

NO. 35186-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBIN TAYLOR SCHREIBER,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Robert L. Harris, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF AFTER ATTENDING THE VICTIM'S FUNERAL CREATED THE APPEARANCE OF UNFAIRNESS, AND REVERSAL IS REQUIRED.

The Code of Judicial Conduct requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. CJC Canon 3(D)(1). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); see also State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) ("Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to its impartiality or fairness can be raised."). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonable person, knowing and understanding all the relevant facts, would conclude that all parties obtained a fair, impartial, and neutral hearing. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995); State v. Bilal, 77 Wn. App. 720, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995).

In this case, the trial judge attended Sergeant Crawford's funeral in his capacity as Superior Court Presiding Judge, knowing that Crawford's death was the subject of an impending criminal prosecution before that

court. CP 50. He also traveled to and from the ceremony with the county prosecutor, with whom he discussed the funeral and the tragic circumstance of Crawford's death. CP 52, 53. A reasonable person knowing these facts would have questions regarding Judge Harris's ability to remain impartial when he later assigned himself to preside over the trial in which Schreiber was charged with murdering Crawford.

Citing "common sense," the state suggests that Schreiber's appearance of fairness argument should be rejected because Schreiber has not alleged any actual prejudice. Br. of Resp. at 22. Washington courts have clearly held, however, that actual prejudice need not be demonstrated, because even a mere suspicion of partiality taints the judge's decision. Sherman, 128 Wn.2d at 205-06; Romano, 34 Wn. App. at 569 (reversal required where the record revealed not even the slightest hint of actual bias, because judge's ex parte investigation created appearance of unfairness). By attending the funeral, traveling with the prosecutor, and participating in a conversation about the "very tragic, and emotional circumstance that brought all of them together,"¹ the judge may have inadvertently obtained information critical to a disputed trial issue. His impartiality might therefore reasonably be questioned, and he should have recused himself. See Sherman, 128 Wn.2d at 206.

¹ CP 53.

2. THE STATUTORILY-CREATED PSYCHOLOGIST-CLIENT PRIVILEGE MUST YIELD TO SCHREIBER'S CONSTITUTIONAL RIGHT OF CONFRONTATION.

Corporal Duane Boynton of the Vancouver Police was a key witness for the prosecution. The state relied on his testimony to establish every element of the charge against Schreiber. Boynton testified that he saw Schreiber get into his truck with a rifle. He made eye contact with Schreiber, ensuring that Schreiber was aware of the police presence. He saw Schreiber raise something, by inference his rifle, while he was driving the truck. And, most importantly, Boynton testified that, from his position behind Schreiber's truck, he could see Crawford inside the patrol car as Crawford braced for impact. The prosecutor argued in closing that if Boynton, who was behind Schreiber, saw Crawford in his car put his hands up in a defensive motion prior to impact, then Schreiber saw it too. 18RP 3291.

Boynton also testified that he was traumatized by Crawford's death and had sought psychological treatment. 6RP 1127. Prior to trial, the defense moved to compel disclosure of Boynton's psychological records, arguing that the effects of the trauma he experienced on his ability to observe and recall were relevant to his credibility. CP 101-02; 1RP 16. The court ruled that Boynton could assert the psychologist-client privilege on cross examination. 2RP 235; 3RP 415. Although it conducted an in

camera review of the records, the court made no rulings concerning the relevancy of the records to the defense theory regarding Boynton's memory and credibility. It merely reiterated that Boynton could assert the psychologist-client privilege. 5RP 1034-35, 1041.

In its brief, the state argues that "it is obvious from the results of the in-camera review that there was nothing there to support the allegations made by the defense." Br. of Resp. at 33. To the contrary, the record does not support such a conclusion. In fact, the court agreed that it was precluding the defense from exploring the allegation that the trauma Boynton experienced affected his memory and recall, based simply on its application of the psychologist-client privilege. 5RP 1037-38.

Schreiber's argument on appeal is that because Boynton's testimony was crucial to the state's case, the statutorily-created psychologist-client privilege should yield to Schreiber's constitutional right of confrontation. See Br. of App. § C.2.b at 26-31. See also Davis v. Alaska, 415 U.S. 308, 319-20, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (confrontation right prevails over juvenile proceedings privilege statute); United States v Nixon, 418 U.S. 683, 709, 94 S Ct 3090, 41 L Ed 2d 1039 (1974) (executive privilege yields to need for criminal evidence); State v. Heemstra, 721 N.W.2d 549, 563 (Iowa Sup. 2006) (in criminal case where confidential communications might reasonably bear on claim of self

defense, medical privilege must yield to constitutional right to present a defense); People v. Bridgeland, 19 A.D.3d 1122, 1124-25, 796 N.Y.S.2d 768 (2005) (statutory psychologist-client privilege must yield to defendant's constitutional right of confrontation where witness's credibility was crucial to case). The state's brief fails to address this argument.

3. **SCHREIBER'S OBJECTION TO THE TRIAL COURT'S ERRONEOUS EXCLUSION OF EXPERT TESTIMONY IS PRESERVED FOR APPEAL.**

The state's case at trial included a substantial amount of testimony from several eyewitnesses, many of whom contradicted each other or contradicted earlier statements they had made. See Br. of App. § C.3.a at 32-33. In an attempt to help the jury evaluate the testimony in light of these inconsistencies, defense counsel planned to call Geoffrey Loftus, an expert in the field of human perception and memory. CP 162. Loftus would testify that memory and perception are subject to outside influences in ways not commonly known to the average person. CP 162.

The state moved to exclude this expert testimony, arguing that everything to which Loftus would testify was within the common experience of jurors, the testimony was not necessary, and it was routinely excluded. 2RP 339. The court excluded the offered testimony, ruling that the information was well within the common experience of the jurors.

The court believed the proposed testimony would invade the province of the jury, since the jury had to determine witness credibility. 3RP 425.

In its brief, the state argues that the defense failed to preserve for appellate review its challenge to the exclusion of Loftus's testimony, because no offer of proof was made as to Loftus's qualifications. Br. of Resp. at 45-47. This argument is specious.

When the state moved to exclude Loftus's testimony prior to trial, the defense filed a memorandum in response, to which was attached Dr. Loftus's 10-page curriculum vitae setting forth his education, experience, awards and honors, professional memberships, publications, and invited addresses. CP 161-75. When the state argued its motion to exclude Loftus's testimony, it made no argument that Loftus was unqualified, and defense counsel noted that there was no argument regarding Loftus's qualifications. 2RP 338-43. And finally, when the court excluded Loftus's testimony, it did so because it felt the substance of the proposed testimony did not meet the requirements of ER 702, giving no indication that it had any question regarding Loftus's qualifications as an expert. 3RP 425; 12RP 2548-49. Since both the substance of the proposed evidence and Loftus's qualifications are clear from the record, no further offer of proof was needed, and this issue is preserved for appeal. ER 103(a)(2); State v. Ray, 116 Wn.2d. 531, 539, 806 P.2d 1220 (1991).

B. CONCLUSION

For the reasons presented above and in appellant's opening brief, this Court should reverse Schreiber's conviction and remand for a new trial.

DATED this 19th day of February, 2008.

Respectfully submitted,



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