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NO. 53566-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY ROACH,

Appellant.

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

The Honorable J. Andrew Toynbee, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Substantive Facts</u>	3
(a) <i>The alleged rape and reporting</i>	3
(b) <i>Facts regarding spousal privilege</i>	4
(c) <i>Sentencing</i>	7
C. <u>ARGUMENTS</u>	9
1. THE IMPROPER DISMISSAL OF JUROR 2 DEPRIVED ROACH OF A FAIR TRIAL.....	9
2. ALLOWING HIS WIFE TO TESTIFY AGAINST HIM DEPRIVED ROACH OF A FAIR TRIAL.....	21
3. ROACH WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.	25
4. BECAUSE ROACH HAS A PRIOR LEWIS COUNTY FELONY CONVICTION, THE TRIAL COURT ERRED IN ORDERING HIM TO PAY A \$100 DNA COLLECITON FEE FOR THE CURRENT CONVICTION.	30
D. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Hough v. Stockbridge</u> 152 Wn. App. 328, 216 P.3d 1077 (2009) <u>rev. denied</u> , 168 Wn.2d 1043 (2010)	15, 18
<u>State v. Bogart</u> 57 Wn. App. 353, 788 P.2d 14 (1990)	23
<u>State v. Budge</u> 125 Wn. App. 341, 104 P.3d 714 (2005)	22, 23, 24
<u>State v. Cobos</u> 178 Wn. App. 692, 315 P.3d 600 (2013) <u>aff'd</u> , 182 Wn.2d 12, 338 P.3d 283 (2014).....	8
<u>State v. Depaz</u> 165 Wn.2d 842, 204 P.3d 217 (2009).....	16
<u>State v. Elmore</u> 155 Wn.2d 758, 123 P.3d 72 (2005).....	16
<u>State v. Gentry</u> 125 Wn.2d 570, 888 P.2d 1105 <u>cert. denied</u> , 516 U.S. 843 (1995)	20
<u>State v. Houston-Sconiers</u> 188 Wn.2d 1, 391 P.3d 409 (2017).....	26, 27, 28, 29, 30, 33
<u>State v. Irby</u> 170 Wn.2d 874, 246 P.3d 796 (2011).....	9, 20
<u>State v. Kloeppe</u> 179 Wn. App. 343, 317 P.3d 1088 <u>rev. denied</u> , 180 Wn.2d 1017 (2014)	19
<u>State v. Kyllo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	29

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Maling</u> 6 Wn. App. 2d 838, 431 P.3d 499 (2018).....	32
<u>State v. Noltie</u> 116 Wn.2d 831, 809 P.2d 190 (1991).....	15
<u>State v. O'Dell</u> 183 Wn.2d 680, 358 P.3d 359 (2015).....	26, 28, 29, 30, 33
<u>State v. Ramirez</u> 191 Wn.2d 732, 426 P.3d 714 (2018).....	31, 32
<u>State v. Sassen Van Elsloo</u> 191 Wn.2d 798, 425 P.3d 807 (2018).....	10, 17, 20
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	29
<u>State v. Tingdale</u> 117 Wn.2d 595, 817 P.2d 850 (1991) <u>cert. denied</u> , 475 U.S. 1112 (1986).....	19
<u>State v. Townsend</u> 142 Wn.2d 838, 15 P.3d 145 (2001).....	29
<u>State v. Williams-Walker</u> 167 Wn.2d 889, 225 P.3d 913 (2010).....	10
 <u>FEDERAL CASES</u>	
<u>Batson v. Kentucky</u> 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).....	9
<u>Crawford v. Washington</u> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	22
<u>Gardner v. Florida</u> 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).....	29

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Graham v. Florida</u> 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....	26
<u>Hicks v. Oklahoma</u> 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980).....	9
<u>Miller v. Alabama</u> 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....	26, 27, 28
<u>Roper v. Simmons</u> 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).....	26
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S.Ct. 2052, 80 LEd. 2d 674 (1984).....	29

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.5	10, 15
Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783),	31, 32
ER 804	5
Former RCW 10.01.160.....	31
LAWS OF 2018, ch. 269, § 6.....	31
LAWS OF 2018, ch. 269, § 18	32
RCW 2.36.110	15, 16
RCW 4.44.150	10
RCW 4.44.170	10, 11, 15, 19
RCW 4.44.180	11
RCW 4.44.190	10, 12, 15

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 5.60.060	5, 6, 7, 21, 22, 23, 24, 33
RCW 9.94	28
RCW 10.01.160	31
RCW 10.64.015	31
RCW 10.101.010	31
RCW 43.43.754	32
RCW 43.43.7541	31, 32
Sentencing Reform Act.....	26, 28
U.S. Const. amend. VI	9
U.S. Const. Amend. VIII	26, 27, 28, 30
U.S. Const. amend. XIV	9
Wash. Const. art. I, § 21.....	10
Wash. Const. art. I, § 22.....	9, 10

A. ASSIGNMENTS OF ERROR

1. The trial court erred by dismissing Juror 2 for cause.
2. The trial court erred in allowing Appellant's spouse to testify against him.
3. Appellant was deprived of his right to effective assistance of counsel at sentencing.
4. The trial court erred by imposing a \$100 DNA collection fee as part of the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Did the trial court deprive Appellant of a fair trial by dismissing Juror 2 for cause over defense objection based on that juror's statement she could not convict if the *only* evidence was the uncorroborated testimony of the accuser?
2. Did the trial court err by refusing to allow Appellant to revoke a prior waiver and exercise his rights to spousal privilege on the basis that the prosecution detrimentally relied on the prior waiver in resolving a separate but related prosecution?
3. Was the Appellant deprived of his right to effective assistance of counsel at sentencing when his counsel failed to seek a mitigated exceptional sentence based on Appellant's youth, both at sentencing (20 years old) and at the time of the offense (18 years old),

when recent Washington Supreme Court decisions make clear youthfulness may provide a basis for such a sentence?

4. Months prior to the present conviction, Appellant was convicted and sentenced for a felony in Washington. Did the trial court err by including a \$100 DNA collection fee as part of the current judgment and sentence when Appellant would have been ordered to pay a DNA collection fee as part of the earlier felony judgment and sentence?

B. STATEMENT OF THE CASE

1. Procedural History

Early in February 2019, the Lewis County prosecutor charged appellant Johnny Roach and his wife, Seirah Daniels, with second degree rape of a child. CP 1-3. The prosecution alleged that in the fall of 2017, Daniels, then 19, held down then 12-year-old KMU while Roach, then 18, had sexual intercourse with her. CP 4-6. Later the same month the trials for Roach and Daniels were severed. CP 72.¹ An amended information referencing only Roach was filed in early May, 2019. CP 8-9.

¹ The use of italicized “CP” cite to what counsel anticipates will be assigned index numbers for documents that are part of a supplemental designation of Clerk’s Papers and will include a footnote with reference to the document title and filing date. CP 72 refers to the “Order to Sever Cases,” filed 02/28/19

A jury trial was held May 20-23, 2019, before the Honorable J. Andrew Toynebee, Judge. RP 1-478.² Roach was found guilty as charged. CP 24. In July 2019, the court sentenced Roach to a minimum term sentence of 114 months. CP 38-51; RP 484-85. Roach appeals. CP 52-66.

2. Substantive Facts

(a) *The alleged rape and reporting*

At trial, KMU testified that in the fall of 2017, sometime after October 13th, when she was a virgin, she was raped by Roach. RP 160-61, 260. According to KMU, the rape occurred when she was visiting Daniels where Daniels and Roach lived with Daniels' grandparents in Glenoma, Washington. RP 160-61.

KMU recalled watching television with Daniels in her bedroom when Roach entered and started touching her "butt." When she told Roach to stop, Daniels told her "it was okay." RP 162-63. Roach then pulled down KMU's legging and engaged in sexual intercourse with her, despite KMU repeatedly telling him to stop. RP 163-65. KMU claimed Daniels helped Roach by holding her down. RP 164. After Roach stopped, he and Daniels went outside to smoke. RP 166.

² RP" refers to the three consecutively paginated volumes of verbatim report of proceedings for the dates of May 20-23, 2019 (trial) and July 10, 2019 (sentencing).

KMU told no one about the alleged rape until January 2019, when she was at home with K KU (KMU's older sister) and Daniels. RP 169. According to K KU, when she asked KMU if she was a virgin, KMU looked down and Daniels giggled and went to the kitchen while KMU went outside. RP 200. K KU followed Daniels, who apparently revealed how KMU lost her virginity. RP 200. K KU reported this revelation to her mother when she got home. Her mother called police. RP 201. Roach and Daniels were subsequently arrested and charged with second degree child rape. CP 1-3; RP 234.

(b) *Facts regarding spousal privilege*

Roach and Daniels married on October 16, 2016, when Roach was 17 and Daniels was 18. RP 352-53. They have a daughter together, born a few months earlier on July 22, 2016. RP 354. At the time of trial, Roach and Daniels were still married. RP 377-78.

The issue of whether Roach would exercise his right under RCW 5.60.060(1)³ to preclude Daniels from testifying against him, was raised

³ This statutory provision provides in part:

A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as

pretrial as part of the State's request to admit certain out-of-court statements by Daniels as statements against penal interest under ER 804(b)(3). *CP 73-79*;⁴ RP 3-20. The second day of trial it came up again when Roach's counsel learned the prosecution was planning to call her as a witness that morning. RP 136-37. When the prosecutor pressed for a decision, defense counsel stated Roach consented to Daniels testifying at his trial. RP 143. Daniels, however, did not testify that day. Instead, at the conclusion of the second day of trial Daniels was interviewed by both the prosecution and defense in anticipation of her trial testimony the following day. RP 309-10.

According to defense counsel, Daniels' interviewed produced several inconsistent versions of events. RP 310. Counsel recalled that at the conclusion of Daniels' interview, the prosecutor stated he could not ethically call Daniels to testify. RP 312.

The following morning, however, the defense was informed Daniels would be called as a prosecution witness. Defense counsel then met with Roach and it was decided he would invoke his spousal privilege

to any communication made by one to the other during the marriage or the domestic partnership. . . .

⁴ "*CP 73-79*" refers to Memorandum of Authorities in Support . . . , filed May 17, 2019

to preclude her from testifying. RP 312. The prosecution objected, noting Roach's previous consent to her testimony. RP 312-14.

The trial court inquired whether Roach could revoke his prior waiver. RP 314. In response, the prosecutor claimed it had relied on it to reach a plea deal with Daniels in return for her testimony at Roach's trial and claimed it would unfairly prejudice the prosecution if Roach were allowed to revoke his prior waiver. RP 314-15.

Defense counsel responded that Roach should not be restricted in his defense based on how the prosecution conducted itself in "some other companion case." RP 315. Defense counsel also noted Roach had relied on the prosecution's statement the night before that it could not ethically call Daniels to testify in light of her inconsistent statements. RP 316.

Defense counsel also claimed Roach had only waived the second aspect of the "spousal privilege" under RCW 5.60.060(1), that which precludes a spouse from being "examined as to any communication made by one to the other during the marriage or the domestic partnership." Defense counsel claimed Roach had never waived the first aspect of the privilege, which allows a defendant to preclude a spouse from offering any testimony whatsoever. RP 316.

With regard to the prosecution's 'detrimental reliance' argument, defense counsel noted the prosecution would not be prejudiced in its case

against Roach by allowing him to invoke his rights under RCW 5.60.060(1), because prosecution had never claimed in opening statement that jurors would hear from Daniels. RP 317.

After reviewing the record, the trial court concluded Roach had previously waived his rights under RCW 5.60.060(1), and that the prosecution had relied on that waiver in reaching a settlement in its case against Daniels. RP 321-23. The court also concluded the prosecution would be prejudiced in its case against Roach if he were allowed to revoke the prior waiver, and therefore it would allow Daniels to testify against Roach as a prosecution witness, which she did. RP 321-22, 351-419.

(c) *Sentencing*

At the direction of defense counsel, Roach did not submit to a presentencing interview with the Department of Corrections (DOC). CP 28. The DOC Presentence Investigation report, however, notes Roach was convicted of residential burglary in Lewis County in 2018, which was sentenced on January 23, 2019, which gave Roach an “Offender Score of “1.” CP 28-29. The report indicates the only sentencing option was “Confinement within the Standard Range Sentence.” CP 30.

Roach stipulated he had a prior residential burglary conviction and that his offender score was “1” and a standard range minimum sentence of

86-114 months. CP 35-37. Other than this written stipulation, neither the defense nor the prosecution submitted any sentencing materials.

At sentencing, the prosecution noted Roach had an offender score of “one point” based on his prior residential burglary conviction and recommended a minimum standard range sentence of 114 months, the high end. RP 482-83. Despite acknowledging Roach’s prior felony conviction, the prosecutor told the court:

There’s been no DNA previously taken according to triple I.^[5] Would [sic] ask the court require that DNA be taken. Would [sic] ask that the court inquire into his ability to pay fines and fees, including the attorney fee, DNA collection fee, victim assessment, filing fee, subject to his ability to pay, . . .

RP 483.

Defense counsel asked the court to impose a 100-month minimum term, arguing “this case does not scream high end of range[.]” RP 483-84. With regard to Roach’s ability to pay legal financial obligations, defense counsel noted he had been working part time, but was also “collecting food stamps.” RP 484. Roach declined allocution. RP 484.

The court followed the prosecution’s sentencing recommendation of 114 months, concluding the case “screams out, for the top of the range.”

⁵ Presumably the prosecutor’s use of the term “triple I” is a reference to the “Interstate Identification index.” State v. Cobos, 178 Wn. App. 692, 696, 315 P.3d 600 (2013), aff’d, 182 Wn.2d 12, 338 P.3d 283 (2014).

CP 41; RP 484-85. The court also imposed a \$500 crime victim assessment and a \$100 DNA collection fee. CP 42; RP 485.

C. ARGUMENTS

1. THE IMPROPER DISMISSAL OF JUROR 2 DEPRIVED ROACH OF A FAIR TRIAL.

The trial court dismissed Juror 2 based on her statement she could not convict if the *only* evidence was the uncorroborated testimony of the accuser. This was error warranting a new trial.

The state and federal constitutions protect an accused person's right to participate in the selection of a jury and to receive a fair trial by that selected jury. Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Irby, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Washington expressly guarantees the inviolate right to a 12-person jury and unanimous verdict in a criminal prosecution. Irby, 170 Wn.2d at 884; see also Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) (once state guarantees right to jury trial, Fourteenth Amendment guards against its arbitrary denial); State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010) ("greater protection" for jury trial rights under article I, sections 21 and 22 than federal constitution).

A court does not have unbridled discretion to remove a potential juror. Challenge of a juror “for cause” is instead governed by RCW 4.44.150 through 4.44.190. CrR 6.5.

RCW 4.44.150(1) defines a “General” for cause challenge, as a claim the juror is unfit to serve in “any action.” RCW 4.44.150(2) defines a “Particular” for cause challenge as a claim the juror is unfit to serve in the present action.

Here the prosecution made a “Particular” for cause challenge as to Juror 2. RP 114. A trial court’s discretion to grant a “Particular” for cause challenge is limited by RCW 4.44.170, which allows a court to dismiss a potential juror only for “implied bias, actual bias, [or] physical inability.” State v. Sassen Van Elsloo, 191 Wn.2d 798, 808, 425 P.3d 807 (2018).

Here, there is no basis to suggest Juror 2 was removed based on physical inability. Therefore, her dismissal was only warranted if she had implied or actual bias, which are defined as follows:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For 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, and which is known in this code as actual bias.

RCW 4.44.170 (emphasis added).

A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

(2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.

(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

RCW 4.44.180 (emphasis added).

Nothing in the record suggest Juror 2 had implicit bias as set forth under RCW 4.44.180.

A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

RCW 4.44.190 (emphasis added).

The issue here is whether there was a sufficient basis for the trial court to conclude Juror 2 had “actual bias” to the extent she could not act impartially at Roach’s trial. The record does not support such a finding.

Juror 2, a 48-year veteran registered nurse, actively participated in voir dire. RP 76-78, 80-82, 84-85, 97-101, 111-114. For example, she offered that she has dealt with patients in the emergency room claiming they had been raped, but who refused to report it to law enforcement for various reasons, such as avoiding the “judicial process” or protecting a family member. RP 84-85. Similarly, Juror 2 offered that she has never encountered a patient submitting a false rape claim but conceded it could happen. RP 97-98. When asked how she responded to the reading of the charge against Roach, Juror 2 commented she was surprised at how young Roach looked, remarking she was expecting an older defendant in light of the charge. RP 101.

During the State’s final voir dire session, the prosecutor inquired how jurors could determine a verdict when the accuser and the accused are the only ones present during the alleged rape and there is no physical evidence to support the allegation. RP 107-08. Juror 30, who was eventually seated to hear the case,⁶ stated, “I would have to use the rest of

⁶ The record includes a list of all potential juror which identifies who was ultimately seated to hear the case, who was dismissed for cause and who

the evidence.” RP 109. Juror 37, who was also eventually seated, stated, “Evidence is evidence. It doesn’t matter if ten people say it or one person says it.” RP 109. Juror 37 agreed he would “evaluate everything in the context of everything else that [he] heard[.]” RP 110. Juror 41, who was eventually seated as the alternate juror, commented that it would be difficult to decide based on only a single witness’s testimony, but he would “look at as much evidence [that] is available and base the decision on that.” RP 110.

Following the prosecutor’s engagement with jurors 30, 37 and 41, Juror 2 asked if the prosecutor was asking if they could decide guilt based solely on the testimony of a 14-year old accuser. The prosecutor responded by asking what Juror 2 would do if the “only real evidence” was the testimony of the accuser, to which Juror 2 responded, “I couldn’t convict.” When the prosecutor sought to confirm her response, Juror 2 stated that she could not convict based on “just one person’s word.” RP 111.

Juror 2 later provided:

If . . . I’m listening to a 14-year-old girl, the only witness, and there is no other corroborating evidence of a doctor visit, hospital visit, DNA, something that is more

was excluded by peremptory challenge. *CP 80-84* (“Random Barcode Strike List,” filed 05/20/19).

evidence, I cannot in all conscience send that gentleman to prison for that one thing.

RP 113 (emphasis added).

Thereafter, the prosecutor requested dismissal of Juror 2 for cause.

RP 114. In response, defense counsel implicitly noted the lack of information available to assess Juror 2's suitability to serve on the jury, noting "[s]he didn't say she couldn't be fair. She's saying, if that's all the evidence there is, I don't believe I could convict. I don't know if that's enough for cause." RP 114. Nonetheless, without further meaningful discussion the trial court granted the prosecutor's request. Id.

Juror 2's reservations about convicting a person of rape based solely on testimony of the accuser failed to set her apart from Jurors 30, 37 or 41, all of which expressed the same reservations but were seated to hear the case. Like Juror 2, Jurors 30, 37 and 41 all indicated they would need to consider all the available evidence before making a decision.

What set Juror 2 apart from these jurors was the prosecutor's questions to her, which unlike the ones to Jurors 30, 37 and 41, limited the scope of the evidence to just the testimony of the accuser. Under the circumstances, Juror 2's response failed to establish that she was "unable to perform the duties" of a juror at Roach's trial or that she was manifestly unfit to serve as a juror "by reason of bias, prejudice, indifference,

inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.” RCW 2.36.110; CrR 6.5. Notably, KMU’s testimony was not the only evidence the prosecution presented at trial, thus the prosecutor’s expressed concerns regarding Juror 2 alleged bias against the prosecution were neither warranted nor justified under the circumstances.

To remove a juror for bias, the record must show the juror was unable to “try the issue impartially and without prejudice to the substantial rights of the party challenging.” Hough v. Stockbridge, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009) (quoting RCW 4.44.170(2)), rev. denied, 168 Wn.2d 1043 (2010). Actual bias must be established by proof. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). The challenging party must prove that the challenged juror has formed or expressed an opinion which would prevent her from trying the case impartially. RCW 4.44.190. Even then, such an opinion itself is insufficient to sustain the challenge unless the trial court is satisfied, from all the circumstances, that the juror cannot disregard the opinion in order to try the case fairly and impartially. RCW 4.44.190.

A court abuses its discretion to remove a juror when such decision stems from application of the wrong evidentiary standard or rests on facts unsupported by the record. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d

217 (2009); State v. Elmore, 155 Wn.2d 758, 774-75, 781, 123 P.3d 72 (2005).

In Depaz, for example, a juror improperly communicated with her husband about the case during deliberations, but the Court concluded that this “bare misconduct” did not provide legal basis to dismiss her without further evidence of inability to serve. 165 Wn.2d at 858. The Court construed RCW 2.36.110 to require that a trial court find a seated juror’s actual inability to serve as a fair juror before removing them. Id. at 857-58.

In Elmore, the trial court failed to apply a heightened evidentiary standard when weighing conflicting evidence about whether a juror was participating in deliberations or was refusing to do so. 155 Wn.2d at 779. Because the trial court had not applied the correct evidentiary standard, the Court held that the trial court had improperly dismissed the juror. Id. at 780.

More recently, the Washington Supreme Court reversed a conviction when the trial court abused its discretion dismissing juror on the basis that she was acquainted with a “critical witness for the defense.” Sassen Van Elsloo, 191 Wn.2d at 810. The Court noted that absent a “showing of the juror’s bias and inability to be fair, the importance of a witness is irrelevant.” Id. at 811. The Court also noted that “neither the

state nor the trial judge inquired whether [the juror] could put aside any prior opinions and judge the case fairly, and the record contains no facts supporting such a finding.” Id. at 812.

These cases make clear that removal of a juror should only occur upon a determination that removal is necessary to avoid prejudice to one of the parties based on a juror’s established inability to be fair and impartial. Sassen Van Esloo, 191 Wn.2d at 811; Depaz, 165 Wn.2d at 858. This is consistent with the recognition that a trial court must err on the side of caution by protecting the defendant’s constitutional right to ensure that a juror is not dismissed for her views of the evidence. Id. at 854 (citing Elmore, 155 Wn.2d at 777–78).

The record does not show Juror 2 was unable to be fair and impartial in her duties as a juror. On the contrary, she made clear that like Jurors 30, 37 and 41, she would need to consider all of the evidence provided before rendering a verdict, and not just the testimony of the accuser. RP 109-13. She never said she would not consider the testimony of the accuser, only that she would need some evidence corroborating the claims before finding the prosecution had met its burden of proof.

This Court has held that a sitting juror is properly retained where that juror gave no indication of an inability to fair or impartial. In Hough, the trial court received a note from a sitting juror which read:

Your Honor: Has Mr. Hough been evaluated by a mental health professional? There is little doubt that this man is delusional & would be diagnosed with obsessive compulsive disorder (OCD). Does the court have the authority to order such an evaluation? (No need to respond to this).

152 Wn. App. at 335.

Hough moved to dismiss the juror who wrote the note on the basis that the juror had already reached a decision before hearing all the evidence. The trial judge denied the motion because she was not convinced the juror had in fact already reached a decision in the case. Id. at 335-36.

On appeal, Hough argued the note was a sufficient showing of the juror's unfitness to warrant his dismissal. This Court concluded the record supported the trial judge's refusal to dismiss the juror because, "The juror's note did not say that the juror could not be fair or impartial. It suggested personality traits that Mr. Hough ultimately agreed with -- that he was compulsive." Id. at 341. The converse should be true here; Juror 2 did not indicate she could not be fair and impartial, therefore she was improperly dismissed. See also State v. Kloepper, 179 Wn. App. 343, 353, 317 P.3d 1088, rev. denied, 180 Wn.2d 1017 (2014) (acquaintance with complaining witness did not reveal bias warranting removal where juror indicated it would not affect his ability to serve); State v. Tingdale, 117

Wn.2d 595, 601, 817 P.2d 850 (1991) (social relationship between prosecutor and juror not grounds for disqualification), cert. denied, 475 U.S. 1112 (1986)).

The trial court here never made any findings about Juror 2's fitness to serve, and instead granted the prosecution's request without any analysis whatsoever. RP 114. Presumably it was on the basis Juror 2's equivocal answer that she could not convict if the only evidence was the testimony of the accuser. But such skepticism cannot reasonably constitute "manifest unfitness" to serve, particularly in light of the prosecution obligation to prove Roach's guilt beyond a reasonable doubt, and when reasonable doubt can arise from the lack of evidence. CP 14 (Instruction 2). Moreover, "[e]quivocal answers alone are not sufficient to establish actual bias warranting dismissal of a potential juror." Sassen Van Esloo, 191 Wn.2d at 808-09 (citing Noltie, 116 Wn.2d at 838).

Rather, "the question is whether a juror with preconceived ideas can set them aside." Id. The trial court must be satisfied that the potential juror is unable to "try the issue impartially and without prejudice to the substantial rights of the party challenging" before dismissing the juror for actual bias. RCW 4.44.170(2). Furthermore, a mere possibility of bias is not sufficient to prove actual bias; rather, the record must demonstrate "that there was a probability of actual bias." Noltie, 116 Wash.2d at 838-39, 809 P.2d 190.

Sassen Van Esloo, 191 Wn.2d at 809 (emphasis added).

The record does not support the trial court's decision to dismiss Juror 2 because no effort was made to establish that record. RP 114. Therefore, the trial court abused its discretion in dismissing Juror 2, just like in Sassen Van Esloo. 191 Wn.2d at 812

The only remaining question is prejudice. There is no right to be tried by a particular juror. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). But removing a qualified juror, without properly applying the legal standard necessary for dismissal requires reversal. Elmore, 155 Wn.2d at 781. As the Irby Court explained when addressing the remedy that follows the improper dismissal of prospective jurors,

It is no answer to say that the 12 jurors who ultimately comprised Irby's jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence had no effect on the verdict.

Irby, 170 Wn.2d at 886-87.

The same is true here. The State cannot show Juror 2's dismissal had no effect on the verdict. This Court should therefore reverse and remand for a new trial.

2. ALLOWING HIS WIFE TO TESTIFY AGAINST HIM
DEPRIVED ROACH OF A FAIR TRIAL.

Roach had a right under RCW 5.60.060(1) to preclude his wife, Daniels, from testifying against him, but the trial court refused to let him exercise that right. This was error that prejudiced Roach's defense. Reversal is therefore warranted.

RCW 5.60.060 provides:

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. . . .

But there are exception, which include when a spouse it tried for a crime against the other, or when tried for a crime committed "against any child of whom said spouse or domestic partner is the parent or guardian. Id. Here there is no basis to find Daniels or Roach were the parent or guardian of KMU, or that Daniels was being tried for committing a crime against Daniels, so neither exception applies.

This statute "generally bars a spouse from testifying without the other spouse's consent." Crawford v. Washington, 541 U.S. 36, 40, 124 S. Ct. 1354, 1357, 158 L. Ed. 2d 177 (2004). Here, Roach initially gave his consent for Daniels to testify at trial, but later sought to revoke that

consent before she did. RP 143. The issue is whether Roach had the right to revoke his consent. This appears to be an issue of first impression.

The basis for the trial court's decision to allow Daniels to testify despite Roach's assertion of his rights under RCW 5.60.060(1) was its conclusion the prosecution had "relied on [Roach's prior waiver] to its detriment in making a plea offer to a severed co-defendant, . . . and I do think that is prejudicial to the state and does affect the decisions the state made in this case, so it does prejudice the state in its handling of this matter." RP 322. In other words, detrimental reliance.

As the trial court noted, there is no case law discussing whether a defendant may revoke a prior waiver of the rights under RCW 5.60.060(1). RP 322. But the concept of 'detrimental reliance' is applicable in the criminal context, such as with regard to plea offers and plea agreements. See e.g., State v. Budge, 125 Wn. App. 341, 345, 104 P.3d 714 (2005) ("detrimental reliance" by a criminal defendant, if proved, can preclude the prosecution from withdrawing a plea offer).

In Budge, the trial court required specific performance of a plea offered the State attempted to revoke. The State appealed, arguing the trial court erred in granting Budge specific performance because he had not yet entered the plea and had not otherwise detrimentally relied on the offer. 125 Wn. App. at 343-46. This Court held that to establish

‘detrimental reliance,’ Budge had to show “that he detrimentally relied on the State's proposal in such a manner that a fair trial is no longer possible.” Id. at 347 (citing State v. Bogart, 57 Wn. App. 353, 357, 788 P.2d 14 (1990)). Finding no factual basis supporting detrimental reliance by Budge, this Court reversed. 125 Wn. App. at 348.

Here, the record fails to establish a basis to conclude Roach’s waiver of his rights under RCW 5.60.060(1), caused the prosecution to act “in such a manner that a fair trial is no longer possible.” Budge, 125 Wn. App. at 347. The prosecution never claimed it had. Instead, the prosecution argued only that it relied on Roach’s waiver to reach a plea agreement with Seirah Daniels in a separate case. RP 314-15. The trial court agreed the prosecution’s, however, that its decision to enter into a plea agreement with Daniels based on Roach’s waiver constituted detrimental reliance and therefore refused to allow Roach to exercise at his rights under RCW 5.60.060(1). RP 321-23.

But as Roach’s counsel noted, whether the prosecution made decisions in other cases based on Roach’s initial waiver is irrelevant to whether it could still fairly prosecute Roach. RP 315-17. Counsel also correctly noted the prosecution never told the jury it would hear from Daniels such that her absence would somehow weaken the State’s case against Roach. RP 317.

Applying the same analysis applied in the context of revoked plea offers, such as discussed in Budge, leads to the conclusion the trial court here erred in refusing to allow Roach to withdraw his prior waiver and invoke his rights under RCW 5.60.060(1). Had Roach attempted to withdraw his prior waiver *after* Daniels testified or *after* the prosecution had assured the jury they would hear from Daniels, then there would be a basis to support the trial court's decision. But in the absence of those facts, the record fails to support a conclusion the prosecution could not fairly try Roach without Daniels' testimony.

Roach was prejudiced by the trial court's error. There were only three alleged eyewitnesses to the events that led to the prosecution of Roach for rape, Roach, Daniels and KMU. CP 4-6. Roach exercised his right to remain silent and attempted to exercise his right for Daniels to remain silent at his trial. But for the trial court's erroneous decision to allow Daniels to testify, the only testifying eyewitness would have been the complaining witness, KMU. The prosecution's case would have been weaker without Daniels' testimony. There was no physical evidence to support KMU's claim, as the forensic evidence was inconclusive at best. RP 292, 296-97.

Daniels' testimony, however, was devastating to Roach's defense because it was allegedly eyewitness testimony that directly corroborated

KMU's misconduct claims against Roach. RP 362-63, 366, 380, 389. As discussed during voir dire, jurors may be more reluctant to convict based solely on the uncorroborated testimony of the complaining witness. RP 107-117. Although KMU and Daniels versions of what occurred were not identical, they were corroborative and therefore provided a much stronger basis for jurors to convict than had only KMU testified, and almost certainly contributed to Roach's conviction. Because the trial court erred in refusing Roach's demand to exercise his rights to prevent Daniels from testifying, and because that error prejudiced Roach's defense, this Court should reverse.

3. ROACH WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Recent Washington State Supreme Court decisions approve using an offender's youth and upbringing as a basis to impose a mitigated exceptional sentence. Roach's counsel failed to educate himself about these recent developments in the law before representing Roach at sentencing and therefore deprived Roach of his right to effective assistance of counsel at sentencing.

"Children are different than adults." State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (citing Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 2457, 183 L. Ed. 2d 407 (2012)). That

difference has constitutional ramifications: “An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” Graham v. Florida, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) U.S. Const. Amend. VIII; Houston-Sconiers, 188 Wn.2d at 8. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable Sentencing Reform Act (SRA) range. Houston-Sconiers**Error! Bookmark not defined.**, 188 Wn.2d at 21; State v. O'Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

In O'Dell, the Court found persuasive the scientific and technical advances in understanding the adolescent brain which served as the foundation for the U.S. Supreme Court decisions in Graham, Miller, and Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (which held the constitution precludes the death penalty for juveniles), O'Dell, 183 Wn.2d at 694-98.⁷

More recently, in Houston-Sconiers, the Court found “[a]n offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all

⁷ At the time of his charged crime, O’Dell was over eighteen years old. Nevertheless, the Court held the trial court could consider whether youth diminished his culpability. Id. at 683.

would be flawed.” 188 Wn.2d at 20. Relying on Miller, the Court held that in exercising its discretion, the court must consider circumstances related to the defendant's youth—such as age and its “hallmark features,” of “immaturity, impetuosity, and failure to appreciate risks and consequences.” Id. at 23. “It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and ‘the way familial and peer pressures may have affected him [or her].’” Id. And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. Id. at 23.

In Houston-Sconiers, two defendants who committed crimes while under 18 years of age, appealed their sentences of 31 and 26 years on grounds that, in part, the difference between children and adults rendered their mandatory firearm enhancements unlawful. 188 Wn.2d at 13. There, the trial court had imposed no time on the underlying crimes but imposed all of the mandatory “flat time” triggered by the firearm enhancements: 312 months for Roberts and 372 months for Houston-Sconiers. Id. The trial court believed it was precluded from exercising its discretion about the appropriateness of the mandatory sentence increase outlined in RCW 9.94. Id.

On appeal, the Supreme reversed the sentences and remanded for

resentencing. The Supreme Court concluded that "[t]he mandatory nature of these enhancements violates the Eighth Amendment protections." Houston-Sconiers, 188 Wn.2d at 25-26. The Court also held that "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable ranges and/or sentencing enhancements when sentencing juveniles in adult court." Id. at 9.

Like the teen in O'Dell, here Roach was 18-years-old at the time of the alleged offense, and 20-years-old at the time of sentencing. O'Dell, 183 Wn.2d at 683; CP 38. Under Miller, O'Dell, and Houston-Sconiers, the court had the discretion to depart from the otherwise standard range sentence established by the SRA. Unfortunately, Roach's counsel never asked the court to consider a mitigated exceptional sentence. This failure deprived Roach of his right to effective assistance of counsel at sentencing.

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 LEd. 2d 674 (1984)). To satisfy the first prong, the defendant must show

counsel's performance fell below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

Roach's counsel recommended a midrange standard range minimum term sentence of 100 months. RP 483. But under Houston-Sconiers and O'Dell, Roach was entitled to have the court consider a mitigated exceptional sentence. The failure to make this request on Roach's behalf constitutes deficient performance.

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Had defense counsel researched the relevant law in advance of sentencing, presumably counsel would have discovered the decisions in Houston-Sconiers, and O'Dell. Armed with these decisions, counsel would have been able to correctly advise the court that it should consider imposition of a mitigated exceptional sentence based on Roach's youth and upbringing.

Roach was prejudiced by his counsel's deficient performance. The Eighth Amendment requires the court to exercise its discretion at the time of sentencing. Houston-Sconiers, 188 Wn.2d at 20. By failing to

correctly advise the court of this duty, the trial court proceeded to impose sentence on based only on the standard range recommendations by the parties. Although the trial court never stated it would have ordered a mitigated exceptional sentence, it would have been reversible error had it refused to consider such a sentence if requested. As such, there is a reasonable probability the trial court would have at least exercised its discretion to consider a mitigated exceptional had defense counsel made the request. Thus, Roach was deprived of his right to effective assistance of counsel and sentencing and remand for resentencing is appropriate.

4. BECAUSE ROACH HAS A PRIOR LEWIS COUNTY FELONY CONVICTION, THE TRIAL COURT ERRED IN ORDERING HIM TO PAY A \$100 DNA COLLECITON FEE FOR THE CURRENT CONVICTION.

Roach is indigent under the applicable criteria. CP 70-71. Therefore, the \$100 DNA fee should be stricken from his judgment and sentence under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

In Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases pending on appeal. Ramirez, 191 Wn.2d at 738, 745-49.

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is *indigent at the time of sentencing* as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 191 Wn.2d at 746 (citing LAWS OF 2018, ch. 269, § 6(3)) (emphasis added); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

This Court should strike the DNA fee imposed against Roach under House Bill 1783 and Ramirez. RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783.

The statute now provides that

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.

RCW 43.43.7541 (emphasis added); Laws of 2018, ch. 269, § 18.

Roach has prior criminal history, including a 2018 residential burglary conviction sentenced in Lewis County on January, 2019. CP 28. Clearly, the State has previously collected his DNA. See State v. Maling, 6 Wn. App. 2d 838, 844, 431 P.3d 499 (2018) (striking \$100 DNA fee

based on Maling's indigence and because "Mr. Maling's lengthy felony record indicates a DNA fee has previously been collected."). Because Roach case is not yet final, the new statute applies, and the DNA fee should therefore be stricken. Ramirez, 191 Wn.2d at 747-50.

D. CONCLUSION

This Court should reverse Roach's judgment and sentence and remand for a new trial because the trial court erred in dismissing Juror 2 for cause and for allowing Daniels to testify over Roach's demand to exercise his spousal privilege rights under RCW 5.60.060(1). In the alternative, this Court should remand for resentencing so the court can consider its discretion under Houston-Sconiers and O'Dell, and to strike the \$100 DNA fee from the judgment and sentence.

DATED this 18th day of December 2019.

Respectfully submitted,

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