

FILED
Court of Appeals
Division III
State of Washington
12/31/2019 10:22 AM

NO. 36918-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER RIENDEAU,

Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The improper dismissal of a juror requires a new trial.
2. The trial court erred when it denied a defense motion for mistrial.

Issues Pertaining to Assignments of Error

1. During jury selection, a potential juror expressed some reservations about his ability to decide the case impartially based on certain experiences and opinions held. Ultimately, however, the juror indicated he could follow the court's instructions when deciding the case and he could be a good juror. Over defense objection, this juror was nonetheless removed for cause. Is this reversible error?

2. A key prosecution witness repeatedly revealed that appellant had an extensive criminal history. Did this improper and damaging testimony require a mistrial?

B. STATEMENT OF THE CASE

The Spokane County Prosecutor's Office charged Alexander Riendeau with Assault in the Second Degree and Tampering With A Witness, both with domestic violence designations. CP 1. Riendeau pleaded guilty to a reduced charge of Assault in the Fourth Degree

and proceeded to trial on the Tampering charge.¹ CP 27-34; RP 6-10.

Evidence at trial revealed that, on the morning of November 9, 2018, Riendeau was booked into the Spokane County Jail on suspicion of assaulting Correna Gibson, his girlfriend and housemate at the time. RP 162-163, 234-235. From the booking area of the jail, Riendeau called Gibson three times within the span of a half hour. RP 165-167.

Riendeau and Gibson discussed how to solve logistical issues resulting from Riendeau's arrest (for example, how Gibson could obtain a key to their home and how they would manage to pay rent and avoid eviction). They also discussed the nature of their relationship and Riendeau's need for mental health treatment. See generally exhibits 1-3, 5-7.²

The tampering charge was based on requests Riendeau made of Gibson. During the first call, Riendeau suggested that Gibson go

¹ A person commits Tampering With A Witness when he attempts to induce a witness or person he believes is about to be called as a witness in an official proceeding to testify falsely or to absent himself or herself from any official proceeding. RCW 9A.72.120(1)(a)-(b); CP 17-18.

² Exhibits 1-3 are redacted recordings of the calls, which were played for jurors. Exhibits 5-7 are transcripts of the unredacted calls used to identify the necessary redactions and filed for purposes of appeal. See RP 132-146, 213-214.

to the prosecutor's office, explain the circumstances, and "maybe . . . talk him into something." Exh. 5, at 5. He also suggested that she could talk to a victim's advocate. Exh. 5, at 10. During the second call, Riendeau asked Gibson if she was "gonna be solid." Exh. 7, at 3. He also indicated that if Gibson and a neighbor who witnessed the alleged assault failed to testify, the case would go away and suggested Gibson convince the neighbor not to go to court.³ Exh. 7, at 17-18. During the third call, Riendeau asked Gibson to "come in and fight for me" and "make 'em take it off." Exh. 6, at 4.

The State called three witnesses.

Spokane Police Detective Dustin Howe testified primarily regarding Riendeau's arrest and his three phone calls to Gibson from jail. RP 155-169.

Victim Witness Advocate Jessica Moon, an employee of the Spokane County Prosecutor's Office, described her contacts with Gibson (including a meeting at Riendeau's first court appearance) and testified that Gibson shared with her what she hoped would happen regarding the assault charge.⁴ RP 198, 214-222.

³ Riendeau was not charged with tampering with the neighbor. CP 27; RP 270.

⁴ Following a defense hearsay objection, Moon was not permitted to testify

The final witness was Correna Gibson, who described her dating relationship with Riendeau, attributed his problems to mental health issues, and recalled telling Jessica Moon that she did not want to press charges against him for assault – an incident she believed had been overblown. RP 233-235, 237-241, 249-252. She could not recall if she otherwise asked that the charge be dropped and asserted that the prosecution was misinterpreting what Riendeau had said to her during their recorded phone calls. RP 252, 260-262. She denied that Riendeau had pressured her to interfere with prosecution of the assault charge. RP 235. And she denied that her contacts and interactions with the prosecutor's office were the result of anything Riendeau had said to her. RP 253, 257-258.

Consistent with Gibson's testimony, the defense argued that the prosecution had taken Riendeau's calls out of context and he had never improperly pressured her to absent herself from trial or otherwise interfered with prosecution of the assault charge. Rather, he had simply encouraged her to provide information relevant to the situation to someone at the prosecutor's office. RP 152-154, 312-324.

Two events are the focus of this appeal. First, during jury

regarding what Gibson said to her about the charge. See RP 206, 211-213.

selection, the court dismissed prospective juror 18 for cause over defense counsel's objection. RP 110-111. Second, during Gibson's testimony, she repeatedly referred to Riendeau's criminal history and made it clear that history was quite extensive.⁵ RP 235, 239, 254.

Jurors convicted Riendeau of Tampering, the court imposed a standard range 60-month sentence for both the Assault and Tampering convictions, and Riendeau timely filed his Notice of Appeal. CP 24-25, 106-107, 148-171.

C. ARGUMENT

1. THE IMPROPER DISMISSAL OF JUROR 18 DENIED RIENDEAU A FAIR TRIAL.

During voir dire, prospective juror 18 identified his name, where he lived, and his hobbies. He also indicated he had never served on a jury and had once been charged with trespass in a Target store, a charge ultimately resolved with a fine and suspended misdemeanor sentence. RP 37.

Later, when the prosecutor asked if anyone had personal experience with domestic violence, juror 18 indicated his wife had been diagnosed with schizophrenia and become violent and

⁵ At sentencing, Riendeau's offender score was calculated as 9+. RP 343; CP 103-104.

destructive toward him and others. RP 47-48. This prompted the following exchange between the trial judge and juror 18:

Court: Would that experience or that relationship influence your consideration of this case?

Juror 18: I – I don't know how to answer that, Your Honor. I'm not sure.

Court: Do you think you'd be able to decide this case based upon what's presented to you in this courtroom and not on any of the history between you and your wife or what she's been through?

Juror 18: Well, I guess I would have to know the facts, like if violence is done by someone that was mentally ill or not. I –

Court: All right. So whether or not you could consider this case impartially would be dependent upon the facts that come out?

Juror 18: Right.

Court: Okay. Thank you.

RP 48.

Later, during the prosecutor's discussion of circumstantial evidence, juror 18 spoke up again:

Juror 18: With my belief system, you got to have at least two witnesses.

Prosecutor: Okay.

Juror 18: And circumstantial evidence, it could be nebulous.

Prosecutor: Okay.

Juror 18: Manipulated in such a way as to make someone look guilty and they're really not. I – to me, it's very iffy.

RP 81-82.

Neither the court nor the prosecutor directly asked juror 18 if he would nonetheless follow the jury instructions even if he disagreed with one or more of them. But the prosecutor subsequently asked that question to the entire group:

So is there anyone here – and you don't know the instructions, but you might read one when you get back there and say, boy, I don't like this one. It doesn't matter if you like it. It does [sic] matter if you agree with it. You have to apply it.

RP 87. Not a single juror, including juror 18, indicated a problem with following the court's instructions even if there was personal disagreement with those instructions. RP 87.

During defense counsel's period of questioning, he confirmed that, in response to the prosecutor's query, everyone had agreed to follow the court's instructions no matter what. RP 88-89.

Moreover, he asked:

So this is going to be a case that involves domestic violence allegations and – and an allegation that some effort was made to intimidate a witness. And you'll hear some evidence. And at the close of it,

you know, you'll be asked to make a decision about the allegations.

Is there anybody that, as you sit here today, you think maybe I'm not a good juror?

RP 104. Juror 18 was not among those who identified a potential problem. RP 104-107.

Outside the jurors' presence, the prosecutor moved to strike juror 18 for cause, arguing his statement about needing to hear the evidence before he could say he'd be fair, and his remark about the necessity of two witnesses, left him unfit to serve. RP 110. Defense counsel objected and pointed out that juror 18 had subsequently indicated he would follow the court's instructions, the necessary prerequisite to serving in the case. RP 110-111.

The court granted the State's motion and struck juror 18 for cause. While recognizing that juror 18 had indicated he would abide by the court's instructions, the court pointed to his earlier comments about wanting to hear the evidence before knowing whether he could be impartial and his "belief system" that required two witnesses, noting the latter was inconsistent with instructions he ultimately would have been given. RP 111. This was error.

The state and federal constitutions protect an accused person's right to participate in the selection of an impartial jury to

hear and decide his case. State v. Irby, 170 Wn.2d 874, 884-885, 246 P.3d 796 (2011); State v. Munzanreder, 199 Wn. App. 162, 174-175, 398 P.3d 162, review denied, 189 Wn.2d 1027, 406 P.3d 280 (2017); U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22.

Judges have a duty to excuse from service those jurors who manifest unfitness due to bias or prejudice. RCW 2.36.110. A judge does not, however, 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 6.4(c)(2).

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 18. RP 110. 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).

Juror 18 obviously was not removed for a physical inability. Nor was he removed for implied bias.⁶ Instead, juror 18 was removed for supposed actual bias.

Actual bias means “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.” RCW 4.44.170(2). When it appears a juror has formed an opinion about the case, “such opinion shall not of itself be sufficient to sustain the challenge, but the court must be

⁶ 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.

satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.” RCW 4.44.190.

Actual bias must be established by actual proof. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). When removing a juror, a court abuses its discretion when the decision to do so rests on facts unsupported by the record. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). Reversal is also required where the court fails to apply the correct legal standard. Sassen Van Elsloo, 191 Wn.2d at 807; State v. Elmore, 155 Wn.2d 758, 779-780, 123 P.3d 72 (2005).

Recently, the Washington Supreme Court reversed a conviction when the trial court abused its discretion in dismissing a juror because the juror was acquainted with “a critical witness for the defense.” Sassen Van Elsloo, 191 Wn.2d at 810. The Court noted that absent “the requisite showing of the juror’s bias and inability to be fair,” the juror’s acquaintance with a witness (regardless of the witness’s importance) was irrelevant. Id. at 811. The Court noted that “neither the state nor the trial judge inquired whether [the juror] could put aside any prior opinions and judge the

RCW 4.44.180.

case fairly, and the record contains no facts supporting such a finding.” Id. at 812.

Similarly, the record from Riendeau’s trial does not show juror 18 was unable to put aside his opinions. While juror 18 certainly had experiences and opinions relevant to his service as a juror in Riendeau’s case and at odds with the jury instructions he would ultimately receive, the court never directly asked him if he could put aside his views and judge the case fairly based on these instructions. The record, in fact, demonstrates he could. In response to subsequent questions from the prosecutor and defense designed to ensure potential jurors would ultimately follow the court’s instructions and could be good jurors, juror 18 confirmed he could do so when he did not identify himself as among those having difficulties in this regard. See RP 87-89, 104-107.

“[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,’” meaning it is probable the juror could not set aside his preconceived ideas. Sassen Van Elsloo, 191 Wn.2d at 809 (quoting Noltie, 116 Wn.2d at 838-839). Minimally, if the trial judge in Riendeau’s case still had some lingering doubts about juror 18 by the time of the State’s challenge, the judge should have

revisited the matter and asked juror 18 the relevant question directly – can you put aside your prior opinions and experiences? This did not happen, and the current record does not justify removal of juror 18 for actual bias. Therefore, the trial court abused its discretion in dismissing him over defense objection.

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, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995). But removing a qualified juror without properly applying the legal standard necessary for dismissal can require 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 18's dismissal had no effect on the verdict. This Court should therefore reverse and remand for a new trial.

2. EVIDENCE OF RIENDEAU'S EXTENSIVE CRIMINAL HISTORY REQUIRED A MISTRIAL.

A defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952). Moreover, under 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

Despite the general prohibition on evidence of a defendant's criminal history, Riendeau's jury learned that he had an extensive history that predated the current charge.

On direct examination, when asked by the prosecutor whether she had conversations with Riendeau while he was at the jail, Gibson responded, "We had a lot to discuss because we lived together for eight months and we shared bills. So he was going away for a long time because he has a record as we all know." RP 235 (emphasis added). Later, when the prosecutor asked Gibson if she told Moon she wanted the assault charge dropped, Gibson answered, "I indicated to her that – I knew the charges weren't

going to get dropped. Look at his history. I mean, they came full force. . . .” RP 239 (emphasis added). Still later, during cross-examination, when defense counsel asked Gibson whether she and Riendeau had discussed dividing up their property during the phone calls, Gibson answered in the affirmative and added, “he’s got a record and we weren’t going to talk again, you know. That was it. . . .” RP 253-254 (emphasis added).

Given that the parties did not intentionally elicit evidence of Riendeau’s criminal history, it’s repeated focus is best described as a “trial irregularity” because such irregularities include the jury seeing or hearing that which it should not. See State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (spectator misconduct); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst from defendant’s mother); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (answer to improper question), cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (statement that defendant had a “record”).

Defense counsel moved for a mistrial based on disclosure of Riendeau’s extensive criminal history. If that motion were denied, counsel asked for a curative instruction. RP 264. The court

indicated that, had the State intentionally elicited the testimony, a mistrial would be appropriate. RP 265. But because the testimony was nonresponsive to any question asked, and because no specific information was provided concerning Riendeau's prior convictions, the motion was denied. RP 265. Instead, the court instructed jurors, "You may not consider that the defendant has been convicted of any crime(s) for any purpose." RP 265-266; CP 16. This was insufficient.

In determining whether a trial irregularity requires a mistrial, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)); Escalona, 49 Wn. App. at 254. Denial of a motion for mistrial is reviewed for an abuse of discretion. Escalona, 49 Wn. App. at 255. An examination of the above criteria reveals an abuse of discretion here.

First, this error was very serious. Gibson testified that Riendeau was "going away for a long time because he has a record as we all know," revealing not only that Gibson had prior criminal history, but also that it was extensive (i.e. the type that made you

go away for a very extended period). RP 235. And in the unlikely event that jurors missed this information, Riendeau referred to it twice more. She testified there was no way the State was going to drop charges against Riendeau: "Look at his history." RP 239. She then referred to his record once more in explaining that she wasn't going to see him again following his arrest, necessitating that they work on dividing up their property. RP 253-254.

Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference" State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes."). It is well accepted, by scholars and courts, that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. See Hardy, 133 Wn.2d at 710-711.

Looking at the second factor – whether the evidence was cumulative – this evidence was not cumulative of any properly admitted evidence.

Third, the court did tell jurors not to consider Riendeau's prior convictions. But some errors simply cannot be fixed with an instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Escalona, 49 Wn. App. at 255-56. In Escalona, this Court noted that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

In State v. Bourgeois, the Supreme Court concluded that a curative instruction sufficiently mitigated any prejudice resulting from an irregularity – a spectator who had glared at a prosecution witness and made a hand gesture as if pointing a gun at the witness. Bourgeois, 133 Wn.2d at 397-398, 408. In so finding, the Court focused on the fact most jurors were apparently unaware of either incident prior to rendering their verdicts. Bourgeois, 133 Wn.2d 398, 408-410.

The opposite is true here. Given that Gibson mentioned Riendeau's extensive criminal record three times, this testimony would not have gone unnoticed. Even without specific information concerning his past convictions, jurors would have been more likely to conclude that a hardened criminal such as Riendeau (one who was "going away for a long time" and for whom there was no chance prosecutors would drop charges because "look at his history") tampered with a witness in order to avoid yet another criminal conviction. Instruction or not, they would have been unable to put the evidence out of their minds, thereby diminishing any reasonable prospect of acquittal. On this alternative ground, this Court should reverse Riendeau's conviction and remand for a new trial.

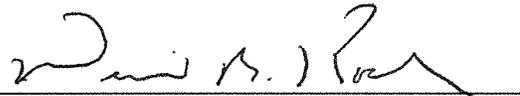
D. CONCLUSION

Based on juror 18's improper removal for cause and based on Gibson's revelations about Riendeau's extensive criminal history, the Tampering conviction should be reversed.

DATED this 31st day of December, 2019.

Respectfully submitted,

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December 31, 2019 - 10:22 AM

Transmittal Information

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