

No. 36853-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Melvin Morgensen,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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Jefferson County Superior Court

Cause No. 07-1-00139-1

The Honorable Judge Craddock D. Verser

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

 1. Did the trial court’s decision to replay all of the evidence for the jury violate Mr. Morgensen’s right to a fair trial by an impartial jury? Assignments of Error Nos. 1-4. 1

 2. Did the trial court present some evidence of potential bias by expressing his unfavorable opinion of Mr. Morgensen, derived in part from prior representation of him in criminal cases? Assignments of Error Nos. 5-7. 1

 3. Did the trial court violate the appearance of fairness doctrine by presiding over the trial despite having an unfavorable opinion of Mr. Morgensen, derived in part from prior representation of him in criminal cases? Assignments of Error Nos. 5-7. 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 5

I. By allowing the state to prove its case a second time while the jury was deliberating, the trial court violated Mr. Morgensen’s constitutional right to a fair trial by an impartial jury..... 5

II. The trial judge violated the appearance of fairness doctrine by presiding over trial despite having an unfavorable opinion of Mr. Morgensen, derived in part from prior representation of him in criminal cases..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bracy v. Gramley</i> , 520 U.S. 899, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997)	8
<i>In re Murchison</i> , 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955)	8
<i>Offutt v. United States</i> , 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954)	8

WASHINGTON CASES

<i>Brister v. Tacoma City Council</i> , 27 Wn. App. 474, 619 P.2d 982 (1980), review denied, 95 Wn.2d 1006 (1981)	9
<i>Buell v. City of Bremerton</i> , 80 Wn.2d 518, 495 P.2d 1358 (1972)	9
<i>Dimmel v. Campbell</i> , 68 Wn.2d 697, 414 P.2d 1022 (1966)	9
<i>OPAL v. Adams County</i> , 128 Wn.2d 869, 913 P.2d. 793 (1996)	9
<i>State v. Dugan</i> , 96 Wn.App. 346, 979 P.2d 85 (1999)	9, 10
<i>State v. Koontz</i> , 145 Wn.2d 650, 41 P.3d 475 (2002)	5, 6, 8
<i>State v. Madry</i> , 8 Wn. App. 61, 504 P.2d 1156 (1972)	8

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	5
U.S. Const. Amend. XIV	5, 7, 8
Wash. Const. Article I, Section 22	5, 7, 8
Wash. Const. Article I, Section 3	5, 7, 8

OTHER AUTHORITIES

Knapp and Hall, *Nonverbal Communication in Human Interaction, 5th ed.*
(2007)..... 6

ASSIGNMENTS OF ERROR

1. Mr. Morgensen was denied his constitutional right to due process.
2. Mr. Morgensen was denied his constitutional right to an impartial jury.
3. The trial judge erred by playing a recording of the trial testimony for the jury.
4. The trial judge erred by allowing the state to present all of its evidence a second time during jury deliberations.
5. The trial judge violated the appearance of fairness doctrine.
6. The trial judge provided some evidence of his own potential bias.
7. The trial judge should have recused himself from hearing Mr. Morgensen's case.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Melvin Morgensen was accused of felony harassment, based on an alleged threat he made to a sheriff's deputy while intoxicated. During deliberations, the trial judge replayed for the jury an audio recording of all the testimony presented at trial. This was done at the jury's request, over Mr. Morgensen's objection.

1. Did the trial court's decision to replay all of the trial testimony during jury deliberations violate Mr. Morgensen's right to a fair trial by an impartial jury? Assignments of Error Nos. 1-4.

At sentencing, the trial judge disclosed that he had previously represented Mr. Morgensen, and had developed an unfavorable opinion of him, especially when he'd been drinking.

2. Did the trial court present some evidence of potential bias by expressing his unfavorable opinion of Mr. Morgensen, derived in part from prior representation of him in criminal cases? Assignments of Error Nos. 5-7.

3. Did the trial court violate the appearance of fairness doctrine by presiding over the trial despite having an unfavorable opinion of Mr. Morgensen, derived in part from prior representation of him in criminal cases? Assignments of Error Nos. 5-7.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

2007 was a hard year for Melvin Morgensen.¹ On the day he was arrested for an alleged assault, he'd been drunk for some time and was extremely intoxicated. RP 71, 79. According to Mr. Morgensen, he woke up drunk and was called a wife-beater by Deputy Tamura, who then attacked him by throwing him to the ground and putting his knee on the back of Mr. Morgensen's neck. RP 91-93. Mr. Morgensen testified that he'd seen this deputy earlier in the day, and had been told that he'd be taken to jail if he encountered Deputy Tamura again. RP 92-93.

Deputy Tamura acknowledged that he took Mr. Morgensen to the ground while handcuffed, forcing him to hit the ground without being able to break his fall. He also acknowledged putting pressure on the back of Mr. Morgensen's neck with his knee. RP 80-81. According to Deputy Tamura, Mr. Morgensen had resisted arrest by locking his arms and legs after being handcuffed, and by refusing to get into the deputy's car. RP 71.

Deputy Tamura testified that he knew Mr. Morgensen, and could tell he was too intoxicated to be booked into jail, so he drove him to the hospital to be cleared first. RP 71-72. During the drive, Mr. Morgensen

¹ He had recently lost his father. RP 91.

told Tamura to “put one in his head,” because if the deputy didn’t kill him, Mr. Morgensen would kill the deputy and his family when he was released in a year. RP 72. Mr. Morgensen also threatened to put a hex on the deputy and his family. RP 78.

Mr. Morgensen was charged with felony harassment, and the case went to jury trial. At trial the deputy testified, followed by Mr. Morgensen. The deputy was then recalled to the stand for rebuttal, and the case was submitted to the jury. After deliberating for some time, the jury asked for the testimony to be repeated. RP 132. Over defense objection, the court replayed an audio recording of the testimony from the entire trial. RP 132-142. Mr. Morgensen was convicted as charged. CP 3-12.

At sentencing, the trial court judge indicated that he had represented Mr. Morgensen in the past:

And, quite frankly, if you’re sober you’re going to appear. I’ve known, you know, I’ve known you for years and I think I’ve represented you before. I’ve sat where Mr. Davis is before.

And, when, and Mr. DeBray is right, Mr. Davis is right, as long as you’re not drinking you’re a very decent human being. You are the worst alcoholic when you drink, you’re the worst person that you can be. I don’t know why, you know, that’s between you and whatever. But, you’re a terrible drunk...

You always get in trouble. Everything that you’ve gotten in trouble for over the past ten years has always been when you get intoxicated, and you abuse people. Whether it’s Gordon Tamura, your girlfriend, or anyone else around you. I mean, that’s your history, Mel, and you know it as well as I do. I’m not telling you anything you don’t know.
RP 159.

The trial judge then sentenced Mr. Morgensen to the high end of his standard range. CP 7. This timely appeal followed. CP 13.

ARGUMENT

I. THE TRIAL JUDGE VIOLATED MR. MORGENSEN'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN HE ALLOWED THE STATE TO PROVE ITS CASE A SECOND TIME WHILE THE JURY WAS DELIBERATING.

Every person accused of a crime has a due process right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. Under the Sixth Amendment to the U.S. Constitution (applicable to the states by action of the Fourteenth Amendment), an accused is also guaranteed the right to trial “by an impartial jury.” U.S. Const. Amend. VI; U.S. Const. Amend. XIV. The Washington State Constitution contains a similar guarantee. Wash. Const. Article I, Section 22.

Because a jury must remain impartial as it determines the facts, replaying testimony during deliberations is disfavored. *State v. Koontz*, 145 Wn.2d 650 at 654, 41 P.3d 475 (2002). The danger is that the jury “may place undue emphasis on testimony considered a second time at such a late stage of the trial.” *Koontz*, at 654, *quotation marks and citations omitted*.

Where videotaped testimony is concerned, the Supreme Court has required trial courts to protect against the danger of undue emphasis:

Trial courts must consider how the replay can be limited to respond to the jury's request and the procedures necessary to protect the parties. Protections to prevent undue emphasis in the manner of video replay may include replay in open court, court control over replay, and review by both counsel before presentation to the jury. Other protections may include the extent to which the jury is seeking to review facts, the proportion of testimony to be replayed in relation to the total amount of testimony presented, and the inclusion of elements extraneous to a witness' testimony. A determination to allow videotape replay should balance the need to provide relevant portions of testimony in order to answer a specific jury inquiry against the danger of allowing a witness to testify a second time. It is seldom proper to replay the entire testimony of a witness.
Koontz, at 657.

Many of the Supreme Court's concerns about replaying video are applicable to audio recordings as well. First, an audio recording may include extraneous information (such as a clerk's whispered comment) picked up by the microphone but not heard by the jury during the live testimony. Second, an audio recording might emphasize certain testimony over other testimony. For example, if Locke leans close to the microphone and Rousseau leans away, Locke's testimony might be clear while Rousseau's testimony is partially inaudible. Third, an audio recording is necessarily stripped of important nonverbal cues, and thus emphasizes the words used over the manner in which they are

communicated. *See, e.g., Knapp and Hall, Nonverbal Communication in Human Interaction, 5th ed. (2007).*

In this case, the trial court replayed the entire trial testimony during the jury's deliberations. RP 132-142. Defense counsel was not given an opportunity to listen to the audio recording in advance, to see if it included extraneous information and to evaluate whether some portions of the testimony were clearer than others.² There is no evidence that the testimony was replayed to answer a specific factual question; rather, the jury's note to the judge asked for "a copy of the statements made by Officer Tamura and by Mr. Morganson [sic] while on the stand." Supp. CP.

By replaying the entire testimony of Deputy Tamura, the court gave the state an opportunity to present its evidence twice. It is of little import that Mr. Morgensen's testimony was also replayed; by giving the state an opportunity to prove its case twice, the court increased the likelihood of conviction. This violated Mr. Morgensen's constitutional right to due process under the Fourteenth Amendment and Article I, Section 3 of the state constitution. U.S. Const. Amend. XIV; Wash.

² Indeed, defense counsel was not even given time to research the issue before the court made its decision. RP 139.

Const. Article I, Section 3. It also violated his right to an impartial jury under the Sixth and Fourteenth Amendments and Article I, Section 22 of the state constitution. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. For these reasons, the conviction must be vacated and the case remanded for a new trial. *Koontz, supra*.

II. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE BY PRESIDING OVER TRIAL DESPITE HAVING AN UNFAVORABLE OPINION OF MR. MORGENSEN, DERIVED IN PART FROM PRIOR REPRESENTATION OF HIM IN CRIMINAL CASES.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law U.S. Const. Amend. XIV. Similarly, Article I, Section 3 of the Washington Constitution provides that “No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. Article I, Section 3. Under both constitutions, due process secures for an accused the right to a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899 at 904, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997). Furthermore, “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” *In re Murchison*, 349 U.S. 133 at 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955), quoting *Offutt v. United States*, 348 U.S. 11 at 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954). “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). “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” *Madry*, at 70; *Brister v. Tacoma City Council*, 27 Wn. App. 474 at 486, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for “partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party...” *Buell v. City of Bremerton*, 80 Wn.2d 518 at 524, 495 P.2d 1358 (1972), *quoted with approval in OPAL v. Adams County*, 128 Wn.2d 869 at 890, 913 P.2d. 793 (1996).

To prevail under the appearance of fairness doctrine, a claimant must only provide *some* evidence of the judge’s actual or potential bias. *State v. Dugan*, 96 Wn.App. 346 at 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any question as to the judge's integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966).

In this case, the trial judge himself provided evidence of a potential for bias. At sentencing, after acknowledging that he’d previously represented Mr. Morgensen, Judge Verser addressed him as follows:

You are the worst alcoholic when you drink, you’re the worst person that you can be. I don’t know why, you know, that’s between you and whatever. But, you’re a terrible drunk... You

always get in trouble. Everything that you've gotten in trouble for over the past ten years has always been when you get intoxicated, and you abuse people. Whether it's Gordon Tamura, your girlfriend, or anyone else around you. I mean, that's your history, Mel, and you know it as well as I do. I'm not telling you anything you don't know.
RP 159.

Because Judge Verser's opinion of Mr. Morgensen was colored by his prior relationship with him as his attorney, he should not have presided over Mr. Morgensen's trial. His comments are some evidence of potential bias under *Dugan, supra*. Accordingly, the conviction must be reversed and the case remanded for a new trial.

CONCLUSION

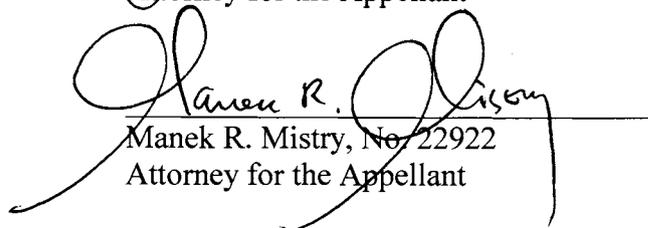
Because Mr. Morgensen's constitutional right to a fair trial by an impartial jury was compromised, his conviction must be reversed. In addition, evidence of potential bias on the part of Judge Verser requires reversal. The case must be remanded for a new trial before a different judge.

Respectfully submitted on February 13, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Melvin Morgensen
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and to:

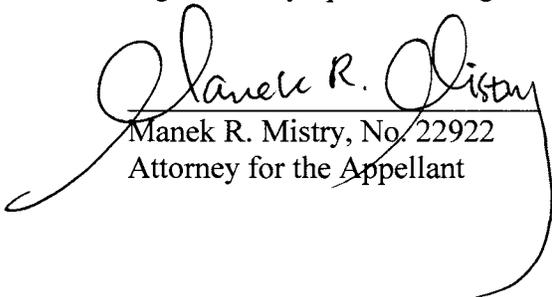
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 13, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 13, 2008.



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