

No. 70462-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT G. ISABEL,

Appellant.

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2014 APR -9 PM 1:36

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

The Honorable Mariane Spearman

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT..... 1

 1. A MISTRIAL WAS THE ONLY REMEDY
 AVAILABLE IN LIGHT OF THE TRIAL
 COURT’S REFUSAL TO GIVE A CURATIVE
 INSTRUCTION 1

 2. OFFICER CONNORS WAS “PECULIARLY
 AVAILABLE” TO THE STATE, THUS IT WAS
 ERROR TO FAIL TO INSTRUCT THE JURY
 HE WAS A “MISSING WITNESS” 2

B. CONCLUSION..... 4

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012)..... 2

State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962)..... 2

A. ARGUMENT

1. A MISTRIAL WAS THE ONLY REMEDY
AVAILABLE IN LIGHT OF THE TRIAL
COURT'S REFUSAL TO GIVE A CURATIVE
INSTRUCTION

In its response, the State notes that “Tucker’s remark, *although regrettable*, was insignificant, because it was not attributed to [Mr.] Isabel’s behavior or prior bad acts, but rather to his family.” Brief of Respondent at 18 (emphasis added). But this simply ignores reality. Mr. Isabel was the individual charged with the offenses and facing trial. Although the alleged threat was apparently made by a family member, the threat would have certainly been attributed by the jury to Mr. Isabel.

The State also argues that “[t]he jury was not admonished to disregard the comment four days after it was made for sound reasons recognized by the trial court and defense counsel.” Brief of Respondent at 18. Although there may have been sound tactical reasons for not admonishing the jury, the choice was Mr. Isabel’s, not the trial court’s. That choice was taken away from Mr. Isabel by the trial judge’s preemptive denial of the curative instruction rendering any objection or request by Mr. Isabel futile at best.

Finally, crucial to appellate decisions affirming the denial of a mistrial for a serious irregularity is the trial court's admonishment to the jury to ignore the irregularity. *See e.g., State v. Taylor*, 60 Wn.2d 32, 33, 371 P.2d 617 (1962). Once that remedy was eliminated by the trial court's refusal to admonish the jury, a mistrial was the only remaining alternative. The trial court erred in failing to grant a mistrial.

2. OFFICER CONNORS WAS "PECULIARLY AVAILABLE" TO THE STATE, THUS IT WAS ERROR TO FAIL TO INSTRUCT THE JURY HE WAS A "MISSING WITNESS"

The primary thrust of the State's argument is that the State tried but could not find Officer Connors, thus he was not "peculiarly available" to the State. Brief of Respondent at 20. But the State's negligence in failing to keep track of its witnesses did not alter the fact he was "peculiarly available" to the State. *See State v. Davis*, 73 Wn.2d 271, 277-78, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012) (there is a "community of interest" between the police and prosecutor's office). Had Officer Connors been a critical witness to a case in which his attendance at trial meant the difference on whether the State could proceed or have to dismiss, the State would have bent over backwards to assure his attendance. The fact the Officer was not a primary

witness here cannot be used to excuse the State's failure to carry out its duty to keep track of its witnesses. Further, Connors was police officer who was acting in this case as a Seattle Police Officer, which rendered him "peculiarly available" to the State. *Id.*

The State also argued the jury heard the information Connors would have provided through another police witness. Brief of Respondent at 20-22. But this ignores the impeachment value of the jury hearing evidence presented by the witness who obtained it, here Officer Connors.

The trial court violated Mr. Isabel's right to present a defense when it refused to instruct the jury on the missing witness. Mr. Isabel submits he is entitled to reversal of his convictions.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant as well as the instant reply brief, Mr. Isabel asks this Court to reverse his convictions and remand for a new trial.

DATED this 8st day of April 2014.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70462-1-I
v.)	
)	
ROBERT ISABEL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **REPLY 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:

<input checked="" type="checkbox"/> MAFE RAJUL, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ROBERT ISABEL 872051 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF APRIL, 2014.

X _____ 

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