

Page Ulrey

10-C-03356-1SEA

10-16-11

NO. 66549-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY DYE,

Appellant.

REC'D

AUG 19 2011

King County Prosecutor
Appellate Unit

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

BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

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

1805475

2/8040/008

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

1. THE COURT ERRED IN PERMITTING THE
COMPLAINANT TO TESTIFY WITH THE ASSISTANCE
OF A SERVICE DOG, IN VIOLATION OF MR. DYE'S
RIGHT TO DUE PROCESS OF LAW. 4

 a. A trial court may provide reasonable
 accommodation for a witness upon request. 4

 b. There was no foundation for the State's request
 for -- or the court's accommodation of -- a "comfort
 dog." 5

 c. Permitting the comfort dog to be present during
 the complainant's testimony was a violation of Mr.
 Dye's due process rights and his right to a fair
 trial. 8

 d. The error was not harmless, and reversal is
 required. 13

2. BY SUBSTITUTING AN ALTERNATE JUROR
WITHOUT VERIFYING THE REPLACEMENT JUROR'S
IMPARTIALITY, THE COURT VIOLATED MR. DYE'S
RIGHT TO AN IMPARTIAL AND UNANIMOUS JURY . 15

 a. Mr. Dye had a constitutionally protected right to a
 unanimous and impartial jury. 16

 b. The trial court's failure to verify the alternate juror's
 impartiality violated Mr. Dye's rights to a
 unanimous and impartial jury. 19

3. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE WHEN IT REFERRED TO THE COMPLAINANT AS "THE VICTIM." 22

a. Judicial comment on the law is presumed prejudicial, and the burden is on the State to show that no prejudice resulted. 22

b. The judicial comment here was unduly prejudicial to Mr. Dye, removing an issue of fact from the

c. Reversal is required. 25

E. CONCLUSION 25

TABLE OF AUTHORITIES

Washington Supreme Court

City of Seattle v. Holifield, 170 Wn.2d 230, 240 P.3d 1162 (2010).
..... 17

Freeman v. Freeman, 169 Wn.2d 664, 239 P.3d 557 (2010) 14

MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959) 14

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)
..... 14

State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645
(1941) 14

State v. Becklin, 163 Wn.2d 519, 182 P.3d 944 (2008) 22

State v. Carroll, 119 Wash. 623, 206 Pac. 563 (1922)..... 19

State v. Cuziak, 85 Wn.2d 146, 530 P.2d 288 (1975)..... 19, 20

State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000)..... 16

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995)..... 22

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) 22, 23, 25

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994).. 16

Washington Court of Appeals

State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993).. 18, 19, 20

State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998)..... 17, 20

State v. Quintero Morales, 133 Wn. App. 591, 137 P.3d 114
(2006), rev. denied, 159 Wn.2d 1018 (2007) 18

| | |
|--|------------|
| <u>State v. Stanley</u> , 120 Wn. App. 312, 85 P.3d 395 (2004) . | 18, 19, 20 |
| <u>State v. Walker</u> , 75 Wn. App. 101, 897 P.2d 957 (1994)..... | 16 |

United States Supreme Court

| | |
|--|-------|
| <u>Coy v. Iowa</u> , 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)..... | 9, 10 |
| <u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)..... | 13 |
| <u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)..... | 14 |
| <u>Irvin v. Dowd</u> , 366 U.S. 717, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)..... | 16 |
| <u>Tennessee v. Street</u> , 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)..... | 11 |
| <u>Wainwright v. Witt</u> , 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)..... | 16 |

Washington Constitution

| | |
|------------------------------|-----------|
| Article I, section 21..... | 16, 21 |
| Article I, section 22..... | 8, 16, 21 |
| Article I, section 3..... | 8, 16, 21 |
| Article IV, section 16 | 22, 25 |

United States Constitution

| | |
|-----------------------------|-----------|
| U.S. Const. amend. VI | 8, 16, 21 |
|-----------------------------|-----------|

U.S. Const. amend. XIV 8, 16, 21

Statutes

42 U.S.C. §§ 12101 et seq..... 5, 6

RCW 49.60 et seq..... 5, 6

GR 33..... 1, 4, 5, 6, 8

Rules

CrR 6.5..... 17, 18, 20, 21

Other State Courts

State v. Aponte, 249 Conn. 735, 738 A.2d 117 (1999) 11, 12

State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944)..... 11

State v. Molnar, 79 Conn. App. 91, 829 A.2d 439 (2003)23

State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992)..... 11

Talkington v. State, 682 S.W.2d 674 (Tex. App. 1984)..... 23

Veteto v. State, 8 S.W.3d 805 (Tex. App. 2000), abrogated on other grounds by, State v. Crook, 248 S.W.3d 172 (Tex. App. 2008) 23

Other Authorities

<http://www.tdi-dog.org> (last accessed August 15, 2011) 6, 10

Lara Bogle, Therapy Dogs Seem to Boost Health of Sick and Lonely, National Geographic News, Aug. 8, 2002 6

William Glaberson, By Helping Girl to Testify at a Rape Trial, a Dog Ignites a Legal Debate, N.Y. Times, Aug. 8, 2011..... 6, 10

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in permitting the complainant to testify with a service dog, violating Mr. Dye's right to due process and a fair trial.

2. The trial court failed to verify that Mr. Dye received a fair trial by an impartial jury when it recalled an alternate to replace a deliberating juror, contrary to the Sixth and Fourteenth Amendments and Article I, sections 21 and 22.

3. The trial court improperly commented on the evidence when, in a jury instruction, it referred to the complainant as "the victim."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. GR 33 permits a trial court to provide reasonable accommodations for persons with disabilities, when an application is presented to the court. A request for accommodation may be denied if it would "fundamentally alter the nature" of the proceeding. Here, the trial court failed to make an adequate inquiry into the need for Ellie, a therapy or "comfort dog," and Mr. Dye timely objected to the dog's presence, noting that juror sympathy would be improperly bolstered by the dog's presence during the complainant's testimony.

Did permitting a dog to sit with the complainant on the witness stand violate due process?

2. When an alternate juror is temporarily dismissed from the case and is then recalled to participate in jury deliberations, the trial court must verify that the alternate remains unbiased and impartial. The trial court replaced a deliberating juror with an alternate juror without questioning whether the alternate remained impartial and free from outside influence. Was the court required to insure that the alternate juror remained qualified to participate in jury deliberations after having been dismissed from service?

3. Article IV, section 16 prohibits judicial commentary on the evidence. Did the trial court improperly comment on the evidence and essentially remove an issue of fact from the jury's consideration by referring to the complainant in the case as "the victim"?

C. STATEMENT OF THE CASE.

Timothy Dye was involved in a romantic relationship with Alesha Lair – a relationship that continued even while Mr. Dye resided in Shelton, Washington during 2007. 11/22/10 RP 70-72; 12/2/10 RP 87-89.¹ While Mr. Dye was not residing with Ms. Lair,²

¹ The fact that Mr. Dye was an inmate at Washington Correctional Center during that time period was not before the jury at trial. 11/18/10 RP 24.

she became involved with Douglas Lare, a developmentally disabled neighbor. 11/30/10 RP 21, 26-27; 12/1/10 RP 14-20.

Alesha Lair eventually moved into Mr. Lare's apartment, opened several lines of credit in his name, encouraged him to purchase a car, bought a number of additional items for the home with his credit cards, and liquidated his retirement account. 11/30/10 RP 29-32; 12/1/10 RP 21-29.

Once Mr. Dye joined Ms. Lair in Seattle, she left Mr. Lare and set up a separate apartment for herself and Mr. Dye. 12/1/10 RP 40-41. On January 24, 2008, Mr. Lare awoke to find Mr. Dye in his apartment, asking for some of his and Alesha's belongings in order to pawn them. 12/1/10 RP 38-40. On the following day, Mr. Lare arrived home from work to find his front door propped open and several items missing, including a large television, a microwave, and two computers. Id. at 35-37. Police found no evidence of forced entry either time, but were told that Alesha Lair still had keys to Mr. Lare's apartment. Id. at 111; 12/2/10 RP 31-33, 54-65.

² Because the spelling and pronunciation of the complainant's and co-defendant's last names are so similar, first names were apparently used in the trial court record.

Alesha Lair was charged and pled guilty to theft in the first degree with a vulnerable adult aggravator. CP 1-12; 12/6/10 RP 12.

Mr. Dye was charged with residential burglary. CP 29-30. At trial, Douglas Lare testified with the assistance of Ellie, a therapy or "comfort dog," which was the property of the prosecutor's office, over defense objection. 11/18/10 RP 28. The jury convicted Mr. Dye of the burglary, but did not return a special verdict as to the vulnerable victim aggravator. CP 68-69.

Mr. Dye appeals. CP 80-90.

D. ARGUMENT

1. THE COURT ERRED IN PERMITTING THE COMPLAINANT TO TESTIFY WITH THE ASSISTANCE OF A SERVICE DOG, IN VIOLATION OF MR. DYE'S RIGHT TO DUE PROCESS OF LAW.

a. A trial court may provide reasonable accommodation for a witness upon request. An accommodation is a measure taken to make an activity or service more readily accessible and usable to a person with a disability. See, e.g., GR 33(a)(1). Such measures may include auxiliary aids and devices, qualified interpreters, and materials in alternative formats. GR 33(a)(1)(B). A person with a disability is defined by the Americans with Disabilities Act of 1990 (ADA), as well

as the Washington Law Against Discrimination. 42 U.S.C. §§ 12101 et seq.; RCW 49.60 et seq.

In Washington, under GR 33, an application for accommodation by a party or witness in a court proceeding may be presented ex parte in writing, or orally and reduced to writing. GR 33(b)(3). An application for accommodation should be made as far in advance of trial as practical, and the trial court shall consider the request and consider, but not be limited by, the provisions of the ADA and other similar local laws. GR 33(c)(1)(A).

An application for accommodation can be denied if the court finds that: 1) the applicant has failed to satisfy the substantive requirements of this rule; 2) the requested accommodation would create an undue financial or administrative burden; 3) the requested accommodation would fundamentally alter the nature of the proceedings; or 4) the accommodation would create a direct threat to the health, safety or well-being of the applicant or others. GR 33(d).

b. There was no foundation for the State's request for -- or the court's accommodation of -- a "comfort dog." There is no right to have a dog⁷ or other emotional support animal under either

⁷ The terms "comfort dog" and "therapy dog" are used interchangeably, along with "emotional support animal," in disability rights law and literature. 42 U.S.C. §§ 12101 et seq.; RCW 49.60 et seq.; Lara Bogle, Therapy Dogs Seem to Boost Health

Washington law or under the ADA. 42 U.S.C. §§ 12101 et seq.; RCW 49.60 et seq.; GR 33. For example, a business with a “no pets” policy need not admit a comfort dog in its establishment. 42 U.S.C. §§ 12101 et seq.; RCW 49.60 et seq. Moreover, GR 33, which governs the request for accommodations in court, pertains to individuals with disabilities – not those seeking the emotional support provided by so-called comfort dogs. GR 33(a)(1).

Here, it is undisputed that Mr. Lare is a person with a mental disability. However, the State did not rely on the complainant’s disability for its application. The deputy prosecutor described the pre-trial request for the dog as “somewhat unusual,” and proceeded to inform the court that Ellie, the dog in question, did not belong to the complainant, but was, in fact, the property of the prosecutor’s office. 11/8/10 RP 27-28. The State merely argued that Mr. Lare “is a complete dog fan,” and that “Ellie has provided tremendous comfort for him in the two times that he’s been with her, and he has asked to have her present during his testimony.” *Id.* at 28.

of Sick and Lonely, National Geographic News, Aug. 8, 2002; William Glaberson, By Helping Girl to Testify at a Rape Trial, a Dog Ignites a Legal Debate, N.Y. Times, Aug. 8, 2011 (hereafter, Glaberson); <http://www.tdi-dog.org> (last accessed August 15, 2011). Since the State articulated its application in terms of the complainant’s need for the dog’s comfort, 11/18/10 RP 28, the term “comfort dog” is used herein.

The defense immediately objected, arguing that the “prejudice” to Mr. Dye would be “extreme,” and that despite the complainant’s anxiety, “I think we should also keep in mind that this has to be a fair trial.” 11/18/10 RP 28, 30.⁸ The court ruled that “if we can accommodate somebody who has a developmental disability when they’re testifying in the courtroom I think it’s appropriate to do so.” Id. at 29.

This ruling, however, was erroneous, and moreover, inapposite to the State’s actual request, as it was premised on the accommodation of the complainant’s mental disability. 11/18/10 RP 29. This is a disability for which he was not in need of, nor did he request, the use of a service animal. Douglas Lare, according to his own testimony and that of his sister, had been living independently in his own home for over 20 years. 11/30/10 RP 18; 12/1/10 RP 11. Mr. Lare had a full-time job with the Veterans Administration Hospital for even longer -- over 25 years. 12/1/10 RP 10. He did not use any type of service animal until these proceedings, at which time Ellie was assigned to him “to help me and to make it easier for me.” Id.

⁸ The defense suggested that if the complainant were permitted to be viewed sympathetically by the jury, while petting a dog, then Mr. Dye should be permitted to hold his baby while testifying. 11/18/10 RP 28. This request was denied. Id. 28-29.

If the dog was to be used, any such application for accommodation should have been assessed using the requirements set forth in GR 33(d). Here, since the request for accommodation was not made based upon Mr. Lare's disability, but upon the prosecutor's desire to enhance his "comfort," the application should have failed under GR 33(d)(1) ("substantive requirements"). Even if the court moved past the first hurdle of substantive requirements, however, the balancing test suggested by GL33(d)(3) – that the requested accommodation would fundamentally alter the nature of the proceedings – would have required that the trial could make a record concerning the potential prejudice caused by permitting Mr. Lare to testify with the dog.

c. Permitting the comfort dog to be present during the complainant's testimony was a violation of Mr. Dye's due process rights and his right to a fair trial. The trial court here, in its apparent desire to protect Mr. Lare, lost its focus on its paramount responsibility, which was to insure that the accused receive a fair trial. See, e.g., Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); U.S. Const. amends. VI, XIV; Wash. Const. Art. I, sec. 3, 22.

Although the case law involving service dogs is scarce, analogous scenarios involving witnesses purportedly in need of some sort of accommodation or protection may provide guidance. The vast majority of such cases involve child victims of sex crimes, such as Coy v. Iowa, and its progeny, in which the Supreme Court held that a defendant's right to confront his accuser was violated when a screen was used to shield a victim from the defendant. 487 U.S. 1012, 1022, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)(reversing due to confrontation clause violation). In Coy, Justice O'Connor suggested in a concurrence that "if a court makes a case-specific finding of necessity, . . . the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." Id. at 1025.

No such finding of necessity was made here as to Douglas Lare, however. The State made no offer of proof concerning Mr. Lare's inability to testify without the aid of a comfort dog, nor did the trial court request one. 11/18/10 RP 28-29. At no time did Mr. Lare seem to have difficulty testifying or being in the same room as Mr. Dye, akin to the line of cases involving child-victims of violent crimes.

Many studies advocate the healing relationship between dogs and their owners. "Visits from Therapy Dogs have shown an

increase... [in] happiness, calmness, and overall emotional well-being,” as well as a “decrease in blood pressure and stress levels.” <http://www.tdi-dog.org> (last accessed August 16, 2011). However, this very feature of the canine-human relationship is troubling in the fact-finding context, where a certain level of emotional tension and stress is integral to the process of confrontation.

It is the very physiological responses that testimony produces that a jury utilizes to determine a witness’s credibility⁹ – and a dog is unable to distinguish between the stress associated with truth-telling and that associated with bearing false witness. “When [witnesses] start talking about difficult things,” ... one psychologist who works with therapy dogs notes, the dog “picks up on that and goes over and nudges them. I’ve seen it with my own eyes.” Glaberson, at 4. Since defense counsel clearly cannot cross-examine the dog as to the source of the witness’s stress – truth-telling or subterfuge – the jury is free to interpret the dog’s signals as testimony from as an unsworn witness that the victim is upset because he or she is telling the truth. Id. at 2.

⁹ While the “face-to-face presence may, unfortunately, upset the truthful rape victim or the abused child, ... it may [also] confound and undo the false accuser or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.” Coy, 487 U.S. at 1020.

Cross-examination has been called the means by which the mission to advance truth-determination in criminal trials is achieved. Tennessee v. Street, 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d. 425 (1985). This mission is foiled by the use of a comfort dog, whose presence suggests the final outcome of the trial, presupposing to the jury the very victimhood of the complainant, invading the jury's exclusive providence as finders of fact, along with the defendant's presumption of innocence. Estelle v. Williams, 425 U.S. at 503; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Other jurisdictions have addressed the situation where a child witness may be apprehensive about testifying. See, e.g., State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992) (error to allow 12 year-old witness to testify holding teddy bear, absent finding of necessity); State v. Aponte, 249 Conn. 735, 745-47, 738 A.2d 117 (1999) (reversing where prosecutor gave child witness a Barney doll to hold during her testimony, as due process violation); State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944) (reversing where prosecutor arranged for child witness to hold mother's doll on witness stand). In Aponte, the Connecticut Supreme Court noted that had the witness simply brought a doll from home that was her personal property – rather

than the doll being a gift from the prosecutor – the error might not have existed. Aponte, 249 Conn. at 745.

Likewise in this case, had Mr. Lare used a dog of his own, the appearance of impropriety would be substantially less. Here, despite the fact that the complainant functions perfectly well without a service dog in his daily life, there was the sense that the State had orchestrated the appearance of Ellie, the comfort dog, in order to engender sympathy for the complainant. 11/18/10 RP 30.

Although the defense requested additional time to voir dire based upon the court's decision to allow the dog in the courtroom, the trial court's response seems to foretell exactly how persuasive the dog's presence would prove to be. The court granted the extra time, but stated: "This being Seattle, you're going to probably get a near unanimous Yes on the pets and the dog lovers." 11/22/10 RP 75.

Despite a jury instruction that jurors should not "draw any conclusions based on the presence of this service dog," jurors could not help but be influenced by the presence of an animal that, among other things, human beings use for protection. CP 53. A juror could easily come to the conclusion that Ellie the dog was present to protect the complainant from the accused, which would only be necessary, were he guilty. Alternatively, the dog's presence could be

seen as comforting a witness made to feel vulnerable, specifically because he was in the presence of the person who committed a crime against him. Either analysis – both improper – suggests the guilt of the accused, and the jury instruction given by the trial court in no way ameliorated this problem.

d. The error was not harmless, and reversal is required. Accordingly, even if the use of a comfort dog were ever permissible, which is not conceded, the trial court failed to make the requisite findings to support the use of the accommodation in this case. The court further failed to balance the rights of Mr. Dye against the witness's need for the dog, and the jury instruction was inadequate to protect Mr. Dye's right to a fair trial.

The use of the dog in this way was a violation of Mr. Dye's confrontation rights, as it interfered with meaningful cross-examination. Lastly, the presence of the comfort dog was unduly prejudicial, as it presupposed the victimhood of the complainant, which is the ultimate issue of fact for the jury to decide.

A constitutional error is presumed prejudicial, unless the State demonstrates beyond a reasonable doubt that the violations did not contribute to the verdict. E.g., Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v.

Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008).

Even if this Court does not find a violation of Mr. Dye’s confrontation right, the trial court abused its discretion by allowing the presence of the dog on the witness stand. When a trial court’s exercise of its discretion is “manifestly unreasonable or exercised on untenable grounds, or for untenable reasons,” an abuse of discretion exists. Freeman v. Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

For the above reasons, the use of the “comfort dog” during the complainant’s testimony was a violation of due process and an abuse of discretion, requiring reversal.

2. BY SUBSTITUTING AN ALTERNATE JUROR WITHOUT VERIFYING THE REPLACEMENT JUROR'S IMPARTIALITY, THE COURT VIOLATED MR. DYE'S RIGHT TO AN IMPARTIAL AND UNANIMOUS JURY

Shortly after the jury began to deliberate, there was a brief inadvertent contact between one of the sworn jurors, Juror 11, and Mr. Dye after court. 12/6/10 RP 129.¹⁰ This contact was immediately brought to the court's attention by defense counsel, and after an inquiry by the trial court, Juror 11 was excused from jury service. 12/6/10 RP 134.

The alternate juror, Juror 6, had been excused earlier that day, and cautioned by the court not to discuss the case, on the chance he needed to participate in deliberations later. 12/6/10 RP 128.

The following day, Juror 6 was called back to court and asked to resume his position within the jury. 12/7/10 RP 10. Before the deliberations resumed with the reconstituted jury, the court briefly told the jurors that they must begin deliberations anew. Id. Yet the court did not speak with the alternate juror to verify that

¹⁰ According to the record, Juror 11 and Mr. Dye were both riding the light rail after court without speaking, when Juror 11's nephew boarded. 12/6/10 RP 134. At this point, Mr. Dye realized that he knew Juror 11's nephew and said hello to him. Id. Mr. Dye and Juror 11 had apparently not realized during jury selection that they knew people in common. Id. at 129.

he remained impartial and unbiased. Juror 6 had been excused at 1:25 p.m. the day before. 12/6/10 RP 129. Although the trial court had advised him “not to discuss the case with anyone,” the court failed to inquire as to the juror’s bias, his discussions, or whether he did any research during the time he was excused from jury duty. Id. The court’s failure to assess the bias and qualifications of the temporarily dismissed juror deprived Mr. Dye of his right to an impartial and unanimous trial by jury.

a. Mr. Dye had a constitutionally protected right to a unanimous and impartial jury. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 3, 22 of the Washington Constitution guarantee a defendant the right to an impartial jury. Wainwright v. Witt, 469 U.S. 412, 429-30, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Moreover, Article I, section 21 of the Washington Constitution “provides greater protection for jury trials than the federal constitution.” State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.2d 913, 918 (2010).

To ensure that the right to a unanimous and impartial jury is adequately protected, when a juror is discharged during deliberations and replaced with an alternate, the court must instruct the reconstituted jury to disregard all previous deliberations and begin deliberations anew. CrR 6.5; State v. Johnson, 90 Wn. App. 54, 72-73, 950 P.2d 981 (1998). The judge also “shall” take steps to ensure alternate jurors remain protected from outside influence if recalled to participate in deliberations. CrR 6.5.

CrR 6.5 directs, in pertinent part:

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 jurors ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations.

A court rule is interpreted based on principles of statutory construction. City of Seattle v. Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). “If the language of a criminal rule is susceptible to more than one meaning, the rule of lenity requires that we strictly construe it against the State and in favor of the accused.” State v. Quintero Morales, 133 Wn. App. 591, 596, 137 P.3d 114 (2006),

rev. denied, 159 Wn.2d 1018 (2007). CrR 6.5 requires the trial court to protect the alternates from improper influence and to ensure that the juror remains impartial before seating that juror as a replacement.

Based on the court rule and the constitutional requirement of a fair and impartial jury, several Court of Appeals decisions dictate that the process of recalling an alternate juror “clearly contemplates” a hearing such as a “brief voir dire” of the recalled alternate to verify his impartiality. State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004); State v. Ashcraft, 71 Wn. App. 444, 462-63, 859 P.2d 60 (1993). At the least, there must be “a formal proceeding” instituted by the judge “to insure that an alternate juror who has been temporarily excused and recalled has remained protected from ‘influence, interference or publicity, which might affect that juror’s ability to remain impartial.’” Johnson, 90 Wn. App. at 72-73 (quoting CrR 6.5); Ashcraft, 71 Wn. App. at 462.

The purpose of the rule is to insure the jury is fair, impartial, and unanimous. Ashcraft, 71 Wn. App. at 466. “These are matters which relate directly to a defendant’s constitutional right to a fair trial before an impartial jury and to a unanimous verdict.” Id. at 463. It is presumptively prejudicial for an unauthorized person to

intrude into the jury room “unless it affirmatively appears that there was not and could not have been any prejudice.” State v. Cuziak, 85 Wn.2d 146, 150, 530 P.2d 288 (1975) (quoting State v. Carroll, 119 Wash. 623, 624, 206 Pac. 563 (1922)). This Court reviews a claim of constitutional error *de novo*. Stanley, 120 Wn. App. at 314.

b. The trial court’s failure to verify the alternate juror’s impartiality violated Mr. Dye’s rights to a unanimous and impartial jury. The process of recalling an alternate juror “clearly contemplates” a proceeding such as a “brief voir dire” of the recalled alternate to verify her impartiality. Stanley, 120 Wn. App. at 315; Ashcraft, 71 Wn. App. at 462.

In Stanley, the trial court replaced a deliberating juror with an alternate juror without instructing the reconstituted jury on the record to begin deliberations anew. Stanley, 120 Wn. App. at 313. In addition, the record failed to show whether Stanley or his counsel was present when the alternate juror was seated or whether the court conducted a hearing to assess the alternate juror’s continued impartiality. Id. While the State conceded the trial court committed error, it argued that the error was harmless. Stanley, 120 Wn. App. at 316. Relying on Ashcraft, this Court held

that the State bore the burden of proving beyond a reasonable doubt the harmlessness of the error, and the reviewing court must be able to determine *from the record* that jury unanimity was preserved. Id.

The process of recalling an alternate juror “clearly contemplates” verifying the alternate juror’s impartiality. Stanley, 120 Wn. App. at 315; Ashcraft, 71 Wn. App. at 462. It is “prudent” for the court to ensure, on the record, that the alternate had not been exposed to outside influence or interference during any period of absence from the court. Johnson, 90 Wn. App. at 72-73 (citing Cuziak, 85 Wn.2d at 149).

This Court must be able to “determine from the record that jury unanimity has been preserved.” Ashcraft, 71 Wn. App at 466. The same on-the-record verification of juror impartiality applies when one juror has been released from service. Here, the record is silent with regard to whether the replacement juror had remained protected from “influence, interference or publicity, which might affect that juror's ability to remain impartial.” CrR 6.5

The right to an impartial, 12-person jury is of constitutional magnitude, and thus is not waived by any failure to object at trial. Cuziak, 85 Wn.2d at 149. The burden falls on the State to

demonstrate that the alternate juror remained free from outside influence during the period of discharge. CrR 6.5.

The trial court discharged Juror 6 before deliberations commenced. 12/6/10 RP 129. Although the trial court asked him to “not discuss the case with anyone,” the juror was not ordered to remain free from outside influence, to refrain from outside research, or from visiting the location of the alleged incident. Id.

The record does not affirmatively show that Juror 6 remained impartial. It is the State’s burden to prove the temporarily discharged juror remained unbiased. Without any on-the-record demonstration of the juror’s impartiality after being excused from service, Mr. Dye was not ensured his right to a unanimous and impartial jury as required by the Sixth Amendment and Article I, sections 21 and 22.

Accordingly, because Mr. Dye did not receive a trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 3 and, 22 of the Washington Constitution, reversal and a new trial are required.

3. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE WHEN IT REFERRED TO THE COMPLAINANT AS "THE VICTIM."

a. Judicial comment on the law is presumed

prejudicial, and the burden is on the State to show that no prejudice resulted. Under Article IV, section 16 of the Washington constitution, a judge is prohibited from conveying to the jury his or her personal opinion about the merits of a case, or from instructing the jury that a fact at issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Whether an instruction is legally correct is reviewed de novo. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008).

Any remark "that has the potential effect of suggesting that the jury need not consider an element of an offense" could qualify as a judicial comment. Levy, 156 Wn.2d at 721. Likewise, a statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting Const. art. IV, § 16). Reversal is required unless the State shows the

defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted. Levy, 156 Wn.2d at 723.

The court's reference to "the victim" in the instant case was contained in the jury instructions. Under similar circumstances, courts in other jurisdictions have found this to be error. In a Texas assault case, Veteto v. State, the appellate court held:

The sole issue of [the defendant's] case was whether he committed the various assaults on A.L. Referring to A.L. as the victim instead of the alleged victim lends credence to her testimony that the assaults occurred and that she was, indeed, a victim. This situation is similar to a case where consent is the sole issue in a rape trial.^[11] ... Thus, the trial court also commented on the weight of the evidence by failing to refer to A.L. as the "alleged" victim.

Veteto v. State, 8 S.W.3d 805, 816-17 (Tex. App. 2000), abrogated on other grounds by, State v. Crook, 248 S.W.3d 172 (Tex. App. 2008); see also State v. Molnar, 79 Conn. App. 91, 829 A.2d 439 (2003) (Conn. App. 2003) (impermissible effect of court's use of "victim" may be ameliorated by additional instruction that it is jury's decision whether complainant is a victim).¹²

¹¹ Talkington v. State, 682 S.W.2d 674, 675 (Tex. App. – Eastland 1984) (reversing where court referred to complainant as "victim").

¹² No such additional instruction was given in this case.

b. The judicial comment here was unduly prejudicial to Mr. Dye, removing an issue of fact from the providence of the jury. The defense theory at trial was essentially two-fold: 1) mistaken identity as to the residential burglary; and 2) sufficiency – even if the intruder was Mr. Dye, that he was merely entering Alesha Lair’s apartment with her own key in order to pick up her belongings and her mail – thus no burglary occurred. 12/6/10 RP 92-120.

Regardless, the defense moved in limine that “Mr. Lare is not to be referred [to] as [a] victim, because that has to be proven and that’s for the jury to decide, if he’s a victim or if he is making it up ... that’s frankly why we’re here, to decide what happened...” 11/18/10 RP 59. The trial court ruled only that the detective would not be permitted to identify Mr. Lare as a victim. Id.

Despite this ruling, however, the trial court, itself, instructed the jury that the complainant was indeed a victim, thereby removing this issue of fact from the jury’s consideration. CP 59-60.

Because the State’s case was dependent on the complainant’s credibility and memory, and the instruction bolstered his credibility, the State cannot prove that the court’s comment on the evidence did not affect the outcome of the trial.

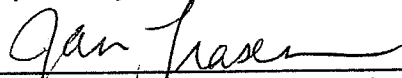
c. Reversal is required. The burden is on the State to show that no prejudice resulted from the trial court's impermissible comment on the evidence in this case. Levy, 156 Wn.2d at 723. Because the trial court's reference to the complainant as "the victim" removed an issue of fact from the jury's consideration, reversal is required. Const. art. IV, § 16; Levy, 156 Wn.2d at 723.

E. CONCLUSION

For the foregoing reasons, Mr. Dye respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 18th day of August, 2011.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorneys for Appellant

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

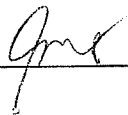
| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 66549-9-I |
| v. |) | |
| |) | |
| TIMOTHY DYE, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF AUGUST, 2011, 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] TIMOTHY DYE 877014 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769 | (X) () () | U.S. MAIL HAND DELIVERY _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF AUGUST, 2011.

X _____ 

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