Illinois Official Reports

Appellate Court

***People v. Johnson*, 2015 IL App (3d) 130610**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DANIEL L.G. JOHNSON, Defendant-Appellant.
District & No.	Third District Docket No. 3-13-0610
Filed	December 10, 2015
Decision Under Review	Appeal from the Circuit Court of Tazewell County, No. 11-CF-557; the Hon. Kevin R. Galley, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Maureen Williams (argued), of Peoria, for appellant. Stewart J. Umholtz, State's Attorney, of Pekin (Richard T. Leonard (argued), of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE LYTTON delivered the judgment of the court, with opinion. Justice Wright concurred in the judgment and opinion. Presiding Justice McDade dissented, with opinion.

OPINION

¶ 1 Defendant, Daniel L.G. Johnson, appeals from his convictions of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2010)) and resisting a peace officer resulting in injury (720 ILCS 5/31-1(a-7) (West 2010)). He argues that (1) the trial court erred in allowing a video of the incident to be played in the courtroom during deliberations, (2) the evidence was insufficient to support convictions for aggravated battery of a peace officer and resisting a peace officer resulting in injury, and (3) he was denied effective assistance of counsel. We affirm.

¶ 2 FACTS

¶ 3 At Defendant's trial, Michael Ward testified that he is a police officer with the Pekin police department. On October 8, 2011, Ward was dispatched to the parking lot of Goodfellas, a local bar in Pekin, Illinois. When he arrived, he found Defendant intoxicated and slurring his words, and he placed him under arrest. At Defendant's trial, Ward testified that Defendant was combative at the scene and would not comply with his instructions to enter the squad car. Eventually, Ward placed Defendant in the squad car and transported him to the Tazewell County Justice Center. Defendant threatened him and called him names during the drive to the center.

¶ 4 Upon arrival at the justice center, Ward asked Defendant to exit the squad car, but he refused to comply and had to be physically removed. Defendant was placed against the pat-down wall to be searched prior to entering the jail. Ward informed one of the correctional officers that Defendant had been Tasered at the bar and still might have probes on him from the Taser. "At that time [Defendant] was tensing his muscles a lot, he was just squirming around, wasn't staying still, wasn't listening to commands just to relax, just to stand there, let us do our jobs, get processed. He was always fidgeting [and] *** somewhat belligerent."

¶ 5 While several officers were restraining him and patting him down, Defendant "head-butted" Brad Catton, a correctional officer at the justice center. Ward testified that the sound was very loud, and he believed it was purposeful. After the head-butt, the officers restrained Defendant on the ground in an effort to control him. Ward attempted to cover Defendant's mouth because Defendant spit on him, and Defendant bit Ward's left hand. Ward was wearing gloves at the time. Ward punched Defendant in the back of the head with his right hand so that Defendant would stop biting him. Ward broke his right hand when he struck Defendant. Ward testified that there was no visible injury to his left hand but that it was sore and tender for a few days.

¶ 6 David Harper testified that he is employed as a correctional officer at the justice center. Harper assisted in processing Defendant. Harper testified that Catton found a barb or probe in Defendant's shirt from a Taser used at the local bar. Catton said the probe was not in Defendant's skin. Ward explained that when Catton pulled it out of Defendant's clothing, Defendant head-butted Catton. Catton testified that, "as soon as I yanked it out, I felt a strike to my left forehead area."

¶ 7 The State then moved to admit a surveillance video of the incident. The State's motion was granted and the video was played in the courtroom. The video was shown to the jury twice during the trial. It is consistent with the officers' testimony to the extent it shows Defendant

head-butt Catton while Defendant is up against the pat-down wall. Specifically, Defendant jerks his head in an extended motion to the right and strikes Catton with his head. The video does not show Defendant biting Ward's hand. Ward's back is facing the camera, blocking Ward's hand movements and Defendant's mouth. It also shows Ward punching Defendant one time with his right hand and then pulling his left hand away.

¶ 8 Defendant did not testify.

¶ 9 During deliberations, the jury sent a note to the trial judge, asking to see the video intake sheet and to view the video a third time. The judge noted that he had discretion to determine which exhibits would be allowed to go back to the jury during deliberations. He denied the request to see the intake sheet but decided to allow the jurors to watch the video in the courtroom. Before the jury viewed the video, the prosecutor asked if the attorneys and Defendant would be staying in the room with the jurors and the judge indicated they would, but it would be silent. Defense counsel asked the trial judge whether the reason the video was not being shown to the jurors in the jury room was because there was no capability for it to be viewed there. The judge responded that since there was no equipment in the jury room and that viewing the video in that room would be difficult. He explained that he was taking an incremental approach to the jury's request to view the video, stating:

> "It wasn't a request for any specific portion of the video, and if there is a follow-up question, we will address that in due course. I am not ruling out anything that you might suggest, but I would rather take an incremental approach and respond to additional specific requests from the jury then."

¶ 10 The judge then called the jury into the courtroom and played the video again. The judge, the parties and counsel were present in the courtroom while the jury watched the video. After a short recess, defense counsel filed a motion to allow the jury to take the video into the deliberation room, which the judge denied. The jury did not ask to see the video again.

¶ 11 The jury found Defendant guilty of aggravated battery against Officer Catton and aggravated battery and resisting a peace officer resulting in injury against Officer Ward. Following a sentencing hearing, the trial court sentenced Defendant to 48 months' probation for the aggravated battery charges and 30 months' probation for resisting a peace officer resulting in injury.

¶ 12 ANALYSIS

¶ 13 I

¶ 14 Defendant contends that the trial court abused its discretion in denying his motion to allow the jury to take the video into the deliberation room. First, he argues that the court erred in failing to perform a balancing test to determine probative value versus prejudicial effect. He also argues that manner in which the jury was allowed to review the video was presumptively prejudicial because the presence of the judge, attorneys and parties impaired the jury's ability to deliberate and thoroughly examine the evidence.

¶ 15 Initially, we emphasize that the trial court allowed the jury to view the video after the conclusion of the trial, *albeit* in the courtroom. This act demonstrates that the trial court properly determine that additional viewing of the video was probative and not unduly prejudicial. See *People v. Williams*, 97 Ill. 2d 252, 291-93 (1983). We also note the exercise of the court's discretion in denying the jury's request to see the intake sheet but granting its

request to view the video. Thus, the trial court was aware of the need to balance the probative and prejudicial values when determining whether to allow the jury to view the video again.

¶ 16 We are left with the narrow question of whether the manner in which the jury was allowed to view the video was sufficient or whether it caused prejudice to the extent that the judge should have granted Defendant's subsequent motion to allow the jury to take the video into the jury room for private viewing.

¶ 17 It is a basic principle of our justice system that jury deliberations shall remain private and secret. *Unites States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964). The primary purpose of this honored rule is to protect the jurors from improper influence. *United States v. Olano*, 507 U.S. 725, 737-38 (1993). Although the presence of a third party impinges on the privacy and secrecy of deliberations, reversal is not warranted if no harm resulted from the intrusion. *Id*. at 738.

¶ 18 In *Olano*, the United States Supreme Court considered the presence of alternate jurors in the jury room during deliberations under federal rules of criminal procedure. Two alternate jurors were permitted to retire with the jury and were present throughout deliberations. Because the defendants failed to object to the presence of the alternate jurors, the Supreme Court considered the matter under the federal plain error rule. The Court acknowledged that the presence of the alternates contravened the rule that deliberations should remain "private and secret" but held that it generally "analyzed outside intrusions upon the jury for prejudicial impact." *Id*. The Court noted that it would not presume prejudice or find that the error was " 'inherently prejudicial' " where the alternate jurors were instructed not to participate in the deliberations. *Id*. at 739-40 (quoting *United States v. Olano*, 934 F.2d 1425, 1439 (9th Cir. 1990)). The Court then concluded that the defendants failed to meet their burden of showing that the error resulted in prejudice. *Id*. at 741.

¶ 19 Illinois courts have adopted the same approach; we review outside jury intrusions for prejudicial impact. See *People v. Thorton*, 333 Ill. App. 3d 638, 651 (2002). Prejudice is not presumed from a third-person's interference with the jury. *People v. Epps*, 197 Ill. App. 3d 376, 380 (1990). The record must demonstrate that prejudice resulted or that there was an intent to influence the jury's decision. See *id*. (juror's communication to bailiff did not warrant mistrial where there was no evidence that it was intended to influence jury's decision); see also *People v. Frieberg*, 305 Ill. App. 3d 840, 848 (1999) (unauthorized communication during trial with juror who found "guilty" note did not prejudice defendant where evidence showed juror essentially forgot about the note); *People v. Cart*, 102 Ill. App. 3d 173, 187 (1981) (bailiff inquiry of juror as to outcome of case did not deny defendants their right to impartial jury absent showing by defendants that they were prejudiced by the inquiry); *People v. Veal*, 58 Ill. App. 3d 938, 969-71 (1978) (communications between judge and juror did not warrant reversal of verdict absent provable claim or proof of specific prejudice). A jury verdict will not be set aside because of a communication with a juror by court personnel or a third party unless it is apparent that prejudice resulted from the exchange. *Cart*, 102 Ill. App. 3d at 187.

¶ 20 Here, the record shows no prejudice. The jury viewed the video of the incident twice during trial. We will not presume that a third viewing of the video was prejudicial and the record of the courtroom viewing displays no intent to influence the jury's decision. The essence of the decision to allow the jury to view the video in the courtroom was based on the lack of video equipment readily available in the jury room. The parties were admonished that they would not be allowed to verbally communicate with the jury during the courtroom viewing, and neither

the prosecutor nor defense counsel attempted to do so. The parties discussed the procedure for operating the video equipment, the jury came into the courtroom, they watched the video and they retired to the jury room. The jury's continued deliberation, without requesting to view the video again, indicates that it thoroughly examined and considered the evidence to its satisfaction. Nothing in the record suggests that the judge, the prosecutor, or defense counsel affected the jury's ability to analyze the video evidence. Thus, Defendant has failed to demonstrate that the trial court's decision to allow the jury to view the video in the courtroom resulted in prejudice.

¶ 21 Defendant suggests that the video evidence was favorable to him and that he would have been acquitted if the jury had been allowed to review the video in the jury room. The video fails to support Defendant's claim. The video was admitted by the State as incriminating evidence of Defendant's guilt. It depicts Defendant struggling with the officers and then shows Defendant moving his head in an exaggerated motion to the right before striking Catton on the head in the opposite direction. Moreover, the testimony of the officers was consistent with the incident depicted in the video. In light of the officers' testimony and the video, we cannot assume that viewing the video again in the deliberation room would have resulted in a different verdict.

¶ 22 II

¶ 23 Defendant next challenges the sufficiency of the evidence supporting his convictions for aggravated battery against Officer Catton and Officer Ward and resisting a peace officer resulting in injury against Officer Ward. Specifically, Defendant claims that the State failed to prove that he knowingly caused bodily harm to Catton to support a conviction for aggravated battery. He also claims that evidence of aggravated battery and resisting arrest resulting in injury against Officer Ward was insufficient because proof that Defendant bit Ward came only from Ward's testimony.

¶ 24 When a defendant challenges the sufficiency of the evidence, this court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Brown*, 2013 IL 114196, ¶ 48. A reviewing court may set aside a criminal conviction only where the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Additionally, we will not retry a defendant when considering a challenge to the sufficiency of the evidence. *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 25 A person commits aggravated battery of a peace officer when, in committing a battery, he knows the individual battered to be an officer of the State of Illinois. 720 ILCS 5/12-3.05(d)(6) (West 2010). A person commits resisting a peace officer when he knowingly resists or obstructs the performance of a person he knows to be a peace officer and whose violation was the proximate cause of an injury to a peace officer. 720 ILCS 5/31-1(a) (West 2010). A person convicted of resisting a peace officer who causes an injury to the officer during the commission of the offense is guilty of a Class 4 felony. 720 ILCS 5/31-1(a-7) (West 2010). Whether a peace officer suffered an injury and whether that injury constitutes bodily harm is particularly a jury question. *People v. Terry*, 91 Ill. App. 3d 34, 36 (1980).

¶ 26 At trial, the testimony regarding the charge of aggravated battery against Officer Catton demonstrated that Defendant was not cooperative at the justice center and that the Taser probe

that Catton removed from Defendant was not lodged in Defendant's skin but inside his shirt. The testimony also indicated that Defendant's head made a loud sound when it struck Officer Catton's head and that Defendant's actions were purposeful. Moreover, the video shows Defendant leaning to the right and then swinging his head back to the left to strike Catton in the head. This evidence is sufficient for a rational trier of fact to find Defendant guilty of aggravated battery of a peace officer beyond a reasonable doubt.

¶ 27 Turning to the charges involving Officer Ward, Ward and Harper testified that Defendant bit Ward's hand. Both officers also testified that Ward struck the back of Defendant's head with his right hand so that Defendant would stop biting Ward's left hand. Although the video does not show Defendant biting Ward's hand, it does depict Ward striking the back of Defendant's head with his right hand and pulling his left hand away. While Defendant argues that Ward's testimony was insufficient to support a guilty verdict, the jury apparently believed the officer's testimony that Defendant bit him, and we will not reassess its credibility determination. See *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (weight to be given to a witness's testimony, credibility of the witness, resolution of inconsistencies, and any conflicts in evidence are issues for the trier of fact to determine). Despite Defendant's attacks on Ward's credibility, the evidence is sufficient to sustain his convictions for aggravated battery and resisting arrest resulting in injury of Officer Ward.

¶ 28 III

¶ 29 Defendant also claims that counsel was ineffective because he (1) failed to articulate a clear theory in the case, (2) failed to present a Taser probe and the left glove worn by Officer Ward, (3) failed to put Defendant on the stand, and (4) relied on the prosecutor to operate the video equipment during trial.

¶ 30 Ineffective assistance of counsel is shown only if the defendant can prove that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel errors, the result of the trial would have been different. *People v. Albanese*, 125 Ill. 2d 100, 106 (1988). A review of trial counsel's performance is made under the strong presumption that counsel's actions were the result of sound trial strategy and not incompetence. *People v. Burrows*, 148 Ill. 2d 196, 232-33 (1992). Mistakes in strategy or tactics alone do not amount to ineffective assistance. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 31 Here, the record demonstrates that trial counsel's strategy was to force the State to prove its case beyond a reasonable doubt. Counsel's strategy does not constitute ineffective assistance simply because it was unsuccessful. A misguided theory in the case, witness examination, and the presentation of certain evidence are generally matters of trial strategy and tactical decisions that do not amount to ineffectiveness of counsel. See *People v. Madej*, 177 Ill. 2d 116, 148 (1997), and *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997).

¶ 32 Moreover, the decision of whether to testify ultimately rests with the defendant. *Madej*, 177 Ill. 2d at 146. Defendant chose not to testify; he cannot use that decision to reverse his convictions based on claims of ineffective assistance.

¶ 33 Last, even if defense counsel was deficient in his failure to operate the video equipment at trial, Defendant has failed to demonstrate prejudice. During cross-examination, defense counsel used the surveillance video to question witnesses. He asked the prosecutor to start and stop the video, stating that he did not know how to operate the equipment. Defendant maintains

that it would have been helpful if counsel had working knowledge of the video equipment and was able to start and stop the video himself but fails to argue the prejudicial effect of counsel's deficiency. Thus, even assuming that counsel's inability to operate the video equipment fell below an objective standard of reasonableness, Defendant failed to satisfy the second prong of the *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 34 In this case, we do not see any reasonable probability that had Defendant testified or presented some other evidence, whatever it might be, the outcome of the proceedings would have been different. See *People v. Milton*, 354 Ill. App. 3d 283, 291 (2004).

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Tazewell County is affirmed.

¶ 37 Affirmed.

¶ 38 PRESIDING JUSTICE McDADE, dissenting.

¶ 39 The majority has affirmed the conviction of defendant, Daniel L.G. Johnson, finding, in arriving at that decision, that the irregularity of having the trial judge, the defendant, the prosecutor and defense counsel present during a portion of jury deliberations did not require a new trial for the defendant. Because I disagree with that finding, I respectfully dissent from it. Because I would find the jury issue to be dispositive of whether Johnson is entitled to a new trial, I would not reach the merits of defendant's conviction.

¶ 40 I am in general agreement with the majority's statement of facts. There are, however, two things that I would like to emphasize. The first is that the trial judge determined, in response to a request from the jury during its deliberations, that the jurors could not see the "intake sheet" but that they could see the video another time. This act demonstrates that the trial court actually determined that viewing the videotape a third time during deliberation was probative and not unduly prejudicial. *Peoria v. Williams*, 97 Ill. 2d 252, 291-93 (1983). The only reason that the video was not set up in the jury room is that it would be necessary to move in equipment and it was more convenient for the court to have it shown in the courtroom where equipment was already set up.

¶ 41 The second fact I would emphasize is one that was not included in the majority's statement of facts. After directing that the jurors should watch the video in the courtroom, the trial judge expressed the opinion that he had to be present because "it is a session in open court and I am presiding." This seems to me to be clearly wrong. It was not a session in open court; it was part of jury deliberation being held in the courtroom rather than the jury room for the convenience of the court. The other observers–the prosecutor, defense counsel and the defendant–were present at the court's invitation. The judge then called the jury into the courtroom and retained control of the video equipment as the jurors were allowed to see the video for the third time as they had requested.

¶ 42 As noted by the majority, we are faced with the extremely narrow question of whether the manner in which the jury was allowed to view the probative video was appropriate or whether it "chilled" the deliberative process to the extent that the judge should have granted defendant's subsequent motion to allow the jury to take the video into the jury room for private viewing.

¶ 43 For me, the holding of the United States Supreme Court in *United States v. Olano*, 507 U.S. 725 (1993), is, while perhaps not totally dispositive, highly persuasive. In *Olano*, the Court addressed the presence of alternate jurors in the jury room during deliberations under the Federal Rules of Criminal Procedure. Two alternate jurors were permitted to retire with the jury, but were cautioned not to participate in the discussions. However, they were present throughout the jury's deliberations. Because the defendants failed to object to the presence of the alternates, the Supreme Court considered the matter under the "plain error" rule set forth in Rule 52(b) of the Federal Rules of Criminal Procedure (Fed. R. Crim. P. 52(b)).

¶ 44 The Court's fundamental premise was that "the presence of alternate jurors does contravene ' "the cardinal principle that the deliberations of the jury shall remain private and secret." ' " *Olano*, 507 U.S. at 737 (quoting Advisory Committee's Notes on Fed. R. Crim. P. 23(b), quoting *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)). However, " '[i]f no harm resulted from this intrusion [of an alternate juror into the jury room,] reversal would be pointless.' " *Olano*, 507 U.S. at 738 (quoting *United States v. Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982)). The court explained that it generally has "analyzed outside intrusions upon the jury for prejudicial impact." *Olano*, 507 U.S. at 738.

¶ 45 The Court noted that in theory the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: (1) because the alternates actually participated in the deliberations, verbally or through " 'body language' " or (2) the alternates' presence exerted a " 'chilling' " effect on the regular jurors. *Olano*, 507 U.S. at 739. Ultimately, the Court concluded the defendant had not met his burden of showing the error resulted in prejudice. *Olano*, 507 U.S. at 741. The Court noted there was no showing that the alternates either participated in or " 'chilled' " the deliberations by the jurors. *Olano*, 507 U.S. at 739.

¶ 46 It is, I believe, also significant to the ultimate decision in *Olano* that in most salient respects an alternate juror is no different from the regular juror. Through the vetting procedure of *voir dire*, alternate jurors have been found neutral, unbiased, fair and acceptable to both parties as deliberating jurors in the event one of the seated jurors is no longer able to fulfill the duty to deliberate. Considering these facts in conjunction with the fact that the alternate jurors did not participate in the decision making, it is not at all surprising that the Supreme Court would not presume prejudice from the mere presence of the extra jurors. *Olano*, 507 U.S. at 739-40.

¶ 47 The majority has cited several cases for the purpose of showing that Illinois courts have adopted the same approach; reviewing outside jury intrusions for prejudicial impact. *People v. Thornton*, 333 Ill. App. 3d 638 (2002). It also cites *People v. Epps*, 197 Ill. App. 3d 376, 380 (1990); *People v. Frieberg*, 305 Ill. App. 3d 840, 848 (1999); *People v. Cart*, 102 Ill. App. 3d 173, 187 (1981); and *People v. Veal*, 58 Ill. App. 3d 938, 969-971 (1978), as illustrations of situations where the courts have declined to find or presume prejudice when faced with a claim of prejudicial jury intrusion. All of the cited cases involved contact or communication between a single juror and one or more court personnel. In each of the cases, the court declined to presume prejudice and found that the defendant had not met his burden of proving the improper contact had a prejudicial effect. I do not dispute the propriety of the findings in those cases, but I would argue that they are dramatically different factually and, unlike *Olano*, they are not particularly instructive in the instant case.

¶ 48 In *Olano*, the Supreme Court expressly recognized that "[t]here may be cases where an intrusion should be presumed prejudicial." In such cases, where prejudice is presumed, as

opposed to employing a specific analysis, the ultimate inquiry is the same: Did the intrusion affect the jury's deliberations and thereby its verdict? *Olano*, 507 U.S. at 739.

¶ 49 In the instant case, the viewing of the video in the presence of the judge, the parties and counsel clearly violates the " 'cardinal principle that the deliberations of the jury shall remain private and secret.' " *Olano*, 507 U.S. at 737 (quoting Advisory Committee's Notes on Fed R. Crim. P. 23(b), quoting *Virginia Erection Corp.*, 335 F.2d at 872). Employing the authority and reasoning set out in *Olano*, it is hard to imagine a more intrusive, more chilling presence in the deliberations than the opposing parties–the defendant with his attorney and the State in the person of the State's Attorney–and the trial judge. For the reasons that follow, I would find this violation amply, compellingly justifies a finding of presumed prejudice.

¶ 50 The presence of *Olano*'s neutral alternative jurors is significantly different from the presence of the judge, the parties and counsel. Neither the parties nor counsel are neutral entities. The parties have a substantial interest in the outcome of the litigation. The attorneys, who stand as advocates for the State and the defendant, also have a substantial interest. While the judge is a neutral entity, he is not the finder of fact and does not share the same standing as the jurors. In declining to presume prejudice, the *Olano* Court relied heavily on the fact that the two alternate jurors were indistinguishable from the twelve regular jurors. *Olano*, 507 U.S. at 740. The judge, the parties and counsel are obviously distinguishable from our jurors and from *Olano*'s alternate jurors.

¶ 51 Although we do not *absolutely* know, it would be unreasonable not to actually find, or at the very least to presume, that the presence of these entities did in fact operate as a restraint upon the jurors' freedom of expression and action.

¶ 52 Because of the lack of equipment in the jury room, the jurors were moved out of their personal space and into the extremely controlled environment of the courtroom. I would find it reasonable to presume that, upon adding the presence of the judge, whose avowed intent was to "preside," the parties and counsel to that controlled environment, the ability of the jurors to freely discuss the details of the video and its possible impact on their decision was inhibited or "chilled." Such an inhibition arises, in part, from a reasonable fear that any discussion of the video may result in criticism or judgment from the nonneutral parties and counsel.

¶ 53 Likewise, it is reasonable to presume that the jurors were inhibited from freely discussing the video due to the innately intimidating presence of the judge. In taking this position, I would emphasize that the judge, except for his determination to "preside" during the jury deliberations, did not engage in any type of intimidating behavior. Instead, his *personal* behavior appears to have been entirely appropriate. It is naïve, however, to assume that a normal citizen/juror is not somewhat nervous when attempting to carry out its fact-finding function in the presence of the judge in their deliberations. As reasonable as I believe these inferences to be, it should not be necessary to advance them because of the existence of the previously discussed "cardinal rule."

¶ 54 In light of the particular circumstances of this case, I would hold the viewing of the video in the presence of the judge, the parties and counsel exerted a "chilling" effect on the jury's deliberations and thereby its verdict. Thus, the judge's denial of defendant's subsequent motion to allow the jury to take the video into the deliberation room was an abuse of

discretion.[1] Because the jury deliberations in the instant case were "chilled," the judge's error cannot be harmless.

¶ 55 In coming to this conclusion, I reject the State's argument that the jury "must have been satisfied with viewing the video in the courtroom since there were no other requests regarding the video." Such an assertion is conclusory and based entirely upon speculation. One could just as easily conclude that the jury felt insecure submitting a second request. Perhaps the jury did not want to be deemed a nuisance. Perhaps the jury, upon its first request, actually assumed that it would be allowed to view the video in the jury room and thus when deprived of that opportunity, felt it would be futile to ask again. These possibilities are also speculative. The fact remains that the method employed by the judge was wholly improper and presumptively "chilled" deliberation.

¶ 56 I also reject the argument that even if the jurors were inhibited from discussing the video in the courtroom they could have simply watched it there and then subsequently discussed it upon returning to the jury room. The jury had already seen the video twice and apparently found those viewings insufficient for a decision. The request to see it a third time suggests that there was something specific they wanted or needed to review as part of their deliberation. However, significantly, the jurors did not have actual control of the video. The judge simply called them into the courtroom and played the video for them one time. Thus, the method employed by the judge deprived the jurors of the opportunity to pause the video or replay parts they might have wanted to view in greater detail. More importantly, it inhibited or "chilled" the jurors' freedom to actually discuss the video as it was being played.

¶ 57 For the foregoing reasons, I would reverse defendant's conviction and find that he is entitled to a new trial.

[1]Again, I emphasize that the judge's act of allowing the jury to view the video illustrates that he did in fact find that additional viewing of the video was probative and not unduly prejudicial.