

66169-8

66169-8

NO. 66169-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN T. RAINEY,

Appellant.



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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

When Brian Rainey was arrested for throwing a single punch that hit William Hall, he told the police the reason he hit Hall was that Hall had grabbed him and would not let go. More than one year passed before Rainey had a jury trial on this assault allegation. At his trial, Rainey's defense was that he acted in self-defense. Self-defense requires the jury to decide whether the defendant subjectively believed his use of force was justified, even if that belief was mistaken. The judge refused to let Rainey elicit his statements to police when confronted about the incident, which was the only direct evidence from close to the incident that Rainey believed he was acting in self-defense.

While deliberating, the jury sent three questions to the judge. The judge responded to the jury's questions without consulting Rainey, without holding a hearing, without making any record that it consulted with counsel, and without explaining how it decided on its response to the jury's questions.

The court effectively denied Rainey his right to present his defense by excluding highly probative evidence. It also improperly communicated with the deliberating jury without protecting Rainey's

rights to be present and have an open public trial at which he is meaningfully represented by counsel.

B. ASSIGNMENTS OF ERROR.

1. The court denied Rainey his right to present a defense by prohibiting him from eliciting relevant evidence, contrary to the Sixth and Fourteenth Amendments and Article I, section 22.

2. The court denied Rainey his rights to be present at a substantive trial proceeding, to a public trial, and to meaningful representation of counsel by responding to jury questions about factual and legal matters without including Rainey, his lawyers, or the public.

3. The court violated the public's right to the open administration of justice by communicating with the jury without holding any public hearings.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to present a defense requires a judge to admit probative evidence unless its admission is so prejudicial that it would undermine the fairness of the trial proceedings. Rainey wanted to present evidence highly probative of his self-defense claim but the court refused. Is it possible a reasonable jury would have reached a different verdict if the court had not interfered with

Rainey's ability to present evidence highly probative of his defense?

2. The state constitution and court rules prohibit the trial court from making substantive legal and factual determinations during a trial without affording the defendant the right to appear and defend in person, without consulting with counsel, and without holding a public hearing. The court responded to three jury questions in writing, without informing Rainey and without making any record that it consulted with counsel. When the jury's questions involved substantive matters upon which Rainey should have been consulted, was the court required to notify Rainey and conduct a hearing on the record before communicating with the jury?

3. The federal constitutional rights to be present, have a public trial, and be represented by counsel also bar the court from sua sponte communicating with the deliberating jury but apply a harmless error test. Did the court's failure to consult Rainey or permit his attorney a meaningful opportunity to offer alternatives to the court's instructions to the deliberating jury deny Rainey a fair trial when the court's answers to the jury's questions may have been incorrect?

D. STATEMENT OF THE CASE.

Early one evening, William Hall stepped outside the bar he frequented almost every day of the week to smoke a cigarette. 9/7/10RP 45-46. As he smoked and talked with others from the bar, Brian Rainey stopped and asked to borrow Hall's lighter. 9/7/10RP 46. Rainey lit his cigarette and then turned to leave. 9/7/10RP 23. Hall requested that Rainey return his lighter. Id. Hall's friend Michael Henzler saw Hall touch Rainey's shoulder in an effort to retrieve his lighter, although Hall did not later remember touching Rainey. 9/7/10RP 24, 58-59. Rainey turned and punched Hall one time in the face. 9/7/10RP 24.

Hall initially declined medical attention and went to a friend's apartment where he drank beer. 9/7/10RP 28, 52. The alcohol Hall drank made him feel worse and Hall went to the hospital. Id. at 52. At the hospital, it was determined that Hall had some broken bones in his cheek and nose. 9/8/10RP 14-17. It was also discovered that Hall had kidney failure and bladder problems which required further medical intervention. These were unrelated to the injuries he suffered from being hit in the face. 9/8/10RP 19, 21.

The police arrested Rainey three days after the incident. 9/7/10RP 128-29; 9/8/10RP 33. When the police asked him what

happened, Rainey explained that Hall had grabbed him and would not let go, so he hit Hall one time. 9/2/10RP 39.

While awaiting trial on the charge of second degree assault, the court ordered several evaluations to determine whether Rainey was competent to stand trial. CP 5, 11; 3/29/10RP 10; 4/20/10RP 11; 5/13/10RP 41; 6/30/10RP 69-70. Although the Western State Hospital evaluators found Rainey competent, each different attorney assigned to represent Rainey disagreed. 3/29/10RP 10; 4/20/10RP 11; 5/13/10RP 41; 6/30/10RP 69-70. Rainey refused to submit to any evaluations by other experts. 4/23/10RP 27; 6/30/10RP 72-74. Thus, in the absence of any evidence disagreeing with the Western State Hospital evaluation, the court found Rainey competent to stand trial even though his attorneys voiced concern about his competency. 6/30/10RP 75.

At trial, the court instructed the jury that the prosecution must prove Rainey did not subjectively believe his use of force was reasonable under the circumstances as they appeared to him or that this belief was not objectively reasonable. CP 48-49. However, the court refused to let Rainey elicit the statement that he made to police upon his arrest, in which he said that he hit Hall

because Hall had grabbed him and would not let go. 9/7/10RP
119-21.

During its deliberations, the judge received two written questions from the jury at 3:25 p.m. and responded at 3:26 p.m. CP 54; Supp. CP __. sub. no. 94A (clerk's minutes, page 8). The jury asked a third question that the judge received at 3:29 p.m. and the judge responded three minutes later. CP 52-53.

Rainey was convicted of second degree assault and received a standard range sentence. CP 56, 59-63. The pertinent facts are further discussed in the relevant argument sections below.

E. ARGUMENT.

1. BY DENYING RAINEY'S REQUEST TO INTRODUCE EVIDENCE RELEVANT TO HIS THEORY OF DEFENSE, THE COURT DEPRIVED RAINEY OF HIS RIGHT TO PRESENT A DEFENSE

a. The right to present a defense requires the court to admit evidence pertinent to that defense. When a trial judge prohibits an accused person from eliciting relevant evidence, the judge may effectively preclude the defendant from presenting his or her defense. State v Jones, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). The right "to a fair opportunity to defend against the State's

accusations” is central to the right to due process of law.

Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); U.S. Const. amend. 6; Const. art. I, § 22.

The right to present a defense includes the ability to examine witnesses and offer testimony pertinent to the defense. Chambers, 410 U.S. at 294; Jones, 168 Wn.2d at 720. The constitutional right to present a defense does not extend to having “irrelevant evidence admitted in his or her defense.” State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Evidence that a defendant seeks to introduce must be minimally relevant to a defense. Jones, 168 Wn.2d at 680; State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). But the threshold for relevant evidence is a low one. Darden, 145 Wn.2d 621; ER 401.

Where evidence is relevant to a theory of defense, the court may prohibit its admission only where it is of a character that undermines the fairness of the trial. Darden, 145 Wn.2d at 621. The State bears the burden of showing that the evidence is “so prejudicial as to disrupt the fact-finding process at trial.” Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). When evidence is of high probative value, “it appears [that] no state interest can be compelling enough to preclude its introduction

consistent with the Sixth Amendment and Const. art. I, § 22.” Id. (quoting Hudlow, 99 Wn.2d at 16).

The considerations of evidentiary rules, including ER 403, which requires balancing the probative value of evidence against the danger of prejudice, cannot be used to exclude “crucial evidence relevant to the central contention of a valid defense.” State v. Young, 48 Wn.App. 406, 413, 739 P.2d 1170 (1987).

In Jones, the court reversed a rape conviction because the defendant was precluded from introducing evidence that the incident occurred during an “all-night drug-induced sex party.” 168 Wn.2d at 721. The trial judge had barred Jones from both cross-examining the complainant as well as testifying himself that the complainant used drugs and engaged in consensual sex with Jones and two others during the incident. Id. The trial judge believed the evidence attacked the complainant’s credibility in violation of the rape shield statute. Id. at 717-18. Because the “sex party evidence” was Jones’ entire defense, the Supreme Court held that it “could not be of higher probative value” and thus, could not be barred by concerns of prejudice. Id. at 724.

The nature of the evidence Rainey wanted to introduce did not involve highly inflammatory or titillating claims that might

undermine the truth-seeking function of the jury. Instead, he wanted to introduce evidence about his state of mind close in time to the incident, to support his theory that he acted in self-defense. Accordingly, it was not evidence of a character that would undermine the fairness of the fact-finding process of the trial. See Darden, 145 Wn.2d at 623. Yet the court excluded crucial, relevant evidence that explained Rainey's version of events and formed his theory of defense.

b. Rainey attempted to introduce evidence relevant to this claim of self-defense. Where self-defense is at issue, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). The jury must take into account "all the facts and circumstances known to the defendant, including those known substantially before the [incident]." Id. Because the "vital question is the reasonableness of the defendant's apprehension of danger," the jury must stand 'as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" Id. (quoting State v. Ellis, 30 Wash. 369, 373, 70 P. 963 (1902)).

Rainey was arrested about six blocks from the bar where the confrontation had occurred, three days after the incident. 9/8/10RP 37. A police officer stopped Rainey on the street, told him he matched the description of the suspect in an assault, and called to verify whether he should arrest Rainey, but Rainey fled. 9/8/10RP 37-39. Shortly thereafter, the police found him hiding in a stairwell of an apartment building. 9/8/10RP 40-41. During the car ride to the police precinct, Rainey made incongruous statements to police officer David Bunge indicating that “his mental state was not normal.” 9/2/10RP 24.¹ At the police precinct and following his second set of Miranda warnings,² Rainey told the investigating officer Jonathan Chin that the complainant “grabbed me and I punched him because he wouldn’t let go.” 9/1/10RP 39.

The trial court refused to let Rainey elicit any of his statements to the police at trial. 9/7/10RP 121, 143, 164. Before trial, the prosecution argued that Rainey’s mental state was irrelevant unless he had a mental health defense. 9/2/10RP 51.

¹ The court described Rainey’s statements while in the police car as including: asking to go to the hospital, saying he had a brain injury, and talking about trying to contact the counterterrorism unit and the United Nations. 9/2/10RP 52.

² The first set of Miranda warnings were given in the police car by Officer Bunge. 9/2/10RP 15, 52.

The prosecution argued Rainey's statements were self-serving hearsay. 9/7/10RP 118-19; Supp. CP __, sub. no. 94 (State's trial memorandum, pages 6-7).

Rainey explained that his statements to the police were relevant to his state of mind and perceptions at the time of the assault, which was pertinent to his theory of self-defense. 9/7/10RP 119. His statements to the police were relatively close geographically and temporally to the incident. 9/7/10RP 121. They were made at a time when the police had clearly focused Rainey's attention on the circumstances of the alleged assault. Id. There was no reason to believe these statements did not reflect his state of mind at the time of the incident because he gave the same explanation of events during his several competency evaluations before trial. Id.

The court sustained the prosecution's objection because the statements were not made on the date of the incident. 9/7/10RP 120. The court also ruled that Rainey's statements to Chin or Bunge could only be admitted if the State elected to offer them, and then Rainey might be able to introduce his statements to give context to State's witnesses' testimony. 9/7/10RP 121.

Before trial, the prosecution had intended to admit Rainey's statement to Chin that he hit Hall because Hall grabbed and held him. 9/2/10RP 48. It decided not to introduce any of Rainey's statements about the incident at trial after the defense explained its interest in eliciting them. 9/7/10RP 117-18.

Each time Rainey asked Bunge anything about statements Rainey made to the officer, the prosecution objected on the ground of hearsay and the court refused to admit the substance of any such statement. 9/7/10RP 136, 141, 143, 164. The court repeatedly informed Rainey that it would not admit the substance of his statements to the police. 9/7/10RP 120, 143, 164. Chin testified after Bunge, and the State carefully refrained from eliciting any of Rainey's statements about the incident. 9/7/10RP 159-60.

The court agreed there was sufficient evidence to instruct the jury that the State must prove that Rainey was not acting in lawful defense of himself when he hit Hall. 9/8/10RP 47. It instructed the jury that it must view the evidence objectively and subjectively, from Rainey's perspective, in deciding whether his use of force was justified. CP 48, 49. The instructions correctly told the jury that it must decide whether the defendant reasonably believed that force was necessary to defend himself against imminent bodily

harm. See State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). They explained that the fact-finder must view self-defense from the conditions as they appeared to the defendant, and the defendant was entitled to act on his belief that he was in danger, even if that belief was mistaken. CP 49.

Yet Rainey's ability to argue his theory of defense was nullified by the court's refusal to admit his statements about his state of mind during the incident. Rainey had told the police about his perceptions of the incident and why he acted as he did. 9/2/10RP 39. He described Hall as grabbing him and not letting go. Id. Rainey's statements to the police made three days after the incident, when the incident was fresh in his mind, were far more probative than any testimony he could have given at trial. See ER 803(a)(3) (statement describing then-existing state of mind admissible as exception to hearsay rules). He made those statements as the police were confronting him about their suspicions he was involved in an assault. His trial did not occur until more than one year had passed since the incident. CP 1. His statements at the time of his arrest were the most probative evidence he could offer about his state of mind.

c. The court effectively precluded Rainey from presenting his theory of defense and the prosecution took advantage of this gap in testimony. Rainey's defense lacked any teeth without available, relevant evidence to support it. His description of events to police was highly relevant to his defense, because self-defense requires the jury to consider the incident from the accused person's perspective even if this perspective is mistaken. CP 49. The court's refusal to admit this evidence denied Rainey his right to present a defense.

Precluding Rainey from presenting his defense cannot be viewed as a harmless error. Jones, 168 Wn.2d at 724 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State capitalized on the exclusion of evidence of Rainey's state of mind to proclaim that the jury could not inquire into Rainey's perception of events. In response to Rainey's argument that the jury should closely examine the circumstances of the incident in order to interpret what Rainey may have been thinking, the prosecution argued to the jury that it was prohibited from engaging in any such guesswork. 9/8/10RP 80. The prosecutor told the jurors they must base their decision "on the evidence that was presented in this case, not guess, not guess

work, not trying to figure out something that's not presented to you.”

9/8/10RP 80.

She told the jury it was barred from considering Rainey's state of mind absent evidence about it. The prosecutor told the jury, “You don't say, well, gosh, I wonder what the defendant was thinking because nobody would actually hit someone unless they were scared they were going to get hit themselves.” Id. In fact, some people are “violent,” or “do bad things without justification.” Id. at 80-81. The prosecutor argued that the jury could not speculate that Rainey had another reason to hit Hall, because “that simply flies in the face of what we all know to be true, which is that sometimes people make violent, horrible decisions, and that's what the defendant did here.” Id. at 81.

Similarly to Jones, the court precluded Rainey from presenting his theory of defense by excluding relevant, probative evidence that shortly after the incident, when asked to explain what happened, Rainey told police that he hit Hall because Hall had grabbed him and would not let go. 9/2/10/RP 39. The court found enough evidence in the record to instruct the jury on self-defense but barred Rainey from offering the most persuasive evidence available from a disinterested police officer about Rainey's timely

explanation of his state of mind. 9/8/10RP 47. The prosecution insisted that the jury must infer Rainey was a violent person who made a horrible decision, because it could not consider the evidence that the prosecution refused to let the jury hear – that Rainey hit Hall because he thought Hall grabbed him and would not let go. 9/8/10RP 81.

In Jones, the Supreme Court agreed that Jones' consent defense was "not airtight." 168 Wn.2d at 724. Nonetheless, if the jury heard the evidence Jones sought to elicit it would have heard an account of the incident that was not otherwise presented, and therefore "it is possible that a reasonable jury may have reached a different result." Id.

The jury deliberated in Rainey's case for a considerable period of time even though it had not heard critical evidence about Rainey's perception that he was acting in self-defense. CP 48, 49. The deliberating jurors asked several questions, seeking additional evidence, as they grappled with whether the prosecution had proven its case. CP 52-55. Rainey hit Hall one time, and it would be both objectively and subjectively reasonable to think he did not expect to cause serious injury. Had the jury heard Rainey's account of the incident that they were precluded from hearing, the

jury may not have been left only with the prosecution's assertion that Rainey was violent and made a horrible decision, and instead, "it is possible that a reasonable jury may have reached a different result." Jones, 168 Wn.2d at 724. He should be accorded a new trial where he may present his defense.

2. THE TRIAL COURT IMPROPERLY INSTRUCTED THE DELIBERATING JURY IN VIOLATION OF RAINEY'S RIGHT TO A FAIR TRIAL IN OPEN COURT, HIS RIGHT TO MEANINGFUL REPRESENTATION AT ALL CRITICAL STAGES, AND HIS RIGHT TO BE PRESENT

a. A criminal defendant is entitled to be aware of and meaningfully represented at proceedings discussing the instructions for a deliberating jury. The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); U.S. Const. amends. 5, 6, 14;³ Wash. Const.

³ The Fifth and Fourteenth Amendments protect the right to "due process of law," while the Sixth Amendment protects the right to "a speedy and public trial" with the assistance of counsel and right to confront witnesses.

Art. I, § 22;⁴ CrR 3.4 (a). A trial court commits error when it communicates with the jury without notice to the defendant or counsel. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); State v. Allen, 50 Wn.2d 412, 419, 749 P.2d 702 (1988).

CrR 6.15(f)(1) provides:

After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

It violates CrR 6.15(f)(1) for a court to instruct the jury in a private setting, without consulting counsel or the defendant. State v. Jasper, 158 Wn.App. 518, 541, 245 P.3d 228 (2010), rev. granted, Wn.2d __, Supreme Court No. 58227-8 (2011) (citing State v. Langdon, 42 Wn.App. 715, 717, 713 P.2d 120 (1993)).

Additionally, when any matter of substance is discussed regarding how to respond to a jury inquiry, the court must hold proceedings in open court. CrR 6.15(f)(1); see Rogers, 422 U.S. at 39 (“the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity

⁴ “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

to be heard before the trial judge responded”). An accused person and the public have the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006); U.S. Const. amend. 6; Const. art. I, §§ 10, 22. The requirement of a public trial includes jury selection, pre-trial hearings, factual determinations pertinent to the trial process, and other proceedings that are important to the criminal justice system. See In re Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (public trial right attaches to jury selection because it is “matter of importance” to criminal justice system); Easterling, 157 Wn.2d at 178 (co-defendant’s motion to sever and dismiss should be open to public); State v. Sadler, 147 Wn.App. 97, 116-17, 193 P.3d 1108 (2008) (court’s evaluation of Batson factors require public proceeding).

Similarly to the right to have the public see that justice is administered openly, the defendant has the right to be present. 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,” he has the right to be present. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011) (citing Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)). The right to “appear and defend” guaranteed by the

Washington Constitution is broader than its federal constitutional counterpart. Irby, 170 Wn.2d at 883.

Rainey was not present when the judge responded to the jury's questions. Rainey was in custody during the trial proceedings and given the single minute between the judge receiving the note and sending a response to the jury, it would not have been possible to transport him from the jail to the courtroom. Supp. CP __, sub. no. 94A (clerk's minutes, page 8). The jury asked their questions more than three hours after the closing arguments concluded, making it unlikely that the parties remained in the courtroom at the time of the question. Id.

The trial judge used a boilerplate form that automatically includes the language that the court consulted all parties before responding to the jury's question. CP 53, 55. But that form cannot explain what happened in this particular case. The clerk's minutes detail the presence and involvement of the parties in matters conducted both on and off the record throughout the trial. Supp. CP __, sub. no. 94A, page 8. The minutes contain the questions asked by the jury and answers given by the court. Id. Yet the minutes contain no indication that the court discussed the jury's

questions with counsel or Rainey. The court responded to the jury's notes within one minute. Id.

The attorneys did not sign the court's response, appear in court, or mention having any knowledge of the exchanges between the deliberating jury and judge. Thus, the record does not show that Rainey was present or participated in crafting the court's response to the jury's question because of the very short time frame and the absence of any indication he or counsel were consulted in the otherwise detailed clerk's minutes. No public proceedings occurred and the content of the jury's questions and the court's responses were not put on the record other than in the document placed in the court's file.

b. The court's *ex parte* responses to the deliberating jury's questions were inadequate. The jury asked the court three questions. CP 52-55. One question was essentially ministerial and probably did not require any further proceedings: the jury asked whether it could see a police report that had not been admitted into evidence and the court responded, "no." CP 52-53; see In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (defendant need not be present during technical legal discussions or simple scheduling matters).

Another question was potentially ministerial but the court's answer may have been wrong. The jury asked whether it could examine the contents of a duffle bag admitted into evidence. CP 54. The court responded, "no," but since the entire duffle bag was admitted into evidence without objection, the parties may have intended that the jury could examine its contents. CrR 6.15(e) instructs the court that it shall give the deliberating jury all evidence admitted at trial. "[E]xhibits taken to the jury room generally may be used by the jury as it sees fit." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d1353 (1997).

The duffle bag was admitted without limitation. 9/8/10RP 24-26. There is no indication that the parties thought that the jury's examination of the duffle bag would be unduly prejudicial. It was a bag Rainey carried at the time of the incident and when he was arrested. 9/7/10RP 74; 9/8/10RP 24, 36. The court's response, telling the jury it could not look inside the duffle bag, may be contrary to what the parties intended given its admission into evidence without limitation. CP 55.

The final question is the most complex and thus should have been met with considered discussion before responding. The jury asked whether it could consider Rainey's behavior during trial as

evidence. CP 54. The court said “no” and told the jury to “refer to the instruction as to what is evidence.” CP 55.

Although Rainey did not testify, the jury was deciding his intent and state of mind, and the reasonableness of his actions. CP 43, 48, 49. The jury had been instructed not to use Rainey’s failure to testify against him. CP 41. But it is a separate question as to whether the jury could consider or draw positive inferences from Rainey’s appearance during trial.

A prosecutor can comment on the defendant’s presence at trial when arguing that his testimony is not credible. See Portuondo v. Agard, 529 U.S. 61, 69, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000). The prosecutor commented on Rainey’s age, as compared to Hall, during her closing argument, thus drawing on his appearance in court. 9/8/10RP 64. Realistically speaking, jurors are expected to consider information from the courtroom. People dress up for court because they expect that the jury will draw inferences from their in-court behavior and demeanor. Additionally, Rainey’s state of mind was at issue when the jury was evaluating what he perceived when responding to Hall’s demand for his lighter. CP 48, 49.

Jurors are free to weigh and determine facts based on their own common sense or personal beliefs. See Duncan v. Louisiana,

391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (recognizing “common-sense judgment of a jury” as inherent component of jury trial right). There is no mechanical rule the jury must apply when deciding whether a case merits a not guilty finding.

Additionally, a trial court “has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue.” United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005); see also Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed.2d 350 (1946) (“When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.”).

In Southwell, the court’s original instructions were not legally inaccurate, but were unclear. When the jury asked for clarification, the court refused and told them to use the instructions they had been given. 432 F.3d at 1053. The court’s failure to clarify its instructions in response to the jury’s question was error. Id.

The jury’s questions about its access to evidence from the duffle bag and from Rainey’s appearance in court raised factual issues. The court prevented Rainey from offering a different response to the jury’s question by failing to notify him of the

question and it shielded communication with the jury from public scrutiny by failing to make any record about what considerations it weighed in responding to the jury's question. The jury's inquiries were more than administrative or purely legal, but raised substantive issues. Rainey should have been present, his attorney should have participated, and the court should have examined the jury's notes in open court before responding.

c. The trial court's failure to apprise Rainey of its response to the jury inquiries, and its incorrect instructions, violate the State and Federal Constitutions. 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); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). But the Washington Constitution expressly declares a right to be present and thus more strictly requires the State to enforce this fundamental right. State v. Ahren, 64 Wn.App. 731, 735 n.4, 826 P.2d 1086 (1992).

Article I, section 22 explicitly guarantees,

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation

against him, to have a copy thereof, to testify in his own behalf,[and] to meet the witnesses against him face to face [and] . . . to have a speedy public trial . .

(emphasis added). In Irby, the Supreme Court held that right to “appear and defend in person” under article I, section 22, should be interpreted independently of the federal right to be present which stems from the due process clause. 170 Wn.2d at 884. The state constitutional right does not depend on the particular stage of the trial. Rather, it is triggered by whether the accused’s “*substantial rights may be affected.*” Id. (emphasis added by Irby, quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)).⁵

Washington courts have long held that improper communications between the judge and jury, such as supplemental instructions to the deliberating jury, were conclusively prejudicial. Caliguri, 99 Wn.2d at 508. In Caliguri, the court indicated it would depart from this historical approach based on the notion that federal courts and other jurisdictions no longer strictly construed such an error. Id. Caliguri, which involved the court’s replaying of

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).

tapes admitted into evidence without notifying the defendant, contains no analysis of the broader protections required by article I, section 22. This Court does not interpret our constitution based on federal court rulings, rather, it looks at the intent of the constitutional provision at the time of the framing of the constitution. In re Runyan, 121 Wn.2d 432, 441, 853 P.2d 424 (1993).

When the Framers drafted the state constitution, it was the prevailing understanding that an accused person had a personal right to be present during discussions of jury instructions. 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); Cf. State v. Sublett, 156

Wn.App. 160, 231 P.3d 231, rev. granted, 170 Wn.2d 1016 (2010); Jasper, 158 Wn.App. at 539-43.⁶

As articulated in Shutzler, and affirmed in Irby, a violation of the right to be present is “conclusively presumed to be prejudicial.” 82 Wash. at 367.

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; see also Beaudin, 76 Wash. at 308; Linbeck, 1 Wash. at 339.

The constitution’s explicit protection of the public trial right precludes any de minimis analysis 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

⁶ The Supreme Court has two cases before it that touch on the issue of court communication with a deliberating jury. The court granted review in Sublett, where the attorneys met in chambers with the judge to discuss a jury question. 156 Wn.App. at 182. In Jasper, the trial court did not make any record of contacting the attorneys or defendant before responding to a written jury note.

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 similar approach should apply to the violation of Rainey’s right to be present during a material portion of the trial, because the constitution expressly guarantees his right to be present at trial if his substantive rights could be affected. The error is presumed prejudicial just as it is when the court violates the right to a public trial.

Even under a constitutional harmless error test, the prosecution cannot prove this error harmless. During this material stage in the trial, the court summarily rejected the jury’s request for access to an admitted exhibit and its desire to consider Rainey’s in-court appearance. The court should not have directed the deliberating jurors on substantive matters without consulting with Rainey, and without holding an on-the-record conversation with counsel. These lapses in the trial process are conclusively prejudicial and are likely to have affected the outcome of the trial.

158 Wn.App. at 541.

F. CONCLUSION.

For the foregoing reasons, Mr. Rainey respectfully requests this Court reverse his conviction and order a new trial at which he is afforded his fundamental rights under the Sixth Amendment and Article I, section 22.

DATED this 31st day of March 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy Collins', written over a horizontal line.

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

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

| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 66169-8-I |
| v. |) | |
| |) | |
| BRIAN RAINEY, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> BRIAN RAINEY 885335 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272 | (X) () () | U.S. MAIL HAND DELIVERY _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2011.

X _____ 

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