No. 99850-7
COA No. 37394-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CRISTIAN LUPASTEAN,

Petitioner

On Discretionary Review From Adams County Superior Court
and Ritzville District Court
The Hon. Steve B. Dixon, Presiding
The Hon. Dan Johnson, Presiding

PETITION FOR REVIEW

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A. INTRODUCTION

Minutes after the completion of jury selection for a reckless driving case in Ritzville District Court, a juror's husband approached the defense attorney in the courthouse lobby to try to hire him to handle his civil case involving an accident with an unlicensed driver. Upon inquiry, the juror admitted not divulging in *voir dire* her husband's recent accident case.

There are competing lines of precedent from this Court and the Court of Appeals as to whether the judge should have dismissed the juror. The Court of Appeals recognized these split of authority, and explicitly asked this Court to accept review:

> Although we reject the argument based on precedent, we value Cristian Lupastean's contention that an accused should benefit from full disclosure by all jurors before the accused exercises peremptory challenges. We would welcome Supreme Court review of this contention.

Slip Op. at 29.

This Court should accept this invitation, accept review under RAP 13.4(b)(1), (2), (3) and (4), and reverse Mr. Lupastean's convictions.

B. IDENTITY OF PETITIONER

Cristian Lupastean, the petitioner below, asks this Court to accept review of the Court of Appeals' decision terminating review set out in Part C, *infra*.

C. COURT OF APPEALS' DECISION

Mr. Lupastean seeks review of the decision in *State of Washington v. Cristian Lupastean*, No. 37394-1-III, an unpublished opinion from Division Three of the Court of Appeals, issued on May 6, 2021. A copy is attached in Appendix A.

D. ISSUES PRESENTED FOR REVIEW

1. Where a juror's misleading answer was brought to the attention of the court within minutes of the end of jury selection, should the convictions be reversed because of the deprivation of the opportunity to make intelligent decisions regarding peremptory challenges?

2. Must a juror's concealment be "dishonest" to warrant dismissal from the jury?

3. Is Justice Rehnquist's opinion in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984), binding on this Court, or should this Court follow its own prior precedent in cases like *Robinson v. Safeway Stores, Inc*., 113 Wn.2d 154, 776 P.2d 676 (1989)?

E. STATEMENT OF THE CASE

1. *Substantive Facts*

Erika Harvey testified that on January 27, 2018, she was driving a tractor-trailer truck on I-90 near Ritzville, in Adams County, headed east across the country. She was accompanied by Cristian Lupastean, whose father owned the trucking company. Ms. Harvey had a valid commercial driver's license, but Mr. Lupastean's license was suspended. Ms. Harvey said she exited the highway to use the restroom at a gas station. CP 139-48, 152-78.[1]

Washington State Patrol Trooper Antonio Olivas saw the truck go by and decided to pull it over for a routine inspection. He testified that it was Mr. Lupastean who was actually driving, and that Mr. Lupastean and Ms. Harvey changed places after the truck exited I-90. Trooper Olivas said that at the time they switched seats, the truck was rolling at a speed of 10 miles per hour towards some fuel pumps that were about 50 yards away. Given the weight of the truck, Trooper Olivas believed that it was dangerous if someone was not behind the wheel even at 10 mph. CP 97-138.

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[1] The transcripts from the district court can be found in the Clerk's Papers. CP 9-228.

2. *Procedural Facts*

By amended complaint, filed in Ritzville District Court, the State charged Mr. Lupastean with reckless driving, driving while license suspended in the first degree, and driving without a commercial license. After one hung jury, the case was retried on April 12, 2019, the Hon. Dan B. Johnson presiding.[2]

Judge Johnson began jury selection by reading the elements of the three charges. CP 45-46. Judge Johnson then asked if the potential jurors had "any personal experience with a similar or related type of case or incident as a victim, witness, or accused," and whether "any of you have a close friend or relative who has had experience with a similar or related type of case or incident? And that would be as a victim, witness, or accused." CP 49. A few jurors mentioned their own personal experiences or those of their family members with accidents or suspended license cases, including one at a rest stop, but assured the court they could be fair. CP 49-51. Juror No. 6 said nothing in response, and neither side exercised a peremptory or "for cause" challenge against her. CP 76-77. The defense used up all three of its peremptory challenges. CP 93.

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[2] Judge Johnson is the judge in Lincoln County District Court. The regular judge in Ritzville, the Hon. Adalia Hille, had recused herself from the case.

Immediately after jury selection, but before opening statements, defense counsel, Mr. James Kirkham, asked for a break to use the bathroom. CP 83. During the few minutes he was outside the courtroom, the husband of Juror No. 6 approached him and, as relayed by Mr. Kirkham, "he asked if I was an attorney, and then proceeded to ask about an incident that he had been involved in with regards to getting hit by an unlicensed driver in an accident, and his wife is on the jury." CP 84. Mr. Kirkham later stated, "He's asking if I'm an attorney so that they can try and recoup losses in an accident with an unlicensed driver." CP 92. Mr. Kirkham said he could not talk to the juror's husband any more, and immediately came back and informed the judge of the contact. CP 83-85.

Judge Johnson brought Juror No. 6 back for questioning. She said that a month earlier her husband was dropping the grandchildren off at school, and as he was coming home he was hit by driver who did not have his license. She did not reveal this in questioning because "they didn't go to court and he just got a ticket, I don't know, I assumed it would be okay. . . . So, since they didn't go to court, and my husband didn't get a ticket or nothing, I assumed, you know, it would be okay. So, I didn't bring it up to the judge's attention." CP 87-88. Although Juror No. 6 still felt she could be fair, she noted that they blamed her husband:

> since the kid, the young boy, had the right of way, and they blamed my husband for the accident, you know. And the young kid, it was a young boy, driving without a license, so I figured, you know, the way the situation happened, you know, it wasn't my husband's fault because he had made the turn, it was the other oncoming car that hit him on the side, you know. . . . It was just one of those accidents that happen.

CP 89.

Mr. Kirkham asked to disqualify Juror No. 6 and moved for a mistrial. Judge Johnson mulled over whether he should try to call back some of the jurors rather than re-doing jury selection and asked whether the defense would object. Mr. Kirkham wanted to do some research and the court took a brief recess. After the break, Judge Johnson denied the motion for a mistrial, concluding that the juror was not deliberately untruthful and that she could still be fair and impartial. CP 90-96.

The jury convicted Mr. Lupastean of all counts. CP 3-5. On June 12, 2019, the district court imposed sentence. CP 6-8. Mr. Lupastean appealed to Adams County Superior Court, but the Hon. Steve Dixon affirmed the convictions, following the plurality opinion in *McDonough Power Equip., Inc. v. Greenwood*, *supra*, and focusing on the "honesty" of the juror. CP 229.

Mr. Lupastean sought discretionary review in the Court of Appeals. On July 8, 2020, a commissioner granted review. The Court of Appeals then

issued an unpublished opinion on May 6, 2021, affirming the convictions. Mr. Lupastean now seeks review in this Court.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *The Court Should Take Review Because of the Conflicting and Confusing Lines of Cases About Juror Concealment*

a. Introduction

Juror No. 6 in this reckless driving and unlicensed driving case failed to disclose during *voir dire* the fact that her husband had recently been in accident with an unlicensed driver, and then her husband tried to hire the defense lawyer. Juror No. 6's concealment, whether "dishonest" or not, interfered with Mr. Lupastean's ability to exercise intelligent peremptory challenges. She also should have been dismissed due to actual or implied bias under CrRLJ 6.4(c)(1), RCW 2.36.110, and RCW 4.44.160 – .180.

Because of the timing of the discovery of the information that Juror No. 6 did not initially divulge, the district court had a number of options that would have minimal impact. The court could have dismissed the juror, and either recalled the recently discharged jurors for continued jury selection or summoned additional jurors pursuant to RCW 2.36.130. Alternatively, the judge should have declared a mistrial, with minimal expense given the one

hour of court time expended on jury selection.[3] However, by keeping Juror No. 6 on the jury, the district court violated Mr. Lupastean's rights to a fair jury trial, protected by the due process and jury trial right clauses of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.[4]

Resolution of Mr. Lupastean's claims, though, is complicated because, as explained below, there are conflicting lines of cases from this Court and the Court of Appeals applying what appear to be parallel legal standards, announced without reference to each other. This is all compounded by a confusing three-opinion decision in *McDonough Power Equip., Inc. v. Greenwood*, *supra*, a 1984 case from the United States Supreme Court case dealing with a federal rule of civil procedure.

This Court should accept review of this case and resolve the conflicting decisions, and construe what impact *McDonough* has on Washington law.

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[3] *See* CP 42, 83 (jury selection starts at 9:20 a.m.; recess was at 10:20 a.m.; discussion about Juror No. 6 begins at 10:36 a.m.).

[4] "Both the United States and Washington State Constitutions provide a right to trial by an impartial jury, which requires a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Munzanreder*, 199 Wn. App. 162, 174, 398 P.3d 1160 (2017) (internal quotations and citations omitted). *See also State v. Winborne*, 4 Wn. App. 2d 147, 420 P.3d 707 (2018) (failure to dismiss a juror who was a witness to the alleged crime was structural constitutional error). Additionally, peremptory challenges are "an important state-created means to the constitutional end of an impartial jury and a fair trial." *State v. Saintcalle*, 178 Wn.2d 34, 62, 309 P.3d 326 (2013) (Madsen, J., concurring) (internal quotation omitted).

b. The Fractured Decision in *McDonough*

McDonough involved a personal injury lawsuit against a lawnmower manufacturer for damages caused when a teenager's feet came into contact with the blades. After a three-week trial and a judgment for the defendant, the plaintiffs learned that a juror had failed to disclose that he had a son who had broken his leg due to a tire explosion. Although the Tenth Circuit reversed the denial of new trial motion based on the failure of the jury to reveal his son's accident, the U.S. Supreme Court reinstated the judgment. The decision generated three opinions authored by Justices Rehnquist, Blackmun and Brennan, all of whom voted to reverse the Tenth Circuit.

In *McDonough*, Justice Rehnquist's lead opinion (joined by Chief Justice Burger, Justice White and Justice Powell), construing only Federal Rule of Civil Procedure 61, would have held that a party seeking a new trial based on jury concealment had to demonstrate both (1) that the "juror failed to answer honestly a material question" and (2) that a correct response "would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556 (Rehnquist, J., opinion). Justice Rehnquist concentrated on the costs to the system by overturning a three-week jury trial "because of a juror's mistaken but honest response to a question." *McDonough*, 464 U.S. at 555 (Rehnquist, J., opinion).

On the other hand, five justices (Justices Blackmun, O'Connor, Stevens, Brennan and Marshall) joined in Justice Rehnquist's opinion with the caveat that under some circumstances a new trial could be granted even for honest answers if there was actual or implied bias. *McDonough*, 464 U.S. at 556-57 (Blackmun, J. concurring); *McDonough*, 464 U.S. at 557-58 (Brennan, J. concurring). Thus, the true majority in *McDonough* did not require proof that a juror was dishonest when not disclosing material facts, although many courts would rely simply on Justice Rehnquist's minority opinion as the holding of the case. *See, e.g.*, *State v. Briggs*, 55 Wn. App. 44, 50-52, 776 P.2d 1347 (1989) (quoting Justice Rehnquist's opinion as the "holding" of the Supreme Court, without mentioning the concurrences).

c. The Conflicting Lines of Cases in Washington

Due to the fractured court, the Court of Appeals noted in this case that since *McDonough* was issued in 1984, "state courts and lower federal courts have struggled to discern [its] holding." Slip Op. at 15. Some Washington decisions have uncritically accepted the two-part federal civil rule test announced by Justice Rehnquist (juror dishonesty and a basis for a challenge for cause) as "the law" in Washington, even in criminal cases under the Sixth Amendment and article I, sections 21 and 22. *See, e.g., In re Personal*

Restraint of Elmore, 162 Wn.2d 236, 266-269, 172 P.3d 335 (2007); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994); *In re Det. of Broten*, 130 Wn. App. 326, 336-37, 122 P.3d 942 (2005); *State v. Cho*, 108 Wn. App. 315, 320-24, 30 P.3d 496 (2001); *State v. Briggs*, *supra*.

In contrast, there are a series of cases from this Court and the Court of Appeals, both before and after *McDonough*, that for decades held that a juror's concealment, whether or not dishonest, interfered with the intelligent use of peremptory challenges and thus was a basis for a new trial. *See, e.g.*, *Robinson v. Safeway Stores, Inc.*, *supra*; *Gordon v. Deer Park Sch. Dist. 414*, 71 Wn.2d 119, 426 P.2d 824 (1967); *State v. Simmons*, 59 Wn.2d 381, 368 P.2d 378 (1962); *Smith v. Kent*, 11 Wn. App. 439, 523 P.2d 446 (1974).

Robinson affirmed the grant of a new trial in a negligence case where a juror did not disclose biases against those from California:

> A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. When the failure to respond in voir dire relates to a material question, the appropriate remedy is to grant a new trial.

Id. at 159.

Robinson relied heavily on *Smith v. Kent*, *supra*, where the Court of Appeals granted a new trial in a personal injury case after a juror had not

been completely forthcoming about his work experiences in *voir dire*. This interfered with exercise of the plaintiff's peremptory challenges:

> It is to be remembered, however, a false answer on a material matter, whether it relates to the prospective juror's bias and prejudice or whether it relates to other material matters, lures the litigant into a false sense of security, discourages further inquiry, and deprives a litigant of a fair, intelligent and adequate opportunity to challenge the juror either for cause or by way of peremptory challenge. An answer concerns a material matter if, for example, had the litigant known the truth of the matter, he could reasonably be expected to exercise a peremptory challenge if necessary to excuse the juror from serving. . . .

Smith v. Kent, 11 Wn. App. at 445.

Further, regarding the requirement of showing intentional concealment, there are cases, both from Washington and federal courts, which have explicitly not followed the minority position of Justice Rehnquist in *McDonough*, where a juror was biased even though they may not have been typically "dishonest." *See, e.g.*, *State v. Boiko*, 138 Wn. App. 256, 260-66 156 P.3d 934 (2007) (finding implied bias under CrR 6.4(c)(1) & RCW 2.36.110); *Porter v. Zook*, 898 F.3d 408, 431 (4th Cir. 2018) (dishonest includes not just "straight lies" but failure to disclose). *See also Williams v. Taylor*, 529 U.S. 420, 441-42, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (ordering evidentiary hearing based on juror concealment without even mentioning *McDonough*).

d. This Court Should Accept Review to Resolve the Conflicting Lines of Cases

The Court of Appeals noted cases like *Robinson v. Safeway Stores, Inc*., *supra*, but concluded: "Unfortunately for Cristian Lupastean, his appeal comes twenty-five years too late." Slip Op. at 28. Instead, the Court of Appeals relied on the other line of cases, such as *Lord*, *Elmore*, and the "majority of Washington court of appeals' decisions" that "employ the *McDonough* two-part test outlined by Justice Rehnquist without any modifications or stretching of the test's elements, when considering whether to grant a new trial based on alleged juror misconduct." Slip Op. at 24 (citing cases).

The Court of Appeals recognized that Mr. Lupastean "perspicaciously observes that the *Lord* court did not overrule *Robinson v. Safeway Stores, Inc*. The *Lord* decision did not even mention *Robinson v Safeway Stores*. Also, Lupastean notes that the *Lord* decision came in the context of a personal restraint petition, when the accused faces higher standards of review." Slip Op. at 28-29. Moreover, *Robinson v. Safeway Stores, Inc*. was issued in 1989, whereas *McDonough* was issued years earlier in 1984. Yet, as the Court of Appeals recounted, "Although the Washington Supreme Court decided *Robinson* after *McDonough Power Equipment, Inc. v.*

Greenwood, this state's high court did not mention the United States Supreme Court decision." Slip Op. at 27.

This Court does "not lightly set aside precedent." *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)). Accordingly, this Court will only overrule prior precedent if there is "a clear showing that an established rule is incorrect and harmful before it is abandoned." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). In part, because of this stringent test, this Court does not overrule past precedent *sub silentio*. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).

This Court has never overruled *Robinson v. Safeway Stores, Inc*., *supra*, and it is binding law in Washington. Indeed, in a 2016 civil case, this Court reaffirmed the holding of *Robinson*. In *Long v. Brusco Tug & Barge, Inc*., 185 Wn.2d 127, 368 P.3d 478 (2016), the Court held that juror declarations could not be used to attack a jury verdict because the

information addressed matters that inhered in the verdict. On the other hand, the Court noted:

> Had any jurors failed to disclose their relevant background, this may have been a basis for finding misconduct. *See Robinson v. Safeway Stores, Inc*., 113 Wn.2d 154, 158-59, 776 P.2d 676 (1989) (misconduct when venire member failed to disclose bias against Californians in personal injury action by a California resident); *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wn.2d 119, 121, 426 P.2d 824 (1967) (misconduct when venire member failed to disclose prejudice in favor of schoolteachers in a personal injury action against a schoolteacher).

Long v. Brusco Tug & Barge, Inc., 185 Wn.2d at 135 n. 5. It is apparent that this Court continues to believe that the cases relied on by Mr. Lupastean continue to be "the law" in Washington even though they were decided in the 1960s, 1970s and 1980s. *See also State v. Saintcalle*, 178 Wn.2d 34, 62, 309 P.3d 326 (2013) (Madsen, J., concurring) (citing *Smith v. Kent*, *supra*, with approval).

As noted above, the Court of Appeals was acutely aware of the divergent lines of cases and the lack of clarity in the law, and essentially asked this Court to accept review:

> Although we reject the argument based on precedent, we value Cristian Lupastean's contention that an accused should benefit from full disclosure by all jurors before the accused exercises peremptory challenges. *We would welcome Supreme Court review of this contention*.

Slip Op. at 29 (emphasis added). The Court should therefore accept review under RAP 13.4(b)(1), (2), (3) and (4).

2. *The Court Should Follow Earlier Precedent, Not Justice Rehnquist's Opinion in McDonough*

If this Court accepts review, it should follow its past binding precedent in *Robinson v. Safeway Stores, Inc*., *supra*, and earlier cases that held that juror concealment, whether or not dishonest, interfered with the ability to make intelligent peremptory challenges and thus was a basis for a mistrial or a new trial. The State will be unable to show that such cases are both incorrect and harmful so as to be overruled.

Justice Rehnquist's two-part test in *McDonough* essentially crept into Washington law. The earliest references to *McDonough* in Washington came in two Court of Appeals' decisions which have limited precedential value. *State v. Briggs*, *supra*, came out on July 31, 1989, a few days after *Robinson* issued on July 27, 1989, but never cited to it , and then actually reversed Mr. Briggs' conviction on other grounds so the discussion of *McDonough* was dicta. Division One's decision in *State v. Rempel*, 53 Wn. App. 799, 770 P.2d 1058 (1989), *rev'd on other grounds*, 114 Wn.2d 77, 785 P.2d 1134 (1990), was issued on April 10, 1989. Mr. Rempel filed his petition for review on May 10, 1989, more than two months *before* this Court issued

Robinson, and did not raise the issue in this Court, instead (successfully) challenging only the sufficiency of evidence for one count.

This Court's first discussion of *McDonough* was in *Lord*, where Justice Rehnquist's opinion was cited "briefly," without significant analysis. *See State v. Cho*, 108 Wn. App. at 323 (Cho's reliance on *Robinson* "might have merit were it not for the fact that the issue of the proper standard arose again in the Supreme Court, *albeit briefly*," in *Lord*) (emphasis added). The *Lord* Court unfortunately never discussed the concurring opinions in *McDonough* nor was there discussion about how Justice Rehnquist's opinion in *McDonough* rested on a construction of a federal rule of civil procedure, rather than a construction of (1) constitutional law, or (2) Washington law that had been in force for decades.

On the other hand, *Elmore* and *Lord* can be limited to their unique procedural postures, collateral attack proceedings filed years after the trial where the petitioner had a strict standard of review.[5] In contrast, this case involves a direct appeal where there was a near-contemporaneous challenge to Juror No. 6 in the trial court, and thus the costs and impact of a mistrial would have been minimal.

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[5] *See Elmore*, 162 Wn.2d at 269 ("that juror misconduct resulted in a complete miscarriage of justice.").

Lord and *Elmore* should also be limited to their particular facts. In *Lord*, an investigator spoke to a juror after the trial who informed him that contrary to his answers in *voir dire*, he had read press accounts of the case but had no in-depth knowledge of the case and had not formed any opinions. *Lord*, 123 Wn.2d at 312-13. One basis for decision in the case was the narrow ground that the investigator's declaration of what the juror told him was hearsay and therefore could not be the basis for PRP relief. Thus, the remaining brief discussion of *McDonough* was dicta. *Id*. at 313.

In *Elmore*, a juror failed to disclose two minor incidents of sexual contact that occurred to him when he was a child, neither of which involved the type of rape or violent crime involved in the case. A careful reading of *Elmore* reveals that this Court never actually addressed the issue of whether a juror's withholding of information needed to be intentionally dishonest and instead decided the case based on narrow grounds – that because the type of information withheld in *Elmore* had little to do with the facts of the case, any error was not material.[6]

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[6] The Court stated that a "claim of juror misconduct in this circumstance is more compelling when a juror is closely associated with a victim of the same type of offense as that being tried." *Elmore*, 162 Wn.2d at 268 (citing *City of Cheney v. Grunewald*, 55 Wn. App. 807, 780 P.2d 1332 (1989) (error not to excuse juror in DUI case whose niece was killed by intoxicated driver and who was a member of M.A.D.D.); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1 (3d Cir. 1957) (setting aside a robbery conviction where it was disclosed at post-trial hearings that a juror had earlier

(continued...)

This Court therefore need not overrule any of its own prior cases. Instead, it can limit *Elmore* and *Lord* to their facts and narrow procedural postures, and follow its past precedent in *Robinson* and earlier cases, precedent that is neither incorrect nor harmful.

Notably, in this case, the State has never argued that the holding of *Robinson* in any way created a burden on the courts or interfered with the goals of jury selection. It simply has argued that *Robinson* is no longer "the law" in Washington, a very different argument than one that points to some social cost to the rule announced in that case. *See Brief of Respondent* at 22-23. In contrast, a rule that promotes jury selection based on full disclosure of information is the opposite of "harmful" and should be continued to be applied in this State, whatever Justice Rehnquist's opinions were about the result under Federal Rule of Civil Procedure 61.

G. CONCLUSION

This Court should accept review under RAP 13.4(b)(1), (2), (3) and (4), and reverse Mr. Lupastean's convictions. Juror No. 6's concealment of her husband's accident with an unlicensed driver not only interfered with Mr.

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[6] (...continued)
been a robbery victim). *See also Allison v. Dep't of Labor & Indus*., 66 Wn.2d 263, 265, 401 P.2d 982 (1965) (granting new trial where juror denied he had ever suffered a back injury but later signed an affidavit that in fact he had had such an injury and suffered from back distress for many years).

Lupastean's ability to exercise an intelligent peremptory challenge, but she should have been disqualified for implied bias under CrRLJ 6.4(c)(1), RCW 2.36.110, and RCW 4.44.160 – .180. The failure to dismiss her (and selected another juror) or declare a mistrial violated Mr. Lupastean's right to a due process and a fair jury trial. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3, 21 & 22.

DATED this 3rd day of June 2021.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. CRISTIAN LUPASTEAN, Petitioner.	)	No. 37394-1-III UNPUBLISHED OPINION

FEARING, J. — We must decide whether a juror's incomplete and perhaps misleading answer to a question during voir dire constituted juror misconduct and whether any misconduct warrants a new trial for petitioner Cristian Lupastean. Unlike the settings addressed in most other reported decisions, the parties discovered the incomplete answer at the beginning of trial, and the trial court addressed the potential juror misconduct. We conclude that the trial court did not abuse its discretion when

refusing to dismiss the juror, and we affirm Lupastean's convictions. The juror did not intentionally mislead the parties, and the juror held no disqualifying bias.

FACTS

The jury needed to decide whether petitioner Cristian Lupastean or Erika Harvey drove a truck when Trooper Antonio Olivas spotted the truck on January 27, 2018, at 2:50 p.m., on I-90 in Adams County. Both Harvey and Lupastean then occupied the truck. Lupastean's father owned the trucking company that owned the truck. Harvey had a valid commercial driver's license, but Lupastean's license was suspended.

During trial both Erika Harvey and Cristian Lupastean testified that Harvey drove the truck. Harvey averred that she exited the interstate to use the restroom at a gas station because she felt sick. She saw the emergency lights of Trooper Antonio Olivas's vehicle only after she took the exit ramp and brought the truck to a stop near the gas station. She had not earlier noticed the presented of the law enforcement vehicle.

Trooper Antonio Olivas works for the Washington State Patrol's commercial vehicle division. At the identified time, Trooper Olivas observed the truck, in which Erika Harvey and Cristian Lupastean traveled, pass him. Olivas testified that Lupastean, not Harvey, drove the truck.

Trooper Antonio Olivas decided to stop the truck for a routine inspection, and he turned on his emergency lights. The vehicle exited the freeway onto a ramp and continued toward a gas station. Trooper Olivas grew curious as to why the truck did not

stop, and he peered into the truck's mirrors to observe the driver. He observed Lupastean and Harvey switch seats, with Harvey assuming the driver's seat. At the time the two switched seats, Olivas estimates that the truck traveled at 10 miles per hour toward gas station fuel pumps fifty yards away. Trooper Olivas testified that a vehicle of that size traveling at ten miles an hour could be dangerous.

PROCEDURE

The State of Washington charged Cristian Lupastean, in district court, with driving while license revoked in the first degree, driving without a commercial license, and reckless driving.

At the beginning of voir dire, the trial judge listed the three charges and read the elements of each charge. He informed the jury that the State charged Cristian Lupastean with driving while having a revoked license in the first degree:

> A person commits the crime of driving while license revoked in the first degree when he or she, having been found by the Department of Licensing, to be a habitual traffic offender, drives a motor vehicle while an Order of Revocation is in effect.

Clerk's Papers (CP) at 45. He then read the elements of the second charge, driving without a commercial driver's license. The trial court declared that a person commits this crime when, "at the time of the driving, he or she does not have a valid commercial driver's license." CP at 46. Finally, the court explained that the third charge for reckless

driving occurs when a driver "drives a motor vehicle in willful or wanton disregard for the safety of persons or property." CP at 46.

After listing the charges and their respective elements, the district court asked all members of the venire:

> Have any of you had any personal experience with a similar or related type of case or incident as a victim, witness, or accused?

CP at 49. One potential juror responded affirmatively, and the rest responded in the negative.

The district court next asked:

> Do any of you have a close friend or relative who has had experience with a similar or related type of case or incident? And that would be as a victim, witness, or accused.

CP at 51. Three jurors responded affirmatively. One commented that a brother-in-law was in an accident when the other driver was unlicensed. Another noted that his brother had his driver's license revoked and the brother was arrested for driving while under the influence of alcohol (DUI). The third venire person recounted that a child had received a DUI. The district court noted on the record negative responses from other jurors to the question.

The State questioned venire juror 14 on her ability to evaluate a case based on testimony. Defense counsel exercised all available peremptory challenges. Venire juror number 14 was seated as juror number 6. We hereafter refer to this juror as juror 6.

After the district court swore in the jury, the district court ordered a brief recess. After the recess, defense counsel informed the trial court that the husband of juror 6 approached him and told him that his car had been hit by an unlicensed driver. According to counsel:

> He [the juror's husband] asked if I was an attorney, and then proceeded to ask about an incident that he had been involved in with regards to getting hit by an unlicensed driver in an accident, and his wife is on the jury.

CP at 84. Counsel explained that the husband wanted to recoup his losses in the accident with the unlicensed driver. According to defense counsel, he informed the man that he could not speak with him during the trial.

After the disclosure by defense counsel, the district court summoned juror 6 into the courtroom for questioning. The following colloquy ensued:

> THE COURT: And it has come to the Court's attention that apparently your husband has been involved in an automobile accident?
> JUROR NO. 6: Yeah, this was about a month ago, but it didn't go to court or nothing.
> THE COURT: Okay. And as far as that accident, do you think that would affect your ability to be fair and impartial in this case?
> JUROR NO. 6: Oh, yeah.
> THE COURT: You think it would affect you?
> JUROR NO. 6: No, it wouldn't affect me. I would be fair.
> THE COURT: Okay. Be a fair juror?
> JUROR NO. 6: No, yeah, I would be fair.
> THE COURT: All right. Any further questions from the State or the defense?
> MS. RUSSELL [the State's attorney]: No. Thank you, Your Honor.
> MR. KIRKHAM [defense counsel]: Yes, Your Honor. Ms. Castro, what do you know about that accident?

JUROR NO. 6: Well, I wasn't with him when it happened.

MR. KIRKHAM: Okay.

JUROR NO. 6: But he was dropping off my grandkids at school, and when he dropped off the last one—I'm just thinking in my head of what he told me—that he was coming home and he was making a left turn and there was an oncoming car and it hit him.

MR. KIRKHAM: Okay. Do you know if the other driver was cited or not?

JUROR NO. 6: The other driver didn't have his driver's license.

MR. KIRKHAM: Okay. And earlier when we had everybody in here the judge was asking some questions, and one of the questions had to do whether you or a family member had been involved in a similar incident that's alleged here, and you didn't answer to that. Is that correct?

JUROR NO. 6: Well, yeah, because I didn't think, you know—since they didn't go to court and he just got a ticket, I don't know, I assumed it would be okay.

MR. KIRKHAM: Okay. That gentleman was charged with driving without a license?

JUROR NO. 6: I don't know what happened to the other gentleman that hit my husband. All I know that he didn't have no driver's license.

MR. KIRKHAM: He didn't have a license?

JUROR NO. 6: He didn't have a driver's license.

MR. KIRKHAM: Okay. And the allegations here are that my client was driving without a license. You understood that, correct?

JUROR NO. 6: Yeah, uh-huh.

MR. KIRKHAM: Do you think that those are two similar incidences?

JUROR NO. 6: He was driving without a license?

MR. KIRKHAM: That's the charge.

JUROR NO. 6: Yeah, they're the same, the same, because the other young—it was a young kid and he was driving without a license, a young kid.

MR. KIRKHAM: Okay.

JUROR NO. 6: So, since they didn't go to court and my husband didn't get a ticket or nothing, I assumed, you know, it would be okay. So, I didn't bring it up to the judge's attention.

MR. KIRKHAM: Right.

JUROR NO. 6: Yeah.

> MR. KIRKHAM: And I understand why you didn't bring it up. I'm not mad at you or anything.
>
> JUROR NO. 6: Oh, okay.
>
> . . . .
>
> JUROR NO. 6: Well, yeah, when he was asking that question I was thinking behind my head. I go, well, it didn't go to court, my husband didn't get a ticket. I assumed it would be okay, but I thought in my mind.

CP at 85-88.

The prosecuting attorney then asked juror 6 some questions:

> MS. RUSSELL: Ms. Castro, it didn't seem similar to you, is that why you didn't raise it with us?
>
> JUROR NO. 6: Yeah, yeah, yeah.
>
> . . . .
>
> JUROR NO. 6: Yeah, yeah, my husband was just involved. It wasn't—they blamed my husband since the kid, the young boy, had the right of way, and they blamed my husband for the accident, you know. And the young kid, it was a young boy, driving without a license, so I figured, you know, the way the situation happened, you know, it wasn't my husband's fault because he had made the turn, it was the other oncoming car that hit him on the side, you know.
>
> MS. RUSSELL: And it didn't involve a truck, or reckless driving, or anything like that?
>
> JUROR NO. 6: No, no, no.
>
> MS. RUSSELL: Okay.
>
> JUROR NO. 6: It was just one of those accidents that happen.
>
> MS. RUSSELL: Thank you.
>
> JUROR NO. 6: So, that's why I didn't bring it up to attention because my husband didn't get no ticket, he didn't even go to court. It's like, well, you know.
>
> MS. RUSSELL: So, you still think you can be fair?
>
> JUROR NO. 6: Oh, yeah. Yeah, that's why I brought it up when I brought it up to the gentleman. I thought, well, I'll be fair, you know.

CP at 89-90.

Defense counsel moved to disqualify juror 6 and for a mistrial. Counsel conceded that he did not believe that the juror deliberately failed to disclose information. Nevertheless, counsel asserted that the juror still failed to correctly answer the court's question regarding family members impacted by unlicensed drivers. No additional juror had been selected as an alternative juror, although the court considered returning a recently excused juror to take juror 6's place. The State registered no objection to summoning a belated alternate, although the State did not deem an alternate necessary.

After a recess, the trial court announced its ruling on the defense's motion to disqualify juror 6 or a new trial. The court found that juror 6 did not deliberately fail to disclose requested information. Defense counsel repeated that he did not allege a deliberate failure to disclose. The trial court declined to disqualify juror 6 because she did not deliberately mislead the parties or the court and she declared her ability to be fair and impartial. The district court also denied a motion for a mistrial.

The jury convicted Cristian Lupastean on all three counts. Lupastean appealed to the Adams County Superior Court. The superior court affirmed. We granted discretionary review of the superior court's decision.

LAW AND ANALYSIS

On appeal, Cristian Lupastean repeats his contention that the district court erred when it failed to excuse juror 6. He contends that the continued seating of juror 6 violated due process of law and his right to a jury trial as stated in the Sixth and

Fourteenth Amendments to the United States Constitution and article I, sections 3, 21, and 22 of the Washington State Constitution. Lupastean again concedes that juror 6 honestly answered the pertinent voir dire question, but argues that the answer was misleading. According to Lupastean, the misleading answer prevented his counsel from inquiring further as to the bias of juror 6 and also prevented him from exercising a peremptory challenge of juror 6. According to Lupastean, the district court should have either declared a mistrial or selected another juror.

Implied and Actual Juror Bias

Although Cristian Lupastean seeks reversal on constitutional grounds, his argument necessitates our listing of the reasons for disqualifying jurors for bias and identifying the difference between actual and implied bias for purposes of juror removal. Lupastean contends juror 6 possessed both actual and implied bias.

A number of Washington statutes address removal of potential jurors for bias. RCW 4.44.170 states:

> Particular causes of challenge are of three kinds:
> (1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as *implied bias*.
> (2) For 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 which is known in this code as *actual bias*.
> (3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of

> performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

(Emphasis added.) RCW 4.44.190 addresses "actual bias:"

> A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he or she may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

RCW 4.44.180 defines "implied bias:"

> A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:
>
> (1) Consanguinity or affinity within the fourth degree to either party.
>
> (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
>
> (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
>
> (4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

Cristian Lupastean contends that, because of juror 6's husband's accident with an unlicensed driver, juror 6 had hostility toward Lupastean, an alleged unlicensed driver. Lupastean adds that the juror eventually agreed that the facts underlying the prosecution of Lupastean possessed similarities to her husband's accident in that both involved a

purported unlicensed driver. Based on these facts and the juror's concession, Lupastean contends juror 6 possessed actual bias against him. We disagree.

Actual bias under RCW 4.44.170(2) and RCW 4.44.190 consists of a state of mind that the juror cannot shed and that prevents a juror from impartially trying a case. Few similarities arise between juror 6's husband's accident and the driving by Cristian Lupastean without a license. The trial court and counsel questioned juror 6, after the husband talked to defense counsel. Based on the questioning, the trial court could reasonably conclude that juror 6 carried no actual bias against Lupastean. We defer to the trial court's finding because the trial court is in the best position to observe a juror's testimony and determine whether he or she may try a case impartially. *State v. Perez*, 166 Wn. App. 55, 67, 269 P.3d 372 (2012).

Under RCW 4.44.180, a juror holds implied bias if related familially to a party, possesses some economic relationship with a party, served as a juror on a case involving identical facts, or has an "interest" in the subject matter of the suit. Lupastean contends the trial court should have dismissed juror 6 under either subsection 2 or 4 of the statute. Subsection 2 directs excusal of a juror who is the legal client of a party. According to Lupastean, his defense counsel was a potential attorney for juror 6's husband and, because Washington is a community property state and the husband wanted payment for the damage to the couple's car, defense counsel was a potential attorney for the juror. We observe that any such relationship with defense counsel could create bias in favor of

defense counsel and his client, Cristian Lupastean, rather than bias against Lupastean. Nevertheless, RCW 4.44.180(2) demands removal only if the juror's attorney is a party, not if the juror's attorney is an attorney for a party in the lawsuit. Also, juror 6's husband never hired defense counsel, so no attorney-client relationship developed. Defense counsel immediately ended any discussion of the husband's potential case.

Cristian Lupastean may contend that juror 6 possessed an "interest" in the subject matter of the prosecution because the juror and her husband sought recovery for damages against an unlicensed driver. Nevertheless, the "interest" mentioned in RCW 4.44.180(4) means a direct pecuniary interest in the subject matter of the pending case or in the financial condition of a party. *Dean v. Group Health Cooperative of Puget Sound*, 62 Wn. App. 829, 835-36, 816 P.2d 757 (1991). Juror 6 possessed no interest in the economic wellbeing or harm of Lupastean or in a successful prosecution of Lupastean.

Because a great variety of fact patterns can arise, a trial court possesses a measure of discretion in determining what constitutes an "interest" within the meaning of RCW 4.44.180(4), and its ruling should not be disturbed on appeal absent abuse of that discretion. S*tate v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987); *Carle v. McChord Credit Union*, 65 Wn. App. 93, 108, 827 P.2d 1070 (1992). The trial court did not err when denying removal of juror 6 because of an alleged interest in the subject matter of the prosecution.

Constitutional Right to Fair Jury

We move to our constitutional analysis. Under both the United States and Washington State Constitutions, the right to trial by jury must be preserved and remain inviolate. *State v. Boiko*, 138 Wn. App. 256, 260, 156 P.3d 934 (2007); U.S. CONST. amend. VI; CONST. art. I, § 21. The right to trial by jury requires a trial by an unbiased and unprejudiced jury and one free from juror misconduct. *State v. Boiko*, 138 Wn. App. at 260. A juror's failure to speak during voir dire regarding a material fact can amount to juror misconduct. *In re Detention of Broten*, 130 Wn. App. 326, 337, 122 P.3d 942 (2005).

Cristian Lupastean rests his appeal on purported misconduct of juror 6 when failing to disclose her husband's recent accident with an unlicensed driver. We must address whether juror 6 engaged in misconduct and, if so, whether Lupastean must show prejudice resulting from the misconduct. In doing so, we must discern whether juror 6 provided a false, misleading, or incomplete answer and her state of mind when answering. We must also discern whether, assuming juror 6 gave an inappropriate answer, Lupastean must show some form of underlying bias, and, if so, actual bias or implied bias. Our previous conclusion that juror 6 suffered no disqualifying bias creates an obstacle to Cristian Lupastean's success on his constitutional argument.

The law about inaccurate answers during voir dire is discombobulated and lacks any unifying and comprehensive rule. The scattered condition of the law renders an organized analysis difficult and prolongs this opinion.

McDonough Two-Part Test

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984), remains the nation's leading decision with regard to alleged juror misconduct when incompletely or inaccurately answering a question during voir dire. Although the decision arose from a civil trial, criminal courts apply the same test emanating from the decision. Few states have diverged from the United States Supreme Court decision when applying state constitutional provisions. Washington State follows United States Supreme Court precedent.

In *McDonough Power Equipment, Inc. v. Greenwood*, Billy Greenwood brought a products liability lawsuit against McDonough Power Equipment for injuries sustained when his feet struck a lawnmower blade. During voir dire, the district court questioned members of the venire:

> "Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?"

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 550. Venire juror Ronald Payton did not respond. After a three-week trial and a jury verdict in favor of the

manufacturer, Greenwood learned that juror Payton failed to disclose that his son had sustained a leg injury from a tire explosion. The juror did not believe that his son's injury resulted in a "disability or prolonged pain and suffering." Greenwood moved for a new trial, which the district court denied.

On appeal, in *McDonough Power Equipment, Inc. v. Greenwood*, the Tenth Circuit reversed and ordered a new trial on the basis that Ronald Payton failed to respond affirmatively to the district court's inquiry. The circuit Court of Appeals reasoned that the juror's failure to disclose his son's injury prejudiced Greenwood and impacted his right to raise a peremptory challenge.

The United States Supreme Court, in a fractured opinion, reversed the appeals court in *McDonough Power Equipment, Inc. v. Greenwood*. Since then, state courts and lower federal courts have struggled to discern the holding in *McDonough Power Equipment, Inc.* In the lead opinion, then Associate Justice Rehnquist wrote for himself and three other members of the court that "respondents are not entitled to a new trial unless the juror's failure to disclose denied respondents their right to an impartial jury." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 549. Justice Rehnquist based his opinion on Federal Rule Civil Procedure 61, which reads that a district court order should not be set aside or a new trial granted unless a defect within that order renders the denial of such action inconsistent with substantial justice. Justice Rehnquist

announced a two-part test to determine whether a juror's failure to answer a question during voir dire deprives a party of the right to a fair trial:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556. Under the lead opinion, the defendant must show that the juror lied and a correct answer would have established disqualification based on bias.

In Justice Blackmun's concurring opinion, in which two other justices joined, he agreed that "the honesty or dishonesty of a juror's response is the best indicator of whether the juror in fact was impartial." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 556 (Blackmun, J. concurring). Nevertheless, he stated:

> I write separately to state that I understand the Court's holding not to foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury. Thus, regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 556-57 (Blackmun, J. concurring). According to Justice Blackmum, a finding that the juror lied is not essential to demonstrating bias and gaining a new trial.

Justice Brennan, joined by Justice Marshall, concurred in the judgment only. Justice Brennan agreed with the lead opinion that a juror's failure to provide a complete answer would not always warrant a new trial. He considered honesty only a factor in determining whether a juror is biased:

> In my view, the proper focus when ruling on a motion for new trial in this situation should be on the bias of the juror and the resulting prejudice to the litigant. More specifically, to be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. at 557-58 (Brennan, J. concurring). Justice Brennan's views may echo Justice Blackmun's decision rather than generating a third test.

Cristian Lupastean contends that the two-part test promoted by Justice Rehnquist in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) is not the exclusive test for determining whether to grant a new trial based on alleged juror misconduct. In turn, Lupastean argues that intentional concealment and disqualifying juror bias are not always required to obtain a new trial. In so arguing, Lupastean contends other federal decisions modify the two-part test, Washington decisions modify the test, and the two-part test's interference in his right to exercise peremptory challenges should lead this court to modify the test. We address these arguments in such order.

Other Federal Decisions

Cristian Lupastean relies on *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) and *Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018) in support of his position that a court's consideration of whether to grant a new trial is not limited to the *McDonough* test. Further, he insists that federal courts have indicated that Justice Rehnquist's reference to "honesty" should encompass misleading answers regardless of the intent of the juror.

In *Williams v. Taylor*, 529 U.S. 420 (2000), the United States Supreme Court considered whether to grant state prisoner Michael Wayne Williams' petition for federal habeas corpus relief in the form of an evidentiary hearing on a claim of juror bias. The district court asked whether jurors were related to any prospective witnesses or whether they were ever represented by counsel for either of the parties. Venire juror Bonnie Stinnett indicated a no response, and she later sat on the jury that convicted Williams. Williams later learned that Stinnett, although now divorced, had a seventeen-year marriage with the sheriff deputy who investigated the scene of the crime, interrogated an accomplice in the case, and became the prosecution's first witness. The prosecuting attorney also formerly represented Stinnett in the divorce case. Stinnett explained she remained silent to the voir dire question because she was no longer related to the sheriff deputy, and she believed the prosecuting attorney represented neither her husband nor her during the divorce proceeding as neither party contested the divorce.

The United States Supreme Court, in *Williams v. Taylor*, determined that the juror's silence in response to questions on voir dire was misleading. With regard to the first question, although not technically related, "her silence after the first question was asked could suggest to the finder of fact an unwillingness to be forthcoming; this in turn could bear on the veracity of her explanation for not disclosing that Woodson had been her attorney." *Williams v. Taylor*, 529 U.S. at 441. With regard to the second question, the Court concluded that Stinnett failed to disclose material information and her failure to disclose the information was "misleading as a matter of fact." *Williams v. Taylor*, 529 U.S. at 442. The U.S. Supreme Court found that an evidentiary hearing should be held for Williams to expose Stinnett's potential bias.

The unanimous decision in *Williams v. Taylor* suggests that, under some circumstances, the challenger to the jury verdict need not show that the juror intentionally lied when answering a voir dire question. The *Williams* Court never mentioned *McDonough Power Equipment, Inc. v. Greenwood*.

In *Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018), a capital murder case, a jury convicted Thomas Porter of killing law enforcement officer Stanley Reaves. In a federal habeas petition, Porter raised theories of juror bias based on actual bias and a juror's failure to disclose under *McDonough Power Equipment, Inc. v. Greenwood*. Defense counsel asked members of the jury if a family member had ever worked as a law enforcement employee. In response, juror Bruce Treakle disclosed that his nephew

worked as a police officer. He stated that the relationship would not affect his ability to be impartial. After the verdict, the juror revealed that he found testimony from Reaves' wife emotional because he had a brother who worked in law enforcement. The brother worked as a deputy sheriff in the jurisdiction adjacent to where the crime occurred.

In *Porter v. Zook*, the Fourth Circuit concluded that *McDonough Power Equipment, Inc. v. Greenwood* and *Williams v. Taylor* presented two distinct tests for a new trial based on a juror's answer to questioning. The court suggested that *Williams v. Taylor* applied to a prosecution when the juror held actual bias; whereas, *McDonough Power Equipment, Inc. v. Greenwood* applied in instances of alleged implied bias. If the accused claims implied bias, the accused must show juror misconduct under *McDonough*. In an actual bias claim, the accused could succeed regardless of whether the juror intentionally lied. Despite so analyzing *Williams* and *McDonough*, the court stretched the coverage of *McDonough*'s analysis of implied bias to something more than intentional lying.

The court, in *Porter v. Zook,* first addressed the actual bias claim stating the juror not only failed to disclose that his brother worked in law enforcement, but also informed counsel that he found witness testimony emotional and had sympathy for law enforcement because his brother worked as a law enforcement officer. The Fourth Circuit held that an evidentiary hearing should be held on the claim of actual bias.

The Fourth Circuit, in *Porter v. Zook*, next addressed the *McDonough* claim. The circuit court of appeals held that the lower courts failed to reasonably apply *McDonough* when they concluded that the juror responded honestly. The lower court reasoned that the juror acknowledged that he had a nephew in law enforcement and that he simply was not asked if he had additional relationships to law enforcement officers. The court of appeals stated: "[We] have viewed the 'honesty' aspect of the first *McDonough* prong as encompassing not just straight lies, but also failures to disclose." *Porter v. Zook*, 898 F.3d at 431. The court ordered an evidentiary hearing in order to determine whether further follow up questions stemming from a correct answer, that the juror's brother worked in law enforcement, would provide a basis for a challenge for cause.

We have written at length considering United States Supreme Court jurisprudence because of the many arguments forwarded by Cristian Lupastean and the slim distinctions posited by Lupastean when advocating for a new trial and because we wish to show that we analyzed the arguments and distinctions. Nevertheless, under either the *McDonough Power Equipment, Inc. v. Greenwood* rule or the *Williams v. Taylor* rule, Lupastean's appeal fails. Under *McDonough Power Equipment, Inc. v. Greenwood*, juror 6 did not intentionally lie, and the juror held no implied bias. Any failure to disclose by juror 6 lacks the egregious nature of the juror's misleading comments in *Porter v. Zook*.

Under *Williams v. Taylor*, juror 6 may have failed to fully disclose facts or provided an unintentionally misleading answer. But, the juror possessed no actual bias as

found by the trial court. Unlike in the reported decisions, the error was caught immediately after selection of the jury, and the trial court and counsel questioned the juror concerning her response and her potential bias. Juror 6 eventually made a full disclosure and that disclosure did not supply a valid basis for a challenge for cause.

Washington Decisions

In attempt to convince this court to reject the teachings of *McDonough Power Equipment, Inc. v. Greenwood* and to expand the circumstances under which the accused can gain a new trial, Cristian Lupastean cites numerous Washington decisions. We discuss at length his principal cited decision, *State v. Boiko*, 138 Wn. App. 256 (2007), and briefly mention other cited opinions. We conclude that Washington decisions do not assist Lupastean.

In *State v. Boiko*, this court described the *McDonough* test as requiring a party to show that (1) the juror intentionally failed to answer a material question, and (2) a truthful disclosure would have provided a valid basis for a challenge for cause. This court then acknowledged that the majority opinion in *McDonough* was written by concurring Justice Blackmun, not the lead opinion of Justice Rehnquist. This court stated that, instead of establishing intentional concealment, when a juror's responses on voir dire do not demonstrate actual bias, in exceptional cases the courts will draw a conclusive presumption of implied bias from the juror's factual circumstances.

In *State v. Boiko*, this court affirmed the trial court's decision that implied bias existed as a matter of law. After entry of the verdict, the defense learned that juror 31 was married to a key prosecution witness. She also applied for a job with the prosecutor a year earlier, and she was involved in ongoing litigation with prosecuting counsel in a separate case. Juror 31 disclosed some facts in her juror questionnaire which should have encouraged further questioning from either party's counsel. Nevertheless, during voir dire, no one inquired, and juror 31 did not volunteer that she was married to a witness for the prosecution. The trial court concluded that she had not failed to make material disclosures, although she could have volunteered more information. The trial court did not apply the *McDonough* test. Instead, it concluded juror 31's relationship with a key witness demonstrated implied bias as a matter of law. The trial court granted Boiko a new trial.

In *State v. Boiko*, this court affirmed the trial court's holding. This court wrote:

> The peculiarities arising in this situation were numerous, complex, and fairly considered by the trial court implying bias and ordering a new trial. The nature of juror 31's marital circumstances could inject any number of positive or negative emotions from the juror, whether conscious or not, that may manifest in supportive or obstructive reactions.

State v. Boiko, 138 Wn. App. at 264.

State v. Boiko stands for the proposition that an accused may gain a new trial in exceptional circumstances. Nevertheless, the trial court found implied bias as a matter of law and this court affirmed the finding. Lupastean does not advocate his case as

exceptional. He concedes he does not show implied bias under the terms of RCW 4.44.180. He asks this court to extend a reading of RCW 4.44.180(2) to encompass the alleged bias held by juror 6. We decline this request particularly since the trial court found that juror 6 did not answer dishonestly. We also decline the request because the majority of Washington court of appeals' decisions employ the *McDonough* two-part test outlined by Justice Rehnquist without any modifications or stretching of the test's elements, when considering whether to grant a new trial based on alleged juror misconduct. *State v. Cho*, 108 Wn. App. 315, 321, 30 P.3d 496 (2001); *State v. Briggs*, 55 Wn. App. 44, 52-53, 776 P.2d 1347 (1989); *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991); *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 141, 856 P.2d 746 (1993); *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991).

Our high court has ruled that any misleading or false answers during voir dire require reversal only if accurate answers would have provided grounds for a challenge for cause. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994). When a juror fails to disclose information during voir dire, a new trial is warranted when the information withheld is material and a truthful response would have provided a basis for challenge for cause. *State v. Carlson*, 61 Wn. App. 865, 878 (1991).

We deem a Washington Supreme Court decision, *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 266-269, 172 P.3d 335 (2007), not *State v. Boiko*, controlling. The Supreme Court considered the personal restraint petition of Clark Elmore. Elmore

challenged his conviction for aggravated first degree murder and rape of his stepdaughter. He argued that he deserved a new trial based on a juror's failure to disclose two incidents, during which another boy touched him sexually.

In *In re Personal Restraint of Elmore*, Juror number 12 answered "no" to two inquiries on his juror questionnaire. The first question asked whether he or friends or relatives had been the victim of a crime, whether or not reported. The second question queried whether he or friends or relatives were the victim of a sexual offense. After the jury read its verdict, defense investigators questioned the juror and he disclosed that he had been sexually molested as a child. He insisted, however, that he had not recalled the incidents until questioned and he believed that neither incident constituted illegal conduct. In evaluating whether to grant a new trial, the state high court relied on the test outlined in *McDonough*. The court stated that the first obstacle faced by Clark Elmore was showing that the juror's late disclosed answer was material. The court observed that both incidents were minor and differed significantly from the murder and rape charges in the case before it. "Thus, even assuming that Juror 12 had disclosed the two prior incidents, given the minimal nature of the sexual contact Elmore cannot demonstrate that the answers would have supported a challenge for cause as required by *McDonough*." *In re Personal Restraint of Elmore*, 162 Wn.2d at 269 (2007). The *Elmore* factual background holds more similarities to Cristian Lupastean's appeal than does the background in *State v. Boiko*.

Peremptory Challenge

In his appeal, Cristian Lupastean astutely emphasizes that juror 6's failure to disclose information precluded him from making an intelligent peremptory challenge. By the time the juror's full disclosure occurred, Lupastean had already exercised all of his peremptories. He correctly observes that a party may use a peremptory challenge to exclude a juror for reasons that do not rise to the level of bias. *State v. Briggs*, 55 Wn. App. 44, 51 (1989).

Historically, Washington case law permitted a party a new trial if he or she was foreclosed from exercising peremptory challenges. *State v. Simmons*, 59 Wn.2d 381, 392, 368 P.2d 378 (1962). In *State v. Simmons,* the Washington State Supreme Court stated:

> Where a person serves on a jury who, if not excused for cause, would certainly have been peremptorily challenged if certain questions on *voir dire* had been answered truthfully, it was [sic] been held to be an abuse of discretion not to grant a new trial.

State v. Simmons, 59 Wn.2d at 392.

Cristian Lupastean relies on *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 776 P.2d 676 (1989). Plaintiff Marie Robinson, a California resident, was concerned about bias from Washington jurors. Her counsel questioned potential jurors about their ability to be fair to a Californian resident. The future jury foreman responded that the fact that the plaintiff was from California would not affect his ability to be fair. He acknowledged

involvement in a divorce lawsuit, however, he did not disclose involvement in any other case. During deliberations, the foreman asserted that Californians like to sue and do so all the time. After the verdict, he disclosed that he was a defendant in a lawsuit involving a car accident brought by a Californian. The state Supreme Court affirmed the trial court's granting of a new trial, reasoning:

> A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. When the failure to respond in voir dire relates to a material question, the appropriate remedy is to grant a new trial.

Robinson v. Safeway Stores, Inc., 113 Wn.2d at 159.

Although the Washington Supreme Court decided *Robinson* after *McDonough Power Equipment, Inc. v. Greenwood*, this state's high court did not mention the United States Supreme Court decision. The Washington Supreme Court acknowledged that, in addition to the concealing or misrepresenting of bias by a juror, a party has the right to be free from juror conduct that precludes her from intelligently using a peremptory challenge. The court wrote:

> [A] false answer on a material matter, whether it relates to the prospective juror's bias and prejudice or whether it relates to other material matters, lures the litigant into a false sense of security, discourages further inquiry, and deprives a litigant of a fair, intelligent and adequate opportunity to challenge the juror . . . The jury a litigant accepts on the basis of misleading information on which he has a right to rely is not the constitutional jury to which he is entitled. The only remedy that will obviate the harm done to his right of trial by jury is to grant a new trial.

Robinson v. Safeway Stores, Inc., 113 Wn.2d at 160 (quoting *Smith v. Kent*, 11 Wn. App. 439, 445, 523 P.2d 446 (1974)).

Unfortunately for Cristian Lupastean, his appeal comes twenty-five years too late. The state Supreme Court discussed the proper standard for obtaining a new trial again under the circumstances of being precluded to exercise a peremptory challenge, even if briefly, in *In re Personal Restraint of Lord*, 123 Wn.2d 296 (1994). The Supreme Court returned to application of the full *McDonough* two-part test.

In *In re Personal Restraint of Lord*, juror Manuel Rosario denied having heard anything about the crime charged in both his juror questionnaire and again during individual voir dire. After the entry of a guilty verdict, Rosario disclosed to an investigator that he earlier read about the crime in a newspaper. He insisted, however, that he lacked extensive knowledge of the case and he had formed no opinions. The state Supreme Court noted that Rosario gave no indication that he used his previously obtained knowledge during jury deliberations. Any misleading or false answers during voir dire required reversal only if accurate answers would have provided grounds for a challenge for cause. The high court held that the little knowledge held by Rosario would not support a challenge for cause.

Cristian Lupastean perspicaciously observes that the *Lord* court did not overrule *Robinson v. Safeway Stores, Inc.* The *Lord* decision did not even mention *Robinson v.*

Safeway Stores. Also, Lupastean notes that the *Lord* decision came in the context of a personal restraint petition, when the accused faces higher standards of review.

We note the anomaly created by *In re Personal Restraint of Lord*'s failure to mention *Robinson v. Safeway Stores*. Nevertheless, we follow this court's long line of decisions that declare that *Lord* requires a court to apply the two-part test from *McDonough Power Equipment, Inc. v. Greenwood*. The Supreme Court, assuming it earlier had abandoned the two-part test, reinstated the test in *In re Personal Restraint of Lord*. This court no longer considers the loss of the intelligent use of a peremptory challenge as a basis for a new trial. *State v. Perez*, 166 Wn. App. 55, 67 (2012); *State v. Cho*, 108 Wn. App. 315, 321 (2001).

Although we reject the argument based on precedent, we value Cristian Lupastean's contention that an accused should benefit from full disclosure by all jurors before the accused exercises peremptory challenges. We would welcome Supreme Court review of this contention.

CONCLUSION

Under current precedent, we hold that Cristian Lupastean's right to a fair and impartial jury was not violated. We affirm his three convictions.

A majority of the panel has determined 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.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

CrR 6.4(c) provides:

> (c) Challenges for Cause.
>
> (1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.
>
> (2) RCW 4.44.150 through 4.44.190 shall govern challenges for cause.

CrRLJ 6.4(c) provides:

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> (2) RCW 4.44.150 through 4.44.190 shall govern challenges for cause.

Federal Rule of Civil Procedure 61 provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

RAP 13.4(b) provides:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 2.36.110 provides:

> Judge must excuse unfit person.
>
> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.130 provides:

> Additional names.
>
> If for any reason the jurors drawn for service upon a jury for any term shall not be sufficient to dispose of the pending jury business, or where no jury is in regular attendance and the business of the court may require the attendance of a jury before a regular term, the judge or judges of any court may direct the random selection and summoning from the master jury list such additional names as they may consider necessary.

RCW 4.44.160 provides:

> General causes of challenge are:
>
> (1) A want of any of the qualifications prescribed for a juror, as set out in RCW 2.36.070.
>
> (2) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action.

RCW 4.44.170 provides:

> Particular causes of challenge.
>
> Particular causes of challenge are of three kinds:
>
> (1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
>
> (2) For 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 which is known in this code as actual bias.
>
> (3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.180 provides:

> Implied bias defined.
>
> A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:
>
> (1) Consanguinity or affinity within the fourth degree to either party.
>
> (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
>
> (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
>
> (4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (amend. 10) provides in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. . . .

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On June 3, 2021, I served a copy of the Petition for Review on counsel for the Respondent by filing this pleading through the Portal and thus a copy will be delivered electronically to all parties.

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

Dated this 3rd day of June 2021, at Seattle, Washington.

s/ Alex Fast
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