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STATE OF WASHINGTON  
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NO. 37788-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO SALGADO ROJAS,

Appellant.

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

The Honorable John Nichols, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court failed to notify Rojas that the jury had questions during its deliberation.
2. The trial court failed to consult with Rojas before submitting answers to the jury's questions.
3. The trial court had inappropriate contact with the jury when it answered its questions without involving Rojas.
4. The trial court deprived Rojas of his court-rule and due process right to be present at all court proceedings.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Was it error for the trial court to exclude Francisco Rojas from participating in responding to the two jury questions when the trial court's responses were not completely accurate and caused error in Rojas' case?

**C. STATEMENT OF THE CASE**

**1. Procedural History.**

The Clark County Prosecuting Attorney charged Francisco Salgado Rojas with attempted murder in the first degree and attempted murder in the second degree. CP 12-13. Although the two counts were not charged in the alternative, they both pertained to the same shooting of Miguel Ramirez-Alvarado on the same day. CP 12-13. Both charges included firearm enhancements. CP 12-13.

Prior to trial, the court held a CrR 3.5 hearing. 3RP 20-77; 4RP 88-138. The hearing explored two taped statements Rojas made with Vancouver police detectives within hours of the shooting and Rojas' arrest. 3RP 59. As Rojas is a Spanish speaker and the detectives were English speakers, a Spanish-speaking Vancouver police officer acted as a translator to facilitate the interviews. 3RP 22-24. Rojas testified at the 3.5 hearing to being pushed against his will by the police detectives to make certain statements. 4RP 103-06. The detectives testified that Rojas made certain statements after being advised of his *Miranda* rights and waiving his rights. 4RP 69-70. The trial court found the detectives' testimony more credible than Rojas' testimony and refused to suppress the statements. 4RP 134-37. To date, the trial court has not entered written findings of fact and conclusions of law.

During deliberations, the jury sent two written questions to the court. CP 14,15. The court responded to the questions in writing. CP 14, 15. There is no suggestion in the record that the court notified or in any other way involved Rojas, his attorney, or the prosecutor in responding to the jury questions. See Supp. Designation (trial court record, sub nom. 99).

A jury found Rojas guilty of attempted first degree murder with a firearm enhancement. CP 39, 41. Rojas, who had no criminal

history, received a standard range sentence of 270 months. CP 45, 47.

Rojas appeals. CP 56-69.

## **2. Factual History.**

Miguel Ramirez-Alvarado ("Ramirez" ) was shot twice during daylight hours, while walking through a Vancouver neighborhood. 5RP 153-156, 179, 182, 6RP 276. Neither shot was fatal. 6RP 283. The shooter, a Hispanic man, who got out of a dark-colored Jetta, confronted Ramirez with a pistol and shot perhaps eight times. 5RP 156, 175. The shooter then got back into the Jetta and left. 5RP 175. Several people in the neighborhood saw or heard the shooting and called the police. 5RP 160, 177. A witness gave the police a description of the Jetta including a partial license plate. 5RP 213-214.

Within minutes, the police saw the Jetta and started to follow it. 6RP 341. The Jetta stopped abruptly. 6RP 341. While the driver stayed with the car, the two passengers fled. 6RP 341-42. Both passengers were found up a nearby tree. 5RP 193-194. Francisco Salgado Rojas was one of the two people in the tree. 6RP 316-318. The police found a handgun in the brush near the stopped Jetta and another handgun, a Colt .45, on the Jetta floorboard. 5RP 228.

Rojas was detained for questioning. 7RP 512-522. Rojas told police detectives during the second of two interviews that he shot

Ramirez because Ramirez shot and killed his brother in Mexico. 7RP 500, 525. The jury listened to the audio recording. 7RP 502. During his testimony, Ramirez denied shooting or killing Rojas' brother. 6RP 290. Ramirez identified Rojas in a police montage as the person who shot him. 7RP 533-534. During his trial testimony, Ramirez denied knowing Rojas. 6RP 294.

The police sent the recovered Colt .45 and bullets from the scene of the shooting to the crime lab for analysis. The lab concluded that the bullets recovered from the scene were shot from the recovered Colt .45. 6RP 408-412. Also, Rojas' DNA, as well as some other identified person's DNA was on the Colt .45. 6RP 440-50.

At trial, the Jetta's driver testified that Rojas was the shooter and that he had pled to a charge of attempted robbery and agreed to testify truthfully at Rojas' trial. 6RP 314-315.

Rojas testified that he was not the shooter, that there had been a fourth person in the Jetta who was the shooter, and that any contrary statements he made to the police were not the truth. 7RP 564-573.

**D. ARGUMENT**

**ROJAS IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT DEPRIVED HIM OF HIS RIGHT TO PARTICIPATE IN ANSWERING JURY QUESTIONS.**

Francisco Salgado Rojas was present at his CrR 3.5 hearing. Rojas was also present at his trial through the closing arguments. But once the jury was sent to deliberate, the trial court failed to allow Rojas to be present when the jury asked questions. Twice during its deliberation, the jury sent out written questions to the trial judge. And twice during deliberation, the trial judge failed to notify Rojas that the jury had a question and, consequently, did not involve Rojas in answering the jury's question. The trial court's failure to involve Rojas in the jury questions deprived Rojas of his rule-based and due process right to be present during his trial and to contribute to the jury's deliberation. The trial court's errors require that Rojas be given a new trial.

(i) The court violated CrR 6.15(f)(1)

CrR 6.15(f)(1) requires that the trial court involve the defendant and his counsel when the jury asks a question:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility

that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

The trial court violated CrR 6.15(f)(1) when it (1) failed to give Rojas an opportunity to participate in responding to the jury questions, (2) failed to give Rojas an opportunity to comment on the appropriate response, and (3) failed to give Rojas the appropriate notice of the jury questions so he could make any objections to the court's decision how to respond to the questions.

In *State v. Ratliff*, the trial judge took the jury's questions outside the presence of the parties and without notifying them. *State v. Ratliff*, 121 Wn. App. 642, 90 P.3d 79 (2004). This Court held that the trial judge had violated both former CrR 6.15(f)(1) and defendant Ratliff's right to be present at all stages of the proceedings when it failed to notify the parties of the jury's questions. *Ratliff*, 121 Wn. App. at 646. Both of these conclusions apply equally in Rojas' case.

Just as in *Ratliff*, the judge violated CrR 6.15(f)(1). The jury questions should have been discussed between the court and the parties, including Rojas, in an effort to come to an agreed-upon response to each of the jury's questions. The rule clearly requires the judge to notify the parties and give them an opportunity to comment. Giving an "opportunity" by putting the jury questions in the superior

court file and not mentioning them to Rojas is not the type of opportunity contemplated by the rule.

(ii) The trial court deprived Rojas of his constitutional right to be present at all proceedings.

The judge impermissibly communicated with the jury in violation of Rojas' state and federal constitutional right to appear and defend himself in person and through counsel at all stages of the proceeding. U.S. Const. amend. VI.; Wash. Const. art. 1, § 22; The core of the constitutional right to be present is the right to be present when evidence is presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . .'" *Gagnon*, 470 U.S. at 526. Further, any communication by the judge to the jury during deliberations without the presence of the accused and the accused's counsel is presumed prejudicial. *State v. Waite*, 125 Wash. 667, 238 P. 617 (1925); *State v. Shutzler*, 82 Wash. 365, 144 P.2 284 (1914); *State v. Wroth*, 15 Wash. 621, 47 P. 106 (1896); *Linbeck v. State*, 1 Wash. 336, 25 P. 452 (1890). Because this is a constitutional error, the court must reverse unless the state demonstrates beyond a reasonable doubt that the outcome would have been the same absent

the errors. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1181 (1985); *Ratliff*, 121 Wn. App. at 646.

(iii) The trial court's error is not harmless.

Communication between the trial court and the jury in the absence of the defendant is error. *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Although a trial court's improper communication with a jury is error, reversal is required only if that error is prejudicial. *Caliguri*, at 508. But where a defendant demonstrates the possibility of prejudice from the trial court's communication, it is the State's burden to prove harmless error beyond a reasonable doubt. *Caliguri*, at 509. The state cannot do that in Rojas' case.

The jury sat through three days of trial before hearing closing argument and being sent out to deliberate at 10:56 a.m. on the fourth day. See Supp. Designation (trial record, sub. nom. 99). By 11:20 p.m., the jury sent out the first of its two written questions. CP 14. In its first question, the jury asked to see a transcript of the interrogation of Rojas. CP 14. At 11:30 a.m., the court responded, "We cannot provide you with the transcript, however the recording of the interrogation is available." CP 14. However, the court's response was not entirely accurate. Although there is not evidence in the record that a complete transcription was available, a partial transcription was admitted at the CrR 3.5 hearing. See Supp Designation, Exs. 4 and 5.

Had Rojas been made aware of the jury's question, Rojas could have moved to reopen his case and have the partial transcript admitted. *State v. Luvene*, 127 Wn.2d 690, 711, 903 P.2d 960 (1995) (A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court.)

The jury sent out its second question at 12:05 p.m. asking, "Can we get Ex. 58, map of crime scene." CP 15. At 12:10, the court responded that "Ex. 58 was not admitted into evidence, but was used for "illustrative" purposes only. Thus it cannot go into the jury room." CP 15. Again, the court's instruction was not entirely accurate. Exhibit 58 was admitted for illustrative purpose without objection. 5RP 154-554. Exhibit 58 was a drawing of the intersection where the shooting occurred. 5RP 154-554. Although illustrative exhibits are not favored to go with the jury for deliberation, it is still a discretionary ruling and there is no inherent error in permitting them in the jury room. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 426-27, 114 P.3d 607 (2005).

What the jury is getting at by their two questions is significant. There is no question that Miguel Ramirez was shot. The issue at trial was, Who shot him? Both the intersection diagram, Exhibit 58, and Rojas' partially-transcribed taped interview contained information relevant to the jury's questions. The diagram would help the jury

understand who could see what. The in-court identification of otherwise uninvolved eye-witnesses, such as that by Howard Tikka, were sketchy. Tikka originally told the police that he could not identify the shooter. 5RP161. The police believed him and made no effort to show him any sort of photo montage or have Rojas participate in a line-up. 5RP 162. After seeing a picture of Rojas in the Columbian newspaper, Tikka, at trial suddenly identified Rojas as the shooter. 5RP 159. Another eye witness, Jarrett Pogue, identified the Jetta's other passenger, as the shooter. 7RP 554-555.

The jury did not have to believe Martinez when he testified that it was Rojas, a person he had never met, who suddenly confronted him on the street and shot him. The jury also did not have to believe the driver of the car, a person who had cut a deal with the prosecutor to testify against Rojas, when the driver testified Rojas was the shooter.

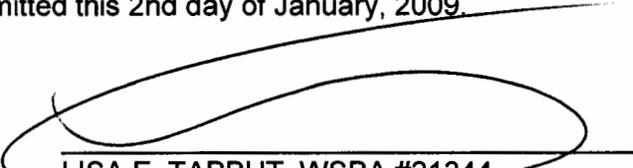
The written record of Rojas' testimony could have been matched against what Rojas said in court. To the jury, the written record may have been more important than the audio recording during deliberation because it may well have been easier to understand than the Spanish-language interpretation it listened to at trial.

Under the facts of the case, prejudice was possible and the state cannot prove that it was harmless beyond a reasonable doubt.

**E. CONCLUSION**

Rojas' conviction should be reversed and his case remanded for retrial.

Respectfully submitted this 2nd day of January, 2009.



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I certify under penalty of perjury pursuant to the laws of the State of Washington  
that the foregoing is true and correct.

Dated this 2<sup>nd</sup> day of January 2009, in Longview, Washington.

  
\_\_\_\_\_  
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