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Bothell Municipal Court #15995

84907-2

No. 63494-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

City of Bothell, Respondent

v.

James K. Barnhart, Appellant

BRIEF OF RESPONDENT

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ORIGINAL

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A. Issues on Appeal

1. Under Washington law, can Mr. Barnhart's jury "include members who reside other than in the county in which the offense occurred" when Mr. Barnhart accepted the jury panel, which included two King County residents, without using any of his three peremptory challenges to cure a possibly erroneous refusal by the trial court to excuse for cause?

2. Under Washington law, can Mr. Barnhart's jury "include members who reside other than in the county in which the offense occurred" when the seating of jurors complied the RCW 2.36.050, which reflects the Washington State Supreme Court's interpretation of the Washington State Constitution?

3. Under Washington law, can Mr. Barnhart's jury "include members who reside other than in the county in which the offense occurred" when all but two jurors were residents of the county in which the offense occurred and when Mr. Barnhart did not allege or argue prejudice?

B. Statement of the Case

Procedural History

The City of Bothell accepts Mr. Barnhart's version of the Procedural History with one addition and one exception. First, the City would like to add that at the conclusion of voir/dire, Mr. Barnhart made a for-cause challenge of the jurors who were King County residents. At that time, there were two. The trial court denied that challenge. The City then used a peremptory challenge to excuse juror #11, a King County resident. A replacement juror, #13, also a King County resident, was seated. The trial court then asked Mr. Barnhart if he would like to exercise a peremptory challenge. Despite having three peremptory challenges available, Mr. Barnhart accepted the jury panel with two King County residents seated. See appendix 1.

Second, this Court accepted discretionary review to determine "whether a jury may include members who reside other than in the county in which the offense is alleged to have occurred." Commissioner's Ruling Granting Discretionary Review, page 2.

C. Summary of the Argument

A jury may include members who reside other than in the county in which the offense is alleged to have occurred in at least three situations:

1) when a defendant accepts the jury panel without having exhausted his peremptory challenges; 2) when seating jurors who reside other than in the county in which the offense is alleged to have occurred complies with RCW 2.36.050, which follows the Washington Supreme Court's interpretation of the Washington State Constitution; or 3) when seating jurors who reside other than in the county in which the offense is alleged to have occurred results in harmless error.

D. Argument

1. A JURY MAY INCLUDE MEMBERS WHO RESIDE OTHER THAN IN THE COUNTY IN WHICH THE OFFENSE OCCURRED WHEN THE DEFENDANT ACCEPTS THE JURY PANEL WITHOUT USING ANY PEREMPTORY CHALLENGES.

Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. Ross v. Oklahoma, 487 U.S. 81, 89, 108 S.Ct. 2273 (1988).

In Washington, RCW 4.44.130 states that each party in an action shall be entitled to three peremptory challenges. Pursuant to RCW 10.46.070, criminal matters shall be conducted in the same manner as in civil actions. Under Washington law, a party accepting a juror without

exercising available challenges cannot challenge that juror's inclusion. Martini ex rel. Dussault v. State, 121 Wn.App 150, 175, 89 P.3d 250 (2004). Further, a defendant must use all of his peremptory challenges before he can show prejudice arising from the selection and retention of a particular juror to try the cause, and is barred from any claim of error in this regard. State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969), State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957), State v. Tharp, 256 Wn.2d 494, 500, 256 P.2d 482 (1953), State v. Jahns, 61 Wash 636, 638, 112 P. 747 (1911).

In this case, Mr. Barnhart made a for-cause challenge to remove the two seated King County jurors. When the challenge was denied, Mr. Barnhart was given an opportunity to use his peremptory challenges. He declined to use the three challenges available to him to attempt to remove the two King County jurors. As such, Mr. Barnhart accepted a jury including members who reside other than in the county in which the offense is alleged to have occurred. Because Mr. Barnhart accepted the jury, he is barred from now arguing any error arising from that decision.

It should be noted that there is another line of cases similar to this issue, which, at first glance, might appear to overturn nearly 100 years of currently valid Washington case law associated with this topic. Upon a closer read, it does not. *See e.g.* State v. Fire, 145 Wn.2d 152, 34 P.3d

1218 (2001); State v. David, 118 Wn.App 61, 74 P.3d 686 (2003); and State v. Gonzales, 111 Wn.App 276, 45 P.3d 205 (2002).

While the issue in the instant case is whether a defendant must use his peremptory challenges to correct an erroneously denied for-cause challenge, in State v. Fire, the issue before the Washington State Supreme Court was whether a defendant who actually used a peremptory challenge to correct an erroneously denied for-cause challenge is deprived of his right to an impartial jury, even absent any showing that a biased juror sat on the panel, for which automatic reversal is the remedy. 145 Wn.2d at 152. Under the old Parnell rule, "a refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, was considered on appeal as prejudicial." State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1970).

In Fire, the Court concluded that a defendant's use of a peremptory challenge to correct a trial court's error does not warrant automatic reversal, absent a showing of prejudice. 145 Wn.2d at 152. In making that determination, the Washington State Supreme Court abrogated its prior ruling in Parnell by stating, "the rule in [State v.] Stenz [30 Wash. 134, 70 P. 241 (1902)] enunciated in Parnell is no longer viable in Washington law." Fire, 145 Wn.2d at 163. Further, the Washington State Supreme Court stated, "we expressly abandon the Parnell rule and adopt

that enunciated by the United States Supreme Court in [United States v.] Martinez-Salazar [528 U.S. 304, 120 S.Ct. 774 (2000)]." Id. at 165.

Martinez-Salazar is a case with facts similar to Fire in that the defendant actually used a peremptory challenge, albeit in a federal setting, to remove a juror to correct what the defendant believed to be an erroneous denial of a for-cause challenge. 528 U.S. at 304. Again, in the instant case, the defendant did not use any of his three challenges available to correct was he thought was an improper denial of a for-cause challenge.

The issue in Martinez-Salazar, which is the same issue addressed in Fire but not in the instant case, was whether or not the "forced" use of a peremptory challenge in jury selection to correct a trial court's erroneous denial of a for-cause challenge violated a person's entitlement to use peremptory strikes and right to an impartial jury. 528 U.S. at 307. The rule that the Washington State Supreme Court adopted from Martinez-Salazar in Fire was that the use of a peremptory challenge to cure a trial court's error does not require reversal of the conviction absent prejudice, nor does such use deprive the right to an impartial jury. 145 Wn.2d at 154.

However, the United States Supreme Court in Martinez-Salazar stated that it was specifically addressing "a problem in federal jury selection left open in Ross" [v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273

(1988)]. 528 U.S. at 307. (emphasis added) The Court states that the Ross decision "dealt with an issue resembling the one presented here, although the issue in Ross arose in a state law setting." 528 U.S. at 313. (emphasis added)

This language indicates that the Court's decision in Ross, which, depending on the state, may require a defendant in a state law setting to use a peremptory challenge to strike a juror who should have been removed for cause in order to preserve the claim on appeal, was not being abrogated, simply clarified for a federal setting.

The Court in Martinez-Salazar then rejected the Government's contention that federal law should follow state law, like the Oklahoma statute considered in Ross. 528 U.S at 305.

Instead, the United States Supreme Court noted, as dicta, that the defendant in a federal court "had the option of letting [the biased juror] sit on the petit jury and, upon conviction, pursue a Sixth Amendment challenge upon appeal." Id. at 315.

In summary, the United States Supreme Court in Martinez-Salazar and Ross has ruled that in a federal setting, a defendant does not have to use a peremptory challenge to correct the trial court's error in order to preserve an appeal. However, in a state setting, if the state requires a

defendant to use peremptory challenges to correct a trial court's error, a defendant must use said challenges or forego the issue on appeal.

In the instant case, the Washington State Supreme Court has consistently held since 1911 in State v. Jahns, supra, that a defendant must use his peremptory challenges to correct a trial court's erroneous denial of a for-cause challenge. Further, this holding has never been abrogated by the Washington State Supreme Court, nor was it properly before the Court in State v. Fire, supra. Moreover, a review of relevant case law indicates all of the cases cited for this issue are still valid. Finally, the dicta in State v. Fire citing to the dicta in Martinez-Salazar was not on point, as Martinez-Salazar is both factually different from the instant case and was deciding a federal, not state, issue.

As such, the holding in Ross v. Oklahoma, supra, which allows a state to control the use of peremptory challenges, is controlling on this point. Because valid Washington case law states that a defendant must use his peremptory challenges in order to preserve the issue for appeal, a jury may include members who reside other than in the county in which the offense is alleged to have occurred when a defendant, as in the instant case, accepts the jury panel without having exhausted his peremptory challenges.

2. A JURY MAY INCLUDE MEMBERS WHO RESIDE OTHER THAN IN THE COUNTY IN WHICH THE OFFENSE OCCURRED WHEN SEATING SAID JURORS COMPLIES WITH RCW 2.36.050, WHICH FOLLOWS THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE WASHINGTON STATE CONSTITUTION.

"We presume statutes are constitutional and review challenges to them de novo." State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009).

The Washington constitution provides that "[i]n 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. "This follows the common law principle that juries should be drawn from the area of the alleged crime." Lanciloti, 165 Wn.2d at 667. (emphasis added) "Historically, jurors were not just drawn from the area; they might also be witnesses to the crime or character of the accused." Id. at 667. "Over time, the ideal jury evolved into a panel of impartial community members drawn from the community at large." Id. (emphasis added) "The constitutional requirement that the jury be both impartial and 'of the county' balances those two principles." Id. at 668. This language indicates that the Washington State Supreme Court has interpreted "of the county" to mean from the community/area in which the crime occurred.

RCW 2.36.050, which states in relevant part, that "jurors for the jury panel may be selected at random from the population of the area served by the court," (emphasis added) follows the Washington State Supreme Court's interpretation of the Washington constitution that the jury should be drawn from the area in which the crime occurred and made up of community members from the community at large.

The framers of the Washington constitution may not have foreseen a city which rests in two counties, as none of the six cities in Washington which rest in two counties existed at the time the Washington Constitution was ratified. However, based on the supreme court's interpretation of article one, section 22, the framers' intent was to create a jury from members of the community at large of the area in which the alleged crime occurred.

RCW 2.36.050, as applied, allowing for a municipal court to draw jurors by random selection from the area served by the court, results in a jury made up of members of the community in which the crime allegedly occurred. Therefore, the application of RCW 2.36.050 does not violate the supreme court's interpreted meaning of article 1, section 22.

In the case at bar, as in Tukwila v. Garrett, 165 Wn.2d 152, 96 P.3d 681 (2008), the City of Bothell developed its jury list by drawing jurors from areas encompassed by the zip codes that closely but

imprecisely followed the city's boundaries. The one difference is that the area and community of Bothell rests in two counties and draws jurors from both King and Snohomish counties. However, the juror pool drawn and summoned is representative of the community and area of Bothell. In this case, the result was a jury consisting of five residents of the City of Bothell and one resident of unincorporated Snohomish County.

This exactly follows the Supreme Court's interpretation that juries should be drawn from the area of the alleged crime and that a jury should be a panel of impartial community members drawn from the community at large.

As a result, Mr. Barnhart's jury, which included members who reside other than in the county in which the offense occurred, was proper because it both complied with RCW 2.36.050 and followed the Washington Supreme Court's interpretation of the Washington State Constitution.

3. A JURY MAY INCLUDE MEMBERS WHO RESIDE OTHER THAN IN THE COUNTY IN WHICH THE OFFENSE OCCURRED WHEN THE RESULT IS A HARMLESS ERROR.

The United States Supreme Court has recognized that most constitutional errors can be harmless. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827 (1999). "If the defendant had counsel and was tried by

an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." Neder, 527 U.S. at 8, citing Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101 (1986). In order for an error to be held harmless, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. State v. King, 2009 WL 3298059, citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

However, there are a limited class of cases in which "structural" errors have occurred, which are subject to automatic reversal. Neder, 527 U.S. at 8. Such cases include complete denial of counsel, a biased trial judge, racial discrimination in selection of a grand jury, denial of self-representation at trial, and defective reasonable-doubt instruction. Id. (Other citations omitted.) "Such errors deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Id. at 8-9.

The Supreme Court of Washington has held that a structural error results in presumed prejudice, the remedy for which is remand for a new trial. State v. Strode, 2009 WL 3210389, ¶ 17 (2009).

In the case at bar, the City of Bothell argues that there is no error in seating two jurors from King County because Mr. Barnhart accepted the

jury with the King County jurors and because the Court complied with RCW 2.36.050, which reflects the spirit of the Washington State Constitution. However, if this Court does find that an error occurred, that error is harmless beyond a reasonable doubt.

Here, Mr. Barnhart had counsel and was tried by an impartial adjudicator. Therefore, there is a strong presumption that any constitutional errors that may have occurred are subject to a harmless error analysis. While there does not appear to be any cases with analogous facts to the case at bar, there are many cases detailing the importance of a defendant receiving a fair trial.

The Washington State Supreme Court had held that the purpose of statutory procedures for making up the jury lists [referring to RCW 2.36.050] is to provide a fair and impartial jury. Tukwila, 165 Wn.2d at 159, 196 P.3d 681 (2008). (citing State v. Twyman, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001)). Further, if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity that has had no effect upon the purpose to be effected. Tukwila, 165 Wn.2d at 160 (citing State v. Rholeder, 82 Wash 618, 620-21, 144 P. 914 (1914)). (emphasis added)

Prejudice [in the jury selection process] will be presumed only if there is a *material* departure from the statutory requirements. (emphasis NOT added). Tukwila, at 161. If there is substantial compliance with the statute, then a challenger may claim error only if he or she establishes actual prejudice. Id. In establishing actual prejudice, the most important questions are whether "there was any exclusion of any class of citizen of weighting or the jury list or that the jury list was not a representative cross section of the community," or whether "the jury list, the venire or the jury itself was so composed that there might have been any inherent bias or prejudice" against the challenger or denial of his or her right to challenge any juror for bias or peremptorily. Id. (emphasis added)

In the instant case, Mr. Barnhart argues that because his alleged criminal acts took place in Snohomish County, the court erred by seating jurors who were King County residents. Even assuming, without conceding, that an error occurred, Mr. Barnhart makes no argument regarding prejudice: presumed or actual.

Addressing the possibility of presumed prejudice, it is clear that there is none. In Tukwila, the Court held that the selection of jurors from outside Tukwila's boundaries does not invalidate the selection procedure provided the jurors were randomly selected. Id. at 162. Here, the trial court, as required, randomly selected the jurors for Mr. Barnhart's trial.

Mr. Barnhart makes no other argument that there was presumed prejudice. Absent a material departure, which has not been argued, there cannot be presumed prejudice.

Further, even with the King County residents seated, the jury still consisted of a two-thirds majority of Snohomish County residents. Thus, any error could not be considered material departure; therefore, no presumed prejudice exists.

Without presumed prejudice, Mr. Barnhart can only claim error if he proves actual prejudice. Mr. Barnhart also fails to make any such argument regarding the exclusion of any class of citizen, that the jury list was not a representative cross section of the community, that the composition of the jury or jury list showed inherent bias or prejudice, or that there was denial of his right to challenge any juror for bias or peremptorily.

Here, Mr. Barnhart had a fair and impartial jury, which is, ultimately, the critical inquiry. Tukwila, at 162-63. Returning to the question of whether any alleged constitutional error was harmless, because the record is completely devoid of any prejudice, this Court can find that even if there was an error, it is harmless beyond a reasonable doubt. There is no record or argument of any prejudice; therefore, there is nothing that

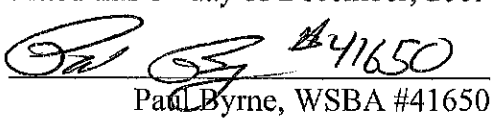
would lead this Court to believe the jury selection process contributed to Mr. Barnhart's conviction.

In the alternative, this Court can decline to find whether an error even occurred because Mr. Barnhart has failed to prove, or even claim, that prejudice exists as a result of the jury selection process. Without prejudice, the question of error would be moot.

E. Conclusion

In conclusion, Mr. Barnhart's jury, and any jury in Bothell or in any of the other cities in Washington which rest in two counties, may include members who reside other than in the county in which the offense is alleged to have occurred 1) when a defendant accepts the jury panel without having exhausted his peremptory challenges; 2) when seating jurors who reside other than in the county in which the offense is alleged to have occurred complies with RCW 2.36.050, which follows the Washington Supreme Court's interpretation of the Washington State Constitution; or 3) when seating jurors who reside other than in the county in which the offense is alleged to have occurred results in harmless error.

Respectfully submitted this 8th day of December, 2009



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		COUNTY RESIDENTS	DMS
	1044	- CR/ DENIED. ATD OBJECTION IS NOTED	DMS
	1044	- CITY PEREMPTOPRY JUROR #11 SEAT 5	DMS
	1045	- CLERK CALLS JUROR #13 SEAT 5	DMS
	1045	- DEFENSE ACCEPTS THE PANEL AS SEATED	DMS
	1045	- CITY ACCEPTS THE PANEL AS SEATED	DMS
	1046	- JURORS SWORN AND SEATED AS FOLLOWS;	DMS
		#17 DAVID NEAL #2 KATHLEEN BILLINGTON	DMS
		#23 JILL OCAIN #13 ELAINE MADISON	DMS
		#7 KATHLEEN FICHERA #1 DEBORAH ABBOTT	DMS
	1047	- JURORS EXCUSED RECESS	DMS
	1105	- JURORS IN	DMS

Appendix 1

No. 63494-1-I

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

City of Bothell, Respondent, vs. James Barnhart, Appellant.	)	Declaration of Mailing

I, G. H. Tipple, declare under penalty of perjury of the laws of the State of Washington that on December 8, 2009, I deposited in the U.S. Mail, postage pre-paid, the enclosed copy of City's Brief of Respondent in the above-referenced case, to:

Mark Stephens
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DATED this 8th day of December, 2009, at Bothell, Washington.

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