

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35053-3-III

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STATE OF WASHINGTON, Respondent,

v.

DIEGO CONTRERAS-AVILES, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

At the conclusion of the voir dire process in Contreras-Aviles's jury trial, a prospective juror stated, in the presence of the full panel, that he would like to know whether Contreras-Aviles was in the country illegally. Contreras-Aviles was born in Mexico and speaks primarily Spanish, requiring an interpreter's assistance at trial. The trial court admonished the prospective juror that the question was improper, but did not otherwise question the juror or any of the remaining panel members about racial bias. Contreras-Aviles's motion for a mistrial was denied, and he was subsequently convicted. At sentencing, the trial court orally ordered the forfeiture of an onion knife that had been seized as evidence and introduced at trial, without any showing that the State followed the statutorily required forfeiture procedures. These errors require reversal and remand.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** The trial court erred in denying Contreras-Aviles's motion for a mistrial when a potential juror tainted the panel by inquiring about his immigration status.

**ASSIGNMENT OF ERROR 2:** The trial court erred in forfeiting Contreras-Aviles's property at sentencing without statutory authority.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** Did the prospective juror's question inject racial bias into the jury selection?

**ISSUE 2:** Was the trial court's admonition, without more, sufficient to protect the defendant's right to an impartial jury?

**ISSUE 3:** Absent a record of a statutory basis for ordering the forfeiture of Contreras-Aviles's property, did the sentencing court's forfeiture order exceed its authority?

### **IV. STATEMENT OF THE CASE**

The State charged Diego Contreras-Aviles with assaulting his roommate in the second degree with an onion knife. CP 1, RP (Jury Trial)<sup>1</sup> at 60-61, 62-64, 81, 84. Contreras-Aviles is from Mexico, and required a Spanish language interpreter to assist him at trial. RP (Jury Trial) at 98, 99.

During jury selection in the case, after the individual questioning was concluded and the parties were about to proceed to exercising

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<sup>1</sup> The verbatim reports of proceedings consist of three volumes, non-consecutively paginated, containing a CrR 3.5 hearing held on December 6, 2016, the jury trial and sentencing combined in one volume, and the jury selection in a third volume. Because this brief will not refer to the volume containing the CrR 3.5 hearing and the remaining two volumes are entitled "Jury Trial" and "Jury Selection" respectively, references to the record will be to the volume titles "Jury Trial" and "Jury Selection" throughout this brief.

challenges, the court called on prospective Juror no. 4, who stated, “I would like to know if the defendant is in this country illegally?” The trial court responded, “That is not a question that it is permissible to ask, sir.” The court then proceeded to challenges with no further questioning or admonition. RP (Jury Selection) at 34.

Contreras-Aviles moved for a mistrial, arguing that the statement was made to poison the mind of the jury, that he would have no way to refute the suspicion that Contreras-Aviles was in the country illegally, and the implication of the statement was that Contreras-Aviles’s immigration status should have some bearing on his guilt or innocence of the crime. RP (Jury Trial) at 13. The State conceded that the question was improper and it was difficult to know how it might have affected the thinking of the remaining jurors, but argued that removing the prejudiced juror cured the defect. RP (Jury Trial) at 14. The State further indicated that it would not oppose individually questioning the remaining jurors. RP (Jury Trial) at 16. The court did not accept this invitation and stated,

All right. Here is the issue, the issue comes before Court in sort of an odd procedural posture in that both parties had finished with their questioning, and the juror sua sponte raised his hand and asked the question. The Court attempted to both point out that it wasn’t a reasonable line of inquiry and tread the line between overemphasizing it and not dealing with it sufficiently by indicating that it was not a question that it was appropriate to ask.

I've had the issue come up in trials before, and in those instances the parties have been able to ferret out the bias as a result of the question and indicate to the jurors that it's simply not something that one can consider.

Under these circumstances I believe that my response to the question is sufficient that the trial can go forward. I'm concerned about the question, but I believe that the question and my response to it do not lead me to the conclusion that this jury will not follow the instructions, follow only the law, and that my concluding opening remarks regarding sympathy and prejudice will be followed by the jury. So the motion is respectfully denied at this time.

RP (Jury Trial) at 16-17.

The jury convicted Contreras-Aviles as charged. CP 41-42, RP (Jury Trial) at 150. At sentencing, the State also requested that the knife be forfeited to the Pasco Police Department. RP (Jury Trial) at 156. The court granted the State's request and ordered the knife forfeited to the Pasco Police Department. RP (Jury Trial) at 160.

Contreras-Aviles timely appeals, and has been found indigent for that purpose. CP 62, 64.

## V. ARGUMENT

I. The trial court erred in denying Contreras-Aviles's motion for a mistrial when, before the jury was impaneled, a prospective juror asked whether he was in the country illegally.

The reviewing court considers a trial court's denial of a motion for a mistrial for abuse of discretion. *State v. Wade*, 186 Wn. App. 749, 773, 346 P.3d 838, *review denied*, 184 Wn.2d 1004 (2015). The trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540, *review denied*, 186 Wn.2d 1028 (2016).

The defendant has a constitutional right under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution to a fair trial by an unbiased and unprejudiced jury, free of disqualifying juror misconduct. *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). Statutorily, the trial court has a duty to excuse any juror who has manifested unfitness due to bias or prejudice. RCW 2.36.110; *see also State v. Munzanreder*, 199 Wn. App. 162, \_\_\_ P.3d \_\_\_, 2017 WL 2378167, at 5 (June 1, 2017).

Under some circumstances, the trial court may be constitutionally obligated to inquire into the subject of racial prejudice during voir dire. *Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973). In *Ham*, the defendant was a young black man who was well known for civil rights work and who claimed in defense to a marijuana possession charge that the police were attempting to frame him due to his civil rights activity. 409 U.S. at 525. There, the U.S. Supreme Court held that the Fourteenth Amendment required the trial court to interrogate the jury on racial prejudice due to the nature of the case, and the purpose of the amendment in preventing the State from invidiously discriminating against defendants on the basis of race. *Id.* at 526-27.

While the U.S. Supreme Court has recognized that *Ham* does not establish a universal rule, it has reiterated that the circumstances of a case may require questioning into racial bias based on whether there is a significant likelihood that without such questioning, the jury would not be impartial. *Ristiano v. Ross*, 424 U.S. 589, 595-96, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). The mere fact that a cross-racial crime is alleged does not inherently suggest the possibility of racial bias infecting the trial. *Id.* at 597-98. However, where racial issues are “inextricably bound up with the conduct of the trial” and the evidence may “intensify any prejudice that individual members of the jury might harbor,” the *Ristiano* Court

reiterated that questioning on racial bias may be constitutionally required. *Id.* at 597.

Washington courts have similarly acknowledged that specific voir dire questions may be required when a case carries racial overtones, or when it involves “other forms of bias and distorting influence which have become evident through experience with juries.” *State v. Fredericksen*, 40 Wn. App. 749, 753, 700 P.2d 369, *review denied*, 104 Wn.2d 1013 (1985) (*citing U.S. v. Jones*, 722 F.2d 528, 529-30 (9th Cir. 1983)). An abuse of discretion is found “if the questioning is not reasonably sufficient to test the jury for bias or partiality.” *Id.* at 752.

Here, the issue of racial bias arose when, after the parties had concluded their individual questioning of the panel, a prospective juror asked, in the presence of the full panel, “I would like to know if the defendant is in this country illegally.”<sup>2</sup> RP (Jury Selection) at 34. While the posture of the case itself may not have raised particularized concerns about racial bias such as those present in *Ham*, the prospective juror’s injection of extraneous considerations about Contreras-Aviles’s legal

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<sup>2</sup> Contreras-Aviles, who is a native Spanish speaker, required the assistance of an interpreter at trial, as did some of the State’s witnesses. RP (Jury Selection) at 32-33.

status based upon his Latino heritage<sup>3</sup> certainly raised the “racial overtones” that require a particularized inquiry. *Fredericksen*, 40 Wn. App. At 753. The question highlighted the potential for race-based considerations to enter into the jury’s deliberative process and did so in front of the entire panel, raising the specter that similarly-minded panelists would silently wonder the same to themselves.

While the potentially prejudicial effect of the question was probably curable, the trial court’s response did nothing to ferret out the biases of both the juror who asked the question, or the remainder of the panel who may have been affected by it. Instead, the court simply informed the juror, “That is not a question that it is permissible to ask, sir.” RP (Jury Selection) at 34. The court did not examine the prospective juror or any other member of the panel whether they would speculate about Contreras-Aviles’s legal status, whether it would affect their consideration of the case, including their evaluation of Contreras-Aviles’s testimony, or whether they could put aside any personal feelings or political viewpoints about Latino immigrants to decide the case based solely upon the evidence. Thus, while the trial court’s statement was

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<sup>3</sup> Such biases, based upon an individual’s Hispanic ethnicity, have been accepted by the highest courts as racial in nature. *See Pena-Rodriguez v. Colorado*, \_\_ U.S. \_\_, 137 S. Ct. 855, 863, 197 L. Ed. 2d 107 (2017) (bias was racial where juror commented about Mexican men being aggressive toward women and speculated that a defense witness was “an illegal.”).

certainly not inaccurate, it did nothing to evaluate whether the prospective juror was disqualified to serve under RCW 2.36.110, notwithstanding the enormous red flag the question raised.

In fact, the court's admonition may have served to exacerbate, rather than alleviate, the potential for racial bias to infect the jury. In considering how to respond to allegations of racial prejudice contaminating a jury's deliberations, the U.S. Supreme Court has noted that generic questions about impartiality may be inadequate to expose biases that can poison jury deliberations, but more pointed questions can exacerbate existing prejudices without doing much to expose its existence. *Pena-Rodriguez v. Colorado*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107 (2017). Moreover, there is a difference between having personal experiences the improperly influence a juror's consideration of the case, and calling that person a bigot. *Id.* For these reasons, racial bias must be treated with special precaution, to avoid "a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.*

In a California appellate decision, a trial court addressed the problem of racial bias in voir dire by informing the jury that it did not want racism in its court, stating it recognized that jurors would not want to

raise their hands and claim to be a bigot, and inviting any prospective jurors who would be unable to be fair for racial reasons to lie about reasons why they could not serve. *People v. Mello*, 97 Cal.Rptr.2d 523, 524-25 (Cal. App. 4th 2002). While characterizing the trial court's directives as "well-intentioned but misguided," the California Court of Appeal noted that "after being told that bigotry has no place in the courtroom and that it is insulting and embarrassing to admit racial animus, some prospective jurors may have been reluctant to volunteer information of a racial animus, yet unwilling to lie under oath." *Id.* at 528. As such, the instruction "frustrated the main object of voir dire, to ferret out bias and prejudice on the part of prospective jurors." *Id.* (internal quotations omitted).

Clearly, the trial court's admonition in this case does not rise to the "astonishing" level of the *Mello* court's instruction to prospective jurors to lie about their racial biases. *Id.* at 527. Yet, for many of the reasons stated in *Mello*, it suffered from similar defects. Advising the juror that the question about Contreras-Aviles's legal status was improper, without more, shames the prospective juror for asking the question and thereby discourages other panelists from expressing similar concerns. Informing the panel that silence is preferred to frank acknowledgment of racially-motivated concerns simply assures that the prospective jurors will be silent

about their concerns. As in *Mello*, this is counter-intuitive to the purpose of voir dire to explore and ferret out such biases, to ensure an impartial panel.

In moving for a mistrial, Contreras-Aviles pointed out that he would be unable to refute the implication that he was present illegally and the suggestion that his legal status should have some bearing on the determination of guilt. RP (Jury Trial) at 13. The trial court responded that its response to the question was sufficient and there was no reason to believe the jury would not follow the instructions. RP (Jury Trial) at 17. But the trial court did not consider that its response called into question whether the jury was impartial, as constitutionally required. Under the Fourteenth Amendment jurisprudence, the potential for racial bias to contaminate the jury must be the subject of special precaution, and must be specifically inquired into under circumstances where there is reason to believe it could taint the deliberative process. The trial court's simple admonition fell short of ensuring that the panel did not harbor racial bias against Contreras-Aviles, and was insufficient to test its partiality. See *Fredericksen*, 40 Wn. App. At 752.

For these reasons, the trial court's denial of Contreras-Aviles's motion for a mistrial was an abuse of discretion when it failed to ensure an

impartial jury. Accordingly, the conviction should be reversed and the case remanded for a new trial.

II. The trial court erred in forfeiting Contreras-Aviles's property when the State did not follow the statutory procedures to forfeit property used in the commission of a crime.

During the sentencing hearing, the trial court ordered that the knife seized from Contreras-Aviles and introduced as an exhibit at trial should be forfeited. Because the court lacked authority to order Contreras-Aviles's property forfeited unless the State followed the prescribed statutory procedures, the order was erroneous and should be vacated.

A court's authority under the Sentencing Reform Act is reviewed *de novo*. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Washington has a statutory procedure to forfeit property used in a crime, and courts lack inherent authority to order forfeitures outside of the statutory schemes. *State v. Alaway*, 64 Wn. App. 796, 799-801, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992); *see also* RCW 10.105.010 (felony forfeiture statute).

In *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014), the trial court ordered the forfeiture of property seized by police as part of the

sentence. Applying these principles, the *Roberts* court held that absent a showing of the sentencing court's statutory authority to order the forfeiture, the order must be reversed. *Id.* at 97.

Here, no authority was given supporting the forfeiture of Contreras-Aviles's property. Nothing in the record suggests that the State complied with the requirements of RCW 10.105.010, or that any other statutory provision empowers the court to order the forfeiture. Consequently, the order forfeiting Contreras-Aviles's property lacked statutory authority and must be reversed.

III. Appellate costs should not be imposed due to Contreras-Aviles's indigency.

Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, Contreras-Aviles respectfully requests that due to his continued indigency, the court should decline to impose appellate costs in the event he does not prevail. His report as to continued indigency is filed contemporaneously with this brief and shows that he lacks assets and income, has no education, and works primarily in farm labor.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court recognized that if a defendant meets the GR 34 standard for indigency, “courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839. The *Blazina* decision responded to growing national attention to the societal burdens associated with imposing unpayable legal financial obligations on indigent defendants, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” 182 Wn.2d at 835. Under Washington’s system, unpaid obligations accrue interest at 12% per annum and can be subject to collection fees, creating the perverse outcome that impoverished defendants who pay only \$25 per month toward their obligations will, on average, owe more after ten years than at the time of the initial assessment. *Id.* at 836. As a result, unpaid financial obligations can become a burden on gaining (and keeping) employment, housing, and credit rating, and increase the chances of recidivism. *Id.* at 837.

The presumption of indigence continues throughout review. RAP 15.2(f).

The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant’s financial

circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should “allocate appellate costs in a fair and equitable manner depending on the realities of the case.” *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Finally, in recognition of the hardships imposed by large appellate cost awards, the Supreme Court has recently revised RAP 14.2 to provide that unless the Commissioner receives evidence of a substantial change in the appellant’s financial circumstances, the original determination that the appellant lacks the ability to pay should control and costs should not be imposed on indigent appellants.

Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs. Contreras-Aviles has been found indigent for appeal and has complied with this court’s General Order. Under the *Sinclair* standard as well as revised RAP 14.2, an appellate cost award is inappropriate in this case.

## VI. CONCLUSION

For the foregoing reasons, Contreras-Aviles respectfully requests that the court REVERSE his conviction and/or the order forfeiting his property and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 1 day of September,  
2017.



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**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Diego Aviles Contreras  
c/o Franklin County Jail  
1016 N. 4th Ave.  
Pasco, WA 99301

And, pursuant to prior agreement of the parties, via e-mail to the following:

Shawn P. Sant  
Franklin County Prosecuting Attorney  
Appeals@co.franklin.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 1 day of September, 2017 in Walla Walla,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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