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JUL 25 2011

King County Prosecutor
Appellate Unit

NO. 65519-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH JONES,

Appellant.

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

The Honorable James D. Cayce, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

JONES' ABSENCE WHEN THE TRIAL JUDGE REPEATEDLY PLAYED THE INTERVIEWS FOR JURORS VIOLATED HIS RIGHT TO BE PRESENT.

Citing State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the State argues that Jones had no right to be present for the replay of the recordings in this case. See Brief of Respondent, at 10-11. Gregory does not control here.

In Gregory, the defense indicated it had no objection to jurors replaying a video of the crime scene during deliberations. Gregory, 158 Wn.2d at 846. During the first day of deliberations, the jury notified the judge's judicial assistant that they wished to view the crime scene video. Because the viewing equipment was already set up in the courtroom, the assistant escorted jurors into the courtroom, where they watched the video as the assistant stood guard just outside the courtroom in the hallway. Once finished, the jurors were simply returned to the jury room. Id. at 846-847.

On appeal, Gregory argued this procedure violated his right to be present for all critical stages of trial. Id. at 847. The Supreme Court rejected that argument, noting there had not been any improper communications with jurors in his absence. Rather, "[t]he

bailiff merely facilitated the use of the courtroom video equipment and ensured that the jury would not be interrupted.” Id. at 847.

Gregory does not control Jones’ case because there was no evidence in that case of any improper communications between the bailiff and jurors. Gregory, 158 Wn.2d at 847. Jones’ case is controlled by State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989), which makes it clear that replaying a recording in the defendant’s absence, *where there is communication between the judge and deliberating jurors*, is an error “of constitutional dimensions, violating the defendant’s right to appear and defend himself in person and by counsel.” Rice, 110 Wn.2d at 613 (citing State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983)).

Alternatively, argues the State, even if Jones had a constitutional right to be present when the DVDs were replayed, Jones waived his right to be present by failing to object. Brief of Respondent, at 11-12. As pointed out in the opening brief, however, any waiver of Jones’ right to be present had to be voluntary and knowing. Jones was never advised of his right and the court never engaged him in a colloquy on the issue. See Brief of Appellant, at 11-12 (discussing cases); see also State v. Wicke,

91 Wn.2d 638, 641, 644-645, 591 P.2d 452 (1979) (counsel's waiver of constitutional right, even in defendant's presence, insufficient where judge did not inquire whether defendant had discussed the matter and agreed to waiver). Thus, Jones' failure to object is neither surprising nor determinative.

In another attempt to prevent this Court from reaching the merits of Jones' claim, the State argues he cannot demonstrate the constitutional error in his case is "manifest," meaning one with practical and identifiable consequences. Brief of Respondent, at 12-14. But Jones has already identified the potential prejudice he suffered. See Brief of Appellant, at 13-16. Moreover, the Supreme Court has considered this error for the first time on appeal, even when that Court ultimately found the error harmless beyond a reasonable doubt. See Rice, 110 Wn.2d at 613-614.

Regarding the merits of Jones' argument, the State argues that Caliguri and Rice do not control because in both cases the court communicated with jurors without prior notice to the defendant. Here, in contrast, Jones heard Judge Cayce indicate jurors would be permitted to replay the DVDs, heard his attorney indicate he (the attorney) had no desire to be present, and did not

object or otherwise indicate he wished to attend. Brief of Respondent, at 16-20.

The difficulty with this argument is that no one bothered to inform Jones that he had a right to be present for the replays and that he *could* object. In fact, by telling counsel that “normally” attorneys are not present for such replays, Judge Cayce implied Jones had no grounds to complain. See 10RP 76-77. Whether a defendant does not get notice of the replays or is never informed of his right to attend, the problem is the same: there is not a knowing, intelligent, and voluntary waiver of the right to be present.

Because the trial judge communicated with jurors during the replays, Jones had a right to be present. And for the reasons discussed in the opening brief, the State cannot show the violation of this right was harmless beyond a reasonable doubt.

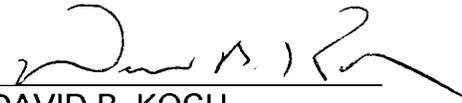
B. CONCLUSION

This Court should reverse Jones' conviction and remand for a new trial.

DATED this 25th day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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