SUPREME COURT NO. 91783-3
COURT OF APPEALS NO. 70323-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

FELIPE A. MAGNEY,
Appellant.

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

PETITION FOR REVIEW

FELIPE A. MAGNEY, #786812
APPELLANT, PRO SE
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A. IDENTITY OF PETITIONER

Felipe A. Magney, Appellant, pro se, asks this Court to accept review of the decision designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision made by the Court of Appeals, Division I, which affirmed the Judgment and Sentence imposed by the Superior Court of Washington, King County, Cause No. 10-1-02994-6-KNT. A copy of the decision is in the Appendix at A-1.

C. ISSUES PRESENTED FOR REVIEW

The trial court erred by allowing a juror to continue serving after disclosing his brother worked as a security guard at the crime scene during the time of the alleged incident.

D. STATEMENT OF THE CASE

1. Procedural Facts

The State charged appellant Felipe Magney with two counts of first degree robbery, two counts of second degree assault, drive-by shooting, and first degree unlawful possession of a firearm. CP 36-39. After the court dismissed one count of robbery, a jury convicted Magney of all remaining charges. CP 108. Magney received a 303-month sentence, including 132 months in firearm enhancements. CP 109. Magney appealed. CP 349. The Court of Appeals, Division I, affirmed the judgment and sentence. Appendix A-1.

2. Substantive Facts

On the evening of April 24, 2010, Magney and his wife Alyssa had a heated verbal argument. 15RP 22. Not wanting their children to witness the argument, Magney decided to leave the house until both he and his wife calmed down. 15RP 23. Magney had recently been released from Clallam Bay Correctional Center,

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where he had successfully completed numerous life skills classes which all revolved around his extrication from gang involvement. 15RP 29-31. Sadly, because of his time incarcerated, Magney did not know many people in his community, and only one person that he knew answered his call for help that night. 15RP 24. This was Julian Patton, whom Magney had met at Clallam Bay Correctional Center. 15RP 24. In prison, Patton had been an enforcer for the Hoover Crips, but had always been supportive of Magney's decision to leave gang life. 15RP 34-35. Even though Patton was still an active gang member, because he had always shown so much support for Magney, Magney asked Patton if he could pick him up to get him out of the house for awhile. 15RP 36-37.

Patton, his friend Keenan "Fatty" Stell, and an unidentified woman picked Magney up at his home. 15RP 37-38. After dropping the woman off, the three men drove to Federal Way to meet Patton's girlfriend, Amber Clifton, at her home. 15RP 39. After about an hour, Patton decided that they should go to The Palace, a nearby Asian restaurant and bar. 15RP 39-40. Because no one had much money, the group did not stay long and then Patton had the idea to go to Poppa's Pub. 15RP 40.

Magney decided that the dispute with his wife Alyssa had blown over enough for him to go home and talk things over, so he asked patton to take him home instead of to Poppa's Pub. 15RP 40. Patton, who worked as a bouncer at Poppa's, refused Magney's request. 15RP 40-41. While Patton was hoping that his friends and co-workers would let him into the bar for free, he also stated that he could help Magney get a job. 15RP 41.

When they arrived at Poppa's, the bar was very busy and security denied them entry. 15RP 42. As they walked away, Clifton was unhappy; she and Patton

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were arguing, so Magney fell back to give them some privacy. 15RP 44. Patton saw several acquaintances drive by in a distinctive car -- a dark burgundy Buick Regal with large tires and hydraulic lifts. 15RP 46. He told Magney to follow him to talk to the cars occupants. 15RP 45. Stell and Clifton had already walked back to their car, and Magney again asked Patton to take him home. 15RP 45-46. While trying to convince Patton that he really wanted to be taken home, Magney followed Patton to rear alley parking area behind the bar, where a blue Monte Carlo was parked. 15RP 46. Magney wondered if his eyes were playing tricks on him because the both did and did not look like the car he had originally seen drive past. 15RP 46.

Because he had no interest in talking with any of Patton's friends, Magney lagged behind and spoke on his cell phone to give Patton extra space, essentially just killing time until he could get a ride home. 15RP 47. As they neared the car, Magney again told Patton to take him home. 15RP 48. Patton told Magney to "chill out." 15RP 48. Magney then saw Patton draw a gun, open the door of the car and order the driver out of the car. 15RP 48-49. After the driver got out of the car, Patton looked at Magney and said "get your bitch ass in the car. You know what it is." 15RP 50. Magney, confronted with an armed gang enforcer who knew where he and his family lived, and knowing Patton's reputation for violent retribution in the Hoover Crips, had no choice but to follow Patton's orders. 15RP 65-66. He opened the passenger door and told a second woman who had been sitting in the rear passenger seat, to get out before Patton shot her. 15RP 51-52. Still fearing that Patton would shoot him as well, Magney got into the vehicle. 15RP 55.

As Patton started the car, the two women ran toward the front of the club. 15RP 53. Patton ordered Magney to take the gun and start shooting.

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15RP 58-59. Not wanting to harm anyone, and unable to safely exit the moving vehicle being driven by Patton, Magney rolled down the car window and fired several shots straight up into the air. 15RP 60. As Patton pulled the car into the street, Magney again fired a couple of shots straight up into the air. 15RP 67.

Kent police officers Miller and McQuilkin, both working bicycle patrol, were in the parking lot across from Poppa's addressing parking congestion in the area. 5RP 16-23. They heard the gunshots and ran towards the scene. 5RP 24. Both officers testified that the muzzle flashes they saw coming from the car were directed up in the air. 5RP 26, 105. They began firing at the vehicle and continued firing until the car was well out of range. 5RP 107.

Several other police units pursued the car. 9RP 15. The chase lasted approximately half a mile. 9RP 16. Inside of the vehicle, Magney again asked Patton to just let him out, and Patton again threatened him, stating that he would "smoke" Magney if he got out of the car. 15RP 71. Ultimately, police ended the pursuit by forcing the car into a guardrail. 15RP 73. Police pulled Patton out of the driver's seat and placed him under arrest. 15RP 74. Magney, seated in the passenger seat, had head injuries from hitting the window during the crash. 15RP 73. He looked back at the officers and saw a machine gun pointed at him. 15RP 75. Disoriented and in shock, Magney kept nodding at the officers giving him instructions. 15RP 75-76. They tazered him in the chest and pulled him from the vehicle. 15RP 76. As an officer slammed Magney face down onto the concrete into a pile of broken glass, he put his hands underneath him to brace his fall, and officers began punching and kneeing him. 15RP 76.

After being transported to Valley Medical Center for treatment, Magney

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was transported to the Kent jail, where he was booked and subsequently charged.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT ERRED BY ALLOWING A JUROR TO SERVE AFTER HE REVEALED THAT HIS BROTHER WORKED AS A BOUNCER AT POPPA'S PUB.

Review should be accepted under RAP 13.4(b) (1), (2), (3), and (4). The holdings in this case are in conflict with reported decisions of this and other Courts. The issues are Constitutional and of substantial public importance.

The State and Federal Constitutions guarantee criminal defendants the right to an impartial jury. U.S. Const, amend. VI; Wash. Const, art. I, section 22; State v. Davis, 141 Wn.2d 798, 824-825, 10 P.3d 977 (2000). Washington statute and court rules further enshrine this right. 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 practice incompatible with proper and efficient jury service.

RCW 2.36.110.

The statute "provides the grounds for which the court may dismiss a juror," while the court rule establishes procedures governing the replacement of excused jurors. State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). Specifically, CrR 6.5 provides that "[i]f 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."

After jury selection was completed, one juror, now identified as number 8, indicated to the bailiff that his brother worked as a security guard at

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Poppa's Pub, where many of the events discussed at trial occurred, at the approximate time the events occurred. 4RP 6-7. The court questioned the juror off the record. 4RP 7. After questioning, defense counsel for both Magney and Patton expressed concerns about the juror's familiarity with the case and the court reserved on the issue for consideration the next day. 4RP 7-8. The court never returned to address this potential conflict.

While the juror's connection might not have automatically disqualified him from service, the court failed in its responsibility to question the juror's fitness to serve fairly and impartially. Counsel's expression of concern and the reservation on the issue is sufficient to preserve this error for review. However, the court's failure to examine the juror's late disclosure and reconsider his fitness to serve, given the potential bias, is also a manifest constitutional error that may be addressed for the first time on appeal. State v. Cho, Wash.App. 315, 330, 30 P.3d 496 (2001).

Together, the Constitution, court rules, and state statutes place a "continuous obligation" on the court to investigate and excuse juror's who are unfit to serve. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). "The question for the judge is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." Hough v. Stockbridge, 152 Wn.App 328, 341, 216 P.3d 1077 (2009). The court made no such finding.

The presence of a juror with personal knowledge of security issue's at Poppa's Pub became even more problematic during the trial, given that evidence was presented that Magney's co-defendant, Julian Patton also worked as a bouncer at Poppa's. The very high probability of a direct connection between a co-defendant and a juror was never investigated, and that

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constitutes a manifest injustice affecting Magney's Constitutional right to trial by a fair, impartial jury.

Statute provides that a prospective juror must be excused for either actual or implied bias. RCW 4.44.170. One way in which a prospective juror can be impliedly biased is if he or she has "an interest...in the event of the action, or the principal question involved therein." RCW 4.44.180. The fact pattern in this current instance is one that suggest a strong probability that juror number 8 did not have enough degree's of separation from Magney's co-defendant Julian Patton, and certainly not enough from the establishment where the bulk of the crimes were committed.

In State v. Cho, a juror in a criminal trial failed to timely disclose that he was a retired police officer. Given the strong possibility of bias, the defendant requested a new trial. Cho, at 318 and 329. The Court of Appeals noted that such remedy was not unprecedented and indicated a willingness to grant the request. Cho, at 329 (citing U.S. v. Scott, 854 F.2d 697, 699 (5th Cir. 1988)). Because the parties had not briefed the issue of implied bias, the Court of Appeals first remanded for an evidentiary hearing and entry of further findings. Cho, at 329.

Here, Magney's right to an impartial, unbiased jury is in direct conflict with the presence of a juror with direct family ties to the co-defendant who placed Magney under duress and forced him to participate in the crimes.

F. CONCLUSION

For these reasons stated, this Court should reverse Magney's convictions.

DATED this 25th day of June, 2015.

Respectfully submitted,

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APPENDIX A-1

Decision

Court of Appeals Division I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 70323-4-I
Respondent,	)	DIVISION ONE
v.	)	
FELIPE A. MAGNEY,	)	UNPUBLISHED
Appellant.	)	FILED: March 9, 2015

Cox, J. – Felipe Magney appeals his convictions for robbery in the first degree and other crimes. He first argues that court erred by ruling that his custodial statements to police officers were admissible in violation of Miranda v. Arizona.[1] He next argues that the court's failure to enter written CrR 3.5 findings of fact and conclusions of law requires a remand. Lastly, he claims that the court abused its discretion when it allowed a juror to serve after he disclosed his brother was a security guard at a certain bar.

Because Magney's custodial statements were not admitted at trial, any error in the pretrial ruling to admit them was harmless beyond a reasonable doubt. The trial court's CrR 3.5 findings and conclusions have now been entered, and there is no claim of tailoring or other prejudice. And the court did not abuse its discretion in allowing the juror to serve. We affirm.

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[1] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State charged Magney and a co-defendant with multiple felonies, including multiple counts of robbery and one count of drive-by-shooting. The charges stemmed from an incident outside of a bar, where Magney and his co-defendant allegedly stole a car at gunpoint.

After Magney was arrested, he spoke to police officers on several occasions. Police read him his Miranda rights each time, and he twice invoked his rights.

Before trial, the court held a CrR 3.5 hearing to determine if statements made by Magney and his co-defendant would be admissible. Although the court ruled the statements would be admissible at trial, in fact, the State decided not to introduce them into evidence at trial.

Shortly after the jury was empaneled, one juror informed the bailiff that his brother worked as a security guard at the bar where some of the events took place. The bailiff then disclosed this in open court. The court questioned this juror on the record. But, in the absence of any further questions from any party, the court permitted the juror to remain on the panel.

During trial, the court dismissed one count of robbery against Magney. The jury convicted Magney of all remaining counts.

Magney appeals.

STATEMENTS TO OFFICERS

Magney argues that the court erred by ruling pretrial that some of his custodial statements to police officers were admissible in violation of Miranda.

Because these statements were never actually admitted at trial, any error in the court's pretrial ruling was harmless beyond a reasonable doubt.

When a trial court admits statements in violation of Miranda, it is a constitutional error.[2] "'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 in the absence of the error.'"[3]

Here, the challenged statements were never offered by the State or admitted into evidence. Thus, any error in the court's pretrial ruling admitting these statements was harmless beyond a reasonable doubt.

In his brief, Magney states that the court admitted these statements. But he provides no citation to the record. Moreover, Magney did not file a reply brief to contest the State's assertion in its brief that the statements were never admitted. Finally, our independent review of the record shows that the statements were never actually admitted. Thus, Magney's arguments are unpersuasive.

CR 3.5 FINDINGS AND CONCLUSIONS

Magney argues that this court should remand his case because the trial court failed to enter findings of fact and conclusions of law following the CR 3.5 hearing. Because these have been entered and there is no claim of tailoring or other prejudice, we disagree.

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[2] See In re Pers. Restraint of Cross, 180 Wn.2d 664, 688, 327 P.3d 660 (2014).

[3] State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014) (quoting State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)).

CrR 3.5 requires the trial court to enter written findings of fact and conclusions of law following a hearing. But a trial court may enter its findings while an appeal is pending.[4] That happened here.

When the trial court enters its findings and conclusions after the appellant's brief is filed, this court will reverse only if the appellant shows prejudice from the delay or "that the findings and conclusions were tailored to meet the issues presented in his brief."[5] There is no claim of tailoring or other prejudice here. Accordingly, we reject this argument.

INVESTIGATION OF JUROR BIAS

Magney argues that the court erred by failing to investigate a juror's fitness to serve. Magney concedes that the juror was not disqualified from service. But he argues that the court failed to adequately investigate whether the juror was biased. We disagree.

Under RCW 2.36.110, the court must dismiss unfit jurors. This statute creates a "continuous obligation" of the court to investigate whether a juror is unfit.[6]

On appeal, we "grant[] broad discretion to the trial judge in conducting an investigation of jury problems."[7]

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[4] State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004).

[5] Id.

[6] State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005).

[7] Id.

Here, the court did not abuse its discretion when it allowed the juror to continue to serve. The court questioned the juror on the record. The court asked the juror if he had "spoken to [his] brother about anything that might relate to issues involved in this case." The juror said that he had not. The court then asked the juror about his brother's employment at the bar and confirmed that the juror had no outside knowledge of the case. Finally, the court asked the juror if he would follow the instruction not to discuss the case with his brother. The juror answered that he would.

After questioning the juror, the court told counsel to consider the situation over the weekend and raise any concerns when trial resumed. The court also told counsel to let it know if they wanted the court to ask the juror any additional questions. When trial resumed, counsel did not either raise any concerns about the juror or request that the court ask the juror any additional questions. The court did not abuse its discretion by permitting the juror to remain on the case after following these procedures.

Magney argues that his case must be reversed under State v. Cho.[8] But that case is not analogous to Magney's case.

In Cho, a juror did not disclose that he was a former police officer.[9] The record in that case "raise[d] a troubling inference of deliberate concealment."[10]

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[8] 108 Wn. App. 315, 30 P.3d 496 (2001).

[9] Id. at 319.

[10] Id. at 327.

This court remanded that case for the trial court to make findings on whether the juror was impliedly biased.[11]

Magney's case does not raise any inference that the juror was biased or deliberately concealed any facts. In fact, it was the juror who informed the bailiff that his brother worked at the bar. And the court examined the juror about potential bias and appears to have concluded that the juror would be unbiased in deciding the case. There was no abuse in this discretionary determination. Accordingly, Cho is distinguishable from the present case.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Appelwick, J.

Becker, J.

[11] Id. at 328-29.