

FILED
JULY 31, 2015
Court of Appeals
Division III
State of Washington

No. 32876-7-III

COURT OF APPEALS
DIVISION III
IN THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MATTHEW O. HASTINGS, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY
THE HONORABLE SCOTT WOLFRAM

REPLY BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The Trial Court Violated Mr. Hastings' Right To Be Present Under the State and Federal Constitutions, and CrR 3.4, After Receiving A Question From The Deliberating Jury And Responding To It Outside The Presence of Mr. Hastings and His Attorney, In Violation of CrR 6.15.
- B. The Trial Court Erred When It Denied A Timely Motion For Dismissal After Prejudicial Custodial Contact In The Presence of the Jury.

Issues Related To Assignments Of Error

- 1. Did the trial court violate Mr. Hastings' right to be present when it received and responded to a question from the deliberating jury outside the presence of Mr. Hastings and his attorney, requiring a new trial?
- 2. Did the trial court err when it denied a timely motion for a new trial after the jury observed Mr. Hastings being escorted out of the courtroom by a deputy, requiring a new trial?

II. STATEMENT OF FACTS ON REPLY

Mr. Hastings incorporates the facts presented in Appellant's Brief and adds the following.

Matthew Hastings and Nancy Newman knew each other for approximately 35 years, and lived together on and off for about the last 10 years. (RP 52). Mr. Hastings had been injured at work, and sometime within the first five years of their shared life, he was paid a settlement and began receiving SSD. (RP 53).

After the jury had been instructed, and was making its way out of the courtroom to begin deliberations, Sergeant Garby approached Mr. Hastings and said, "Come here, let's go." (RP 113). The closest juror was less than two feet away. Mr. Hastings' attorney whispered to Mr. Hastings to "stay put, to try to wait until the jury [was] out." Id. She also tried to signal the sergeant that the jury was still in the courtroom, but he repeated his directive to Mr. Hastings. (RP 113-114). Mr. Hastings stepped directly in the path of one of the jurors to move toward the sergeant. Id. The officer physically took control of Mr. Hastings by the arm and continued to physical restrain him as he escorted him out of the courtroom and all the way to the stairs and another thirty feet after that. (RP 126).

Although defense counsel was able to get the sergeant's attention and told him he was supposed to wait until the jury was out, the officer physically held Mr. Hastings by the arm. (RP 114;126). Defense counsel returned to the courtroom and advised

the court of the events. (RP 114). The following day counsel filed a motion to dismiss, which the court denied. (CP 86-90; RP 115). The jury found Mr. Hastings guilty on all counts. (CP 120-121).

On October 16, 2014, defense counsel filed a motion for a new trial under CrR 7.5. (RP 140-147). Defense counsel became aware of a written record showing that during its deliberations the jury submitted the following question to the court :

Regarding "a crime" in Instruction no. 12, can that crime be:

- a. violation of restraining order
- b. theft
- c. both
- d. just entering unlawfully

(CP 124).

Without contacting counsel, the court responded to the jury inquiry in writing, "You have the court's instructions on the law. Please refer to your instructions and continue to deliberate." (CP 124).

The hardcopy question and answer do not list the time the question was given to or returned by the court.

At the sentencing hearing, November 4, 2014, the court agreed that he had not contacted counsel about the jury question, stating he had no idea why he did not follow CrR 6.15. (RP 127). Counsel pointed out to the court that had she been aware of the inquiry she would have objected to the court's response and asked

the court to tell the jury that option “d”, an unlawful entrance was not sufficient for a conviction of burglary. (RP 127).

The court denied the motion for a new trial. (RP 127). Mr. Hastings makes this appeal. (CP 196-215).

III. ARGUMENT

A. The Trial Court Erred In Denying A Motion For A New Trial After Violating Mr. Hastings' Right To Meaningful Representation At A Critical Stage of His Trial.

Mr. Hastings stands on the arguments made in appellant's opening brief and adds the following.

Mr. Hastings argues that under Washington law, the discussion of a jury question is a critical stage of a criminal proceedings and under the State and Federal constitutions, a defendant has the right to be present and receive meaningful representation at a critical stage. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); *State v. Ratliff*, 121 Wn.App. 642, 646, 90 P.3d 79 (2004); U.S. Const amends. 5, 6, 14; Wash. Const. Art. 1, §22.

Furthermore, It is a duty of the court to notify the parties of the contents of jury questions and provide an opportunity to

comment upon an appropriate response. CrR 6.15(f)(1). It is well settled that a trial court commits error when it communicates with the jury absent notice to the defendant or counsel. *State v. Langdon*, 42 Wn.App. 715, 717, 713 P.2d 120 (1986); *see also Ratliff*, 121 Wn.App. at 646.

In *Jasper*, the jury submitted a question to the court and the court there also failed to notify the parties of the contents of the jury's question or to provide an opportunity to comment on an appropriate response, in violation of CrR 6.15(f)(1)¹. *State v. Jasper*, 158 Wn.App.518, 541, 245 P.3d 228 (2010). The *Jasper* Court weighed three issues: whether the court erred when it answered the jury question, whether the instruction the defense said it would have offered was even available, and whether the error was harmless.

The Court concluded the trial court did err by not informing the parties of the inquiry, and not providing Jasper's counsel with

¹ CrR 6.15 provides in pertinent part: (f) Questions from Jury During Deliberations. (1) The jury shall be instructed that any questions 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.

an opportunity to participate in developing an appropriate response. *Jasper*, 158 Wn.App. at 543. The third issue, whether Jasper was prejudiced was answered in the negative. As respondent's brief indicates, the Court found no prejudice because the court's response was neutral, and did not convey any affirmative or harmful information. *Id.* (Br. of Resp. at 7-8). The Court specifically found, however, that the trial court could not properly have given the additional instruction because the effect would have been to add a theory neither party had presented. *Jasper*, 158 Wn.App. at 541. Had the proposed additional instruction been available, the *Jasper* court may well have come to a different conclusion in its harmless error analysis.

Unlike *Jasper*, here the jury was confused by an essential element requirement. Defense counsel made a record that had she had an opportunity to assist in formulating the response, she would have objected to merely referring back to the instructions. (CP 144). Defense counsel here correctly raised the *possibility* of prejudice, because the neutral response by the court could not guarantee that the jury unanimously agreed that all the elements of burglary had been proved by the State beyond a reasonable doubt. The jury did not understand that unlawful entry alone did not

constitute burglary. (CP 144). If the jury relied on the unlawful entry alone, the State was relieved of the burden of proving the essential elements of the charges beyond a reasonable doubt..

Mr. Hastings does not argue that his right to be present at the time the court gave the jury an answer. Rather, his argument is that he was not meaningfully represented when the court had interaction with the jury outside the presence of the parties, most especially defense counsel. While it is within the trial court's discretion *whether* to give further instruction to a deliberating jury, fairness and the appearance of fairness require the trial court to follow the court rules and *allow meaningful representation of the defendant*. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008); *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012)(emphasis added).

Here, there is no question that Mr. Hastings' counsel was not notified. Because the court did not notify Mr. Hastings' counsel of the jury question, and he was thereby precluded from presenting additional instruction, Mr. Hastings respectfully asks this Court to find that his constitutional right to be meaningfully represented at a critical stage of trial was violated and grant him a new trial.

B. The Trial Court Erred When It Denied A Timely
Motion For A New Trial After Prejudicial Custodial
Contact In The Presence of the Jury.

The court's duty to shield the jury from routine security measures is a constitutional mandate. *State v. Gonzalez*, 129 Wn.App. 895, 901, 120 P.3d 645 (2005) (quoting *State v. Hutchinson*, 135 Wn2d 863, 887-888, 959 P.2d 1061 (1998)).

The Respondent's brief misquotes the record regarding the deputy's physical restraint of Mr. Hastings, and makes an argument based on the incorrect assumption. (Br. of Resp. at 3, 10).

In fact, the oral record is as follows:

Ms. Burkhart: Yes, your Honor. And I don't have anything to add to my memorandum. I think the only thing that I would like to say is just to make sure the record is correct. The State's memorandum described the incident as the guard took Mr. Hastings by the arm and then escorted him out of the courtroom without further touching him.

That's not, in fact, what happened. He was physically held by the arm during the entire process of escorting him out of the room until he reached the stairs, which for the record is about six feet outside of the courtroom with a left hand turn and probably another thirty feet down the hallway.

So I did want it to be clear that he was physically held by the deputy during that entire process.

(Emphasis added).

The State's counsel then added:

Ms. Mulhern: And I think I did hopefully an adequate job of briefing the issues. I did want to point out, since Ms. Burkhart raised it, I only know what I saw. I saw the Deputy touch him

by the arm and then the next thing I saw was him in the hall and he wasn't being held by anyone.
(RP 126.)

The presumption of innocence guarantees every criminal defendant “**all** the physical indicia of innocence, including that of being brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn.2d 792, 844, 975, P.2d 967 (1999)(emphasis added).

As argued in appellant's opening brief, a defendant's right to be presumed innocent requires courts to guard against factors that may undermine the fairness of the trial process. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Further, the *Estelle* Court held that equal protection considerations prohibit the imposition of different conditions upon those defendants who have the wherewithal to post bail and secure their release from those who do not have the resources to post bail. *Id.* at 505-06.

For example, in *Gonzalez*, the trial court gave an instruction to the jury during voir dire, which alerted the jury to the fact that the defendant had not posted bond, was being held in custody, and would be transported from the jail wearing handcuffs. *Gonzalez*, 129 Wn.App. at 648-49. The reviewing court noted the pre-emptive instruction essentially told the jury that Gonzalez was indigent,

incarcerated, had been transported in restraints, and tried under guard. *Id.* at 901. The Court noted “[W]e have previously held that the appearance of shackles **or other restraints** may reverse the presumption of innocence by causing jury prejudice and thus denying due process.” *Id.* (emphasis added).

Mr. Hastings argues that in front of the jury, the deputy both verbally and physically restrained him. His freedom of movement was substantially curtailed. The message to the jury was that Mr. Hastings had not been able to post bond, was being held in jail, and that he needed a guard. The act of restraining him in front of the jury violated his right to the presumption of innocence. *Holbrook v. Flynn*, 475 U.S. 560, 568-69, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *Gonzalez*, 129 Wn.App. at 903.

As the *Gonzalez* court reasoned, a jury may inadvertently or unavoidably perceive the defendant’s condition. In such a circumstance, the court may give a simple curative instruction at the defendant’s request if necessary to remedy the inadvertent exposure. The court also has the discretion to grant a mistrial. *Gonzalez*, 129 Wn.App. at 902,905 (quoting *State v. Rodriguez*, 146 Wn.2d 260,271, 45 P.3d 541 (2002).

Here, while the exposure was inadvertent, it did occur. Because the jury had already been dismissed for deliberations, the time for the curative instruction had passed. This irregularity deprived Mr. Hastings of a fair trial. As this Court has held, “However strong the government’s case, the fundamental right to a fair trial demands minimum standards of due process. *Gonzalez*, 129 Wn.App. at 905 (quoting *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1997)). “When a trial right as fundamental as the presumption of innocence is abridged, however, reversal is required. *Id.*” The trial court should have granted the requested new trial.

APPENDIX NOTE:

For the Court’s convenience, attached as an appendix are the clerk’s papers referred to in Mr. Hasting’s Statement of Additional Grounds.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hastings respectfully requests that this Court reverse his conviction and order a new trial at which he will be afforded his rule-based and constitutional right to be meaningfully represented and which is free

from the prejudicial taint of custodial contact in the presence of the jury.

Respectfully submitted this 31st day of July 2015.

s/ Marie Trombley, WSBA # 41410
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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Matthew Hastings, do hereby certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the Brief of Appellant was sent by first class USPS mail, postage prepaid to: Matthew Hastings, DOC # 788621, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362; and by electronic service by prior agreement between the parties, to Teresa J. Chen, Attorney at Law: tchen@co.franklin.wa.us.

Dated this 31st day of July 2015.

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SUPERIOR COURT OF WASHINGTON – COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,

Plaintiff,

-vs-

MATTHEW OWEN HASTINGS,
DOB: 02/26/1959

Defendant.

NO. 14-1-00140-9

AMENDED INFORMATION

COMES NOW, Michelle M. Mulhern, Deputy Prosecuting Attorney for the County of Walla Walla, State of Washington, and by this amended information accuses **MATTHEW OWEN HASTINGS** of the crime of:

Count 1: **Residential Burglary – Domestic Violence**, RCW 9A.52.025(1) and 10.99.020, Class B Felony (10 years or fine of \$20,000 or both);

Count 2: **Violation of a Protection Order – Domestic Violence**, RCW 26.50.110(5) and 10.99.020, Class C Felony (5 years or fine of \$10,000 or both);

Count 3: **Theft in the Third Degree – Domestic Violence**, RCW 9A.56.050(1)(a) and 9A.56.020(1)(a) and 10.99.020, Gross Misdemeanor (364 days or fine of \$5,000 or both);

committed as follows:

Count 1: That the said **Matthew Owen Hastings**, in the County of Walla Walla, State of Washington, On or about April 23, 2014, did, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a dwelling other than a vehicle, to-wit: 10246 Mill Creek Road, and furthermore, the defendant did commit the above crime against a family or household member, as defined by RCW 10.99.020;

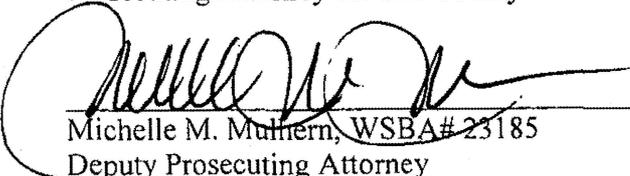
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3 Count 2: That the said **Matthew Owen Hastings** in the County of Walla Walla, State of
4 Washington, On or about April 23, 2014, with knowledge that the Walla Walla County
5 District Court had previously issued a protection order, restraining order, or no contact order
6 pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in City of Walla Walla,
7 State of Washington vs. Matthew O. Hastings, Cause No. 4Z0297109, did violate the order
8 while the order was in effect by knowingly violating the restraint provisions therein,
9 prohibiting him or her from acts or threats of violence against or stalking of, a protected party,
10 or restraint provisions prohibiting contact with a protected party, and furthermore, the
11 defendant has a least two prior convictions for violating the provision of a protection order,
12 restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50,
13 or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, contrary to
14 Revised Code of Washington 26.50.110, and furthermore, the defendant did commit the above
15 crime against a family or household member, as defined by RCW 10.99.020;

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18 Count 3: That the said **Matthew Owen Hastings** in the County of Walla Walla, State of
19 Washington, On or about April 23, 2014, did wrongfully obtain control over property of a
20 value not exceeding seven hundred fifty dollars (\$750), to-wit: jewelry and a dog, belonging
21 to Nancy L. Newman, with the intent to deprive the owner thereof of such property, and
22 furthermore, the defendant did commit the above crime against a family or household
23 member, as defined by RCW 10.99.020;

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contrary to the form of the statute in such cases made and provided, and against the peace and
dignity of the State of Washington.

DATED at Walla Walla, Washington on this 4th day of June, 2014.

JAMES L. NAGLE,
Prosecuting Attorney for said county


Michelle M. Mulhern, WSBA# 23185
Deputy Prosecuting Attorney

PA

Hastings

FILED
WALLA WALLA DISTRICT COURT

JUN 17 2014

JOHN O. KNOWLTON
DISTRICT COURT JUDGE

DISTRICT COURT OF WASHINGTON - WALLA WALLA COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

NO. 4Z0297109

Vio. Pro. Order

Ass. 4

3/25/14

-vs-

MOTION AND ORDER
FOR DISMISSAL

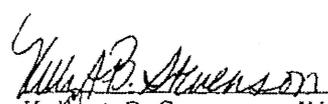
MATTHEW OWEN HASTINGS,
DOB: 02/26/1959

Defendant.

MOTION

COMES NOW Kelly A.B. Stevenson, Deputy Prosecuting Attorney for Walla Walla County, and respectfully moves the Court for an order dismissing the charge in the above-mentioned matter with prejudice for the following reason: It appears the state will be unable to prove the absence of a statutory defense beyond a reasonable doubt.

DATED this 17th day of June 2014.



Kelly A.B. Stevenson, WSBA# 38895
Deputy Prosecuting Attorney

Hastings

ORDER

BASED UPON the above and foregoing Motion, the Court now being fully advised in the premises, and good and sufficient cause appearing therefore, it is hereby ORDERED that the charge in the above-mentioned matter be dismissed with prejudice.

DATED this 17 day of June, 2014.

John O. Knowlton

DISTRICT COURT JUDGE

Presented by:

Kelly A.B. Stevenson

Kelly A.B. Stevenson, WSBA# 38895
Deputy Prosecuting Attorney