

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
Plaintiff/Respondent,) COA No. 39876-5-III
vs.) Ferry No. 19-1-00039-10
)
DONALD LAVERN LOUIE,) MOTION TO REVERSE
Defendant/Appellant.) AND REMAND FOR NEW
) TRIAL
)
_____)

I. Identity of Moving Party

The Appellant, Donald Lavern Louie, moves for the relief set forth below.

II. Requested Relief

Reversal of Mr. Louie's conviction of child molestation in second degree on June 8, 2023, and remand for a new trial.

III. Facts Relevant to Motion

On January 5, 2024, counsel for appellant received a copy of the transcripts prepared by Amy Brittingham. Significant

portions of Mr. Louie’s jury trial could not be transcribed due to the fact that they were not recorded. The trial took place on June 5, 6, 7, 8, 2023. The recording of the trial begins with a discussion about the procedure for individual voir dire. Report of Proceeding (hereafter “RP”) at 52. It appears the beginning of the trial is missing. Portions of the record are missing from the time of 11:32 A.M. to 2:34 P.M. RP at 118. On June 6, 2023, portions of the record are missing from the time of 12:16 P.M. to 12:34 P.M. RP at 405. On that same date, portions of the record from 1:36 P.M. to 2:13 P.M. are missing. RP at 410. On June 8, 2023, portions of the record from 9:22 A.M. to 11:31 A.M. are missing. RP at 746.

IV. Motion and Grounds for Relief

The Washington State Constitution guarantees all criminal defendants the right to an appeal. WASH. CONST. art. I, sec. 22. To pursue an effective appeal, a criminal defendant is constitutionally entitled to a record of sufficient completeness. *State v. Waits*, 200 Wash.2d 507, 513, 520 P.3d 49 (2022). A sufficiently complete

record does not necessarily require a verbatim transcript; alternative methods are acceptable, provided they permit effective appellate review. *Id.* Effective review allows counsel to determine which issues to raise on appeal and provides the relevant, equivalent report of the trial record where the alleged issues occurred. *Id.* Where appellate counsel did not participate in the trial, he or she must be able to determine satisfactorily what errors to assign for the purpose of obtaining an adequate review and must be able to test the sufficiency of completeness of any narrative statement of facts for an adequate review. *State v. Larson*, 62 Wash.2d 64, 67, 381 P.2d 120 (1963).

The usual remedy for a defective record is to supplement the record with appropriate affidavits and have the discrepancies resolved by the judge who heard the case. Washington Rule of Appellate procedure (RAP) 9.3, 9.4, 9.5. However, where the affidavits are unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the appellate court must order a new trial. *State v. Tilton*, 149 Wash.2d 775, 783, 72 P.3d 735 (2003). The

amount of the record missing in this case would seem to be so great as to make reconstructing the record an unrealistic possibility.

Significant portions of the trial court's initial statements and questions for the jury are completely missing. It is not known whether pretrial motions were made just prior to jury selection. Large portions of voir dire are missing. Mr. Louie is of Native American descent. One of the potential jurors commented on that fact. RP at 288. Some of the individual voir dire is missing. RP at 118.

Considering the fact of Mr. Louie's ancestry, it is vital to review the jury selection process. The purpose of General Rule 37 is to prevent the unfair exclusion of jurors on the basis of race. The lack of record makes it impossible to adequately review if there was compliance with the rule.

In addition to missing portions of voir dire, large portions of the testimony from the trial are missing. The testimony of Officer Kersten and Detective Melby is entirely missing. RP at 746. They are referred to in the record just prior to their testimony. RP at 743. The prosecutor refers to the testimony of both law enforcement

officers in her closing remarks to the jury to help bolster the credibility of the complaining witness. RP at 827. Due to the age of the complaining witness, the State conceded that the child hearsay rule would not be applicable to this case. RP at 13. It would be of critical importance to know with precision what the officers testified about in this case. If the State elicited testimony that vouched for the complaining witness, that would jeopardize Mr. Louie's right to a fair trial. *State v. Lang*, 12 Wash. App.2d 481, 488-89, 458 P.3d 791 (2020). Also, potentially contained in that missing portion of the record were discussions on jury instructions.

Another factor making reconstruction of the record difficult in this case, is the woman who prosecuted is now a superior court judge. If she became involved in the reconstruction of the record she would be acting as an advocate for the State. Mr. Louie's trial attorney, Elizabeth Tereno, does believe it is possible to reconstruct the missing portions of the record. *See* Declaration of Elizabeth Tereno. If the record cannot be adequately reconstructed, Mr. Louie must be given a new trial.

V. Conclusion

For the reasons stated, Mr. Louie's conviction should be reversed, and the case remanded for a new trial.

I certify that this document contains 1056 words.

Respectfully submitted this 6th day of February 2024.

/s/ Jeff Compton
Jeff Compton,
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DIVISION III
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STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 38976-5-III
vs.) Ferry No. 19-1-00039-10
)
DONALD LAVERN LOUIE) PROOF OF SERVICE
Defendant/Appellant)

I, Jeff Compton, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 6, 2024, I served the Ferry County Prosecuting Attorney's Office the attached documents by the United States Postal Service, postage prepaid, at:

Ferry County Prosecuting Attorney's Office
350 East Delaware Ave. #11
Republic, WA 99166

Dated this 6th day of February, 2024.

/s/ Jeff Compton
Jeff Compton, WSBA #24082
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 39876-5-III
Plaintiff/Respondent)
v.)
DONALD LAVERN LOUIE,) DECLARATION OF
) ELIZABETH
) TERENO
Defendant/Appellant)
_____)

I, Elizabeth Tereno, declare under penalty of perjury under the laws of the State of Washington that

(1) I was Donald Louie's court-appointed lawyer in Ferry County for the matter now before this Court on Appeal.

(2) I conducted the trial on behalf of Mr. Louie

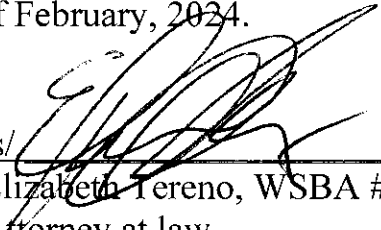
(3) I have been informed that large parts of the trial were not recorded for the purposes of creating a record. These portions of the trial include portions of jury selection, discussion of jury instructions, and the entire testimony of two police witnesses.

(4) I do not believe I can reconstruct these missing portions of the record in a way adequate to allow for review on appeal.

(5) Opposing counsel, Kathryn Burke, is now a judge in Okanogan County.

Dated this 5th day of February, 2024.

/s/


Elizabeth Tereno, WSBA #43245

Attorney at law

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Spokane, WA 99205

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