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Court of Appeals
Division III
State of Washington

NO. 32559-8-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SIMON GAROUTTE,

Appellant.

BRIEF OF RESPONDENT

GARTH DANO
PROSECUTING ATTORNEY

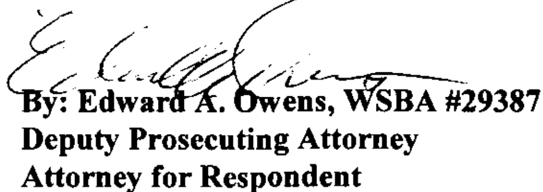

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TABLE OF CONTENTS

Page

Table of Contents ..... i-ii

Table of Authorities ..... iii-iv

I. IDENTITY OF RESPONDENT 1

II. RELIEF REQUESTED 1

III. ISSUES 1

A. Was Mr. Garoutte denied his right to trial by an impartial jury when the trial court denied his motion for a mistrial regarding Juror No. 9 and when the trial court denied his motion to replace Juror No. 8 and Juror No. 9 with alternate jurors? 1

B. Did the trial court abuse its discretion in denying Mr. Garoutte's motion to exclude evidence of his January 18, 2014 arrest following his failure to appear in court? 1

C. Did the trial court err by failing to enter written findings of fact and conclusions of law on the bench trial on the possession of a controlled substance count? 1

IV. STATEMENT OF FACTS 1

V. ARGUMENT 2-10

A. The trial court did not deny the defendant his right to trial by an impartial jury when it denied his motion for a mistrial regarding Juror No. 9 and when the trial court denied his motion to replace Juror No. 8 and Juror No. 9 with alternate jurors. 2-7

TABLE OF CONTENTS (continued)

Page

B. The trial court did not abuse its discretion when it denied the defendant's motion to exclude evidence of his January 18, 2014 arrest following his failure to appear...... 7-10

C. The trial court erred by failing to enter written findings of fact and conclusions of law on the bench trial on the possession of a controlled substance count............ 10

VI. CONCLUSION 11

TABLE OF AUTHORITIES

Page

STATE CASES

Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962)................5

Hough v. Stockbridge, 152 Wn. App. 328, 216 P.3d 1077 (2009)....3-4

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App 266, 796 P.2d 737 (1990)..5

State v. Bourgeois, 133 Wn.2d 389, 945 P.3d 1120 (1997).............10

State v. Briggs, 55 Wn. App. 44, 776 P.2d 134 (1989).....................4, 5

State v. Carlson, 61 Wn. App. 865, 812 P.2d 536 (1999)................5

State v. Chirinos, 161 Wn. App. 844, 255 P.3d 809 (2011).............2

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002).....................8

State v. Depaz, 165 Wn.2d 842, 204 P.3d 217 (2009).......................3

State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001)..........................2

State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002)..............3

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993)..................10

State v. Harvey, 34 Wn. App. 737, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983).......................................5

State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998).....................10

State v. Hicks, 41 Wn. App. 303, 704 P.2d 1206 (1985)..................6

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)..........................8

TABLE OF AUTHORITIES (continued)

Page

STATE CASES (continued)

State v. Jorden, 103 Wn. App. 221, 11 P.3d 866 (2000), review denied 143 Wn.2d 1015 (2001) 2, 4

State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991) 3

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) 2

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001) 9

State v. Rempel, 53 Wn. App. 799, 770 P.2d 1058 (1981) 6

STATUTES AND OTHER AUTHORITIES

CrR 6.1(d) 10

ER 401 .... 8, 9

ER 402 8

ER 403 .... 8, 9

RAP 10.3(b) 1

RCW 2.36.110 3

RCW 4.44.170 .... 3, 4

RCW 9A.08.010 8

RCW 9A.76.170(1) 8

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

A. Was Mr. Garoutte denied his right to trial by an impartial jury when the trial court denied his motion for a mistrial regarding Juror No. 9, and when the trial court denied his motion to replace Juror No. 8 and Juror No. 9 with alternate jurors?

B. Did the trial court abuse its discretion in denying Mr. Garoutte's motion to exclude evidence of his January 18, 2014, arrest following his failure to appear in court?

C. Did the trial court err by failing to enter written findings of fact and conclusions of law on the bench trial on the possession of a controlled substance count?

IV. STATEMENT OF FACTS

The substantive and procedural facts have been adequately set forth in appellants brief; therefore, pursuant to RAP 10.3(b), the State shall not set forth an additional facts section. The State shall refer to the record as needed.

V. ARGUMENT

A. The trial court did not deny the defendant his right to trial by an impartial jury when it denied his motion for a mistrial regarding Juror No. 9 and when the trial court denied his motion to replace Juror No. 8 and Juror No. 9 with alternate jurors.

The State would agree with the defendant when he states: The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantees the right to trial by an impartial jury. See, *e.g.*, *State v. Chirinos*, 161 Wn. App. 844, 848 n.3, 255 P.3d 809 (2011). The State constitutional provision does not provide greater protection than the federal constitutional provision. *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001).

The constitutional right to trial by an impartial jury "focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). "[A]n essential element of a fair trial is an impartial trier of fact – a jury capable of deciding the case based on the evidence before it." *Id.*

A trial court's decision to excuse a juror is reviewed for abuse of discretion. *State v. Jorden*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000).

"A trial court abuses its discretion when it bases its decision on untenable ground or reasons." *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). The remedy for denial of the constitutional right to trial by an impartial jury is reversal. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

RCW 4.44.170 sets forth the grounds upon which jurors may be removed for cause. Jurors may be removed for cause if they:

> (1) Possess a state of mind "which satisfies the court that the challenged person cannot try the issue impartially and without prejudice", (2) if they are related to one of the parties, (3) if they have sat on a jury in a previous trial of the same case, or (4) if they have an interest in the litigation.

A court's ruling on a motion for a mistrial is within the sound discretion of the trial court. *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The motion should be granted only if a defendant's right to a fair trial has been prejudiced. *Lord* 117 Wn.2d at 887.

RCW 2.36.110 requires a judge to dismiss "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." "'Actual bias' is 'the existence of a state of mind on the part of the juror in reference … 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.'" *Hough v. Stockbridge*, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009) (alteration in original) (quoting RCW 4.44.170(2)). The trial judge has fact finding discretion in determining whether to grant or deny a juror's dismissal based on bias. *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015 (2001). This discretion "allows the judge to weigh the credibility of the prospective juror based on his or her observations." *Id.* Appellate courts defer to the trial judge's decision. *Id.*

In the case at hand the trial judge disclosed to the defendant and the State, while the attorneys were exercising peremptory challenges, the fact that Juror No. 9 lives across the street from him. (RP 59). Also following jury selection, the trial court told the attorneys that Juror No. 8 and State's witness Ms. Webb were neighbors for a number of years. From that information and that information alone the defendant asked for a mistrial when the court denied the defendant's motion to replace the jurors with alternate jurors. The court had no factual basis on which to base a finding of actual or imputed bias on the part of those two jurors. There is nothing in the record to establish these jurors could not try the case impartially and without prejudice.

When asking whether prejudice occurred, the inquiry is objective rather than subjective. *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d

1347 (1989); *Gardner v. Malone,* 60 Wn.2d 836, 841, 376 P.2d 651 (1962); see *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Whether it actually did is a matter that inheres in the verdict and thus may not be delved into. *Gardner v. Malone*, 60 Wn.2d at 841; *State v. Briggs*, 55 Wn. App. at 55. Information known during voir dire but not revealed upon request will be prejudicial if it is material and would have provided the objective basis needed to challenge for cause; it will not be prejudicial if no more is shown than that it might have affected how a party subjectively decided to exercise peremptory challenges. *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1999); *State v. Briggs*, 55 Wn. App. at 52.

To assess whether prejudice has occurred, it is necessary to compare the particular misconduct with all of the facts and circumstances of the trial. As a neutral, trained person observing both the verbal and nonverbal features of the trial, the trial judge is in the best position to make this comparison. See *State v. Harvey*, 34 Wn. App. 737, 744, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983). Not surprisingly, then, whether to grant a motion for mistrial is a matter addressed to the sound discretion of the trial court, and that court's decision will be overturned on appeal only for an abuse of discretion *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. at 271; *State v. Briggs*, 55 Wn. App. at 60;

State v. Rempel, 53 Wn. App. 799, 801, 770 P.2d 1058 (1981); *State v. Hicks* 41 Wn. App. 303, 314, 704 P. 2d 1206 (1985).

The defendant has failed to show this court that the trial judge abused his discretion when he denied Mr. Garoutte's motion to replace Jurors 8 and 9 with the two alternate jurors. The State would agree with the trial judge when he said, "I don't think there's a legal basis in either case at this point to substitute the jurors in." (RP 273).

The State would argue that a trial judge is not a party to a case. They provide no testimony during trial, and instruct the jury regarding that exact issue. The instruction instructed the jurors the following:

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. It is appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely. (RP 277, 8-15).

It's true that the trial judge stated he has known Juror No. 9 for 30 years, that they have been friends for a long time, that his first daughter and Juror No. 9's daughter are best friends, and that he has not discussed Mr. Garoutte's case with Juror No. 9. (RP 61, 70, 271). The court even made a record that he didn't know he would be handling the case until the morning of trial. (RP 271). Even when reviewing objectively the facts of

this issue concerning Juror No. 9 there was not an abuse of discretion by the trial judge.

Regarding Juror No. 8 being known by a State's witness, Grant County Clerk's Office Deputy Clerk Marla Webb, there was no evidence provided that Ms. Webb was a close friend. The information provided to the court was that Ms. Webb knew the juror as they have been next door neighbors for a number of years. (RP 70-71). Juror No. 8 did not disclose she knew Ms. Webb during jury selection giving some support that they were not close friends when the juror didn't even know her name. (RP 71). The trial court judge offered to bring Juror No. 8 into the courtroom and question her regarding her relationship with Ms. Webb but the defendant declined the offer. (RP 272-273).

Speculating that a particular juror may or may not know a witness does not meet the standards for removal of jurors from the panel. A "might have affected the outcome", as the defendant argues here, does not meet the standard of abuse of discretion by the trial court in deciding to have Juror No. 8 remain seated in the panel.

B. The trial court did not abuse its discretion when it denied the defendant's motion to exclude evidence of his January 18, 2014 arrest following his failure to appear.

To prove the crime of bail jumping, the State had to prove that the defendant had knowledge of the requirement of a subsequent personal appearance before any Washington court and failed to appear as required. RCW 9A.76.170(1). A person knows or acts knowingly or with knowledge when he or she (1) is aware of a fact, circumstance, or result described by a statute as being a crime or (2) has information that would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute as being a crime. RCW 9A.08.010(1)(b).

To be admissible, evidence must be relevant. ER 402. Under ER 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even if relevant, however, evidence may still be excluded under ER 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." Still, [t]he threshold to admit relevant evidence is very low [and] [e]ven minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (citing *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). The decision to admit evidence lies within the sound discretion of the trial

court and will not be overturned absent a manifest abuse of that discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

The challenged evidence of the testimony of Deputy Fisher, regarding the date he arrested the defendant from the warrant for bail jumping was directly relevant to the issue of whether the defendant willfully discontinued making himself unavailable for court. The defendant failed to appear to court on October 8, 2013. Deputy Fisher testified he arrested Mr. Garoutte on January 18, 2014 some 102 days after failing to appear in court. In allowing the State to admit the evidence the day the defendant was arrested the court reasoned:

> "Well, it seems to me if he's gone for four months and he makes no attempt to get back in front of the court, which I think is a rational inference from what happened here. I think that supports the notion that his failure to appear back before the court is not simply because he didn't know what date, because a reasonable person under the circumstances would have made some inquiry within four months, and after the trial date passes, I think that supports that notion." (RP 236, 3-12).

The evidence that was presented was directly relevant to the issue of whether the defendant willfully discontinued making himself unavailable to the court. The testimony satisfies the test for relevancy under ER 401 and its probative value outweighed any prejudicial effect under ER 403. There was no abuse of discretion, thus no error committed

by the court in the court's ruling, thus the conviction for bail jumping should not be reversed.

An evidentiary error "requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.3d 1120 (1997).

C. The trial court erred by failing to enter written findings of fact and conclusions of law on the bench trial on the possession of a controlled substance count.

As summarized in the defendant's statement of the case, the defendant was charged with one count of possession of methamphetamine and one count of bail jumping. Both counts were heard by the trial court in a unitary jury trial, and the jury was instructed to only consider the bail jumping charge.

When trial was completed the court failed to enter written findings of fact and conclusions of law on the bench trial as is required by CrR 6.1(d). Therefore, the case should be remanded back to the trial court for entry of such written findings and conclusions. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

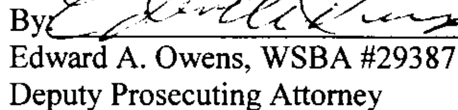
VI. CONCLUSION

The defendant's conviction for bail jumping should not be reversed. Mr. Garoutte was not denied his right to an impartial jury when the trial court denied his motion for a mistrial regarding Juror No. 9, nor when the trial court denied his motion to replace Juror No. 8 and Juror No. 9 with alternate jurors. There was no evidence shown that Juror No. 8 and Juror No. 9 could not be impartial jurors.

The trial court did not abuse its discretion in denying the defendant's motion to exclude his January 18, 2014 arrest following his failure to appear some three months earlier. The evidence was relevant evidence and was directly related to the facts of the case.

Respectfully submitted this 27th day of April, 2015.

GARTH DANO
Prosecuting Attorney

By 
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