

FILED

MAY 18, 2015
Court of Appeals
Division III
State of Washington

NO. 31500-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAMON L. MCCART ,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises two assignments of error. These can be summarized as follows;

1. Appellant was denied a fair and impartial trial when one person in the jury pool indicated he knew Appellant from when the potential juror worked at with the Department of Corrections.
2. The court violated Appellant's right to a public trial by allowing the trial to continue past 4 p.m. on several occasions.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no violation of Appellant's right to a fair and impartial trial, the jury pool was not tainted.
2. The right to a public trial was not violated.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ALLEGATION ONE

Appellant claims that the following statement was so egregious that the entire venire pool was tainted;

THE COURT: ...Next question. Does anyone know the Defendant Damon McCart? And if so, please raise your hand?

THE COURT: Okay. Okay. I want to be very careful with these questions. Do you know him personally or just his name?

PROSPECTIVE JUROR NUMBER 46: I retired from the Department of Corrections at Ahtanum Youth --

THE COURT: Okay.

PROSPECTIVE JUROR NUMBER 46: -- Corrections.

THE COURT: Now, you're not answering my question.

PROSPECTIVE JUROR NUMBER 46: I know him from there. I --

THE COURT: Okay. You know him from employment. Okay. Okay.
RP 96-7

This was followed by inquiry of juror 19;

THE BAILIFF: Number 19.

THE COURT: Okay. I do have a question or two for Number 19. Ma'am, you indicated that because of your either current or former employment that you don't think you could be fair. I want to be careful how we do this. Is it because of current employment or former employment?

PROSPECTIVE JUROR NUMBER 19: Current.

THE COURT: Okay. And do you work in law enforcement?

PROSPECTIVE JUROR NUMBER 19: Somewhat, yes.

THE COURT: Somewhat? Okay.

PROSPECTIVE JUROR NUMBER 19: Supervisor.

THE COURT: But you don't know the attorneys or defendant; is that correct?

PROSPECTIVE JUROR NUMBER 19: I'm not sure. He looks familiar, but I'm not sure.

THE COURT: Okay. Okay. And is that the reason that you're not sure if you could be fair or not, or is there another reason?

PROSPECTIVE JUROR NUMBER 19: I'm an inmate supervisor.

THE COURT: Okay. There may be some follow-up down the road on that.

PROSPECTIVE JUROR NUMBER 19: (Inaudible).

THE COURT: Thank you for sharing that information.

RP 102-3

Appellant claims that the statement by juror 46 was such that “the jury pool was told that he (the defendant) had served time in a corrections facility.” There is not on single word spoken by Juror 46 which states that McCart was serving time in a corrections facility. Based on the follow-up statement made by the court “[y]ou know him from employment.” it is just as likely that the rest of the pool believed that it was in fact “employment” not incarceration that brought the two into contact. Appellant’s birthday is March 11, 1986, this statement occurred on February 25, 2013. This means that the Appellant was just shy of his 27th birthday at the time these sixteen words were spoken. (CP 57) Juror 46 did not state how he knew Appellant. Appellant assumes this statement was made in a manner such that the rest of the venire could and would only understand the juror’s knowledge of Appellant came from Appellant being incarcerated in that institution. It is just as likely due to the fact that Appellant would obviously have been more than old enough to have been employed at the Correctional Facility that the jury was assume it was a previous working relationship. The action against McCart was in “adult” court and obviously McCart was an adult. The contact indicted by juror 46 was at a “youth” facility. This juror was then excused from the pool. (RP 97)

As pointed out by the State during trial there was going to be and was testimony by jail staff regarding the property, an identification card, of McCart that was placed into the custody of the jail. (RP 140-35) McCart fought hard to keep this information from coming into evidence during trial thus forcing the State to bring in witnesses whose very testimony was that they worked in the intake section of the jail when Appellant was taken into jail. If McCart was actually worried about whether this group of jurors was tainted by the very brief and equivocal statements made in voir dire he should then have been as concerned about forcing the State to physically present witnesses, in uniform, who worked in the jail and would specifically testify that McCart had been in jail. Obviously he was not concerned about the jury knowing he had been in jail during trial and certainly not now on appeal.

The action in the trial court at issue was a motion for a mistrial which this court will review for an abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court abuses its discretion when no reasonable person would adopt the trial court's view. Greiff, 141 Wn.2d at 921, 10 P.3d 390. This court will overturn a trial court's decision on a motion for mistrial only if there is a substantial likelihood that the prejudice affected the verdict. Greiff, 141 Wn.2d at 921, 10 P.3d 390

(quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Lewis, 130 Wn.2d at 707.

Both the United States and Washington constitution's guarantee criminal defendants the right to a fair and impartial jury. U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22. The trial court must excuse prospective jurors if they hold views that make it impossible to be unbiased and fair. See State v. Hughes, 106 Wn.2d 176, 185, 721 P.2d 902 (1986) (citing Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir.1978)).

Appellant relies on Mach v. Stewart, 137 F.3d 630 (9th Cir. 1998)¹, where the defendant was charged with sexual conduct with a minor under age 14. A prospective juror who was a social worker and had studied child psychology said during voir dire that she had never become aware of a case in which a child had lied about being sexually assaulted. Mach, 137 F.3d at 631-32. The trial court removed her for cause after questioning her before the entire jury pool. Mach, 137 F.3d at 632. The Ninth Circuit reversed the defendant's conviction, holding that

¹ Mach has been cited on several occasions by courts in this state, none are published opinions which can be cited here, however none of those cases overturned the trial courts actions.

the juror's comments were so prejudicial that they irreparably tainted the jury pool. Mach, 137 F.3d at 634.

Mach is distinguishable, in Mach, the juror's observation went to the central issue of the case, the victim's credibility. Mach, 137 F.3d at 634. In Mach, the defendant was on trial for sexual contact with an eight-year-old girl. 137 F.3d at 631. The juror was the first prospective juror questioned in voir dire was a social worker, who stated that she would have a difficult time being impartial because of her work experience. Mach, 137 F.3d at 631-32. She also stated that "sexual assault had been confirmed in every case in which one of her clients reported such an assault." Mach, 137 F.3d at 632. The court continued to question the prospective juror, eliciting "at last three more statements from [the prospective juror] that she had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted." Mach, 137 F.3d at 632. The court also asked the other prospective jurors whether anyone disagreed with the woman's statements and no one responded. Mach, 137 F.3d at 633. The trial court denied Mach's motion for a mistrial in which he "argu[ed] that the entire panel had been tainted by the exchange between the court and" this prospective juror. Mach, 137 F.3d at 632.

On appeal, the Ninth Circuit stated that "[g]iven the nature of [the prospective juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times they were repeated, " it "presume[d] that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused." Mach, 137 F.3d at 633. The 9th circuit equated the prospective juror's statements as tantamount to introducing highly inflammatory, extrinsic evidence from an expert which was directly connected to the defendant's guilt and vacated the conviction after finding that the statements substantially affected or influenced the verdict. Mach, 137 F.3d at 633.

Here, juror 46 said nothing about a witness or the victim's credibility. Nor did the juror's comment touch on any other possible issue in the case. At most, the juror's comment suggested that he knew McCart through work. There was never any indication that Juror 46 had seen Appellant in custody nor did juror 46 say whether his opinion of McCart was favorable or unfavorable. Because juror 46's statement were neutral, the trial court did not err in denying the motion to excuse the entire panel. Here to the court took great care to limit any response and did nothing to support the statements of the jurors in front of the panel, in fact the court's statement about the contact was from "employment" mitigated any impact.

Even in an infamous case State v. Coe, 109 Wn.2d 832, 841-2, 750 P.2d 208 (1988) where there was an actual record that juror's had knowledge of prior trials of Coe and his mother the court found no error when the trial court refused to excuse those jurors, stating;

The defendant contends the trial court erred in denying challenges for cause to jurors who were aware of the outcome of the first trial or Ruth Coe's conviction. We find no error, since the trial court relied on the jurors' assurances of impartiality.

The Supreme Court has stated a prospective juror who has prior knowledge of the defendant's prior conviction and reversal need not be automatically disqualified. Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). A trial court may decide, as a question of fact, whether a juror's "protestation of impartiality" should be believed, and the appellate court must then give great deference to that finding. Patton, at 1036, 104 S.Ct. at 2891.

The defense primarily relies on United States v. Williams, 568 F.2d 464, 471 (5th Cir.1978). Williams, however, was relied upon by the Third Circuit in Yount v. Patton, 710 F.2d 956, 969 (3d Cir.1983), which the Supreme Court later reversed in Patton v. Yount, supra.

Further, as the trial court below observed, the jury inevitably would learn of the prior trial during the course of the retrial. In State v. Latham, 100 Wn.2d 59, 64, 667 P.2d 56 (1983), the court noted:

Petitioner's argument assumes he was entitled to a jury which was totally ignorant of the subject matter of the case and the witnesses. This standard was rejected in Irvin v. Dowd, [366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961)].

There the Court noted:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved.... It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, at 722-23 [81 S.Ct. at 1642-43].

Here the trial court after objection by Appellant excused juror 46. There was no emphasis on this statement and the court went on with voir dire. It is interesting to note that the previous juror questioned, juror 49, stated that they had heard about the case “[j]ust through friends” and answered “yes” when the court asked “Because you've heard of information possibly about this case through friends, do you think you've begun to start forming opinions about this case.” This statement would appear to be as “egregious” as the statement by juror 46, and yet there is no mention of this colloquy or issue raised.

The United States Supreme Court in Smith v. Phillips, 102 S.Ct. 940, 455 U.S. 209, 216-17 (1982) discussed claims of juror bias as follows;

Our decision last Term in Chandler v. Florida, 449 U.S. 560 (1981), also treated a claim of implied juror bias. Appellants in Chandler were convicted of various theft crimes at a jury trial which was partially televised under a new Canon of Judicial Ethics promulgated by the Florida Supreme Court. They claimed that the unusual publicity and sensational courtroom atmosphere created by televising the proceedings would influence the jurors and preclude a fair trial. Consistent with our previous decisions, we held that the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case -- be it printed or broadcast -- compromised the ability of the particular jury that heard the case to adjudicate fairly.

Id. at 575. Because the appellants did not [attempt] to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them, we refused to set aside their conviction. *Id.* at 581.

These cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case. (Emphasis in original, footnote omitted.)

The jurors in this case swore an oath, on two occasions initially they swore;

THE COURT: Okay. I see that the jury is seated. Good afternoon. An important part of the trial process is jury selection. And this requires that you be placed under oath. So I'm going to have all of you please stand and raise your right hand and the clerk will swear you in.
THE CLERK: Do you solemnly swear or affirm that you will truthfully answer all questions of you by or under the direction of the Court concerning your qualifications to serve as a juror on this case?
THE PROSPECTIVE JURORS: (In unison) I do. (RP 91)

They were then charged as follows:

THE CLERK: Would you like me to swear them in?
THE COURT: Yes. Why don't you go ahead and swear them in first. Before we take the midmorning break

you're going to be sworn in as the jury panel. And then we'll be on break for about 15 minutes. So if the clerk would please swear the jury in.

THE CLERK: All please rise. Do you solemnly swear or affirm that you well -- will well and truly try the issues in this case according to the evidence and the Court's instructions?

THE JURORS: I do. (RP 235)

The court stated as follows during the discussion regarding whether these statements were such that there should be a mistrial declared;

THE COURT: Yeah. We want to make sure she's not discussing this issue with the other jurors. As far as Number 46, that's close, but I think he was cut off in time. And I -- I don't think that it's enough to prejudice the entire jury. The jury's going to get instructed that they're to consider only the evidence in the case and that they're to follow the jury instructions.

There's a very strong presumption that the jurors are going to follow the law as given to them and they're going to convict or not convict based upon the evidence and the instructions to the jury. And so I think that that one statement, although unfortunate, I don't think that's enough to grant a mistrial.

RP 145

The jury instructions instructed the jury that was picked as follows;

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true.

Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict. (CP 27)

...

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict. (CP 29)

Once again a trial court's denial of a motion for mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). In deciding whether an inadvertent remark at trial requires reversal, a court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of other admissible evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Lewis, 130 Wn.2d at 707. When this court applies the "Weber factors" to the facts in this case it will determine that the actions of the

trial court should be affirmed. In context, the remarks of the juror were not particularly serious. The remarks clearly did not have the same effect as if he had been brought in front of the jury wearing prison coveralls or shackles. See State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998) (defendant's appearance before jury in shackles may cause jury prejudice, but trial court has broad discretion in making determination).

This allegation should be dismissed by this court.

RESPONSE TO ALLEGATION TWO.

This allegation was addressed and dismissed by the Washington State Supreme Court in State v. Andy, 90567-3, 182 Wn.2d 294, 340 P.3d840 (2015). In both Andy and State v. Arredondo, *infra*, the parties agreed to remand the cases to the trial court to allow hearings to be conducted so that a better record could be developed regarding the issue claiming that the Yakima County courthouse had been “closed” at the time of the trials based on several criterion; signs on the outside of the building, actions of the courts in conducting hearings past some of the times posted on those signs, etc. The claim in Andy and Arredondo, and here, was that the actions of the court in combination with these other alleged errors was a “de facto” closure of the courtrooms to the public and therefore a violation of the defendant and the public’s right to a public trial. Andy was certified by this court to the State Supreme court. This case along

with numerous other cases was stayed pending the outcome of Andy. As this court is well aware the Supreme Court ruled that there was no violation of the public trial right in Andy.

The record in this case was supplemented with the transcripts and findings of fact and conclusions of law from the hearings conducted on remand for both State v. Andy and State v. Arredondo COA #30411-6. The record before this court in McCart is the record that was before the Supreme Court when it decided Andy. This court can come to no other conclusion than McCart's rights, as were Andy's, were not violated by the actions of the court or the county.

V. CONCLUSION

For the reasons set forth above this court should deny allegations in this appeal. This appeal should be dismissed.

Respectfully submitted this 18th day of May 2015,

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DECLARATION OF SERVICE

I, David B. Trefry state that on May 18, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief , to Mr. David Gasch at gaschlaw@msn.com and on May 13, 2015 by US Mail to Damon L. McCart # 884434 PO Box 769 Connell WA 99326

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

DATED this 18th day of May, 2015 at Spokane, Washington.

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