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NO. 67341-6-I

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

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~~COURT OF APPEALS DIV I
STATE OF WASHINGTON~~
FILED

STATE OF WASHINGTON,

Respondent,

v.

RODNEY B. SUMMERS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) During jury deliberations, the foreman reported that a juror had looked up a definition of “reasonable doubt.” The court questioned both the foreman and the juror about this incident. During this questioning, the defendant was linked to the courtroom by telephone but was not physically present. Did this procedure constitute a “manifest error affecting a constitutional right,” so that it can be challenged for the first time on appeal?

(2) If the issue can be raised, did this procedure violate either (a) the defendant’s right to due process under the federal constitution or (b) his right to “appear and defend in person” under the state constitution?

(3) At sentencing, the trial court exercised its discretion to impose a \$100 financial penalty. As authority for this penalty, the court cited a statute that was not in effect at the time of the defendant’s crime. Other statutes authorized the court to impose a penalty up to \$250,000. Can the \$100 penalty be challenged for the first time on appeal?

(4) In connection with treatment requirements, the trial court required the defendant to submit to plethysmograph and polygraph

testing at the direction of his community corrections officer. Can these requirements be challenged for the first time on appeal?

II. STATEMENT OF THE CASE

A. EVIDENCE AT TRIAL.

Between 2000 and 2003, the defendant, Rodney Summers, lived at the Hampton Court Apartments in Everett with J. (born July, 1993) and her mother. 1 RP 38; 3 RP 297, 300. During the first six months of this period, J.'s brother Jo. lived there as well. 2 RP 184.

A few months after they moved in, the defendant had J. sit on his lap on the couch. He showed her a magazine that had pictures of naked men and women doing sexual things. After making her look through the entire magazine, he took her into the bedroom and told her to get on the bed. He started rubbing her on the crotch of her jeans. Then he took off her pants and underwear. He rubbed her on her vagina. He told her to put her hand on his penis. When she refused, he grabbed her hand and made her rub him. He told her that if she told anyone, she'd be taken away from her entire family and would never see them again. 1 RP 47, 53-66.

From this point on, the defendant touched J.'s vagina almost every day when her mother was gone. About 50% of the time, he made her put her mouth on his penis. A couple of times, he put his

mouth on her vagina. 1 RP 68-72. If her brother was home at the time, the defendant told him that J. was grounded and sent him outside to play. 2 RP 74-75.

On one occasion, the defendant put J. on the bed, got on top of her, and put his penis in her vagina. "It hurt really bad, and it was really scary." She told him to stop, but he put his hand over her mouth. After some time, the defendant pulled out and ejaculated on her stomach. When the defendant saw that she was bleeding, he told her to go in the bathroom and take care of it. She held a washcloth on the outside of her vagina. The blood soaked through, leaving a blood spot around the size of a quarter. The defendant said that if she told anyone, he would kill her family. 2 RP 82-94.

Jo. testified that the relationship between J. and the defendant seemed to be close. He wasn't aware of them having any issues. When he was living with the defendant and J., he would sometimes go outside to play. If his mother was home, J. would come out and play with him. If only the defendant was home, J. wasn't allowed outside. The defendant never explained why. About half the time, when Jo. tried to go back inside, the door would be locked. Sometimes the door would be opened

immediately. Other times, he would knock and get no response. He sometimes had to wait a half hour to an hour to get back inside. 2 RP 186-88.

About two years after the defendant left (approximately 2005), J. told her best friend what the defendant had done to her. The friend said that she didn't believe her. J. figured that if her best friend didn't believe her, nobody would. In 2008, J. decided through prayer that she needed to tell somebody to protect the little kids. She disclosed to her pastor and subsequently to her family. 2 RP 113-16.

J. had a medical examination in October, 2008. The examination disclosed a notch and a skin tag in her hymen. 3 RP 277-79. Such a notch can be caused by penetrating injury, but other causes are possible. 3 RP 286.

In his trial testimony, the defendant denied ever abusing J. His relationship with her was "strained" because J. believed that she didn't get enough attention. He frequently disciplined J. because she would "get in trouble at school or with her mouth." 3 RP 296-99.

B. HEARING ON JURY QUESTIONS.

During jury deliberations, the jury sent out two questions:

Re: Detective Martin – the detective was present throughout the trial. Midway in the trial, Detective Martin gave witness/testimony re the case. Is the detective [sic] allowed to be both co-counsel [sic] and/or the plaintiff and or the witness.

1 CP 59.

A jury member goes home after the trial goes to the jury. The member looked up the definition of “presumption of innocence” & beyond a reasonable doubt” Should the juror [sic] be dismissed.

1 CP 58.

The court discussed these questions in open court with both counsel present. The defendant was “on the phone” during this hearing. 5/20 RP 13. With regard to the first question, the court responded in writing: “The state is allowed to designate a managing witness.” 1 CP 59. No one objected to this response. 5/20 RP 2-4, 14-16.

With regard to the second question, the court questioned the presiding juror. The presiding juror said that Juror no. 3 had looked up in a book the definition of presumption of innocence and reasonable doubt. Juror no. 3 had not disclosed anything that he had read. Neither counsel sought to ask any further questions of the presiding juror. 5/20 RP 6.

The court then questioned Juror no. 3. He said that he had looked up an old law book that he had in his attic. He found a

definition of presumption of innocence and proof beyond a reasonable doubt. What he read was consistent with the definition the court had given. Defense counsel again did not ask any questions. 5/20 RP 7-10.

After these jurors were questioned, the court offered the defendant the opportunity to discuss things privately with his attorney. The defendant asked to do so. The court reminded him that at that point, the call was not confidential. The defendant responded, "the phone call is fine. " The court then arranged for a private phone connection. 5/20 RP 13-14.

After the defendant had conferred with his attorney, the court re-convened. The prosecutor proposed re-reading the introductory instruction (WPIC 1.02). Defense counsel agreed, provided that the entire instruction was re-read. The defendant, who was again present by phone, raised no objection. The court proceeded accordingly. 5/20 RP 19-27.

III. ARGUMENT

A. THE PROCEDURE USED BY THE TRIAL COURT IN QUESTIONING JURORS DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

1. Any Violation Of The Defendant's Rights Under Court Rules Cannot Be Raised For The First Time On Appeal.

The defendant's brief rests entirely on issues raised for the first time on appeal. He raises only one challenge to his conviction: that he was entitled to be physically present when the court questioned jurors. Because the defendant did not object to this procedure, he may raise the issue only if it constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Application of this rule involves two steps. First, the court must determine whether the alleged error involves a constitutional issue. Second, it must determine whether the error is "manifest." State v. Hayes, 165 Wn. App. 507, 514 ¶¶ 20-21, 265 P.3d 982 (2011).

With regard to the first showing, the defendant claims that the trial court violated his due process rights under the federal constitution and his right to "appear and defend" under the state constitution. Brief of Appellant at 8. These claims involve constitutional issues, which satisfy the first portion of the test.

The defendant's argument is not, however, limited to those claims. He also argues that the trial court violated his right to be

present under CrR 3.4. Brief of Appellant at 17-20. The violation of a procedural rule cannot be raised for the first time on appeal. State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). If the defendant believed that his physical presence was important, he should have raised that objection at trial. Absent any such objection, the alleged violation of CrR 3.4 should not be considered. Consequently, review should be limited to the defendant's constitutional claims.

2. Since Any Constitutional Violation Had Only A Speculative Impact On The Defendant's Rights, It Does Not Constitute A "Manifest Error" That Can Be Raised For The First Time On Appeal.

Even with regard to the constitutional claims, the defendant must satisfy the further requirement that the error was "manifest." "An error is manifest when it has practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 84 (2001). To establish that an error was manifest, the defendant must "show how, in the context of the trial, the alleged error actually affected [his] rights." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the effect of the error is purely abstract and theoretical, it cannot be raised for the

first time on appeal. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

In the present case, the defendant cannot show that the alleged error had any actual effect on his rights. This is not a case in which the defendant was denied the ability to participate in a portion of the proceedings. Rather, he was connected to the courtroom by telephone and was given an opportunity to consult privately with his attorney. 5/20 RP 4, 14, 18, 22. The defendant's brief speculates that he might not have been able to hear part of the proceedings. Brief of Appellant at 12. This speculation is not, however, supported by the record. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333.

The defendant suggests that his physical presence could have affected the proceedings in several ways. Brief of Appellant at 26-27. Some of these suggestions are contrary to the record. For example, the defendant suggests that he could have questioned the jurors differently or raised an objection to a juror's continued participation. The defendant was, however, placed in private contact with counsel. 5/20 RP 14. He therefore had the

opportunity to raise suggestions about questions to ask the jurors. He also had the chance to raise any objections with the court. Nothing in the record indicates that he had any disagreement with his attorney's actions or the court's rulings.

Apart from this, the defendant's claims of prejudice rest on speculation. Perhaps the defendant's physical presence would have led one of the jurors to answer questions differently. Perhaps the defendant's observation of the jurors would have led him to ask his lawyer to take different actions. Perhaps the court, in response to such a request, would have discharged one or more jurors or declared a mistrial. There is, however, nothing in the record to suggest that any of these possibilities would have occurred. The effects of the alleged error are not "practical and identifiable," but rather abstract and theoretical. Any error is therefore not "manifest" and cannot be raised for the first time on appeal.

None of this discussion is intended to suggest that the procedure followed by the trial court was ideal. It would be better practice to have the defendant physically present. This probably would have occurred had either the defendant or his attorney requested it. The defendant and his attorney may have believed that the jury had favorable leanings, especially in view of the first

question it submitted (concerning the managing witness). 1 CP 59. They cannot sit silent, allow the proceeding to occur without objection, hope for a favorable verdict, and then seek a new trial because of an alleged error that could have been prevented by a timely objection. Absent any showing of a practical impact on the outcome of the case, the defendant's claim should not be considered for the first time on appeal.

3. Since The Defendant's Participation By Telephone Allowed Him To Give Advice Or Suggestions To His Attorney, It Satisfied Due Process Requirements Under The Federal Constitution.

If the issue can be considered, the defendant's claims should be rejected. The defendant raises claims under both the federal and state constitutions. These claims should be considered separately.

With regard to the federal constitution, the defendant has cited no authority that telephonic participation is insufficient to satisfy due process requirements. All of the cases that he cites involve Fed. R. Crim. Pro. 43, not constitutional requirements. United States v. Williams, 641 F.3d 758 (6th Cir. 2011); United States v. Lawrence, 248 F.3d 300 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228 (5th Cir. 1999). These cases rest on

dictionary definitions of “presence” – a word that is used in Rule 43, but not in the Due Process Clause.

Due process requirements were considered by the U.S. Supreme Court in Kentucky v. Stincer, 482 U.S. 730, 1007 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). There, the defendant was, over his objection, excluded from a witness competency hearing, but his attorney was allowed to be present. Id. at 732-33. The court held that this procedure did not violate due process:

[The defendant] has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify. He has presented no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency. . . . [T]here is no indication that [the defendant] could have done anything had he been at the hearing nor would he have gained anything by attending.

Id. at 747.

This analysis applies even more strongly in the present case. The defendant had no relationship with the jurors. He knew nothing about their background. Moreover, unlike the situation in Stincer, the defendant was able to participate in the hearing. If the defendant’s complete exclusion did not violate due process in

Stincer, there was equally no violation in the present case from the defendant's physical absence.

In contrast, the Washington Supreme Court has held that the exclusion of a defendant from voir dire violated the due process clause of the Federal constitution. State v. Irby, 170 Wn.2d 874, 880-84 ¶¶ 9-16, 246 P.3d 796 (2011). The court reasoned that, if present, the defendant could give advice or suggestion or even supersede his lawyer altogether.¹ Id. at 801 ¶ 14. In the present case, however, the defendant was aware of the proceedings and in contact with counsel. He could have given advice or suggestions. He could even have sought to raise his own objections if he had wished to do so. There is nothing further that he could have done if he had been present. The requirements of due process were satisfied.

¹ The last aspect of this "right" is questionable. A federal court has held that challenging jurors is a tactical decision that lies within the control of counsel. United States v. Boyd, 86 F.3d 719, 723 (7th Cir. 1996), cert. denied, 520 U.S. 1231 (1997); see RPC 1.2(a) ("the lawyer shall abide by the client's decision ... as to a plea to be entered, whether to waive jury trial, and whether the client will testify").

4. “Appearance” Under The State Constitution Requires Ability To Participate In The Proceedings, Not Physical Presence.

Analysis of the State constitution leads to the same result. Unlike CrR 3.4, the constitution says nothing about “presence.” Rather, article 1, § 22 protects the right to “*appear* and defend in person, or by counsel.” At common law, “appearance” meant “[a]ny action on the part of a defendant ... which recognizes the case as in court.” Dlouhy v. Dlouhy, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960); see In re Proceedings Before Special Inquiry Judge, 78 Wn. App. 13, 16, 899 P.2d 800 (1995). Under usage contemporaneous with the adoption of the Washington constitution, “appearance” did not require physical presence. Indeed, physical presence was not even sufficient to constitute “appearance.” McCoy v. Bell, 1 Wash. 504, 509, 20 P. 595 (Wash. Terr. 1889).

Nor do current procedures invariably require the defendant’s physical presence at important stages of this case. To the contrary, CrR 3.4(d)(1) allows a defendant to be “present” via video conference at preliminary appearance, arraignments, bail hearings, and trial settings. If the defendant’s argument in this case is correct, this rule is probably unconstitutional.

The defendant points out that the rights guaranteed by article 1, § 22 are in some respects broader than those covered by the due process clause. See State v. Martin, 171 Wn.2d 521, 252 P.2d 872 (2011) (limitations on prosecutorial comments about defendant's presence at trial); State v. Rafay, 167 Wn.2d 644, 222 P.3d 86 (2009) (defendant's right to self-representation on appeal). In particular, the State constitutional right "arguably" protects the defendant's right to appear at any stage of trial where the defendant's substantial rights could be affected. Irby, 170 Wn.2d at 802 n. 6. None of these cases, however, deal with defendants who were allowed to "appear" in ways other than physical presence. The defendant here was placed in a position that allowed him to personally protect his substantial rights. State constitutional requirements were satisfied.

B. THE SENTENCE IMPOSED WAS WITHIN THE COURT'S AUTHORITY.

1. Since The Court Had Authority To Impose Financial Obligations Up To \$250,000, Its Imposition Of A \$100 Penalty Cannot Be Challenged For The First Time On Appeal.

In addition to challenging the conviction, the defendant challenges three provisions of his sentence: the \$100 domestic violence penalty, and two conditions of community custody. None of these provisions were challenged in the trial court.

The Supreme Court has allowed “illegal or erroneous sentences” to be challenged for the first time on appeal. This is allowed because it “tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection.” State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

With regard to the \$100 penalty, however, the sentence imposed was neither “illegal” nor “erroneous.” Regardless of the applicability of RCW 10.99.080, the court had power to impose a \$100 financial penalty. Indeed, the court was authorized to impose a \$50,000 fine for each of the five class A felonies, for a total possible fine of \$250,000. Labeling the \$100 as a “domestic violence penalty” instead of a “fine” had no impact on the defendant’s rights.

Reviewing this issue serves none of the purposes explained in Ford. It is not necessary to bring the sentence into conformance with governing statutes, which allow a financial penalty far greater than \$100. Nor does upholding this sanction result in a penalty that varies widely from that imposed on any other defendant in a comparable situation. All that review accomplishes is litigation over

which governmental entity receives the assessment, at a cost that far exceeds the benefit to any claimant. The defendant's challenge to the \$100 penalty should not be considered for the first time on appeal.

2. When Treatment Conditions Are Imposed, The Court Can Require Both Plethysmograph And Polygraph Testing At The Discretion Of The Community Corrections Officer.

Finally, the defendant challenges two conditions of community custody: the requirements for plethysmograph and polygraph testing. If these conditions are unauthorized by statute, they can be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744 ¶ 5, 193 P.3d 768 (2008).

With regard to the plethysmograph testing, resolution of this case is governed by State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998). There, the court held that a requirement for such testing is permissible if it is imposed in connection with crime-related treatment. Id. at 343-45. Such a treatment requirement was imposed in the present case. CP 25, condition no. 13.

The defendant claims that plethysmograph testing can only be required at the direction of a treatment provider, not at the direction of a community correction officer. Brief of Appellant at 38. Contrary to this claim, Riles upheld a requirement that one of the

defendants (Gholston) “[s]ubmit to polygraph and plethysmograph testing at the request of your therapist *and/or Community Corrections Officer.*” Id. at 337 (emphasis added). The condition imposed in the present case is supported by Riles.

The defendant also claims that the plethysmograph requirement is unconstitutional because it is overly intrusive. The Supreme Court has recognized that the “substantial public safety interest outweighs the truncated privacy rights of the convicted sex offender.” In re Detention of Campbell, 139 Wn.2d 341, 356, 986 P.2d 771 (1999); see In re Detention of Williams, 163 Wn. App. 89, 97 ¶ 18, 265 P.3d 570 (2011). The defendant claims that the testing is permissible only if it will promote the goal of rehabilitation under the facts of the particular case. Brief of Appellant at 35-37, citing United States v. Weber, 451 F.3d 552 (9th Cir. 2006). Since the defendant here raised no objection was raised in the trial court, the facts necessary for this determination are not in the record. Consequently, the error is not “manifest” and cannot be raised for the first time on appeal. McFarland, 127 Wn.2d at 333.

With regard to polygraph testing, the condition imposed in the present case is again substantially identical to one that was upheld in Riles, 135 Wn.2d at 337, 353. This court has construed a

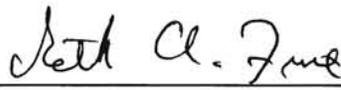
similar condition as impliedly limited to monitoring compliance with the sentencing order. The court “strongly encouraged” sentencing courts to make this limitation explicit. The lack of an explicit limitation was not, however, a sufficient basis for overturning the sentencing condition. State v. Combs, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000). Similarly in the present case, the polygraph requirement was properly imposed.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on April 12, 2012.

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