

68940-1

68940-1

NO. 68940-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MONSON,

Appellant.

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

The Honorable Larry E. McKeeman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court denied appellant a fair trial by refusing to excuse a juror who demonstrated bias.

Issue Pertaining to Assignment of Error

During the appellant's murder trial, a juror expressed concerns for her safety after noticing someone watching her as she entered her car near the courthouse. The juror expressed concern the person was associated with appellant's trial and she might be harmed or influenced by people associated with the appellant. Defense counsel argued the juror was biased and requested she be excused. The trial court declined, surmising the juror's fears were based on trial testimony about appellant's "methamphetamine-using group of people." 10RP<sup>1</sup> 97. Where the juror's comments and demeanor demonstrated she feared the appellant, did the trial court err by not excusing her for bias?

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – June 28, 2011; 2RP – February 2, 2012; 3RP – February 3, 2012; 4RP – March 23, 2012; 5RP – April 6, 2012; 6RP – April 13, 2012; 7RP – April 20-25, 2012; 8RP – April 26, 2012; 9RP – April 27, 2012; 10RP – April 30, 2012; 11RP – May 1, 2012; 12RP – May 2, 2012; 13RP – May 3, 2012; 14RP – May 4, 2012; 15RP – May 7, 2012; 16RP – May 8, 2012; 17RP – May 9, 2012; 18RP – May 18, 2012.

B. STATEMENT OF THE CASE

1. Trial Testimony

Appellant Joshua Monson met Edward and Deborah LaMourie shortly before Christmas in 2010. 9RP 156; 11RP 74; 15RP 136. Monson went to the LaMouries' apartment several times to use heroin and methamphetamine. 9RP 159; 11RP 75-76; 15RP 121. Monson at times asked Edward about killing people and disposing of the bodies. 9RP 163-64; 15RP 136-37.

Edward saw that Monson carried a .45 caliber pistol and once helped him with the gun's firing pin. 9RP 164-68. Before the New Year, Monson gave Edward a note with the number two and half million on it. Edward believed the note represented the amount of money Monson was willing to pay to shoot someone in the LaMouries' apartment. Edward dismissed the note because he knew Monson had no money. 9RP 168-69.

Monson spent the night at the LaMouries' apartment on New Year's Eve. 9RP 170; 11RP 74-77. He asked Deborah twice that night if he could kill someone in the apartment. She said no. 11RP 78-79. Because Deborah feared having guns in the house, Edward took Monson's pistol and gave his own shotgun to Deborah for safe keeping. 9RP 166-67. Deborah put the guns in the laundry room. 11RP 77-78. Deborah did

not know whether Monson took the pistol back when he left the next day and did not check the laundry room. 11RP 79-80.

Monson returned to the apartment around one or two a.m. the following day. 11RP 80-81. He, Edward, Brady Jones and Brian Jones used drugs there. 9RP 171-73, 211; 11RP 81. At some point, Monson asked Edward for a pair of socks. Monson followed Edward into the bedroom. 9RP 177; 11RP 82-83. As Edward looked for socks, he noticed Monson “messing around” with his front waistband. 9RP 180. Monson told Edward he had only one bullet. Edward responded that “it only takes one.” 9RP 181. Edward then told Monson he could change in the bathroom. Monson took the socks and a pair of gloves and went to the bathroom. 9RP 180-81, 215.

Edward heard a gunshot moments later. 9RP 183, 214-15. Keith Kayser, who was on the phone with Brian Jones, heard him say, “Hey, what the fuck are you doing man, put that down.” 11RP 20, 52. Kayser heard a pop-crackle sound and then Deborah screaming. 11RP 20-21. From the kitchen, Deborah saw a flash of light and heard a loud bang. 11RP 83-84. She saw Brian was falling and had a hole in his head. 11RP 84-85. She did not see anyone near Brian. 11RP 86. She screamed and ran toward the front door. 11RP 90-91. Edward ran toward Deborah. 9RP 183-85; 11RP 90. He did not know where anyone else was at the

time of the gunshot. 9RP 184, 214-16. Deborah told Edward that “somebody shot him through the window.” 9RP 183-84; 11RP 91. Brady was sitting three to five feet from Brian and heard a muffled gunshot. 10RP 113, 122, 128. He did not see anyone near Brian and did not see Monson shoot a gun. 10RP 115, 120, 131.

After the gunshot, everyone ran out of the apartment. 9RP 186; 10RP 114-16; 11RP 90-91; 15RP 122, 129, 131. When Monson got outside Deborah heard him say, “Oh, my god. What did I do? Oh my god. Oh my god.” 11RP 93. Monson asked Edward, “What do we do, what do we do?” 9RP 189. Edward called 911 and ran next door to his sister’s apartment. 9RP 184, 187, 217; 11RP 91, 94; 15RP 123.

Edward’s nieces, I.V. and A.L., were awakened by knocking on the door. 9RP 105-07, 124, 128. Edward told them someone was murdered in his apartment. 9RP 108, 129, 148-49. He put a shotgun in the closet and left. 9RP 109, 129-30. Monson entered as Edward was leaving. 9RP 110, 119-20, 132-34. He had something tucked in his shirt and went to the closet. A.L. told Monson to leave. 9RP 111, 119, 132-34. Monson paced for several seconds before retrieving something from the closet and leaving. 9RP 112. A.L. could not tell what it was. 9RP 135. I.V. did not see anything in Monson’s hands when he left. 9RP 112, 119.

A.L. heard Monson say “oh my god, I’m so sorry, sorry,” a few minutes after he left. 9RP 136.

Pamela Banks lived upstairs from the LaMouries and was awakened by screaming and loud noises. 9RP 7-9. Banks went outside and saw Brady leaning over the banister. He was smoking and shaking. 9RP 11-12. Brady made a gun gesture with his hand, pointed at his head, and said “shot him in the head.” 9RP 13-14; 10RP 116. He told Banks the bullet came through a window. 9RP 14. Banks overheard a man and woman talking about needing to get their stories straight. 9RP 18-19.

Police and paramedics arrived shortly thereafter. A frantic Monson contacted an officer and said somebody had been shot. 11RP 112-13. Monson told the officer he was in the bathroom when he heard a pop sound and screaming. Monson left the bathroom and saw Brian lying on the ground in a pool of blood. 11RP 119-20; 15RP 122-23, 129-30, 132.

Paramedics found Brian lying face down on the floor with a single gunshot wound to his head. 9RP 26-27, 37, 45-46. He died later that day. 9RP 74, 90-93; 11RP 164. A medical examiner estimated the bullet was fired from about two feet away. 9RP 97-99; 13RP 107, 117, 120-22. The wound was consistent with a handgun and could have been made by a .45 caliber pistol. 9RP 81-85; 14RP 36-37.

Detective Patrick VanderWeyst collected DNA and blood samples from Monson. 11RP 156-57, 179-180. Monson spoke with police and denied shooting Brian. 11RP 119; Supp. CP \_\_\_ (sub no. 55, State's Memorandum Re Admissibility of Defendant's Statements, at 42, 55, 64, 72).

Meanwhile, police searched the apartment. No bullet holes or damage were found on the walls or windows of the apartment. 8RP 27, 47, 96-97, 100; 11RP 106, 123; 14RP 33-34. Officers found a shell casing and one fired bullet. 8RP 20-21, 23-25, 97, 100; 9RP 232; 11RP 165-66, 168; 13RP 83. A shotgun and empty pistol magazine were found in Edward's sister's apartment closet. 10RP 175-78. Police also found a .45 caliber pistol between the mattress and box spring of Edward's bed. 10RP 32, 78, 150-51. The pistol had a loose trigger guard and fit the magazine. 10RP 151-52, 178.

Two days after the shooting, deputy sheriff Mark Lewis saw Monson with Christina D'Angelo. 12RP 71, 73, 76-78, D'Angelo was arrested for outstanding warrants. 12RP 78-79, 83. D'Angelo gave a recorded interview with police about the shooting. 13RP 11-12, 41. She was "groggy" and experiencing drug withdrawal during the interview. 13RP 13-14, 27-28. D'Angelo told police Monson carried a .44 caliber pistol in his front waistband and asked for a ride so he could shoot

someone. 12RP 199-201. Monson told D'Angelo he had a bullet for Brady and would kill Keith. 12RP 203-05. Monson told D'Angelo, "I shot him" and that he was sorry for everything that had happened. 12RP 195-99. D'Angelo mouthed "Josh" when asked who did the shooting. 13RP 42, 57.

Based on this evidence, the state arrested Monson and charged him with one count each of first-degree premeditated murder and unlawful possession of a firearm. 14RP 163; CP 179-80.

Monson was housed next to Derrick Hargress in jail. 12RP 87, 89; 13RP 62, 70. Monson told Hargress he shot someone in the head in "Eduardo's" apartment. 12RP 92, 99, 155-56. Monson offered to pay Hargress to kill D'Angelo and two other people. 12RP 94-96. Hargress revealed these statements to the prosecutor and testified against Monson in exchange for dismissal of domestic violence charges. 12RP 87, 101.

At trial, D'Angelo denied Monson told her about the shooting or that he shot someone. 12RP 214. D'Angelo did not recall telling the police anything she was alleged to have said. 12RP 190-208, 215-16.

Melissa Vandelac was a friend of Brian. 12RP 175. She testified she twice saw Monson with a pistol. 12RP 176-78. Monson told her it was a .44 that he kept in his waistband. 12RP 176-77.

Kayser met Monson three times but never saw him armed. 11RP 11-12, 16, 59-60, 62. Kayser testified Monson asked him whether he wanted to do a "hit" for money. 11RP 15, 63. Monson said he had a pistol he planned to use. 11RP 16, 60. Kayser dismissed these statements, believing Monson was trying to sound tough. 11RP 45, 60.

Monson's DNA was found on the pistol and magazine. 14RP 120-21, 127-29. The fired bullet and expended casing came from the recovered .45 caliber pistol, and the magazine fit the gun. 13RP 89, 95, 98, 114.

Monson acknowledged having the .45 caliber pistol on New Year's Eve and day. On New Year's Day Monson gave the pistol to Edward for safe keeping and never got it back. 15RP 124-25. Monson lied to police about having possession of the pistol because he knew he was not eligible to have a firearm. 15RP 125-16. He denied taking the pistol to Edward's sister's apartment. 15RP 126.

Monson also denied shooting Brian, making comments about doing a "hit" or murdering someone, and discussing the shooting with D'Angelo or Hargress. 15RP 120, 135-37.

After hearing the above, a Snohomish County jury found Monson guilty as charged. 17RP 2-4; CP 83, 85. The jury also found Monson was armed with a firearm during the murder. CP 82. The trial court sentenced

Monson to standard range concurrent prison sentences of 480 months for the murder and 60 months for the unlawful possession. The court also imposed a consecutive 60-month firearm enhancement. 18RP 25; CP 29-4. Monson timely appeals. CP 1-18.

2. Juror Bias

Before the start of the third day of Monson's trial, juror 6 told the bailiff she had safety concerns:

Oh, I just saw somebody – I was crossing the – the parking lot last Friday, and there was just happened to be, like, I didn't see the car, the van coming, and so when I separated from the other juror, I just cross it really quick. And then there's a van that came in, and I stopped a little bit and then looked at the person who was driving, and then when she was going up on the ramble riding [sic] I just kind of look who was it, and then she was still looking at me when I was about to get into my door.

10RP 10.

The juror said she was not sure if the person in the van was associated with Monson's case. 10RP 10-11. The trial judge asked juror 6 whether the experience would affect her ability to be fair and impartial. She said, "with that, no. It's not. It's just about, you know, knowing how are we going to be safe, yeah. So it was not a question at that time. It's just, you know, in general. In any way." 10RP 11

The State declined to question juror 6. 10RP 11. The following exchange occurred during defense counsel's questioning of juror 6:

Q: Do you feel that someone associated with the case might present a risk of harm to you?

A: I don't know how to answer that question.

Q: Just how ever you feel because there's no wrong answer. I mean, either way it's right.

A: I think it's -- you know, I speak for myself and maybe in general public I think everybody would feel the same about the safety.

Q: Because of the charge -- ?

A: Yes.

Q: -- In this case. And are you concerned that witnesses who have testified might, for some reason, want to influence you or do something to you?

A: Some of them.

Q: Uh-huh.

A: Which I don't know who they are.

Q: Sure. Sure. Do you have a sense that Mr. Monson or his family or somebody associated with him might be looking for you and do some damage to you?

A: That's a question.

Q: And it concerns you?

A: Yes.

10RP 12-13.

As to whether she could remain impartial, juror 6 initially stated, “I don’t think it that way . . . It’s – or I don’t see it that way” and “Like, you know, I don’t have any judgment that way because of that so it’s – because everyone has its own decision.” 10RP 13. When questioned further about whether her fear would make it difficult to remain neutral, juror 6 said “Yeah. I don’t think so,” and “I think it will be fair.” 10RP 14.

After questioning ended, the court took argument on whether to excuse juror 6. The prosecutor deferred to the trial court, stating “it could go either way.” 10RP 16. Defense counsel asked that juror 6 be excused for bias, noting that while she used neutral language, her demeanor suggested otherwise. 10RP 17.

The trial court reserved ruling, but acknowledged it was concerning juror 6 had associated the incident with Monson’s case and believed someone associated with Monson was in the van. 10RP 17.

After the lunch recess, the court denied defense counsel’s motion to excuse the juror. 10RP 96. The court concluded her answers demonstrated juror 6 could decide the case based on the evidence and law. The court explained the juror was concerned Monson was involved with a group of methamphetamine users. 10RP 97. Defense counsel objected to denial of his motion to excuse juror 6. 10RP 97.

C. ARGUMENT

THE TRIAL COURT DENIED MONSON A FAIR TRIAL BY REFUSING TO EXCUSE A JUROR WHO DEMONSTRATED BIAS.

Both the United States and Washington constitutions guarantee a defendant the right to a fair trial by an “impartial jury.” U.S. Const. amends. 5, 6; Const. art. 1, §§ 3, 21, 22. Failure to provide a fair and impartial jury violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995). Even if only one juror is improperly influenced, the defendant is denied a fair trial. State v. Stackhouse, 90 Wn. App. 344, 350, 957 P.2d 218, rev. denied, 136 Wn.2d 1002 (1998).

Under RCW 2.36.110<sup>2</sup> and CrR 6.5,<sup>3</sup> the trial court has a “continuous obligation” to excuse jurors who are found to be unfit. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). A juror is unfit if he or she exhibits bias, prejudice, or conduct incompatible with proper jury service. See RCW

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<sup>2</sup> “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.”

<sup>3</sup> This rule provides in pertinent part: “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, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury.”

2.36.110. The test is whether the juror's bias has prejudiced the defendant such that he has not received a fair trial. United States v. Hendrix, 549 F.2d 1225, 1229, cert. denied, 434 U.S. 818 (1977). Any reasonable doubt that the misconduct affected the verdict must be resolved against the verdict. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740, rev. denied, 158 Wn.2d 1011 (2006); State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989).

A juror's ability to remain impartial throughout the presentation of evidence is a fundamental qualification for jury service. Indeed, jurors take an oath to "well, and truly try, the matter in issue . . . and a true verdict give, according to the law and evidence as given them on the trial." RCW 4.44.260. A juror is prejudiced if she has a state of mind toward the defendant that prevents her from impartially trying the issue. RCW 4.44.170(2); State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996). When the trier of fact is unable to render a disinterested, objective judgment, the right to a fair trial by an impartial jury is compromised. United States v. Thompson, 744 F.2d 1065, 1068-69 (1984).

Thompson is instructive here. In Thompson, the defendants were charged with murdering their four-month-old son by starvation and gross neglect. In its case-in-chief, the government presented a photograph of the child taken three days after his death. After viewing the photograph, one

of the jurors reported that it had upset him. The juror admitted he did not think he would be able to remain open-minded and was not sure he could be totally fair. Thompson, 744 F.2d at 1067. When the judge reminded the juror of the presumption of innocence and the government's burden of proof and asked if he could resume his duties, the juror said he was not sure, but he would try. Thompson, 744 F.2d. at 1068. Thompson's motion for a mistrial was denied. Thompson, 744 F.2d at 1067.

The appellate court held that it was an abuse of discretion to proceed with a juror who could not unequivocally state he could keep an open mind. The Court noted less drastic alternatives to a mistrial were available to the court, including replacing the juror with an alternate. Because these options had not been considered, the court reversed Thompson's convictions. Thompson, 744 F.2d at 1068-69.

In this case, as in Thompson, the court was faced with a juror who was not sure she could keep an open mind. Juror 6 was concerned someone connected with the trial was watching her and that she might be harmed or influenced by people associated with Monson. And while the juror said she thought she could be fair, her demeanor apparently suggested otherwise. 10RP 17. Defense counsel's assertion the juror was biased was not disputed. Indeed, the prosecutor acknowledged if the juror was affected by her fear of Monson, she might be more likely to convict.

10RP 16. Under the circumstances, the court abused its discretion by not excusing the biased juror and replacing her with an available alternate.

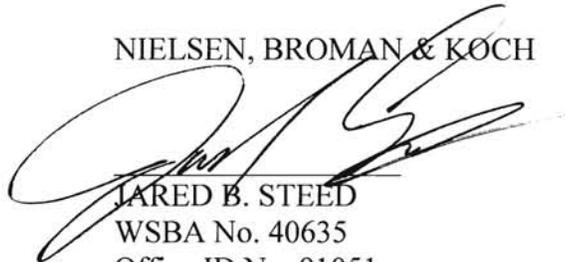
D. CONCLUSION

For the reasons discussed above, this Court should reverse Monson's convictions and remand for a new trial.

DATED this 31<sup>st</sup> day of January, 2013.

Respectfully submitted,

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DIVISION ONE

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v.	)	COA NO. 68940-1--I
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JOSHUA MONSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JANUARY 2013.

x *Patrick Mayovsky*

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