70323-4

70323-4

NO. 70323-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

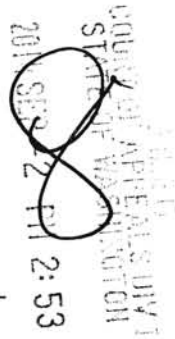
STATE OF WASHINGTON,

Respondent,

v.

FELIPE A. MAGNEY,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred. Although the trial court made a pre-trial ruling that custodial statements by the defendant were admissible, the statements were never elicited during trial. Was any error in the trial court's ruling harmless beyond a reasonable doubt?

2. CrR 3.5(c) requires a trial court to enter written findings of fact and conclusions of law after a hearing on the admissibility of a defendant's custodial statements. The trial court signed timely CrR 3.5 findings, but due to a clerical error the findings were originally filed only under a co-defendant's cause number. Where the error has since been corrected, is remand for the entry of findings unnecessary?

3. A trial court has a continuous obligation to investigate allegations that a juror is unfit to serve, and to excuse jurors who are found to be unfit. When the trial court discovered during the trial that a juror's brother worked part-time at the bar outside which the crime occurred, the court questioned the juror on the record. The juror indicated that he had no outside knowledge of the

incident, the parties, or the witnesses, and none of the parties requested that he be excused. Did the trial court properly exercise its discretion in allowing the juror to remain on the jury?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Felipe Magney, and his co-defendant, Julian Patton, with robbery in the first degree of Tracy Watters, drive-by shooting, robbery in the first degree of Carmeesha Moss, assault in the second degree of Officer Scott McQuilkin, and assault in the second degree of Officer Rex Miller, with firearm enhancements on the robbery and assault charges. CP 36-39; 5RP[1] 7, 87. The State also charged Magney with unlawful possession of a firearm in the first degree. CP 36-39.

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[1] The State adopts Magney's manner of referencing the 21 volumes of the report of proceedings: 1RP (November 17, 2011), 2RP (November 21, 2011), 3RP (November 22, 2011), 4RP (November 30, 2011), 5RP (December 6, 2011), 6RP (December 7, 2011), 7RP (December 8, 2011), 8RP (December 10, 2010*), 9RP (December 15, 2011), 10RP (December 19, 2011), 11RP (December 20, 2011), 12RP (January 9, 2012), 13RP (January 10, 2012), 14RP (January 11, 2012), 15RP (January 12, 2012), 16RP (January 17, 2012), 17RP (January 23, 2012), 18RP (January 24, 2012), 19RP (January 25, 2012), 20RP (March 2, 2012), and 21RP** (Supplemental Transcript, November 30, 2011).
*Although it occurs first chronologically, this volume is referred to as 8RP in conformity with the labeling in Magney's brief.
**The twenty-first volume was prepared after Magney filed his Brief of Appellant. Magney's counsel has provided a copy of the supplemental transcript to the State, and the official transcript will presumably be transmitted to the Court soon.

Magney and Patton were initially tried together. 1RP 2. However, during the presentation of Magney's case, the trial court granted Patton's motions for severance and a mistrial due to Magney raising a defense of duress by Patton. 14RP 87; 15RP 3. The trial court also later dismissed the charge against Magney that alleged a robbery of Carmeesha Moss. 17RP 40. The jury found Magney guilty of all the remaining charges and the corresponding firearm enhancements. CP 98-105.

Magney received a high-end standard range sentence of 171 months on the robbery charge, and low-end standard range sentences of 87 months on the drive-by shooting and unlawful possession of a firearm charges and 63 months on each of the assault charges, to run concurrently. CP 108-12. The trial court also imposed mandatory consecutive terms of 60 months for the robbery firearm enhancement and 36 months for each of the assault firearm enhancements, for a total sentence of 303 months. CP 109, 111. Magney timely appealed. CP 349.

2. SUBSTANTIVE FACTS.

Tracy Watters was celebrating her 18th birthday on an April night in 2010 when she went to Poppa's Pub in Kent, Washington

with her boyfriend, Samuel Corbett, and her friend, Carmeesha Moss. 6RP 38-44. Corbett drove the group in Watters' 1985 Monte Carlo, which Corbett had "trick[ed] . . . out" with seven televisions, a three-thousand-dollar sound system, and 24-inch rims. 6RP 36-41, 158-59. At Poppa's Pub, Watters and Moss waited in the car, which was idling in an alley, while Corbett got out to investigate the cover charge at the club. 6RP 49. As Watters sat in the front passenger seat, she noticed two men, later identified as Magney and Patton, walk past the car and stand directly behind it talking to each other. 6RP 52-54.

Soon thereafter, Patton approached and opened the driver's door. 6RP 57-58. Watters grabbed the keys out of the ignition as Patton opened the door, but dropped them at her feet when she saw Patton slide into the driver's seat and point a gun at her. 6RP 57-60. Patton said something along the lines of "bitch, give me the keys before I shoot you." 6RP 61. Watters frantically searched for the keys in the dark foot well while pleading with Patton not to kill her. 6RP 63.

Magney opened Watters' door and told her, "[G]et the fuck out of the car." 6RP 64. Watters fled, and Magney then moved the front seat forward and told Moss, who was in the back seat, "[G]et out of the car you stupid bitch." 6RP 64; 13RP 28. Watters and Moss ran screaming toward Poppa's Pub and alerted Corbett to what had occurred. 6RP 64; 15RP 53. As Corbett started to run toward the car, Magney took Patton's gun and fired multiple shots into the air. 6RP 69; 15RP 59-60.

Officers Rex Miller and Scott McQuilkin of the Kent Police Department were on bike patrol nearby and arrived quickly after hearing the shots. 5RP 24-25, 97. They dismounted in the street, drew their weapons, and observed the Monte Carlo begin to drive toward them. 5RP 25. The Monte Carlo then stopped and started to make a U-turn in the narrow street. 5RP 25-26. As Patton attempted to turn the car around, Magney fired several more shots. 5RP 26; 15RP 68. Based on the shape of the muzzle flashes in the darkness, Miller and McQuilkin could tell that the first shot was directed up into the air, but that subsequent shots were pointed directly at them. 5RP 26, 105.

Miller and McQuilkin returned fire, but Patton and Magney managed to complete the U-turn and fled the scene. 6RP 26-36, 107. Other officers quickly located the fleeing vehicle, and a chase occurred until the pursuing officers were able to perform a "pit" maneuver to spin the Monte Carlo to a stop. 7RP 87-88. Even though multiple officers had him at gunpoint, Magney refused to comply with commands to stop moving and face forward as he sat in the passenger seat. 9RP 76. At least one officer believed they would have to shoot him, but a failed attempt to taser Magney distracted him enough for officers to pull him from the car and handcuff him. RP 76-78. Patton was removed from the car without incident. 9RP 16.

Magney testified at trial and admitted to participating in the robbery, but claimed that he did so only because Patton demanded it and because he feared that Patton would have him or his family killed if he refused. 15RP 48-60. Magney also claimed that he had always fired the gun straight up into the air, and denied seeing Officers Miller and McQuilkin or shooting at anyone. 15RP 64-68.

Additional facts are presented below in the sections to which they pertain.

C. ARGUMENT

1. THIS COURT NEED NOT REVIEW THE TRIAL COURT'S RULING ON THE ADMISSIBILITY OF MAGNEY'S CUSTODIAL STATEMENTS, BECAUSE ANY ERROR WAS HARMLESS.

Magney contends that his conviction should be overturned because the trial court erred by admitting custodial statements obtained in violation of Magney's Miranda[2] rights. This claim should be rejected. The trial court did not actually admit any of Magney's statements—it merely made a pre-trial ruling as to their admissibility should they be offered. Because no statements by Magney were ever offered at trial, any error in the trial court's ruling was harmless beyond a reasonable doubt.

a. Relevant Facts.

Prior to trial, the trial court held a hearing pursuant to CrR 3.5 to determine the admissibility of statements Magney made to police officers in the hours following his arrest. 3RP 9-77. The trial court heard testimony about four categories of statements that Magney had made after being read Miranda warnings: statements during an initial interview before Magney asked for a lawyer;

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

spontaneous statements by Magney shortly after asking for a lawyer; statements in a second interview before again asking for a lawyer, to officers who did not know Magney had asked for a lawyer in the first interview; and statements by Magney in a third interview that occurred after Magney re-initiated contact with officers and told them he no longer wished to speak to a lawyer. 3RP 13-17, 21-24, 63-65.

The State indicated that it did not intend to elicit any of Magney's statements in its case-in-chief, and asked the trial court only for a ruling as to the voluntariness of the statements. 3RP 72. The trial court correctly found that Magney's statements were voluntary and could be used for impeachment purposes, but also found that all of the statements were admissible in the State's case-in-chief because Magney had been read fresh Miranda warnings and had waived his rights at the beginning of each interview. 3RP 77; CP 367.

At trial, the State presented no evidence in its case-in-chief regarding any statements by Magney. 9RP 30-62, 154-73; 10RP 6-23; 11RP 6-12 (testimony of all four officers present for any of Magney's statements). The only reference to any statements by Magney occurred during cross-examination, when Magney's

counsel elicited only the fact that Magney had voluntarily spoken to certain officers twice after being advised of his right to remain silent. 10RP 16-17; 11RP 9.

During Magney's testimony, he was prevented from testifying about what he had told officers by a timely hearsay objection by the State. 15RP 79. The State ended up not calling any rebuttal witnesses. 18RP 5-6. The jury thus heard no testimony from any source regarding the substance of Magney's statements. 9RP 30-62, 154-73; 10RP 6-23; 11RP 6-12; 15RP 19-122; 16RP 11-30.

b. Any Error In The Trial Court's CrR 3.5 Ruling Was Harmless Beyond A Reasonable Doubt Given That No Statements By Magney Were Actually Admitted At Trial.

Where statements obtained in violation of Miranda are admitted at trial, the error is constitutional. State v. Nysta, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that

any reasonable jury would have reached the same result had the error not occurred. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

Here, any error in the trial court's pre-trial ruling regarding the admissibility of Magney's statements had absolutely no effect on the outcome of the trial, because none of Magney's statements were actually admitted during the trial. 9RP 30-62, 154-73; 10RP 6-23; 11RP 6-12; 15RP 19-122; 16RP 11-30. The jury heard exactly the same evidence that it would have heard had the trial court ruled that none of Magney's statements were admissible for any purpose. It is therefore irrelevant whether the trial court's ruling was error or not; even if it was, the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724.

2. THE TRIAL COURT PROPERLY ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE CrR 3.5 HEARING.

Magney contends that the trial court failed to enter written findings of fact and conclusions of law regarding the CrR 3.5 hearing, and that remand for entry of findings is required. This claim should be rejected. Because the trial court did in fact enter

written findings of fact and conclusions of law in a timely manner, remand is unnecessary.

a. Relevant Facts.

A joint CrR 3.5 hearing regarding statements by co-defendants Magney and Patton occurred on November 22, 2011. 3RP 1. On March 5, 2012, three days after sentencing, the trial court signed written Findings of Fact and Conclusions of Law regarding the hearing. CP 362-68. The findings were filed that same day under Patton's cause number; however, due to a clerical error they were not filed under Magney's cause number. CP 362-63. When the error was discovered after the State received the Brief of Appellant, the trial prosecutor located the findings in the electronic court records under Patton's cause number and filed a copy under Magney's cause number with a declaration explaining what had occurred. CP 362-63.

b. Remand Is Unnecessary Due To The Existence Of Written Findings.

CrR 3.5 requires a trial court to enter written findings and conclusions after the hearing. CrR 3.5(c). That procedure was

complied with in this case. CP 364-68. The only error was a clerical one, resulting in the findings initially being filed only under Patton's cause number. CP 363. That clerical error has now been corrected, and remand is therefore unnecessary. CP 363.

3. THE TRIAL COURT PROPERLY INVESTIGATED THE POSSIBILITY THAT JUROR 8 WAS UNFIT TO SERVE AND PROPERLY EXERCISED ITS DISCRETION IN ALLOWING HIM TO REMAIN ON THE JURY.

Magney contends that the trial court deprived him of a fair trial by not investigating whether a juror whose brother sometimes worked as a security guard at Poppa's Pub was fit to serve on the jury, and by not excusing that juror. These claims should be rejected. The trial court questioned the juror in open court and determined that the juror had no outside knowledge of the events at issue; furthermore, neither party requested that the juror be excused. The trial court thus properly exercised its discretion in allowing the juror to continue serving on the jury.

a. Relevant Facts.

Following opening statements, the trial court notified the parties that Juror 8 had just informed the bailiff that his brother may

have worked as a security guard at Poppa's Pub around the time of the incident. 4RP 7; CP 382. The juror had already indicated during voir dire that he did not know any of the parties or potential witnesses in the case, including several security guards who had been working at Poppa's Pub on the evening of the crime. 4RP 7.

The trial court then brought Juror 8 into the open courtroom, on the record and in the presence of the parties, and the following colloquy occurred:

> Court: You are Mr. Secord?
> Juror: Yes, ma'am.
> Court: Hi. Dave just told me that your brother has worked security at Poppa's Pub.
> Juror: Yes, ma'am.
> Court: And I wonder if you could just tell whether -- whether you've spoken to your brother about anything that might relate to issues involved in this case?
> Juror: I honestly don't remember any incidents that he has told me about where this may have been -- I don't remember this ever coming up.
> Court: Okay. Do you remember whether he was working there in April of this past year -- of this year?
> Juror: Of this year?
> Magney's counsel: Last year.
> Court: 2010 -- of 2010?
> Juror: I believe he was.
> Court: MmmHmm.
> Juror: I don't remember his schedule or if he was working that night. He was only a part time.
> Court: Okay. Okay. But you don't have any outside information about this case I understand?
> Juror: No, ma'am. None at all.

Court: Okay. And can we count on you not to discuss this incident with your brother?
Juror: Absolutely.
Court: Alright. Thank you very much Mr. Secord.
Juror: Thank you.

21RP 2-4. Juror 8 then returned to the jury room. 4RP 7; 21RP 4.

Immediately thereafter, Magney's counsel stated, "At this point I don't have any reason to question that. But it does raise concerns." 4RP 7. Counsel did not elaborate, and did not suggest that the juror was biased or ask the court to excuse him. 4RP 7. Patton's counsel similarly did not ask for the juror to be excused, but indicated that she was reserving on the issue. 4RP 8.

The trial court stated that if either defense counsel thought of any concerns over the weekend or any other questions he or she wanted to ask the juror, he or she should let the court know immediately when the trial resumed the following week.[3] 4RP 7-8. Defense counsel both acknowledged that instruction. 4RP 8.

When trial resumed the following week, the court addressed an issue that had arisen regarding another juror's request to be excused for mental health reasons. 5RP 3-5. After that issue was resolved, the trial court asked the parties if they were ready to

[3] This conversation occurred at the end of the day on Wednesday, November 30, 2011, immediately before the trial recessed until Tuesday, December 6, 2011.

proceed with testimony. 5RP 5. Neither Magney's nor Patton's counsel raised any concerns regarding the fitness of Juror 8, and the State proceeded to call its first witness. 5RP 5-7. At no point during the remainder of the trial did anyone raise any concerns about Juror 8 or ask that he be removed from the jury.

b. This Court Should Not Review Magney's Claim For The First Time On Appeal.

In order to raise a claim of error for the first time on appeal, a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. Not every alleged constitutional error is manifest. State v. Lynn, 67 Wn. App. 339, 343-44, 835 P.2d 251 (1992) ("[I]t is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.").

A manifest error is "an error that is 'unmistakable, evident or indisputable,'" and that has "practical and identifiable consequences in the trial of the case." State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)). The mere

possibility of prejudice is insufficient—the defendant must show that the alleged error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Even where a constitutional error is manifest, it can still be waived by deliberately not litigating the issue during trial. State v. Hayes, 165 Wn. App. 507, 515, 265 P.3d 982 (2011).

Magney challenges the trial court's failure to investigate or excuse Juror 8 for the first time on appeal, but does not allege that the trial court's level of investigation or its failure to excuse Juror 8 had identifiable consequences in Magney's trial. Instead, he simply alleges that the possibility of bias existed and was not investigated. Brief of Appellant at 16. However, the record affirmatively shows that the trial court did investigate the issue, and determined that Juror 8 had no outside knowledge of the case, the parties, or any of the witnesses.[4] 4RP 7; 21RP 3-4. Magney has thus failed to establish that a manifest constitutional error occurred.

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[4] Magney's argument appears to be based on a misreading of the trial court record. In the report of proceedings originally filed in this appeal, the trial court's questioning of Juror 8 was treated as individual voir dire and was not transcribed. 4RP 7. That appears to be the source of Magney's incongruous assertions that the trial court did not investigate whether Juror 8 was biased and that the court questioned him off the record. Brief of Appellant at 15-16. The trial court's questioning of Juror 8 has since been transcribed, and confirms that Juror 8 was questioned on the record in open court to determine whether he was biased. 21RP 2-4.

Even if the extent of the trial court's investigation or its failure to remove the juror had constituted a manifest constitutional error, Magney waived the issue by deliberately not litigating it during the trial. After Juror 8 was questioned and indicated that he had no outside information about the case, Magney's counsel indicated that he still had concerns, despite acknowledging that he had no reason to doubt the truthfulness of the juror's answers. 4RP 7. The trial court explicitly invited the parties to think about the issue over the weekend and to propose additional questions or raise concerns about the juror's fitness to serve at the beginning of the next trial day. 4RP 7-8.

By not taking the court up on that invitation when the trial resumed, Magney appears to have made a deliberate choice not to litigate Juror 8's fitness to serve. See Hayes, 165 Wn. App. at 519-20. He therefore waived any claim that the questioning was inadequate or that Juror 8 was unfit to serve on the jury, and may not now raise such a claim on appeal. Id. at 517-20.

Even if this Court were to reach the substance of Magney's claim for the first time on appeal, it fails for the reasons stated below.

c. The Trial Court Fulfilled Its Duty To Investigate Juror 8's Fitness To Serve And Properly Exercised Its Discretion In Allowing Him To Continue Serving.

Under the federal and state constitutions, both the accused and the State have the right to an impartial jury. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005); State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). RCW 2.36.110 states:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

This statute and CrR 6.5[5] "place a continuous obligation on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit." Elmore, 155 Wn.2d at 773.

[5] CrR. 6.5 states, in relevant part, "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury."

A trial court's decision about whether to excuse a juror for unfitness to serve is reviewed for abuse of discretion. State v. Depaz, 165 Wn.2d 842, 855, 204 P.3d 217 (2009). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

Here, the trial court properly investigated the possibility that Juror 8's connection to a security guard at Poppa's Pub might make him unfit to serve. 21RP 2-4. The trial court questioned the juror on the record, in open court, with all the parties present, and determined that the juror had no outside information or bias that would render him unfit to serve. 4RP 7; 21RP 2-4.

Despite the trial court's invitation to propose additional questions or raise any concerns after thinking about the issue over the weekend, none of the parties ever asked the court to investigate further or to excuse the juror. In the absence of any request to excuse Juror 8, or any valid basis to grant such a request had one been made, the trial court properly exercised its discretion in allowing Juror 8 to continue serving on the jury.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Magney's convictions.

DATED this 2nd day of September, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marti McCaleb and Christopher Gibson, the attorneys for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the BRIEF OF RESPONDENT, in State v. Felipe A. Magney, Cause No. 70323-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this ____day of August, 2014.

_____
Name
Done in Seattle, Washington