NO. 72553-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SASSEN VANELSLOO,

Appellant.

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

The Honorable Deborah Garrett, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY[1]

1. THE TRIAL COURT IMPROPERLY EXCUSED JUROR 12.

Sassen-Vanelsloo contends, for reasons set forth fully in the opening brief, that the trial court erred in excusing Juror 12 for bias. Brief of Appellant (BOA) at 22-26. In response, the State places much stock in the fact that the trial court did not explicitly state that it was dismissing juror 12 for actual rather then implied bias. See Brief of Respondent (BOR) at 13-15. This argument misses the mark for several reasons.

First, the State clearly challenged Juror 12 on the basis of actual bias. See 17RP 860 (arguing Juror 12 should be dismissed because "through a lot of questioning she [Juror 12] eventually said that she, you know had some good feelings about what Ms. Burton or the community had done[.]"

Second, even assuming for sake of argument that juror 12 was dismissed on the basis of implied bias, the State's argument necessarily fails. Under RCW 4.44.180, a challenge for implied bias may be made for

[1] The State's arguments regarding the operability of the shotgun for purposes of the firearm enhancement and imposition of legal financial obligations have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

one of four enumerated reasons.[2] The only cause which would even arguably apply under the facts of this case would be that Juror 12 had an "interest ... in the event of the action, or the principal question involved therein." RCW 4.44.180(4). The reasoning necessary to determine whether a juror is impliedly biased due to interest in the action involves two steps. First, the trial judge must ascertain the facts. Second, the trial judge must ascertain whether those facts constitute an interest of the type described in RCW 4.44.180(4). Carle v. McChord Credit Union, 65 Wn.

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[2] A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

> (1) Consanguinity or affinity within the fourth degree to either party.
>
> (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
>
> (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
>
> (4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

App. 93, 108, 827 P.2d 1070 (1992). Here, the trial court failed to undertake any analysis necessary to "ascertain whether those facts constitute an interest of the type described in RCW 4.44.180(4)." Id. As the trial court recognized, it was a "close case," as to whether Juror 12 should even be excused because "there is not a real strong relationship between the juror and the witness[.]" 17RP 861. Indeed, the State concedes, "Juror #12 did not verbally express obvious bias[.]" BOR at 19.

The State nonetheless suggests that Juror 12's answers to repeated questioning, though "appropriate," were designed to deceive the court and allow her to remain on the jury. BOR at 19-20. In support of this contention, the State points only to the trial court's remark that Juror 12 would not be pleased at being excused. 17RP 863. What the trial court recognized however, was that no juror would be pleased about being excused "after a week-and-a-half being on the jury." 17RP 863. Contrary to the State's suggestion, the trial court made no findings about Juror 12's demeanor, tone of voice, and mannerisms which would support a finding of either actual or implied bias.

The State's attempt to analogize this case to State v. Thompson[3] and United State v. Bolden[4] is misplaced, as both cases are factually distinguishable. In Thompson, the defendants were charged with murdering their four-month-old son by starvation and gross neglect. In its case-in-chief, the government presented a photograph of the child taken three days after his death. After viewing the photograph, one of the jurors reported that it had upset him. The juror admitted he did not think he would be able to remain open-minded and was not sure he could be totally fair. Thompson, 744 F.2d at 1067. When the judge reminded the juror of the presumption of innocence and the government's burden of proof and asked if he could resume his duties, the juror said he was not sure, but he would try. Thompson, 744 F.2d. at 1068. Thompson's motion for a mistrial was denied. Thompson, 744 F.2d at 1067.

The appellate court held that it was an abuse of discretion to proceed with a juror who could not "state unhesitatingly that he could keep an open mind[.]" Thompson, 744 F.2d at 1068. The Court noted less drastic alternatives to a mistrial were available to the court, including replacing the juror with an alternate. Because these options had not been

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[3] 744 F.2d 1065 (4th Cir. 1984).

[4] 596 F.3d 976 (8th Cir. 2010), cert. denied, 562 U.S. 915 (2010).

considered, the court reversed Thompson's convictions. Thompson, 744 F.2d at 1068-69.

In Bolden, the defendant's girlfriend spoke with two jurors during a recess midway through trial. During court questioning, the first juror stated that she spoke with Bolden's girlfriend about the weather and did not know her identity or relation to Bolden. Upon a similar inquiry to the second juror, the court determined the second juror spoke with Bolden's girlfriend for a longer period of time about more personal matters, such as the juror's husband's car accident. The second juror also learned the woman was Bolden's girlfriend. The government expressed concerned of potential bias resulting from the latter conversation because it argued the personal information could be perceived as a threat or as a means to obtain sympathy for Bolden. Bolden's counsel did not object to excusing the juror. The court allowed the first juror to return to the jury, but excused the second juror due to her knowledge of the identity of Bolden's girlfriend. Bolden, 596 F.3d at 979.

On appeal, Bolden's co-defendant asserted there was no legitimate basis for the removal of the juror because nothing she learned in the conversation with Bolden's girlfriend would cause her to be impartial. Bolden, 596 F.3d at 980. The appellate court disagreed, noting the evinced concern the interaction could prejudice the juror because she

could feel threatened or biased because she had shared personal information with Bolden's girlfriend. Bolden, 596 F.3d at 981.

Unlike the jurors in Thompson and Bolden, and contrary to the State's argument that Juror 12's answers here were equivocal, the record shows Juror 12's passing contact with Burton did not impact her impartiality. BOR at 17-18. Juror 12 explicitly told the bailiff that "her knowledge of Ms. Burton would not affect her assessment of the testimony in any way." 17RP 853. She denied that the State's cross-examination of Burton concerned her. Juror 12 made clear that her passing contact with Burton two years previously was neither a positive or negative experience. Juror 12 was indifferent towards Burton. 17RP 861. Rather, it was the fact that her nephew received treatment that was positive to Juror 12; something for which both Burton, and Juror 12, had minimal involvement in. 17RP 856-58.

Under the circumstances here, the trial court erred in dismissing Juror 12 based solely on her prior passing contact with Burton. Sassen-Vanelsloo fully discussed in his opening brief why the trial court's improper dismissal of Juror 12 prejudiced his case. BOA at 26.

2. THE STATE FAILED TO PROVE SASSEN-VANELSLOO WAS ARMED WITH A FIREARM FOR EACH OF THE FIVE SENTENCE ENHANCEMENTS IMPOSED.

In the opening brief, Sassen-Vanesloo argued the State failed to prove he was armed with a firearm during his offenses. Citing State v. Mills[5] and State v. Gurske[6] as support, Sassen-Vanelsloo maintains the State failed to prove that the shotgun -- found in the "rear cargo area" of the car, underneath other items on the floor, and which was out of reach of the driver of the car -- was easily accessible and readily available for purposes of the firearm enhancement. BOA at 29-40.

The State first argues that Sassen-Vanelsloo was in constructive possession of the shotgun as the driver of the car. BOR at 30-31. But, as noted in the opening brief, the "mere presence" of a gun at the crime scene, "mere close proximity of the gun to the defendant, or constructive possession alone is not enough to show the defendant is armed." BOA at 29-30 (citing Gurske, 115 Wn.2d at 138); BOA at 40 (citing State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245 (2007)).

The State also attempts to distinguish Gurske by arguing that Sassen-Vanelsloo could access the shotgun whenever he accessed his

[5] 80 Wn. App. 231, 907 P.2d 316 (1995).

[6] 115 Wn.2d 134, 138, 118 P.3d 333 (2005).

drugs, or when he stopped the car. BOR at 31-32. Another review of the facts of Gurske demonstrates why the State's attempt to distinguish it necessarily fails here.

In Gurske, the zipped backpack containing the methamphetamine also contained a torch and a pistol. Gurske, 155 Wn.2d at 136. Thus, Gurske had access to the gun anytime he opened the backpack to access the methamphetamine. But, that fact was not what was significant to the Supreme Court. Rather, the Court noted that while there was physical proximity of the pistol, the methamphetamine, and Gurske, there was "simply nothing" which gave rise to an inference that Gurske could reach over or around the driver's seat and access the weapon from the driver's seat. Gurske, 155 Wn.2d at 143. Nor was there any evidence that Gurske had used the weapon against another person at any other time, such as when he acquired or was in possession of the methamphetamine. Id.

As in Gurske, here there was no physical proximity between Sassen-Vanelsloo and the shotgun when availability for use for offensive or defensive purposes was critical. As in Gurske, Sassen-Vanelsloo could not have accessed the shotgun or the backpack as the driver of the car. He would have had to exit the car or move into the rear seat to reach either. 17RP 293, 337, 563. Additionally, Sassen-Vanelsloo had already left the presence of the car before the officers arrived, opened the rear-cargo hold

area, saw the shotgun, and searched the backpack which led to discovery of a locked bank bag which contained the drugs. See State v. Ague-Masters, 138 Wn. App. 86, 104, 156 P.3d 265 (2007) (finding evidence was insufficient to show firearms in a safe were easily accessible and readily available in part because police had already arrested defendant when they found the guns and there was no evidence he attempted to use or had used one of the firearms for offensive or defensive purposes).

Like Gurske, there was also no evidence Sassen-Vanelsloo used the shotgun against another person at any other time, such as when he allegedly acquired or was in possession of the drugs. Aardema did not recognize guns found in the car, and she had never seen Sassen-Vanelsloo bring a shotgun into any car he was driving, let alone the one in which it was found. 17RP 441-43. The State failed to prove sufficient evidence to show that the shotgun was easily accessible and readily available to Sassen-Vanelsloo.

Finally, to the extent Gurske conflicts with State v. Eckenrode[7] and State v. O'Neal[8], Gurske controls here. BOA at 34-39. Like Gurske, here there was no evidence of defendant admissions, police monitoring equipment, and proximity of the defendant to an easily accessible and

[7] 159 Wn.2d 488, 493, 150 P.2d 116 (2007).

[8] 159 Wn.2d 500, 504-05, 150 P.3d 1121 (2007).

readily available gun; facts which Eckenrode and O'Neal found significant in concluding that the defendants were using the guns to protect contraband as part of a continuing crime.

3. THE STATE HAS WAIVED THE ABILITY TO SEEK APPELLATE COSTS BY FAILING TO RESPOND TO SASSEN-VANELSLOO'S SINCLAIR ARGUMENT.

In his opening brief, Sassen-Vanelsloo argued this Court should deny the State's request for appellate costs because he has been found indigent and unable to pay for the expenses of appellate review. BOA at 48-49. This Court recently held in State v. Sinclair "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612, 616 (2016), rev. denied, __ Wn.2d __, 2016 WL 3909799. Despite this very clear directive, the State did not respond to Sassen-Vanelsloo's appellate costs argument in its briefing, did not discuss Sassen-Vanelsloo's ability to pay appellate costs, and, most significantly, did not ask this Court to impose appellate costs.

It is unclear whether the State's failure to discuss appellate costs means it does not intend to seek costs or means it intends to litigate this issue at the cost bill phase of the appeal in the event Sassen-Vanelsloo does not substantially prevail. However, Washington courts recognize

that where the respondent fails to respond to an argument by the appellant, the respondent concedes that issue. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

This Court "indisputably" possesses the discretion to deny appellate costs. Sinclair, 367 P.3d at 615 (pointing to RCW 10.73.160 and State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000)). The Sinclair court recognized the State "has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill." Id. at 616 (emphasis added); see also id. at 617 ("Both parties can be helpful to the appellate court's exercise of its discretion by developing fact-specific arguments from information that is available in the existing record." (Emphasis added.)). Therefore, where the appellant properly makes a Sinclair argument in his or her opening brief, the State waives the right to seek appellate costs where it fails to respond to this issue in its briefing.

The Sinclair court further noted that "where the State knows at the time of receiving the notice of appeal that no cost bill will be filed, a letter so advising defense counsel would be courteous." Id. at 616. It would likewise be courteous of the State to inform the appellant (and this Court) in its response brief that it does not intend to seek appellate costs, rather

than remaining silent and leaving the specter of appellate costs looming over the appellant.

Finally, there has been no order finding Sassen-Vanelsloo's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." The State has not rebutted this presumption of indigency with any specific facts or argument in its briefing. This Court must presume Sassen-Vanelsloo remains indigent and give him the benefits of that indigency. RAP 15.2(f).

The obligation of paying thousands of dollars in appellate costs, plus accumulated interest, would be "quite a millstone" around Sassen-Vanelsloo's neck. Sinclair, 367 P.3d at 617. Sassen-Vanelsloo properly objected to appellate costs in his opening brief, giving the State an opportunity to respond. The State failed to do so and therefore failed "to preserve the opportunity to submit a cost bill." Id. at 616. This Court should hold the State has waived its right to seek appellate costs by failing to comply with Sinclair and request appellate costs in its response brief.

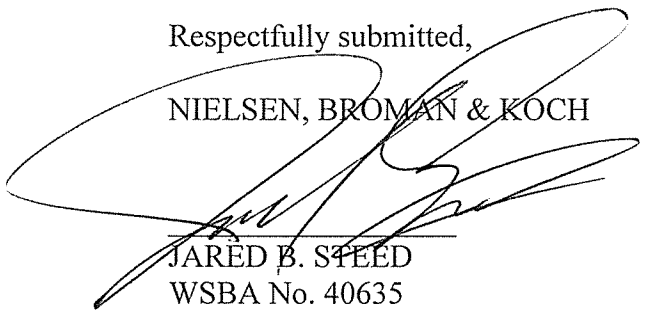
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Sassen-Vanelsloo's convictions and remand for a new trial.

DATED this 29th day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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