FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, **Respondent,** **v.** **BILLIE JO FELLAS,** **Appellant.**	**No. 30509-1-III** **Division Three** **UNPUBLISHED OPINION**

Sweeney, J. —This appeal follows convictions for delivery of a controlled substance and resisting arrest. The defendant was the object of a police-controlled drug buy. She claims the court should have conducted an evidentiary hearing on her motion for a new trial. She supported her motion with a number of claims. She claimed a witness was coached by a detective in the courtroom while the witness testified. She argued that a juror should have been challenged for bias because the juror knew the investigating detective. Finally, she argued that a witness should not have been allowed to remain in the courtroom and then testify. No one asked for an evidentiary hearing on these issues and the court correctly concluded that none was necessary. The court

properly denied a motion for a new trial. We then affirm the convictions.

FACTS

Detective Michael Grall worked undercover for the Washington State Patrol narcotics section. He was part of the Olympic Peninsula Narcotics Enforcement Team. And he supervised an operation where confidential informant Rhonda Zuzich bought drugs from Michelle Knotek. Police gave Ms. Zuzich $100 worth of marked bills.

Ms. Zuzich drove to Ms. Knotek's house and asked if she had any methamphetamine to sell. Ms. Knotek said she did not, but said she could get some from Billie Joe Fellas. Ms. Zuzich gave Ms. Knotek the $100. Ms. Knotek called Ms. Fellas and they met at a nearby park. Ms. Knotek got into Ms. Fellas' car and Ms. Knotek bought a small bag of methamphetamine. Ms. Knotek and Ms. Zuzich met up and Ms. Knotek gave Ms. Zuzich the methamphetamine.

Detective Grall arrested Ms. Knotek. Ms. Knotek agreed to work with police; she hoped to get into drug court. She told Detective Grall that she had bought the methamphetamine from Ms. Fellas. Detective Grall came to Ms. Fellas' apartment. He told her that she was under arrest. Ms. Fellas nonetheless tried to go back into her apartment to retrieve her shoes. Detective Grall grabbed her by the wrist and Ms. Fellas tried to pull away. Ms. Fellas also resisted going down the stairs outside her apartment.

Detective Grall and several other officers forced Ms. Fellas to walk down the stairs.

The State charged Ms. Fellas with delivery of a controlled substance, methamphetamine, and resisting arrest. The case proceeded to a jury trial and Ms. Knotek testified. Defense counsel's examination of Ms. Knotek focused on her deal with police. She testified that police agreed to recommend leniency in her possession case in exchange for her cooperation and truthful testimony.

The next day, defense counsel moved to dismiss the case and argued that Detective Grall had "coached" Ms. Knotek by "nodding his head yes or no, thereby coaching her to answer yes or no." Report of Proceedings (Aug. 10, 2010) (RP) at 6-7. Counsel reported that Ms. Fellas' relatives in the courtroom had witnessed this, but that court staff had not. The trial court reserved ruling and said that Ms. Fellas could impeach Ms. Knotek with testimony that she was coached. *Id.* at 11. Defense counsel again moved to dismiss after the State rested. The court said that the issue was one of witness credibility and denied the motion. The jury found Ms. Fellas guilty of both counts.

Ms. Fellas hired a new lawyer and she moved for a new trial. She filed three affidavits in support of the motion. Ms. Fellas recalled in her own affidavit that Ms. Knotek looked to Detective Grall for help answering questions during her testimony. She also said that, even though Ms. Knotek was subject to recall and actually recalled as a

witness, Ms. Knotek remained in the courtroom after her initial testimony. Finally, she remembered that her previous lawyer refused to challenge juror 29 for cause or use a peremptory challenge even though the juror was Detective Grall's friend. Two affidavits from a family member and a friend echoed Ms. Fellas' observations that Detective Grall coached Ms. Knotek. The trial court denied the motion for a new trial.

DISCUSSION

Evidentiary Hearing—Motion for New Trial

We review a court's decision to deny a motion for new trial for abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994).

The court may grant a motion for new trial "when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a). A defendant relying on facts outside the record must provide those facts by affidavit. *Id.*

The court may hold an evidentiary hearing when a defendant moves for a new trial[1] to "resolve genuine factual disputes." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Ms. Fellas urges that the court must hold an evidentiary hearing whenever a defendant moving for a new trial submits competent affidavits. Br. of Appellant at 11-12. But this is wrong for several reasons. First, the decision whether or not a hearing is necessary is discretionary with the trial judge who has to make the

[1] *See State v. Bandura*, 85 Wn. App. 87, 94, 931 P.2d 174 (1997).

decision. *See State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). Next, an evidentiary hearing is only required when there are facts that are material and disputed. *See Rice*, 118 Wn.2d at 886. A material disputed issue of fact does not necessarily arise every time a defendant files an affidavit in support of a new trial. Finally, it is hard to fault the judge for failing to hold an evidentiary hearing when no one asked for one.

Ms. Fellas by way of affidavits complained that (1) defense counsel did not move to strike juror 29 for cause despite juror 29's statement that he was good friends with Detective Grall, (2) Ms. Knotek was allowed to hear other witnesses' testimony and then testify herself, and (3) Detective Grall openly coached Ms. Knotek's testimony by nodding and shaking his head during her testimony.

Whether there was cause to challenge juror 29 was an issue of law that did not require the court to resolve material disputed facts. There is cause to challenge a juror if he has an actual or implied bias. *State v. Cho*, 108 Wn. App. 315, 321, 30 P.3d 496 (2001). And here there is no showing of either. The juror said he could be fair and impartial despite his relationship with the detective. There was then no actual bias. RCW 4.44.170(2) ("the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party

challenging”). And there were no grounds to support a challenge for implied bias. RCW 4.44.180.

The court also did not have to resolve any material disputed facts to pass on the propriety of Ms. Knotek remaining in the courtroom after she testified. Ms. Knotek did remain in the courtroom after she testified and the State recalled her during its rebuttal. But neither party moved to exclude witnesses until after Ms. Knotek had listened to other witnesses. Moreover, whether to exclude witnesses is up to the judge presiding over the proceedings. *State v. Johnson*, 77 Wn.2d 423, 428, 462 P.2d 933 (1969). The court was not required to sua sponte exclude witnesses. And a court would abuse its discretion if it prevented a witness from testifying because he or she remained in the courtroom in the absence of an order excluding witnesses. *See id.* (preventing a witness from testifying because he unknowingly violated an order excluding witnesses would be an abuse of discretion). Again, the court did not have to resolve any material disputed facts to pass on Ms. Fellas’ motion for a new trial.

Finally, the trial court did not need to resolve material disputed facts regarding Detective Grall’s alleged coaching. The allegations were unpersuasive for several reasons. First, all of the conduct complained of took place in open court in front of the judge, counsel, and court personnel. No one except Ms. Fellas’ friend and family saw

anything untoward. Second, the judge invited counsel to raise the matter during testimony before the jury. RP at 11. That approach would have most effectively addressed the problem, if one existed. Finally, Ms. Fellas argues that she was prejudiced because "if [Ms. Knotek] had answered to the contrary, the jury may have been swayed differently." Clerk's Papers at 29. This showing of prejudice is speculative to say the least.

The court then did not abuse its discretion by not calling for an evidentiary hearing. Nor was counsel ineffective for not requesting one.

Statement of Additional Grounds (SAG)

SAG 1. Initially, Ms. Fellas argues that the trial court should have held an evidentiary hearing on her motion for new trial and that defense counsel was ineffective for failing to ask for such a hearing. We have already addressed these issues.

Second, Ms. Fellas argues that the defense counsel was deficient because he failed to move for separate trials on the delivery and resisting arrest charges. Separate trials are, however, only appropriate when "there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). She suggests that the jury inferred that she was guilty of delivery of methamphetamine because it heard

evidence that she resisted arrest. Ms. Fellas makes no showing that the jury improperly inferred Ms. Fellas' guilt from the fact that she resisted arrest. And, given the factual circumstances here that may have been an appropriate inference in any event. 2 McCormick on Evidence § 263 (Kenneth S. Broun ed., 6th ed. 2000).

Third, Ms. Fellas suggests that there was insufficient evidence to convict her of resisting arrest. Resisting arrest required a showing that "she intentionally prevent[ed] or attempt[ed] to prevent a peace officer from lawfully arresting him." Former RCW 9A.76.040(1) (1975). The evidence showed Ms. Fellas tried to go back into her apartment when Detective Grall told her she was under arrest and that Detective Grall had to pull Ms. Fellas away from the apartment by her wrists. There was sufficient evidence to support a conviction for resisting arrest.

SAG 2. Ms. Fellas argues that her Sixth Amendment right was violated because a confidential informant gave hearsay testimony. However, Ms. Fellas does not direct us to any specific hearsay testimony or any objection.

Ms. Fellas also argues that the prosecutor improperly argued that she led Ms. Knotek to a secluded place to sell drugs. "The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) (citing *State v.*

Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). Ms. Fellas told Ms. Knotek to meet her at a park and Ms. Knotek got into Ms. Fellas' car to buy drugs. The prosecutor then did not inappropriately invite the jury to infer that Ms. Fellas led Ms. Knotek to a secluded place to buy drugs.

SAG 3 and 4. Ms. Fellas argues that a new trial was required because of Detective Grall's witness coaching and because Detective Grall's friend was on the jury. There is no need to address these issues again.

We affirm the convictions for delivery of a controlled substance, methamphetamine, and resisting arrest.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Korsmo, C.J.

Siddoway, J.