

NO. 35081-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

TISHAWN WINBORNE,
Appellant.

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

Spokane County Cause No. 16-1-03040-9

The Honorable Timothy B. Fennessey, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Winborne's Sixth Amendment right to an impartial jury
2. The trial court violated Mr. Winborne's Fourteenth Amendment right to due process.
3. The trial court violated Mr. Winborne's Wash. Const. art. I, § 21 right to a trial by jury.
4. The trial court violated Mr. Winborne's Wash. Const. art. I, § 22 to an impartial jury.
5. The trial court abused its discretion by failing to conduct any inquiry upon learning that a juror at Mr. Winborne's trial had been a factual witness in the case.

ISSUE 1: Due process and the right to an impartial jury require a trial judge to conduct a meaningful hearing into possible juror bias or partiality. Did the trial court violate Mr. Winborne's Sixth and Fourteenth Amendment rights by failing to undertake any inquiry upon learning that a deliberating juror had been a factual witness to the charges?

6. The trial court violated its continuous obligation under RCW 2.36.110 to excuse any unfit juror.
7. The trial court violated its continuous obligation under CrR 6.5 to excuse any unfit juror.

ISSUE 2: RCW 2.36.110 and CrR 6.5 place a continuous obligation on a trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. Did the trial court in Mr. Winborne's case fail these duties by refusing to hold a hearing regarding a juror who was also a factual witness in the case?

8. The verdict against Mr. Winborne cannot stand because it was rendered, in part, by a juror with implied bias.

ISSUE 3: The right to an impartial jury does not permit a verdict to stand in situations giving rise to a presumption of juror bias: such as when a juror was a witness to the alleged

crime. Does the continued participation of a juror who was also a witness to the allegations against him at his trial require reversal of Mr. Winborne's convictions?

9. The court violated Mr. Winborne's Sixth Amendment right to a jury trial by permitting improper opinion evidence on the ultimate factual issues in the case.
10. The court violated Mr. Winborne's art. I, § 21 right to a jury trial by permitting improper opinion evidence on the ultimate factual issues in the case.
11. The court violated Mr. Winborne's art. I, § 22 right to an impartial jury by permitting improper opinion evidence on the ultimate factual issues in the case.

ISSUE 4: Testimony providing an improper opinion of guilt violates the constitutional right to a jury trial because it invades the province of the jury. Did the court violate Mr. Winborne's right to a jury trial by denying his motion to prohibit police witnesses from testifying that he was driving recklessly and that he was eluding the officers, both of which were ultimate factual issues for the jury to decide?

12. The Court of Appeals should decline to impose appellate costs, if Respondent substantially prevail and request such costs.

ISSUE 5: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Winborne is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tishawn Winborne came to the attention of the Spokane Police while they were investigating someone else. RP 28-29.

On August 5, 2016, police became suspicious that Mr. Winborne was driving a stolen car and followed him as he drove through a residential area. RP 163-68; 192-203.

Mr. Winborne was about one and a half blocks in front of Officer Cole, who was following him. RP 201. Officer Cole turned on his patrol car's lights and siren, but turned them off after only one and a quarter blocks. RP 202.

The next day, after another short pursuit, the police tracked Mr. Winborne through the streets of Spokane using a GPS device they had attached to his car and eventually arrested him. RP 241-303.

The state charged Mr. Winborne with two counts of Attempting to Elude a Police Vehicle. CP 3-5.

The state also charged Mr. Winborne with car theft, Second Degree Assault, and Third Degree Assault. CP 3-5. The theft charge was dismissed after the prosecution rested at Mr. Winborne's trial because the state had not presented any direct evidence that the car was stolen. RP

380-81. The jury later acquitted Mr. Winborne of the assault charges. RP 477.

At the beginning of trial, Mr. Winborne moved *in limine* to prohibit the state's police witnesses from testifying regarding the ultimate factual issues in the case, such as whether he was "eluding" or driving "recklessly." CP 99, RP 51.

The court denied Mr. Winborne's motion. RP 66.

As a result, the state's police witnesses were permitted to testify at least eight times during trial that Mr. Winborne was driving "recklessly." RP 171, 172, 203, 256, 260, 262, 265. The police officers opined that Mr. Winborne had been "eluding" at least twice. RP 252, 357.

One officer testified, while describing Mr. Winborne's conduct, that: "[o]bviously, he was eluding me at this time." RP 252.

The officer who arrested Mr. Winborne on August 6th testified that he told her he had run from the police because he had just been released from jail and did not want to go back. RP 334.¹

During deliberations, the jury sent a note to the judge, informing the court that one of the jurors now realized that he had been a witness to

¹ The officer also testified that Mr. Winborne threatened to beat up the woman who had reported the car stolen. RP 338. She also said that he bragged about driving faster than the police. RP 339.

the alleged events on August 5th. CP 146. The note asked the court whether this disqualified that juror from further service. CP 146.

In response to this inquiry, Mr. Winborne moved for the juror who had been a witness to be removed from the jury. RP 474. The prosecutor requested that the court start by conducting individual questioning of the juror to obtain more information. RP 474.

The court denied both requests. The court also declined Mr. Winborne's motion to remind the jury that they could not consider any evidence that was not presented in the courtroom. RP 475. Instead, the court let the juror who had been a witness to the allegations against Mr. Winborne continue deliberation without any inquiry or further instruction. RP 475-76.

The jury convicted Mr. Winborne of both counts of Attempting to Elude. RP 477. This timely appeal follows. CP 212.

ARGUMENT

I. THE COURT VIOLATED MR. WINBORNE'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS BY FAILING TO CONDUCT ANY INQUIRY UPON LEARNING THAT A DELIBERATING JUROR HAD BEEN A FACTUAL WITNESS TO ONE OF THE CHARGED OFFENSES.

In Mr. Winborne's case, the trial court learned mid-deliberation that one of the jurors had been a witness to the events supporting the August 5th charge. CP 146. The extent of the issue was apparently

significant enough that at least some of the jurors wondered whether that juror should be disqualified from further service. CP 146.

Upon hearing this information, Mr. Winborne moved for the juror to be dismissed. RP 474. The prosecutor moved for the court to question the juror to discern more about the situation. RP 474.

But the court did neither of those things. RP 475. In fact, the court refused to even remind the jurors that their decision must be based only on the evidence presented at trial. RP 475.

As a result, neither the court nor the parties ever ascertained what the juror actually witnessed, whether it was anything beyond what the state had presented as evidence, whether it led the juror to believe that Mr. Winborne was more likely guilty, or whether the juror had shared any extraneous information with other jurors.

The court's failure to conduct any inquiry whatsoever into the possibility that a juror was also a factual witness in the case violated Mr. Winborne's rights to due process and to an impartial jury.

Indeed, the presence of a factual witness on Mr. Winborne's jury constitutes one of the rare circumstances in which an appellate court can presume implied bias, which requires reversal even without further showing.

The federal and state constitutions both guarantee the rights to due process and to trial by an impartial jury in a criminal case. U.S. Const. Amends.VI, XIV; art. I, §§ 21, 22. *State v. Munzanreder*, 33328-1-III, 2017 WL 2378167, at *5, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. June 1, 2017).

These rights “require[] trial by an unbiased and unprejudiced jury.” *State v. Boiko*, 138 Wn. App. 256, 260, 156 P.3d 934 (2007). An impartial jury is one that “determines guilt on the basis of the judge’s instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision. *Oswald v. Bertrand*, 374 F.3d 475, 477 (7th Cir. 2004).

To make these rights a reality, Washington statute places a duty on a trial 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.

This statute, along with CrR 6.5, “place[s] a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” *State v. Berniard*, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014).

An accused person is denied his/her right to an impartial jury if any one juror is biased or prejudiced. *Fields v. Woodford*, 309 F.3d 1095, 1103 (9th Cir. 2002), *amended*, 315 F.3d 1062 (9th Cir. 2002).

A trial judge's decision regarding dismissal of a juror is reviewed for abuse of discretion. *Berniard*, 182 Wn. App. at 118. A court abuses its discretion if its decision is manifestly unreasonable or based untenable grounds or reasons. *Id.* A decision is manifestly unreasonable if it is "outside the range of acceptable choices given the facts and the legal standard." *Id.* A decision is based on untenable reasons if it is based on the wrong legal standard. *Id.*

Violation of the right to an impartial jury is "classic structural error," not subject to harmless error analysis. *Oswald*, 374 F.3d at 482; *Berniard*, 182 Wn. App. at 123-24. Any violation requires a new trial, even without a showing of prejudice. *Id.*; *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015), *review denied*, 184 Wn.2d 1036, 379 P.3d 953 (2016). This is because "[e]ven a clearly guilty criminal is entitled to be tried before an impartial tribunal." *Oswald*, 374 F.3d at 482 (*citing Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed. 751 (1961); *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

The trial court's violations of Mr. Winborne's rights to due process and to an impartial jury require reversal of his convictions. *Id.*

- A. The trial court acted outside the range of acceptable choices by failing to conduct any inquiry whatsoever upon learning that a deliberating juror had been a witness to the allegations against Mr. Winborne.

Failure to provide an accused person with a fair hearing regarding an allegedly partial juror violates the minimal standards of due process.

Boiko, 138 Wn. App. at 260.

The United States Supreme Court has outlined the requirements of due process in the face of an allegedly impartial juror:

...due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

A "critical" element of due process is the requirement that a trial judge – upon learning of possible juror bias -- conduct a hearing "to determine the circumstances, the impact thereof, and whether or not it was prejudicial." *Oswald*, 374 F.3d at 477-78 (quoting *Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). The trial court's investigation must be "reasonably calculated to resolve the doubts raised about the juror's impartiality." *Id.* at 481 (citing *Mu'Min v. Virginia*, 500 U.S. 415, 419-22, 430-32, 111 S.Ct. 1899, 114 L.Ed.2d 493

(1991); *Turner v. Murray*, 476 U.S. 28, 35-36, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (plurality); *Ham v. South Carolina*, 409 U.S. 524, 525-27, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973)) (other internal citations omitted).

In Mr. Winborne's case, the trial court failed to conduct any inquiry at all upon learning that a juror had been a factual witness in the case. RP 475. The court's total failure to hold a hearing violated the minimal standards of due process. *Id.*; *Smith*, 455 U.S. at 209; *Boiko*, 138 Wn. App. at 260.

RCW 2.36.110 and CrR 6.5, also place a "continuous obligation" on a trial court to meaningfully "investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating." *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). The duty requires the trial court to conduct a balanced inquiry into any alleged juror partiality. *Id.*

This independent obligation falls on the trial court, regardless of any action or inaction by the parties. *Irby*, 187 Wn. App. at 192-93.

The trial court in Mr. Winborne's case also failed this independent duty under Washington law when it refused to conduct any inquiry into the juror's status as a factual witness to the charges. *Id.*; *Elmore*, 155 Wn.2d at 773.

The trial court violated Mr. Winborne’s rights to an impartial jury and to due process by refusing to conduct any inquiry whatsoever upon learning that a deliberating juror had been a witness to the allegations against him. *Oswald*, 374 F.3d at 477-78; *Smith*, 455 U.S. at 209; *Boiko*, 138 Wn. App. at 260. The court’s failure to hold a meaningful hearing also violated its duty under RCW 2.36.110 and CrR 6.5 to investigate all allegations of juror unfitness. *Elmore*, 155 Wn.2d at 773; *Irby*, 187 Wn. App. at 192–93. Mr. Winborne’s convictions must be reversed.

B. The facts of this case give rise to a presumption of implied juror bias, which requires reversal.

A partial juror can be unfit for service because s/he possesses either actual or implied bias. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (Brennan, J., concurring).² A court can “draw a conclusive presumption of implied bias from [a] juror’s factual circumstances. *Id.*, *Boiko*, 138 Wn. App. at 261-62 (citing *Smith*, 455 U.S. at 222 (O’Connor, J., concurring)).

Any doubts regarding juror bias must be resolved against the juror. *State v. Cho*, 108 Wn. App. 315, 330, 30 P.3d 496 (2001).

² *McDonough* is a plurality opinion and a majority of Justices in the case agreed that bias could be conclusively implied. *See Boiko*, 138 Wn. App. at 261, n. 2.

Some circumstances will necessarily give rise to a presumption of bias. *Id.* at 325 n. 5. In *Smith*, Justice O'Connor detailed these "extreme situations that would justify a finding of implied bias." Her examples include situations in which:

... the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Smith, 455 U.S. at 222 (O'Connor, J. concurring) (emphasis added).

The constitutional right to an impartial jury does not permit a verdict to stand under these extreme situations, regardless of whether the lower court concludes that the juror expressed actual bias. *Id.*

Accordingly, the guilty verdict against Mr. Winborne cannot stand. *Id.* This case, in which a juror "was a witness or somehow involved in the criminal transaction," represents one of the extreme situations in which an appellate court must conclusively imply bias regardless of the result of any hearing below. *Id.* The juror who witnessed an event simply cannot act impartially and assess guilt or innocence based solely on the evidence presented by the state.

The circumstances of this case give rise to a presumption of implied bias on the part of the juror who was also a factual witness to the

allegations against Mr. Winborne. *Id.*; *Cho*, 108 Wn. App. at 330. Mr. Winborne's convictions must be reversed. *Id.*

II. THE TRIAL COURT VIOLATED MR. WINBORNE'S RIGHT TO A JURY TRIAL BY PERMITTING THE STATE'S POLICE WITNESSES TO PROVIDE IMPROPER OPINIONS OF HIS GUILT.

In order to convict Mr. Winborne, the jury was required to find beyond a reasonable doubt that he had eluded the police and that he had driven recklessly while doing so. RCW 46.61.024(1). Accordingly, Mr. Winborne moved *in limine* to prohibit the state's police witnesses from invading the province of the jury providing opinion testimony on these ultimate factual issues. CP 99, RP 51.

But the trial court denied Mr. Winborne's motion. RP 66. As a result, several police officers were permitted to testify -- some of them numerous times -- that Mr. Winborne had attempted to elude them and that his driving qualified as reckless. RP 171, 172, 203, 252, 256, 260, 262, 265, 357. Indeed, the jury heard police officers say at least eight times that Mr. Winborne had been driving recklessly. RP 171, 172, 203, 256, 260, 262, 265.

The court violated Mr. Winborne's right to a jury trial by denying his motion and permitting the state's witnesses to provide improper opinion evidence.

Testimony providing an improper opinion of the guilt violates the right to a jury trial. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009); U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22.³ Opinion testimony violates the “inviolate” right to trial by jury, which “vests in the jury the ultimate power to weigh the evidence and determine the facts.” *Hudson*, 150 Wn. App. at 652.

Neither a lay nor an expert witness may offer improper opinion testimony by direct statement or inference. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). A law enforcement officer’s improper opinion testimony may be particularly prejudicial because it carries “a special aura of reliability.” *Id.*

Whether testimony provides an improper opinion turns on the circumstances of the case, including “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *Hudson*, 150 Wn. App. at 653.

In a case alleging Attempting to Elude a Police Vehicle, whether the accused drove recklessly is an element of the offense. RCW

³ This Court reviews constitutional issues *de novo*. *State v. Armstrong*, — Wn.2d —, 394 P.3d 373, 377 (Wash. 2017).

46.61.024(1). An opinion of whether the accused's driving was reckless is, therefore, an opinion of guilt of an Attempting to Elude charge.

Several of the state's police witnesses characterized Mr. Winborne's driving as reckless throughout their testimony. RP 171, 172, 203, 256, 260, 262, 265. The officers also explicitly told the jury that Mr. Winborne had eluded their pursuit. RP 252, 357. Under the *Hudson* factors, these statements constituted improper opinions of Mr. Winborne's guilt. *Hudson*, 150 Wn. App. at 653.

Turning first to the type of witness involved, as police officers, the jury likely attributed a "special aura of reliability" to testimony. *Id.*; *King*, 167 Wn.2d at 331.

Looking second to the nature of the testimony, the officers' explicit characterizations of Mr. Winborne's driving as "reckless" and of his behavior, in general, as "eluding" brought their improper opinions directly in line with the elements of the offense. *Hudson*, 150 Wn. App. at 653.

Considering, third and fourth, the nature of the charge and the defense, the charges against Mr. Winborne put the questions of whether he had been eluding and whether he had driven recklessly directly as issue. *Id.* His defense of general denial put each element in play. *Id.*

Analyzing, finally, the other evidence before the trier of fact, the police officers were the only witnesses at trial. *Id.*

The officers' characterizations of Mr. Winborne's behavior as "eluding" and of his driving as "reckless" constituted improper opinions of guilt and invaded the exclusive province of the jury. *Id.*; *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007). The improper opinion testimony requires reversal of Mr. Winborne's convictions. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. WINBORNE, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).⁴

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in

⁴ Though the recent amendments to RAP 14.2 arguably negate the requirement for an indigent appellant to raise this issue in his/her Opening Brief, Mr. Winborne raises it, nonetheless, out of an abundance of caution. See RAP 14.2 (*as amended* by 2017 WASHINGTON COURT ORDER 0001).

Blazina apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Accordingly, the trial court waived all non-mandatory LFOs in Mr. Winborne's case. CP 205-06. The trial court also found Mr. Winborne indigent at the end of the proceedings in superior court. CP 243-44.

That status is unlikely to change, especially with the imposition of a lengthy prison term. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Additionally, the newly amended RAP 14.2 specifies that the trial court's finding of indigency stands unless the state presents evidence that the accused's financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

CONCLUSION

The trial court violated Mr. Winborne's rights to due process and to an impartial jury by failing to conduct any inquiry at all upon learning that a juror had been a factual witness to the case and by letting the impliedly partial juror to continue to sit on the case. The court also violated Mr. Winborne's right to a jury trial by permitting extensive police opinion evidence regarding the ultimate factual issues in the case. Mr. Winborne's convictions must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Winborne who is indigent.

Respectfully submitted on June 27, 2017,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on June 27, 2017.



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LAW OFFICE OF SKYLAR BRETT

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