not published

COLEMAN AND KELBER
A LAW PARTNERSHIP

Thomas F. Coleman
Steven T. Kelber

1800 N. Highland Ave.
Suite 106
Los Angeles, CA 90028
(213) 464-6666

February 7, 1978

Honorable John L. Cole
Presiding Judge
Appellate Department
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

Re: Request pursuant to Rule 978 of the California Rules of Court
Re: People v. James, CR A 15320, filed 10/27/77 (enclosed)
People v. Williams, CR A 13607, filed 11/4/76 (enclosed)

Dear Judge Cole:

I have been admitted to practice for a little over one year now and sometime represent clients in 647(a) cases. It amazes me that there is so little published appellate material on the conduct of these trials. Some of the opinions deal with the scope and constitutionality of the statute, but there is virtually no case law on the proper conduct of a 647(a) trial.

I recently came across the unpublished decision in People v. James, referred to above. I could find no other case law on this point. It seems that if the trial courts and prosecutors are going to comply with your decision in James, this case should be published.

In discussing this case with my partner, he informed me that the James decision is consistent with this Court's earlier decision in People v. Williams. Williams held that it was prejudicial error for a prosecutor to ask a 647(a) defendant if he were a homosexual. The Williams decision was not unanimous, Judge Marshall being of the opinion that these were not grounds for reversal. It seems to me that if the Williams decision had been published, perhaps the Court in James would not have made the error it did.

In any event, I am requesting that the James and Williams decisions be published in the official reports. The decisions presented sufficiently open questions of law to warrant a dissent in each case. I am requesting that you transmit this request, along with your recommendation and reasoning, to the Supreme Court at your earliest opportunity.

Very truly yours,

Steven T. Kelber

STEVEN T. KELBER

STK/pad
ccs: Chief Justice Rose Bird
Long Beach City Prosecutor
Pasadena City Prosecutor
Sanford L. Horn, Esq., Attorney at Law

FILED

NOV - 4 1976

John J. Corcoran, Acting County Clerk

BY D. R. STERLING, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DOUGLAS ROBERT WILLIAMS, Defendant and Appellant.	Superior Court No. CR A 13607 Municipal Court of the Long Beach Judicial District No. M 118549 OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, Kenneth E. Sutherland, Judge.

Judgment reversed.

For Appellant - Thomas F. Coleman

For Respondent - Robert W. Parkin, City Prosecutor
by Wm. S. Hulsy, Deputy City Prosecutor

-oOo-

In its decision on appeal in this case (People v. Williams, 59 Cal.App.3d 225), the Court of Appeal has held that the court properly instructed with respect to the definition of "lewd and dissolute conduct" and that on the facts of this case it was not error to fail to instruct that "sexual motivation" is an element of the offense prescribed. The Court of Appeal has retransferred the case to this court to dispose of the remaining issues.

We hold that three additional errors, taken in the aggregate, are sufficiently prejudicial to require reversal.

1. The lighting condition of the restroom was an issue in the case. Juror Cassaday improperly visited the scene of the

EXHIBIT "D"

2d 211, 221. While he could not get into the restroom which was locked, he went down there to see whether the bushes obscured the light. He saw the bushes, their relationship to the lights and what relationship the lights had to the door and noted a boarded up window and a window with a slat missing. He found out in fact that the bushes obscured part of the lights but had no way of knowing how much light was transmitted. He observed the position of the lights with respect to the door and the mercury vapor light on the top of the embankment, a matter that was not duplicated by either pictures or testimony at the trial. While he testified that he did not make the information known to the other jurors he also testified that he could not wipe out of his mind the information he had and that what he observed had a bearing on his judgment, although he also stated that the verdict would have been the same.

2. Mr. Cassaday told the court about his visit apparently on the same day that it had occurred. The court did not tell the jury of this, however, until after counsel had argued and prior to the time of instruction. Private communication between a judge and a juror are improper. People v. Alcalde [1944] 24 Cal.2d 177, 189; People v. Weatherford [1945] 27 Cal.2d 401, 418-419; People v. House [1970] 12 Cal.App.3d 756, 765.

3. The prosecution asked the defendant whether he was a homosexual and defendant answered "no." The question was very definitely in error and should not be repeated in the event of retrial. People v. Giani [1956] 145 Cal.App.2d 539; People v. Musumeci [1955] 133 Cal.App.2d 354.

A miscarriage of justice should be declared when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the

two errors complained of skewed the fairness of the trial. By the time the jury went into its deliberations, Juror Cassaday knew that what he had done was wrong because he had already reported himself to the judge. He could not get out of his mind what he had seen. While he claimed it did not influence him, we know also that he refrained from discussing the issue of lighting with the jury apparently in a conscientious effort to avoid using information which he had improperly gained. By the same token, however, other testimony concerning lighting was before the jury and defendant was entitled to have all of the jurors discuss that evidence. If the court had advised counsel promptly of the visit -- the court knew of it prior to argument -- counsel may have stated their argument differently. It is simply impossible to reconstruct what might have happened,

In light of our disposition we find it unnecessary to discuss other claimed errors.

Judgment is reversed.

Judge

I concur:

Judge

I dissent.

When the instant case was originally before this court, it concluded that the then existing authorities required the jury to be instructed as to sexual motivation. The matter has now been returned to us with an adjudication by the Court of Appeal that such instruction need not be given and that we should examine the numerous (two dozen) other issues raised by the defendant. We have complied with the directions of the Court of Appeal but find that

three errors -- a visit of a juror to the scene of the a[illegible] offense, the failure of the judge to tell the jury about the visit and the inquiry of the defendant by the prosecutor whether the defendant was a homosexual. Said majority holds that such errors justify reversal.

I disagree. Laws are enacted to protect society and to permit that society to grow and prosper under such laws. Compliance with such laws whether in the Constitution or statute is obligatory if our society is to be maintained. Doubtless with that thought in mind, there was embedded in the State Constitution (Art. VI, § 13) a principle that declared that despite error in the trial of a case, it should not be retried unless such errors have resulted in a miscarriage of justice. Were there not such a provision, the courts would be drowned in a flood of cases tried again and again for inconsequential errors. I respectfully submit that my learned colleagues are here ignoring the Constitution and contributing to the flood.

While the juror erred in visiting the scene, he did inform the trial judge. The latter thought so little of the incident that he did not communicate the matter to anyone else. That, too, was error. But this juror swears that he did not discuss his visit with his fellow jurors and would not have decided the case otherwise had he not gone to the scene. In addition, the judge finally did get around to advisement of the defense with reporter present. The judg[illegible] error, in view of the juror's declaration is de minimus. Hence, her[illegible] we have an obviously conscientious and sincere man who swears that h[illegible] he not garnered knowledge from the visit he would not have altered his vote. As every intendment favors the judgment I must believe what he swore to. The errors, therefore, are not of such substance a[illegible] to have caused a miscarriage of justice and thereby require a reversal. (Calif. Const. Art. VI, § 13.)

145 Cal.App 2d 39, 546, such a question
trial for alleged violation of sections 288 and 288 a of the Penal Code involving maltreatment of a young boy. The court held that even the charge was "sufficient to inflame the mind of the average person." Giani, supra, was decided in 1956; this is 1976, in which year homosexual parades and homosexual demands for greater rights are constant subjects for discussion in our newspapers and magazines. While the mention of homosexuality today may evoke other reactions such as disgust, pity, antagonism, etc., a 1976 jury could hardly be "inflamed." This defendant is charged with violation of Penal Code section 647, subdivision (a). The testimony of Officer Rose furnished ample evidence that defendant did commit the crime. Whether the defendant was a homosexual who had violated the law or a non-homosexual who had committed the crime may very well be considered irrelevant to a jury which found that a person who was sufficiently described as the defendant did do the act. I find it difficult to believe that the mention of the word homosexual so "inflamed" the jury as to cause it to cast aside all reason and disregard the facts and decide that the defendant was guilty because he denied that he was a homosexual. With respect, I contend that these miniscule errors (which make even a scintilla loom large) should not be enlarged to such proportions as to topple Article VI, section 13 of the California Constitution.

The remaining score of the defendant's issues are of even less significance or persuasiveness. Hence, I see no need to discuss them.

I would affirm.

Presiding Judge

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 15320 Trial Court No. M 127556

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ROGER PANGBORN JAMES,
Defendant and Appellant.

ON APPEAL
from the
MUNICIPAL COURT
of the
Los Angeles
Judicial District,
County of Los Angeles,
State of California.
M. G. Franciscus, Judge

FILED
OCT 27 1977
JOHN J. CORCORAN, County Clerk
BY E. WALLIN, DEPUTY

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed.

Over objection the prosecutor was allowed to introduce evidence that the arresting officer had gone to the scene of the offense to investigate homosexual activities occurring in and about the men's restroom. It was error to admit this testimony. The court overruled defendant's objection on the ground "that the issue of probable cause had to be presented in order to explain the officer's presence at the location." No issue of probable cause was in the case. The evidence did no more than to show defendant's disposition to commit the act charged. Evidence Code section 1101, subd. (a) and (b) preclude its admissibility.

The error was prejudicial. The case was a close one, turning on the credibility of the arresting officer vis-a-vis that of defendant. The prosecutor (who has not filed a brief in support of the judgment below) exploited the testimony in his argument to the jury: "Why did the defendant pick this particular restroom to go relieve himself when he could have picked any of these one, two, three and possibly four restrooms to go to relieve himself, and right there, right in the line of sight, why did he go there? Well, it's a place frequented by homosexuals. The defendant is not on trial for being a homosexual. You do not have to be a homosexual to commit the offense of 647(a) at all. He is not on trial for that. But, this area is an area that is frequented by homosexuals . . ."

We are aware that in response to a question by his own counsel defendant admitted on direct examination that he was a homosexual. This testimony, however, was given after the erroneous admission of the testimony described above. It is quite possible that, in light of the fact the trial court had allowed such testimony to come into evidence, the defense wanted to forestall further questioning on cross-examination. It is clear to us that the admission by defendant did not cure the error.

The judgment is reversed.

Cole
Presiding Judge

I concur:

Wasson
Judge

I dissent. In my opinion the admission cured the error. Appellant did not contend that his voluntary admission was in any way a response to the erroneously admitted testimony. I would affirm.

Wenke
Judge

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