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STATEMENT OF THE CASE

The state on January 13, 2009 charged Appellant with one count of Delivery of a Controlled Substance and one count of Involving a Minor in Drug Dealing. At a jury trial on these charges, the state called Detective Kevin Engelbertson to testify regarding a "controlled buy" with the Appellant. After his testimony, and during the lunch break in the trial, one of the jurors voiced her concern with being "very familiar with Vader and some of the names that you called in court." RP 31. Due to her knowing some of the people referenced in the trial, she asked to be excused from the jury. The court proceeded to conduct a two-part voir dire separated by the lunch break. The following is the first exchange:

The Court: What's the issue?

Juror: Well, I'm very familiar with Vader and some of the names that you called in court. I did not recognize, but listening to the names again, yes, I do know some of these people, so I'd like to be excused.

The Court: There mere fact that you know some of these people, that causes you to believe you'd have a hard time sitting as a fair and impartial juror in the case?

Juror: Yeah, it would bother me.

The Court: Do you know some of the names of these people that the detective talked about in his testimony, and do you know them well?

Juror: No.

The Court: Of course, I realize Vader is a small community.

Juror: Uh-huh.

The Court: Do you know any of them on a personal or social basis?

Juror: No.

The Court: Okay. Are uncomfortable – do you live in the Vader area?

Juror: Yes.

The Court: Are you comfortable sitting as a juror in this cause because of the fact that there's people involved in the Vader community the detective is describing? Do you feel apprehensive about the fact that you're being asked to sit in judgment of some action and there may be perhaps some retaliation or something of that sort?

Juror: Yes.

The Court: Is it very concerning to you?

Juror: Uh-huh.

The Court: Would you like to inquire?

Mr. Meagher: Can you tell us which names?

Juror: No.

Mr. Meagher: I have no other questions.

The Court: Mr. Williams?

Mr. Williams: Well, probably everybody on the jury is going to feel imitated by passing judgment on somebody else. I don't know that this juror could put aside her feelings and judge the evidence on the facts.

The Court: Ma'am, are you able to put aside whatever feelings you may have and the fact that you may know some of the names and – and judge the case on the evidence as it's presented?

Juror: Yes.

The Court: Okay. Either one of you have any other questions?

Mr. Williams: I don't.

Mr. Meager: No.

The Court: I'm going to leave on the jury at this point.

Juror: Okay.

The Court: Go ahead and enjoy your lunch.

After this discussion, the trial judge decided to keep the juror on the jury but later agreed to conduct further voir dire of her to determine whether she had bias against a particular person. RP 40. In response, the following exchange between judge and juror occurred:

The Court: Please have a seat. I had you brought back in because I want to follow up on some questions we asked you before the lunch break. As I understand

it, your initial concern, with respect to service in this jury, arose during the course of your listening to Detective Engelbertson's testimony; is that correct?

Juror: uh-huh.

The Court: And what triggered it was his mention of some – of at least one individual about whom you're concerned that you may know who lives in the Vader area?

Juror: Just – just knowing the Vader area in general and – and coming in contact with these people and, you know, it's – I just feel uncomfortable.

The Court: Are you – are you concerned that there – in the event that you were to continue to serve on a jury, know this particular individual, that there might be retribution to follow in the event there were a conviction?

Juror: Not really, but I'm just hoping that I can be impartial.

The Court: Okay. Who specifically – what specific name was it that raises concern?

Juror: Maybe it's not so much as it is vicinity, the area, because I know a lot of people down there.

The Court: I see. Are you telling me you would have some difficulty being fair and impartial because of the fact that the entire transaction about on which the State basis the prosecution occurred in the Vader area?

Juror: I'm just worried somewhere during the trial it could create a problem, so I wanted to bring forth early.

The Court: So it isn't specifically on individual that Detective Engelbertson mentioned. It's more of the fact

the transaction occurred in Vader and nobody told you that during the jury selection?

Juror: Yes.

The Court: Do you think you could be aside any concern and actually judge the case on the evidence as presented, or would you prefer that the Court excuse you from further attendance and participation?

Juror: I would prefer the Court to excuse me, if that's possible.

The defense attorney, Mr. Williams, then requested the court to clarify its final question:

The Court: Counsel?

Mr. Meagher: The State has no questions. Our concern was it may have been a particular person. What I hear her saying is that's not the case.

Mr. Williams: And although she didn't – you asked her a two-part question, can you judge the case impartially, or would you rather be excused, and she says, I would rather be excused. She had previously answered – and I think I'm correctly stating it—that she could set aside feelings and judge the case impartially based on the evidence. If that's still her position, I'm not submitted that she should be excused.

The Court: Is that still your position?

Juror: Yes.

The Court: Okay.

Juror: I just didn't know if anything would develop further into the case, and then it would cause a setback.

The Court: As it stands right now, the answer appears to be no. I'm going to leave you on the jury and not excuse you. I don't think there's anything that warrants replacing you as a juror. And in the event that something additional comes up that causes you concern or alarm, then you tell the bailiff, and we'll go through this process again. Okay. Thank you for your candor.

RP 42-43.

Based on these responses, the judge denied the juror's request to be excused. RP 43.

At the end of the trial, the jury found Mr. Watts guilty of both charged counts.

ARGUMENT

1. The Trial Court Did Not Abuse Its Discretion By Requiring The Juror To Remain On The Jury.

Mr. Watts makes two arguments, the first of which regards the court's decision to retain the concerned juror on the jury. He argues that the juror expressed sufficient doubts about her ability to be fair and impartial to warrant removal by the trial court. He claims the failure to remove the juror denied him his constitutional right to a fair trial. He misapplies the applicable law and court rule.

Both the Sixth Amendment and Article I, § 22, of the Washington constitution guarantee every criminal defendant the right to a fair and impartial jury. See *Irwin v. Dowd*, 366 U.S. 717,

723, 81 S. Ct. 1639, 6 L. Ed. 2d 75 1 (1961); State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). To ensure these rights, a juror is excused for cause if his or her views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Hudes, 106 Wn.2d 176, 181, 721 P.3d 902 (1986), quoting, Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L. Ed. 2d 841 (1985). 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." The trial judge is in the best position to evaluate whether a juror meets this description. State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). Thus, 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, 108 Wn.2d 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 ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

A juror is biased if she has a state of mind toward the defendant that prevents her from impartially trying the issue. RCW

4.44.170(2); State v. Noltie, 116 Wn.2d 831, 837, 809 P.2d 190 (1991); State v. Aires, 92 Wn.App. 931, 937, 966 P.2d 935 (1998). "Prejudice' is defined as '[a] forejudgment; bias; partiality; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice.'" Aires, 92 Wn.App. at 937 (*quoting* BLACK'S LAW DICTIONARY 1061 (6th ed. 1990)). A court should not disqualify a juror if she can set aside her preconceived ideas. Noltie, 116 Wn.2d at 839-40. State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). The actual bias of a potential juror must be established by proof. Noltie, 116 Wn.2d at 838. Equivocal answers alone are not cause for dismissal. Rupe, 108 Wn.2d at 749.

In the present case, the trial court properly acted within its discretion by not removing the concerned juror from the jury. The juror's fear of her impartiality was ill defined and based almost entirely on the fact that she lived in the small community where the crime occurred. She did not identify a particular reason she would be biased either against the state or against the defendant. She could not identify any individual that she had a material connection to that would cause her to be partial. She stated she didn't personally or socially know any of the persons mentioned in the

testimony and didn't fear retribution. RP 32, 41. In fact, by the end of the voir dire, she explained that her concern was that the crime occurring in her hometown *possibly* could affect her judgment at some point in the trial, but hadn't up to that time. RP 42.

Mr. Watts cites *City of Cheney v. Grunewald*, 55 Wn.App. 807, 780 P.2d 1332 (1989), as an analogous case that supports his argument. But the facts of his trial can be distinguished from *Grunewald* in the same manner that the Supreme Court in *Noltie* distinguished *Grunewald*.

In *Noltie*, the Supreme Court considered a trial court's failure to remove a juror for cause when the juror said she would try to be fair, but there was a possibility that she would favor the state. The defendant, who had been charged with statutory rape and indecent liberties, moved for her removal. The juror stated that she "might" have difficulty ruling fairly since she had two little granddaughters and thought it would be traumatic when the child victim testified. *Noltie*, 116 Wn.2d at 836. When the defense attorney asked her if her fondness for children cause her to lean to one side of the case, she responded:

That's what I was afraid of at first, yes. The more I've listened to the Court and the more I participated in it, it seems that it would be a lot easier to be fair, but at first I

was very apprehensive about it. Noltie, 116 Wn.2d at 836.

The trial court summarized her concern by stating, "you can't say positively that you are not going to be fair and you can't say that in all probability you won't be fair, it's just that you have the fear that you would not be?" The juror agreed. Noltie, 116 Wn.2d at 837.

The Supreme Court found that the trial court did not abuse its discretion in denying the defendant's motion. In doing so, it distinguished *Grunewald*:

"In *Grunewald*, the court held that a juror in a DWI trial should have been excused because (1) he was a member of Mothers Against Drunk Drivers (M.A.D.D.); (2) his niece had been killed by a drunk driver and (3) he stated that he did not think the DWI defendant would get a fair trial from jurors with his frame of mind.... In the present case, what the juror essentially indicated was a degree of discomfort about listening to an alleged child victim of sexual abuse and a fear that it would be difficult for her to be impartial. Factually this is a different kind of situation than *Grunewald*, wherein one of the juror's family members had actually been a victim of the same type of crime as that on which he was being asked to sit in judgment. In the present case, the voir dire testimony of the juror did not show that there was a probability of actual bias." Noltie, 116 Wn.2d at 838.

This same conclusion is true here. The juror twice stated that her concerns would not prevent her from judging the case impartially, on the evidence as presented. RP 33, 43. In fact, Mr. Watts' attorney made note of this fact to the trial court and indicated that

he felt that there was no risk to a fair trial. RP 34, 38, 42-43. The court agreed after discussing the juror's statements at length with both counsels. The trial court was in the best position to make that judgment and its decision should not be disturbed now. Noltie, 116 Wn.2d at 839-40. Mr. Watts is only able to show the possibility of prejudice due to this juror's ordinary, vague concerns with serving as a juror. The juror's voir dire testimony simply does rise to the level to raise a question of the fairness of his trial and to warrant reversal of his conviction. This court should affirm the conviction.

2. The Supreme Court's Holding in *Sate v. Smith* does not prohibit a court from requiring a defendant to post two separate bonds as a condition of release pending appeal.

Mr. Watts next argues that the trial court erred when it required him to post two bonds, each from a different surety. He claims that imposing this condition of release violated CrR 3.2, which supersedes RCW 10.73.040 under State v. Smith, 84 Wn.2d 498, 527 P.2d 674 (1974). This argument fails for two reasons.

First, the trial court did not act contrary to CrR 3.2 in requiring bonds from two sureties. Nowhere does the rule prohibit such an order. In fact, CrR 3.2(b)(5) permits an order for multiple sureties. As observed by Mr. Watts, CrR(h) permits a trial court to revoke, modify, or suspend the terms of release and/or bail

previously ordered. Under CrR 3.2(b), a court finding that a defendant is likely not to appear may "require the execution of a bond with *sufficient solvent sureties*, or the deposit of cash in lieu thereof." CrR 3.2(b)(5) (emphasis added). The trial court here did make such a finding. Respondent's Suppl. CP 1. Thus, regardless of any statute, it was within the court's authority to require a bond from each of two sureties.

Moreover, *State v. Smith* did not fully abrogate the authority of the Legislature to require two bonds through RCW 10.73.040. In *Smith*, the Supreme Court examined the conflict between the statute, which required post-conviction bail, and CrR 3.2(h)(former), which required release of a defendant post-conviction unless there was a likelihood the defendant would flee or present a risk of violence. 3.2(h) (former). The Court first observed that the issue of whether to award bail is a procedural choice. It then concluded that,

"Since the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature... the right to bail (and release) after verdict and pending appeal in the two cases consolidated and considered in this opinion is governed solely by the provisions of CrR 3.2(h)." *Smith*, 84 Wn.2d at 502 (citations omitted).

This holding does not support Watts' conclusion that RCW 10.73.040 does not control any aspect of the restrictions placed on a defendant pending appeal. The *Smith* holding does not address the format or number of bonds required when a trial court imposes such a restriction on release. The *Smith* holding simply is that CrR 3.2, and not the statute, determines "the right to bail (and release)." This holding leaves available to the legislature the authority to regulate the *manner* of setting bail and posting of bonds. *State v. Hunt* 76 Wn.App. 625, 629 n.1, 886 P.2d 1170, 1173 (1995) (The remaining portions of RCW 10.73.040 are void only to the extent that they conflict with CrR 3.2(f)).

Moreover, unlike in *Smith*, the statutory provision in question here does not abridge or modify CrR 3.2(h). As already noted, CrR 3.2 does not address the precise number of bonds a defendant must obtain pending appeal. The rule leaves the number to the discretion of the court. This absence of any inconsistency between the rule and this portion of the statute distinguishes the *Smith* holding. In support of its conclusion, the *Smith* court cited RCW 2.04.200, which provides:

"When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect."

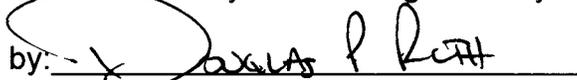
This statute, and the associated reasoning of the Court, does not apply where the requirement in RCW 10.73.040 for a defendant to acquire two bonds is not in conflict with the Supreme Court's rule. The mere fact that the posting of a bond is a procedural act does not invalidate the entirety of RCW 10.73.040. A court should first attempt to harmonize a court rule with a statute and give both effect. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), *cert. denied*, 549 U.S. 1254 (2007); *State v. Wiens*, 77 Wn.App. 651, 656, 894 P.2d 569 (1995). This is possible here. Until the Supreme Court broadens CrR 3.2 to delineate the number of bonds necessary for a defendant to gain release pending appeal, the legislature's proscription controls that aspect of the court's procedure.

CONCLUSION

For the foregoing reasons, this court should affirm Mr. Watts' conviction.

RESPECTFULLY submitted this 6 day of October, 2009.

MICHAEL GOLDEN
Lewis County Prosecuting Attorney

by: 
DOUGLAS P. RUTH, WSBA 25498
Attorney for Plaintiff

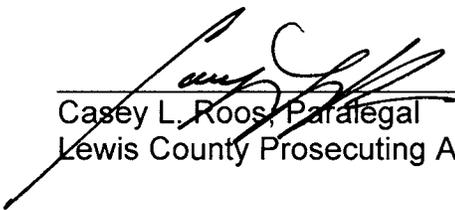
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 39016-7
Respondent,)
vs.)
COLTON ANDREW WATTS,) DECLARATION OF
Appellant.) MAILING
)
)
_____)

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On October 6, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Robert Quillian
2633 Parkmont Ln SW Suite A
Olympia WA 98502-5793

DATED this 6th day of October 2009, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office

Declaration of
Mailing

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09 OCT -8 PM 12:25
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BY Casey L. Roos
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