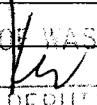


NO. 37350-5-II

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW J. GALVIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 07-1-05276-5

BRIEF OF RESPONDENT

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

1. Whether the defendant preserved the issue of jury misconduct when he did not object or move for the mistrial in the trial court?
2. Whether the trial court abused its discretion when it did not order a mistrial for potential juror misconduct after conducting a full hearing into the issue?
3. Whether defense counsel was ineffective for failing to move for mistrial where the court committed no error?

B. STATEMENT OF THE CASE.

1. Procedure

On October 11, 2007, the Pierce County Prosecuting Attorney charged Matthew Galvin (hereafter referred to as defendant) with one count of malicious mischief in the first degree. CP 1. Trial began January 22, 2008, Honorable John Hickman, presiding. I RP ff. On January 25, 2008, the jury returned a verdict finding the defendant guilty as charged. CP 40. On February 8, 2008, the court sentenced the defendant within the standard range. CP 47-57. On the same day, the defendant filed his timely notice of appeal. CP 58.

2. Facts

January 25, 2008, the parties were awaiting the verdict. The parties appeared in court to hear the verdict. Ms. Bertha Fitzer was the deputy prosecuting attorney who had tried the case. Judge Hickman told the parties that the jury had reached a verdict. IV RP 235. Judge Hickman told the parties that a potential problem had arisen with Juror 8.

On the morning of the 25th, Juror 8 reported to the judicial assistant (JA) that Juror 8 was a victim in a pending criminal case. The juror had received a letter from the Prosecuting Attorney's Office the previous day, informing the juror that the deputy prosecutor assigned to her case was Ms. Fitzer. IV RP 235. Ms Fitzer told the court that the letter had probably come from a victim/witness advocate in the Prosecutor's Office. Ms. Fitzer had not sent it. The judge and the parties agreed that it would be best to inquire of Juror 8.

Juror 8 was brought out to be examined. She stated that the letter had come from a victim/witness advocate. The letter apprised her of changes in the trial date and that Ms. Fitzer was the prosecutor assigned to her case. IV RP 239. The juror had never had any contact with Ms. Fitzer regarding that case. Juror 8 stated that she had already arrived at her decision in the present case before opening the letter. IV RP 237, 238. The letter had had no effect on her deliberations. IV RP 237, 239. She had told other jurors about receiving the letter. IV RP 239. Juror 8 returned to the jury room.

The court then questioned each juror individually regarding the issue. Each juror told the court that Juror 8's disclosure regarding the letter had not affected their individual decisions and had not been discussed in deliberations. IV RP 244, 246, 247, 248, 250, 252, 254, 255, 256, 259, 260.

After conducting the inquiry, the court decided not to order a mistrial. IV RP 262. The jury then entered to render its verdict. IV RP 262-263.

C. ARGUMENT.

1. THE DEFENDANT'S CLAIM THAT THE COURT ERRED WHERE IT FAILED TO DECLARE A MISTRIAL WAS NOT PROPERLY PRESERVED.

Failure to object precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held that Hettich could not raise a *Frye* objection on appeal because he did not make a *Frye* objection at trial. Under *Thetford*, this court is precluded from reviewing the defendant's claim on appeal as it was not preserved in the trial court.

In the present case, defense counsel agreed that the court should ask Juror 8 about the letter she had received. IV RP 236. After Juror 8 was examined, counsel discussed the “consequences and options” with the defendant. IV RP 242. Counsel then told the court that he did not think it had risen to the level of “abandoning the jury” at that point. IV RP 242. Counsel did want to hear from the other jurors before making a final decision on whether to move for a mistrial. *Id.* After the court and both counsel had inquired of all the jurors, defense counsel had the opportunity but declined to request a mistrial. IV RP 261. The issue was not preserved for appeal.

2. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO DECLARE A MISTRIAL AFTER INQUIRING INTO POSSIBLE JUROR MISCONDUCT.

The dismissal of an unfit juror is governed by RCW 2.36.110. Under the statute, the court has the duty to excuse any juror, who, in the opinion of the judge, has become unfit to serve. If deliberations have begun, CrR 6.5 instructs the court to excuse any juror who has become unable to perform his duties and replace him with an alternate.

Trial courts are presented with many types of juror misconduct issues. In *State v. Jordan*, 103 Wn. App. 221, 11 P.3d 866 (2000), a juror was dismissed for sleeping or being “inattentive” during trial. In *State v. Elmore*, 155 Wn.2d 758, 123 P. 3d 72 (2005), the presiding juror and

another juror alleged that a third was refusing to deliberate and was disregarding the law as given by the court. In *State v. Earl*, 142 Wn. App. 768, 177 P. 3d 132 (2008), a juror became so anxious and stressed during deliberations that her psychologist requested that she be excused for health reasons.

Where the possibility of juror misconduct arises, the appropriate course for the trial court is to make an inquiry. See *State v. Elmore*, 155 Wn.2d at 773-774; *State v. Earl*, 142 Wn. App. at 771-772. Once the court has conducted the proper inquiry, the court's decision is reviewed only for abuse of discretion. *Elmore, supra*, at 761. In its inquiry, the court must be careful to respect the principle of jury secrecy. *Earl, supra*, at 775. The court must take care not to inquire into the reasoning behind ongoing deliberations, nor dismiss a juror whose only "misconduct" may be disagreement with other jurors over determining the facts and applying the law. *Elmore, supra*, at 771-772.

In jury selection, prospective jurors may be excused for cause for actual or implied bias. RCW 4.44.170,.180. Where potential juror bias is or should have been discovered, the trial court has great discretion to excuse the juror or, in the event the trial has begun, to order a new trial. See *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991); *State v. Boiko*, 138 Wn. App. 256, 156 P.3d 934 (2007). Great deference is accorded the determination of the trial court in such cases. *Id.*

The cases where new trials were granted for implied juror bias stemmed from juror concealment of material facts. In *State v. Boiko*, *supra*, the juror failed to disclose that she was married to a key State's witness. The prosecuting attorney in the case failed to disclose that he knew the juror, an attorney, that he had a case pending with her, and that she had applied for a job with the prosecuting attorney.

In *State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2001), despite questions in jury selection regarding law enforcement and relationships with the courts, the juror failed to disclose that he was a former police officer. The defense attorney moved for a new trial the day after learning of the juror's omission. It is significant to note that the remedy ordered by the Court of Appeals was not a new trial. The case was remanded for the trial court to conduct a hearing, including the examination of witnesses regarding the alleged misconduct. *Id.*, at 329.

In the present case, the court acted very cautiously. Unlike the facts in *Boiko* and *Cho*, Juror 8 brought the potential issue to the court's attention immediately. There is no implication that she tried to hide material facts from the court in order to get on or stay on the jury. The potential problem arose on the final day of deliberations. The court could determine from speaking with counsel that the deputy prosecutor, Ms. Fitzer, had not personally or directly contacted Juror 8. The letter had been sent as a matter of routine by a victim/witness advocate from the Prosecutor's Office.

Appropriately, the court examined Juror 8 outside the presence of the other jurors to determine the nature of the letter and if it had influenced the juror in any way. Juror 8 confirmed that the letter had been sent by a victim/witness advocate, not by Ms. Fitzer. Juror 8 stated that she had already reached her decision in the case prior to reading the letter. She stated the letter did “absolutely not” affect her deliberation. IV RP 237. Again, when questioned by defense counsel, Juror 8 was very clear that the letter had not influenced her in any way. IV RP 239.

The court went on to question each juror individually. Each said that Juror 8’s letter had no bearing or influence on their decision-making. Each juror stated that neither the fact of the letter, nor its connection to the prosecutor in the present case was considered in their individual decisions. IV RP 244, 246, 247, 248, 250, 252, 254, 255, 256, 259, 260. Each juror said that it had no influence and was not discussed in the group deliberations. All but Jurors 5, 10, and 12 had already reached their personal decisions in the case. IV RP 250, 256, 260. The jurors simply thought it was an interesting coincidence.

The party alleging juror misconduct has the burden to show that misconduct occurred. *State v. Earl*, 142 Wn. App. at 774. Implied bias is not shown merely because a juror is acquainted with a party or the prosecutor. *State v. Tingdale*, 117 Wn.2d 595 601, 817 P.2d 850 (1991). Any connection between Juror 8 and the prosecutor was de minimus. The defendant here cannot show that Juror 8 was biased or that misconduct

occurred or that the jury was tainted in any way. On the contrary, the court's inquiry dispelled any appearance or suspicion that the jury or the verdict was tainted.

3. WHERE THE COURT'S INQUIRY ESTABLISHED THAT THERE WAS NO JURY MISCONDUCT, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996);

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

In the present case, the defendant cannot satisfy either prong of the *Strickland* test. The court made a proper inquiry into whether the letter received by Juror 8 had tainted or affected the jury in any way. The court properly concluded that there was no impact on the jury. There were no grounds for a mistrial. It is not ineffective assistance of counsel where counsel fails to object where the trial court has made no error. *See, e.g., State v. Henrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

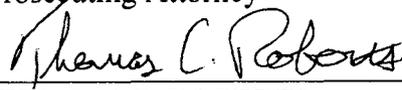
D. CONCLUSION.

The defendant received a full and fair trial where the court made an appropriate inquiry into potential juror bias or misconduct. For the

reasons argued above, the State respectfully requests that the defendant's conviction be affirmed.

DATED: MARCH 6, 2009

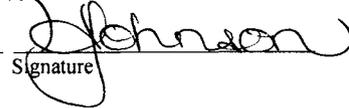
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Certificate of Service:

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.

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