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NO. 44184-5-II

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

CITY OF CAMAS,

Respondent,

vs.

VLADIMIR GRUNTKOVSKIY;

Petitioner.

BRIEF OF AMICUS CURIAE
CITY OF VANCOUVER

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I. INTRODUCTION

Petitioner Vladimir Gruntkovskiy seeks reversal of his conviction because of an alleged error that he never attempted to address at trial. That alleged error, as is plain from the arguments of the parties, is whether the trial court complied with RCW 2.36.050. This is a statutory right. Even if it was violated below, the Supreme Court has held that statutory errors cannot be raised for the first time on appeal, even if they tangentially relate to a constitutional right. Thus, this Court should affirm Gruntkovskiy's conviction.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The City of Vancouver is the largest municipality in Clark County, and is located to the immediate west of Respondent, City of Camas. Like the City of Camas, the City of Vancouver prosecutes violations of its ordinances through the Clark County District Court.

Vancouver prosecutes thousands of cases each year. A fair number of these cases go to trial, and a number of these cases are appealed to the Clark County Superior Court. Over 30 such appeals have occurred since 2011. As such, Vancouver's resources are unnecessarily expended whenever a criminal defendant attempts to raise non-constitutional issues for the first time on appeal, which is what has happened here. Therefore,

Vancouver has an interest in this Court properly defining what issues may be reviewed for the first time on appeal.

III. STATEMENT OF THE CASE

The pertinent facts of this case are undisputed. Petitioner Vladimir Gruntkovskiy was charged with driving under the influence by the City of Camas. The alleged crime undisputedly took place in Clark County. All six jurors who found Mr. Gruntkovskiy's guilty resided in Clark County. However, none resided in Camas. The jury convicted Gruntkovskiy.

He raised on appeal, for the first time, the argument that he was entitled to a jury made solely from individuals who resided in the area served by the municipal court, namely the City of Camas.

IV. ISSUE PRESENTED

Whether, assuming a right to a municipal court jury comprised solely of citizens who reside in a city where an alleged crime occurred exists, such right is statutory rather than constitutional, thus requiring that claimed error be raised at trial to preserve the argument for appeal under RAP 2.5(a).

V. ARGUMENT

Gruntkovskiy argues that his conviction must be reversed because his jury, comprised entirely of Clark County residents, did not include any residents of the City of Camas. Regardless of whether RCW 2.36.050

guaranteed him the right to have Camas residents decide his guilt, this Court should affirm the conviction because Gruntkovskiy's claimed right derives from statute, not the Constitution.

A. This Court should affirm the conviction because the single error assigned to the trial court does not implicate Gruntkovskiy's constitutional rights.

Both Gruntkovskiy and Camas begin their arguments by discussing whether the trial court erred by impaneling a jury comprised of individuals, all of whom resided in Clark County, but none of whom resided in Camas. Only then does each party explain why or why not the error should be considered in the first place, i.e., whether Gruntkovskiy waived his right to challenge the jury's composition. Neither should be faulted for this approach, as it was the order in which the issues were analyzed by the Commissioner in her ruling granting limited review.

Amicus submits that the analysis must be reversed. Time and time again, Washington's appellate courts analyze *whether* an error has been properly preserved *before* discussing whether there was error in the first place. *E.g.*, *State v. Grimes*, 165 Wn. App. 172, 179, ¶ 13, 267 P.3d 454 (2011). This logically makes sense, because holding that a trial court action was error would be dicta if the error was not preserved in the first place and could not serve as a basis for reversal. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003) (“Statements in a

case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.”) (quoting *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992)).

1. Appellate courts presumptively do not review errors alleged for the first time on appeal.

A quarter century ago, our Supreme Court noted that “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). That presumption against entertaining alleged trial court errors for the first time on appeal

reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Id. Consequently, when an alleged error is not properly raised at the trial court, the default rule is to consider the argument waived. *Id.*

However, RAP 2.5(a)(3) creates an exception for “manifest error[s] affecting a constitutional right.” As *Scott* recognized, “[c]onstitutional errors are treated specially because they often result in serious injustice to the accused.” *Scott*, 110 Wn.2d at 686. But it must be remembered that RAP 2.5(a)(3) “is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *Id.* at 687 (quoting *State v.*

Valladares, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

The Supreme Court has held that errors may not be raised on appeal for the first time unless the appellant can “demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, ¶ 12, 217 P.3d 756 (2009). The appellate court “do[es] not assume the alleged error is of constitutional magnitude.” *Id.* at 98, ¶ 13. For example, even though instructional errors can implicate an accused person’s right to a fair trial, *e.g.*, *State v. Stein*, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001), not all instructional errors implicate constitutional rights, *O’Hara*, 167 Wn.2d at 103-05, ¶¶ 21-24.

O’Hara is instructive. The Supreme Court there noted that a defendant’s constitutional right to a fair trial requires that “the jury instructions, when read as a whole, . . . correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” *O’Hara*, 167 Wn.2d at 105, ¶ 25. However, if the claimed error, though relating to the adequacy of the instructions, merely complains that a term was improperly left as undefined, the alleged error is not of a constitutional magnitude. *Id.* at 105-06, ¶¶ 25-27; *accord Scott*, 110 Wn.2d at 689-91. As such, simply because an alleged error has a tangential relationship to a purported constitutional right does not mean

that the error is truly of a “constitutional magnitude” to permit argument for the first time on appeal. RAP 2.5(a)(3). In addition, simply because an argument alleges a constitutional violation does not mean that the error is necessarily “manifest.” *State v. Davis*, 175 Wn.2d 287, 343-45, ¶¶ 107-12, 290 P.3d 43 (2012) (refusing to consider claim that death penalty violated state constitution because record insufficiently developed at trial court, and thus the alleged error was not “manifest”).

2. If an alleged error stems from a statutory right, failure to raise the claim at the trial court precludes appellate review.

The Supreme Court has held that any error predicated on a statutory right must be raised at the trial court level, or else it is waived. *State v. Hughes*, 154 Wn.2d 118, 153, ¶ 68, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 221-22 & n.4, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In *Hughes* the defendant argued that the trial court committed reversible error by failing to allow allocution. *Id.* at 152-53, ¶ 67. While noting that “[f]ailure by the trial court to solicit a defendant’s statement in allocution constitutes legal error,” the Supreme Court nonetheless held that the defendant in *Hughes* waived the challenge by failing to raise it at the trial court level. *Id.* at 152-53, ¶¶ 67-68. The Court held, “Because the right at issue is *statutorily based* and is not a constitutional right, and because Hughes

failed to raise this objection at trial, this court does not have to address his allocution claim on review.” *Id.* at 153, ¶ 68 (emphasis added). Consequently, under RAP 2.5(a)(3), the claimed error was waived. *Id.*¹

In sum, if the error alleged by Gruntkovskiy arises from a statutory right, it has been waived because the issue was not raised before the trial court. RAP 2.5(a); *Hughes*, 154 Wn.2d at 152-53, ¶¶ 67-68. Conversely, if the alleged error “is truly of constitutional dimension,” then the court must analyze whether the error is “manifest,” at which point review would be warranted. *O’Hara*, 167 Wn.2d at 98, ¶ 12.

B. RCW 2.36.050 confers a statutory right to a certain jury in courts of limited jurisdiction, an alleged violation of which does not affect one’s constitutional rights, meaning a claimed error of such cannot be raised for the first time on appeal.

The crux of Gruntkovskiy’s appeal is that his rights under RCW 2.36.050 were violated. Br. of Pet’r at 8 (noting an alleged “Violation of”

¹ On the same day that the Washington Supreme Court decided *Hughes* (April 14, 2005), the Court also decided *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev’d*, 548 U.S. 212 (2006), a companion case (the Supreme Court often accepts review of two cases as companions when they involve a similar issue but are too dissimilar to consolidate, and in which case the decisions are issued the same day, *e.g.* *State v. Warden*, 133 Wn.2d 559, 561, 947 P.2d 708 (1997), and *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997)). Both *Hughes* and *Recuenco* held that an error under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), could never be harmless and would always require reversal. *Recuenco*, 154 Wn.2d at 164, ¶ 14; *Hughes*, 154 Wn.2d at 142-48, ¶¶ 44-55. The United States Supreme Court reversed this holding, concluding that a *Blakely* violation was subject to a harmless error analysis. *Recuenco*, 548 U.S. at 218-22.

For obvious reasons, *Recuenco*’s holding that a purported *Blakely* constitutional error could be harmless has no effect on Washington law, particularly RAP 2.5. As such, *Hughes*’s analysis of RAP 2.5(a)(3) and its inapplicability to alleged violations of statutory rights is still binding on this court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)).

the Statutory Right”). The statute at issue, unamended since 1988, provides:

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected *at random from the population of the area served by the court.*

RCW 2.36.050 (emphasis added). Gruntkovskiy claims that the trial court violated this statute by drawing prospective jurors from all of Clark County rather than the City of Camas. Regardless of the merits of this claim, Gruntkovskiy is claiming a violation of his *statutory* rights under RCW 2.36.050. So much is clear from his explicit statement in favor of reversal: “there was a material departure from *the statutory requirement* of local jurors.” Br. of Pet’r at 11 (emphasis added). Regardless of whether Gruntkovskiy’s rights under RCW 2.36.050 were violated, he cannot raise that claim now. “Because the right at issue is statutorily based and is not a constitutional right, and because [Gruntkovskiy] failed to raise this objection at trial, this court does not have to address his allocution claim on review.” *Hughes*, 154 Wn.2d at 153, ¶ 68.

C. There is no constitutional right to have a jury drawn from any specific geographical location other than from within the county in which the crime was alleged to have been committed.

Nevertheless, Gruntkovskiy asserts that his constitutional rights under were violated, pointing to the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution.

The Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

U.S. CONST., amend. VI. When the Sixth Amendment was ratified in 1787, it along with the rest of the Bill of Rights applied only to the federal government and not the states. *Cf. Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51, 8 L. Ed. 672 (1833). However, the courts have interpreted the Fourteenth Amendment's due process clause to have "incorporated" various rights from the first few amendments. *Duncan v. Louisiana*, 391 U.S. 145, 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The Supreme Court has not decided whether the "vicinage clause" of the Sixth Amendment applies to the states. *see Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004), but the only Courts of Appeals to have examined the issue have concluded that the clause does not apply to state action. *Caudill v. Scott*, 857 F.2d 344, 345-46 (6th Cir. 1988); *Cook v.*

Morrill, 783 F.2d 593, 594-96 (5th Cir. 1986); *Zicarelli v. Dietz*, 633 F.2d 312, 320-26 (3rd Cir. 1980).

Whether the “vicinage clause” of the Sixth Amendment was or was not incorporated into the Fourteenth Amendment need not be decided here, because Washington’s Constitution does contain a vicinage clause: “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury *of the county* in which the offense is charged to have been committed.” CONST. art. I, § 22 (emphasis added). Applying this constitutional mandate, the Supreme Court has invalidated a conviction reached by a jury comprised of residents of the same city, but not the same county, *see City of Bothell v. Barnhart*, 172 Wn.2d 223, 232-33, 257 P.3d 648 (2011), but has upheld the conviction of a defendant whose jury was drawn from only a segment of the county, but still within the same county in which crime was committed. *State v. Lanciloti*, 165 Wn.2d 661, 669, 201 P.3d 323 (2009). Lest there be any doubt, the Supreme Court rejected the argument that the phrase “of the county” in article I, section 22, is synonymous with “area served by the court” in RCW 2.36.050:

In 1889, the framers of our constitution appear to have had a clear understanding of the legal definition of “county,” having drafted article XI covering county, city, and township organization. CONST. art. XI. The framers expressly provided that “[t]he several counties of the Territory of Washington existing at the time of the adoption

of this Constitution are hereby recognized as legal subdivisions of this state.” *Id.* art. XI, § 1. *The framers were familiar with “counties” as legal subdivisions of this state, and their inclusion of the term “county” in article I, section 22 should not be interpreted as referencing any other boundary line.*

....

If we were to interpret “county” to mean “community represented by the court” as Bothell requests, we would “violate the basic constitutional precepts that the constitution means what it says, and when it is not ambiguous there is nothing for the court to construe.” *Wash. State Motorcycle Dealers Ass’n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). Bothell does not argue that “county” meant something different in 1889, and given the framers’ passage of article XI, governing counties and their recognition in this state, their choice of the term “county” in article I, section 22 seems entirely purposeful. *See* CONST. art. XI, §§ 1, 3. Although Bothell correctly points out that multicounty cities did not exist in 1889 when our constitution was ratified, that does not alter the framers’ clear intent to set the jury selection boundary at the county line. *To change the definition of “county” to “the community represented by the court” would amount to a holding that the framers did not mean what they said.*

Barnhart, 172 Wn.2d at 232 (emphasis added).

Constitutionally then, all that matters for purposes of article I, section 22, are whether the jury is drawn from within the *county’s* boundaries. *Accord Lanciloti*, 165 Wn.2d at 669. Gruntkovskiy has never argued (and no court has ever held) that the Sixth Amendment requires a *smaller* geographical jury pool than what article I, section 22 guarantees. It is well established that state constitutions may provide greater protections than what the federal bill of rights affords, but cannot provide less. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816

P.2d 18 (1991) (“federal law operates as a floor for speech protection, above which article 1, section 5 operates only when appropriate”). And Gruntkovskiy cites no authority that holds the Sixth Amendment’s vicinage clause (a) applies to state and local government, and (b) requires the a jury be drawn from a geographical area smaller than the county in which the crime was committed. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). There is no support for the proposition that article I, section 22 provides less protection than what the Sixth Amendment demands.

As a result, so long as all jurors come from within “the county in which the offense is charged to have been committed,” any *constitutional* “vicinage” requirement is satisfied. CONST. art. I, § 22. Gruntkovskiy ostensibly concedes that a district court jury may be comprised entirely of county residents, regardless of the neighborhood from which they come. Br. of Pet’r at 8. The upshot of this concession is that the error he claims now is of a *statutory* nature, consequently precluding appellate review. *Hughes*, 154 Wn.2d at 153, ¶ 68.

Finally, it is worth addressing Gruntkovskiy’s attempt to equate RCW 2.36.050 a *constitutional* right to a jury “representing a fair cross

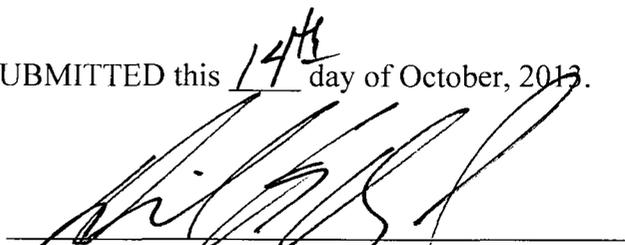
section of the *community*.” Br. of Pet’r at 2 (emphasis added); *see also id.* at 7, 8. The phrase “fair cross section of the community” stems from *Taylor v. Louisiana*, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), in which the United States Supreme Court invalidated a Louisiana law that excluded all women from jury service absent a previously filed declaration. *Id.* at 531. The “fair-cross-section requirement” of the Sixth Amendment then prohibits juries “made up of only special segments of the populace” or juries from which “large, distinctive groups are excluded.” *Id.* at 530. The present case does not involve those concerns, but rather the argument that in a court of limited jurisdiction, created by statute, a jury must derive from a smaller subset of the populace than what the constitutional specifically guarantees.

VI. CONCLUSION

It is undisputed that each juror who comprised the panel which convicted Gruntkovskiy resided in Clark County, the same “county in which the offense is charged to have been committed.” CONST. art. I, § 22. That is all that the Constitution requires. Any other error that may have occurred arises from statute, not the Constitution, and therefore has been waived by attempting to raise that issue for the first time on appeal. RAP 2.5(a)(3).

The superior court, and the conviction, should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of October, 2013.



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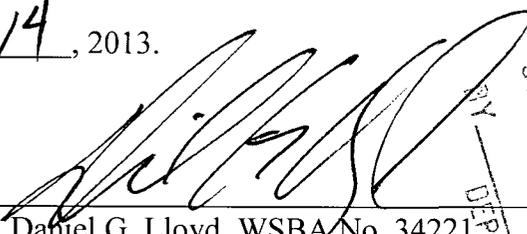
CERTIFICATE OF SERVICE

I certify that on the date referenced below, I mailed (via first class mail, postage prepaid) a copy of the foregoing document to each and every attorney of record herein, as identified below:

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