

68940-1

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NO. 68940-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MONSON,

Appellant.

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

The Honorable Larry E. McKeeman, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT DENIED MONSON A FAIR TRIAL BY REFUSING TO EXCUSE A JUROR WHO DEMONSTRATED BIAS.

During Monson's trial juror 6 expressed concerns someone connected with the trial was watching her and that she might be harmed or influenced by people associated with Monson. 10RP 10-14. Monson contends, for reasons set forth more fully in the Brief of Appellant (BOA), that the trial court abused its discretion by not excusing the juror and replacing her with an available alternate. BOA at 12-15.

The State maintains the court properly relied on the juror's comments that she thought she could be fair. Brief of Respondent (BOR) at 5-13. For the following reasons, Monson asks this Court to reject the State's arguments.

When the trier of fact cannot render a disinterested, objective judgment, the right to a fair trial by an impartial jury is compromised. United States v. Thompson, 744 F.2d 1065, 1068-69 (1984). The State cites People v. Santiago<sup>1</sup> and People v. Cargill<sup>2</sup> for the proposition that

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<sup>1</sup> 255 A.D.2d 63, 691 N.Y.S.2d 22, appeal denied, 94 N.Y.2d 829, 702 N.Y.S.2d 599 (App. Div. 1999).

<sup>2</sup> 70 N.Y.2d 687, 518 N.Y.S.2d 792 (1987).

fear of personal consequences is not alone a sufficient reason to discharge a juror. BOR at 10-12. Both cases are factually distinguishable.

Santiago was charged with second-degree murder for the shooting death of Jorge Orgando as Orgando sat in his parked car. A witness identified Santiago as the shooter. Santiago, 255 A.D.2d at 65.

At the end of the first day of trial, a juror who lived two blocks from the shooting scene told the judge and parties, "I live too close to the crime scene and I think that puts my family and me in danger." Santiago, 255 A.D.2d at 67. The juror indicated he recognized Orgando from his neighborhood. The juror denied he was afraid of Santiago but answered "yes" when asked if he was "afraid of people who you think he knows?" Santiago, 255 A.D.2d at 67. The juror stated he would vote "according to the evidence." Santiago, 255 A.D.2d at 67. The People moved to disqualify the juror. Defense counsel did not object, noting that while the juror "left [defense counsel] with the inference that he thought my client was guilty, he stated he could be fair." Santiago, 255 A.D.2d at 67.

The court reserved decision, and the next day, questioned the juror further. The juror explained he would not feel safe around his neighborhood after the trial was over. The juror confirmed he would vote guilty if the People proved their case beyond a reasonable doubt and not guilty if the case was not proven. The People again moved for the juror's

removal. Defense counsel opposed. The court again reserved decision. Santiago, 255 A.D.2d at 67.

After the eyewitness testified, the court returned to the juror. He stated he felt much better and could be fair and impartial to both sides. When asked if he felt a guilty vote would cause repercussions for him or his family, the juror replied, “[N]ot really, at this time because I’ve done some small research and there is a very slight chance that that may happen . You know, ask friends in cases like this. They told me it’s all right. Just go for it.” Santiago, 255 A.D.2d at 67-68. The court declined to excuse the juror, noting it was convinced the juror could be fair and impartial. Neither side objected to the court’s decision. Santiago, 255 A.D.2d at 67-68.

On appeal, Santiago argued the juror was “grossly unqualified,” and should have been replaced. Santiago, 255 A.D.2d at 67. The Court of Appeals noted initially that Santiago waived the argument by not objecting to the trial court’s decision. The court went on to note, however, that despite the juror’s initial reservations, it was clear from his repeated and clear assertions that he could render an impartial verdict. The court also noted there was no prejudice to Santiago by keeping the juror because any fear of retribution “could only have inured to defendant’s benefit.” Santiago, 255 A.D.2d at 68.

Like Santiago, Monson argues the trial court abused its discretion by not excusing the biased juror and replacing her with an available alternate. BOA at 12-15. However, unlike Santiago, Monson repeatedly requested the juror be excused. 10RP 17, 97. Indeed, unlike in Santiago, here the prosecutor acknowledged if juror 6 was affected by her fear, she might be more likely to convict. 10RP 16.

Furthermore, unlike the juror in Santiago, juror 6 was less certain she could remain neutral. The best she could do was say that she did not think her fear would affect her decision and that she thought it would be fair. 10RP 14.

In Cargill, the court discharged a juror upon her request during trial after telling the court her mother was moving into an apartment building in the same complex where the murder occurred and where the families of Cargill and his co-defendant lived. Though the juror indicated she could remain fair and impartial, she also stated she feared possible consequences for her and her mother if they were seen by the defendants' relatives. Cargill's co-defendant opposed discharging the juror since she stated she could remain fair and impartial. See Jameson v. Coughlin, 22 F.3d 427, 428 (2<sup>nd</sup> Cir.), cert. denied, 513 U.S. 888 (1994) (detailing facts of Cargill, 70 N.Y.2d 687, in denying co-defendant's petition for habeas corpus).

On appeal, Cargill argued the trial court erred in dismissing the juror. Coughlin, 22 F.3d at 428. The Court of Appeals agreed and ordered a new trial. Coughlin, 22 F.3d at 429 (citing Cargill, 70 N.Y.2d at 689).

The Court of Appeals' decision derived from its earlier holding in People v. Buford, 69 N.Y.2d 290, 506 N.E.2d 901 (1987), that New York's "grossly unqualified" standard for discharging a sworn juror required a trial court to extensively inquire as to whether a juror possesses a state of mind that prevents an impartial verdict. Coughlin, 22 F.3d at 428 (citing Cargill, 70 N.Y.2d at 688). The Court of Appeals concluded the trial court failed to conduct a sufficient inquiry to determine whether the juror could not remain impartial. Because the juror was discharged without such inquiry, the Court of Appeals ordered a new trial. Coughlin, 22 F.3d at 429 (citing Cargill, 70 N.Y.2d at 689).

Unlike in Cargill, Monson does not argue the trial court's inquiry was insufficient to determine whether Juror 6 was unable to render an impartial verdict. Rather, Monson argues the inquiry demonstrated the juror was biased against Monson and should have been excused. BOA at 12-15.

For the aforesaid reasons, the State's reliance on the cited cases is misplaced. Juror 6's comments and demeanor demonstrated she feared

Monson. The trial court abused its discretion by not excusing the biased juror and replacing her with an available alternate.

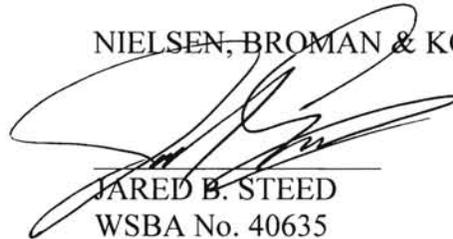
B. CONCLUSION

For the reasons discussed above and in the opening brief, this Court should reverse Monson's convictions and remand for a new trial.

DATED this 11<sup>th</sup> day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11<sup>TH</sup> DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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MONROE, WA 98272

*X*  
OCT 11 2013  
SNOHOMISH COUNTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF OCTOBER 2013.

*X Patrick Mayovsky*  
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