

original

NO. 35938-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

TODD WICKSTROM,

Appellant.

CLERK OF COURT
STEPHANIE AREND
JUDGE
2019 APR 12

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

The Honorable Stephanie A. Arend, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court's erroneous dismissal of a qualified juror denied appellant his constitutional right to an impartial jury.

Issue pertaining to assignment of error

The state and federal constitutions guarantee a defendant the right to an impartial jury. Where the trial court granted the state's challenge for cause to a prospective juror when there was no showing that the juror was biased or otherwise incapable of performing the duties of a juror, did the court deny appellant his right to a fair and impartial jury?

B. STATEMENT OF THE CASE

Appellant Todd Wickstrom and co-defendant Shawn Deen were charged with second degree burglary, and the case proceeded to jury trial in Pierce County Superior Court before the Honorable Stephanie A. Arend. CP 1; RCW 9A.52.030(1). A pool of 40 prospective jurors was called for voir dire, and during initial questioning of the venire, the court asked,

Does anybody have any inability to sit for a period of time? We try to take a break after about an hour and a half or two hours, but does anybody have any problems, physical or otherwise, that would interfere with your ability to sit as a juror.

1RP¹ 32.

Juror No. 18 responded, “I don’t know if I would be antsy....With my medication, I might cause it. Tiredness and stuff. But I should be able to...I might not be able to.” 1RP 32. Voir dire continued, with each party questioning the group of prospective jurors. No further questions were asked of Juror No. 18 to clarify his concerns.

When the venire left the courtroom so that the parties could discuss challenges for cause, the court indicated that nine prospective jurors had raised issues, including Juror No. 18. 1RP 82, 86. The court stated,

I want to explain to you about 18. 18 was in our jury pool from my last trial, so I have a little bit of information that you all don’t have. He is bipolar. He is on medication. I don’t want to potentially embarrass him by eliciting that information. I thought I could share that with you guys outside the presence of the rest of the group. That’s—I think he even did make a reference to his medication. He told us in a prior case that his bipolar was under control because of the medication, but I think he’s you know, being honest and truthful that he doesn’t know how it may affect his ability to sit all day long, and I thought you should know that information.

1RP 86.

The prosecutor then moved to excuse Juror No. 18 for cause, stating the juror clearly had some health concerns and he would hate to

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—12/6/06; 2RP—12/12/06; 3RP—12/13/06; 4RP—12/14/06; 5RP—2/9/07.

have the stress of the trial trigger any type of issues with him being bipolar. 1RP 86.

Counsel for both Wickstrom and Deen opposed the challenge. Since the juror was stable on his medications, and the only issue he identified was the possibility that he would be antsy, there was no basis to remove him from the venire for cause. 1RP 87. Nonetheless, the court granted the state's challenge and excused the juror. 1RP 87.

Wickstrom and Deen were convicted as charged, and Wickstrom received a low-end standard range sentence. CP 54-55. He filed this timely appeal. CP 64.

C. ARGUMENT

THE TRIAL COURT DEPRIVED WICKSTROM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY EXCUSING JUROR NO 18.

Criminal defendants are constitutionally guaranteed the right to trial before an impartial jury. U.S. Const., amend. 6, 14; Wash. Const., art. I, § 22; State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). To protect these rights, trial courts have a “continuous obligation” to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. State v. Elmore, 155 Wn.2d 758, 772, 123 P.3d 72 (2005); RCW 2.36.110. While the trial court has discretion to determine

whether cause has been established to excuse a juror², a juror may be excused for cause only under very limited circumstances. See RCW 4.44.150-.170.

There are two types of challenges for cause. The first is general: that the juror is disqualified from serving in any action. RCW 4.44.150. This type of challenge is established by showing that the juror lacks any of the competency requirements set forth in RCW 2.36.070³, or “[u]nsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action.” RCW 4.44.160.

The second type of challenge for cause relates to the particular action and requires a showing of actual or implied bias or

²State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996), review denied, 130 Wn.2d 1022 (1997).

³ RCW 2.36.070 provides as follows:

A person shall be competent to serve as a juror in the state of Washington unless that person:

- (1) Is less than eighteen years of age;
- (2) Is not a citizen of the United States;
- (3) Is not a resident of the county in which he or she has been summoned to serve;
- (4) Is not able to communicate in the English language; or
- (5) Has been convicted of a felony and has not had his or her civil rights restored.

the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.170.

The basis for the state's challenge to Juror No. 18 in this case is not entirely clear from the record. There was no indication of actual or implied bias. Rather, the prosecutor seemed to believe that Juror No. 18 was not capable of serving as a juror because he was bipolar. 1RP 86. It is not clear from the prosecutor's argument or the court's ruling whether the challenge was to the juror's ability just in this particular case or to his capacity to serve as a juror in general. 1RP 86-87.

The prosecutor explained that he "would hate to have the stress of a trial trigger any type of issue with him [Juror No. 18] being bipolar." 1RP 86. But there was no reason to believe this particular trial would be unduly stressful. The trial was not expected to be lengthy, and in fact it lasted only two days. 1RP 6; 2RP 130.

Nor did the case involve any expert testimony, and the issues were straightforward. On the one hand, the state's evidence was that Wickstom, Deen and Ronald Shaffer were arrested coming out of a junk yard after hours. 2RP 180-83. The arresting officer did not see them taking anything, but he found some radiators in the back of Shaffer's truck,

which the property owner identified as his. 2RP 178, 187, 194. On the other hand, Shaffer testified for the defense that he saw the radiators on the side of the road and put them in the back of his truck and then went into the yard to see what else he could take. 3RP 286-87. Wickstrom and Deen helped him lift the radiators into the truck but opposed his entering the yard and only came into the yard to convince him to stop what he was doing and leave. 3RP 287-88.

The only information the prosecutor had about Juror No. 18's bipolar disorder was that it was controlled by medication. This information came from Judge Arend. 1RP 86. Although the judge had learned in a previous voir dire that the juror was bipolar and on medication, she did not indicate that she observed anything which caused her to believe that the prospective juror's treated condition rendered him incapable of performing the duties of a juror. See RCW 4.44.160(2); RCW 4.44.170(3). See also State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (court excused juror based on observations that juror had been inattentive throughout trial), review denied, 143 Wn.2d 1015 (2001).

The only concern supported by the record was that Juror No. 18's medication might or might not make him antsy. 1RP 32. There is just no basis to conclude that the juror's potential "antsiness" would prevent him from performing the duties of a juror, particularly in a two day trial where

the jury would be provided frequent breaks. The trial court wrongly excused Juror No. 18 and thereby deprived Wickstrom of his constitutional right to a fair and impartial jury.

D. CONCLUSION

The trial court's erroneous dismissal of a potential juror violated Wickstrom's right to a fair and impartial jury, and his conviction should be reversed.

DATED this 27th day of July, 2007.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Todd Wickstrom*, Cause No. 35938-3-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 27, 2007

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STATE OF WASHINGTON
BY:  JRM