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NO. 63276-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KYLE M. FOX,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. During voir dire, the trial court asked if any prospective juror felt he or she could not be impartial. One juror volunteered she was not sure she could be: she was a retired police officer and she would be wondering what evidence had been excluded. She said was not sure she could follow instructions, but would try. She was excused for cause without objection. Appellant asserts her comments tainted the entire venire and deprived him of a fair trial.

May he raise this claim of error, when he did not seek a mistrial below?

Was trial counsel ineffective in not seeking a mistrial, when the prospective juror's candidness is precisely what the voir dire process is designed to elicit, and what the court had requested?

II. STATEMENT OF THE CASE

A. DEFENDANT'S POSSESSION OF A STOLEN VEHICLE.

Paul Schachter lives in the Greenlake area of Seattle. He awoke the morning of Nov. 23, 2008 to find his brown Honda missing from his driveway. 1RP 120-24, 157. He had taken the keys out, as well as any valuables and the faceplate to his sound system, but left the car unlocked so any would-be thieves and

prowlers wouldn't break out the windows. 1RP 129-30. He reported the car stolen. 1RP 125, 152.

Amarjit Grewal lives in Everett on a cul-de-sac. 1RP 133, 135, 141. It backs onto a greenbelt and a ravine. 1RP 146, 148. The ravine is impassible even on foot. 1RP 148. On the morning of Nov. 25, 2008, Grewal saw a car he did not recognize parked at the very end of the cul-de-sac. It had not been there at 9 pm the previous evening. 1RP 136-41, 150; 2RP 12. Grewal could see that the driver's seat was tilted back and that a person was sitting/lying in the seat, covered by a sheet. Thinking he was looking at a corpse, Grewal called police. 1RP 141-42.

Police got a call of a "slumper" in a vehicle at 9:21 – 9:22 am. They arrived in under five minutes. They "ran" the reported plates and learned the car was Schachter's Honda, stolen two days before. 1RP 150-53; 2RP 6-9, 11. Because the vehicle was stolen, they approached it with guns drawn, as a felony situation. 1RP 152, 156; 2RP 13-14. Finding the doors locked, they rapped on the driver-side window, yelling "Everett Police!" The defendant, Kyle Fox, awoke when these commands were repeated. 1RP 158; 2RP 14-15.

The defendant's response, once awake, was to reach over and slap down the front and rear door locking bars and dive to the front passenger-side door. 1RP 158-59, 165. Finding his way blocked there by a second armed officer, the defendant scrambled over the center console to the rear driver-side door and ran out. 1RP 159; 2RP 16-17. When the officer on that side tried to stop him by grabbing him by his sweatshirt, the defendant shrugged it off and kept running. 1RP 159-61, 2RP 16-17. An attempt by a pursuing officer to "taser" him was unsuccessful. 1RP 162; 2RP 18-20. Officers eventually cornered him, but the defendant remained uncooperative to commands, so police wrestled him to the ground. They succeeded in handcuffing him, but only after considerable struggle. 1RP 161-63; 2RP 22-24, 56.

Schachter arrived onscene to identify and take possession of his car. 2RP 25. He and officers found a number of things in the passenger compartment that didn't belong to him. 1RP 126-27; 2RP 25, 30. These included fleece slippers on the floor in front of the driver's seat, a knit coat, some third person's Microsoft ID, a knife, brass knuckles, stocking cap, gloves, and a sweatshirt, some cooking utensils, and a Timberland boots box with worn athletic

shoes inside. 1RP 126-27; 2 RP 34-40, 66-67, 70, 76. (The defendant was wearing the new boots. 2RP 56, 67.)

It appeared to police that someone had modified or damaged the Honda's ignition. While the ignition had not been "punched," and looked normal, nonetheless Schachter had trouble starting the car. At first the key would only go in halfway. Eventually, after some 3-4 minutes, he got it started. 1RP 125, 127-28; 2RP 25-26, 29, 50-51. Police did not find any keys, shaved or otherwise, in the car or on the defendant. They explained to the jury that there were other ways to start a car. 2RP 44-45.

The defendant's identification listed a home address in Seattle some 14 blocks south and 12 blocks west of Schachter's driveway. 1RP 122, 132; 2RP 28-29; Ex. 6.

The defendant testified he was basically homeless, staying in shelters and with friends. 2RP 85-86. He asserted he hadn't stayed at the Interlake address for months. 2RP 121. He sometimes stayed at a shelter in Seattle's University District, including during that November. He acknowledged that wasn't all that far away from Schachter's address either. 2RP 86-87, 121-23.

The defendant said he took a bus to Everett the afternoon/evening of Nov. 24 to meet friends and his old girlfriend.

2RP 87-89. Late that night (past 10:30 pm), he found himself unwelcome at his ex-girlfriend's party at McCabe's Tavern in Everett. 2RP 90, 133-34. He "wandered aimlessly" through Everett to find an unlocked car to sleep in. Eventually he discovered Schachter's car parked "tucked out of view" at the end of a cul-de-sac. 2RP 94-96. 131-32, 136-37; see Ex. 3 and 2RP 9-10, 41-43, 113 (aerial view of route one would have had to walk to get from McCabe's to cul-de-sac).

Two friends testified that they never saw the defendant driving a car that night. 2 RP 106 (saw defendant walking up hill from bus station); 2 RP 144-46 (gave defendant a ride to tavern).

The defendant acknowledged that fighting and running from the police was an "error in judgment." 2 RP 96-97, 133. He was impeached with four prior felony possession of stolen property convictions and one prior felony taking motor vehicle conviction, all occurring between 2005 and 2007. 2RP 86-87, 120.

Fox was charged with one count of possession of a stolen vehicle, RCW 9A.56.068. 1 CP 87-88. A jury convicted as charged. 1 CP 59. The trial court imposed a prison-based DOSA ("drug offender sentencing alternative") sentence of 25 months plus

treatment. 1 CP 19-34; 4RP 13-18. A standard-range sentence would have been between 43 to 57 months. Id.

B. VOIR DIRE.

At the beginning of voir dire, a prospective juror who worked in the prosecutor's office was excused for cause without any questioning. 1RP 25-26. The court advised prospective jurors that "a lot of work, by necessity and by the rules of law, has to occur outside your presence." 1RP 30. The court then inquired if anyone felt they could not be impartial. One juror, #29, volunteered that she would have a hard time being impartial, given that "I don't believe we're going to hear everything that happened." 1RP 36. Further brief questioning, first by the court and then by the prosecution, established that juror #29 retired from police work 20 years earlier and that, in her experience, generally "certain things would be ruled out." 1RP 37. She said she would try to follow instructions, but wondering about what facts had been left out would stick in her mind. Id. Defense counsel asked she be excused for cause and the prosecutor had no objection. The Court thanked Juror #29 for her candor and excused her. 1RP 38. (1RP 36-38 is attached hereto.)

Voir dire then continued uneventfully. See 1RP 38-109. Prospective jurors showed some sophistication in understanding defense's counsel's role: 1RP 75 (juror #20: "you know the system, you know the ins and outs . . . to guide the process as far as representing his interests"), 1RP 76 (juror #22: "you're his advocate, and to keep him in line"). The State ended up exercising all seven of its preemptory challenges; the defense exercised three. 1RP 104-09.

III. ARGUMENT

A. OVERVIEW.

The defendant claims, for the first time on appeal, that a comment in voir dire somehow tainted this entire trial. He is wrong. And his assignment of error should be placed in context.

This was a straightforward and simple trial of a nonviolent property offense, comprising two days of testimony. See 2 CP 119-29. There had been no pretrial suppression motions. Evidentiary questions at trial were few and simple. E.g., 1RP 10-17, 2RP 99-102 (defendant's priors can be used to impeach, but not for substantive evidence); 1RP 17-21, 2RP 62-65 (third party property found in car not to be described as "stolen," although one officer inadvertently said so). The issue was always whether the State

could prove the defendant knew the car was stolen. See 1 CP 51 (to-convict instruction, listing elements). At trial, each side had something to work with. The prosecution could argue that the defendant's "fight and flight" response when found in the car was consistent with guilty knowledge, as well as highlight his living near where the car was stolen. The defense could point out that the defendant's friends did not see him driving a car that night, and that, as an inveterate car thief, it was not altogether implausible that he would use his criminal experience to find an unlocked car to sleep in. The jury was permitted to draw inferences either way. See 1 CP 49 (instruction on direct vs. circumstantial evidence), 1 CP 52 (instruction re "knowingly"). They were, of course, the sole judges of credibility. 1 CP 46 (being so instructed); State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (credibility the sole province of the fact-finder, and not subject to appellate review). Their verdict reflects they drew inferences as they were permitted to do, and that they did not believe the defendant's version of events. This was a straightforward result. The defendant assigns no error to the testimony elicited, nor to opening statements or closing argument.

B. THE DEFENDANT CANNOT RAISE ERROR FOR THE FIRST TIME ON APPEAL UNLESS IT IS “MANIFEST” CONSTITUTIONAL ERROR, WHICH THIS IS NOT.

Unable to find any fault with the testimonial portion of the trial, the defendant instead argues that one prospective juror’s volunteered comments, in direct response to a question from the court during voir dire, somehow tainted the entire venire and led to an unjust result. However, his experienced trial attorney¹ did not assign error to prospective juror #29’s comments at trial. This precludes review.

Errors not challenged at trial may be reviewed on appeal only if they involve “manifest error affecting a constitutional right.” RAP 2.5(a)(3). This inquiry involves a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). A mere allegation of a violation of a constitutional right does not mandate review. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). “‘Manifest’ means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed;” the defendant must make a plausible showing that the error, to be “manifest,” had “practical and identifiable consequences

¹ At sentencing the court expressed “great respect” for trial counsel. 4RP 13.

in the trial,” resulting in actual prejudice. State v. Lynn, 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992). accord, State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002); State v. Stein, 144 Wn. 2d 236, 240, 27 P.3d 184 (2001); State v. McFarland, 127 Wn.2d at 333-34.

A defendant has a constitutional right to trial by an unbiased jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); U.S. Const. amend. VI (1792). Consequently, the issue is, at least nominally, “constitutional.” But not only is there is no manifest constitutional error; there is no error at all.

“[T]he purpose of voir dire is to determine whether any of the prospective jurors would have difficulty returning a fair and impartial verdict.” State v. Ford, 151 Wn. App. 530, 543-44, 213 P.3d 54 (2009). It is “to give litigants the opportunity to explore potential juror attitudes for juror challenges.” Lopez-Stayer v. Pitts, 122 Wn. App. 45, 51, 93 P.3d 904 (2004); CrR 6.4(b). This goal can hardly be achieved if jurors are not open, candid, and honest, as juror #29 was. Indeed, this Court has found error when a prospective juror was *not* candid, and *concealed* information. State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001) (prospective juror concealed fact of

being retired police officer, apparently to get on jury, giving rise to presumption of bias; remanded for evidentiary hearing).

Here, *voir dire* functioned exactly as it should. Juror #29, like the prospective juror in Cho was a retiree from police work. But, unlike the juror in Cho, juror #29 was candid and honest about possibly not being able to be impartial. This is precisely what we want prospective jurors to do during *voir dire*. *And it was in direct response to what the court asked*. Appellant's argument – that a candid answer about possible bias taints the whole venire – would completely undermine *voir dire*'s effectiveness, not to mention greatly increase the number of mistrials precisely in instances where *voir dire* was most effective. This is an untenable position.

Moreover, the prospective juror's comments did not address this case or this defendant, but, instead, the exclusionary rule generally. This is hardly anything new or unknown. The exclusionary rule as applied to the States has existed for almost half a century, and in federal jurisprudence for nearly twice that long. Mapp v. Ohio, 367 U.S. 643, 652, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914); Potter Stewart, "The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the

Exclusionary Rule in Search-and-Seizure Cases,” 83 Colum. L.Rev. 1365 (1983). It has become part of popular consciousness, no less so than Miranda warnings. Moreover, other jurors exhibited a fairly sophisticated knowledge of criminal procedure and role of defense counsel. 1RP 75 (juror #20: “you know the system, you know the ins and outs . . . to guide the process as far as representing his interests”), 1RP 76 (juror #22: “you’re his advocate, and to keep him in line”). It is hard to see how juror #29 simply expressing her knowledge of the exclusionary rule, and her reservations about its application, was somehow telling the other prospective jurors anything they did not already know. Moreover, the instructions they ultimately received actually *told the jurors* that evidence could be ruled inadmissible. 1 CP 45-46.

In State v. Noltie a prospective juror expressed far more reservation and equivocation about being able to be impartial than juror #29 expressed here, yet the trial judge’s denial of a challenge for cause there was upheld. State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991). (If anything, the parties and court here were too quick to excuse the juror here for cause.) The comments here were far more benign. Since they would not, under the Noltie standard, have supported a challenge for cause, it is hard to see

how they nonetheless still could have tainted the juror pool. This is not manifest constitutional error. It is not even error at all. Consequently, the matter cannot be raised for the first time on appeal.

C. APPELLANT CANNOT ESTABLISH TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

Not having objected below, and thus faced with the bar in RAP 2.5(a)(3) and State v. Lynn, the defendant argues his trial counsel was ineffective in not having sought a mistrial when juror #29 made the comments she did. This argument is meritless.

To prevail on a claim of ineffective assistance, the defendant must show that (1) his trial counsel's representation was deficient, and (2) the deficiency actually prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pers. Restraint of Pirtle,

136 Wn.2d 467, 487, 965 P.2d 593 (1998); Hendrickson, 129 Wn.2d at 78. Both “prongs” must be shown. Id. Counsel is presumed effective, a presumption the defendant must overcome. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d at 334-36; State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

The defendant argues trial counsel was deficient in not seeking a mistrial. He claims the voir dire comments here were so harmful that the trial court would have *had* to grant such a motion, under a per se standard or something close to it. BOA 11, 13. But a trial court’s denial of a motion for mistrial, had such a motion been brought, is reviewed for abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006); State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). This is an onerous and deferential standard that the defendant ignores and that, on this record, he could not have overcome.

Trial counsel might have had a legitimate tactical reason for not seeking a mistrial: namely, that the panel she had was as favorable as any her client was going to get. The record affords some evidence of this: the prosecution ended up exercising all seven of its preemptories, while the defense only exercised three. 1RP 104-09. A court may not sustain a claim of ineffective

assistance if there was a legitimate tactical reason for the allegedly incompetent act. Strickland, 466 U.S. at 690; State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Ultimately, however, the resolution of this issue turns on trial counsel's assessment of the jurors, which is not of record. This alone defeats the defendant's claim of error on direct appeal. McFarland, 127 Wn.2d at 388 n.5 (when ineffective assistance claim depends on evidence outside the record, remedy is to file personal restraint petition).

Furthermore, as discussed above, there was no error: juror #29 did exactly what we expect of prospective jurors in voir dire, and did so in direct response to the court's question about the possibility of bias. That being so, counsel can hardly be faulted for not seeking a mistrial in response to something that was not error. A motion for mistrial, if made, would have been denied.

The defendant disagrees, arguing juror #29's comments were a serious "trial irregularity," to be analyzed under the standard in State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987). BOA 10. But of the five cases he cites as authority for and examples of "trial irregularity," only one involves juror questioning in voir dire. In State v. Rempel, a juror stated during voir dire she did not know the alleged victim in a sexual-assault case. When the complaining

witness came in to take the stand, however, the juror recognized her and told the court so. The court and parties asked follow-up questions and the court determined the juror could nonetheless be impartial, and denied a motion for mistrial, an action which this Court affirmed. State v. Rempel, 53 Wn. App. 799, 800-04, 770 P.2d 1058 (1989), reversed on other grounds, 114 Wn.2d 77, 785 P.2d 1134 (1990). Rempel thus involved initial *nondisclosure*, whether willful or inadvertent. Here, we have the opposite. No case holds that candid disclosure, requested by the court, concerning whether one can be an impartial juror, can so taint a jury pool that a mistrial must be granted. Consequently, no analysis as a “trial irregularity” is needed. Juror #29 is to be commended for being honest. Instead, the defendant would have her, and us, punished, by requiring mandatory mistrials whenever a prospective juror reveals possible bias during voir dire.

Lastly, the defendant argues he suffered prejudice because this was a close case and without juror #29’s comments it would have gone the other way. BOA 13-14. This is pure speculation, and ignores the presumption that jurors will follow their instructions. See, e.g., State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993) (articulating the presumption). The defendant has established

neither deficient performance nor resulting prejudice, and it is his burden to do so. Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 334-36. His argument is unsupported by authority and, by undermining the very purpose of voir dire, is contrary to public policy.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on February 8, 2010.

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APPENDIX

VOIR DIRE OF JUROR # 29

1RP 36-38

1 it to go beyond this week, is there anyone that feels that
2 your participation in a trial of the length would be
3 impossible or would impose an undue hardship? Anyone? I
4 see no hands.

5 Everyone I know has opinions. Some of you may
6 have strong personal beliefs about what the law is or what
7 you personally believe the law ought to be. However, as
8 jurors, it will be your duty to accept the law from my
9 instructions. Is there anyone who feels that he or she
10 cannot follow the law as given to you by the Court? Anyone?
11 I see no hands. I realize you know very little about the
12 case at this point, but does anyone think that they might
13 not be able to be impartial and fair to both sides? Anyone?
14 Juror No. 29. Could you perhaps elaborate, ma'am?

15 JUROR NO. 29: I just don't believe that we're
16 going to hear everything that happened. I've been a police
17 officer, so I probably would be -- not be impartial because
18 I know --

19 THE COURT: Okay. I recognize everyone comes to
20 this room with various experiences and so on. Do you
21 believe that you can base your decision on the facts that
22 are presented to you here in this courtroom?

23 JUROR NO. 29: I think I'd spend more time
24 wondering about the facts that I'm not hearing.

25 THE COURT: Okay. Any comments or questions from

1 counsel?

2 MR. ALSDORF: I'll take a shot at that, your
3 Honor.

4 THE COURT: Okay.

5 MR. ALSDORF: Well, thanks for being honest. How
6 long ago was it that you were a police officer?

7 JUROR NO. 29: It's been 20 years.

8 MR. ALSDORF: Okay. And you said two things:
9 You said I don't believe we're going to hear the full story
10 and I was a former police officer. Are those two things
11 related or which of those factors makes you think that you
12 can't serve impartially today?

13 JUROR NO. 29: Well, my experience has been that
14 certain things would be ruled out, will not be allowed to be
15 testified to.

16 MR. ALSDORF: And even if you had that knowledge
17 or suspicion, if the Court gave you a packet of jury
18 instructions that constituted the law and what you are to
19 follow --

20 JUROR NO. 29: I would honestly try, but it's
21 still going to stick in my mind.

22 MR. ALSDORF: Okay. Well, thank you for being
23 honest.

24 THE COURT: Ms. Tarantino, did you have any
25 questions for this juror?

1 MS. TARANTINO: I didn't, your Honor, but I would
2 challenge her for cause.

3 THE COURT: Okay. Mr. Alsdorf?

4 MR. ALSDORF: No objection, your Honor.

5 THE COURT: Okay. Ma'am, thank you for your
6 candor. Given the comments made, I will excuse Juror No. 29
7 for cause at this time. Thank you. Ma'am, if I can ask you
8 to hand in your jury number to Ms. Anderson and ask you to
9 report back down to the jury coordinator's office for
10 whatever instructions they would give you at that time.

11 Is there anyone else that would raise their hand
12 as to that particular question? I see no other hands. Let
13 me ask even a broader question than that. Does anyone know
14 any reason why you believe you should not sit as a juror on
15 this particular case? Anyone? I see no hands.

16 Let me ask a question which generally yields
17 quite a few hands. Please raise your hand if you've ever
18 heard of Phil Donohue before. Please raise your hand if
19 you've heard of Phil Donohue. Okay. Just about everyone
20 has heard of Phil Donohue. This type of jury selection that
21 we're about to launch into is sometimes referred to as the
22 Phil Donohue method. I guess the reason for that, some of
23 you that may have served on juries some time ago may recall
24 a process where the usual procedure was we'd start with
25 Juror No. 1, the attorneys would ask lots of question of