a Child in the First Degree. CP 1-10. A jury acquitted Jones on count I, but found him guilty on count II. CP 50-51. The court imposed a standard range sentence of 100 months to life, and Jones timely filed his Notice of Appeal. CP 69, 74.

2. Substantive Facts

Joseph Jones and Salita Haywood began dating in 2003. By October of that year, the two had moved in together, along with Haywood's three children. 5RP¹ 85. At the time, Haywood's oldest child, daughter S.M., was seven years old. 5RP 83, 87. Jones and Haywood married in 2004. 5RP 90. The family lived in Des Moines until June 2005, when they moved to Federal Way. 5RP 91-92.

There was tension between Jones and Haywood's extended family, several of whom did not like Jones and did not get along with him. 5RP 28-29, 31-32, 48, 116, 134, 143-144. Jones felt that Haywood's family was taking advantage of her – including taking her food stamps and her money – so he put a stop to this. 5RP 116-117; 9RP 154-156. Moreover, Jones was a strong believer in discipline. 9RP 155-157. While Haywood's other children responded well to the discipline and Jones' house rules, S.M. did not. 9RP 157-159.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – April 13, 2010; 2RP – April 14, 2010; 3RP – April 15, 2010; 4RP – April 19, 2010; 5RP – April 20, 2010; 6RP – April 21, 2010; 7RP – April 22, 2010; 8RP – April 26, 2010; 9RP – April 28, 2010; 10RP – April 29, 2010; 11RP – June 4, 2010.

S.M. would often spend time with her grandmother, Carolyn Haywood, who gave her more freedom than she enjoyed at home. 7RP 46. S.M.'s grandmother spoiled her grandkids and "let them get away with stuff sometimes." 5RP 135-136; 7RP 65-66. S.M. complained to her grandmother that Jones was too restrictive and raised his voice. 5RP 144-145.

S.M. also loved visiting her godparents, Marlenia Alexander and Anthony Owens. 5RP 12-13, 93, 133; 7RP 45. They also spoiled her. 7RP 66. She stayed with them every other weekend. 5RP 15, 28, 94. Unlike home, she did not have to do any chores there. 7RP 45-46. During one visit with her godparents, S.M. was permitted to stay up until 3:00 a.m., which upset Jones. 5RP 114. Just before S.M. headed to her godparents' house for a weekend visit in late July 2005, Jones told S.M. this would be the last time she was permitted to stay there. 5RP 15-16, 114-115.

After arriving at her godparents' home for the weekend, S.M. got into an argument with her cousin L.H., who is seven months younger than S.M. 7RP 41, 51, 57; 8RP 24, 28-29. After S.M.'s godfather spoke to the girls and had them sort out their differences, he asked them if there was anything else they wanted to tell him.

In response, S.M. accused Jones of raping her.² 7RP 57-58. In light of S.M.'s claim, L.H.'s mother asked L.H. if Jones had ever touched her inappropriately. L.H. said he had not. 5RP 53, 65.

Police were notified of S.M.'s allegation. 6RP 6-7. On July 28, 2005, Dr. Rebecca Weister, a child abuse specialist, met with S.M., who was then eight years old. 6RP 52, 56, 66. S.M. told Dr. Weister she was going to live with her grandmother because she was not comfortable around Jones. 6RP 69-70. When asked why Jones made her uncomfortable, she claimed he once came into her room, pulled her pants down, and started "humping" her. 6RP 70. S.M. went on to say that she and Jones were "side by side," it hurt, and she found "white stuff" in her underwear. 6RP 71-72. She also claimed it happened more than once – both when they lived in Des Moines and when they lived in Federal Way – and always in her bedroom. 6RP 72-76.

A physical examination of S.M. revealed that a portion of her hymenal tissue was irregular and diminished. The rest of her genital examination revealed nothing of concern. 6RP 87, 96-97. Dr. Weister could not quantify the diminution of hymenal tissue.

² This was not S.M.'s only allegation of serious misconduct against a family member. She once falsely accused her mother of beating

6RP 117. Nor could she tell when the injury occurred. 6RP 98-99. But it was consistent with a healed injury from a vaginal penetrating trauma. 6RP 92, 132.

According to Salita Haywood, the injury may have been caused by an accident involving a fence. S.M. attempted to jump over the fence, but was unsuccessful, landing on top of the fence and injuring herself. 5RP 102-103. Dr. Weister's finding of vaginal penetrating trauma was not diagnostic; it did not mean that S.M. had been sexually abused. 6RP 118-119. Dr. Weister could not rule out the possibility a fence caused S.M.'s injury. 6RP 95-96, 120-121.

On August 3, 2005, King County child interview specialist Ashley Wilske also interviewed S.M. 7RP 8-9, 28. S.M. indicated she had been raped only twice. Exhibit 10, at 6, 12; exhibit 11.³ And whereas she told Dr. Weister she was only raped in her bedroom, this time she claimed the first time occurred in her mother's bed while five of her siblings and cousins also were in the bed. Exhibit 10, at 6-10. She claimed the second time occurred after they moved from Des Moines to Federal Way. Jones entered

her grandmother. 5RP 127-128.

her bedroom and had intercourse with her. According to S.M., Jones stopped and left the bedroom when Salita Haywood called his name from another room in the house. Exhibit 10, at 10-11.

The Federal Way Police Department completed its investigation of S.M.'s claims on August 30, 2005 and forwarded all pertinent information to the King County Prosecutor's Office for a charging decision. 8RP 22. No charges were filed in 2005 or 2006.

L.H. had heard S.M.'s allegation of rape in 2005. 8RP 43-44. She was close with S.M. and looked up to her. 5RP 43, 150. In December 2006, L.H. – despite denying in 2005 that Jones had ever sexually abused her – changed her story and claimed that Jones had also touched “her private area” back in 2005. 5RP 53-58, 65; CP 3. Despite this new information, no charges were filed in 2007, either. But on March 3, 2008, prosecutors filed the two charges accusing Jones of raping both L.H. and S.M. CP 1-8.

S.M.'s 2010 trial testimony differed from what she claimed in 2005. Whereas she told Ashley Wilske she had been raped only twice, she testified it happened “a lot.” 7RP 55. She claimed she

³ Exhibit 11 is a DVD recording of the interview. Exhibit 10 is a transcript of the interview based on the DVD.

lied in 2005 to protect her mother – who seemed happy in her relationship with Jones – and to protect Jones, who she thought would get in less trouble if she said it only happened a couple of times. 7RP 77-78, 80. Whereas S.M. told Dr. Weister it always happened in her bedroom, and told Ashley Wilske it only happened in her bedroom and her mother's bedroom, she testified it also happened in the kitchen. 7RP 48-49. Other than the kitchen incident, however, the only incident about which she could remember any details was the claimed rape in her mother's bedroom when the other children were also present. 7RP 50-57. S.M. denied that she had made up the allegations because of Jones' stricter house rules or a desire to live elsewhere. 7RP 61-62. She also denied injuring herself on a fence. 7RP 77.

L.H. also testified at trial, claiming that one morning, after spending the night at S.M.'s house, Jones woke her up, pulled her pants down, and raped her. She claimed she struggled, but Jones tied her hands to the bed frame with rope. 8RP 31-38. L.H. made a similar allegation in a 2007 interview with King County child interview specialist Carolyn Webster. 8RP 70-71, 78-81; exhibits 14-15. L.H. claimed that she lied in 2005 when she denied sexual abuse. 8RP 43-44.

Several witnesses testified for the defense. Dr. John Yuille, a forensic psychologist, criticized portions of the State's interviews with S.M. and L.H. because the questioning was leading and certain claims were not adequately explored. 9RP 4-77. Lynn Schultz, a defense investigator, testified to statements the girls had made during defense interviews that were not entirely consistent with other statements they had made. 9RP 95-110. Sixteen-year-old Ariel Jones, Joseph Jones' niece, testified that S.M. admitted to her that the allegations against Jones were lies.⁴ 9RP 82. And Jones himself took the stand, denying any wrongdoing with S.M. or L.H. 9RP 151, 163.

3. Jury Deliberations

Following closing arguments, the court and the attorneys discussed what to do should jurors ask to view the DVD interviews of S.M. and L.H. The following exchange occurred:

COURT: Okay. And what will happen is if they do want to view those, then, I will close the courtroom, have them come in. I won't say anything other than that they are not to talk while we play the videos. We'll hand out the transcripts, I will tell them again they can only look at the transcripts while they are observing the video, and that as soon as the video is

⁴ S.M. denied this conversation with Ariel. 7RP 64.

stopped, take the transcripts from them, send them back into the jury room.

PROSECUTOR: Is that going to be done with us present or –

COURT: If you all want to be present, yes. Normally, no.

PROSECUTOR: Okay.

D. COUNSEL: I don't have any desire to be present.

PROSECUTOR: I don't, either.

10RP 76-77. At no time did the court ask Jones whether he wanted to be present if the DVDs were replayed for jurors or inform him of his right to be there. 10RP 77-78.

Jurors deliberated over the course of five court days. Supp. CP ____ (sub no. 86A, Clerk's Minutes, at 18-24). And during those deliberations, they asked for and were shown the DVD of L.H.'s interview two times and the DVD of S.M.'s interview three times before ultimately acquitting Jones of raping L.H. and convicting him of raping S.M. Only the trial judge, bailiff, and court clerk were present when the DVDs were played. CP 45-49, 54-55, 58-59; Supp. CP ____ (sub no. 86A, Clerk's Minutes, at 19-20, 22-24).

C. ARGUMENT

JONES' ABSENCE WHEN THE RECORDED INTERVIEWS WERE REPEATEDLY PLAYED FOR JURORS VIOLATED HIS RIGHT TO BE PRESENT AT TRIAL.

Due Process guarantees any person accused of a crime the right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Washington Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22; see also State v. Irby, ___ P.3d ___, 2001 WL 241971, at n.6 (Slip op. filed 1/27/11) (state constitutional provision arguably even broader than federal provisions).

"It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). It is improper for a trial court to replay a recording for a deliberating jury in the defendant's absence. State v. Rice, 110

Wn.2d 577, 613, 757 P.2d 889 (1988) (citing Caliguri, 99 Wn.2d at 508), cert. denied, 491 U.S. 910 (1989). “[T]his error is one of constitutional dimensions, violating the defendant’s right to appear and defend himself in person and by counsel.” Rice, 110 Wn.2d at 613. Where, as here, a third party was present during the communications, reversal is not automatic. But the State must prove the error was harmless beyond a reasonable doubt. Rice, 110 Wn.2d at 614; Caliguri, 99 Wn.2d at 509.

As an initial matter, Jones never waived his right to be present when the DVDs were replayed. Any waiver of a constitutional right must be voluntary and knowing. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). There is nothing on the record indicating that Jones voluntarily and knowingly waived his right to be present in the courtroom as jurors heard the evidence against him replayed. Courts “must indulge every reasonable presumption against the loss of the constitutional right to be present at a critical stage of the trial.” Campbell v. Wood, 18 F.3d 662, 672 (9th Cir. 1994). And there can be no knowing and intelligent waiver unless the defendant is aware of the right at issue. See State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988) (“Unless the defendant is informed of his right,

he cannot be presumed to know it.”); State v. Duckett, 141 Wn. App. 797, 806-807, 173 P.3d 948 (2007) (“the court never advised Mr. Duckett of his public trial right or asked him to waive it. He certainly could not then make a knowing, intelligent and voluntary waiver of this constitutional right.”); see also State v. Eden, 163 W.Va. 370, 256 S.E.2d 868, 873 (1979) (valid waiver of right to be present requires “that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment.”).

It is the court’s role to ensure a knowing, voluntary, and intelligent waiver of constitutional rights. The duty to protect fundamental constitutional rights “imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.” Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Consistent with this duty, CrR 3.4(a) requires the defendant’s presence “at every stage of the trial” unless “excused or excluded by the court for good cause shown.” (Emphasis added).

Yet, at Jones’ trial, the court never informed Jones he had the right to be present when evidence was replayed for jurors. In fact, the court’s comments implied there was no such right. When

the prosecutor asked if the DVDs would be replayed “with us present,” the court responded – in Jones’ presence – “If you all want to be present, yes. Normally, no.” 10RP 77. The court’s response, which may have been directed only at the attorneys, certainly did not convey Jones’ constitutional right to be present. In fact, the response strongly implied there was no such right, since “normally” no one attended. Although the attorneys then indicated they personally had no desire to be present, no one bothered to ask Jones. This was his right to waive, not the attorneys’.

The DVDs were obviously extremely important. They were the only recorded interviews jurors were provided. And their importance in jurors’ minds is apparent from the fact they listened to them a total of seven times (once each during the prosecution’s case and five times during deliberations). Indeed, the last thing jurors did before finding Jones guilty was to listen one more time to S.M.’s interview. They returned a guilty verdict 31 minutes later. See Supp. CP ___ (sub no. 86A, Clerk’s Minutes, at 23).

The State cannot demonstrate this violation of Jones’ constitutional right to be present was harmless beyond a reasonable doubt. There was no court reporter present for the court’s interactions with jurors during the replays. While the court

indicated prior to the replays that it intended only to instruct jurors on use of the transcripts and that they should not talk while in the courtroom (see 10RP 76-77), because there is no record of what was actually said, there is simply no way to determine the court did not make a comment beneficial to the prosecution and detrimental to Jones regarding the recorded interviews.

In this respect, Jones' case differs from the seminal cases on this issue. In Rice, for example, although the defendant was not present for the replay of certain evidence, a court reporter was, and a transcript was available to ensure there were no improper communications of substance between the court and the jurors. See Rice, 110 Wn.2d at 614; see also State v. Smith, 85 Wn.2d 840, 852-853, 540 P.2d 424 (1975) (new trial not warranted where transcript of communications revealed no possible prejudice). In Caliguri, although there was no court reporter, the parties knew what happened in the defendant's absence, apparently because there had been a post-judgment motion based on the constitutional violation. See Caliguri, 99 Wn.2d at 505, 508-509. There is no such record upon which the State can rely here.

Moreover, with or without a record of what actually happened in Jones' absence, jurors were left to speculate that

Jones did not care enough about his trial to attend this portion of the proceedings or declined to attend based on his perception conviction was inevitable. “A jury may raise very damaging inferences from the bare fact that the defendant has somehow flown.” Commonwealth v. Kane, 19 Mass. App. Ct. 129, 472 N.E.2d 1343, 1348 (1984), review denied, 475 N.E.2d 401 (1985). Where a defendant has been present, but is then absent from the proceedings, the proper course is to instruct jurors “wholly to disregard the fact.” Id. (citing Taylor v. United States, 414 U.S. 17, 18, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973), aff’g United States v. Taylor, 478 F.2d 689, 690 (1st Cir. 1973); State v. Parham, 174 Conn. 500, 504, 391 A.2d 148 (1978)); see also People v. Brisbane, 205 A.D.2d 358, 613 N.Y.S.2d 368 (trial court properly instructed jurors not to draw any adverse inference from defendant’s absence), review denied, 645 N.E.2d 1230 (1994).

Jones’ jury was never instructed to disregard his absence. While the failure to give such an instruction might not be a factor in a case where the evidence of guilt was overwhelming, its impact cannot be ignored in a close case such as this. The prosecution’s case had several weaknesses. S.M.’s allegations of rape (where and how often) varied depending on when and to whom she was

speaking. She had a motive to lie (to enjoy greater freedoms elsewhere). S.M. had previously made a false accusation against a family member. Ariel Jones testified that S.M. admitted the allegations of rape were false. There were no witnesses to the alleged abuse. Nor was there definitive physical evidence of a rape – Dr. Weister could not exclude the possibility S.M.'s abnormal hymen was the result of a physical injury unrelated to sexual intercourse. Jurors did not convict until the fifth day of deliberations. And, they asked the court for guidance on what constitutes a hung jury. CP 52-53. This was a very close case indeed.

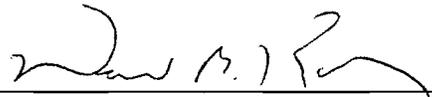
Because Jones was denied his right to be present for all critical stages of trial, and the State cannot show his absence from the jury's review of critical evidence was harmless beyond a reasonable doubt, his conviction must be reversed.

D. CONCLUSION

Jones was denied his constitutional right to be present at every critical stage of trial. His conviction should be reversed and his case remanded for a new trial.

DATED this 9th day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 65519-1-I
)	
JOSEPH JONES,)	
)	
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 9TH DAY OF MARCH 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH JONES
DOC NO. 340483
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P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF MARCH 2011.

x Patrick Mayovsky

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COURT CLERK
E LEROY