

68327-6

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No. 68327-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD HUBBARD,

Appellant.

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

REPLY BRIEF

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A. ARGUMENT

1. BECAUSE MR. HUBBARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY AN UNBIASED JURY, REVERSAL MUST BE GRANTED.

- a. If a potential juror demonstrates actual bias, the trial court has no discretion and must excuse the juror for cause. While the denial of a challenge for cause is generally within the trial court's discretion, State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996), if a potential juror demonstrates actual bias, the court must excuse the juror for cause. Otis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 754, 812 P.2d 133 (1991). Actual bias is "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). A challenge for cause should be granted where a prospective juror's views "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions or oath." Id.

b. Juror 18 demonstrated actual bias; therefore, the trial court had no discretion to deny Mr. Hubbard's challenge. Juror 18 acknowledged her bias candidly – not once – but at least three times during voir dire. Juror 18 was the first juror to note her concerns with the subject matter of the case, explaining her “bias” as “a mother with daughters.” 9 RP 143-44 (emphasis added). Juror 18 also remarked, “I'm not sure I could be fair and that concerns me ... and I want to be honest about that.” Id. at 145 (emphasis added).

The State attempts to deemphasize Juror 18's concerns by citing only two of the many comments this juror made during a lengthy voir dire. In reality, Juror 18 endured three rounds of voir dire, and in each round, patiently explained her deep concerns about her ability to be fair and impartial. In the second round, Juror 18 again stated that she found the idea of sitting on a sex offense case “very concerning.” 9 RP 208-09. Finally, on the third round of voir dire, Juror 18 stated, “I just want to be fair to Mr. Hubbard and I'm concerned ... I'm being very honest ... please ...” 10 RP 46.

In her final words to defense counsel, who asked Juror 18, “You don't want to do this?” Juror 18 responded, “I don't think you want me.” 10 RP 46 (emphasis added).

This situation resembles the situation in State v. Gonzales, where this Court found actual juror bias. 111 Wn. App. 276, 281, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). Although the State attempts to distinguish the instant case from Gonzales, the two cases are indistinguishable where the State made no attempt to rehabilitate Juror 18, and the court's attempts to do so were unsuccessful. This Court emphasized in Gonzales:

We do not say that a juror whose initial responses indicate actual bias can never be rehabilitated by affirmative responses to thorough and thoughtful inquiry.... But appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp.

111 Wn. App. at 281. The questioning of Juror 18 revealed a strongly-held bias, similar to that expressed in Gonzales, and the court wrongly denied the challenge. 9 RP 144-45, 208; 10 RP 44-46, 29-30, 99-100.

c. The remedy is reversal and a new trial with an impartial jury. Where a biased juror sits on the jury, the defendant is denied his Sixth Amendment and article I, sections 3 and 22 rights to a jury trial, and the only remedy is to remand the matter for a new trial. United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); State v. Fire, 142 Wn.2d 152, 158, 34

P.3d 1218 (2001). In light of the showing of actual bias here, the trial court had no discretion but to excuse Juror 18 for cause. Otis, 61 Wn. App. at 754.

2. BECAUSE THE TRIAL COURT DENIED MR. HUBBARD HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING RELEVANT EVIDENCE, REVERSAL IS REQUIRED.

a. The trial court improperly denied Mr. Hubbard's applications under ER 608(b) and ER 404(b). Mr. Hubbard made an extensive offer of proof, detailing prior acts of dishonesty committed by B.M.O., relevant to her bias and motive to lie against Mr. Hubbard concerning the child molestation charges. 16 RP 36-39, 132-36, 137-39; CP 130. The prior bad acts of B.M.O. were relevant both to her credibility and to her anger at Mr. Hubbard for being the household disciplinarian; likewise, B.M.O.'s prior acts of forgery, shoplifting, and computer hacking were highly relevant to B.M.O.'s motivation for making the allegations in this case.

b. The court's exclusion of relevant evidence denied Mr. Hubbard his right to present a defense, requiring reversal. The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct

1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV.

Article I, section 22 of the Washington Constitution provides a similar guarantee. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.”

The State argues that the acquittals on counts I and III indicate that B.M.O. was sufficiently impeached on the methods “still available” to Mr. Hubbard, short of the excluded prior bad acts of B.M.O. Resp. Brief at 41. This is cold comfort, however, to Mr. Hubbard, and is irrelevant to the analysis on appeal. The State’s argues that this Court should apply the harmless error standard, relying upon Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 436-37, 167 P.3d 1193 (2007). The State’s reliance is misplaced, however, as the facts of Doe are quite different from the instant case. In Doe, which first of all, involved appellate review of the admission of 404(b) evidence at trial, this Court held that the trial court had not abused its discretion in admitting such 404(b) evidence. 141 Wn. App. at 436. Further, the Doe Court held the error harmless, largely due to the large amount of corroboration of that defendant’s abuse of the victims in the case

cited by the State. Id. at 436-37 (noting the defendant had previously pled guilty to the same conduct, and had “confessed to and was disciplined by the LDS Church for his transgressions”).

In the instant case, where the jury acquitted Mr. Hubbard of two of three charged counts, and where the only corroboration of the remaining act was the testimony of another child, it is disingenuous to compare this case and Doe. Because of the many inconsistencies between B.M.O.’s and her brother Sean’s testimony, any matter which undercut the alleged victim’s credibility or established bias or motive to lie was relevant. B.M.O. had a strong motivation to make allegations of criminal conduct against Mr. Hubbard – the man whose name she had forged, and the only adult who enforced discipline in her home. B.M.O. knew that by making this allegation, she could make Mr. Hubbard “disappear.” RP 17 158-59. The fact that the alleged victim had a strong motive to lie and an acknowledged grudge was a fact that made her credibility less likely.

Because the court’s exclusion of relevant evidence denied Mr. Hubbard his Sixth Amendment right to present a defense, the error requires reversal of Mr. Hubbard’s conviction unless the State can prove beyond a reasonable doubt that it “did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87

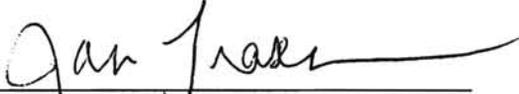
S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Jones, 168 Wn.2d at 724 (“it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.”). The State cannot meet this burden in this case.

The State cannot prove beyond a reasonable doubt that the exclusion of relevant evidence of bias and motive was harmless. This court must reverse Mr. Hubbard's conviction.

B. CONCLUSION

For the above reasons, as well as those stated in the Opening Brief, Mr. Hubbard respectfully asks this Court to reverse his conviction and grant a new trial.

Respectfully submitted this 20th day of February, 2013.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68327-6-I
v.)	
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RONALD HUBBARD, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF FEBRUARY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF FEBRUARY, 2013.

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