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Court of Appeals
Division III
State of Washington
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No. 36971-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
Chelan County Superior Court
Cause No. 19-1-00312-04

State of Washington, Respondent

v.

Gary Elton Sargent, Jr., Appellant

BRIEF OF RESPONDENT

Ryan S. Valaas, WSBA #40695
Chelan County Deputy Prosecuting Attorney
P.O. Box 2596
Wenatchee, WA 98807
(509) 667-6202

Table of Contents

I. Statement of the Issue1

II. Statement of the Case.....1

 A. Procedural Facts.....1

 B. Substantive Facts1

III. Argument3

 THE COURT DID NOT ABUSE ITS DISCRETION
 WHEN IT DISMISSED JUROR 27 FOR CAUSE BASED
 ON HER INABILITY TO LISTEN TO THE EVIDENCE3

IV. Conclusion7

Table of Authorities

Washington Cases	Page
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 Wn.2d 1105 (1995)	4
<i>State v. Jordan</i> , 103 Wn. App. 221, 11 P.3d 866 (2000)	4-5
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	3
<i>State v. Sassen Van Elsloo</i> , 191 Wn.2d 798, 425 P.3d 807 (2018).....	3
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisions Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	3
 Statutes	
RCW 2.36.110	passim
 Court Rules	
CrR 6.5	passim

I. STATEMENT OF THE ISSUE

Under RCW 2.36.110 and CrR 6.5, did the trial court commit a manifest abuse of discretion when it removed a juror for cause where (1) the juror confirmed she would be paying more attention to the judge than the evidence presented, (2) the juror confirmed she would be distracted by her anger for the judge, (3) the juror believed the judge to be very biased, and (4) the court found that the juror would not focus on the evidence, may treat Mr. Sargent unfairly, and may improperly affect deliberations by introducing extraneous information about her perception of the judge and the judge's bias?

II. STATEMENT OF THE CASE

A. Procedural Facts

The State is satisfied with Mr. Sargent's statement of procedural facts in his opening brief.

B. Substantive Facts

The State is satisfied with Mr. Sargent's statement of substantive facts subject to the following addendums. Before Juror 27 was brought out for questioning, the State informed the court that the juror had interacted with a staff member of the prosecutor's office:

[PROSECUTOR]: . . . [Juror 27] contacted Christian {sic} in our office and expressed her dismay at being selected on a jury and basically said she didn't want to be there. I wasn't

present for this conversation . . . but one of the staff members - - she came up to one of the staff members. And apparently they noted that . . . she was not happy . . . and expressed as much . . .

RP 161. After the State moved to dismiss Juror 27 for cause, the judge ruled as follows:

THE COURT: Okay. I am going to excuse [Juror 27]. I'm sorry to do so since we haven't even started the presentation of the evidence. As I understood and heard her answers to the questions, she would not be focusing on the presentation of the evidence.

I'm concerned also, reading between the lines, that although she said, *Thankfully it's all men; there's no women*, that she somehow suggested that I might favor [the prosecutor] over [defense counsel]. And I'm worried about her being fair to both sides in listening to this case and making a decision. I'm also quite frankly a little bit concerned about her possibly bringing in extraneous information to the discussions among the jurors in terms of going off on a thing about, you know, Judge Allan [the trial judge] and bias and whatnot. And I'm concerned about that might somehow taint the deliberation process and take the focus away from where it should be and the evidence in this particular case.

RP 167-68. Although Mr. Sargent objected to the judge excusing Juror 27, he did not object to any of the trial court's reasons or findings, instead merely stating "I think at this point we picked thirteen jurors. I think we should stick with the thirteen jurors." RP 167.

III. ARGUMENT

THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JUROR 27 FOR CAUSE BASED ON HER INABILITY TO LISTEN TO THE EVIDENCE.

Dismissal of a 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, 806-09, 425 P.3d 807 (2018). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 807 (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisions 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).

Both RCW 2.36.110 and CrR 6.5 provide a wide variety of reasons that require a trial court to dismiss a juror.

It shall be the duty of a 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. Furthermore, “If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order

the juror discharged.” CrR 6.5. “RCW 2.36.110 and CrR 6.5 place 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. Jordan*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). Furthermore, a defendant has no right to be tried by a jury that includes a particular juror. *Jordan* at 229 (citing *State v. Gentry*, 125 Wn.2d 570, 615, 888 Wn.2d 1105 (1995)). In *Jordan*, the Court of Appeals held that the trial court did not abuse its discretion when it excused a juror who the trial court believed was being inattentive (based on the court’s observations of the juror). *Jordan* at 229.

In the present case, the trial court did not abuse its discretion in excusing Juror 27 because the court’s conclusion that Juror 27 would not be paying attention to the evidence is well supported in the record:

THE COURT: All right. So [Juror 27], I’m going to ask a question. And I’m sorry that you are so angry with me, but my question relates to this case and whether you believe that you can fairly decide this case on the merits being a member of the jury **or if your unhappiness with me would be too distracting to allow you to focus** on giving the parties here a fair trial on this particular issue that’s presented.

[JUROR 27]: Because I’ve seen your work in this courtroom, I will be watching you.

THE COURT: Okay. All right. Okay. All right. Does that cause you to have any questions, [prosecutor]?

[PROSECUTOR]: Just a follow-up question. And so [Juror 27] you said – You know, I’m sorry about everything that you’ve had to go through, but **it sounds like you’d just be**

focused on the judge rather than maybe the evidence that's coming in.

[JUROR 27]: Yes. Because the bias that I saw in dealing with the attorneys, I would be wondering if she was giving you benefit that she wasn't giving to the other counsel.

RP 166-67 (emphasis added). Essentially, the court inquires whether Juror 27's anger towards the judge would be "too distracting" to allow her to focus, and Juror 27 indirectly confirms this by responding she "will be watching" the judge. The prosecutor then follows up on this by asking Juror 27 if she would be focusing on the judge rather than the evidence, and Juror 27 confirms that this is correct. In this response to the prosecutor's question, Juror 27 also suggests that she suspects the judge may give the prosecutor "benefit that [the judge] wasn't giving to [defense counsel]."

Standing alone, Juror 27's confirmed lack of attentiveness was sufficient for the trial court to excuse her. *Jorden* at 229. More specifically, the trial court was obligated to excuse Juror 27 once it was determined Juror 27 wouldn't pay attention to the evidence. RCW 2.36.110; CrR 6.5. However, in addition to the lack of attentiveness reason, the court found a number of additional reasons why excusing Juror 27 was appropriate: (1) the belief that Juror 27 may favor the prosecutor over defense counsel; (2) the worry that Juror 27 may not be fair to both sides; and (3) the concern about Juror 27 bringing in extraneous information to the discussions among

the jurors (particularly relating to the trial judge and her bias) and this information taking the focus away from the evidence in the case. RP 168.

All of these additional findings by the court in excusing Juror 27 relate to “conduct or practices incompatible with proper and efficient jury service.” RCW 2.36.110. Juror 27 was clearly extremely hostile towards the judge and this extreme anger would have negatively affected her ability to sit on the jury. The judge was correct in being concerned that Juror 27’s hostility would bleed into how Juror 27 treated the present case (listening to the evidence, deliberations with the other jurors, and being fair to Mr. Sargent). Based on the trial judge’s prudent excusal of Juror 27, Mr. Sargent falls far short of showing that the trial judge abused her discretion; the court’s decision was neither manifestly unreasonable nor based on untenable grounds.

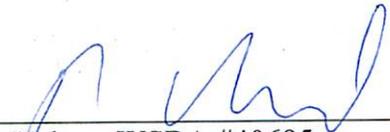
Finally, it should be noted that the excusal of Juror 27 did not affect Mr. Sargent’s right to a unanimous verdict by a 12 person jury; after Juror 27 was excused, there were 12 jurors remaining and they reached a unanimous verdict finding Mr. Sargent guilty. There is also no indication that Juror 27 was excused by the court for an improper reason (e.g., race).

IV. CONCLUSION

Based on the foregoing reasons, this Court should affirm Mr. Sargent's conviction because the trial court did not abuse its discretion in excusing Juror 27.

DATED this 8 day of April, 2020.

Respectfully submitted:



Ryan Valaas, WSBA #40695
Deputy Prosecuting Attorney

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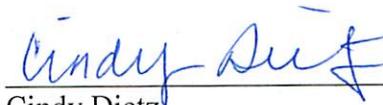
DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 8th day of April, 2020, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 8th day of April, 2020.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTING ATTORNEY

April 08, 2020 - 4:27 PM

Transmittal Information

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