

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

07 AUG 15 PM 2:12
STATE OF WASHINGTON
BY: 

State of Washington

Respondent,

v.

Russell Eugene Pearson

Appellant.

No. 35359-8-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Russell Eugene Pearson, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground # 1

Appellant was denied his right to Due Process under the 6th and 14th Amendment to the U.S. Constitution and Article 1, section 3 of the Washington Constitution when the State engaged in prosecutorial misconduct misleading the court and depriving the court of making an informed decision as to whether to dismiss the Felony murder charge.

Appellant's attorney has already argued that the state's untimely charging of felony murder requires dismissal of that conviction. In addition to that ground for dismissal Appellant asserts that prosecutorial misconduct mislead the court and deprived the trial court of making an informed decision when they considered the dismissal of the felony murder charge during a pretrial hearing. The state argued to the trial court that

their theory of the case to support the charge of felony murder was based on intent to commit a theft and then at trial presented evidence to support felony murder based on intent to commit assault. Since Appellant's conviction on second degree felony murder predicated on assault was overturned by the Supreme Court's decision in *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), the state was understandably hesitant to admit before the court their intention to charge felony murder based on the predicate crime of burglary with assault as the intended crime.

Appellant was charged with second degree intentional murder, second degree felony murder predicated on burglary, and first degree assault. Appellant moved to dismiss the charges on double jeopardy and mandatory joinder grounds. CP 59-96. The court dismissed the first degree assault charge as barred by double jeopardy. The court denied the motion to dismiss the second degree intentional murder. When it came to arguments on second degree felony murder the court stated this was a tougher question:

The more difficult question I have had is whether, in the alternative, the predicate can be changed in an amended information post trial to include new predicate offenses, and in this case, residential burglary or burglary in the second degree as predicate offenses to the murder. RP 6.

The state was asked their theory of the case to support this charge and the state replied the predicate crime of burglary was based on unlawful entry and they were there to commit a crime, to steal from Mr. Klum. RP 7-8. The court then asked for clarification to make sure there was not another crime in the state's mind.

The Court: So what the State is averring is that the intent was to commit a crime of theft, not to commit some other felony offense? Is that what you are suggesting? RP 8.

The state then agreed that their theory of the case was that the defendant went over to the victim's apartment to retrieve some night vision goggles that were not his. Assault was never mentioned until trial.

From the very beginning in opening statements the state presented a story that this case was about retaliation for a fight that enraged the defendant. The state claimed the defendant went to get his friend and told him to get his gun. Then they stated the defendant went over to the victim's apartment and intended the death of Mr. Klum. 4RP 113-114.

Prior to closing arguments and against the objections of defense counsel¹ the prosecutor added an instruction on assault. In closing arguments the state repeated that this case is about anger and retaliation. The prosecutor went on for an extended time finishing it with the statement: "The defendant took his life and executed him because of an assault and maybe a theft." The only theft that is mentioned is that of the victim, not the defendant. 9RP 767-774.

Both Washington and Federal courts have ruled that a prosecutor has a special duty not to mislead. *United States v. Universita* 298 F.2d 365, 367 (2nd Cir. 1962); *State v. Thompson* 73 Wn.App. 654, 663-664, 870 P.2d 1022(1994)(citing *State v. Reeder* 4 Wn.2d 888, 892, 285 P.2d 844 (1955)). *State v. Guizzotti* 60 Wn.App.289, 296, 803 P.2d 808(1991).

¹ Mr. Silverthorn: And, bam, sabotage, the day of. Right after I get my closing done, right after I got it fixed, Andress plus plus. So, obviously, I'm objecting like crazy on the assault on the record I made yesterday. The last trial was murder based on felony assault. It didn't work out. Now the statute is different, the law is different, so now they want to do it again under a slightly modified theory. It is unfair surprise. 9RP 756

In this case the prosecutor misled the court at a critical phase where the validity of the felony murder charge was being decided. The state claimed their theory of the case to support the felony murder charge was about appellant's intent to commit a theft. At trial the state did not present evidence of intent to commit theft but presented evidence of going to the victim's apartment to assault him out of anger and retaliation. It is evident the state intended all along to use assault as the intended crime. However the state was unwilling to present this assault theory during the pretrial hearing where the decision on whether to dismiss the felony murder charge was being made.

Because they were told the state's case was built on unlawful entering with the intent to commit a theft the court did not have an opportunity to make an informed ruling on whether to dismiss the charge of felony murder. The court never ruled on whether an assault based felony murder charge with the added element of unlawful entry would conflict with the Supreme Court's decision in *Andress* which had overturned Appellant's original conviction on felony murder.

Additional Ground # 2

Petitioner was denied his right to a fair and impartial jury guaranteed under the 6th and 14th Amendments, his 6th Amendment right to confrontation and cross-examination as well as his right to Due Process under the 5th and 14th Amendments when jury misconduct/tampering became apparent and the court failed to hold a hearing to determine the impact on the jury.

During a break in trial a juror felt he was waved at by a woman near the elevator who had been sitting in the courtroom. He did not tell the court about it but another juror (juror number 7) brought the incident to the court's attention. The man did not identify

who the woman was to the court. Juror number 7 stated the man told the entire jury about it and they had discussed it. They identified the woman who made the wave as the defendant's mother. Juror number 7 brought it to the court's attention only after thinking about it and being bothered by it over the weekend. She said she was impacted by it and she did not think it should have happened. Then she stated the entire jury thought it was strange and shouldn't have happened. Defense counsel moved for a mistrial but was denied. The prosecutor stated that all the jurors should be questioned and the defendant's family should be banned from the courtroom. The judge did not question any of the other jurors but instead added an instruction that any gesture or discussions of a gesture should be disregarded. 8RP 693-710.

A. Jury tampering/jury misconduct

Washington courts have ruled on the severe impact that jury misconduct can have on a trial. In *State v. Hall* 40 Wn.App. 162, 168, 697 P.2d 597 (1985), the court stated "Once juror misconduct has been found, and it is 'reasonably doubtful' whether the misconduct affected the verdict, the trial court abuses its discretion if it does not grant a new trial" *Gardner v. Malone*, 60 Wn.2d 836, 846 376 P.2d 651, 379 P.2d 918 (1962).

Numerous Constitutional issues are involved with jury tampering and misconduct. The Supreme Court has stated that jury tampering and misconduct implicates the right to a public trial, the right of confrontation, the right to cross-examination, the right to counsel,² the right to an impartial jury,³ and due process.⁴ Jury misconduct is a mixed question of law and fact. *Sassounian v. Roe* 230 F.3d 1097 (9th Cir. 2000).

The presence of a single biased juror introduces a structural defect not subject to harmless error analysis. *Dyer v. Calderon* 151 F.3d 970 (9th Cir. 1998). (Citing *Arizona v. Fulminante* 499 U.S. 279, 111 S. Ct. 1246, 113 L.ed.2d 302 (1991)).

Jury misconduct occurred when the jury discussed the issue of the "wave" among themselves against the instructions provided to them. This introduced information to the jury that was not presented at trial and was not subject to objection, to cross-examination,

² *Parker v. Gladden* 385 U.S. 363, 87 S.Ct. 468, 470 (1966).

³ *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

⁴ *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed.2d 654 (1954)

to explanation, or to rebuttal.⁵ It denies the due process right to an impartial jury. A jury is to make their decision based on the evidence presented at trial.

Not only was extraneous information brought in but it is obvious from the record that at least one juror felt this was an attempt at jury tampering. The blame was put on the family of appellant. 8RP 701. While the juror who experienced the contact was elusive about whom it was that provided the hand gesture, juror number 7 stated that he told her it was the defendant's mother who did this. There can be no mistaking the tone of juror number 7 when she repeated more than once that the contact should not have happened. When questioned she stated the entire jury felt there was some adverse action on the part of the defendant's family, "we all thought it was strange and should not have happened". 8RP 702. In the juror's mind there was one person who caused this event and that was the defendant's mother. She was clearly irritated about it and thought about it over the weekend. 8RP 698,700.

The 9th Circuit has distinguished a difference between jury tampering and "more prosaic kinds of jury misconduct." "Jury tampering is a much more serious intrusion into the jury's processes and poses an inherently greater risk to the integrity of the verdict." *U.S. v. Dutkel* 192 F.3d 893, 895 (9th Cir. 1999) (Discussing *Remmer v. United States*).

In this situation with the alleged tampering attributed to the defendant's mother we do not know whether the jurors discussed what role the defendant may have played in the event. They could easily have speculated he sent his mother on a mission to befriend one of the jurors. Without questioning the remaining 11 jurors we are not aware what took place in those discussions and what level of bias may have developed because of the incident and the decision of the jurors to discuss it among themselves prior to bringing it to the court's attention.

B. Failure to hold a hearing

⁵ *State v. Balisok*, 123 Wn.2d 114, 118; *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

Both Washington and Federal case law hold that jury misconduct/tampering creates a presumption of prejudice that the state can only overcome by a showing that the misconduct was harmless beyond a reasonable doubt. *State v. Murphy*, 44 Wn.App. 290, 296, 721 P.2d 30, review denied, 102 Wn.2d 1002 (1986) (applying Remmer prejudice standard), *US v. Matinez* 151 F.3d 384 (5th Cir. 1998), *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). In this case the trial court failed to hold a hearing to ascertain what each of the jurors had heard, what discussion had taken place about the event among the jury and what impact the alleged tampering incident had on each of them.

The highest court in the land has ruled on this need for an investigation long ago. When jury tampering is alleged as it was here there is a presumption of prejudice and the state bears a heavy burden of showing that it was harmless beyond a reasonable doubt.⁶ In this case the state failed to meet this burden. A hearing was never held to determine the extent the jury panel was impacted by the misconduct and alleged tampering. All we have is the one juror stating the entire panel of jurors felt this was strange and should not have happened.

Even the State thought it was important as the prosecutor wanted the entire family of the defendant banned from the courtroom because of the wave and he admitted the need to question each of the jurors.

I think we will have to inquire of the other jurors, you know, if they heard anything about it. I want Pearson's family banned from the courtroom. But also, what I'd like done is I would like Mr. Pearson's family to be excused from the courtroom. I'd like to see them banned from the courtroom. 8RP 704.

Defense counsel moved for a mistrial and was denied by the judge. 8RP 705-707. The judge eventually decided to just issue an instruction to the jury and never inquired as to whether the juror's were impacted by this alleged case of tampering.

Because the judge refused to question the jurors we don't know the magnitude the alleged tampering had on the remainder of the jury. Since jury number 7 was obviously

⁶ *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed.2d 654 (1954)

affected it is reasonable to conclude that others were impacted to a lesser or greater degree by the hand gesture and the ensuing discussion among the jury. The prosecutor even acknowledged the likelihood of a mistrial when he thought the questioning of the jurors was going to take place.

Roberts: ...there shouldn't have been any contact or whatever anyway. And now we have to discuss with these other jurors. And who knows what some of these other jurors might say. 8RP 704

Everything pointed to a problem with this event and instead of investigating it and making a decision based on the results the court took the route of pretending everything was all right and never investigated the matter. The trial court's refusal to grant defense counsel's request for a mistrial nor hold a hearing to investigate the tampering/misconduct charges violated Petitioner's rights to a fair and impartial trial as well as his due process rights. It "undermined one of the most fundamental tenets of our justice system: that a defendant's conviction may be based only on the evidence presented during the trial." *United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996).

Additional Ground # 3

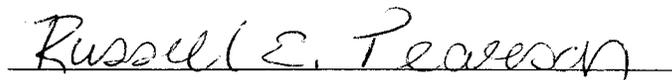
Appellant was denied the effective assistance of counsel when his attorney promised Appellant would testify and tell his story and then failed to have him testify.

Appellant would like to supplement the argument that his attorney has already brought to this court in Appellant's opening brief. In jury voir dire his attorney told each one of the prospective jurors that his client would be testifying and telling the jury why he went to Klum's apartment. However at the close of the state's case his attorney advised him not to testify. Under the circumstances counsel's broken promise constitutes deficient performance.

Appellant has been attempting to obtain transcripts of his jury voir dire since June 25, 2007. He has had several communications with his attorney and she informed him she is waiting for his trial attorney to amend his order of indigency. He is still waiting for the transcripts to show up but has decided at this time to file this Statement of Additional Grounds.

The United States Supreme Court has held that a criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his claims. *Coppedge v. United States*, 369 U.S. 438, 446, 81 S.Ct. 21, 82 S.Ct. 917. Washington Courts have also held this position. *State v. Young* 70 Wn. App. 528, 529, 856 P.2d 399, *State v. Atteberry*, 87 Wn. 2d 556, 560, 554 P.2d 1053.

Respectfully submitted this 15th day of August, 2007.

A handwritten signature in cursive script that reads "Russell E. Pearson". The signature is written in black ink and is positioned above a horizontal line.

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