

No. 41871-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Leonard Coleman,

Appellant.

Lewis County Superior Court Cause No. 10-1-00331-7

The Honorable Judges Richard Brosey and James Lawler

Appellant's Reply Brief

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ARGUMENT

I. MR. COLEMAN’S RIGHT TO APPEAR AND DEFEND IN PERSON, HIS RIGHT TO CONFRONTATION, AND HIS RIGHT TO DUE PROCESS WERE INFRINGED BY THE TRIAL JUDGE’S FAILURE TO ADEQUATELY ACCOMMODATE HIS DISABILITY.

Once alerted to an accused person’s disability, the court is wholly responsible for ensuring that an accused person can understand the proceedings. *Linton v. State*, 275 S.W.3d 493, 503 (Tex., 2009); *People v. James* 937 P.2d 781, 783 (Colo., 1996). Here, Mr. Coleman alerted the trial judge to his severe hearing impairment. RP (1/25/11) 85; RP (1/26/11) 138-139. The court provided some accommodation, but did not make certain that Mr. Coleman was able to hear and understand the testimony, and Mr. Coleman missed “quite a bit” of the proceedings. RP (1/26/11) 138-139. Even after learning that the accommodation provided was inadequate, the trial judge made no attempt to rectify the problem. RP (1/26/11) 169-189; RP (1/27/11) 3-80; RP (2/7/11); RP (2/25/11); RP (3/9/11).

Respondent does not suggest that Mr. Coleman’s constitutional rights were fully honored. Brief of Respondent, pp. 14-22. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Instead, Respondent suggests that any violation was waived because Mr. Coleman

failed to demand further accommodation.¹ Brief of Respondent, pp. 14-19.

This is incorrect. A manifest error affecting a constitutional right may be raised for the first time on review.² RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008). As the Supreme Court has explained,

“[t]he focus of the actual prejudice [analysis] must be on whether the error is so obvious on the record that the error warrants appellate review.... Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in

¹ Respondent also suggests that Mr. Coleman invited any error by failing to object. Brief of Respondent, pp. 20-22. But the two cases cited by respondent do not turn on the issue of invited error. See Brief of Respondent at 20-22 (citing *In re Marriage of Olson*, 69 Wash.App. 621, 850 P.2d 527 (1993) and *State v. Mendez*, 56 Wash.App. 458, 784 P.2d 168 (1990)). Had Mr. Coleman and his attorney asked the court *not* to accommodate his disability, the error would arguably be barred by the invited error doctrine. See, e.g., *State v. Alphonse*, 147 Wash.App. 891, 899, 197 P.3d 1211 (2008).

² In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” ... This analysis is distinct from deciding whether the error was harmless and therefore does not warrant reversal.

State v. Schaler, 169 Wash.2d 274, 284, 236 P.3d 858 (2010) (alterations in original) (citations omitted). The burden of showing harmless error remains with the prosecution; it must establish harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wash.2d 874, 886, 246 P.3d 796 (2011).

In this case, Respondent concedes that any error is of constitutional dimension. Brief of Respondent, p. 19. Respondent contends, however, that review is inappropriate because there was no error and/or Mr. Coleman suffered no prejudice. Brief of Respondent, p. 19. Respondent is incorrect on both counts.

The record contains both direct and circumstantial evidence establishing that Mr. Coleman was unable to hear the proceedings. First, the court was made aware of Mr. Coleman’s disability at the outset. RP (1/25/11) 85. Second, the court was informed that Mr. Coleman’s hearing aids didn’t work in the courtroom, and that the accommodation provided by the court helped only “a little bit more” than his hearing aids. RP (1/25/11) 85. Third, Mr. Coleman testified that he’d missed “quite a bit”

of the trial, and was relying on his attorney to make up for the problem.³

RP (1/26/11) 138-139.

Upon hearing Mr. Coleman's testimony, the court should have stopped the proceedings and provided further accommodation. The court could have arranged for an "interpreter" to provide a simultaneous relay of the proceedings. Alternately, the court could have arranged for a real-time transcription display, so Mr. Coleman could follow along onscreen.⁴ The judge's failure to take any steps violated Mr. Coleman's right to be present, his right to confrontation, and his right to due process. *Linton, supra; James, supra.*

The error had practical and identifiable consequences at trial, because "given what the trial court knew at [the] time" Mr. Coleman testified, it "could have corrected the error." *Schaler, at 284* (citations omitted). Furthermore, the record reveals some of the consequences Mr. Coleman suffered. For example, without proper accommodation, he was unable to hear at least some portion of the proceedings.⁵ Having missed

³ Respondent characterizes Mr. Coleman's testimony about his hearing loss and his inability to hear the proceedings as "self serving." Brief of Respondent, p. 16, 18, 21. It is not clear what Respondent means by this. Apparently, Respondent believes that an accused person's statements cannot be taken seriously unless corroborated.

⁴ Counsel believes that this is available already in the Lewis County Superior Court.

⁵ Respondent implies that Mr. Coleman must have been able to hear the proceedings, because he was able to hear the judge, defense counsel, and the prosecutor

some portion of testimony and argument, he could not intelligently discuss the progress of the case with his attorney.

Respondent has not suggested that the error was harmless under the stringent standard applied to constitutional error. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The state's effort to address harmlessness fails. Mr. Coleman's inability to hear "quite a bit" of the proceedings was neither trivial, formal, nor merely academic. Instead, the error prejudiced him, and may well have affected the final outcome of the case. *Lorang*, at 32. The state has not attempted to argue that any reasonable fact-finder would reach the

when they addressed him directly. Brief of Respondent, pp. 16-19. But Mr. Coleman did not contend that the problem arose when he was addressed directly.

same result, or that the evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke*, at 222.

The court's failure to adequately accommodate Mr. Coleman's disability infringed his right to appear and defend in person, his right to confrontation, and his right to due process. *Linton*, *supra*; *James*, *supra*. Respondent's argument that any error was waived is without merit. *Id.*

II. THE TRIAL COURT SHOULD NOT HAVE CONDUCTED ANY COURT PROCEEDINGS BEHIND CLOSED DOORS.

The trial court's *in camera* conference with counsel violated the constitutional requirement that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Respondent erroneously conflates the public trial right with the right to be present. Brief of Respondent, pp. 23-24 (citing *In re Pirtle*, 136 Wash.2d 467, 965 P.2d 593 (1998)). Mr. Coleman does not argue that the instructions conference violated his right to be present. *See* Appellant's Opening Brief.

The outcome of this case will likely turn on the Supreme Court's decision in *State v. Sublett*, 156 Wash.App. 160, 231 P.3d 231, *review*

granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). Accordingly, Mr.

Coleman rests on the argument set forth in his Opening Brief.

III. MR. COLEMAN WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Coleman rests on the argument set forth in his Opening Brief.

IV. MR. COLEMAN'S CONVICTIONS VIOLATED HIS FOURTEENTH ERROR! BOOKMARK NOT DEFINED. AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EACH CHARGE.

Mr. Coleman rests on the argument set forth in his Opening Brief.

V. THE TRIAL COURT'S ORDER SUPPRESSING MR. COLEMAN'S STATEMENTS MUST BE UPHELD.

A. The government bears the heavy burden of showing the voluntariness of any statements taken from a suspect in the absence of counsel.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.⁶ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

⁶ Similarly, Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash.

The government bears the heavy burden of showing that an accused person's statements are admissible under the due process "voluntariness" test, which "takes into account the totality of the circumstances to examine 'whether a defendant's will was overborne by the circumstances surrounding the giving of a confession.'" *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002) (quoting *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotations and citation omitted)). The due process test takes into consideration the characteristics of the suspect and the details of the interrogation. *Dickerson*, at 434.

Factors to be considered include, *inter alia*, "the degree of police coercion; the length, location and continuity of the interrogation; and the defendant's maturity, education, physical condition, mental health, and age." *Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011). A confession is involuntary if extracted by threats, or direct or implied promises, however slight, or the exertion of any improper influence. *Hogan*, at 7. The privilege against self-incrimination absolutely precludes use of any involuntary statements against an accused in a criminal trial, for any

Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wash.2d 228, 235, 922 P.2d 1285 (1996).

purpose. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

B. The prosecution failed to establish that Mr. Coleman's statements were admissible under the due process voluntariness test.

In this case, the prosecution failed to present evidence regarding the totality of the circumstances surrounding Mr. Coleman's statements. First, the prosecution did not introduce the details of the ten-minute conversation between Mr. Coleman's initial admission and the time the officers read Mr. Coleman his rights and obtained a recorded statement. RP (1/7/11) 4-54; CP 8-10, 44-45. Second, the prosecution failed to establish any facts relating to Mr. Coleman's age, experience, educational level, IQ, mental health, or any other factor that could bear on the voluntariness of his statements. RP (1/7/11) 4-54; CP 8-10, 44-45.

Absent such evidence, the trial judge could not determine whether or not Mr. Coleman's statements had been improperly induced by promises, threats, or other improper influence, or how police pressure might have influenced his decision to speak. *Hogan*, at 7. Under these circumstances, the trial judge was justified in finding that the prosecution had failed to meet its heavy burden of proving the voluntariness of the statements. *Gamez*, *supra*.

Respondent's arguments focus exclusively on whether or not Mr. Coleman was subjected to custodial interrogation. Brief of Respondent, pp. 7-14. But custodial status, although critical to the *Miranda* test,⁷ is but one of many factors that a trial court may review in deciding whether or not the state has met its burden of proving voluntariness under the totality of the circumstances.⁸

The trial court correctly concluded that the prosecution failed to meet its heavy burden of establishing the voluntariness of Mr. Coleman's statements under the due process clause. The court's decision should not be disturbed on appeal. *Hogan, supra; Dickerson, supra.*

⁷ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁸ The state summarized what circumstances did come out at the hearing, leaving out several important facts. First, Mr. Coleman had been called by his son, who had warned him that police were coming to talk to him about touching P.R.'s breasts. RP (1/26/11) 148-150, 161-162. Deputy Humphrey asked Mr. Coleman if he knew why they'd come. Having received a warning call from his son, Mr. Coleman responded by saying "I did it," instead of waiting for the officers to explain. RP (1/7/11) 12, 28. Humphrey asked what he had done, and Mr. Coleman told him that he had touched P.R.'s breast, later explaining that it was inadvertent and while hugging. RP (1/7/11) 28; RP (1/26/11) 152. Second, while Mr. Coleman agreed to give a taped statement, the state did not offer the recording at the suppression hearing. A "transcript" that had been prepared and provided to the court had not been reviewed for accuracy, and was not prepared by anyone who testified at the hearing. RP (1/7/11) 33-34; Exhibit 2 from Suppression Hearing, Supp. CP.

CONCLUSION

Mr. Coleman's convictions must be reversed. The charges must be dismissed, or, in the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

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I further certify that I sent an electronic version of the brief, with permission, to:

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And that I delivered the original electronically to the Court of Appeals, Division II, for filing, through the court's online filing portal;

All on October 26, 2011.

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 October 26, 2011.



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