73297-8

NO. 73297-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRANK BORDERS,

Appellant.

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

The Honorable William Downing, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The selection of juror 31 to serve on the appellant's jury violated his right to trial by an impartial jury under the Sixth and Fourteenth Amendments and article 1, section 22 of the Washington Constitution.

Issue Pertaining to Assignment of Error

Did the inclusion of a biased individual on the appellant's jury deny him his constitutional right to a fair and impartial jury?

B. STATEMENT OF THE CASE[1]

The State charged Frank Borders with second degree rape of S.C. and J.P. for separate incidents occurring in 2007. CP 1-5. Borders's first trial ended with jury deadlock, and the court declared a mistrial. CP 390. Following a second trial, the jury convicted him as charged. CP 6. The court sentenced Borders to life in prison without the possibility of parole as a persistent offender under "two strikes" and "three strikes" provisions. CP 6-16; former RCW 9.94A.030(33) (2006); RCW 9.94A.570.

Borders appealed. CP 20. He argued that the trial court erred in admitting evidence of prior misconduct under RCW 10.58.090 because

[1] This brief refers to the verbatim reports as follows: 1RP – 12/3 and 12/8/14; 2RP – 12/9/14; 3RP – 12/15 and 12/17/14; 4RP – 1/14/15; 5RP – 1/15/15; 6RP – 1/20/15; 7RP – 1/21/15; 8RP – 1/22/15; and 9RP – 1/26, 1/27, 2/27, and 3/20/15.

that statute was unconstitutional. He also argued that, given the complainants' credibility issues at trial, the error was not harmless.

Following State v. Gresham,[2] this Court agreed, reversed Borders's convictions, and remanded for a new trial. CP 20-25.

Borders was tried again in January of 2015. The jury was unable to agree as to count 2 (relating to J.P.), and a mistrial was declared as to that count. 9RP 631-35. But the jury convicted Borders of count 1, relating to S.C., and the court again sentenced him to life without the possibility of parole, this time under the two strikes provision of the Sentencing Reform Act. CP 559-60.

Borders timely appeals. CP 568-70.[3]

C. ARGUMENT

WHERE THE COURT SEATED A BIASED JUROR, BORDERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

The trial court denied Borders his state and federal constitutional rights to a fair and impartial jury by permitting juror 31, who expressed bias inhibiting her ability to fairly try the case, to serve on his jury. Reversal is therefore required.

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[2] 173 Wn.2d 405, 269 P.3d 207 (2012).

[3] The facts relating to Borders's claim on appeal are set forth within the argument section.

1. Introduction to applicable law

The federal and state constitutions guarantee every accused person the right to a fair and impartial jury. Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); State v. Gonzales, 111 Wn. App. 276, 277, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). To protect these rights, a potential juror will be excused for cause if his or her views would "'prevent or substantially impair the performance of [his or her] duties as a juror in accordance with [the] instructions and [the juror's] oath.'" Id. at 277-78 (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)).

Under RAP 2.5(a)(3), a party may raise, for the first time on appeal, a "manifest error affecting a constitutional right." An accused has the federal and state constitutional right to a fair and impartial jury. The error alleged here, seating a biased juror, violates those rights. State v. Irby, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015) (citing In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)).

Moreover, a trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant. Irby, 187 Wn. App. at 193 (citing State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43

(2012), cert. denied, 134 S. Ct. 62 (2013); Hughes v. United States, 258 F.3d 453, 464 (6th Cir.2001)).

By statute, "actual bias" warranting a juror's dismissal is defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging[.]" RCW 4.44.170(2). Although the statute refers to the "challenged person" and "the party challenging," removal does not turn on whether a party has exercised a challenge:

> CrR 6.4(c)(1) states that "[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case." *This rule makes clear that a trial judge may excuse a potential juror where grounds for a challenge for cause exist, notwithstanding the fact that neither party to the case exercised such a challenge. In fact, the judge is obligated to do so. . . .*

Davis, 175 Wn.2d at 316 (emphasis added).

Whether the trial court should have removed a juror for cause is reviewed for abuse of discretion. State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001). And where a juror should have been dismissed for cause, but ultimately decides the guilt of the accused, reversal is required. Gonzales, 111 Wn. App. at 282; see also United States v. Martinez-

Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (seating a juror who should have been dismissed for cause requires reversal); Fire, 145 Wn.2d at 158 (same).

2. The record shows that juror 31 expressed actual bias and was never rehabilitated, and the court failed in its duty to excuse her.

Here, the court abused its discretion and denied Borders his constitutional right to a fair and impartial jury by permitting juror 31 to decide the case. Supp. CP ___ (sub no. 358A, Clerk's Minutes, at 10); 4RP 512 (identifying juror, referred to by name throughout the verbatim reports, as juror 31).

Before jury selection began, Judge Downing reassured counsel that challenges for cause "shouldn't arise, if I'm doing my job. If a juror seems to me to be problematic for this case, then I will probably excuse the juror before spending undue time . . . with any attempts at maneuvering by either of the parties." 3RP 399. The judge also told the attorneys that, in general, he did not believe it was appropriate for the parties to argue challenges for cause before the panel. 3RP 399.

The following exchange occurred during voir dire: The court inquired if any of the potential jurors had friends or family members who had been victims of sexual assault or sexual misconduct. 4RP 436. The court received a number of responses. 4RP 437-41.

The court then asked if there was any potential juror who had herself or himself been so victimized. 4RP 441. The court explained,

> I have two goals in asking all these questions. You know, first we want people to look within and make sure that they would be a fair juror in this case, not prejudging issues. We don't want anybody who, because of personal experiences, is going to jump to conclusions about the allegations in this particular case. And second of all, my purpose is that I don't want to see anybody on the jury for whom it would be too emotional, too difficult to sit in this case because of personal experiences.

4RP 441-42. The second juror to express related concerns was juror 31. 4RP 442.

> THE COURT: . . . .Was there anybody in the box that had a hand up? Okay.
>
> Now, in the back there were a couple more hands . . . . And in the second row I get to [juror 31].
>
> JUROR [31]: Yes, I was 16, stranger, no criminal charges.
>
> THE COURT: The two concerns that I mentioned, the fairness of the process and your comfort –
>
> JUROR [31]: It's hard to know. It's hard to know until –
>
> THE COURT: Yeah.
>
> JUROR [31]: -- the proceedings (Inaudible).
>
> THE COURT: Sure.
>
> JUROR [31]: However, I don't know if we're going to be asked about this, my proximity to the

> location.[4] I already feel a certain sense of safety issues in my neighborhood. I'm two blocks -- I live two blocks from one of the situations.
>
> THE COURT: Right. Okay, all right. And there were a couple more hands all the way in the back row, I think.
>
> Let's see, Ms. [M-C].
>
> [DIFFERENT JUROR]: Yeah, so I was in high school. . . .

4RP 442. Juror 31 had already mentioned that she lived within blocks of the location of the count 1 crime. 4RP 431; see also 4RP 457 (juror's 31's self-introduction, including neighborhood where she resided).

The court did not inquire further of juror 31, but rather immediately moved on to the next juror. 4RP 442. The court dismissed one of the jurors, but not 31, immediately after that series of questions. 4RP 444.

The court then asked jurors to introduce themselves and, after that, moved hardship excusal requests. 4RP 444-68. The court then allowed the parties to conduct their own questioning.

As the court had indicated, without prompting from the parties, the court later dismissed a number of other jurors who had offered

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[4] The count 1 incident involving S.C. was alleged to have occurred in the Central District of Seattle, near 19th Avenue and East Yesler Way. See, e.g., 6RP 21 (police officer's testimony). Borders was ultimately convicted only of count 1. CP 512 (verdict).

problematic opinions or expressed discomfort with the facts of case. But it did not dismiss juror 31. 4RP 530-31, 533, 543. Neither party exercised a peremptory challenge toward juror 31, and she sat on the jury. 4RP 545-56; Supp. CP ___ (sub no. 358A, supra).

3. Well-established law requires reversal of Borders's conviction.

As the following cases reveal, it is error for a court to fail to inquire further of a juror, such as juror 31, who expresses serious doubts as her ability to be impartial. Such error violates the right of an accused to a fair and impartial jury and requires reversal.

In Gonzales, a juror indicated she was more inclined to believe police officers and admitted she was not certain she could presume the defendant innocent in the face of officer testimony indicating his guilt. 111 Wn. App. at 278-81. Although the prosecutor expressed the intent to speak more with the juror, that never occurred. The juror was seated, and the defendant convicted. Id. at 279-80.

On appeal, this Court recognized that the juror had admitted a bias for police and had questioned her own ability to follow the presumption of innocence. Moreover, the juror was never rehabilitated; in fact, there was not even an effort at rehabilitation. Id. at 281-82. Gonzales's conviction was reversed. Id. at 282.

In Hughes, the Sixth Circuit determined that the seating of an unchallenged juror who displayed actual basis likewise required a new trial. 258 F.3d at 464. The court asked potential jurors whether they thought they could be fair. One of the jurors volunteered that she had "'quite close'" ties to police officers. When the court asked if anything in that relationship would prevent her from being fair, she said, "I don't think I could be fair.'" The court asked her again, "'You don't think you could be fair?'" The juror answered, "'No.'" Id. at 456. The court moved on to inquire of other jurors, and there was no follow up to this exchange. Later, the juror did not respond to general questions defense counsel posed to the group, including whether they would find a police officer witness more credible. Nor did she or any other juror respond when the court asked the group "if they all could find at that moment that [Hughes] was not guilty because there had not yet been any testimony." Id.

The court discussed a number of cases in which courts *denied* relief where one or more jurors expressed doubts as to their own impartiality or even made statements that, on their face, clearly indicated actual bias. Id. at 458. The court held, however, that Hughes's case was distinguished by "the conspicuous lack of response, by both counsel and the trial judge, to [the juror's] clear declaration that she did not think she could be a fair juror." Id. Moreover, the court rejected the contention that

"group questioning" of potential jurors was sufficient to rehabilitate the juror in question. Id.

Most recently, in State v. Irby, this Court reached the same result based on the court's failure to inquire of a potential juror who expressed bias during voir dire. 187 Wn. App. at 197. At the beginning of voir dire, the trial judge posed a general question designed to elicit potential bias. Juror 38 raised her hand, leading to the following exchange:

> JUROR: I'm a little concerned because I did work for the government, Child Protective Services, I'm more inclined towards the prosecution I guess.
>
> THE COURT: Would that impact your ability to be a fair and impartial juror? Do you think you could listen to both sides, listen to the whole story so to speak?
>
> JUROR: I would like to say he's guilty.

Id. at 190.

As in Hughes, there was no follow-up to this exchange. The judge went on to a different juror, and juror 38 was never questioned individually about her remark that she "would like to say he's guilty."

This Court determined the juror's statement was similar to the Hughes juror's statement that she did not think she could be fair. As in Hughes, there was a "'conspicuous lack of response.'" Irby, 187 Wn. App. at 196 (quoting Hughes, 258 F.3d at 458). Neither the trial court nor the prosecutor attempted to elicit from juror 38 any assurance that she had

an open mind as to guilt. Irby, 187 Wn. App. at 196. Moreover, the situation was not remedied by the fact that, at the end of voir dire, the prosecutor reiterated the State's burden of proof and questioned the group generally: "does everybody here think that they can basically make a finding of guilty or not guilty based on the evidence that you hear?" Id. This Court rejected State's contention that juror 38's impartiality could be inferred from the fact that she, like the rest of the potential jurors, made no response to this question. "[S]uch questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias. Id. (citing Hughes, 258 F.3d at 461).

This Court therefore concluded that juror 38 demonstrated actual bias and that seating her was manifest constitutional error requiring reversal and remand for a new trial. Irby, 187 Wn. App. at 197.

As in the foregoing cases, juror 31's responses to the court's initial inquiry suggested she would be biased toward the State based on her history as a sexual assault victim. Not only did she express doubt as to her ability to be fair for that reason, also expressed concern that the proximity of her residence to the location of the crime in count 1 would interfere with her ability to decide the case. As in Hughes, no one, including the court, followed up on either concern.

The court had a duty to seat only unbiased jurors. The court had, in addition, painstakingly reassured counsel that it was the *court's* responsibility to dismiss jurors for cause if any issues arose. The court's failure to adhere to its promise and failure to inquire further regarding this juror's biases denied Borders a fair trial. Reversal is required. Irby, 187 Wn. App. at 197.

In response, the State may argue that Borders could have used peremptory challenges to remove juror 31 and that therefore he should not be permitted to complain on appeal about her inclusion. It is, however, the absence of such a challenge that actually preserves this issue for review. See Fire, 145 Wn.2d at 158 (where a juror should have been removed for cause, issue preserved for appeal only if peremptory not used against that juror and juror decides case) (citing Martinez-Salazar, 528 U.S. 304); Gonzales, 111 Wn. App. at 282 (absence of peremptory challenge preserves issue for appeal). Accordingly, any such contention should be rejected.

The State may also argue that juror 31 was, in fact, rehabilitated, and therefore her seating did not violate Borders's constitutional rights. For example, defense counsel posed a general question to all veniremembers who knew victims of "violent" crime or who had themselves been victims of such crimes if they had strong feelings about

the nature of the case that would prevent them from acting as jurors. 4RP 527-33. Juror 31 did not respond.

Under the case law, however, such general questioning is insufficient. Without direct questioning of the juror expressing bias, it is impossible to conclude whether he or she could simply put such concerns aside and try the issues impartially. See State v. Fire, 100 Wn. App. 722, 728, 998 P.2d 362 (2000) (recognizing that few jurors "will fail to respond to a leading question asking whether they can be fair and follow instructions," which is to be contrasted with "thorough and thoughtful inquiry" regarding stated biases), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001); see also Hughes, 258 F.3d 461 (silence of group in the face of generalized questioning on various subjects including police credibility insufficient to establish that juror was rehabilitated as to her expressed bias toward police).

The Sixth and Fourteenth Amendments and article 1, section 22 guarantee an impartial jury. Taylor, 419 U.S. at 526; Gonzales, 111 Wn. App. at 277. The presence of even one biased juror cannot be deemed harmless. United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000). Borders's conviction must be reversed.

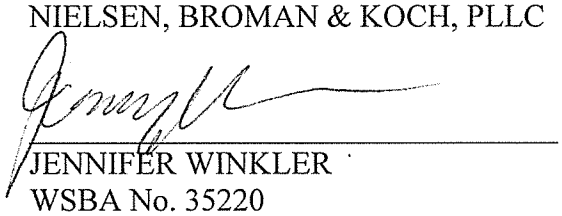
D. CONCLUSION

The selection of juror 31 deprived Borders of his constitutional right to a fair and impartial jury. Reversal is therefore required.

DATED this 30TH day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73297-8-I
	)	
FRANK BORDERS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCTOBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FRANK BORDERS
DOC NO. 254642
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER, 2015.

X Patrick Mayovsky