

Original

NO. 35938-3 II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TODD WICKSTROM, APPELLANT

FILED  
COURT OF APPEALS  
DIVISION II  
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SIVCOY

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie A. Arend

No. 06-1-01952-2

BRIEF OF RESPONDENT

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the trial court properly excuse a juror for cause when the trial court acted within its discretion and a showing of abuse of discretion has not been made? ..... 1

B. STATEMENT OF THE CASE. .... 1

C. ARGUMENT..... 3

    1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCUSING A JUROR WITH A POTENTIAL MENTAL OR PHYSICAL DEFECT. .... 3

D. CONCLUSION. .... 7

## Table of Authorities

### Federal Cases

<u>Ross v. Oklahoma</u> , 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).....	6
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### State Cases

<u>State v. Blackwell</u> , 120 Wn.2d 822, 845 P.2d 1017 (1993) .....	4
<u>State v. Brett</u> , 126 Wn.2d 136, 157, 892 P.2d 29 (1995).....	3
<u>State v. Phillips</u> , 65 Wn. 324, 326, 118 P. 43 (1911) .....	6
<u>State v. Roberts</u> , 142 Wn.2d 471, 518, 14 P.3d 713 (2000) .....	6
<u>State v. Rupe</u> , 108 Wn.2d 734, 743 P.2d 210 (1987) .....	4, 5

### Constitutional Provisions

Sixth Amendment, United States Constitution.....	3
--	---

### Statutes

RCW 2.36.070 .....	4
RCW 2.36.110 .....	3
RCW 4.44160 .....	4

### Rules and Regulations

CrR 6.4(c)(1) .....	3
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly excuse a juror for cause when the trial court acted within its discretion and a showing of abuse of discretion has not been made?

B. STATEMENT OF THE CASE.

On May 2, 2006, the Pierce County Prosecuting Attorney's Office charged appellant, TODD ERIC WICKSTROM, hereinafter "defendant", with one count of burglary in the second degree. CP 1<sup>1</sup>. Co-defendant, Shawn Deen, was also charged with one count of burglary in the second degree. CP 1.

Trial on commenced on December 6, 2006 for defendant and Shawn Deen jointly. 1RP 5. Trial was expected to last for three to four days. 1RP 6. The court requested a venire pool of 40 and voire dire commenced that morning. 1RP 10, 17. During the court's preliminary questioning of the jury, it asked if any potential jurors had "the inability to sit for a period of time." 1RP 32. The court continued by asking whether

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<sup>1 1</sup> CP refers to the Clerk's Papers.

1RP refers to the verbatim report of proceedings that occurred on December 6, 2006.

2RP refers to the verbatim report of proceedings that occurred on December 12, 2006.

3RP refers to the verbatim report of proceedings that occurred on December 13, 2006.

4RP refers to the verbatim report of proceedings that occurred on December 14, 2006.

anyone had “any problems, physical or otherwise, that would interfere with [the] ability to sit as a juror?” 1RP 32.

In response to these inquiries, Juror 18 responded that he didn’t know if he would become “antsy”, and said, “With my medication, I might cause it [sic]. Tiredness and stuff. But I should be able to.” 1RP32. Juror 18 then stated “I might not be able to” in an apparent reference to his ability to serve as a juror. 1RP 32.

The court instructed the venire to leave the room so that the parties could present challenges for cause outside of its presence. 1RP 81. The court and parties proceeded to evaluate each juror’s ability to serve, and reviewed their possible conflicts as voiced during voir dire. 1RP 82-90.

In reference to Juror 18, the court stated:

I want to explain to you about 18. 18 was in our jury pool from my last trial, so I have a little bit of information that you all don’t have. He is bipolar. He is on medication. I don’t want to potentially embarrass him by eliciting that information. I thought I could share that with you guys outside the presence of the rest of the group. That’s—I think he even did make reference to his medication. He told us in a prior case that his bipolar was under control because of the medication, but I think he’s, you know, being honest and truthful that he doesn’t know how it may affect his ability to sit all day long, and I thought you should know that information.

1RP 86.

The State moved to challenge Juror 18 for cause, because he “clearly has some health concerns.” 1RP 86. The State voiced concerns that the stress of a trial might trigger Juror 18’s bipolar disorder,

particularly because Juror 18 had not previously sat on a jury and was therefore unable to predict his reaction to jury service. 1RP 86-87.

Defense counsel for both defendant and Mr. Deen opposed the challenge. 1RP 87. Defendant's attorney stated that he had family members with bipolar disorder, and that if his relatives were medicated then "things should be okay." 1RP 87. The court granted the motion, and excused Juror 18 for cause. 1RP 87.

Defendant was convicted as charged and received a sentence in the low-end of the standard range. CP 49-59. Defendant filed a timely appeal. CP 64-72.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCUSING A JUROR WITH A POTENTIAL MENTAL OR PHYSICAL DEFECT.

The Sixth Amendment guarantees a defendant the right to a trial by a fair and impartial jury. State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). RCW 2.36.110 provides, in part, that it is the duty of the judge to excuse 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." A party may challenge a potential juror for cause. CrR 6.4(c)(1). The trial judge is in the best position to evaluate

a juror's ability to be fair and impartial. State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987).

RCW 4.44160 states that a general cause of challenge may include: lack of qualifications under RCW 2.36.070<sup>2</sup>, unsoundness of mind, or a defect of the mind or body that results in the juror being incapable of performing a juror's duties.

A grant or denial of a challenge for cause is at the discretion of the trial court, and will not constitute reversible error absent a showing of manifest abuse of discretion. Rupe, at 748. Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993).

In the present case, the trial court properly acted within its discretion by granting the State's challenge for cause for Juror 18, because the record shows that the juror had concerns about his ability to serve even if he was on medication. When the court asked whether any potential jurors had "any problems, physical or otherwise" that would interfere with

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<sup>2</sup> RCW 2.36.070 provides:

A person shall be competent to serve as a juror in the state of Washington unless that person:

- (1) Is less than eighteen years of age;
- (2) Is not a citizen of the United States
- (3) Is not a resident of the county in which he or she has been summoned to serve;
- (4) Is not able to communicate in the English language; or
- (5) Has been convicted of a felony and has not had his or her civil rights restored.

their ability to serve as jurors, Juror 18 volunteered that he didn't know if he would be "antsy." 1RP 32. Juror 18, when explaining the possibility of his becoming antsy, stated, "With my medication, I might cause it. Tiredness and stuff. But I should be able to." 1RP 32. Juror 18 next stated that he "might not be able to [serve as a juror]." 1RP 32.

Based upon the information made part of the record by the court pertaining to Juror 18's mental illness, Juror 18's own indication of concern over his ability to serve, and his contradictory statements, the court had reasonable basis upon which to form the opinion that Juror 18 was unfit to serve. The court reasonably determined that Juror 18's bipolar disorder, and effects of his medication, resulted in a defect of his mind or body that rendered him incapable of serving on the jury.

A trial court's discretionary determination will not result in reversible error absent a showing of abuse of discretion. Rupe at 749. Here, defendant has failed to provide any evidence to demonstrate that the trial court's excusal of Juror 18 was not properly within its discretion. Therefore, because defendant has failed to establish that the trial court abused its discretion in granting the excusal of Juror 18 for cause, his claim cannot result in reversible error.

As Juror 18 was not improperly excused, defendant's constitutional rights were not violated and his conviction may not be reversed.

Additionally, a defendant does not have a vested right to have a particular member of the venire pool impaneled. State v. Phillips, 65 Wn. 324, 326, 118 P. 43 (1911). All the law requires is that a defendant be tried by a fair and impartial jury. Id. Any claim that the jury was not impartial must focus on the jurors that were actually seated. State v. Roberts, 142 Wn.2d 471, 518, 14 P.3d 713 (2000), citing to Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988). If a defendant has been tried by an impartial jury, “it would be nonsense to grant a new trial.” Phillips at 327.

In the present case, defendant has not asserted that the particular jurors impaneled at trial were not impartial. As defendant has failed to demonstrate that he was denied a fair and impartial jury, his conviction may not be reversed nor may he be granted a new trial.

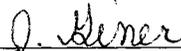
D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the Judgment entered below.

DATED: SEPTEMBER 14, 2007

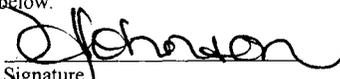
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Jessica Giner  
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/14/07   
Date Signature