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NO. 36971-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

GARY SARGENT, JR.,

Appellant.

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

The Honorable Lesley A. Allan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by dismissing juror 27.

Issue Pertaining to Assignment of Error

Prior to beginning voir dire the court informed the parties juror 27 had expressed to the bailiff her animosity towards the trial judge. Neither party nor the court questioned juror 27 about this animosity during voir dire. Neither party used all of its peremptory challenges, and juror 27 ended up on the jury. Under these circumstances, did the trial court commit reversible error by dismissing juror 27 after she was an impaneled juror on the basis that she might focused on the judge more than on the evidence presented at trial when there was no evidence to support that concern?

B. STATEMENT OF THE CASE

1. *Procedural Facts*

The Chelan County Prosecutor charged appellant Gary Sargent, Jr. with first degree robbery, claiming that on May 13, 2019, he stole property from Adam Ball and displayed what appeared to be a deadly weapon to accomplish the offense. CP 10-11. A trial was held July 23-24, 2019, before the Honorable Lesley A. Allan, Judge. RP¹ 15-379.

¹ There are three consecutively paginated volumes of verbatim report of proceedings for the dates of July 22, 2019 (readiness hearing before the Honorable Travis C. Brandt, Judge), July 23-24, 2019 (trial) and July 25, 2019 (sentencing before Judge Allan), referenced herein as “RP” followed by the relevant page number.

A jury convicted Sargent as charged. CP 34; RP 374-77. Sargent was sentence to 108 months of incarceration and 18 months of Community Custody. CP 35-46; RP 406. Sargent appeals. CP 48-61.

2. *Substantive Facts*

Voir dire was conducted on July 23, 2019, before Judge Allan, and each party was allowed seven peremptory challenges. RP 16-18. Thirty-three jurors made up the venire, including Carrie Bratlie, juror 27. CP 68-70 (Supp CP __ (sub no. 26, Peremptory Challenges, Seated juror list & record of all potential jurors, filed July 24, 2019)).² Prior to swearing in the venire, Judge Allan notified the parties that juror 27 had expressed “some negative things about me to Mr. Bailiff about me.” RP 29. Neither party expressed any concern about allowing juror 27 to remain part of the venire.

During the initial voir dire procedures Judge Allan had each juror introduce themselves. RP 47-61. In this regard, juror 27 stated:

Yes. My name is Carrie Bratlie. My neighborhood is Merritt, Washington. I live there with my partner. He is semi-retired. My education is a bachelor’s degree. I don’t have any previous jury experience. And my leisure activities are skiing in winter and traveling and the sunshine.

RP 58.

² The italicized CP reference is to the anticipated Clerk’s Papers index numbers that will be assigned to sub no. 26 of the trial record, which lists the peremptory challenges used by each party, the impaneled jurors and all of the potential jurors who participated in voir dire. A supplemental designation of clerk’s papers was filed contemporaneously with this brief.

During the prosecutor's voir dire, juror 27 twice responded to various questions along with other jurors by raising her juror number card. First, juror 27 responded 'yes' to the question of whether anyone had ever been the victim of a property crime. RP 68. Next, juror 27 responded 'yes' to the question of whether anyone felt "that the police didn't do a good enough job trying to figure out who stole your property and get it back for you?" RP 69. When asked by the prosecutor to elaborate on these responses, juror 27 stated:

It was a while we were living in King County. And they no longer – in the city of Federal Way, they don't even send out a policeman anymore for burglary. You simply go online and place the items that were stolen from you in a long list of things, and you don't even speak to the police department anymore.

RP 70. Juror 27 characterized this process as, "It's like, 'Call – call somebody who cares.'" RP 71. Juror 27 did not respond affirmatively to any further general inquiries by either the prosecution or defense during the remainder of voir dire, nor was she directly question by either. See RP 71-134.

After voir dire both parties exercised only five of their seven allotted peremptory challenges. RP 135. As a result, juror 27 was seated as the 12th juror on a jury of 13, which included a single undesignated alternate juror to be determined by lot just prior to deliberations. RP 20-21, 137, 145. The

jury was sworn, given preliminary instruction and then released for a lunch break. RP 138-47.

Before the parties and court adjourned for lunch, Judge Allan noted juror 27 had made it on the jury and had not been questioned about her animosity towards the judge by either party. RP 147. Judge Allan advised the parties that as juror 27 left the court for the lunch break after being impaneled, she turned to the judge “with a sort of angry look on her face” and mouthed in his direction something like, “I can’t believe I’m having to do this.” RP 147-48. The court asked what if anything the parties wanted to do about this, or whether the court should simply excuse her from the jury. RP 148.

The prosecutor stated he noticed the mad look on juror 27’s face but did not see her mouth anything. Defense counsel urged the court to question her before deciding whether to excuse her outright. RP 148. The court agreed to question her after the break. RP 149.

When juror 27 was brought in for further questioning after the break, the following exchange occurred:

[THE COURT:] So we brought you in – I’ll just do a little background. We were made aware this morning that you had expressed to Mr. [Bailiff] that you didn’t want to be on a trial where I was the judge. I disclosed that to the attorneys before we started questioning, but nobody asked you about it. And I thought perhaps you realized this case isn’t about me the judge, it’s about Mr.

Sargent and about these attorneys trying the case and about the jury deciding it. But it became evident once you were selected that you were pretty unhappy about being here.

I want to make sure or find out that you're [sic] unhappiness with me, can you set that aside and be fair to the parties in this case? Because this is, of course, very important to Mr. Sargent and to the State.

JUROR CARRIE BRATLIE: I probably understand that better than anybody else –

THE COURT: Okay

JUROR CARRIE BRATLIE: -- in this room. I sat through, we'll call it a trial. Okay? I don't know if you even remember it.

THE COURT: I don't. I've racked my brain trying to remember.

JUROR CARRIE BRATLIE: Harrison/Peterson, Caden Peterson, my nephew, who I have not seen for over a year because you gave Angela Peterson the trust, the Peterson trust.

THE COURT: Oh, okay. All right. Okay. Yeah. Okay.

JUROR CARRIE BRATLIE: I am absolutely tingling with anger.

THE COURT: Okay.

JUROR CARRIE BRATLIE: Your bias that you bring to this courtroom is beyond irresponsible. And what I witnessed in your bias, I understand what this gentleman is going through. I do. The bias, again, that you brought, that you felt without looking at all the details, you can never get me to believe that you read both sides of that case before.

Potentially after, you did, when you realized that Angela Harrison was lying to you. But the damage had already been done at that point. I don't care about money. I honestly don't care about the property I live in. What I care about is the relationship that I once had with my nephew that I no longer have.

Your bias is what did that, your bias that all women are correct. I thank God there's no – there's no woman in here. This is a straightforward case. It's all men. You can't possibly have a bias.

RP 162-64.

The court then recalled the specifics of the case juror 27 was complaining about, noting it involved designating who would control the trust for juror 27's nephew. RP 164-65.

Initially, both parties declined the court's invitation to question juror 27. RP 165. The court then asked juror 27 whether her animosity towards the court "would be too distracting to allow you to focus on giving the parties here a fair trial on this particular issue that's presented." RP 165. Juror 27 responded, "Because I've seen your work in this courtroom, I will be watching you." Id. This prompted the prosecutor to ask, "it sounds like you'd just be focused on the judge rather than maybe the evidence that's coming in." Juror 27 replied: Yes. Because the bias that I saw in dealing with attorneys, I would be wondering if she was giving you benefit that she wasn't giving to the other counsel." Defense counsel declined to question juror 27 further and juror 27 was sent back to the jury room. RP 166.

The prosecutor moved to dismiss juror 27, claiming "I believe she has indicated and stated she would not be listening to the evidence." Defense counsel replied, "I think at this point we picked thirteen jurors. I think we should stick with the thirteen jurors." The court granted the prosecutor's request and dismissed juror 27, despite the defense objection. RP 167.

C. ARGUMENT

THE COURT COMMITTED REVERSIBLE ERROR BY
DISMISSING JUROR 27.

Juror 27 should not have been dismissed because of animosity towards the trial judge. Such animosity does not constitute a legitimate basis to dismiss an impaneled juror. Similarly, juror 27 should not have been dismissed based on speculation that she might “not be focusing on the presentation of evidence,” might “not be fair to both sides,” might bring “in extraneous information,” and might create “some kind of mistrial situation.” RP 167-68. At the time she was dismissed, no evidence had been presented so there was no basis to measure her level of attentiveness at trial. The record does shows juror 27 actively and attentively engaged in voir dire and neither party chose to exercise a peremptory challenge against her during final jury selection, despite being informed of her animosity towards Judge Allan prior to voir dire. RP 29. Juror 27’s ambiguous response to the prosecutor’s post-jury-empanelment questioning does not support a contrary conclusion. Juror 27’s response indicates she agreed she would “focused on the judge rather than maybe the evidence that’s coming in,” but she also stated she would be watching for any bias the judge showed in favor of the prosecution, which would necessarily require being attentive to all aspects of the trial, including the admitted evidence. Dismissal of

juror 27 deprived Sargent of his right to fair trial by the jury impaneled by the parties. This Court should therefore reverse and remand for a new trial.

The state and federal constitutions protect an accused person's right to participate in the selection of a jury and to receive a fair trial by that selected jury. Batson v. Kentucky, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Irby, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Wash. Const. art. I, section 22. Washington expressly guarantees the inviolate right to a 12-person jury and unanimous verdict in a criminal prosecution. Irby, 170 Wn.2d at 884; see also Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) (once state guarantees right to jury trial, Fourteenth Amendment guards against its arbitrary denial); State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010) ("greater protection" for jury trial rights under article I, sections 21 and 22 than federal constitution).

A court does not have unbridled discretion to remove an impaneled juror. See e.g., Miller v. State, 29 P.3d 1077, 1083-84 (Ok. Crim.App. 2001) (court's discretion to dismiss selected juror for good cause "ought to be used with great caution"); People v. Bowers, 87 Cal.App.4th 722, 729 (Cal.App. 2001) (court's discretion to dismiss juror is "bridled to the extent" that juror's inability to perform his or her functions must appear in the record as a "demonstrable reality, and court[s] must not presume the worst of a

juror.”). To the contrary, “the law presumes each juror sworn is impartial and qualified to sit on a particular case, otherwise he would have been challenged for ‘cause.’” State v. Latham, 30 Wn. App. 776, 781, 638 P.2d 592, 595 (1981), aff’d, 100 Wn.2d 59, 667 P.2d 56 (1983).

Dismissal of an impaneled juror is generally governed by RCW 2.36.110 and CrR 6.5 and is reviewed for an abuse of discretion. State v. Sassen Van Elsloo, 191 Wn.2d 798, 806, 809, 425 P.3d 807 (2018). A trial court abuses its discretion if its decision is “manifestly unreasonable or based on untenable grounds.” Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Moreover, “[a] trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” Fisons Corp., 122 Wn.2d at 339.

CrR 6.5 provides that a juror shall be excused only after the court has “found” she is “unable to perform the duties” of a juror. RCW 2.36.110 explains that the court shall excuse a juror if she 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.”

Juror 27 was not “found” to be “unable to perform the duties” of a juror, nor was she found to have manifested “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. Instead the trial court speculated she “would not be focusing on the presentation of evidence,” that she might “not be fair to both sides,” that she might bring “in extraneous information,” and that she might create “some kind of mistrial situation.” RP 167-68. But all of this is mere speculation and did not warrant the dismissal of juror 27.

There is simply no basis in the record to support finding juror 27 might bring “in extraneous information,” and that she might create “some kind of mistrial situation.” RP 167-68. Therefore, these reasons for dismissing juror 27 are untenable because they are not supported by the record. Rohrich, 149 Wn.2d at 654.

As to the court’s conclusion juror 27 “would not be focusing on the presentation of evidence,” this is also unsupported by the record. RP 167. The evidentiary portion of trial had not yet begun when the court decided to dismiss juror 27, so there was no basis to measure the attentiveness, or lack thereof, of any juror, much less juror 27 beyond what had occurred in voir

dire. The record shows juror 27 was active and attentive during voir dire and actively participated and responded appropriately at various times during the process. That juror 27 was fit to serve as a juror is punctuated by both parties foregoing the exercise of a peremptory challenge to remove her from the jury, despite having peremptory challenges to spare. RP 135. The record does not support the trial court finding juror 27's would fail to be attentive to the evidence presented at trial and therefore was an abuse of discretion. Rohrich, 149 Wn.2d at 654.

The only remaining reason articulated by the court was that juror 27 might “not be fair to both sides.” RP 167. This implicates the bias prong of RCW 2.36.110. In Sassen Van Elsloo, the Court concluded that in addition to the standards set forth under CrR 6.5 and RCW 2.36.110, if the impaneled juror is being dismissed on the basis of “actual bias,” the standards set forth under RCW 4.44.170 and defined in RCW 4.44.190, the statutes governing the for-cause dismissal of potential jurors, must also be met.” 191 Wn.2d at 798. The Sassen Van Elsloo Court went on to explain that:

when challenging a juror for bias, the challenging party must prove actual bias, regardless of whether the challenge occurs during voir dire or during the trial. Accordingly, to properly dismiss an impaneled juror for actual bias, the challenging party must prove (1) that the impaneled juror has formed or expressed a biased opinion and (2) that “from all the

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

191 Wn.2d at 810.

Here, the prosecution did not prove nor did the trial court find that juror 27 had formed “a biased opinion.” Instead the court merely expressed concern by “reading between the lines” that she might not be “fair to both sides in listening to this case and making a decision.” RP 167. This was mere speculation by the trial court and not a finding. And because any such finding would not be supported by the record, any reliance on actual bias to dismiss juror 27 constitutes an abuse of discretion. Rohich, 149 Wn.2d at 654.

The trial court should not have dismissed juror 27 based on an unfounded concern that her animosity towards the trial judge arising from an unrelated prior civil matter. The correct procedure would have been to see if juror 27’s (or any other juror for that matter) conduct during trial somehow jeopardized the fairness of the trial. If it did, then juror 27 could have been dismissed if necessary. In the alternative, if juror 27 was not randomly picked as the alternate juror at the end of trial, the parties could have agreed to designate her as such. Unfortunately, the trial court took the unnecessary and extreme measure of dismissing a qualified and impaneled juror before it was warranted and over defense objection.

Reversal is required unless the prosecution can prove the error was harmless. Sassen Van Elsloo, 191 Wn.2d at 815.

To show that an erroneous dismissal of an impaneled juror was harmless, the State must present evidence that allows the appellate court “to ‘say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.’” Hinton[v. United States], 979 A.2d [663], 691 [(D.C. 2009)] (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). If the appellate court is in “virtual equipoise” as to the harmlessness of the error, the error should be treated as if it were not harmless. Id. While it may be difficult for the government to show the absence of prejudice, it is not impossible: “we would suppose that if the government’s case is strong and there is no reason apparent in the record to think the erroneously removed juror would have dissented, a reviewing court could be satisfied that the juror substitution had no substantial influence on the outcome.” Id. at 691-92.

Sassen Van Elsloo, 191 Wn.2d at 823 (emphasis added).

The prosecution cannot meet this burden. The prosecution’s case against Sargent turned on the testimony of the only eyewitnesses to the alleged incident, Adam Ball, the complaining witness, and Sargent. RP 237-69 (Ball); RP 285-316 (Sargent). There was no video evidence of the alleged incident presented to the jury and the other witnesses only got involved after the fact.

Sargent and Ball were both homeless, had lived on the streets of Wenatchee, had known each other prior to the incident and considered each

other friends. RP 237-39, 285-86, 300. Ball claimed Sargent stole his belongings and assaulted him with a stick in the process. RP 243-48. Sargent claimed he had no intent to steal Ball's belongings and was merely assisting Ball with them, and that the alleged assault with a stick was not intentional, but simply an accident. RP 289-99.

Based on this record, the prosecution cannot show juror 27 would have made the same credibility assessments regarding Ball and Sargent that the other jurors ultimately made. At best, the record leaves this Court "in 'virtual equipoise' as to the harmlessness of the error." Hinton, 979 A.2d at 691. Under Sassen Van Esloo, this requires reversal because the prosecution cannot satisfy its burden to prove the error harmless. 191 Wn.2d at 823.

D. CONCLUSION

For the reasons stated, this Court should reverse and remand for a new trial.

DATED this 30th day of March, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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