NO. 1007086

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

_____

STATE OF WASHINGTON,
Respondent,
v.
THEOTRY DONZELL OLSON,
Appellant.

_____

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

_____

THE HONORABLE STEPHEN E. BROWN, JUDGE (ret.)

_____

ANSWER TO PETITION FOR REVIEW

_____

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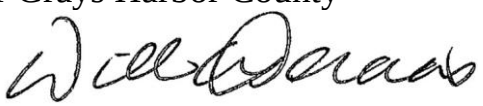
BY: 

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RESPONSE TO ASSIGNMENT OF ERROR

1. The Court did not err in denying the Motion for a mistrial because Juror Nine was not impliedly biased.

COUNTERSTATEMENT OF THE CASE

In November of 2019, Daniel Martinez lived at 2835 Aberdeen Avenue in Hoquiam with two roommates, Hector and Devin. RP I at 103.[1] Mr. Martinez is 17. RP I at 128. No one in the house owns a firearm. RP I at 127.

Early in the morning of November 17, Petitioner Olson, who Mr. Martinez had never met, arrived at the house on Aberdeen Avenue with two females. RP 1 at 104. People were having a few drinks. RP I at 105.

Mr. Martinez and Hector went to pick up another female so she could hang out. RP I at 107. When they returned Olson was intoxicated and had a gun in his waistband. RP I at 108-09. Mr. Martinez testified that the firearm alarmed him, because he

[1] The report of proceedings of January 22, 2020 are marked Vol. I and are referred to as RP I. The report of proceedings the following day are marked Vol. II and will be referred to as RP II.

didn't know Olson, Olson was intoxicated, and there was no need for a firearm. RP I at 110. Olson told Mr. Martinez that he always had a bullet ready to fire, and he cocked the firearm to demonstrate. RP I at 111. Mr. Martinez was able to identify the firearm, and said that it had been pointed at him when Olson had it out, waving it around. RP I at 114.

People started fleeing the house. RP I at 118. Olson started screaming that he was going to rob people, so Mr. Martinez and a few others retreated to a bedroom. RP I at 119. The police arrived, surrounded the house, and asked people to come outside. RP I at 121. Olson asked Mr. Martinez if he could stash the gun in the house, to which Mr. Martinez said no. RP I at 124. Olson then asked to lead a prayer, which Mr. Martinez reluctantly agreed to. RP I at 123. Mr. Martinez later exited the house at the request of the police. RP I at 124.

Salvador Enriquez was also at the house that night. RP I at 62. He saw Olson there that night, but did not know his

name. RP I at 63. Mr. Enriquez said he was playing beer pong with Olson and his two friends. RP I at 66.

Mr. Enriquez testified that Olson pulled a gun from his pants pocket. RP I at 67. He was able to identify the gun, and said Olson aimed it at him. RP I at 68.

Mr. Enriquez testified that Olson got into a fight with this girlfriend, then pulled out the gun again, and said he would steal from everybody. RP I at 71-72. Mr. Enriquez said he was scared and alarmed. RP I at 73. Mr. Enriquez said he retreated into a bedroom with others, but Olson came in with the gun and aimed it at everybody. RP I at 74. Mr. Enriquez said Olson left and Mr. Enriquez hid in the closet and called 911. RP I at 75. Mr. Enriquez heard Olson drop the gun as Olson exited the house. RP II at 279. Later, Mr. Enriquez exited the house with Mr. Martinez at the request of the police. RP I at 76.

Mr. Enriquez' 911 call was later admitted as Ex. 36 and played for the jury. RP II at 279.

Officers Spaur and Verboomen of the Hoquiam Police responded. RP I at 148. Officers from Aberdeen and Cosmopolis also responded. RP I at 149. Upon arrival, they announced themselves and called for everyone to come out of the house with their hands up. RP I at 150. Eventually, Olson came out, but he remained on the front porch, rather than coming right out. RP I at 154.

After the house was cleared, officers found a pistol on the front porch inside of a cardboard box. RP I at 157. The pistol was admitted as Ex. 3, the same exhibit that Mr. Martinez and Mr. Enriquez had identified as the pistol Olson had pointed at them.

Officer Mitchell of the Aberdeen Police responded to assist the Hoquiam officers. RP I at 171. He stationed himself fewer than one hundred feet from the residence. RP I at 173. Officer Mitchell testified that the first person to come out of the

house was yelling about someone inside with a gun. RP I at 174-75.

Officer Mitchell explained that Olson did not come out of the house until the Hoquiam officer switched to using their PA system to call from the residents to come out. RP I at 175. When Olson came out, Officer Mitchell called for him to come back towards Officer Mitchell's patrol car. RP I at 176. Officer Mitchell testified that Olson stepped halfway out, and then Officer Mitchell heard something drop or hit the floor. RP I at 176. Olson then laid on the ground, even though Officer Mitchell had told him to come towards him. RP I at 176. Officer Mitchell explained that, when he went into the house, he saw a pistol just where Olson had paused and Officer Mitchell had heard the thump. RP I at 178. He immediately identified it as a Taurus G2 9mm pistol, a type of gun that he himself owned. RP I at 178. He identified Ex. 3 as the gun found on the porch. RP I at 179.

Officer Verboomen testified that they impounded a silver Subaru that night. RP II at 220. He later served a search warrant on the vehicle to look for evidence of ownership and ammunition and any other evidence of firearms. RP I at 224. In the vehicle, Officer Verboomen found a temporary driver's license with Olson's name on it in a pair of shorts in the back seat. RP I at 227-30. Officer Verboomen also found a box of ammunition in a side pocket of a backpack in the trunk. RP II at 233-34. The ammunition matched the type of ammunition found in the loaded gun retrieved off the porch of the residence. RP I at 235.

Mr. Olson testified. He admitted that he had previously been convicted of a felony, and could not possess firearms. RP II at 307-08. He testified that there was no incident when the police arrived. RP II at 175.

Olson's girlfriend also testified, and claimed that she never saw a gun. RP 1/23/2020 at 325.

The jury convicted Petitioner of Unlawful Possession of a Firearm I the First Degree and Unlawful Display of a Weapon.

Petitioner appealed. The Court of Appeals, Division II, affirmed his conviction:

> We hold that the trial court did not err in denying Olson's motion for a mistrial because (1) Olson did not show that juror 9 was related to either Martinez or Hector within the fourth degree, and (2) leaving juror 9 on the jury did not violate Olson's constitutional right to an impartial jury because her relationship with Martinez was tenuous at best and the court was satisfied with the juror's ability to remain fair and impartial to both sides.

State v. Olson, No. 54547-1-II (February 1, 2022), pp. 1-2.

Because of its holding, the court did not address the issue of whether Martinez and Hector were "parties" under RCW 4.44.180(1). *Id.* at p. 7, fn. 2.

ARGUMENT

RAP 13.4(b) governs acceptance of review by this court and provides that review will be accepted *only if* one of four enumerated considerations are met. Petitioner seeks review

under RAP 13.4(b)(3), that this case involves a "significant question of law under the Constitution of the State of Washington or of the United States," arguing that the Petitioner was denied his constitutional right to a fair trial because of a biased juror. Petition for Review, p. 6. As will be demonstrated below, Petitioner received a fair trial and this petition should be denied.

Constitutional issues are reviewed de novo. *State v. Vance,* 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

The denial of a motion for a mistrial or a decision whether to remove a juror for bias is reviewed for abuse of discretion. *State v. Lawler,* 194 Wn. App. 275, 282, 374 P.3d 278 (2016) (biased juror); *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016) (mistrial) (both cases cited by the Court of Appeals below).

The abuse of discretion standard is applied when, such as here:

> (1) the trial court is generally in a better position than the appellate court to make a given determination; (2) a determination is fact intensive and involves numerous facts to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which no rule of general applicability could be effectively constructed; and/or (5) there is a strong interest in finality and avoiding appeals.

State v. Sisouvanh, 175 Wn.2d 607, 621, 290 P.3d 942 (2012).

1. Juror Nine was not related to either party, so it was not error to deny the Motion for a mistrial.

A. Introduction.

Mr. Olson argues that one of his jurors was impliedly biased as that term is defined in RCW 4.44.180(1). He claims that Juror Nine was a cousin to a victim, that a victim is, for all intents and purposes, a party to a criminal action, so the trial court should have granted a mistrial when, halfway through the trial, the parties discovered the connection.

However, his argument is far too attenuated. The relationship between the juror and the witnesses is far from

clear. And, to any extent the witnesses in question were "victims," neither one was a party to the criminal action. Therefore, Petitioner's right to a fair trial was not violated, and denying the motion for a mistrial was not an abuse of discretion.

B. Neither Daniel Martinez nor Hector were parties to the case of *State of Washington v. Theotry Olson*.

Petitioner's assignment of error is based upon the premise that Juror Nine was related to a party to the case. This argument rests upon the assumption that victims are parties to a criminal action. But this is contrary to the plain language of the relevant statute, as well as long established law which holds that victims are not a parties to a criminal action.

Preliminarily, the Petitioner is correct that a potential juror who is a first cousin to one of the parties in a criminal action is subject to a for-cause challenge. In criminal proceedings, RCW 4.44.150 through RCW 4.44.190 governs challenges for cause. CrR 6.4(c)(2). Both implied and actual

bias are particular causes of challenge. RCW 4.44.170. RCW 4.44.170(1) provides that an impliedly biased juror is disqualified as a matter of law, and must be excused. *State v. Gosser*, 33 Wn. App. 428, 433, 656 P.2d 428 (1982). Implied bias is defined by RCW 4.44.180(1),[2] which provides, in relevant part, "[a] challenge for implied bias may be taken for any or all of the following causes, and not otherwise… [c]onsanguinity or affinity within the fourth degree to either party." (Emphasis added.)

However, Juror Nine is not related to either party. Here, as the relevant statute plainly contemplates, there are two parties: the State of Washington and Theotry Olson. The record does not indicate that Juror Nine is within four degrees of consanguinity or affinity of either.

[2] *State v. Boiko*, relied upon by the Petitioner, held RCW 4.44.180 to be archaic. *State v. Boiko*, 138 Wn. App. 256, 265 n. 8, 156 P.3d 934 (2007). The statute was written when women were incompetent to sit on juries.

Nevertheless, Mr. Olson argues that the victims are a "party" for the purposes of a for-cause challenge. For this proposition, he cites to the 1891 murder case of *State v. Coella*, 3 Wn. 99, 103, 28 P. 28, 28 (1891). In *Coella* the Supreme Court held that the employer of the murder victim, who was in the venire, would be considered an adverse party for the purposes of a challenge for cause. However, *Coella* is inapposite for two reasons.

First, the *Coella* court was concerned with a different part of the statute, one that used different words. *Coella* applied what is now codified as subsection (2). *See* Laws of 2003, ch. 406, § 7. In 1891 that portion of the law read, "[s]tanding in the relation of… master and servant… to the

adverse party,…."[3] Code of 1881 § 212 (emphasis added.) In contrast, subsection (1), at issue here, refers to "either party."[4]

A fundamental rule of statutory construction is that when the legislature uses different words within the same statute, it is deemed to mean different things. *State v. Roggenkamp,* 153 Wn.2d 614, 625, 106 P.3d 196, 201 (2005). Subsection (1) refers to either party, whereas "adverse party" something else. In *Coella* the court extended the term "adverse party," to mean a third party, in this case, the deceased murder victim.[5] Applying the same logic in this case would be contrary to the plain meaning of the statute. Crime victims are neither party, not either party.

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[3] The statute was amended in 2003 to read "a party," rather than "adverse party." Laws of 2003, ch. 406, § 7.

[4] "Either" means "being the one and the other of two" or "being the one or the other of two." https://www.merriam-webster.com/dictionary/either (accessed March 12, 2021, emphasis added.)

[5] *But see McCorkle v. Mallory*, 30 Wn. 632, 637, 71 P. 186, 188 (1903) (holding, "[t]he words 'adverse party,' as used in [subsection (2)], clearly refer to the parties to the action,-the plaintiff and defendant,-and are used to include both.*"*

Secondly, the *Coella* court recognized that murder is different when it added, "it goes without saying that the reasons apply with much more force in a case like this." *Coella* at 103. Here, Mr. Olson was not charged with murder, or even assault or harassment. He was charged with intimidating or alarming others by waiving a gun around. CP at 7. Almost any witness to such a crime would almost necessarily be a "victim," but certainly not the same as in a murder case.

Even assuming, *arguendo*, that Daniel Martinez and Hector were victims, that does not make them a party to the criminal action. The Washington State Constitution requires that all criminal prosecutions shall be conducted in the name and by the authority of the State of Washington. Wa. Const. art. IV, § 27.

Were victims a party to a criminal act, the legislature would not have had to enact laws to give crime victims some rights and standing in criminal cases, such as Chapter 7.69

RCW, and Art.1, § 35 of the Washington constitution. This Court has recognized the principle that victims are not a party to a criminal action. *See State v. Olson*, 11 Wn. App. 2d 1056, 2019 WL 7373499 at 5 (Div. I, 2019, unpublished, quoting *U.S. v. Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010).)[6]

The Petitioner argues that the rule of lenity requires this Court to interpret RCW 4.44.180(1) to encompass victims. However, "the rule of lenity applies only where a statute is ambiguous, and a statute is ambiguous only if it is 'subject to more than one reasonable interpretation'." *State v. Cyr*, 195 Wn.2d 492, 505, 461 P.3d 360, 366 (2020). Here, subsection (1) of the statute seems to be exceedingly clear. By use of the word "either" the purpose was to mean one of the names on either side of the "v."

Even if the rule of lenity applied, it would only mean that, out of the multiple possible interpretations, the more

[6] Cited for persuasive authority (GR 14.1).

favorable would apply. The rule of lenity has never been interpreted to mean a court confers a benefit on a criminal defendant to which he is not entitled, or strains to interpret a statute so it applies to a situation that it clearly does not.

Certainly, subsection (2), as it was written in 1891, could be ambiguous today. It applies to jurors who have a connection to an "adverse party." But adverse to whom? To the juror? Were this case concerned with interpreting subsection (2) as it was previously written, the rule of lenity might be applied to resolve in Petitioner's favor. But that is simply not the case.

Petitioner also urges this Court to construe procedural statutes liberally to preserve a defendant's right to a fair trial. Petition for Review, p. 8. Again, construing a statute liberally is one thing, but holding that it says the opposite of the plain meaning is another. Petitioner urges this Court not to construe, but to ignore.

Because neither Hector nor Mr. Martinez were a "party" to the criminal action, and no possible interpretation can stretch the plain meaning otherwise, Juror Nine was not impliedly biased. Because she was not impliedly biased, she was not subject to a for-cause challenge. Mr. Olson's rights were not violated.

C. The record is insufficient to determine whether Juror Nine is within four degrees of affinity or consanguinity to either Hector or Mr. Martinez.

Juror Nine described Mr. Martinez as her "uncle's nephew." The Defendant points out that an uncle's nephew is first cousin.[7] But if Juror Nine and Mr. Martinez were really first cousins, it is likely that Juror Nine would have said, "he's my cousin." But she did not. She chose to refer to him as her uncle's nephew, and there must be a reason for her choice of words. This is not merely speculative. Based on the other

[7] Such a relative could also be a brother, and no one appears to believe Mr. Martinez was Juror Nine's sibling.

information in the record, their relationship is much more distant or indefinite than simply a first cousin.

For example, when Mr. Martinez first recognized Juror Nine, he did not say she was his uncle's niece or cousin. When asked to describe how he knew her, Mr. Martinez said that his cousin used to play with Juror Nine, so she might know him. RP I at 91. This would seem to contradict the assertion that Mr. Martinez and Juror Nine were first cousins.

Juror Nine was unsure if she knew who Mr. Martinez' parents were. RP I at 96. Were Mr. Martinez really a first cousin, this would mean that Juror Nine was unsure if she knew her own aunt and/or uncle. Yet she described him as her "uncle's nephew." But if Mr. Martinez were really a first cousin, he could not be an "uncle's nephew" without also being one of Juror Nine's aunts or uncle's child. It seems impossible that this relationship was intended to describe a first cousin.

And Juror Nine equivocated about their relationship, asserting that she considers Mr. Martinez and Hector to be relatives, rather than simply affirming that they were, in fact, relatives. When specifically asked if she had a relationship with Mr. Martinez, Juror Nine indicated said, "no." RP I at 94.

What is more likely is that Mr. Martinez is more distantly related to Juror Nine than a first cousin. Perhaps the nephew to a great-uncle, or someone that Juror Nine calls an uncle, even if there is no consanguinity or affinity. At any rate, the record is far from clear that Juror Nine was within the fourth degree of affinity or consanguinity to Mr. Martinez, as Petitioner asserts. As pointed out by the Court of Appeals below:

> Juror 9 stated that Martinez was her uncle's nephew. Olson presumes that this means that Martinez was juror 9's first cousin, the son of one of the uncle's brothers or sisters and therefore the son on one of juror 9's aunts or uncles. First cousins are considered to be in the fourth degree of consanguinity.
>
> However, Martinez also could have been juror 9's uncle's nephew on the uncle's *wife's* side of the family. This would make Martinez the son of one of the *wife's*

> brothers or sisters. In that situation, juror 9 would not be a blood relative of Martinez and RCW 4.44.180(1) would not apply.
>
> The evidence suggests the latter arrangement. Juror 9 did not recognize Martinez by name and did not even remember his name or nickname. This would be unlikely if Martinez actually was a first cousin living in the same area. And she did not refer to him as her cousin, nor did Martinez refer to juror 9 as his cousin. Further, juror 9 believed that she knew Martinez's parents, but she did not know them any better than she knew Martinez. Again, this would be unlikely if Martinez's parents were her aunt and uncle within her immediate family.
>
> Regarding Hector, juror 9 stated only that she was "related" to him. 1 RP 94. But the record does not disclose how she was related to him. However, juror 9's lack of specificity suggests that he was a more distant relative than an uncle (third degree) or cousin (fourth degree). Otherwise, she presumably would have said that Hector was her cousin or uncle rather that giving a vague answer.

State v. Olson, No. 54547-1-II (February 1, 2022), pp. 6-7 (emphasis in the original) (citations omitted).

When determining if a witness is impliedly biased, a trial court must ascertain the facts. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 108, 827 P.2d 1070, 1081 (1992) (citing *Ottis*

v. Stevenson–Carson School Dist. 303, 61 Wn. App. 747, 812 P.2d 133 (1991).) Then, the trial court must decide if those facts fit the statute defining implied bias. *Id*. That factual determination involves a great deal of discretion because of the myriad number of ways the individual facts may present themselves. *Id*. Appellate courts defer to that determination unless it is a clear abuse of discretion. *Id*.

Here, the trial court found that Juror Nine's connections to Mr. Martinez were tenuous. RP I at 101. This was reasonable because, although one's "uncle's nephew" can be a first cousin, given the totality of Juror Nine's statements regarding the relationship, it makes no sense that she was so closely related to Mr. Martinez.

The trial court found that Juror Nine's relationship to Mr. Martinez was tenuous. Given that she did not know his real name, could not remember the nickname he went by, or even whether she knew his parents, this was not unreasonable.

Without an affirmative finding that Juror Nine and Mr. Martinez (or Hector) were first cousins, Petitioner's whole argument fails. This is because a juror's mere acquaintance with a even party, by itself, cannot support a challenge for cause. *State v. Tingdale*, 117 Wn.2d 595, 601, 817 P.2d 850 (1991). Here, the relationship is unclear at best. The record below does not establish that Mr. Martinez and Juror Nine were in the fourth degree of consanguinity as required by the statute.

D. The trial court did not err in disallowing continued questioning of Juror Nine.

Petitioner also claims that the trial court erred by not allowing Mr. Olson's trial counsel to question Juror Nine further. But he fails to establish prejudice or error.

For example, Petitioner asserts that further questioning, "curtailed his ability to retrieve additional information to support his motion for a mistrial." Petition for Review, p. 17. This is pure speculation. It could have also yielded more

information that the juror was not biased, perhaps by revealing her relationship was more remote, as appears likely.

Petitioner also asserts that, "[f]urther questioning . . . could have revealed why Juror Nine did not reveal her close relationship with Hector and her relationship with Mr. Martinez until Mr. Martinez pointed it out." Petition for Review, p. 21. But the answer to this question is already in the record. Juror Nine did not know Mr. Martinez by anything but a nickname that she did not even remember. RP I at 94. Mr. Olson did not ask about anybody relationship with anyone named Hector in *voir dire*, even though the opportunity presented itself. RP I at 99.

Petitioner's trial counsel had the opportunity to ask Juror Nine questions, and he felt.it unnecessary. RP I at 98. There is no allegation that trial counsel was ineffective.

Questioning of juror during a trial carries a risk of causing the juror to feel he or she is adversarial to the

questioning party, or inadvertently influencing the panel. *See State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). Juror Nine was questioned once, and Petitioner was satisfied with her answers. Olson was not denied the right to examine Juror Nine; there was no error.

E. It was not an abuse of discretion to deny the motion for a mistrial.

Mistrials should only be granted when a defendant has been so prejudiced that nothing else will ensure that he or she will receive a fair trial. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653, 666 (2012). When a trial court denies a mistrial, the decision is reviewed for abuse of discretion; that is, only when no reasonable judge would have denied the motion. *Id*.

A trial court's decision to excuse members of the venire is also reviewed under an abuse of discretion standard. *State v. Roberts*, 142 Wn.2d 471, 518-19, 14 P.3d 713 (2000) (citing *Tingdale*, *supra*.). "The reason for this deference is that the trial judge is able to observe the juror's demeanor and, in light

of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial." *State v. Gentry,* 125 Wn.2d 570, 634, 888 P.2d 1105 (1995).

Had the trial court believed that Juror Nine was within the fourth degree of affinity or consanguinity to either of the parties, Juror Nine would have been considered impliedly biased pursuant to RCW 4.44.180(1), and the mistrial should have been granted.

But here, RCW 4.44.180(1) unambiguously refers to either party. Neither Hector nor Mr. Martinez are parties. So even if Juror Nine was a first cousin of one of those two men, she was not impliedly biased under RCW 4.44.180(1). Therefore, she could have been the subject of a preemptory challenge. However, preemptory challenges are not a constitutional right. *State v. Evans*, 100 Wn. App. 757, 763, 998 P.2d 373, 377 (2000).

It was not an abuse of discretion to deny the Motion for a mistrial. Juror Nine knew nothing about the incident, and said she could be fair and impartial.

F. *Boiko* is inapposite.

The Defendant argues that *State v. Boiko*, 138 Wn.App. 256, 156 P.3d 934 (2007) also compels this Court to hold that a first cousin to a witness such as Mr. Martinez, or "victim" such as Hector, constitutes implied bias. But *Boiko* is not directly applicable because it simply upheld the grant of a new trial, which is discretionary.

In *Boiko,* after trial, the parties learned one of the jurors was married to the State's important witness, was an attorney representing a party in an action against the county, and had applied for a job at the prosecutor's office. *Boiko* at 259. The trial court granted the defendant a new trial under the sixth amendment doctrine of implied bias. *Id*. at 261. The State appealed, arguing the trial court had abused its discretion

because RCW 4.44.180 precludes implying bias except as specified in the statute. *Id*. at 264.

Division III of this Court upheld the trial court's grant of a new trial, holding, in relevant part, that CrR 6.4(c)(2) (and RCW 2.36.110) allow a judge to *sua sponte* dismiss jurors, and CrR 1.1 provides that the criminal rules supersede any procedural statutes. *Id*. at 265.

The main similarity between this case and *Boiko* is that the decisions of the respective trial courts are discretionary. This Court should follow *Boiko*, recognize that the trial court here did not abuse its discretion, and deny the petition.

CONCLUSION

A defendant has the right to a fair trial, not a perfect one. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007). As demonstrated, Mr. Olson had a fair trial before an impartial jury under both the state and federal constitutions.

Juror Nine was not biased. Victims are not parties to a criminal action, and Mr. Martinez and Hector were only "victims" by virtue of the fact that they were among many people who were alarmed at the Defendant's unlawful display. Even if they were, Juror Nine's relationship to these two men is far from clear. The record does not establish that it is within four degrees of affinity or consanguinity and, as the Court of Appeals pointed out, Mr. Olson has the burden of proof. *State v. Olson,* No. 54547-1-II (February 1, 2022) p. 7.

Because Juror Nine was not impliedly biased, it was not an abuse of discretion to deny the motion for a mistrial. The Defendant's constitutional right to a fair trial by an impartial jury was not violated, and he shows no prejudice.

For all the foregoing reasons herein this Court should deny the Petition for Review.

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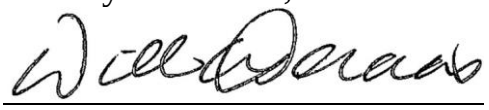
DATED this 23rd day of March, 2022.

Respectfully Submitted,

BY: 

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