

FILED

SEP 04, 2012

Court of Appeals
Division III
State of Washington

30651-8-III

COURT OF APPEALS, DIVISION THREE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

MATTHEW GAROUTTE

Appellant.

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

BRIEF OF RESPONDENT

D. Angus Lee, WSBA #36473
Prosecuting Attorney
PO BOX 37
Ephrata, WA 98823
Phone: (509) 754-2011
Fax: (509) 754-3449
dlee@co.grant.wa.us

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES BEFORE THE COURT..... 1

III. STATEMENT OF THE CASE..... 1

IV. ARGUMENT..... 5

 A. A TRIAL COURT’S REFUSAL TO REMOVE A JUROR FOR CAUSE
 IS REVIEWED FOR ABUSE OF DISCRETION. 6

 B. JUROR 19 WAS UNBIASED AND ABLE TO FOLLOW THE LAW... 8

 C. CASES CITED BY GAROUTTE ARE INAPPLICABLE AND
 DISTINGUISHABLE..... 9

V. CONCLUSION..... 11

TABLE OF AUTHORITY

Cases

Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 754, 812 P.2d 133, 137 (1991)..... 7

State v. Alires, 92 Wn. App. 931, 936, 966 P.2d 935 (1998)..... 8

State v. Coe, 109 Wn.2d 832, 750 P.2d 208 (1988)..... 7

State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) 7, 10

State v. Gilcrist, 91 Wn.2d 603, 611, 590 P.2d 809 (1979) 6

State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002) 9

State v. Gosser, 33 Wn. App. 428, 433, 656 P.2d 514 (1982) 6

State v. Grenning, 142 Wn.App. 518, 540-41, 174 P.3d 706, 717-18 (2008),
aff’d, on other grounds, 169 Wn.2d 47 (2010) 8

State v. Noltie, 116 Wn.2d 831, 840, 809 P.2d 190 (1991) 6, 7

State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S.
1061; *rev denied*, 487 U.S. 1263 (1988)..... 6

State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996), *review denied*,
130 Wn.2d 1022 (1997) 6, 7, 9

United States v. Jones, 608 F.2d 1004 (4th Cir. 1979), cert. denied, 444 U.S.
1086 (1980)..... 7

Statutes

RCW 2.36.070 5

RCW 2.36.110 6

Treatises

14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE:
TRIAL PRACTICE § 202, at 331 (4th ed. 1986) 6

I. INTRODUCTION

During the State's examination of the jury panel in this case, Juror 19 expressed frustration about how "little is done law enforcement wise" about blatant drug use. Garoutte did not directly examine Juror 19 at any point, but challenged him for cause. Garoutte's trial counsel stated that he 'suspected' that 19 may not be fair.

The trial court exercised its sound discretion and denied the challenge for cause against Juror 19, finding there was insufficient basis to excuse that juror for cause. The trial court did grant Garoutte's other challenges for cause.

After Garoutte's challenged for cause was denied he used his peremptory challenges. Showing his lack of concern about Juror 19 sitting on the jury, Garoutte used his last two peremptory challenges on jurors who were beyond the range of potential jurors.

II. ISSUES BEFORE THE COURT

Did the trial court abuse its discretion when it denied Garoutte's motion to dismiss Juror 19 where there was no evidence that Juror 19 could not hear the case fairly?

III. STATEMENT OF THE CASE

Jury Selection

At the outset of jury selection the trial court made a preliminary examination of the panel and asked the following question. 1RP 50¹.

At an appropriate time I will be instructing you on the law that applies to this case. As a juror you are ordered to accept those instructions and set aside any contrary belief you may have as to what the law is or ought to

¹ The 1/25/12 Report of Proceedings will be referred to as 1RP.

be. And I told you I have to follow that same requirement. Do any of you feel that for any reason, be it political, social, religious or otherwise, you would have difficulty doing that to apply that law?

1RP 50-51. Juror 19 did not indicate he would not follow the law. 1RP 51.

The trial court also asked “is there anything about this particular case, perhaps something I haven't touched on, that would cause you to begin this trial with feelings, tendencies or leanings one way or the other?” 1RP 51. Again, Juror 19 did not indicate that he had any leanings or tendencies. 1RP 51.

The trial court also admonished the panel during the selection process on the importance of the presumption of innocence, saying

Members of the Jury, there are people who are accused wrongly of crimes. The question is not whether somebody has done something at some time or is suspicious. The State has to prove that each element of the crime is proven beyond a reasonable doubt, not whether you like a person or whether they must have done something bad in their life to be here. There are people who are wrongly accused. The State does have that burden. And the defendant has no burden to prove any element of any crime.

1RP 85-86.

At the end of the State's examination of the jury panel the following exchange occurred between the State and Juror 19:

MR. OWENS: Okay. And the same question I've been asking. Do you think that you would hold any biases towards the Department of Corrections because of that relative?

JUROR NUMBER 19: Not toward the Department of Corrections so much. I would not...

MR. OWENS: Okay. With that answer I'm feeling that you're a little bit -- you could be -- have biases against somebody. So what would that be?

JUROR NUMBER 19: Oh, just what I've observed with -- mostly my cousin's friends and a blatant -- some of the things they do involving drugs, how little is done law enforcement wise about it. You know, you -- you just sit there wondering, you know, just how much does it take to actually get these people arrested in the first place where I can go on-line

on Facebook and see, you know, his friends offering him, you know, "Hey, I can bring over a bag of whatever tonight" and nothing's done about it. That's frustrating.

MR. OWENS: Yes.

THE COURT: And that's your time, Mr. Owens.

1RP 74-75. Immediately after that answer was provided the trial court announced that the State's allotted time for questioning had expired. 1RP 75. Counsel for Garoutte then examined the panel, but asked no questions of juror 19 directly. 1RP. He did ask the panel generally the following:

MR. KOZER: How many people can hold the State to its burden of beyond a reasonable doubt today if you're chosen?

(Prospective jurors raising paddles.)

MR. KOZER: Okay. How many people who said that Matthew looks guilty right here and right now think that it would be better if there was another juror sitting on the jury? Juror Number 4, Number 3. Okay.

(Prospective jurors raising paddles.)

MR. KOZER: Matthew is standing behind the eight ball with you folks, correct? I mean, in all honesty. I mean that there's some bias. Look, when we talk about biases it's a simple thing... So those folks who raised their paddles that Matthew is starting behind the eight ball -- If I could see those paddles again, please. -- do you think it would be fair if you sat on the jury for Matthew?

(Prospective jurors raising paddles.)

MR. KOZER: Your Honor, I'm going to move for cause -- Would those folks show me the paddles again, please.

(Prospective jurors raising paddles.)

MR. KOZER: -- on Jurors Number 3, 4, 18, 19, 20 and 22 that in this situation they could not be fair to Mr. Garoutte if they were on the panel.

THE COURT: What was your specific question to them that they raised their paddle to?

MR. KOZER: There was a couple of questions I went through, Your Honor. Again, I think it's: As Matthew sits here he looks guilty to them, that he's -- essentially if they were seated as jurors that he would be starting behind the eight ball lest they couldn't really be fair. *And I suspect that they could not*, given the honesty of their answers, follow the burden of proof and the principles of presumption of innocence because clearly he's not presumed innocent in their eyes.

THE COURT: Well, *I don't think that each of those statements that you just made can be attributed to each of those jurors*. There have been

some jurors that have made some of those statements. But *to say all those jurors have made all those statements is inaccurate*. So based upon the last question you asked, I would deny it. You can make your challenge for cause later if you would like to based upon earlier questions. And we can go line by line with each one.

1RP 77-79 (emphasis added).

Garoutte's counsel then examined jurors 3, 4, and 11 and then told the court he did not have any further questions. 1RP 79-81. He did not further examine juror number 19. 1RP.

Garoutte's Counsel then simultaneously challenged multiple jurors for cause. 1RP at 90. The court granted the motion as to jurors 3, 4, 9, and 11, but denied as to 19. 1RP 91-92.

THE COURT: Okay. *Part of my judgment is based upon what I'm seeing here too, not just the written answers*. And as far as Number 3, she said that the defendant is guilty as he sits here. Now, later she recovers and says "Well, I'll presume him to be innocent." But I -- I'm just not satisfied with that answer and her body language, her -- the way she's answering the questions. 3, 4, 9 and 11 all when asked "Does he appear to be guilty?" all answered "Yes" based upon his appearance. I don't know how you get around that when people say something like that. 11 said that "I can't be objective" is what 11 said. I think it was 3, 4 and 9 that said "This person appears guilty to me." So I will be excusing for cause 3, 4, 9 and 11. *The other ones that Mr. Kozler brings up I don't -- I couldn't ascertain from their answers that there would be a basis to excuse them for cause.*

1RP 91-92 (emphasis added).

In total, the trial court excused jurors 3, 4, 9, 11, 20, and 23 for cause. CP 91-92. Garoutte then used peremptory challenges on jurors 13, 16, 23, 27, 30, 34, striking two jurors (30 and 34) that were not even in the range of potential jurors, instead of striking Juror 19. CP 91-92. Juror number 28 was the final juror seated. CP 92.

Facts Proven at Trial

Matthew Garoutte was on community custody on August 17, 2011, and was sitting in a chair outside a motel where he was staying. CP 5-6. Community corrections officers (CCO's) from the Department of Corrections (DOC) approached him with a request for a urinalysis (UA), at which point Mr. Garoutte stated that a UA would be "dirty" since he had taken some narcotics a friend had given him. CP 5-6; 2RP 122-24, 161-64.² At trial Mr. Garoutte testified in his defense. He stated that when the DOC officer asked him to take a urinalysis he told the officer "I'll just admit that the UA is dirty." 2RP 29.

In a search incident to arrest, officers located heroin in Mr. Garoutte's right front pants pocket, along with drug paraphernalia. CP 5-6; 2RP 124, 163-66. He testified that when he was searched by the DOC officer "they found ... a little black velvet bag." 2RP 30. He also admitted on the stand that in that black bag was heroin. 2RP 34. He also admitted on the stand that "anything illegal in the house was [his]". 2RP 30.

Garoutte was found him guilty on both counts as charged. CP 68-69. Garoutte appeals. CP 90.

IV. ARGUMENT

A person shall be competent to serve as a juror in the state of Washington unless that person is less than eighteen years of age; is not a citizen of the United States; is not a resident of the county in which he or she has been summoned to serve; is not able to communicate in the English language; or has been convicted of a felony and has not had

² The 1/26/12 Report of Proceedings will be referred to as 2RP.

his or her civil rights restored. RCW 2.36.070. It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service. RCW 2.36.110.

In this case the trial court, in accordance with its duties, excused several jurors for cause, but declined to excuse Juror 19 for cause because there was no “basis to excuse” Juror number 19. 1RP 91-92. This ruling by the court was a sound exercise of discretion that should not be altered on appeal.

A. A TRIAL COURT’S REFUSAL TO REMOVE A JUROR FOR CAUSE IS REVIEWED FOR ABUSE OF DISCRETION.

A defendant assigning error to the court's denial of a challenge for cause must show more than the mere possibility that the juror was prejudiced. *State v. Noltie*, 116 Wn.2d 831, 840, 809 P.2d 190 (1991) (citing 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE § 202, at 331 (4th ed. 1986)). And, therefore, unless it is very clear, the court's denial of a challenge for cause must be sustained. *Noltie*, 116 Wn.2d at 839; *State v. Witherspoon*, 82 Wn. App. 634, 637, 919 P.2d 99 (1996), *review denied*, 130 Wn.2d 1022 (1997).

“Washington cases have consistently held that the denial of a challenge for cause lies within the discretion of the trial court and will not constitute reversible error absent a manifest abuse of that discretion.” *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190, 195 (1991)(citing *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied,

486 U.S. 1061; *rev denied*, 487 U.S. 1263 (1988); *State v. Gosser*, 33 Wn. App. 428, 433, 656 P.2d 514 (1982); *State v. Gilcrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979)).

The trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991); see also *State v. Witherspoon*, 82 Wn. App. 634, 637, 919 P.2d 99 (1996) (denial of a challenge to a juror for cause is within the trial court's discretion). Therefore a denial of a for-cause challenge is reviewed for manifest abuse of discretion. *State v. Fire*, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001).

In *State v. Coe*, 109 Wn.2d 832, 750 P.2d 208 (1988), the trial court denied challenges for cause to jurors who were aware that Coe had previously been convicted of the current murder charges at an earlier trial. The Washington Supreme Court held that the trial court may decide, as a question of fact, whether a juror can be impartial. *State v. Coe*, 109 Wn.2d 832, 841, 750 P.2d 208, 213 (1988).

In cases where actual bias is claimed, it must be established by proof. *State v. Noltie*, 116 Wn.2d 831, 838 (Wash. 1991)(citing 14 L. Orland & K. Tegland, Wash. Prac., Trial Practice § 202, at 330 (4th ed. 1986)). The party challenging a juror on the ground of actual bias bears the burden of demonstrating the facts necessary to sustain the challenge by a preponderance of the evidence. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 754, 812 P.2d 133, 137 (1991).

In this appeal Garoutte does not meet his burden to establish proof of actual bias, nor does he establish that the trial court abused its discretion.³ If Juror number 19 was actually biased against Garoutte, his trial counsel would have stricken him from the jury with a peremptory challenge, instead of essentially throwing away his last two peremptory challenges on jurors 30 and 34, who were not even in range to be potential jurors. Neither the trial court nor Garoutte's trial counsel felt that Juror 19 was biased against Garoutte or they would have acted differently. The trial court did not abuse its discretion.

B. JUROR 19 WAS UNBIASED AND ABLE TO FOLLOW THE LAW.

The record supports the trial court's finding that Juror 19 was unbiased and able to follow the law. In *State v. Alires*, the defendant raised ineffective assistance of counsel based on his counsel's failure to challenge four jurors for cause who admitted bias against Hispanics during voir dire. *State v. Alires*, 92 Wn. App. 931, 936, 966 P.2d 935 (1998). The defendant's counsel asked the venire, "[d]oes anybody believe that Hispanics are more likely to commit crime in the Valley than other people?" *Id.* at 933. Several jurors raised their hands. *Id.* at 933-34. His counsel followed up by asking, "any of you that raised your hands, do you feel that you'd be unable to listen to the evidence in this case and make your decision based solely on the evidence rather than any preconceived idea that you might have about Hispanics?" *Id.* at 934. No jurors raise their hands in response

³ See *United States v. Jones*, 608 F.2d 1004 (4th Cir. 1979), cert. denied, 444 U.S. 1086 (1980) (juror's personal experience based upon the death of his niece alone did not disqualify him from serving on the jury); *State v. Grenning*, 142 Wn.App. 518, 540-41, 174 P.3d 706, 717-18 (2008), aff'd, on other grounds, 169 Wn.2d 47 (2010) (trial court denied challenge for cause on juror who saw the headline of an article about the case; held: to excuse a juror for cause, party must prove actual bias).

to this question, and four of these jurors were impaneled. *Id.* The *Alires* court inferred the failure of these jurors to raise their hands was an indication that they would be fair and impartial. *Id.* at 938. The court classified these jurors “as jurors with preconceived ideas who need not be disqualified if they can put these notions aside and decide the case on the basis of evidence given at trial.” *Id.* at 939.

Assuming for the sake of argument that Juror 19 can fairly be characterized as a juror “with preconceived ideas” (which he cannot), he indicated to the trial court that he could decide the case on the evidence and follow the law. Like in *Alires*, the trial court here examined the jury panel and asked the panel if they felt that “for any reason, be it political, social, religious or otherwise, you would have difficulty” following the courts instructions on the law. 1RP 50-51. Juror 19 did not indicate he would not follow the law. 1RP 51. The trial court also asked “Is there anything about this particular case, perhaps something I haven't touched on, that would cause you to begin this trial with feelings, tendencies or leanings one way or the other?” 1RP 51. Again, Juror 19 did not indicate that he had any leanings or tendencies. 1RP 51. Like in *Alires*, the failure of Juror 19 to raise his hand is an indication that he would be fair and impartial. There is no evidence in this record to the contrary.

C. CASES CITED BY GAROUTTE ARE INAPPLICABLE AND DISTINGUISHABLE.

Garoutte cites to several cases in his appeal but they are inapplicable and distinguishable. Most of the cases cited by Garoutte revolve around issues related to bias

against or for a class of people (race, gender, national origin, employer, etc.).⁴ However, Juror 19 expressed no views at all related to any class and there is no evidence in the record that Matthew Garoutte is a member of a protected class. As such these class bias cases are of no value.

Garoutte next argues that this case is analogous to *Fire*, by downplaying the extreme bias actually displayed by a juror directly towards *Fire*, writing “the court held that the juror had demonstrated actual bias, which showed an ability to apply the presumption of innocence”, because the juror was “‘very opinionated’ about child sex cases and that persons like the defendant should be ‘severely punished.’” *Brief of Appellant*, 13. However, *Fire* is easily distinguishable from the present case because the juror in *Fire* expressed views going far beyond those expressed by Juror 19 in this case.

In *Fire*, the defendant was charged with child molestation. The judge asked potential jurors if they had any reason for not wanting to sit on the jury. A juror raised his hand and responded with intense accusatory language pointed directly at the defendant, saying

“***I consider him a baby raper***, and it should just be severely punished... I’m very opinionated when it comes to this kind of crime. I hold innocent—or children from conception [are] very dear, and they should be protected.”

Fire, 145 Wn.2d at 724 (emphasis added).

⁴ *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002) (The juror unequivocally admitted a bias regarding a class of persons); *State v. Witherspoon*, 82 Wn. App. 634, 919 P.2d 99 (1996) (The juror unequivocally admitted a bias regarding a race of persons);

The facts in *Fire* go far beyond those at hand. In *Fire* the juror specifically stated that she considered the defendant a “baby rapists”, whereas Juror 19 simply expressed some frustration at lack luster law enforcement, but never indicated that he would not follow the law or presumption of innocence, and, despite Garoutte’s unfounded assertion at trial, the trial court specifically declined to find that Juror 19 expressed a view that Garoutte looked guilty. 1RP 91-92. Juror 19 never expressed any view at all about Garoutte specifically.

The cases cited by Garoutte are inapplicable and distinguishable. Juror 19 did nothing more than express a view that law enforcement does not do enough, a view almost universally held by the modern citizen. If a jury must be comprised only of citizens who are completely satisfied with the efforts of law enforcement, trial courts will have a new and far more difficult task finding 12 qualified jurors.

V. CONCLUSION

In this case Garoutte made a blanket challenge for cause against several jurors. The trial court did not abuse its discretion when he granted the motion in part and denied it in part, because there is was no evidence of actual bias by Juror 19 against Garoutte. If there were actual bias against Garoutte it would have been observed by the trial court and by Garoutte. If Garoutte truly believed that Juror 19 was bias against him he would have stricken him from the jury with one of the two peremptory challenges he used to strike members of the panel who could have never even been seated.

For the reasons set forth above, the State of Washington respectfully requests that this Court deny the appeal

Dated Tuesday, September 04, 2012

Respectfully submitted,

s/ D. Angus Lee

D. Angus Lee, WSBA #36473

Prosecuting Attorney

PO BOX 37

Ephrata, WA 98823

Phone: (509) 754-2011

Fax: (509) 754-3449

DLEE@CO.GRANT.WA.US

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,) No. 30651-8-III
)
) DECLARATION OF SERVICE
Respondent,)
v.)
)
MATTHEW GAROUTTE,)
)
Appellant.)

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and to Maureen Cyr and Oliver R. Davis of Washington Appellate Project, Attorneys for Appellant, containing a copy of the Brief of Respondent.

Matthew Garoutte - #840189
Washington Corrections Center
PO Box 900
Shelton WA 98584

Maureen Cyr
Oliver R. Davis
Washington Appellate Project
1511 Third Ave. Suite 701
Seattle WA 98101

Dated: Tuesday, September 04, 2012

s/ Kaye Burns

Kaye Burns