

NO. 43203-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARK ALLEN MARKUSSEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The trial court violated Mr. Markussen's right to be present under the State and Federal constitutions, and CrR 3.4, after receiving two questions from the jury and reinstructing the jury without Mr. Markussen's presence in the courtroom.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Did the court violate Mr. Markussen's right to be present at all critical stages of the proceedings where the trial judge received two questions from the jury during deliberations, extensively discussed responses with attorneys, and then reinstructed the jury without bringing Mr. Markussen into the courtroom and without permitting Mr. Markussen to participate in person? Assignment of Error 1.

C. SUPPLEMENTAL STATEMENT OF THE CASE

During deliberation, the jury submitted two questions to the court. Clerk's Papers 267, 269. Mr. Markussen, who was in custody, was not present in the courtroom when the questions were discussed and when the court reinstructed the jury. 5RP at 924, 928, 929-30.

The Opening Brief of Appellant was filed November 2, 2012. The State filed its Brief of Respondent on March 25, 2013.

D. SUPPLEMENTAL ARGUMENT

2. MR. MARKUSSEN WAS DENIED THE RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS WHERE THE COURT REINSTRUCTED THE JURY TWICE WITHOUT MR. MARKUSSEN'S PRESENCE IN THE COURTROOM.

A defendant has the right to be present when his substantial rights may be affected. The right to be present as protected by the federal constitution extends to all critical stages of the trial. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); U.S. Const. amends. 5, 6, 14. An accused person's right to "appear and defend" is more broadly protected by art. I, § 22 of the Washington Constitution than its federal constitutional counterpart. *State v. Irby*, 170 Wn.2d 874, 883, 246 P.3d 796 (2011) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)); Instead, the Washington constitution guarantees an accused person the right to appear and defend in person "at every stage of the trial when his substantial rights may be affected." *Irby*, at 885 (quoting *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914)); *State v. Garza*, 150 Wn.2d 360, 77P.3d 347 (2003). The "right to appear and defend in person" is a personally held right that is not satisfied by counsel's participation in the

proceedings. *State v. Rafay*, 167 Wn.2d 644, 650, 222 P.3d 86 (2009). The right to be present attaches to any hearing where the court considers factual questions, but may not attach to hearings where the court considers only questions of law. *State v. Berrysmith*, 87 Wn. App. 268, 273, 944 P.2d 397 (1997), rev. denied, 134 Wn.2d 1008 (1998). See also *State v. Bremer*, 98 Wn. App. 832, 834-35, 991 P.2d 118 (2000) (defendant has a right to be present at proceedings substantially related to the opportunity to defend against the charge). Under *Berrysmith* when the right to confront witnesses is not at issue, the court must address two questions to determine whether a hearing is a critical stage of proceedings, requiring the defendant's presence. The court must consider (1) whether the subject of the proceeding related purely to a legal matter; and (2) if so, "whether the absence of the defendant reasonably bore a substantial relation to the fullness of his or her opportunity to defend against the charge" or whether his absence thwarted a just hearing. *Berrysmith*, 87 Wn.App. 273-74 (citing *U.S. v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)).

Once the jury has begun its deliberations, any communication between the court and the jury in the absence of the defendant is error. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). Criminal Rule 6.15

expressly requires that all parties be notified of any jury question posed to the trial court during deliberations and be afforded an opportunity to comment upon the court's intended response:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.... Any additional instruction upon any point of law shall be given in writing.

CrR 6.15(f)(1).

Here, the jury submitted the following question during deliberation:

We don't have the cell phone maps. Shouldn't we have those?

CP 267.

Mr. Markussen was not present in court; he remained in custody during the proceedings and could not control whether or when he was transported to court. 5RP at 924.

After discussions with counsel regarding the jury questions, the court sent the following response: "No." CP 267.

Approximately an hour later the jury sent the following query to the

court:

We noticed that defense evidence #173 is a copy and has been altered (See Qty.) and that the item # looks to be written with a different pen. Is it possible to get the official copy from VDP? Something is wrong here. We don't believe what the DA said about the "Item #"[.]

CP 269.

Again, instead of transporting Mr. Markussen to the courtroom and allowing him to hear this second question, the court simply decided to re-instruct the jury and responded: "[y]ou have all of the exhibits admitted at trial[.] You can't have anything more." 5RP at 928, 929-30; CP 269.

Mr. Markussen was not present to guide his attorney in a request for a new instruction, was not able to confer privately with his attorney during the proceedings or to obtain information as to what was transpiring with the jury request. See *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct 1057, 25 L.Ed.353 (1970) (ability to communicate with counsel is one of the "primary advantages" of being present).

This was a violation of his right to confer with counsel and his right to be present. See CrR 3.4(a).

Excluding Mr. Markussen from personally participating in the response to the jury question and reinstruction requires reversal. In *Irby*, the

Court explained that Washington case law historically treated a violation of the accused's right to be present as presumptively prejudicial. *Irby*, 170 Wn.2d at 885. The right was strictly enforced and not cured by the attorney's presence. *Id.*

Similarly, when there is a violation of the right to be present, the federal constitution places "the burden . . . on the prosecution to prove that the error was harmless beyond a reasonable doubt." *United States v. Marks*, 530 F.3d 759, 812 (9th Cir. 2008). In *Irby*, the Court held that the prosecution was required to show that all of the dismissed jurors "had no chance to sit on Irby's jury," and the State could not meet this heavy burden. *Irby*, 170 Wn.2d at 886. Those dismissed jurors had not had their ability to serve tested by Irby. *Id.* While the attorneys and judge had agreed those jurors should be excused, the defendant himself had not probed their qualifications. Here, had Mr. Markussen been present for the jury questions, he might have suggested to his attorney a wholly different and more complete response to the jury's questions. The court's unexplained failure to include Mr. Markussen in the review of the jury notes and reinstruction of the jury during deliberations denied him of his right to be present at a critical stage of the proceedings and to appear and defend where his substantial rights may be

affected. The State cannot show this error was harmless beyond a reasonable doubt. *Irby*, 170 Wn.2d at 886. Accordingly, this violation of Mr. Markussen's right to be present requires reversal.

E. CONCLUSION

Based on the foregoing argument, Mr. Markussen respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED: May 24, 2013.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on May 24, 2013, that this Appellant's Supplemental Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy was mailed by U.S. mail, postage prepaid, to Ms. Anne Cruser, Clark County Prosecuting Attorney, PO Box 5000, Vancouver, WA 98666 and to the appellant, Mr. Mark Markussen, DOC #355143, Unit B,

Cell BB04-L, Coyote Ridge Correction Center, 1301 N Ephrata Ave, PO Box 769, Connell, WA 99326.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 24, 2013.

Peter B. Tiller

PETER B. TILLER

TILLER LAW OFFICE

May 24, 2013 - 3:24 PM

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