

63974-9

63974-9

NO. 63974-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GREGORY JORDAN,

Appellant.

2009 APR 23 11:11-52
CLERK OF COURT
STATE OF WASHINGTON
63974-9-I

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

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

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A. INTRODUCTION.

Gregory Jordan and his trial attorney Brian Todd explained to the court far in advance of trial and immediately upon Todd's appointment to the case that there was a complete breakdown in the attorney-client relationship stemming from another case in which Todd represented Jordan, and their relationship was now worse and could not be repaired. The court conducted no inquiry into the nature of the conflict between attorney and client and refused to appoint another lawyer to represent Jordan.

At Jordan's jury trial, one juror fell asleep during the testimony of the State's central witness. The court noticed the juror's dozing but refused Jordan's request to question the juror about how much testimony she missed or remove the inattentive juror.

Additionally, the prosecution disregarded the court's pretrial ruling suppressing Jordan's statements to the police because the State had not proven Jordan understood and waived his Miranda rights. Despite the court's clear order finding Jordan's post-arrest statements inadmissible, the prosecution elicited testimony about Jordan's understanding of his Miranda rights and his statements following his Miranda rights. These errors, separately and together,

denied Jordan his right to a fair trial and meaningful assistance of counsel and require reversal of his convictions.

B. ASSIGNMENTS OF ERROR.

1. The court denied Jordan his right to a fair trial by jury when it took no action regarding a sleeping juror, in violation of the Sixth Amendment and Washington Constitution, Article I, sections 21 and 22, as well as the mandates of RCW 2.36.110 and CrR 6.5.

2. The court denied Jordan his right to the meaningful assistance of counsel as required by the Sixth Amendment and Article I, section 22.

3. The prosecution impermissibly commented on Jordan's right to remain silent as guaranteed by the state and federal constitutions and denied Jordan his right to a fair trial.

4. The cumulative errors in the case denied Jordan his right to a fair trial by jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to a fair trial by jury includes the right to a jury comprised of individuals who remain alert and awake during important trial testimony. Here, one juror slept through at least part of the testimony in the case. The court acknowledged seeing the juror asleep several times but refused to question or remove the

juror. Did the court's failure to inquire into whether the juror missed testimony while sleeping or dismiss the juror deprive Jordan of his right to a fair trial by jury?

2. A person accused of a crime has a right to the meaningful assistance of counsel and when a court learns of a severe conflict between attorney and client, it must inquire into the underlying issues in private and in depth. In the case at bar, both defense counsel and Jordan informed the court of a complete breakdown in communication but the court summarily refused to appoint Jordan a new lawyer without even inquiring into the reason for the attorney-client conflict. Did the court deny Jordan his right to counsel and improperly disregard its obligation to ensure there is no irreconcilable conflict between attorney and client?

3. A person accused of a crime has the right to remain silent and the prosecution may not use that silence against him. In the instant matter, the court ruled that Jordan did not waive his right to remain silent and found his post-arrest statements to the police were inadmissible. Did the prosecution flagrantly disregard the court's clear ruling when it elicited testimony about Jordan's post-arrest statements to police even though the court had ruled these statements were inadmissible?

D. STATEMENT OF THE CASE.

A police trooper, Dan McDonald, stopped Gregory Jordan while he was driving his car after seeing Jordan's tires cross the lane lines several times. 3RP 128.¹ He investigated Jordan for driving while intoxicated. He quickly concluded Jordan had not consumed any alcohol, but suspected he may have used narcotics. 3RP 138, 143.

McDonald arrested Jordan and found cocaine as well as numerous prescribed medications in Jordan's possession. 1RP 145-46. Jordan refused to submit to a blood test to determine the substances in his system.

Jordan was arrested on February 16, 2008, but not charged with any offenses until January 21, 2009. On May 8, 2009, Jordan's recently appointed attorney Brian Todd asked to withdraw from the case. He told the court that within 25 seconds of his first meeting with Jordan, there was a "complete breakdown in communication." 5/8/09RP 3-4. Todd explained that he had

¹ The verbatim report of proceedings (RP) from pretrial and sentencing proceedings will be referred to by the date of the proceedings. Trial testimony is contained in four consecutively paginated volumes and is referred to herein by the volume number as follows:

1RP refers to 6/18/09;
2RP refers to 6/23/09;

3RP refers to 6/24/09;
4RP refers to 6/25/09.

represented Jordan on another occasion, and said he “truly” believed that communications were completely broken. Id. at 4. Todd said he did not usually ask to withdraw from cases even with difficult clients but felt it was necessary in this case.

Jordan concurred and also explained that his sour relationship with Todd stemmed from an earlier case. He said that Todd “sent me to the joint before on something,” and they had a breakdown then and the breakdown was worse this time. 5/8/09RP 5-6.

The court did not inquire into the circumstances of the conflict between attorney and client. It refused to appoint a new attorney and told Jordan his only choice was to represent himself. The judge complained that Jordan would never be satisfied with an attorney, because he had also requested his last attorney be replaced. 5/8/09RP 4, 6-7.

Jordan repeated his complaints about his attorney at his next court appearance several weeks later, when the case was sent to another judge for trial. Todd explained that he tried to communicate with Jordan but it was difficult. 1RP 8. Jordan said that he had tried to replace Todd but could not, and thought he should represent himself. 1RP 7. The trial judge told Jordan that if

he wanted to represent himself, he could ask on the day trial begins. 1RP 7, 13. On the next court date, when trial began, Jordan said he maintained his objections to his attorney and said he was being deprived of effective assistance of counsel, but he did not believe he was capable of representing himself so he declined to do so. 2RP 23.

During his jury trial, Jordan noticed that Juror 9 was sleeping and he moved for a mistrial. 3RP 156. The judge and prosecutor also saw the juror sleeping, but the judge refused to question the juror about whether she missed any testimony or was having difficulty paying attention. 3RP 156-57. The judge took no action other than warning the jurors to pay attention and promising to make eye contact with the jurors sitting next to any dozing juror so that the sleepy person's neighbors would know to alert the sleeping juror. 3RP 158.

The jury convicted Jordan of the charged offenses of possession of a controlled substance and driving while under the influence of drugs. The court imposed a standard range sentence.

Pertinent facts are included in further detail in the relevant argument section below.

E. ARGUMENT.

1. THE COURT'S REFUSAL TO QUESTION A SLEEPING JUROR DENIED JORDAN HIS RIGHT TO A FAIR TRIAL BY JURY

a. Jordan was constitutionally entitled to a fair trial by a jury untainted by misconduct. A person accused of a crime has the unambiguous right to a trial by a fair and impartial jury. U.S. Const. amend. 6;² Wash. Const. Art. I, § 22.³ "The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." State v. Tigano, 63 Wn.App. 336, 340-42, 818 P.2d 1369 (1991) (citing Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989)). A sleeping juror constitutes juror misconduct. United States v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987).

In Washington, removal of an unfit juror is governed by statute:

It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, **inattention** or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

²"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

³"In criminal prosecutions the accused shall have the right to have a speedy public trial by an impartial jury."

(emphasis added) RCW 2.36.110. Court rule similarly directs a trial court to discharge any juror who is unfit. CrR 6.5 states that, “If at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged.” (emphasis added). RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror. State v. Jorden, 103 Wn.App. 221, 227, 11 P.3d 866 (2000).

Here, the trial court ignored its clear obligation to preserve Jordan’s right to a trial with a qualified, able jury by refusing to even interview the juror about any missed testimony. The court agreed the juror was sleeping during trial testimony of the principal witness, which defense counsel also noticed and the prosecutor did not dispute. The court’s failure to ensure the jury was performing its basic obligation denied Jordan his constitutional right to a fair trial by an impartial jury.

b. The trial court abused its discretion by refusing to investigate an allegation of a sleeping juror. The trial court’s determination of whether to remove a juror is reviewed for an abuse of discretion. Jorden, 103 Wn. App. at 226. Where there is

an allegation of juror misconduct, the trial court is obligated to investigate the alleged misconduct and determine whether a party is prejudiced. United States v. Barrett, 703 F.2d 1076, 1082-83 (9th Cir. 1982).

In Barrett, a juror acknowledged he was sleeping during the trial and asked to be removed. 703 F.2d at 1082. The trial judge mistakenly believed he did not have the authority to remove the juror without the parties' stipulation and did not dismiss the juror because the Government refused to stipulate to the substitution of an alternate juror. Id. at 1082-83. After the jury convicted Barrett, he filed a motion to interview the juror. Id. The judge denied the motion, stating, "there was no juror asleep during this trial." Id. at 1082-83. On appeal, the court found the trial judge abused his discretion by assuming "there was no juror asleep" and refusing to inquire into the matter. Id.

Here, Jordan noticed and complained that Juror 9 was sleeping through the testimony of the only witness in the case who recounted the incident. 3RP 156. The only other witness in the case was a chemist who tested controlled substances. Jordan told the court, "I'd like to question the juror - - the one that's been sleeping through the whole thing. I'd like to ask for a mistrial." Id.

Defense counsel explained that the juror was “apparently continuing to fall asleep through the trooper’s testimony.” 3RP 156.

The trial judge had also observed Juror 9 sleeping. 3RP 156-57. The judge agreed that Juror 9 was “certainly” closing her eyes, struggling to stay awake, and appeared to be dozing. 3RP 157-58. She had been closing her eyes and then shaking herself awake and this cycle repeated itself several times. Id. The trooper had testified for over one hour and was almost finished with his direct examination when Jordan moved for a mistrial based on the juror’s inattention to the case. Supp. CP __, sub. no. 35A, page 5 (Clerk’s minutes); 3RP 112-155.

The totality of the case against Jordan involved Trooper McDonald’s allegations that Jordan was driving erratically and appeared to be under the influence of some drug. The only other witness in the case was a chemist who testified that the substance taken from Jordan’s pocket was cocaine. 4RP 209-21. Like Barrett, the trial court refused to question the sleeping juror about whether she missed any of McDonald’s testimony despite her obvious and continuous drowsiness during McDonald’s testimony. This was contrary to statute and case law and an abuse of the trial

court's discretion. RCW 2.36.110; CrR 6.5; Barrett, 703 F.2d at 1082-83.

Not only did the court disregard its obligation to inquire of the obviously sleeping juror, the court belittled Jordan's complaint, claiming there could be no prejudice to him because the juror's inattentiveness occurred during the prosecution's case. 3RP 156. The court told Jordan that the sleeping juror would be to his "advantage," even though the court had no ability to know how the juror would react to the testimony given and how she would fill in the gaps of missed testimony. 3RP 156.

The court did not deny that the juror missed critical testimony. Instead, the court assumed that by missing critical portions of the State's case, it must work to Jordan's benefit, apparently presuming the sleeping juror would be more likely to think that the prosecution had not met its burden of proof. 3RP 156. The problem with this reasoning is that it does not account for other responses, such as the juror assuming that she simply missed evidence when asleep and crediting the prosecution with proving its case even if it had not done so, or relying heavily on the notes and recollections of other jurors.

The judge undertook his own efforts to correct the problem. When the judge noticed the juror asleep, he made eye contact with the juror next to her and prompted that juror to nudge Juror 9 until she awoke. 3RP 158. The court promised to pay close attention to Juror 9 through the rest of the proceedings. Id.

When the jurors returned to the courtroom following the parties' discussion about the juror, the court instructed all jurors to "stay attentive." 3RP 159. The judge warned the jurors that if "I catch" any jurors falling asleep, "I'll make eye contact with the juror on either side of you" and that juror can "nudge you." RP 159.

In State v. Jorden, the State moved to disqualify a sleeping juror. 103 Wn.App. at 224-26. After several days of testimony and efforts to keep the juror awake, the trial court held a hearing to address the State's motion and allowed the parties to present witnesses. Id. at 225. Jorden requested a hearing to question the juror about any missed testimony. Id. at 225-26. The trial court denied the defendant's motion to question the juror but it excused the juror, noting its observations of the juror's inattentiveness. Id. The Court of Appeals held the trial court did not abuse its discretion in refusing to question the sleeping juror before excusing her where there was ample evidence she was unfit as a juror. Id. at 230.

Unlike State v. Jorden, the court in the case at bar's *ad hoc* solution for a sleeping juror ignored the problem that the juror had plainly missed testimony from the only fact witness in the case about critical issues in the case. Rather than inquire of the juror to see if she missed testimony or needed relief for any medical reason, the court decided it would personally monitor the jurors and assure they remained alert during the rest of the trial by closely watching them and making eye contact with them.

The court's solution created another problem, because a judge is not supposed to communicate directly or indirectly with jurors. Periods of prolonged eye contact intended to send messages to jurors about their attentiveness are inappropriate. The court created a risk that jurors would be expecting silent messages from the judge about their own performance as jurors.

In Jorden, the trial judge excused the juror and used an alternate juror in the juror's stead to guard against the possibility that the defendant was convicted by a jury which included a juror who did not hear all the evidence. Here, there was no dispute the juror was asleep and the court refused to inquire into the extent of any testimony the juror missed.

The court's preference for willful blindness as to the extent of testimony the juror missed rather than simply questioning the juror as Jordan asked may have been because, unlike State v. Jorden, the court had not empanelled any alternate jurors. The court had selected only 12 jurors for this case. Supp. CP __ sub. no 35A (Clerk's minutes, page 5, listing 12 jurors impaneled). Regardless of the court's motives, the court did not cure the problem caused by the juror's inattentiveness by remaining willfully ignorant of whether the juror's sleepiness undermined her ability to participate in the case and deliberate based upon the evidence offered.

c. Jordan's conviction must be reversed. A criminal defendant is entitled to a new trial where juror misconduct prejudiced the defendant to the extent it deprived him of his constitutional right to a fair trial by an impartial jury. Barrett, 703 F.2d at 1083 (citing United States v. Hendrix, 549 F.3d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818, 98 S.Ct. 58, 54 L.Ed.2d 74 (1977)). The resulting prejudice from a juror who misses "essential portions" of the trial deprives the defendant of his right to a fair trial and impartial jury. Barrett, 703 F.2d at 1083.

By sleeping during central witness testimony, the juror in question missed “essential portions” of the trial. A sleeping juror is an absent juror. United States v. Olano, 62 F.3d 1180, 1189 (9th Cir. 1995). Here, the juror’s “absence” during the testimony deprived Jordan of his right to a fair trial by an impartial jury as she was absent during an essential portion of the trial. Thus, reversal is required.

2. WHEN FACED WITH AN ATTORNEY AND CLIENT WHO HAVE A HISTORY OF A COMPLETE BREAKDOWN IN COMMUNICATIONS AND THE COURT DOES NOT KNOW THE FACTUAL BASIS OF THIS CONFLICT, THE COURT DENIES THE ACCUSED PERSON THE RIGHT TO CONFLICT-FREE COUNSEL BY IGNORING THE PROBLEM

a. A criminal defendant has the right to representation by an effective advocate. The Sixth Amendment of the federal constitution⁴ and Article I, section 22 of the Washington constitution⁵ protect an accused’s right to counsel at all stages of a criminal proceeding. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); State v. Harrell,

⁴ The Sixth Amendment protects an accused’s right “to have Assistance of Counsel for his defense.”

80 Wn.App. 802, 804, 911 P.2d 1034 (1996). While accused persons are not guaranteed a good rapport with their attorneys, they are guaranteed representation by “an effective advocate” with whom they have no irreconcilable conflicts. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A criminal defendant must be able to communicate with his lawyer during key phases of trial preparation, to “provide needed information to his lawyer and to participate in the making of decisions on his own behalf.” Riggins v. Nevada, 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992).

A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. In Re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) (“For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’”).

⁵ Article I, section 22 of the Washington Constitution provides that, “in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

Although a trial court has broad latitude to deny a motion for substitution of counsel, this discretion must be balanced against the accused's Sixth Amendment right. Nguyen, 262 F.3d at 1003.

To compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.

Stenson, 142 Wn.2d at 759 (Sanders, J., dissenting) (citing United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979)).

To determine whether there is an irreconcilable conflict justifying the substitution of counsel, the Washington Supreme Court has adopted the Ninth's Circuit three-part test. Stenson, 142 Wn.2d at 724 (adopting the test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors include "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." Id.

The appellate court reviews the trial court's decision on a motion for new counsel for an abuse of discretion. Stenson, 142 Wn.2d at 733. An abuse of discretion occurs when a court's ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues

presented. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

b. A court must adequately inquire into a request for a new attorney based on an irreconcilable conflict. A serious breakdown in communication requiring substitution of counsel may occur even when counsel is competently representing an accused person. Nguyen, 262 F.3d at 1003 (“Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense.”). A court errs by focusing on the attorney’s competence when an accused person complains about the attorney-client relationship. Id. Instead, the court must inquire into the nature of the problem between the lawyer and client. Id. at 1002.

In Nguyen, the defendant complained at the start of trial that his attorney was rude and almost never talked to him. Id. at 1001. The defense attorney responded by telling the court he met with the defendant several times and he was prepared for trial. Id. The court did not further inquire into the defendant’s complaints. Id. During trial, defense counsel told the court that his client would no longer speak with him. Id. The court informed the defendant that

his lawyer was representing him adequately and it would not provide him with a different attorney. Id.

The Nguyen Court found the trial court abused its discretion and deprived Mr. Nguyen of his right to counsel on two grounds: denying his request for more time to obtain a new attorney and refusing to substitute counsel. Id. at 1002. Although the request for counsel came at the start of trial, the court did not consider the length of possible delay from substituting counsel. Id. at 1004. The timeliness inquiry balances “the resulting inconvenience and delay against the defendant’s important constitutional right to counsel of his choice.” Moore, 159 F.3d at 1161 (internal citation omitted). “The mere fact that the jury pool was ready for selection or even that the jury was ready for trial does not automatically outweigh Nguyen’s Sixth Amendment right.” Nguyen, 262 F.3d at 1004.

Additionally, the court inadequately inquired into the defendant’s complaints. Id. at 1003. The court should have asked about the nature of the problem with the present attorney by questioning the defendant and attorney “privately and in depth.” Id. at 1004; see also United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir . 2002) (“in most circumstances a court can only

ascertain the extent of a breakdown in communication by asking specific and targeted questions.”). By limiting its inquiry into whether the attorney and client had met to discuss the case and whether the attorney was prepared to proceed, the court did not sufficiently seek information about the nature of the problem. Nguyen, 262 F.3d at 1005; see also Adelzo-Gonzalez, 268 F.3d at 778 (trial court must “probe more deeply into the nature of the relationship” between defendant and counsel beyond assessing attorney’s preparedness); Moore, 159 F.3d at 1160 (giving “both parties a chance to speak and ma[king] limited inquires to clarify” does not mean court adequately understood “the extent of the breakdown.”).

Finally, the severity of the conflict in Nguyen was extreme. During the trial, defense counsel admitted there was a complete breakdown in communication. 262 F.3d at 1004. This lack of communication is further grounds upon which the court should have substituted counsel. Id.

c. The court refused to inquire into the attorney-client conflict even though the attorney agreed that the breakdown was complete and the problems arose out of court. Attorney Brian Todd informed the court that there was a “complete breakdown” in

communication with Jordan. 5/8/09RP 4. He explained that he had represented Jordan on another occasion and had problems in his relationship with Jordan on that prior occasion. He stated he was not usually an attorney who would ask to withdraw from a case based on client conflict but he felt no alternative course and asked that a new attorney be appointed. 5/8/09RP 4.

Jordan echoed these comments. Id. at 4-6. He alluded to problems with Todd when Todd represented him on another occasion, where “he sent me to the joint before on something.” Id. at 5. He said he could not work with Todd, and their breakdown in communications was worse than it was the last time Todd represented him. Id. at 6. Jordan also explained that he had mental health issues and had been talking with mental health people about his case. Id.

The trial court did not ask any questions to Jordan or Todd about the reason for the conflict or why they felt it could not be remedied. The court made no inquiries into the nature of Todd’s prior representation of Jordan. The court simply refused to give Jordan another attorney because Todd was Jordan’s third attorney. Id. at 4, 6-7. Jordan had also complained about his last attorney, “Mr. Tackitt,” and his first attorney had withdrawn from the case for

an unknown reason. Id. at 6-7. The court summarily concluded that Jordan would not be satisfied with any one, and refused Jordan's plea that he would vastly prefer his last attorney, Tackitt, rather than Todd.

Jordan's request for a new attorney was timely and unequivocal. He voiced his complaints immediately upon Todd's appointment to the case, at their first court appearance together, approximately six weeks before trial began and more than two months before speedy trial time expired. See e.g., Nguyen, 262 F.3d at 1003 (timely when made the day trial set to begin); Moore, at 1159, 1161 (timely when made two and a half weeks before trial).

"For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'" Nguyen, 262 F.3d at 1004 (citing Moore, 159 F.3d at 1160). Here, the court did not inquire into the reason for the conflict, which arose from Todd's earlier representation of Jordan in an unrelated matter. Even though the court did not know anything about the other case in which the conflict arose, the court presumed that the problem was unreasonable on Jordan's part, even though Todd agreed that the breakdown was complete in

their relationship. 5/8/09RP 4. The extent of the conflict was severe, the court's inquiry into its cause was nonexistent, and the complaint was timely raised. Thus, the court abused its discretion in denying Jordan his right to representation by conflict-free counsel.

d. Reversal is required. A court's unreasonable or erroneous refusal to substitute counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; see also Gonzalez-Lopez, 548 U.S. at 150 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (internal citation omitted)). Here, the court blamed Jordan for his complaint about Todd even though Todd agreed that his inability to communicate with Jordan was complete and unlikely to change, and the problem rested on occurrences that predated the case at bar, about which the court conducted no inquiry.

The court's lack of inquiry in regard to Todd and Jordan's complaints of a severe breakdown in communication echoes its refusal to inquire into the undisputed inattention of a juror who slept through a significant portion of the testimony in the case by the

critical witness for the prosecution. Jordan is entitled to the meaningful representation of counsel and he notified the court of the problem far in advance of trial. He is likewise entitled to a fair trial by jury. The cumulative effect of these errors denied Jordan his rights to counsel and due process of law. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996).

3. AFTER THE COURT RULED THE PROSECUTION HAD NOT PROVEN JORDAN WAIVED HIS *MIRANDA* RIGHTS, THE STATE IMPERMISSIBLY ELICITED TESTIMONY THAT JORDAN UNDERSTOOD HIS RIGHTS AND OFFERED JORDAN'S STATEMENTS INTO EVIDENCE, IN DIRECT VIOLATION OF THE COURT'S PRETRIAL RULING

a. Jordan had the right to remain silent upon being questioned by the police. Custodial interrogation must be preceded by advice that the defendant has the right to remain silent and the right to the presence of an attorney during interrogation. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); U.S. Const. amends. 5, 14; Wash. Const. Art. I, § 9. “[C]ourts indulge every reasonable presumption against waiver of constitutional rights.” Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1231, 51 L.Ed.2d 424 (1977) (quoting Johnson v. Zerbst, 304

U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1019 (1938)). The prosecution bears the “heavy” burden of proving that an accused person knowingly and intelligently waived the right to remain silent based upon his or her understanding of the right to remain silent. State v. Erho, 77 Wn.2d 553, 557, 463 P.2d 779 (1970) (citing Miranda, 384 U.S. at 475)).

After a CrR 3.5 hearing, the court ruled that the prosecution did not prove Jordan understood and waived his right to remain silent or his right to an attorney before questioning and found Jordan’s post-arrest statements to the police inadmissible. 2RP 53, 55. The court’s findings of fact, drafted by the prosecution, concluded that Jordan’s “custodial statements were not knowingly and intelligently made after waiver of Miranda rights.” CP 34.

The court agreed that the prosecution could elicit Jordan’s refusal to submit to a blood test but not his specific statements. CP 34; 3RP 33. Although the court had initially suppressed both Jordan’s statements and his refusal to allow a blood test, after reconsideration the court admitted only the fact of Jordan’s refusal. The court did not retreat from or alter its ruling that Jordan had not knowingly and intelligently waived his right to remain silent and all of his statements remained inadmissible. CP 34; 3RP 66.

b. The State repeatedly commented on and drew attention to Jordan's silence in response to police questioning even though it had not proven he waived his right to remain silent. An accused person's refusal to submit to a blood test following an arrest for driving under the influence may be admissible without violating the right to remain silent. RCW 46.61.517. In the case at bar, the prosecution used Jordan's refusal to submit to a blood test as an open door to undermine the court's CrR 3.5 ruling and comment on Jordan's post-arrest statements.

At the jury trial, the prosecution elicited from Trooper McDonald that he arrested Jordan and "read him his constitutional rights." 3RP 143. The prosecutor asked McDonald to read the Miranda rights he gave to Jordan from his police department-issued card. McDonald read those Miranda rights in full. 3RP 144. Next the prosecutor asked McDonald whether Jordan understood those rights and the trooper responded, "He stated he understood his rights," even though the court had ruled that all of Jordan's statements were inadmissible. 3RP 144.

After the trooper described taking Jordan to the police station, the prosecutor asked again, "did you advise the defendant of his constitutional rights?" 3RP 161. McDonald said "Yes, I did."

The prosecutor had the trooper repeat, in full, those Miranda rights that he read Jordan, despite the court ruling that Jordan did not express his understanding of and waiver of these rights. 3RP 162-63. The prosecutor asked the officer whether Jordan signed the form asking whether he understood his rights, and McDonald said no, “[h]e refused to sign.” 3RP 163.

The prosecutor further asked the officer if Jordan “indicate[d] at any time that he wanted to exercise his rights.” 3RP 163. The court sustained Jordan’s objection to the comment on his right to silence and the prosecution rephrased the question to: “Did the defendant ever convey to you that he wanted to exercise his rights?” 3RP 164. Jordan again objected but the court overruled it. McDonald answered “[n]o he did not.” Id.

The prosecutor next asked McDonald whether Jordan “ever ask[ed] for an attorney?” 3RP 164. McDonald said he did not. Id.

McDonald explained that after reading Miranda rights, he read the implied consent warnings. 3RP 165. McDonald read the warning in full to the jury and, in response to the prosecution’s question, said Jordan did not “express any confusion” about the warnings. 3RP 167.

c. The prosecution disregarded the court's clear ruling that none of Jordan's statements were admissible at trial. When a court issues a definitive pretrial ruling suppressing evidence based on a constitutional violation, the prosecution is not free to disregard that ruling at trial. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (2005). Here, the court unambiguously ruled that Jordan did not knowingly and intelligently waive his right to remain silent or to have an attorney present and his statements to McDonald were inadmissible at trial beyond the fact of his refusal to submit to a blood test. CP 34; 2RP 53, 55; 3RP 66.

In violation of this ruling, the prosecutor asked the police officer whether Jordan asked for an attorney, whether he said he wanted to exercise his rights, whether he expressed confusion about his rights, and whether he understood his rights. This evidence was barred by the court's definitive pretrial ruling, because this testimony consisted either of specific statements from Jordan or his silence in the face of questions asked by the officer. CP 33-34.

When reviewing prosecutorial misconduct, the court first considers whether the prosecutor's actions were improper, and second, whether there is a substantial likelihood that the

misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.2d 937 (2009). The failure to object to misconduct does not waive the error on appeal if the remark amounts to a manifest constitutional error. State v. Dixon, 150 Wn.App. 46, 57, 207 P.3d 459 (2009). Where a prosecutor's remarks are so flagrant and ill-intentioned that they evince "an enduring and resulting prejudice," the court will grant relief without regard to whether there was a trial objection. Fisher, 165 Wn.2d at 747.

Here, the prosecution's disregard of the court's ruling was flagrant. Jordan objected to the prosecutor's efforts to comment on his right to remain silent and the court overruled his objection, thus permitting the jury to hear that Jordan did not "convey" that he wanted to exercise his right to remain silent. 3RP 163. The jury also heard that Jordan "stated" that he understood his Miranda rights, even though the court had ruled to the contrary after the CrR 3.5 hearing. CP 33-34; 3RP 144. Although the prosecutor did not introduce all of Jordan's statements, she was not at liberty to ignore the court's ruling that Jordan's statements to the officer were inadmissible because the prosecution had not proven they were made following a knowing and intelligent waiver of his rights.

A comment on the defendant's exercise of his right to remain silent requires reversal unless the prosecution proves the error was harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Knapp, 148 Wn.App. 414, 421, 199 P.3d 505 (2009). Evidence that an accused person refused to speak with the police following arrest constitutes an impermissible burden on the right to remain silent. State v. Romero, 113 Wn.App. 779, 795, 54 P.3d 1255 (2002).

In Romero, the arresting officer testified that he read Miranda rights to the defendant and the defendant chose not to waive them and would not talk to the officer. Id. at 793. The Romero Court found the police officer impermissibly commented on the defendant's exercise of his right to remain silent. Id. at 794. Likewise, in Easter, the prosecutor prejudicially commented on the defendant's pre-arrest silence by eliciting testimony from an officer that the defendant did not answer questions and looked away without speaking to the arresting officer. 130 Wn.2d at 242-43.

Similarly, in the case at bar, the jury learned that Jordan "stated" he understood his constitutional rights, refused to sign the form stating he understood, did not say he wanted to exercise his rights, and did not ask for an attorney. The prosecution elicited this

evidence even though the court had ruled that the prosecution did not prove Jordan understood his Miranda warnings and his statements were therefore inadmissible at trial.

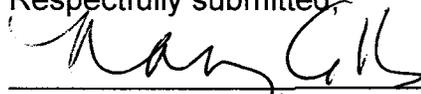
Jordan's conduct in refusing to cooperate and provide the police with evidence it could use against him was the center point of the prosecution's contention that Jordan drove while under the influence of drugs. 4RP 245. His slurred speech or drowsiness could have readily been attributed to other causes, including the lack of teeth in his mouth or routine tiredness. He did not perform so poorly on the field sobriety tests or other physical tests that his conviction was a foregone conclusion. 3RP 137-42. The prosecution intentionally elicited Jordan's inadmissible statements to the police to bolster its claim that Jordan knowingly and intelligently refused to provide the State with evidence from a blood test even though the court had clearly ruled the State did not prove he understood his rights when he refused the blood draw. The prosecution's reliance of Jordan's inadmissible statements and silence in direct violation of a court order requires reversal and cannot be proven harmless beyond a reasonable doubt, reversal is required. Easter, 130 Wn.2d at 242.

F. CONCLUSION.

For the foregoing reasons, Gregory Jordan respectfully requests this Court reverse his convictions and remand the case for a fair trial with meaningful representation by competent counsel.

DATED this 23rd day of December 2009.

Respectfully submitted



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63974-9-I
v.)	
)	
GREGORY JORDAN,)	
)	
Appellant.)	

2009 DEC 23 11:52
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> GREGORY JORDAN
12360 35 TH AVE NE, #1
SEATTLE, WA 98125 | (X)
()
() | U.S. MAIL
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_____ |

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X _____
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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710