

No. 36853-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Melvin Morgensen,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

Jefferson County Superior Court

Cause No. 07-1-00139-1

The Honorable Judge Craddock D. Verser

Appellant's Reply Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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ARGUMENT

I. MR. MORGENSEN WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY.

Courts disfavor replaying testimony after a jury begins deliberations. *See* Brief of Respondent, p. 6. Replaying testimony may violate an accused's right to a fair trial by an impartial jury. *State v. Koontz*, 145 Wn.2d 650 at 654, 41 P.3d 475 (2002); Wash. Const. Article I, Section 3 and Section 22; U.S. Const. Amend. VI; U.S. Const. Amend. XIV.

Although video and audio recordings of testimony present different problems, both have the potential to make the proceedings unfair. In this case, the trial judge should not have replayed the entire trial testimony during the jury's deliberations, especially since the jury did not have a specific factual question it wanted answered. RP 132-142; CP 17.

Playing the audio once (to prevent "undue repetition") and "giving both sides another opportunity to be heard" did not solve the problem. Brief of Respondent, p. 7. Under the court's procedure, the state had two full opportunities to present its evidence to the jury. The second full opportunity occurred during deliberations. By giving the state a second bite at the apple, the trial court increased the likelihood of conviction.

This was unfair. Accordingly, the conviction must be reversed and the case remanded to the superior court for a new trial.

II. JUDGE VERSER VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.

Judge Verser had represented Mr. Morgensen in the past, and had formed a negative opinion of him; he voiced that opinion from the bench prior to pronouncing sentence. It is irrelevant that his opinion was “unanimously held,” or that the sentence was “thoughtful [and] unbiased.” His prior representation and negative opinion created an appearance of fairness problem that taints the entire proceeding. Mr. Morgensen’s conviction must be reversed and the case remanded for a new trial before a different judge. *State v. Dugan*, 96 Wn.App. 346 at 354, 979 P.2d 85 (1999).

CONCLUSION

Mr. Morgensen was entitled to a fair trial by an impartial jury, presided over by an unbiased judge. Because he was denied these things, his conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on April 12, 2008.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

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

Melvin Morgensen
81 Elkins Road
Port Hadlock, WA 98339

and to:

Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368

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

All postage prepaid, on April 12, 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 April 12, 2008.


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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