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Court of Appeals
Division III
State of Washington
11/30/2017 1:30 PM

NO. 35053-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIEGO CONTRERAS-AVILES,

Appellant.

DIRECT APPEAL FROM THE SUPERIOR COURT OF
FRANKLIN COUNTY

BRIEF OF RESPONDENT

Respectfully submitted
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein. For ease of clarity, the Respondent will be hereafter referred to as the State.

II. RELIEF REQUESTED

The State asserts no error of constitutional magnitude occurred in the trial of the Appellant (for ease of clarity, hereafter referred to as the Defendant), and asks this Court to affirm his conviction.

III. ISSUES FOR REVIEW

- A. CAN THE DEFENDANT SHOW PREJUDICE AFFECTING HIS RIGHT TO A FAIR TRIAL WHEN A PROSPECTIVE JUROR WHO QUESTIONED HIS IMMIGRATION STATUS WAS NOT A MEMBER OF THE ACTUAL JURY?**
- B. WHERE THERE WAS NO OBJECTION MADE AT THE TIME OF SENTENCING TO THE FORFEITURE OF A WEAPON USED IN THE COMMISSION OF A CRIME, IS THE ISSUE PRESERVED FOR APPEAL?**
- C. SHOULD AN ABLE-BODIED DEFENDANT WHO IS CAPABLE OF WORKING BE ASSESSED APPELLATE COSTS?**

IV. STATEMENT OF THE CASE

In 2015, the Defendant lived in an apartment located at 1708 W. Bonneville Street in Pasco, Franklin County, Washington with two roommates, Jose Sanchez Manjares and Marcelo Morfin Palomino. CP 1-2; RP (Jury Trial) 38; 81. On June 28, 2015 Officer Adrian Alaniz was dispatched to the address “for a reported disturbance.” CP 2; RP (Jury Trial) 29-30. Marcelo Morfin Palomino made the 911 call. CP 2, RP (Jury Trial) 87. An argument ensued about food during which the Defendant raised a machete over his head and advanced towards Jose. RP (Jury Trial) 83-84. Marcelo picked up two hand weights in an attempt to defend himself and Jose against the Defendant. CP 3; RP (Jury Trial) 85-86.

The Defendant made a phone call to a friend, requesting that he bring a gun to the location. RP (Jury Trial) 86-87. The Defendant’s friend, Solomon Hernandez, drove to the apartment in a white Nissan Pathfinder. CP 3; RP (Jury Trial) 31. The Defendant walked out to Mr. Hernandez’s vehicle and put the machete in the back. RP (Jury Trial) 55. The machete was given to Officer Alaniz by Mr. Hernandez and thereafter logged into evidence at the Pasco Police Department. RP (Jury Trial) 37. It

was identified by Marcelo as being the same machete used by the Defendant. RP (Jury Trial) 84. Both Jose and Marcelo seemed “distraught” about the situation. RP (Jury Trial) 39-40.

The Defendant appeared to Officer Adrian Alaniz to have been drinking. RP (Jury Trial) 36. He smelled like alcohol, his speech was slurred, his eyes were watery and bloodshot, his coordination was off, and his speech was repetitive. RP (Jury Trial) 36. The Defendant was thereafter charged by Information with Assault in the Second Degree, (Domestic Violence) pursuant to RCW 9A.36.021(1)(c) and RCW 10.99.020(3). CP 1.

After a multi-day jury trial, the Defendant was convicted of Assault in the Second Degree. CP 41. The jury also found the Domestic Violence Special allegation answering in the affirmative to the question “[w]ere [the Defendant] and Jose Sanchez Monjares members of the same family or household?” CP 42.

V. ARGUMENT

- A. **THERE IS NO ERROR WHERE THE PROSPECTIVE JUROR WHO QUESTIONED THE DEFENDANT’S IMMIGRATION STATUS WAS NOT SEATED ON THE JURY AND DID NOT DELIBERATE ON THE VERDICT. THE COURT’S ADMONITION WAS PROPER. THE DEFENDANT CANNOT SHOW PREJUDICE AFFECTING HIS RIGHT TO A FAIR TRIAL ESPECIALLY WHERE MULTIPLE WITNESSES WERE ALSO SPANISH-SPEAKING.**

The Defendant argues that an impermissible question asked by a prospective juror in the presence of the full jury panel requires reversal of the Defendant's conviction. Brief of Appellant, (hereafter BOA) 5-12. The Defendant's recitation of the exact verbiage is correct. Right before the parties exercised preemptory challenges, prospective juror number 4 was recognized by the judge and asked, in the presence of the full panel, "I would like to know if the Defendant is in this country illegally?" RP (Jury Selection) 34. The prospective juror's question was addressed promptly and sternly by the trial court when the judge responded "[t]hat is not a question that is permissible to ask, sir." *Id.*

Prospective juror number 4 was preemptively challenged by Defense counsel RP (Jury Trial) 14; he was not seated as a juror for this case and had no part in jury deliberations. The Defense thereafter moved for a mistrial *Id.* at 13, which counsel for the State opposed. *Id.* at 14. The trial court declined to declare a mistrial. *Id.* at 17. The prosecutor stated she would not oppose individual questioning of the remaining jurors. *Id.* at 16. The trial court chose not to conduct individual questioning, likely considering the risk of overemphasizing an improper subject matter.

In so doing, the court noted a number of facts. First, that the question was asked “sua sponte” by the juror and was not in response to questioning. *Id.* at 16. Second, that 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 was appropriate to ask.” *Id.* at 16-17. And finally, the judge provided his reasoning for declining to declare a mistrial “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.” *Id.* at 17.

The jury was read the standard opening instruction by the trial court:

As jurors you are officers of this court. As such you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Id. at 12. They were read substantially the same instruction at the conclusion of the case as well. *Id.* at 124-25. There was nothing to

suggest that the remaining jurors who were actually selected as part of the jury panel for this case would be unable to follow the court's directives. The jury was never told what the Defendant's immigration status was—leaving unanswered the question of whether he was in the country legally or not.

There is no information in the record to suggest the jury based their verdict on anything other than the evidence that was admitted in court. It is pure speculation to argue that the jury automatically assumed that the Defendant was illegal and used that against him to render an improper verdict. To extend that logic further, if the jury concluded that the Defendant should be convicted because he "might" be illegal, that same jury could have concluded that Jose and Marcelo did not deserve protection under the law because they also "might" be illegal.

Washington State's Supreme Court approved an evidence rule¹ that will take effect in September that makes evidence about a person's immigration status generally inadmissible absent a compelling reason. The right to a trial by an impartial jury is guaranteed to the accused by the Sixth and Fourteenth Amendments to the United States Constitution. *State v. Davis*, 141

¹ Evidence Rule 413 as signed into law pursuant to Order No.25700-A-1201 on November 8, 2017.

Wash.2d 798, 824, 10 P.3d 977 (2000) *citing Turner v. Murray*, 476 U.S. 28, 36 n. 9, 106 S.Ct. 1683 (1986). “Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury.” *Davis, Supra* at 824 *citing State v. Parnell*, 77 Wash.2d 503, 507, 463 P.2d 134 (1969).

The standard of review for the trial court’s decision on a motion for a mistrial is whether the court committed an abuse of discretion. *State v. Hopson*, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). “A reviewing court will find abuse of discretion only when ‘no reasonable judge would have reached the same conclusion.’” *Id. quoting Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 667, 771 P.2d 711 (1989). “[A]bsent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court’s ruling on the scope and content of voir dire will not be disturbed on appeal.”² The Defendant is unable to show that his rights have been substantially prejudiced where the biased juror was not seated on the jury and where no other juror expressed similar views.

² *Davis, Supra* at 826 *citing United States v. Robinson*, 475 F.2d 376 (D.C.Cir. 1973); *Haslam v. United States*, 431 F.2d 362 (9 th Cir. 1970); *cert. denied*, 402 U.S. 976, 91 S.Ct. 1680 (1971).

Aside from general prejudice, there are also potentially due process concerns. “Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940 (1982). There is nothing in the record to suggest that the jury as seated was capable and willing to follow the court’s instructions on the law.

“It is well settled that trial courts have discretion in determining how best to conduct voir dire.”³ Accordingly,

Voir dire “is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion” . . . it is necessary to **discover bias in prospective jurors** and to assist the trial court in its responsibility to remove prospective jurors who will not be able to follow its instructions on the law.

Davis, Supra at 825-826 (emphasis added) *citing Ristaino v. Ross*, 424 U.S. 589, 594-95, 96 S.Ct. 1017 (1976) *quoting Connors v. United States*, 158 U.S. 408, 413, 15 S.Ct. 951 (1895); *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629 (1981).

If he was not preemptively stricken, it is clear that prospective juror number 4 should have been excused from sitting

³ *Davis*, Supra at 825 *citing Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992); *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999); *State v. Laureano*, 101 Wash.2d 745, 758, 682 P.2d 889 (1984); *State v. Robinson*, 75 Wash.2d 230, 231-32, 450 P.2d 180 (1969).

on the jury for this case. The prosecutor said as much in her argument. RP (Jury Trial) 14. The question he asked was implicitly biased against members of Hispanic descent. What is important for this Court to consider is the fact that no members of the selected jury expressed any similar biases. The Defendant asserts, at least by implication, that the comments of one potential juror could irrevocably taint the entire jury pool.

In the case of *Mach v. Stewart*, the defendant was alleged to have sexual contact with an eight year old girl. The first prospective juror that was questioned was a social worker who “stated that she would have a difficult time being impartial given her line of work, and that sexual assault had been confirmed in every case in which one of her clients reported such an assault.” *Mach v. Stewart*, 137 F.3d 630, 631-32, 98 Cal. Daily Op. Serv. 1045 (9th Cir. 1997). The court asked further questions and the juror said that “she had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted.” *Id.* at 632.

Our case is distinguishable from *Mach* in a number of important ways. First, there were no statements made by the panel that invaded on the province of the jury to make credibility

determinations. Second, the impermissible inference of the Defendant's immigration status could well have been levied against the victim and eyewitness (both witnesses who testified on behalf of the State) as both were also Spanish-speaking; both required the assistance of a court-certified interpreter, just like the Defendant. Finally, the subject matter of the trial in *Mach* was clearly addressed by a juror; in our case we simply had an impermissible question that was left unanswered.

In reversing *Mach*, the court noted that the nature of the information conveyed and its connection to the case was "highly significant." *Id.* at 634. The court relied on *Lawson v. Borg*, 60 F.3d 608, 612-13, 95 Cal. Daily Op. Serv. 5528 (9th Cir. 1995) "noting that 'reversible error commonly occurs where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, and where the misconduct relates directly to a material aspect of the case.'" *Dickson v. Sullivan*, 849 F.2d 403, 407 (9th Cir. 1988) likewise found prejudice where "extrinsic information was 'both directly related to a material issue in the case and highly inflammatory.'" The bias in this case was cured when prospective juror number 4 was removed. Because the Defendant is unable to show substantial prejudice as to the

remaining jurors, his case should not be reversed. The trial court in this case acted appropriately; the judge did not abuse his discretion.

B. BECAUSE THE FORFEITURE OF THE MACHETE WAS NOT OBJECTED TO AT THE DEFENDANT'S SENTENCING HEARING, THE ISSUE IS UNPRESERVED FOR APPEAL.

The knife in this case was admitted as Plaintiff's Exhibit 3. RP (Jury Trial) 38. It was forfeited to the Pasco Police Department by way of the Felony Judgment and Sentence. CP 48-61. Most specifically, the language appears on page 7 of 14, paragraph 4.4. CP 54. The forfeiture was specifically mentioned at sentencing. RP (Jury Trial) 156. There was no objection by Defense. *Id.* The court granted the State's request to forfeit the weapon to the Pasco Police Department. RP (Jury Trial) 160. To the best of the State's knowledge, the machete is still in the evidence vault at the Franklin County Clerk's Office and is being held pending the results of this appeal. Counsel for the State has emailed the Clerk's Office and the evidence technician for the Pasco Police Department to ensure that the machete is not destroyed or otherwise disposed of.

The Defendant's request for the return of his machete is not an independent basis for reversal of his conviction. Because there

was no objection at the time of sentencing, the issue is unpreserved for appeal. RAP 2.5(a). The issue does not concern jurisdiction, a failure to establish facts upon which relief can be granted, or a manifest error affecting a constitutional right, so this Court may refuse to review this claim of error.

If the Defendant wants the machete returned, he has civil remedies at his disposal and can make a Motion to the Franklin County Superior Court. As a foundational matter, this Court (or any court) should not be quick to give weapons back to Defendants who are criminally convicted for using the weapon against another individual in a violent crime. The procedures for a Motion for Return of Property are laid out in the Superior Court Criminal Rules.

A person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to possession thereof. If the motion is granted the property shall be returned. If a motion for return of property is made or comes on for hearing after an indictment or information is filed in the court in which the motion is pending, it shall be treated as a motion to suppress.

CrR 2.3(e).

C. AN ABLE-BODIED DEFENDANT WHO IS CAPABLE OF WORKING SHOULD BE ASSESSED APPELLATE COSTS.

The State objects to the Defendant's request to waive costs. The only argument the Defendant makes in support of his argument that this Court should deny any appellate costs requested is that he was determined to be indigent for purposes of this appeal. (BOA at 13). Defendant's counsel would have this Court presume that, because he is employed in field work that he will always be indigent. (BOA at 13). No such presumption can be made. The Defendant is not indigent by GR 34 standards.

He is no longer incarcerated as his sentence was for six months. After his release, the Defendant has resumed his full time work life. "...he does work steadily in the fields when he's not incarcerated. He has no dependents." RP (Jury Trial) 157-58. There was no evidence provided to the trial court or to this Court that the Defendant is on any sort of government assistance. Because he is able-bodied and currently working, he is fully capable of paying appellate costs and fees.

Criminal defendants are and will be motivated to file frivolous appeals at great expense to the public when there is neither cost nor risk of cost to them. Accordingly, the Rules of Appellate Procedure discourage frivolous appeals by presuming costs will be paid to the substantially prevailing party. RAP 14.1(c) ("In all other

circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a)"); RAP 14.2 (court "will" award costs to substantially prevailing party). RCW 10.73.160 is the relevant statute. Unlike RCW 10.01.160 which was construed in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), RCW 10.73.160 does not require an appellate court to consider financial resources and the nature of the burden before imposing costs.

In this case and in all challenges to costs premised on a criminal defendant's ability to pay, this Court should consider the ABA Criminal Justice Standard 21-2.3.⁴ *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993). These black letter standards explain that the criminal justice system unacceptably induces an appeal when there is no risk of costs for frivolous appeals.

In some cases, a nominal imposition of costs may avoid this impropriety. In the instant case, if the State substantially prevails and absent new information, the Court should impose the full appellate costs on the Defendant. Such imposition is appropriate because the Defendant has the ability to earn and to pay, the clerks will collect the LFOs under a reasonable and always negotiable

⁴ Also available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_tocold.html

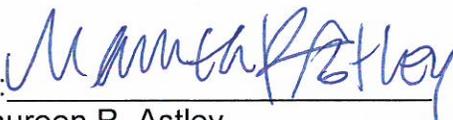
payment plan without interest and under RCW 10.82.090, and if his circumstances change, the Defendant can always and repeatedly seek remission under RCW 10.01.160(4).

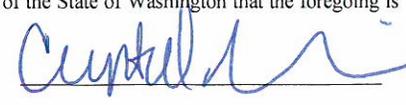
VI. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Defendant's Assault in the Second Degree (Domestic Violence) conviction, finding that no errors of constitutional magnitude occurred during the Defendant's trial.

Dated this 30th day of November, 2017

Respectfully submitted,
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<p>Andrea Burkhart Andrea@2arrows.net</p>	<p>I hereby certify that a copy of the foregoing was delivered to opposing counsel sent via this Court's e-service by prior agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>Dated <u>11/30</u> 2017, Pasco WA </p> <p>Original e-filed at the Court of Appeals; 500 N. Cedar Street, Spokane, WA 99201</p>
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November 30, 2017 - 1:30 PM

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