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COURT OF APPEALS
STATE OF WASHINGTON
SPokane, Washington

No. 29274-6-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MARION SIMONE CLEARY,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
HONORABLE JOHN M. ANTOSZ

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by failing to inquire whether Juror No. 7 was disqualified from serving as a juror under RCW 2.36.070(5).

Issue Pertaining to Assignment of Error

During the jury selection process in this case, did the trial court err by failing to inquire whether civil rights had been restored to a potential juror with a prior felony conviction?

B. STATEMENT OF THE CASE

The defendant, Marion Simone Cleary, was charged with five crimes arising out of an incident that occurred after closing hours at a Grant County tavern where she had been tending the bar. CP 1--2; RP 34--347.

Prior to general *voir dire*, the State noted that three prospective jurors (Numbers 4, 7 and 28) indicated in their questionnaires that they had previously been convicted of a felony. RP 12. The form did not ask whether the declarant's civil rights had thereafter been restored. RP 14. The court and counsel agreed to make individual inquiry. RP 12--13.

After a short recess the court addressed counsel and the following colloquy took place:

THE COURT: Counsel, I do have a question for you on your position about jurors who have been convicted of felonies. The pertinent statute is [RCW] 2.36.070, and that sets out disqualifiers to serve as a juror, and one of them is if you've been convicted of a felony—unless your civil rights have been restored.

And about five or six months ago, the clerk's office changed the questionnaire [to] where it no longer asks have you been convicted of a felony, the next question has traditionally been, have your civil rights been restored? Now, the question asks them instead, are you under DOC supervision?

And I inquired why there was that change, and apparently they were directed – they spoke to a judge, one of our judges, and then I've spoken to our judge and asked why we did that, and he indicated that there was some legislati[ve] change because of the Rossi case with Gregoire, the gubernatorial election dispute, about felons being able to vote. And that's how we get the jurors on our list is, are they eligible to vote or not. And there's kind of been a statute that's allowed now people to vote if they've been convicted of a felony, so long as they're no longer under DOC supervision.

So at least one of our judges has taken the position that the relevant inquiry is no longer have you been fully discharged from your obligations [*sic*], but instead are you under DOC supervision?

Are you both all right with that inquiry? Are you under DOC supervision?

[THE PROSECUTOR]: That's fine.

[DEFENSE COUNSEL]: That's fine, Your Honor.

RP 13–14.

Prospective Juror No. 4, who was individually questioned first, had never been convicted of a felony and made a mistake in answering the form otherwise. RP 15–18. The trial court then decided that prospective jurors No. 7 and No. 28 did not need to be interviewed individually

because, although both had previously been convicted of a felony, they answered “no” to the question whether they were currently under DOC supervision. RP 18–19. Juror No. 7 was ultimately seated on the panel. RP 20.

The jury convicted Ms. Cleary of two counts (third degree assault and obstructing a police officer) and acquitted her of the remaining three counts. CP 49–50. The court imposed standard range sentences. CP 51–52, 56–57. This appeal followed. CP 66.

C. ARGUMENT

The trial court’s failure to inquire whether civil rights had been restored to a potential juror with a prior felony conviction was a material departure from the requirements of RCW 2.36 *et seq.* and requires remand for a new trial.

Standard of Review. The appellate court reviews a trial court's fact-based rulings for abuse of discretion. If the trial court's ruling is based on an interpretation of the law, that decision is reviewed *de novo*. State v. Nemitz, 105 Wn .App. 205, 210, 19 P.3d 48 (2001) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair

trial by an impartial jury. Nemitz, 105 Wn .App. at 210 (citing State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983)). Nonetheless, the Constitution allows states to prescribe relevant qualifications for jurors. Id., citing Powers v. Ohio, 499 U.S. 400, 408, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

“In our state, as in other jurisdictions, jury selection begins with a general screening process that eliminates from jury service those who do not meet statutory qualifications. RCW 2.36.070¹ sets forth basic jury qualifications, which include that the individual is at least 18 years old, a citizen of the United States, a resident of the county in which he or she is to serve, able to communicate in English, and the individual has not been convicted of a felony or not had civil rights restored.” State v. Irby 170 Wn.2d 874, 889-890, 246 P.3d 796 (2011).

The trial court is responsible for disqualifying potential jurors under RCW 2.36.070, but may delegate such authority to court staff and

¹ RCW 2.36.070. Qualification of juror, 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 county clerk by a written document containing specific criteria.
General Rule 28² (b)(1) and (b)(2); RCW 2.36.010 (2)³. The court must establish a means to preliminarily determine by written declaration signed under penalty of perjury whether a person summoned for jury duty meets

² RULE 28. JURY SERVICE POSTPONEMENT, EXCUSAL, AND DISQUALIFICATION

(a) Scope of rule. This rule addresses the procedures for postponing and excusing jury service under > RCW 2.36.100 and > 2.36.110 and for disqualifying potential jurors under > RCW 2.36.070 (basic statutory qualifications).

(b) Delegation of authority to postpone, excuse, or disqualify.

(1) The judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service.

(2) Any delegation of authority under this rule must be written and must specify the criteria for making these decisions.

(3) Judges may not delegate decision-making authority over any grounds for peremptory challenges or challenges for cause that fall outside the scope of this rule.

(c) Grounds for postponement of service.

(1) Postponement of service for personal or work-related inconvenience should be liberally granted when requested in a timely manner.

(2) Postponement shall be to a specified period of time within the twelve-month period pursuant to > RCW 2.36.100(2).

(d) Grounds for excusal from service.

(1) Excusal from jury service shall be limited and shall be allowed only when justified by the criteria established in > RCW 2.36.100(1) and 2.36.110.

(e) Grounds for disqualification of potential jurors. [Reserved. See RCW 2.36.070.]

³ RCW 2.36.010 (2). Definitions

...

(2) "Court" when used without further qualification means any superior court or court of limited jurisdiction in the state of Washington.

...

the basic statutory qualifications set forth in RCW 2.36.070. RCW 2.36.072 (1)⁴. If a person does not meet one of the statutory criteria, the person “*shall* be excused from appearing in response to the summons.” RCW 2.36.072 (4) (emphasis added).

Prejudice will be presumed if there has been a material departure from the statutes governing jury selection. State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991) (citing Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, 139 P.2d 714 (1943)⁵).

⁴ The entire statute provides as follows:

RCW 2.36.072. Determination of juror qualification--Written or electronic declaration

(1) Each court shall establish a means to preliminarily determine by a written or electronic declaration signed under penalty of perjury by the person summoned, the qualifications set forth in RCW 2.36.070 of each person summoned for jury duty prior to their appearance at the court to which they are summoned to serve.

(2) An electronic signature may be used in lieu of a written signature.

(3) "Electronic signature" means an electric sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(4) Upon receipt by the summoning court of a written declaration stating that a declarant does not meet the qualifications set forth in RCW 2.36.070, that declarant shall be excused from appearing in response to the summons. If a person summoned to appear for jury duty fails to sign and return a declaration of his or her qualifications to serve as a juror prior to appearing in response to a summons and is later determined to be unqualified for one of the reasons set forth in RCW 2.36.070, that person shall not be entitled to any compensation as provided in RCW 2.36.150. Information provided to the court for preliminary determination of statutory qualification for jury duty may only be used for the term such person is summoned and may not be used for any other purpose, except that the court, or designee, may report a change of address or non-delivery of summons of persons summoned for jury duty to the county auditor.

⁵ “[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from the statute.” Roche Fruit Co., 18 Wn.2d at 487.

Here, Washington's statutory scheme requires that Juror No. 7, who has previously been convicted of a felony, is not competent to serve as a juror unless his civil rights have been restored. RCW 2.36.070(5). However, the Grant County court system failed to establish that Juror No. 7 was in fact qualified to serve as a juror. The questionnaire used in Grant County appropriately asked if Juror No. 7 was previously convicted of a felony, but did not follow up on the affirmative answer to inquire whether Juror No. 7's civil rights had since been restored. Nor did the superior court directly ask Juror No. 7 whether his civil rights had been restored.⁶ In spite of its statutory obligation to oversee the selection process, the court simply failed to determine whether Juror No. 7 was qualified to serve as a juror.

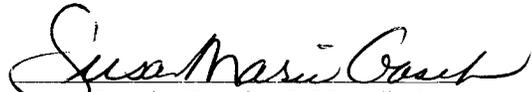
The trial judge's ruling in this case was not in substantial compliance with the statutes. Thus the jury selection process was a material departure from RCW 2.36 and prejudice is presumed. The remedy is reversal and remand for a new trial. Tingdale, 117 Wn.2d at 803.

⁶ Defense counsel may well have been ineffective for acquiescing to the superior court's faulty determination that the relevant inquiry was "are you still on DOC supervision" rather than "have your civil rights been restored". However, the statute places the onus

D. CONCLUSION

For the reasons stated, the convictions must be vacated and the matter remanded for retrial.

Respectfully submitted April 11, 2011.


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on the trial court to preliminarily and accurately determine whether a prospective juror is qualified to serve as a juror.