

Supreme Court No. 87929-0

(Court of Appeals No. 66549-9-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Respondent,

TIMOTHY LEE DYE,

Petitioner.

PETITION FOR REVIEW

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
[Handwritten signature]

JAN TRASEN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Timothy Dye, through his attorney, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Dye seeks review of the Court of Appeals' opinion in State of Washington v. Timothy Lee Dye, No. 66549-9-I (Slip Op. filed August 27, 2012). A copy of the opinion is attached as an Appendix.

C. ISSUE PRESENTED FOR REVIEW

The right to due process of law safeguarded by the Sixth and Fourteenth Amendments and article I, sections 3 and 22 of the Washington Constitution, guarantee a criminal defendant a fair trial, free of undue prejudice. The trial court here permitted the complainant, a developmentally disabled adult, to testify shielded by a dog provided by the prosecutor's office, for his comfort alone. In an unprecedented decision, the Court of Appeals affirmed Mr. Dye's conviction, finding no violation of due process or prejudice. Should this Court review the Court of Appeals opinion, finding it requires review under RAP 13.4(b)(2),(3), and (4)?

D. STATEMENT OF THE CASE

Timothy Dye was involved in a romantic relationship with Alesha Lair – a relationship that continued even while Mr. Dye resided in Shelton,

Washington during 2007. 11/22/10 RP 70-72; 12/2/10 RP 87-89.¹ During the time Mr. Dye and Ms. Lair were apart,² she became involved with Douglas Lare, a developmentally disabled neighbor. 11/30/10 RP 21, 26-27; 12/1/10 RP 14-20.

Alesha Lair eventually moved into Mr. Lare's apartment, opened several lines of credit in his name, encouraged him to purchase a car, bought additional items for the home with his credit cards, and liquidated his retirement account. 11/30/10 RP 29-32; 12/1/10 RP 21-29.

Once Mr. Dye joined Ms. Lair in Seattle, she left Mr. Lare and set up a separate apartment for herself and Mr. Dye. 12/1/10 RP 40-41. On January 24, 2008, Mr. Lare awoke to find Mr. Dye in his apartment, asking for some of his and Alesha's belongings in order to pawn them. 12/1/10 RP 38-40. On the following day, Mr. Lare arrived home from work to find his front door propped open and several items missing, including a large television, a microwave, and two computers. Id. at 35-37. Police found no evidence of forced entry either time, but were told

¹ The fact that Mr. Dye was an inmate at Washington Correctional Center during that time period was not before the jury at trial. 11/18/10 RP 24.

² Because the spelling and pronunciation of the complainant's and co-defendant's last names are so similar, first names were apparently used in the trial court record.

that Alesha Lair still had keys to Mr. Lare's apartment. Id. at 111; 12/2/10 RP 31-33, 54-65.

Alesha Lair was charged and pled guilty to theft in the first degree with a vulnerable adult aggravator. CP 1-12; 12/6/10 RP 12.

Mr. Dye was charged with residential burglary. CP 29-30. At trial, the State requested permission for Douglas Lare to testify with the assistance of a dog, Ellie, owned by prosecutor's office, over defense objection. 11/18/10 RP 28-30. Mr. Dye argued that the prejudice created by the dog's presence would be extreme and would violate his right to a fair trial. Id. The trial judge granted the State's request to have the dog at Mr. Lare's side as he testified. Id. at 32.

The jury convicted Mr. Dye of the burglary, but did not return a special verdict as to the vulnerable victim aggravator. CP 68-69.

On appeal, Mr. Dye argued that his right to due process was violated by the dog's presence during Mr.'s Lare's testimony. He also argued that the trial court erred when it recalled an alternate to replace a deliberating juror without a proper colloquy. In addition, Mr. Dye argued that the trial court improperly commented on the evidence in the court's instructions.

On August 27, 2012, the Court of Appeals affirmed Mr. Dye's conviction in a published decision. As set forth below, Mr. Dye seeks review of the prosecutor's use of a dog during its witness's testimony.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE TRIAL COURT VIOLATED MR. DYE'S
CONSTITUTIONAL RIGHT TO DUE PROCESS
AND A FAIR TRIAL BY PERMITTING THE USE
OF A DOG PROVIDED BY THE PROSECUTION.

1. The federal and state constitutions guarantee the accused the right to due process of law and a fair trial. The federal and state constitutions guarantee every person accused of a crime the right to due process, which is in essence the fair opportunity to defend against the State's accusations. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22; Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010). The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Chambers, 410 U.S. at 294; Jones, 168 Wn.2d at 720. The ability to cross-examine the State's witnesses in a meaningful fashion is integral to due process. Jones, 168 Wn.2d at 720.

The trial court's decision to allow a dog³ to appear on the witness stand impermissibly burdened Mr. Dye's right to due process; this was a

³ The terms "comfort dog" and "therapy dog" are used interchangeably, along with "emotional support animal," in disability rights law and literature. 42 U.S.C. §§ 12101 et seq.; RCW 49.60 et seq.; Lara Bogle, Therapy Dogs Seem to Boost Health of Sick and Lonely, National Geographic News, Aug. 8, 2002; William Glaberson, By

decision without foundation or precedent, requiring review. RAP

13.4(b)(2),(3),(4).

2. There was no foundation for the State's request for -- or the court's accommodation of -- a dog to accompany this adult witness.

The State did not rely on Mr. Lare's undisputed disability when making its application for the dog to appear at trial; therefore, this Court must assess the rationale actually presented by the State. 11/8/10 RP 27-28.

During a pre-trial motion, the deputy prosecutor admitted the pre-trial request for the dog was "somewhat unusual," and informed the court that Ellie, the dog in question, did not belong to the complainant, but was, in fact, the property of the prosecutor's office. 11/8/10 RP 27-28. The State merely suggested that Mr. Lare "is a complete dog fan," and that "Ellie has provided tremendous comfort for him in the two times that he's been with her, and he has asked to have her present during his testimony." Id. at 28.

The defense immediately objected, arguing that the "prejudice" to Mr. Dye would be "extreme," and that despite the complainant's anxiety,

Helping Girl to Testify at a Rape Trial, a Dog Ignites a Legal Debate, N.Y. Times, Aug. 8, 2011 (hereafter, Glaberson); <http://www.tdi-dog.org> (last accessed September 27, 2012).

In its briefing, the State exclusively referred to Ellie as a "trained service dog" or "service dog." Resp. Brief at 2, 7, 10, 12, 14, 16. At argument, the State clarified that Ellie is a "facility dog;" this terminology is adopted by the Court of Appeals. Slip Op. at 3. Prosecutors are now advised in training manuals to use the term "facility dog," in order to prevent appellate issues. See infra, note 8.

“I think we should also keep in mind that this has to be a fair trial.”

11/18/10 RP 28, 30.⁴ The court ruled that “if we can accommodate somebody who has a developmental disability when they’re testifying in the courtroom I think it’s appropriate to do so.” Id. at 29.

This ruling, however, was erroneous, and moreover, inapposite to the State’s actual request, as the request had not been based upon accommodation of Mr. Lare’s disability. 11/18/10 RP 27-29. This is a disability for which he was not in need of, nor did he request, the use of a service animal. Mr. Lare, according to his own testimony and that of his sister, had been living independently in his own home for over 20 years. 11/30/10 RP 18; 12/1/10 RP 11. Mr. Lare had a full-time job with the Veterans Administration Hospital for even longer -- over 25 years. 12/1/10 RP 10. He did not use any type of service animal until these proceedings, at which time Ellie was provided for him “to help me and to make it easier for me.” Id.

The State’s application for the use of the dog should have failed for improper foundation, since being a “complete dog fan” and even finding “comfort” falls far short of the standard required under the limited case law involving so-called comfort items.

⁴ The defense suggested that if the complainant were permitted to be viewed sympathetically by the jury, while petting a dog, then Mr. Dye should be permitted to hold his baby while testifying. 11/18/10 RP 28. This request was denied. Id. 28-29.

3. Permitting the dog to be present during the complainant's testimony was a violation of Mr. Dye's due process rights and his right to a fair trial. The trial court here, in its apparent desire to provide comfort to Mr. Lare, lost focus on its paramount responsibility, which was to insure the accused received a fair trial. See, e.g., Estelle v. Williams, 425 U.S. at 503; U.S. Const. amends. VI, XIV; art. I, sec. 3, 22.

Although the case law involving service or therapy dogs is scarce, analogous scenarios involving witnesses purportedly in need of some sort of accommodation or protection may provide guidance. The vast majority of such cases involve child victims of sex crimes, such as Coy v. Iowa, and its progeny, in which the Supreme Court held that a defendant's right to confront his accuser was violated when a screen was used to shield a victim from the defendant. 487 U.S. 1012, 1022, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (reversing due to confrontation clause violation). In Coy, Justice O'Connor suggested in a concurrence that "if a court makes a case-specific finding of necessity, . . . the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." Id. at 1025.⁵

⁵ The Court of Appeals distinguishes Coy, noting that the Supreme Court specifically declined to address Coy's due process claim. Slip Op. at 5 n.10. The Court did, however, specifically find a Confrontation Clause violation. Coy, 487 U.S. at 1022.

No such finding of necessity was made here as to Douglas Lare, however. The State made no offer of proof concerning Mr. Lare's inability to testify without the aid of a comfort dog, nor did the trial court request one. 11/18/10 RP 28-29. At no time did Mr. Lare seem to have difficulty testifying or being in the same room as Mr. Dye, akin to the line of cases involving child-victims of violent crimes.

Many studies advocate the healing relationship between dogs and their owners. Visits from therapy dogs have shown such effects as "[p]ositive mood alteration" and "[d]ecreased blood pressure." "Perceptions of the Impact of Pet Therapy on Residents/Patients and Staff in Facilities Visited by Therapy Dogs," available at, www.tdi-dog.org (last accessed September 27, 2012). However, this very feature of the canine-human relationship is troubling in the fact-finding context, where a certain level of emotional tension and stress is integral to the process of confrontation.

It is the very physiological responses that testimony produces that a jury utilizes to determine a witness's credibility⁶ – and a dog is unable to distinguish between the stress associated with truth-telling and that associated with bearing false witness. "When [witnesses] start talking about difficult things," ... one psychologist who works with therapy dogs notes, the

⁶ While the "face-to-face presence may, unfortunately, upset the truthful rape victim or the abused child, ... it may [also] confound and undo the false accuser or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." Coy, 487 U.S. at 1020.

dog “picks up on that and goes over and nudges them. I’ve seen it with my own eyes.” Glaberson, at 4. Since defense counsel clearly cannot cross-examine the dog as to the source of the witness’s stress – truth-telling or subterfuge – the jury is left to interpret the dog’s signals as testimony from an unsworn witness that the victim is upset because he or she is telling the truth. Id. at 2.

Cross-examination has been called the means by which the mission to advance truth-determination in criminal trials is achieved. Tennessee v. Street, 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d. 425 (1985). This mission is foiled by the use of a comfort dog, whose presence suggests the final outcome of the trial, presupposing to the jury the very victimhood of the complainant, invading the jury’s exclusive providence as finders of fact, along with the defendant’s presumption of innocence. Estelle v. Williams, 425 U.S. at 503; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Other jurisdictions have addressed the situation where a child witness may be apprehensive about testifying. See, e.g., State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992) (error to allow 12 year-old witness to testify holding teddy bear, absent finding of necessity); State v. Aponte, 249 Conn. 735, 745-47, 738 A.2d 117 (1999) (reversing where prosecutor gave

child witness a Barney doll to hold during her testimony, as due process violation); State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944) (reversing where prosecutor arranged for child witness to hold mother's doll on witness stand). In Aponte, the Connecticut Supreme Court noted that had the witness simply brought a doll from home that was her personal property – rather than the doll being a gift from the prosecutor – the error might not have existed. Aponte, 249 Conn. at 745.⁷

Likewise in this case, had Mr. Lare used a dog of his own, the appearance of impropriety would have been substantially less. Here, despite the fact that Mr. Lare functions perfectly well without a service dog in his daily life, there was the inevitable impression that the State had orchestrated the appearance of Ellie, the comfort dog, in order to engender sympathy for the complainant. 11/18/10 RP 30.

In State v. Hakimi, the only Washington case addressing a similar issue, is inapposite to this case. 124 Wn. App. 15, 19, 98 P.3d 809 (2004).

In Hakimi, the victims in need of comfort were children, the so-called

⁷ This case is also different from the line of child sex abuse cases, as the witness interacted with the “comfort item” while on the witness stand. The record reflects that Mr. Lare introduced Ellie to the jury and fed her treats during his testimony. 12/1/10 RP 10. The State took pains at argument to clarify that Ellie was sitting beside Mr. Lare and not in his lap. However, the record is clear that there was interaction between the witness and dog in the jury's presence, which distinguishes this case from those involving dolls and teddy bears. 12/1/10 RP 10. That the dog was well-mannered is undisputed.

comfort item was an inanimate doll, and the record indicated no interaction with the object in front of the jury, which caused such prejudice here. *Id.*

In this case, although the defense requested additional time to *voir dire* based upon the court's decision to allow the dog in the courtroom, the trial court's response seems to foretell exactly how persuasive the dog's presence would prove to be. The court granted the extra time, but stated: "This being Seattle, you're going to probably get a near unanimous Yes on the pets and the dog lovers." 11/22/10 RP 75.

Despite a jury instruction that jurors should not "draw any conclusions based on the presence of this service dog," jurors could not help but be influenced by the presence of an animal that, among other things, human beings use for protection. CP 53.⁸

It is well settled that the appearance of fairness is so intrinsic to the due process right to a fair trial, that certain violations cannot be cured by a jury instruction. See, e.g., *Estelle v. Williams*, 425 U.S. at 503; *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) ("Our faith in the adversary system and in jurors' capacity to adhere to the trial

⁸ The court ultimately instructed the jury that Ellie was a "service dog," rather than a therapy or "facility dog." CP 53. A recent training article advises prosecutors to use the term "courtroom facility dog" to avoid possible "mistrials," or to avoid creating an "issue on appeal by implying to the jury that the witness is a victim, or [which might] be interpreted as a comment on the evidence." "Courthouse Dogs: Using a Courthouse Facility Dog in the Courtroom," available at www.courthousedogs.com/settings_courtroom.html (last accessed September 25, 2012) (quoted in Gabriela N. Sandoval, *Court Facility Dogs – Easing the Apprehensive Witness*, 39 Apr. Co. Law. 17 (2010).

judge's instructions has never been absolute"); State v. Finch, 137 Wn.2d 792, 843-45, 975 P.2d 967 (1999). In cases where the appearance of fairness is undermined, or where the presumption of innocence is shifted by the procedures followed at trial, as here, the instruction given by the court to not draw any conclusions based upon the dog's presence at trial was simply insufficient to cure the violation to Mr. Dye.

Ellie's presence next to the alleged victim invited jurors to conclude that Ellie was in court to protect the complainant from the accused, which would only be necessary, were he guilty or somehow a frightening person. Alternatively, the dog's presence could be interpreted as comforting a witness made to feel vulnerable, specifically because he was in the presence of the person who committed a crime against him. Either analysis – both improper – suggests the guilt of the accused, undermining the presumption of innocence, and the court's instruction in no way ameliorated this problem. See, e.g., State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) (evidence of witness's fear of testifying could lead jurors to conclude that he or she is fearful of the defendant, and thus as evidence of the defendant's guilt).

4. The error caused Mr. Dye prejudice, it was not harmless, and review is required. Even if the use of a comfort dog were ever permissible, which is not conceded, the trial court failed to make the

requisite findings to support the use of the accommodation in this case. The court further failed to balance the rights of Mr. Dye against the witness's need for the dog, and the jury instruction was inadequate to protect Mr. Dye's right to a fair trial.⁹

The use of the dog in this way was a violation of Mr. Dye's confrontation rights, as it interfered with meaningful cross-examination. Lastly, the presence of the comfort dog was unduly prejudicial, as it presupposed the victimhood of the complainant, which is the ultimate issue of fact for the jury to decide.

A constitutional error is presumed prejudicial, unless the State demonstrates beyond a reasonable doubt that the violations did not contribute to the verdict. E.g., Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt?"); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008).

⁹ Some jurists are apparently expressing discomfort with the courtroom dog program. King County Superior Court Judge Julie Spector, in an interview on the topic, expressed her concern "about the unintended signal emitted by a dog supporting a complaining witness in the presence of a jury, as this may help sway jurors." Marianne Dellinger, Using Dogs for Emotional Support of Testifying Victims of Crime, 15 Animal Law. 171 (2009).

Even if this Court does not find a violation of Mr. Dye's confrontation right, this Court should find the trial court abused its discretion by allowing the presence of the dog on the witness stand. When a trial court's exercise of its discretion is "manifestly unreasonable or exercised on untenable grounds, or for untenable reasons," an abuse of discretion exists. Freeman v. Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

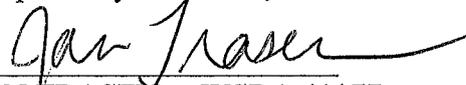
This Court should grant review. RAP 13.4(b)(2),(3),(4).

F. CONCLUSION

For the foregoing reasons, Mr. Dye's petition for review should be granted pursuant to RAP 13.4(b)(2),(3), and (4).

DATED this 27th day of September, 2012.

Respectfully submitted,



JAN TRASEN – WSBA 41177
Washington Appellate Project (91052)
Attorney for Petitioner

APPENDIX

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

STATE OF WASHINGTON,)	No. 66549-9-1
)	
Respondent,)	
)	
v.)	
)	
TIMOTHY LEE DYE,)	PUBLISHED OPINION
)	
Appellant.)	FILED: August 27, 2012

ELLINGTON, J. — Timothy Dye's right to a fair trial was not violated when the court allowed Ellie, the King County Prosecutor's Office "facility dog," to sit next to the developmentally disabled adult victim as he testified. Nor did the court improperly seat an alternate juror without first verifying the alternate's impartiality. We find no error, and affirm Dye's conviction for residential burglary.

BACKGROUND

Douglas Lare is an adult man with significant developmental disabilities.¹ Although he lives independently and has a job, he functions at the level of a child. In 2006 or 2007, Lare met Alesha Lair, who eventually became his "girlfriend."² Alesha, her sister, her mother, and her mother's boyfriend moved into Lare's apartment

¹ Lare has an intelligence quotient of approximately 65, cerebral palsy, and a degenerative joint condition. He is unable to manage his finances, and requires a payee service to pay his bills.

² Report of Proceedings (RP) (Dec. 1, 2010) at 14.

in spring of 2007. Alesha used Lare's money and credit to buy numerous items, including a car. She convinced Lare to take \$59,000 from his retirement account. She opened several credit cards in Lare's name and charged the maximum on each, incurring approximately \$42,000 in credit card debt.³ Alesha's mother and her boyfriend moved out of Lare's apartment in fall of 2007, and Alesha moved out shortly afterward.⁴

Unbeknownst to Lare, Alesha had another boyfriend named Timothy Dye. After she moved out, Alesha rented an apartment for Dye and herself, which she furnished with Lare's money.

Lare discovered that a portable DVD player and a DVD were missing from his bedroom. Several days later, on January 24, 2008, Lare awoke to find Dye in his home, rummaging through his belongings. Dye asked if he could take Lare's DVD player and VCR. Lare said no. Dye nonetheless took DVDs and a shelving unit. Lare reported both incidents to the police.

The next day, Lare returned from work to find his front door propped open. Several items had been stolen from his apartment, including a large television, VCR, DVD player, microwave, and a collectable "bulldog" knife. He reported this to the police as well. Lare became very fearful. He testified he now has three locks on his front door and sleeps with mace, a frying pan, and two knives.

³ Lare testified the only thing he bought for himself during this time was a coat "when I was cold." Id. at 27.

⁴ They moved after Alesha's mother's boyfriend assaulted Lare and broke his glasses during an argument about the use of the car.

The State charged Dye with residential burglary and alleged that Lare was a particularly vulnerable victim. Alesha pleaded guilty to theft in the first degree with a vulnerable victim aggravator.

Before Dye's trial, the State sought permission for a dog named Ellie to sit with Lare during his testimony. Ellie is the King County Prosecutor's Office facility dog.⁵ The court granted the motion over Dye's objection. The court instructed the jury to disregard the dog's presence.

Shortly after the jury began its deliberations, defense counsel notified the court that Dye had had inadvertent contact with one of the jurors during trial. The court replaced the juror with the alternate, who had been instructed not to discuss the case before being briefly excused, and instructed the jury to begin deliberations anew.

The jury found Dye guilty of residential burglary, but answered "no" on the special verdict for the vulnerable victim aggravator.

DISCUSSION

Presence of Facility Dog During Testimony

In a pretrial motion, the State represented that Lare "is experiencing significant anxiety regarding his upcoming testimony," which diminished when Lare was with Ellie, and therefore "requested that Ellie be with him during his testimony."⁶ The State relied upon the court's discretion to control courtroom proceedings and witness examination under ER 611, and upon State v. Hakimi, in which we upheld a trial court's decision to

⁵ In their briefing, the parties variously refer to Ellie as a "service dog" or a "comfort dog." At argument before this court, the prosecutor clarified that Ellie is the office "facility dog." We adopt that term.

⁶ Clerk's Papers at 104.

allow child victims of sexual abuse to hold dolls while testifying.⁷ “Similarly here, because Douglas functions at the level of a child and is fearful of the defendant, the State asks that he be allowed to have the dog present.”⁸

The defense objected, contending the dog would distract the jury, aggravate Dye’s allergies, and cause extreme prejudice. The court offered to make any appropriate accommodations for the allergies, but granted the State’s motion.

Dye contends that Ellie’s presence deprived him of a fair trial by interfering with his right to confront Lare, by improperly inciting the jury’s sympathy and encouraging the jury to infer Lare’s victimhood, and by giving Lare an incentive to testify in the prosecution’s favor. Additionally, Dye contends there was no proper foundation for the request and that the court violated GR 33 by allowing Lare to sit with a facility dog without making necessary findings for accommodation under GR 33, the Americans with Disabilities Act, Title 42 U.S.C. chapter 126, or the Washington Law Against Discrimination, chapter 49.60 RCW.

We address the last arguments first. GR 33 and the antidiscrimination statutes to which Dye refers have no application here. GR 33 establishes a procedure by which persons with disabilities may request accommodation as mandated by the statutes. No request was made under GR 33, Dye’s objection was not made on that basis, and the rule does not establish an exclusive, mandatory procedure. Further, GR 33 requires findings only when a requested accommodation is denied.⁹

⁷ 124 Wn. App. 15, 98 P.3d 809 (2004).

⁸ Clerk’s Papers at 104.

⁹ GR 33(e).

For his argument that Ellie's presence interfered with his right to cross-examine Lare, Dye relies on Coy v. Iowa, in which the United States Supreme Court held that a screen placed between the defendant and the complaining witnesses interfered with the defendant's Sixth Amendment right to "face-to-face confrontation."¹⁰ Coy emphasized the special character of the right to literal face-to-face confrontation, and distinguished it from the right to conduct cross-examination.¹¹ The court noted that while that right is "not absolute, and may give way to other important interests[,] the absence of "individualized findings that these particular witnesses needed special protection" precluded the conclusion that an exception was appropriate.¹² Dye contends the court's failure to make a finding of necessity in this case similarly violated his right to a fair trial.

We disagree. Dye's argument depends on the notion that Ellie effectively screened Lare from Dye. But Dye does not allege the dog's presence prevented him from face-to-face confrontation with Lare. Coy is inapposite.

Dye also suggests Ellie's presence "foiled" the "mission" of cross-examination, invaded the jury's province, and undermined the presumption of innocence.¹³ He argues the dog's presence "presuppos[ed] to the jury the very victimhood of the complainant."¹⁴ And because dogs react to human stress,¹⁵ he suggests the jury was

¹⁰ 487 U.S. 1012, 1021-22, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1998). The court specifically declined to address Coy's due process claim. Id. at 1022.

¹¹ Id. at 1015-20.

¹² Id. at 1020-21.

¹³ Appellant's Br. at 11.

¹⁴ Id.

¹⁵ See, e.g., William Glaberson, *By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate*, N.Y. Times, Aug. 8, 2011.

“free to interpret the dog’s signals as testimony from an unsworn witness that the victim is upset because he or she is telling the truth.”¹⁶

Again, we disagree. The confrontation clause is normally satisfied “if defense counsel receives wide latitude at trial to question the witnesses.”¹⁷ The defense engaged in a lengthy and thorough cross-examination of Lare,¹⁸ highlighting his memory problems and eliciting several inconsistent statements.¹⁹ There is no indication that the dog compromised Dye’s right of cross-examination.

Dye also contends that Lare may have been biased or more suggestible because Ellie belonged to the prosecutor’s office. He argues this created “the sense that the State had orchestrated the appearance of Ellie . . . in order to engender sympathy for the complainant.”²⁰

Dye relies on State v. Aponte.²¹ There, the Connecticut Supreme Court held the prosecutor committed misconduct by giving a child witness a stuffed dinosaur to hold during her testimony. Aponte acknowledged that “had the victim simply brought a favorite object from home, there would have been no basis for objection.”²² The court

¹⁶ Appellant’s Br. at 10.

¹⁷ Pennsylvania v. Ritchie, 480 U.S. 39, 53, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

¹⁸ See RP (Dec. 1, 2010) at 42-120.

¹⁹ See, e.g., RP (Dec. 6, 2010) at 103-04 (“What evidence do we have? We have Mr. Lare, whose memory is, as counsel conceded, which is pretty obvious[,] far from perfect.”); RP (Dec. 6, 2010) at 109-11; 114-15 (“Mr. Lare’s story had changed a lot.”).

²⁰ Appellant’s Br. at 12.

²¹ 249 Conn. 735, 738 A.2d 117 (1999).

²² Id. at 745.

held that the misconduct was compounded when the trial court refused to permit cross-examination to explore the child's possible bias or suggestibility, and the combination of the misconduct and the restriction on the defendant's ability to expose the witness's suggestibility deprived the defendant of due process.²³

In this case, the prosecutor did not give Lare a gift and there is no allegation of misconduct. Further, even if Ellie's temporary companionship were sufficient to create bias or suggestibility, Dye does not allege any restriction on his ability to expose the same during cross-examination. Aponte is inapposite.

Finally, Dye argues that by failing to make specific findings weighing Lare's need for emotional support against the possibility of prejudice, the court violated his right to due process. Because of Lare's developmental disabilities, both parties analogize to cases involving child witnesses. These cases provide abundant authority that a court may allow a child witness to hold a comfort item during testimony where the witness's need for emotional support outweighs the possibility of prejudice.²⁴

²³ Id. at 748.

²⁴ See, e.g., Hakimi, 124 Wn. App. at 21 (court did not err by allowing nine-year-old victims to hold dolls during testimony in sexual abuse when the judge "weighed the interests of Hakimi's two victims against any potential prejudice to Hakimi"); State v. Cliff, 116 Idaho 921, 924, 782 P.2d 44 (1989) ("In cases, such as this, where it is necessary to receive testimony from young children, the court must strike a balance between the defendant's right to a fair trial and the witnesses' need for an environment in which he or she will not be intimidated into silence or to tears."); State v. Dickson, 337 S.W.3d 733, 743-44 (Mo. Ct. App. 2011) (court did not abuse discretion by allowing child victim to hold comfort item after balancing benefit against potential prejudice); State v. Powell, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010) ("We . . . emphasize that trial courts must be cognizant of the possibility that comfort items or other accommodations for minors may unfairly engender sympathy for complaining witnesses. When an objection is raised, courts should require some explanation of the need for such items, particularly when the items will be used during the testimony of teenage children. Nevertheless, in this case, we conclude that the trial court properly weighed the impact

Here, the necessary balancing is implicit in the court's ruling. The court did not think Ellie would distract the jury, and observed that the dog was "very unobtrusive [and] will just simply be next to the individual, not be laying in his lap."²⁵ Given Lare's disabilities and "significant emotional trauma," the court concluded Ellie's presence was appropriate.²⁶ Dye's only other specific objection was with respect to his dog allergy, which the court promised to accommodate. There was no error.

In any event, there was no prejudice. The court instructed the jury not to "make any assumptions or draw any conclusions based on the presence of this service dog."²⁷ Juries are presumed to follow the court's instructions absent evidence to the contrary.²⁸ And the jury did not find that Lare was a vulnerable victim.

Alternate Juror

After closing arguments, the court excused the alternate juror, juror 6. The court admonished juror 6 to abide by the instructions not to discuss the case with anyone and warned him that he might be recalled if any of the jurors could not continue. A few minutes after the jury began to deliberate, the court learned that Dye had had

of the teddy bears on the witnesses and the jury."); State v. Marquez, 124 N.M. 409, 413, 951 P.2d 1070 (1997) (not error to allow 12-year-old victim of sexual assault to hold teddy bear while testifying when court "properly balanced" her need against possibility of prejudice); see also, Dellinger, Marianne, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171, 172, 185 (2009) (discussing use of Ellie in King County Superior Court and advocating for use "only in cases where the witness can demonstrate a truly compelling need for the emotional support and only where the proper balancing with the defendants' rights is performed").

²⁵ RP (Nov. 18, 2010) at 29.

²⁶ Id.

²⁷ Clerk's Papers at 53.

²⁸ State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

inadvertent contact with a juror during the trial. The juror was immediately excused, and the alternate juror was recalled for the following day. The court instructed the jury to begin deliberations anew.

Dye contends the trial court violated his right to an impartial jury by seating an alternate juror without first verifying on the record that he remained impartial. We addressed an identical argument in State v. Chirinos.²⁹ The governing court rule, CrR 6.5, does not require the court to conduct a hearing before replacing a deliberating juror with an alternate. Rather, the court has discretion to do so when the court deems it necessary to ensure the alternate juror has remained impartial.³⁰ Juror 6 received the usual caution given to alternate jurors. As in Chirinos, there was no indication that juror 6 had become biased during his brief absence. The court was no more obliged to question him than to question the jurors who had returned to deliberate after being excused for the evening.³¹

Vulnerable Victim Allegation

Dye next contends the court commented on the evidence when it gave pattern instructions on the “vulnerable victim” aggravating circumstance.³² But he did not object

²⁹ 161 Wn. App. 844, 255 P.3d 809, review denied, 172 Wn.2d 1021, 268 P.3d 224 (2011).

³⁰ Id. at 848-49.

³¹ Id. at 850.

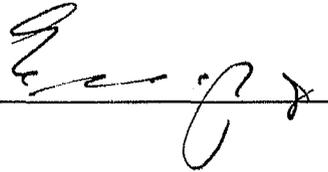
³² The court instructed the jury as follows: “If you find the defendant guilty of residential burglary as charged, then you must determine if the following aggravating circumstance exists: Whether the defendant knew or should have known that the victim was more vulnerable to the commission of the crime than the typical victim of residential burglary and that the victim’s vulnerability was a substantial factor in the commission of the crime.” Clerk’s Papers at 59. The court further instructed, “A victim is ‘particularly vulnerable’ if he or she is more vulnerable to the commission of the crime than the

to the instruction below. Accordingly, we address it only if it represents a manifest error affecting a constitutional right.³³ "An error is 'manifest' if it had practical and identifiable consequences in the case."³⁴

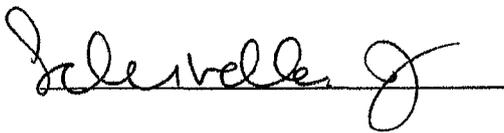
Simply put, Dye cannot show that the instructions constituted a manifest constitutional error because the jury rejected the vulnerable victim aggravating factor. Therefore, we decline to reach the issue.

Affirmed.

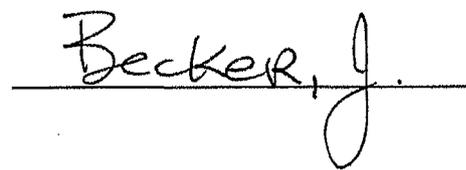
WE CONCUR:



A handwritten signature in cursive script, appearing to be "E. J. Dye", written over a horizontal line.



A handwritten signature in cursive script, appearing to be "Schervelle, J.", written over a horizontal line.



A handwritten signature in cursive script, appearing to be "Becker, J.", written over a horizontal line.

typical victim of residential burglary. The victim's vulnerability must also be a substantial factor in the commission of the crime." Clerk's Papers at 60.

³³ RAP 2.5(a); State v. Ballew, 167 Wn. App. 359, 365, 272 P.3d 925 (2012).

³⁴ Ballew, 167 Wn. App. at 365.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 66549-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Andrea Vitalich, DPA
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 27, 2012