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NO. 63276-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE M. FOX,

Appellant.

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

The Honorable David A. Kurtz, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Defense counsel was ineffective for failing to move for a mistrial after a potential juror tainted the entire venire.

Issue Pertaining to Assignment of Error

At the outset of voir dire, a former police officer indicated she could not be a fair and impartial juror because of her personal experience that certain evidence is withheld from jurors during trial. Defense counsel immediately challenged the former officer for cause and the motion was granted. Counsel, failed, however to move for a mistrial based on the fact this information had tainted the entire venire. Was appellant denied effective representation, an impartial jury, and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged Kyle Fox with one count of possession of a stolen vehicle. CP 1. He was convicted, the court imposed a Drug Offender Sentencing Alternative ("DOSA"), and Fox timely filed his Notice of Appeal. CP 2-18, 21-25, 59.

2. Substantive Facts

a. Voir Dire

Jury selection took place on February 17, 2009. After welcoming prospective jurors and providing them with a summary of the selection process, the court asked if anyone believed he or she could not be impartial and fair to both sides. 1RP¹ 36. Juror 29 responded:

I just don't believe that we're going to hear everything that happened. I've been a police officer, so I probably would be – not be impartial because I know –

2RP 36. At this point, the court cut her off and asked if she could base her decision on the facts presented in the courtroom. 2RP 36. The former police officer replied, “I think I'd spend more time wondering about the facts that I'm not hearing.” 2RP 36.

In response to questions by the prosecutor, the prospective juror indicated that it had been 20 years since she was a police officer. 1RP 37. She said that in her experience, “certain things would be ruled out, will not be allowed to be testified to,” and that this would be on her mind. 1RP 37. Defense counsel immediately

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – February 17, 2009; 2RP – February 18, 2009; 3RP – February 19, 2009; 4RP – March 31, 2009.

challenged her for cause and the court excused her. 1RP 38. At no time, however, did counsel move for a mistrial.

b. Trial Evidence

On the morning of November 24, 2008, Paul Schachter discovered that someone had taken his Honda Accord, which he had parked in the driveway of his Seattle home the previous night. 1RP 120-123; 2RP 72.

The following morning, November 25, Amarjit Grewal looked out the window of his Everett home and spotted an unfamiliar car parked in the cul de sac. 1RP 134-137. On four past occasions, Grewal or a neighbor had reported suspicious vehicles that had been parked in the same area. All four had been stolen. 1RP 139-140. Grewal approached the car and could see that the driver's seat was reclined. A sheet was covering a person in the seat. Grewal feared someone had left a dead body in the car and called 911. 1RP 142.

Two Everett Police Officers responded to the call. 1RP 150, 155; 2RP 10. Running the license plate through their computer system, the officers determined that the car, a Honda, was listed as stolen out of Seattle. 1RP 152, 157; 2RP 11. It was Schachter's Accord. 2RP 25. With firearms drawn, the officers approached the

car and confirmed there was someone inside. The car doors were locked. 1RP 156-158; 2RP 14.

One officer beat on the window and advised the occupant – later identified as Kyle Fox – to show his hands. 1RP 158, 167; 2RP 14. Fox sat up, looked at the officer, and slapped the front and rear door locks on the driver's side of the car as if to make sure they were locked. 1RP 158-159. Fox then dove to the passenger side but, upon seeing the other officer at that door, went to the back seat of the car and escaped out the rear driver's side door. 1RP 159-160; 2RP 15-17.

Fox did not respond to commands that he get on the ground. One officer grabbed his outer clothing, but Fox slipped out of the garment and continued to run. 1RP 160; 2RP 17-18. The other officer fired his taser, but it did not make sufficient contact to apply its charge. 1RP 161-162; 2RP 18-22. After only a hundred feet or so, Fox stopped and was arrested, although he continued to struggle with officers. 1RP 162-163; 2RP 22-24.

Schachter was called to the scene and identified for police items found inside the car that did not belong to him. 1RP 124-125; 2RP 25. These items included a shoe box containing shoes, brass knuckles, two knives, CDs, an iPod case, a Microsoft employee ID, a

woman's billfold, cooking utensils, candy wrappers, and a parking ticket that had been issued in Seattle after the car was stolen. 1RP 126-127; 2RP 34-40, 66-73. On Fox, they found a cell phone, a hairbrush, and a McDonald's coupon. 2RP 60, 75.

The Honda's ignition appeared normal. There were no outward indications it had been tampered with in any manner. 2RP 45. But when Schachter attempted to insert his key, he had difficulty. Eventually, after several minutes of jiggling the key around, he was able to start the car and has been able to use the key without difficulty since. 1RP 127-128; 2RP 25-26. Those who steal cars often stick a shaved key or other tool in the ignition to start the car. 2RP 26. Police did not find any shaved keys in the Honda or on Fox. 2RP 44-45.

Fox testified at trial. He did not have a permanent residence and had been staying at a shelter or with friends off and on throughout the month of November. 2RP 85, 121. On the evening of November 24, he took a bus from Seattle to the Everett bus station. 2RP 87. The mother of Fox's child was celebrating her birthday in Everett. Fox had not seen much of her lately and he decided to travel to Everett and surprise her. 2RP 87.

A friend – Brittany Davenport – worked as a bartender at the

Jade Dragon restaurant, a few blocks from the bus station. Fox had contacted her the previous day to say he was coming to town. He walked to the restaurant and had a few drinks with Davenport, her boyfriend, and others. The drinks were strong and affected Fox. 2RP 89, 125-127.

Fox got a ride with someone else to another bar, where the birthday party was taking place. 2RP 89, 91. Fox was not invited to the party and was not made to feel welcome, so he left after about ten minutes. 2RP 90, 133-136. He walked back to the bus station, but had already missed the last bus to Seattle. He was carrying a bag containing a box of shoes and a jacket. He also had his wallet, cell phone, and other miscellaneous items. 2RP 92, 127-128, 138. Fox fell asleep outside the bus station, but woke up "cold to the bone, shaking pretty badly," and decided to find other accommodations. 2RP 93-94, 130.

Fox warmed himself temporarily at a gas station and then wandered for up to an hour looking for an unlocked car. 2RP 94-95, 130-131. He found one – Schachter's Honda Accord – hopped in, and went to sleep after reclining the driver's seat. 2RP 95-96, 131-133.

Fox was startled awake by banging on the car window and

the sight of two police officers with guns drawn. 2RP 96. In an admitted error in judgment, Fox let himself out of the car and ran, in part, because he has a criminal past.² 2RP 97. Officers wrestled him to the ground and placed him under arrest. 2RP 97-98. Fox denied ever driving the Honda or knowing that it had been stolen. He testified his only intention was to sleep in the car and leave in the morning. 2RP 98-99.

The defense called two additional witnesses. Brittany Davenport confirmed that she and Fox were long-time friends and that Fox had come to see her the evening of November 24. She was outside the Jade Garden smoking when she spotted Fox walking toward the restaurant from the Everett bus stop. 2RP 105-106. Fox had dinner and at least one drink before he left the restaurant. 2RP 107-108.

The other defense witness was Paul Stricklin, a long-time acquaintance of Fox's. 2RP 141-142. Stricklin was with Fox at the Jade Garden. 2RP 142-143. Stricklin then provided Fox with a ride to the bar where the birthday party was taking place. He testified that to his knowledge Fox did not have a vehicle at the Jade Garden.

² Fox has prior convictions for possession of stolen property and taking a motor vehicle. 2RP 86-87, 120.

2RP 144. When Fox did not receive a warm reception at the party, he suggested that Fox leave, which he did. 2RP 145. Stricklin asked Fox where he was going, and Fox responded, "I am going to find a place to sleep under a bridge or something." 2RP 146.

In closing argument, the prosecutor argued that although he could not prove beyond a reasonable doubt that Fox stole the car in Seattle and drove it to Everett, his reaction to police indicated he knew it was stolen when police found him inside. 2RP 155-162. The prosecutor added, however, there was evidence to suggest that Fox himself stole the vehicle from Seattle and hid it in the neighborhood, where he could find it later. 2RP 177-179. The defense argued that Fox was simply looking for a place to sleep and had no reason to know the car was stolen since there were no visible signs it had been tampered with. Moreover, he reacted to police the way he did because they pointed their guns at him and he knew he was not supposed to be in the car. 2RP 163- 175.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.

The United States and Washington State Constitutions guarantee the accused the right to a trial by an impartial jury in all criminal prosecutions. U.S. Const. amend. VI, XIV; Wash. Const. art. I, §§ 3, 22. Washington law further provides the right to an unbiased and unprejudiced jury. State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000).

“Washington, like every other state, is committed to the proposition that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial.” State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds, State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). “[M]ore important than speedy justice, is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” Parnell, 77 Wn.2d at 508.

Fox believes that the statement during voir dire, by the

former police officer, that she knew from experience jurors would be prevented from hearing all the evidence in the case is best described as a “trial irregularity” because such irregularities include the jury seeing or hearing that which it should not. See State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (spectator misconduct); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst from defendant’s mother); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (answer to improper question), cert. denied, 479 U.S. 995 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (statement that defendant had a “record”); see also State v. Rempel, 53 Wn. App. 799, 800-802, 770 P.2d 1058 (1989) (juror’s tardy disclosure of information regarding fitness to serve treated as irregularity), reversed on other grounds, 114 Wn.2d 77, 785 P.2d 1134 (1990).

While defense counsel properly challenged juror 29 for cause, her removal from the venire did nothing to mitigate the harmful impact of her statements. Counsel’s failure to move for a mistrial and a new panel denied Fox his right to effective representation.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const.

art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

No reasonable attorney would have failed to move for a mistrial. When a former police officer tells the entire venire it is not going to hear all the facts, the officer is not referring to facts harmful to the prosecution. Every potential juror would have recognized that juror 29, formerly aligned with the prosecution, was expressing frustration over the exclusion of facts harmful to the defendant. By sharing the reason she could not be impartial toward Fox, juror 29 infected the entire venire at the outset of the process. Counsel's failure to act at that time to protect Fox's right to an impartial jury was deficient.

Moreover, Fox suffered prejudice. Had counsel moved for a mistrial, the trial court would have been obligated to grant the motion. When examining a trial irregularity, the question is whether the incident so prejudiced the jury that the defendant was denied

his right to a fair trial. If it did, a mistrial was required. Escalona, 49 Wn. App. at 254. Courts examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254.

First, the irregularity was very serious. A former police officer shared with the venire her experience that witnesses would be prevented from testifying to facts relevant to the case. Like juror 29, every member of Fox's jury would now be distracted in the knowledge they were likely not getting a full and accurate picture of the defendant. Information detrimental to the defense would be excluded.

The second factor, whether the irregularity involved cumulative information, also supported a mistrial. Juror 29's experiences with the criminal justice system as a law enforcement officer were not cumulative of any other properly admitted trial evidence.

The third factor is whether the trial court instructed the jury to disregard what they heard. There was no request for such an instruction. But the trial court would have been required to examine whether an instruction *could* cure the prejudice. Escalona, 49 Wn.

App. 254-55. In Escalona, this Court noted that “no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.’” Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). As in Escalona, juror 29’s information was inherently prejudicial.

In State v. Bourgeois, the Supreme Court concluded that a curative instruction sufficiently mitigated any prejudice resulting from an irregularity – a spectator who had glared at a prosecution witness and made a hand gesture as if pointing a gun at the witness. Bourgeois, 133 Wn.2d at 397-398, 408. In so finding, the Court focused on the fact most jurors were apparently unaware of either incident prior to rendering their verdicts. Bourgeois, 133 Wn.2d 398, 408-410. The opposite is true here. Every individual that ultimately served on Fox’s jury was present and heard juror 29’s comments.

Because these comments were a serious irregularity, were not cumulative of any proper evidence, were heard by all jurors, and could not be mitigated with a jury instruction, the trial court would have been required to grant a defense motion for mistrial.

There is a reasonable probability counsel’s failure to act

affected the trial outcome. Fox provided a plausible defense. Neither Brittany Davenport nor Paul Stricklin saw Fox with a car the night before his arrest. There were no outward signs the Honda had been stolen. The ignition appeared normal, and police did not find a shaved key or any other device used to start the car. Moreover, the fact this was the fifth abandoned stolen car left in that neighborhood increased the odds Fox would accidentally find such a car in which to sleep as opposed to stealing it and driving it there himself.

In light of juror 29's information, however, jurors would have wondered whether they were receiving the whole story on Fox and whether additional information establishing his guilt had been excluded. Like juror 29, this would have affected jurors' abilities to be fair and impartial.

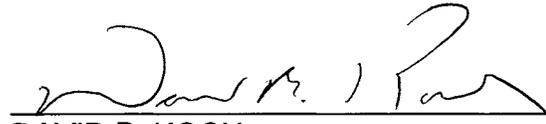
D. CONCLUSION

Defense counsel was ineffective for failing to move for a mistrial. Fox's conviction should be reversed and his case remanded for a new trial.

DATED this 16th day of October, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789

Attorneys for Appellant

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63276-1-I
)	
KYLE FOX,)	
)	
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 16TH DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] KYLE FOX
DOC NO. 893847
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF OCTOBER 2009.

x *Patrick Mayovsky*

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