

NO. 35897-2-II

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

STATE OF WASHINGTON, Respondent

v.

JERRY MARTIN HAVENS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02418-4

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant in his brief. Where additional information needs to be supplied, it will be done so in the argument portion of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is that the trial court erred by denying the defendant's request for a new jury pool. Specifically, the allegation is that while the jury was being selected, one of the potential jurors claimed that she had overheard comments by another potential juror (Mr. Lockhart) that discussed the believability of police officers. (RP 45-46).

This information was then provided to the trial court and after discussion with the attorneys (the defendant was present during this), it was determined that the court would inquire as to whether or not this potential problem had created difficulty for other potential jurors to sit on the case.

Concerning Mr. Lockhart himself, the defense challenged him for cause and the court, without questioning him, granted the motion. (RP 59). After individual questioning of the jurors, the trial court

determined that both sides could receive a fair trial and that they would proceed with the panel:

THE COURT: It is the finding of this Court that when I inquired of all the jurors in here, no one ever really touched on the question of believability of police officers, what was originally reported to us. What they touched on is, I was – the most common thing was, I was surprised I was chosen. A lot of them don't really recall that much of the conversation. All of them have expressed the fact that they feel that they're not affected by it, and that they can still be fair and impartial.

So the Defense request is denied, and we go with this panel.

(RP 107, L.9-20)

As indicated in State v. Jorden, 103 Wn. App. 221, 11 P.3d 866 (2000), a trial court's decision to excuse a juror will be reviewed for an abuse of discretion. Under RCW 2.36.110, the judge has a duty "to excuse from further jury service 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 in compatible with proper and efficient jury service." Criminal Rule 6.5 enables the trial court to seat alternate jurors when the jury is selected.

In our situation, the trial court determined that Mr. Lockhart was unfit to serve. Further, a challenge for cause had been made by the

defense and the trial court agreed and excused him from any service in the case. There is nothing that indicated that the trial court abused its discretion in making this determination. In deciding whether to grant or deny a challenge for cause based on bias, a trial judge has “fact finding discretion.” This discretion allows the judge to weigh the credibility of the perspective juror based on his or her observations. As with other factual determinations made by the trial court, the appellate system defers to the trial judge’s decision. State v. Jorden, 103 Wn. App. at 229.

The defendant must establish prejudice for error to exist. In State v. Vasquez, 130 ARIZ. 103, 107, 634 P.2d 391, 395 (1981), the court stated:

We are only justified in disturbing the verdict of guilty on a count of the alleged misconduct of a juror when it is shown that such misconduct was prejudicial to the rights of the defendant, or when such a state of facts is shown that it may fairly be presumed there from that the defendant’s rights were prejudiced.

Whether such prejudice exists is a matter of fact within the discretion of the trial court. State v. Young, 89 Wn.2d 613, 630, 574 P.2d 1171 (1978). In our situation, the trial court found no prejudice. The court individually discussed this matter with each of the jurors and felt that there was no taint or difficulty with the panel continuing to address the case.

There were no indications given to the trial court from any source that would indicate that this jury had been so tainted that it could not look at the facts and arrive at a conclusion based on the law and evidence in the case. Counsel on appeal has not cited to any specific references in the record that would cause concern that these jurors could not follow the law that they were being provided or could not understand or follow the evidence. All the jurors indicated that they could be fair and impartial in this matter. It is interesting to note that the majority of them did not hear anything, or only heard partial matters and did not think anything of it. One perspective juror came forward indicating what she had heard, and the juror, who apparently, had made the comments, was challenged for cause and the trial court agreed with the defense and removed him from being a juror on the case. Perhaps a different judge may have handled it in a different manner, but that does not indicate that the defendant did not receive a fair trial or that this was not a thorough and complete review of the matter by the court. The question is, was there any abuse of the trial court's discretion in removing the juror and in the way that the questioning was conducted of the other jurors. The State submits that there was no impropriety, misconduct, or other difficulties or problems that would cause this panel to be so tainted that it would have to be totally replaced.

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a juror capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

United States v. Olano, 507 U.S. 725, 738, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

The State submits that in our case, the trial court questioned perspective jurors about the “incident” and satisfied itself that nothing had happened that would affect the jury’s ability to be fair and impartial.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is that he was denied effective assistance of counsel because his attorney during the jury selection process failed to ask perspective jurors whether any of them had heard of this case.

To establish ineffective assistance of counsel, the defendant must show both that counsel’s performance was defective and that the error changed the outcome of the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ineffective assistance of counsel will not be addressed if both of these prongs are not met. Further,

with that is the caveat that the Court of Appeals will give great judicial deference to trial counsel's performance and a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. Staten, 60 Wn.2d 163, 170, 802 P.2d 1384 (1991); State v. Foster, 140 Wn. App. 266, 166 P.3d 726 (2007).

The choice of trial tactics, the actions to be taken or avoided, and the methodology to be employed must rest in the trial attorney's judgment. State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

The issue during jury selection was that one of the jurors had read a newspaper article discussing the nature of the proposed defense of necessity. The defendant was claiming he had possession of the controlled substances to keep them away from his son's girlfriend. The potential juror who read the article was removed for cause. (RP 110). The jury was impaneled and the court admonished the jury not to read, view or listen to any report in the newspaper, radio, or television, or internet on the subject of the trial. (RP 117).

The defense offered in this case was the one reported, that is a defense of necessity. The defense attorney was able to convince the judge to give a necessity instruction and it was provided to the jury as part of the jury instructions in the case. (RP 359). Even if the appellate court accepts a claim that this was some type of error (which the State does not agree with), it clearly does not change the outcome of the trial nor is there any indication or showing that it tainted the jury in anyway whatsoever. There must be a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). The jurors in our case were not only questioned by both attorneys at the trial court level, but were also individually voir dired because of the issue of what they may have overheard during the time that they were perspective jurors. All indications are that the jurors indicated that they could be fair and impartial and that nothing would prevent them from following the court's instructions. Absent any contrary showing, the appellate system presumes that a jury follows the trial court's instructions. State v. Davenport, 100 Wn.2d 757, 763-764, 675 P.2d 1213 (1984); State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Finally, there is a question of the extraneous material that the defense claims may have prejudiced the jury. The defense cites to

State v. Hicks, 41 Wn. App. 303, 704 P.2d 1206 (1985). The Hicks case is interesting because the finding by the appellate court was that there was no actual or probable prejudice shown and thus no presumption of prejudice arose in the case. The discussion from the Hicks case was as follows:

Where a due process violation stemming from jury exposure to extraneous material is alleged, actual prejudice to the defendant need not be shown if a probability of prejudice is demonstrated. State v. Stiltner, 80 Wn.2d 47, 54, 491 P.2d 1043 (1971), cited in State v. Smalls, 99 Wn.2d 755, 767-68, 665 P.2d 384 (1983); State v. Knapp, 14 Wn. App. 101, 114, 540 P.2d 898 (1975). Moreover, prejudice might be presumed if a newspaper article attacked the defendant, expressed an opinion as to his guilt, or was a grossly unfair statement of the trial. See State v. Adamo, 128 Wash. 419, 422, 223 P. 9 (1924). Here no actual or probable prejudice was shown and no presumption of prejudice arises.

First, the articles in question were not specifically on Hicks' trial but rather were general factual and editorial articles, both pro and con, on the insanity defense. Further, unlike the case in State v. Rinke, 70 Wn.2d 854, 859-63, 425 P.2d 658 (1967), here no allegation or showing has been made that the articles were considered by the jury in their deliberations. Unlike the editorial and cartoon in Rinke, the articles here did not go to the jury room marked as an exhibit.

Moreover, here, unlike in Adamo, at 420, and in State v. Harris, 62 Wn.2d 858, 863-64, 385 P.2d 18 (1963), the jury was not polled as to how many had read the articles. Nevertheless, the trial court more than once admonished the jury that their decision was to be based upon the evidence and exhibits presented in court. HN14 A presumption of jury integrity exists. Adamo, at 422. Given the general nature of the articles, which were not specifically about the present trial, in setting forth the pros

and cons of the insanity defense, the facts here do not give rise to a presumption or probability of prejudice. Since no actual prejudice was shown, the trial court did not abuse its discretion in denying the new trial motion. State v. Smith, 11 Wn. App. 216, 218, 521 P.2d 1197 (1974).

- State v. Hicks, 41 Wn. App. at 312-313.

The State submits that there has been no showing of ineffective assistance of counsel, nor has there been any showing of prejudice to the defendant or his case. In both situations, "offending" jurors were removed for cause, the jurors were questioned and all indicated that they could follow the law as given to them and that they could remain fair and impartial and the court properly instructed the jury immediately after their selection as jurors and later on as part of the jury instructions at the close of the case. There is no indication in this record of any impropriety or inability of the jury to properly do their job.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 3 day of December, 2007.

Respectfully submitted:

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DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On December 4, 2007, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Anne Cruser Attorney for Appellant PO Box 1670 Kalama, WA 98625
Jerry Havens, DOC #951768 c/o Appellate Attorney	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
Date: December 4, 2007.
Place: Vancouver, Washington.