NO. 70418-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERRANCE IRBY,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2011 DEC -8 AM 11:09

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

The Honorable Michael E. Rickert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. IRBY WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

Juror 38, previously employed by Child Protective Services, admitted she was "more inclined toward the prosecution" and, when specifically asked whether this would impact her ability to be fair and impartial toward Irby, said, "I would like to say he's guilty." 16RP 40, 42-43. Juror 27, who knew Skagit County Sheriff's Deputies involved in the case and whose father had been a deputy himself, admitted it would be difficult to decide the case based on the evidence because Irby was not represented at trial, she was "kind of pro police officer," and she was more inclined to believe any witness who was a police officer. 16RP 37-38, 68-69.

Juror 38 was never questioned further regarding her acknowledged bias for the prosecution or her desire to convict Irby. See 16RP 49-94. Juror 27 was questioned briefly, but she maintained concern about her ability to decide the case based on the evidence alone. See 16RP 69. Both were permitted to decide the case and both found Irby guilty on all charges. CP 259-261, 263, 266, 363, 382.

The State makes three arguments in defense of these jurors. First, the State argues that Irby cannot raise these constitutional violations under RAP 2.5 in the absence of defense challenges below. Brief of Respondent, at 21-22. Second, the State argues the jurors' admitted biases were inadequate to warrant their removal. Brief of Respondent, at 22-24. Third, the State argues Judge Rickert had no burden to remove biased jurors absent a defense challenge. Brief of Respondent, at 24-27. The State is mistaken.

RAP 2.5(a)(3) permits a party to raise, for the first time on appeal, a "manifest error affecting a constitutional right." A constitutional error is "manifest" where there is prejudice, meaning a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2007)).

Irby's challenges to jurors 38 and 27 satisfy this standard. In State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001), a prospective juror failed to disclose he was a retired police officer and was selected to sit on the defendant's jury. There were no challenges for cause from either side. Cho, 108 Wn. App. at 317-319. The juror's background came to light after the defendant had been convicted, prompting a motion for new trial

based on juror misconduct. Id. at 319-320. In fact, however, the juror had never been asked a question requiring him to disclose his history with law enforcement. Id. at 327.

Still, the Cho court recognized there was a possibility of implied bias, i.e., bias presumed from the deliberate concealment of material information.[1] Id. at 325-326. Although the juror was not untruthful in his answers during voir dire, within the context of the entire line of questioning, there was "a troubling inference of deliberate concealment," which warranted remand for a hearing so that the trial court could evaluate implied bias – which had not been raised or considered below – and determine whether there was a valid basis to challenge the juror for cause. Id. at 326-329. The Cho court held:

> The issue of implied bias is one that may be considered for the first time on appeal under RAP 2.5(a). It goes to the impartiality of the factfinder, a right guaranteed by the Sixth Amendment and a touchstone of the constitutional guarantee of a fair trial. . . .

Id. at 329.

Similarly, in State v. Boiko, 138 Wn. App. 256, 258, 156 P.3d 934 (2007), where a juror failed to disclose she had been married to a key

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[1] Implied bias, like the actual bias at issue in Irby's case, is listed in RCW 4.44.170 as a basis for cause challenges. See RCW 4.44.170(a)-(b); see also RCW 4.44.180 (defining relationships and circumstances for which bias will be implied).

prosecution witness, Division Three rejected the State's argument that any remedy for a biased juror was unavailable where there had been no challenge below:

> The State argues that Mr. Boiko waived the right to challenge the qualification of juror 31. It relies on *Basil v. Pope*, 165 Wash. 212, 218, 5 P.2d 329 (1931), which quoted *State v. Clark*, 34 Wash. 485, 492, 76 P. 98 (1904). *Clark* comments on a long-defunct statute regarding juror qualifications, which expressly provided that an appeal of a jury verdict on the grounds of jury qualifications can only be made on the specific challenge for cause made below. *Clark*, 34 Wash. at 492, 76 P. 98 (citing § 5940, PIERCE'S CODE).[2] Therefore, neither case is relevant. Moreover, the court in *Cho* held that an implied bias challenge could be made for the first time on appeal. 108 Wash. App. at 329, 30 P.3d 496 ("It goes to the impartiality of the fact finder, a right guaranteed by the Sixth Amendment and a touchstone of the constitutional guarantee of a fair trial.").

Boiko, 138 Wn. App. at 266; see also State v. Burch, 65 Wn. App. 828, 838-839, 830 P.2d 357 (1992) (defense challenge under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), may be raised for the first time on appeal under RAP 2.5(a)(3)).

Since even *implied* bias can be raised for the first time on appeal under RAP 2.5(a)(3), there is no reason to treat *actual* bias differently.

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[2] The former statute provided, in pertinent part, "nor shall any disqualification of any member of a grand or petit jury affect the indictment or verdict, unless the juror for that specific cause was challenged or excepted to before the finding of the indictment or rendition of the verdict, and the challenge or exception overruled, and error specifically assigned." Sec. 5940, Pierce's Code.

Moreover, the restrictions contained in RAP 2.5(a) are discretionary: "The appellate court *may refuse* to review any claim of error which was not raised in the trial court." (emphasis added). Even if Irby's challenges did not qualify as manifest constitutional error, the circumstances here would warrant review because Judge Rickert expressly assured Irby his jury would be unbiased, impartial, and consistent with constitutional guarantees. These were assurances Irby had a right to rely upon even in his absence. 7RP 50-51 ("we will pick you a jury and we will do it within the standards as set forth by the U.S. Constitution and the Washington State Constitution and case law and we'll pick an unbiased and impartial and race-neutral jury.").

In its brief, the State quotes Irby acknowledging that, in his absence, the prosecutor would select the jury. The State also focuses on Irby's assertions – made while voicing his concerns about the biased proceedings – that the prosecutor could pick anybody he wanted since the conspiracy against him was going to result in a conviction no matter who decided his fate. See Brief of Respondent, at 5-6, 21-22 (quoting 14RP 146-147, 150-151, 171). These statements reveal that Irby was resigned to the fact the deck had been unfairly stacked against him and would continue to be regardless of which jurors heard his case.

But the State does not argue, nor could it, that this was an affirmative waiver of the right to an impartial jury that somehow authorized the State's selection of biased jurors. The prosecution bears the burden to demonstrate a knowing, voluntary, and intelligent waiver of constitutional protections, and courts "'indulge every reasonable presumption against waiver of fundamental rights[.]'" State v. Frawley, ___ Wn.2d ___, 334 P.3d 1022, 1027 (2014) (quoting City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984)). While Irby validly waived his presence for trial, he never waived his right to an impartial jury. See Frawley, 334 P.3d at 1028 (waiver of presence does not waive other constitutional rights, including right to public trial).

Next, the State argues that neither juror 38 nor juror 27 was removable for cause. It notes that neither juror responded – at the close of voir dire – to the deputy prosecutor's final question, "does everybody here think that they can basically make a finding of guilty or not guilty based on the evidence that you hear?" Brief of Respondent, at 24 (citing 16RP 94). But given that both jurors had already articulated disqualifying biases (and no one seemed to much care), it is not surprising they failed to articulate them a second time. Without direct rehabilitation of these jurors, it is impossible to conclude with any certainty they could simply put their biases aside and try the issues impartially. See State v. Fire, 100

Wn. App. 722, 728, 998 P.2d 362 (2000) (recognizing that few jurors "will fail to respond to a leading question asking whether they can be fair and follow instructions," which is to be contrasted with "thorough and thoughtful inquiry" regarding stated biases), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Finally, the State argues that, in the absence of a defense challenge for cause, a trial judge has no obligation to excuse jurors. See Brief of Respondent, at 24-27. Washington court rules, statutes, and our Supreme Court say otherwise. See State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012), cert. denied, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013) (under CrR 6.4(c)(1), judge is obligated to dismiss biased juror even in absence of challenge); RCW 2.36.110 (imposing duty upon judge to excuse biased jurors). But even if there were no independent duty based on Washington law and/or Judge Rickert's promises, the fact remains that biased jurors decided Irby's guilt, and his challenges are properly before this Court under RAP 2.5(a)(3).

The Sixth Amendment and article 1, sec. 22 guarantee an impartial jury. Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Gonzalez, 111 Wn. App. 276, 277, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003). The presence of even one biased juror cannot be deemed harmless. U.S. v.

Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000). Irby's jury included two. His convictions must be reversed.

2. IRBY WAS DENIED HIS RIGHT TO JURY UNANIMITY.

Irby argued his convictions for Burglary in the First Degree and Felony Murder (based on Burglary in the First Degree) must be reversed because of a violation of his right to unanimous jury verdicts. Specifically, because a rational trier of fact could have entertained a reasonable doubt regarding a burglary in the shop (indeed, Irby maintains the evidence was legally insufficient as to that location), the State's failure to ask for a Petrich[3] instruction or elect a particular act (residence versus shop) requires reversal. See Brief of Appellant, at 23-29.

Before addressing this argument, the State concedes, as a matter of law, that because it pursued a theory that murder was the intended crime for Burglary in the First Degree inside the shop, it could not also rely on a theory that "[t]he murder was committed in the course of, in furtherance of, or in immediate flight from burglary" at that same location. Yet, it did. And because it relied on this theory to prove the aggravating circumstance for Premeditated Murder and used this same argument to prove Felony Murder in the First Degree, that particular aggravating circumstance and

[3] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

the Felony Murder conviction must be reversed based on a violation of the right to jury unanimity. See Brief of Respondent, at 29, 38.

Irby asks this Court to accept the State's concessions. However, it is *also* true that his convictions for Burglary in the First Degree and Felony Murder in the First Degree must be dismissed for the unanimity violation discussed in the opening brief. As to that argument, the State responds that because there was evidence supporting a Burglary in the First Degree in both the residence and in the shop, unanimity is not an issue in this regard. See Brief of Respondent, at 38-43.

The State's argument misses the mark. The State cites to State v. Wright, 165 Wn.2d 783, 802, 203 P.3d 1027 (2009) – a double jeopardy case involving a discussion of *alternative means* of committing murder. See Brief of Respondent, at 38. Adding to the confusion, the State describes Irby's argument as a challenge to the "*alternative means* of burglary of the garage." Brief of Respondent, at 40 (emphasis added). The State then proceeds to argue why there was substantial evidence supporting both *means* (i.e., a burglary in the residence and a burglary in the shop). Brief of Respondent, at 40-42.

The problem, of course, is that each location involved a separate alleged *act* of burglary. This is a multiple acts issue and not an alternative means issue. See State v. Brooks, 77 Wn. App. 516, 520-521, 892 P.2d

1099 (1995) (entry into separate buildings involves separate acts). If this were an alternative means case, no remedy would be available concerning unanimity so long as there was evidence from which jurors could find each means satisfied. See State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994) (unanimity assumed if evidence sufficient to go to jury on each means). Thus, the State's lone focus on sufficiency of the evidence would be proper.

But the test for multiple acts cases is different: "'the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.'" State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (quoting State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, J., concurring)), abrogation on other grounds recognized in In re Stockwell, ___ Wn.2d ___, 316 P.3d 1007 (2014). The Supreme Court of Washington has expressly indicated that the standards for alternative means and multiple acts cases should not be confused. Kitchen, 110 Wn.2d at 410-412.

Therefore, rather than asking if the State presented sufficient evidence from which jurors could have found that Irby committed Burglary in the First Degree in the residence and in the shop (as the State has done), the relevant inquiry is the one addressed in Irby's opening

brief: whether any rational juror could have entertained a reasonable doubt that Irby committed Burglary in the First Degree in the shop. And for the reasons argued there concerning "entering or remaining unlawfully," i.e., no forced entry into shop and evidence of permission generally to be on the premises, one or more jurors certainly could have entertained such a doubt. See Brief of Appellant, at 25-28.

The State's inability to establish unanimity for Burglary in the First Degree requires reversal of that conviction and reversal of the conviction for Felony Murder predicated on Burglary in the First Degree.

3. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE REMAINING AGGRAVATING CIRCUMSTANCES FOR MURDER IN THE FIRST DEGREE.

Although the State concedes the evidence was insufficient to support the aggravating circumstance that the murder was committed in the course of, in furtherance of, or in immediate flight from a Burglary in the First Degree in the shop, it maintains the evidence was sufficient to establish the remaining aggravating circumstances.[4] Brief of Respondent, at 29. The State's argument, however, is based largely on an outdated and discarded interpretation of Washington law.

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[4] The remaining aggravators found by the jury are that "[t]he murder was committed in the course of, in furtherance of, or in immediate flight from . . . residential burglary" and "[t]he defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime." CP 230, 260-261.

As to the jury's finding that Rock's murder occurred in the course of, in furtherance of, or in immediate flight from another crime (here, Residential Burglary inside Rock's residence), the State relies on several cases predating State v. Hacheney, 160 Wn.2d 503, 158 P.3d 1152 (2007), cert. denied, 552 U.S. 1148, 128 S. Ct. 1079, 169 L. Ed. 2d 820 (2008), and applying a "res gestae" approach, i.e., so long as the murder and other crime were in close proximity, the circumstance is satisfied. See Brief of Respondent, at 31-32.

As explained in Irby's opening brief, however, Hacheney rejected that approach for a more precise one. The crimes committed in addition to the murder must have already begun by the time the murder was committed. Post-homicidal crimes will not satisfy this aggravating circumstance. See Brief of Appellant, at 31-34 (discussing Hacheney and State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970)). Thus, this Court should reject the State's argument that Residential Burglary of Rock's residence satisfies this aggravating circumstance because that crime was committed "as part of the same transaction" as the murder in the shop. Brief of Respondent, at 32.

The State recognizes the evidentiary defect in Hacheney and Golladay was the State's inability to prove a second crime (arson in

Hacheney and larceny in Golladay) was already in progress at the time of the homicide. Brief of Respondent, at 34-36. In contrast, argues the State:

> no evidence supports that Irby's murder of Rock preceded the theft of the firearms or that the offenses were not part of the same res gestae. The most likely scenario is that the theft preceded the murder. But at the very least, the theft and murder are certainly part of the same transaction, having occurred in the same period, at the same relative location and that the theft provided the motive for murder.

Brief of Respondent, at 36.

The State's "most likely scenario" that the theft in the residence preceded the murder in the separate shop is based on nothing. It was the State's obligation to prove the aggravating circumstance beyond a reasonable doubt and it failed to do so. It presented no evidence establishing the timing or sequence of events on Rock's property. The State's theory that Rock caught Irby during or right after Irby broke through the master bedroom door lock and stole the firearms, and that Irby and Rock then somehow ended up in the separate shop building, where Irby killed Rock, suffers from a total absence of evidentiary support or logic. Like Hacheney and Golladay, at most the evidence shows a Residential Burglary as an afterthought following a homicide in the shop.

It is for this same reason the second aggravating circumstance – the murder was committed to conceal a crime or the identity of the person committing a crime – also fails for lack of evidence. This aggravator is

established when the evidence shows the killing was intended to postpone, for a significant period of time, discovery of a crime, but the crime cannot be the murder itself. State v. Brett, 126 Wn.2d 136, 167, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); State v. Longworth, 52 Wn. App. 453, 461-463, 761 P.2d 67 (1988). There is nothing in the record – beyond abject speculation – that Rock was slain in the shop to conceal a burglary or any other crime.

Finally, in arguing there is sufficient evidence to support the aggravating circumstances, the State places great weight on the fact Irby did not challenge the jury's finding that the killing in the shop was premeditated based on the use of multiple weapons (something sharp and something blunt and heavy) to kill Rock. See Brief of Respondent, at 2 (issue 3), 27-28, 33; State v. Allen, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006) (prolonged struggle and "various means" of injury sufficient to demonstrate premeditation). But whether there was evidence of a premeditated murder is a separate issue from whether that premeditated murder was aggravated.

4. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN IRBY'S CONVICTION FOR FELONY MURDER.

As noted above, the State concedes Irby's conviction for Felony Murder must be reversed based on a violation of his right to jury

unanimity. The conviction must also be reversed because, as argued in the opening brief, evidence of the crime was insufficient; there was no evidence the murder occurred in the course of, in furtherance of, or in immediate flight from Burglary in the First Degree. See Brief of Appellant, at 36-37. The basis for reversal is not academic because evidentiary insufficiency precludes any possible retrial or reinstatement of the conviction. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice required for failure of proof). For the reasons argued in Irby's opening brief, this Court should reverse the Felony Murder conviction and dismiss it with prejudice.

5. IRBY'S 1976 CONVICTION FOR STATUTORY RAPE IS NOT LEGALLY COMPARABLE TO ASTRIKE OFFENSE AND HAS NOT BEEN PROVED FACTUALLY COMPARABLE.

The State concedes Irby's Statutory Rape conviction is not legally comparable to a current conviction for Rape of a Child because the current statute is more restrictive in its age requirement. While the current statute requires the defendant to be at least 36 months older than the victim, the former statute permitted conviction where the age disparity was smaller. Brief of Respondent, at 47-48.

But the State asserts that the former and current offenses are factually comparable. As to the victim's age in the 1976 offense, the State

argues, "The information alleges that the victim was age thirteen and thus, the State contends this was a fact that was charged and proven to the jury." Brief of Respondent, at 48. The State fails to provide a citation to any legal authority for this contention. As discussed in Irby's opening brief, it is the jury instructions, and not the information, that define the State's proof requirements at trial. Brief of Appellant, at 47 (citing Hickman, 135 Wn.2d at 101-103; State v. Rivas, 49 Wn. App. 677, 683, 746 P.2d 312 (1987)). The State has failed to provide these instructions from the 1976 trial.

Regarding Irby's age, the State notes that the 1976 information alleges Irby committed the offense on May 31, 1976 and reveals that he was charged in Chelan Superior Court on July 8, 1976. Because Irby was ultimately charged in Superior Court, argues the state, he must have been 18 years old by July 1976, meaning he was at least 17 years old when the offense was committed in May 1976, which establishes an age disparity exceeding 36 months. See Brief of Respondent, at 49.

The filing of the information in Superior Court, however, is not proof of Irby's age at the time. A defendant can waive juvenile court jurisdiction. See In re Personal Restraint of Dalluge, 152 Wn.2d 772, 781, 100 P.3d 279 (2004) (citing cases). One reason to do so is to obtain the right to trial by jury, a right Irby exercised in 1976 and one not available in

juvenile court. See State v. J.H., 96 Wn. App. 167, 182-183, 978 P.2d 1121 (noting that a juvenile could waive jurisdiction to obtain benefit of a jury trial), review denied, 139 Wn.2d 1014 (1999), cert. denied, 529 U.S. 1130, 120 S. Ct. 2005, 146 L. Ed. 2d 956 (2000). Or, Irby's case may have been handled in Superior Court following a decline hearing. See In re Hernandez' Welfare, 15 Wn. App. 205, 548 P.2d 340 (analysis of former RCW 13.04.120 involving decline of 16-year-old juvenile offender accused of rape), review denied, 87 Wn.2d 1009 (1976). At the time, such hearings could be held informally. Id. at 209.

The point remains this: because there is no indication Irby's precise age was litigated and decided by a jury in the 1976 case, or that he had any incentive to litigate the matter if he was at least 16, it is impossible to determine his age without running afoul of constitutional prohibitions on judicial fact finding. Irby's age was neither admitted, stipulated to, nor proved beyond a reasonable doubt. See State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). Therefore, the 1976 conviction cannot count as a strike offense. See Brief of Appellant, at 43-48.

6. REFERENCES TO THE FELONY MURDER CONVICTION IN THE JUDGMENT AND SENTENCING FINDINGS MUST BE STRICKEN.

The State describes Irby's argument on this issue as "improper" but never explains why. See Brief of Respondent, at 50. Under State v. Turner, 169 Wn.2d 448, 465-466, 238 P.3d 461 (2010), the offending references must be stricken. The State has conceded the Felony Murder conviction must be vacated and nothing in the judgment or sentencing documents should imply otherwise.

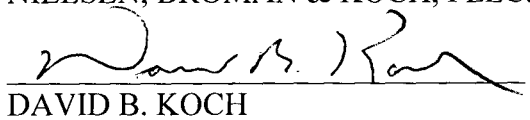
B. CONCLUSION

For all of the reasons discussed in Irby's opening brief and above, this Court should reverse his convictions and vacate his sentence.

DATED this 8th day of December, 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON Respondent, v. TERRANCE IRBY, Appellant.	)))))))))	COA NO. 70418-4-I

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 8TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF DECEMBER 2014.

X Patrick Mayovsky