

68649-6

68649-6

NO. 68649-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN FAAUSU,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL.

Appellant was tried by a jury which included an unauthorized 13th participant during its deliberations which was a structural error that violated Mr. Faausu's constitutional right to a fair trial.

B. ASSIGNMENT OF ERROR.

The court permitted 13 jurors to deliberate in the case, thereby allowing an unauthorized person to participate in deliberations.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

When the jury is deliberating, only people who are authorized to be present may participate in deliberations. When the jury announced its verdict, 13 jurors told the court that each had deliberated in the case. Was there an unauthorized person who participated in jury deliberations ?

D. STATEMENT OF THE CASE.

Steven Faausu was charged by amended information with possession of cocaine, contrary to RCW 69.50.401. CP 5-6.¹ It was further alleged that this offense was committed in a county jail within the meaning of RCW 9.94A.533(5). CP 5.

At trial, King County Corrections Officer Lyle Bremmeyer testified that Mr. Faausu had surrendered himself on a warrant at the King

¹ A separate charge of possession of marijuana was dismissed prior to trial. RP 11.

County Jail on the night of January 29, 2010. RP 19-21. Pursuant to a policy requiring strip searches of all individuals who turn themselves in to the jail, Mr. Faausu disrobed and was examined. RP 22-23. Between Mr. Faausu's buttocks, Officer Bremmeyer found a plastic bag containing "green vegetable matter," matches, rolling papers, and a white powder, i.e., cocaine.² RP 25-27.

In his defense, Mr. Faausu argued through counsel that the evidence failed to show he knew there was cocaine in the packet in which it was found. RP 63. Defense counsel noted that the cocaine was found wrapped in black plastic and therefore was not visible; there was no further testimony about how the bag got there. RP 64. Finally, defense counsel argued that since it was discovered during the booking process, Mr. Faausu did not possess the cocaine within the jail. RP 64.

After the arguments of counsel, the trial judge excused juror 10, who had been selected at random, and sent the jury to deliberate. RP 67-68.³ The jury subsequently found Mr. Faausu guilty of possessing cocaine and further found that the offense was committed while in a county jail. CP 7-8; RP 68. The clerk then polled the jury and thirteen (13) jurors,

² Raymond Kusmi, a forensic scientist with the Washington State Patrol's Crime Laboratory, testified the white powder contained cocaine. RP 47-57. Sergeant Dean Owens testified regarding the chain of custody. RP 34-45.

³ The clerk's minutes indicate 13 jurors were impaneled and that Juror 10, Alfred Lopus, was to have been excused as the alternate. Suppl CP ____ (attached hereto as App. A).

including “Juror Number 10,” acknowledged that these were their individual verdicts and the verdict of the jury. CP 69-70.

Mr. Faausu was subsequently sentenced within the standard range to 24 months confinement as well as various legal and financial obligations. CP 35-43. This appeal timely followed. CP 44.

E. ARGUMENT.

The presence of an unauthorized person in jury deliberations violated Mr. Faausu’s right to a fair trial.

1. Jury deliberations are private and may not be conducted in the presence of unauthorized persons.

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment and Washington Constitution. U.S. Const. amend. 6;⁴ Const. art. I, §§ 21, 22.⁵

⁴ Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

⁵ SECTION 21 TRIAL BY JURY.

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors

To protect the right to an impartial jury, “[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.” Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892). Any “contact,” direct or indirect, “with a juror about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.” Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

Conducting jury deliberations in the presence of someone who is not a juror, “even by one sworn to secrecy and silence, violates the cardinal requirement that juries must deliberate in private.” State v. Cuziak, 85 Wn.2d 146, 148-49, 530 P.2d 288 (1975); see also State v.

in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED.

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Aker, 54 Wash. 342, 347, 103 P. 420 (1909) (“We are not inclined to sanction any practice which permits the invasion of the privacy of the jury room during deliberation.”).

2. The jury deliberated in the presence of and with the assistance of an excused alternate.

Twelve jurors are required in a criminal case by the “inviolable” guarantee of the Washington Constitution. Art. I, § 21; State v. Fisch, 22 Wn.App. 381, 383, 588 P.2d 1389 (1979). Alternate jurors may be impaneled, but may not deliberate with the 12 selected jurors. CrR 6.5.⁶

⁶ Superior Court Criminal Rules (CrR) Rule 6.5, provides:

When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the challenge provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant. 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, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury.

Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial

When the court polled the jury after the verdict was returned in Mr. Faausu's case, 13 jurors responded, including "Juror Number 10," that they had participated in deliberations and agreed with the verdict rendered. RP 69-71. Although the judge had previously instructed the alternate "Juror Number 10," that his services were appreciated but "[y]ou get to go home a little earlier than the others." RP 67. Yet the polling of the jury demonstrates that 13 people participated in the deliberations, one of whom was not authorized to participate. RP 69-71.

3. This fundamental violation of the deliberative process is a structural error.

The sanctity of jury deliberations is a basic structural requirement of a fair trial. Cuziak, 85 Wn.2d at 148-49 ("...there can be no question that [the jury] must reach its decision in private, free from outside influence. This principle is of constitutional stature.") "[P]rejudice will be presumed to flow from a substantial intrusion of an unauthorized person into the jury room unless it affirmatively appears that there was not and could not have been any prejudice." Id. at 150. As in Cuzick, the presence of a non-deliberating juror during the deliberations themselves

juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

produces a presumption of prejudice that can not be overcome here. Here where the unauthorized individual acknowledges participating in the deliberations, the presumption of prejudice can not be overcome.

Furthermore, because jurors may not be called upon to explain how they reached their verdict, the procedure by which the jury deliberates must ensure that they are deliberating without the potential for improper influence. See State v. Hoff, 31 Wn.App. 809, 813, 644 P.2d 763, rev. denied, 97 Wn.2d 1031 (1982). This is crucial because subtle influences affect the jury and can threaten “the integrity of the jury process itself.” See Jones v. Sisters of Providence Hospital, 140 Wn.2d 112, 120, 994 P.2d 838 (2000) (holding that allowing alternate juror to participate in deliberations was prejudicial error requiring reversal and the error was not waived by failure to object).

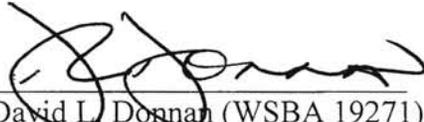
The impossibility of knowing how the presence of the 13th juror affected the outcome is the reason why the error must be treated as structural. The inexplicable involvement of an unauthorized 13th juror in the deliberations of Mr. Faasus’s case requires a new trial.

F. CONCLUSION.

The presence of an unauthorized 13th juror during the deliberations was a fundamental structural error for which Mr. Faasus’s requires a new trial. On this record, it can not be established that this violation of the

constitutional right to a jury was been harmless beyond any reasonable doubt in light of the questions raised regarding Mr. Faausu's knowledge and location at the time of the alleged offense.

Respectfully submitted this 28th day of Septebmer 2012.

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

David L. Donnan (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

CLERK'S MINUTES

SCOMIS CODE: JTrial \$JFA 12 Person

Judge: Mariane C. Spearman
Bailiff: Natalia Sanoja
Court Clerk: Andre Jones
Reporter: Jim Stach
Digital Record:

Dept. 53
Date: 4/2/2012

KING COUNTY CAUSE NO.: 11-1-07657-8 SEA

State of Washington vs. Steven Faausu

Appearances:

Stephanie Guthrie, appearing DPA for State of Washington

Emily Deckman, appearing attorney for Defendant

MINUTE ENTRY

Respective counsel and defendant present

Cause comes on for Trial

VUCSA-Poss. of Cocaine, with an aggravating factor of committing the offense while in a county jail

Discussion on preliminary matters, motion in limines, jury selection

State's motion to dismiss Ct. 2 Poss. of a Controlled Substance (Marijuana)- granted

No CrR 3.5/3.6 hearing by agreement of the parties

State's motion in limines Discovery Demands: A-D are granted, Evidentiary Issues A-C granted

Defendant's motion in limines are all granted

Court break

**State of Washington vs. Steven Faausu
King County Cause No. 11-1-07657-8 SEA**

Court resumes

Jury panel present

Jury Voir Dire begins

Peremptory Challenges:

Peremptory Challenges by State 13, 12, pass, pass, pass, pass, pass

Peremptory Challenges by Defendant 8, 11, 17, 1, 5, 10, 21

The following jurors were duly sworn and impaneled

- | | |
|----------------------|----------------------|
| 1. Alden Lavin | 8. Sudha Katti |
| 2. Uchechi Okezie | 9. Mark Hamilton |
| 3. Lori Opland | 10. Alfred Lopus |
| 4. Brian Bongiovanni | 11. Sharon Gillaspie |
| 5. Christopher Smith | 12. Matthew Flora |
| 6. Nicole Lawrence | 13. Robert Parrish |
| 7. Mark Salmon | |

Court instructs the jury re scheduling, alternate juror seat, notepads for jurors to use, scheduling, not doing any research on this case

Counsel makes opening statements

Court break (lunch)

Court resumes

Jury absent

Discussion on proposed exhibits

Jury present

State's witness Ofc. Lyle Bremmeyer is sworn and examined

State Exhibit 1, 2

Offered and Admitted

State Exhibit 3, 4

Offered and Admitted

Cross examination

**State of Washington vs. Steven Fausu
King County Cause No. 11-1-07657-8 SEA**

State's witness Sgt. Dean Owens is sworn and examined

State Exhibit 4

ReOffered and Admitted

No cross examination

Jury absent

Discussion on proposed jury instructions

Court break

Court resumes

Jury present

State's witness Raymond Kusumi is sworn and examined

Cross examination

State rest

Defendant rest

Jury absent

Discussions on proposed jury instructions, counsel make their objections and exceptions for the record

Court break

Court resumes

Jury present

Court instructs the jury re jury instructions

Counsel makes closing arguments

Court excused the alternate juror. That juror is seating in seat #10 Alfred Lopus

Jury commence on deliberations at 3:36pm

**State of Washington vs. Steven Faausu
King County Cause No. 11-1-07657-8 SEA**

Court break

Court resumes

Jury returns to open Court with verdicts

Verdict Form: Guilty

Special Verdict Form: Yes

Jury is polled

Verdict is received and filed

Jury is discharged

Sentencing date to be set

State's motion to remand the defendant into custody-granted

Court signed order remanding the defendant into custody

Court adjourns

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 68649-6-I
)	
STEVEN FAASU,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF SEPTEMBER, 2012, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] STEVEN FAASU 770168 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF SEPTEMBER, 2012.

X _____ 

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