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Supreme Court No. 100708-6
(COA No. 54547-1-II)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THEOTRY OLSON,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Theotry Olson asks this Court to accept review of a Court of Appeals opinion affirming his convictions for unlawful possession of a firearm in the first degree and one count of unlawful display of a weapon. The Court of Appeals issued the opinion on February 1, 2022. Mr. Olson has attached a copy of the opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

Both the federal and Washington constitutions entitle a person to an unbiased jury. A juror is biased as a matter of law if she is related to the alleged victim. In the middle of trial, Mr. Olson discovered one juror was related to two of the alleged victims. However, when Mr. Olson requested a mistrial, the court refused.

(a) The court's denial of Mr. Olson's motion for a mistrial deprived him of his right to a fair and impartial jury. RAP 13.4(b)(1)-(4).

(b) The court's denial of Mr. Olson's motion for a mistrial was contrary to RCW 4.44.180(1), which provides that a juror has implied bias and cannot serve on a jury if she "has consanguinity or affinity within the fourth degree to either party." RAP 13.4(b)(1)-(4).

(c) After Mr. Olson learned Juror 9 was related to two of his alleged victims, he immediately asked for mistrial without eliciting further answers from the juror. The court denied his motion. When he later asked to gather more information about Juror 9, which could have revealed the extent of Juror 9's familial relationship with the two alleged victims, the court refused. The court erred when it refused to allow Mr. Olson to subject Juror 9 to further questioning. RAP 13.4(b)(2)-(4).

C. STATEMENT OF THE CASE

Theotry Olson and his fiancé, Bhrianna Kauer, were moving from Seattle to Sacramento. RP 308, 310. On their drive south, they stopped in Centralia to visit Ms. Kauer's mother and brother. RP 334. They also stopped in Hoquiam to

visit Ms. Kauer's sister. RP 332. Mr. Olson, Ms. Kauer, and Ms. Kauer's sister went to a bar and then dropped off her sister at a house in Hoquiam. RP 291-92, 295. Mr. Olson and Ms. Kauer ended up playing beer pong at a small party at the house in Hoquiam. RP 292-93. At some point during the evening, Mr. Olson lost the keys to the car. RP 293. Mr. Olson asked for permission to search through the house and look for the keys, and the people in the home assisted him with looking for the keys. RP 295-96. But "before [he] knew it, the police were outside." RP 295-96. The police arrested Mr. Olson. RP 294.

Two of the other individuals at the party had a far different account of what happened that night. Salvador Enriquez and Daniel Martinez testified that Mr. Olson was angry throughout the evening and at one point told everyone he would steal people's belongings and kill everyone as he waved a gun. RP 72, 88-89, 108, 133, 136. Mr. Martinez lived in the

home along with two other men named Hector¹ and Devin Reed. RP 77-78, 104, 144. After Mr. Olson supposedly made his threats and waved the gun, Hector ran out the back door and fled into an alley, only returning after the police arrested Mr. Olson. RP 135, 144. Neither Hector nor Mr. Reed testified.

The State charged Mr. Olson with one count of unlawful possession of a firearm in the first degree and one count of unlawful display of a weapon. CP 8-9. Mr. Olson denied both possessing the gun and waving the gun and threatening others; Ms. Kauer also testified she did not see Mr. Olson in possession of the gun or waving the gun and threatening others. RP 304-05, 325. When the police arrested Mr. Olson, they seized the car and found some ammunition in the trunk. RP 234, 330-31. Ms. Kauer testified the ammunition might be her brothers or a friend's, but it was not Mr. Olson's. RP 330-31. The police

¹ The record does not reveal Hector's last name.

found a gun registered to a person named Michael Hibbit on the porch of the house. RP 157, 311-12.

In the middle of trial, the court learned Juror Nine was related to both Mr. Martinez and Hector. RP 94-95. After learning this, Mr. Olson moved for a mistrial, but the court denied the motion. RP 98, 101, 251, 256.

During summation, the prosecutor argued, “this case comes down to essentially one thing. And that is who do you believe? Who do you believe? Do you believe [Mr. Martinez] and [Mr. Enriquez]? Or do you believe the defendant and his fiancé, [Ms. Kauer?]” RP 347. The jury believed Mr. Martinez and Mr. Enriquez and found Mr. Olson guilty. CP 18-19.

D. ARGUMENT

This Court should accept review because the court improperly denied Mr. Olson’s motion for a mistrial after learning a juror was related to two of his purported victims.

- a. Both the federal and Washington constitutions guarantee a defendant the right to an impartial jury.

The Sixth and Fourteenth Amendments of the federal constitution and article I, section 22 of our state constitution require the government to provide the accused with a fair trial composed of impartial jurors. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Pena-Rodriguez v. Colorado*, __U.S. __, 137 S. Ct. 855, 860-61, 197 L. Ed. 2d 107 (2017); *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). A single juror’s bias deprives the defendant of this critical right. *State v. Gonzalez*, 111 Wn. App. 276, 281-82, 45 P.3d 205 (2002).

When a juror is a close relative to one of the participants in a criminal act, this is an extreme violation of the right to a fair trial, and this Court cannot “allow a verdict to stand under

such circumstances.” *Smith v. Philips*, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O’Connor, J., concurring); *see also State v. Cho*, 108 Wn. App. 315, 325, 30 P.3d 496 (2001). This is because a juror related to one of the participants at trial could unconsciously “inject any number of positive or negative emotions from the juror...that may manifest in supportive or obstructive reactions.” *State v. Boiko*, 138 Wn. App. 256, 264, 156 P.3d 943 (2007). A high probability exists that a juror’s familial relation to one of the participants in the trial could inhibit “the frank discussion necessary to render an impartial verdict. A jury member inclined to believe an opposing witness would then be confronted with the prospect of having to criticize [the juror’s family member] to the juror’s face.” *Id.*

Several statutes also recognize that courts must excuse jurors who are related to participants at trial. Under RCW 4.44.170(1), a court must strike a juror for cause if she has implied bias. Under RCW 4.44.180(1), a juror has implied bias

if she “has consanguinity or affinity within the fourth degree to either party.” RCW 4.44.180(1). Thus, if a juror is related to a party, she is prohibited from serving on the jury as a matter of law. RCW 4.44.170(1).

This Court construes the implied bias statute in the defendant’s favor under two principles of construction. First, this Court employs the rule of lenity, which holds ambiguous statutes must be construed in favor of the defendant. *State v. Boiko*, 138 Wn. App. 256, 265, 156 P.3d 943 (2007). Second, this Court applies the principle that holds procedural statutes must be construed liberally to preserve a person’s right to a fair trial. *Id.*

Applying these principles, while a key witness in the State’s case is not literally a “party,” they are, for purposes of the rule, a party. *Id.* And this Court has held that in a murder case where the decedent could neither be a party nor a witness for the prosecution, the decedent’s status as the victim of the crime rendered him an adverse party to the defendant. *State v.*

Coella, 3 Wash. 99, 103, 28 P. 2d (1891). Consequently, a juror's familial relationship with even a non-testifying victim also renders her impliedly biased.

This Court examines whether a court violated a defendant's right to a fair and impartial jury de novo. *See State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). And this Court examines whether a court erred in either granting or denying a motion for a mistrial for an abuse of discretion, but this Court affords less deference to a court's decision to deny a motion for a mistrial. *State v. Greff*, 141 Wn.2d 910, 921, 10 P.3d 90 (2000); *Boiko*, 138 Wn. App. at 260. A court necessarily abuses its discretion when it infringes on a defendant's constitutional rights. *State v. Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010).

- b. Mr. Olson did not receive a fair trial because one of his jurors was related to two of his purported victims.

Juror Nine was related to **two** of Mr. Olson's purported victims: Daniel Martinez and Hector. Consequently, the court

grievously infringed on Mr. Olson's right to a fair and impartial trial by denying Mr. Olson's request for a mistrial once the court learned of Juror Nine's familial relationship with these men.

During voir dire, the court asked the panel whether anyone knew the individuals expected to testify, including Mr. Martinez. RP 10. Juror nine did not respond. The court impaneled juror nine.

The State's first witness was Salvador Enriquez. RP 60-61. Mr. Enriquez is friends with both Mr. Martinez and Hector, and Hector and Mr. Martinez lived in the house where the criminal acts allegedly occurred. RP 77, 80. Mr. Enriquez claimed at one point during the party, Mr. Olson pulled out a gun and aimed it at everyone, threatened to steal from everyone, and said he would kill everyone. RP 72, 88-89. Mr. Enriquez claimed he hid in a bedroom with Mr. Martinez and another woman because he thought Mr. Olson might kill him. RP 73.

After Mr. Enriquez, testified, Mr. Martinez told the prosecutor he recognized Juror Nine: Erica Rios. RP 90-91. Mr. Martinez told the prosecutor Juror Nine might not know his name, but his cousin used to play with her. RP 91.

The court summoned Juror Nine and Mr. Martinez. RP 93. The court asked Juror Nine whether she recognized Mr. Martinez; Juror Nine said she did. RP 93-94. After excusing Mr. Martinez, Juror Nine shared she knew Mr. Martinez because she is actually related to Hector, and she did not know Mr. Martinez's name or last name because he went by a nickname she did not remember. RP 93. Juror Nine explained she knew Mr. Martinez because he is her uncle's nephew,² and she considers him family just "as much as [she] consider[s] Hector family." RP 95. Juror Nine said she did not speak to Mr. Martinez much, but she was "pretty close with Hector." RP 94.

Juror Nine shared that the last time she spent time with Hector was on Christmas, which was a month before Mr.

² This makes Mr. Martinez Juror Nine's first cousin.

Olson's trial. RP 95. She has been to Hector's house, and she used to live right about the corner from him. RP 95-96. Juror Nine also used to work for Hector. RP 96.

The State asked Juror Nine whether she knew anything about the case; she claimed she did not. RP 94. The State also asked whether she could be fair and impartial to both sides and whether she felt differently about the case now that she knew who was involved. RP 96-97. Juror Nine asserted she did not. RP 97. And the State asked whether she would feel differently about Mr. Martinez's testimony versus any other witness, and Juror Nine claimed she would not. RP 97.

After this line of questioning, the State asked Mr. Olson whether he had other questions. RP 98. Mr. Olson responded, "I think she has said enough. I have no questions." RP 98.

Mr. Olson moved for a mistrial. RP 98. He argued the information Juror Nine shared would have likely led to him striking her earlier during voir dire. RP 98. Mr. Olson argued Juror Nine knew the witnesses and the people being discussed,

and she had been to the house where the crime allegedly occurred. RP 99. The court replied, “we didn’t ask about other people who aren’t going to be called as witnesses. You had the opportunity to ask that question.” RP 99. Mr. Olson argued knowing what he knows now, this was “clearly an issue of bias, even if she says it’s not going to affect [her] ability to try this case.” RP 99.

The court noted Mr. Olson exercised all six of his peremptory challenges, and said “it’s not like you didn’t use a peremptory that you would have.” RP 100. The court told Mr. Olson the trial would proceed and he could raise a motion for a mistrial again with briefing. RP 100.

The State then added it anticipated testimony during trial about the layout of the house, and it was now aware Juror Nine was familiar with the house. RP 101. The court noted, “the record is clear that [Juror Nine] has no prior knowledge of the case. So – and she has, her connections to a witness are so tenuous that she believes she can be a fair and impartial juror. I

don't see any reason to excuse her even if she has been at the location...Offenses occur in public places, and people have been there." RP 101. The court concluded, "I don't think a motion for mistrial based on what came up with [Juror Nine] requires a mistrial at this time." RP 101. It did, however, state "the situation could change." RP 101.

The State called Mr. Martinez as its second witness. RP 103. Mr. Martinez confirmed he lived with Hector. RP 104, 107. Mr. Martinez claimed Hector was the person who invited Mr. Olson and the two other women who accompanied Mr. Olson to the party. RP 105. Mr. Martinez claimed during the party, Mr. Olson showed him his gun and Mr. Olson appeared "angry." RP 108, 112. At another point at the party, Mr. Martinez claimed Mr. Olson "started screaming that he was going to rob us and he said he was looking for the owner of the house." RP 119. Mr. Martinez alleged Hector was in the room when Mr. Olson supposedly drew his gun and waved it at everyone. RP 133, 136. Mr. Martinez then claimed Hector ran

out the back door and fled into an alley. RP 135. Mr. Martinez asserted Hector only returned to the home after the police left. RP 144.

The next day, Mr. Olson asked to interview Juror Nine again and then said he would “have a motion after that.” RP 188. The court denied the request, stating it would interfere with Juror 9’s ability to be fair and impartial. RP 188. The court told Mr. Olson it would only allow him to question Juror Nine if he could “make a showing as to what it is that she wasn’t asked yesterday that needs to be asked today.” RP 188. Mr. Olson again moved for a mistrial due to Juror Nine’s responses on the previous day and said he had a brief argument he could present to the court. RP 189. The court told Mr. Olson he could make his argument for a mistrial later. RP 189.

The court later heard Mr. Olson’s argument for a mistrial. Mr. Olson argued his motion was based on the sixth amendment’s guarantee to a fair trial by an impartial jury. RP 251. Mr. Olson once again pointed out Juror Nine knew the

individuals involved, and he stated he would have either stricken her for cause or exercised a peremptory strike against her he had known about her relationship to Mr. Martinez and Hector. RP 251-52. Mr. Olson also argued it was incredibly unfair to have Juror Nine on the jury because Juror Nine had to assess who was more credible—the State’s witnesses or Mr. Olson and his fiancé—but Juror Nine knew one of the State’s key witnesses. RP 254. Mr. Olson questioned whether the court could trust Juror Nine to be impartial if Juror Nine did not even alert the court when she discovered the case involved people she knew. RP 255.

In response, the State argued (1) “the standard for striking somebody for cause is not whether they know somebody;” and (2) Juror Nine had a “pretty remote relationship” to Mr. Martinez and asserted she could be fair and impartial. RP 255-56.

The court denied the motion for a mistrial because it believed (1) Mr. Olson did not establish a basis for striking

Juror Nine; (2) Juror Nine said she could be fair and impartial; and (3) Juror Nine’s relationship with Mr. Martinez “was relatively remote.” RP 256.

The court erred in denying the motion for a mistrial for several material reasons. First, the court erred in focusing solely on Juror Nine’s familial relationship with Mr. Martinez and ignoring Juror Nine’s close familial relationship with Hector, who was one of the purported victims. The mere fact that Hector did not testify is immaterial, as Hector’s status as the purported victim to the crime conclusively barred Hector’s close family members from serving on the jury. *See Smith*, 455 U.S. at 222 (O’Connor, J., concurring); *Coella*, 3 Wash. at 103; *Cho*, 108 Wn. App. at 325; RCW 4.44.180(1).

Second, as a juror in a case where a close family member was a purported victim, an intolerable risk of bias existed because Juror Nine could “inject any number of positive or negative emotions” into her deliberations, and her status as a close family member of an alleged victim likely inhibited “the

frank discussion necessary to render an impartial verdict.”

Boiko, 138 Wn. App. at 264. Indeed, Juror Nine heard the State’s witnesses recount how Mr. Olson purportedly waved a gun in her close relative’s home and told him he would rob and kill him. Juror Nine also heard how Mr. Olson allegedly frightened her close relative to the extent that he fled from his home and into an alley. Anyone in Juror Nine’s position would be horrified to hear their close relative experienced something so traumatic. Though Juror Nine may have subjectively believed she could be impartial, it would be impossible for Juror Nine to divorce her relationship with Hector from her duty as a juror. Consequently, contrary to the court’s conclusion, it could not rely on Juror Nine’s subjective belief she could be fair and impartial.

For identical reasons, the court also erred in discounting Juror Nine’s relationship with Mr. Martinez as “remote.” First, while Juror Nine did not state she was close to Mr. Martinez, she said she considered him family in the same way she

considered Hector to be family. RP 95. Because she viewed Mr. Martinez in this regard, it would also be emotionally taxing for her to hear him allege Mr. Olson, while armed with a gun, threatened to rob and kill Mr. Martinez. Juror Nine's role as a juror in a case where Mr. Martinez was a testifying alleged "victim" also undermined Mr. Olson's right to a fair and impartial jury.

And even if Juror Nine was not particularly close to Mr. Martinez, the implied bias statute still barred her from serving on Mr. Olson's case, as she had consanguinity "within the fourth degree" to Mr. Martinez. RCW 4.44.180(1). Juror Nine stated Mr. Martinez was her uncle's son, which makes Mr. Martinez her first cousin. RP 95. Under established genealogical principles, this constitutes consanguinity within the fourth degree. *Consanguinity/Affinity Chart*, University of Alabama.³

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https://www.uab.edu/humanresources/home/images/M_images/

The court also erred in forbidding Mr. Olson from inquiring further with Juror Nine to discuss matters relating to her fitness as a juror. The court must be vigilant as to any factor that could undermine a defendant's right to a fair trial. *See Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). But here, the court seemingly blinded itself to other potential reasons to excuse Juror Nine by precluding Mr. Olson from further questioning, opining it would "affect her ability to be fair and impartial." In the alternative, it demanded Mr. Olson demonstrate why he needed to ask more questions. RP 188.

Even if Mr. Olson's questioning of Juror Nine might affect her ability to be fair and impartial to him, Mr. Olson was entitled to shoulder that burden in an effort to ensure he received a fair and impartial jury. *Cf. State v. Bedada*, 13 Wn. App. 2d 185, 203, 463 P.3d 125 (2020).

Relations/PDFS/FAMILY%20MEMBER%20CHART.pdf (last visited Mar. 2, 2022).

Further questioning could have revealed the exact nature of Juror 9's familial relationship with both Hector and Mr. Martinez, and 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. If, for example, Juror Nine attempted to deliberately conceal her relationship with Hector, then this would be another basis to find her biased. *See Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 776 P.2d 676 (1989) (holding it is misconduct for a juror to conceal information that would enable a litigant to determine whether he wants to retain the juror). The court's limitations on Mr. Olson's questioning intolerably curtailed his ability to retrieve additional information to support his motion for a mistrial.

Nevertheless, the Court of Appeals affirmed, opining Mr. Olson "did not show that [J]uror 9 was related to either [Mr.] Martinez or Hector within the Fourth Degree." Op. at 1. But this ignores the fact that Mr. Olson attempted to elicit more

information that could reveal the exact nature of Juror 9's familial relationship with Mr. Martinez and Hector, but the court forbade him from doing so. The court's reason was inimical to Mr. Olson's right to a fair jury trial, as the court denied the request simply because it assumed further questioning would interfere with Juror 9's ability to be fair and impartial. Mr. Olson was entitled to shoulder that burden in order to secure a fair trial. *See Bedada*, 13 Wn. App. 2d at 203. Moreover, Mr. Olson actually did demonstrate that Juror 9 was related to Mr. Martinez with affinity within the fourth degree because Juror 9 revealed Mr. Martinez was her uncle's nephew.

Second, when the Court of Appeals assessed Mr. Olson's constitutional challenge, it disregarded Juror 9's familial relationship with Hector, whom she was "close with" to such an extent that she spent Christmas at his house, worked for him, and lived around the corner from him. All of these circumstances heavily suggest she had a close familial relationship with Hector.

This Court should accept review.

E. CONCLUSION

For the reasons stated in this petition, Mr. Olson respectfully requests that this Court accept review.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of the words exempted by the rule, as 3,800 words.

DATED this 3rd day of March, 2022.

Respectfully submitted,

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February 1, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

THEOTRY DONZELL OLSON,

Appellant.

No. 54547-1-II

UNPUBLISHED OPINION

MAXA, J. – Theotry Olson appeals his convictions of first degree unlawful possession of a firearm and unlawful display of a weapon. The convictions arose from an incident in which Olson displayed a firearm during a party at the house of Daniel Martinez and his roommate Hector.¹ Martinez testified at trial, but Hector did not.

During trial, it was revealed that juror 9 was related in some way to Martinez and Hector. However, she did not know Martinez’s name or nickname and had no relationship with him. In comparison, juror 9 was close to Hector. RCW 4.44.180(1) states that a juror has implied bias if they have “[c]onsanguinity or affinity within the fourth degree to either party.” The trial court denied Olson’s motion for a mistrial based on juror 9’s presence on the jury.

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

¹ We refer to Hector by his first name because his last name is not available from the record. No disrespect is intended.

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. Accordingly, we affirm Olson's convictions.

FACTS

In November 2019, Olson and his fiancé Bhrianna Kauer were at Martinez's and Hector's house for a party. Salvador Enriquez also attended the party. At some point, Enriquez called 911, telling the operator that Olson had pulled out a gun and was aiming it at people. The police arrived and arrested Olson.

The State charged Olson with first degree unlawful possession of a firearm and unlawful display of a weapon.

During jury selection, the trial court read to the prospective jurors the first and last name of all the testifying witnesses, including Martinez's, and asked whether any of the prospective jurors were acquainted with the witnesses in any way. None of the jurors raised their hands, including juror 9. The jurors were not asked if they knew Hector.

The State called Enriquez as its first witness and Martinez as its second witness. Before Martinez testified, he informed the State that he recognized juror 9 as somebody he knew. The State told the trial court that Martinez made it sound like he was not extremely close to juror 9, that she may not know his name, but that his cousin used to play with her.

The trial court called juror 9 into the courtroom to confirm whether she knew Martinez. Juror 9 did not recognize his name. The court had Martinez briefly come into the courtroom, and juror 9 stated that she recognized him. She stated that she was "related to Hector, and so that's how I know him. But I didn't know his name or his last name because they gave him a nickname." 1 Report of Proceedings (RP) at 94. Juror 9 also could not recall the nickname.

Juror 9 stated, “I don’t really talk to [Martinez] that much, but I am pretty close with Hector, now that I know that that’s which Hector we are talking about.” 1 RP at 94.

When asked how she knew Martinez, juror 9 stated that he was her uncle’s nephew. She stated that she really did not have a relationship with him. She had last talked to Martinez some time the previous year. On the other hand, she had spoken with Hector a month earlier, had been to his house two years earlier, and used to work for him. When asked whether she considered Martinez family, juror 9 responded, “As much as I consider Hector family.” 1 RP at 95. Juror 9 believed that she knew Martinez’s parents, but did not know them any better than Martinez.

Juror 9 stated that she did not know anything about the case before the trial started. Hector had never mentioned the incident to her. The State asked juror 9 whether she could remain fair and impartial to both sides despite knowing that Martinez and Hector were involved. She stated that she felt no differently about the case, that she would feel no differently about Martinez’s testimony than the other witnesses that she did not know, and that she could remain fair and impartial to both sides even though there was testimony about what had happened to Hector.

After the State had asked juror 9 questions, Olson declined to question her any further. Specifically, defense counsel stated, “I think she has said enough. I have no questions.” 1 RP at 98.

Olson moved for a mistrial on the grounds that the information juror 9 had just given likely would have led him to use a peremptory challenge on her or to strike her for cause because of bias. The trial court denied the motion, stating that it saw no reason to excuse juror 9. The court stated that “her connections to a witness are so tenuous” and “she believes that she can be a

fair and impartial juror.” 1 RP at 101. However, the court did say that Olson could raise the issue again later.

On the next day of trial, Olson asked the trial court for the opportunity to question juror 9 again. The court denied the request because additional questioning might interfere with her ability to remain fair and impartial. Olson later renewed his motion for a mistrial based on his constitutional right to a fair trial by an impartial jury. The court again denied the motion, in part because there was no basis in the record for striking juror 9 for cause. The court emphasized that juror 9 indicated that she could be fair and impartial and her relationship with Martinez was relatively remote.

The jury convicted Olson of first degree unlawful possession of a firearm and unlawful display of a weapon. Olson appeals his convictions.

ANALYSIS

A. LEGAL PRINCIPLES

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a fair trial by an impartial jury. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). This right includes the right to “ ‘a trial by an unbiased and unprejudiced jury.’ ” *Id.* (quoting *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991)). The inclusion of a biased juror on a jury violates the constitutional right to a fair trial, regardless of whether the bias is actual or implied. *State v. Taylor*, 18 Wn. App. 2d 568, 577, 490 P.3d 263 (2021).

In addition to the constitutional right, several statutes address the dismissal of jurors because of bias. RCW 4.44.170(1)-(2) states that a juror can be challenged for implied bias or actual bias. Implied bias requires “the existence of the facts [that] in judgment of law

disqualifies the juror.” RCW 4.44.170(1). One of the exclusive definitions of implied bias is when the juror has “[c]onsanguinity or affinity within the fourth degree to either party.” RCW 4.44.180(1). Actual bias requires “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.” RCW 4.44.170(2).

The party claiming juror bias has the burden of showing by a preponderance of the evidence the facts necessary to show bias. *State v. Wilson*, 141 Wn. App. 597, 606, 171 P.3d 501 (2007).

RCW 2.36.110 provides that the trial court has a duty to excuse a juror who has manifested unfitness because of bias. We review for an abuse of discretion a trial court’s decision regarding the dismissal of a juror under this statute. *State v. Lawler*, 194 Wn. App. 275, 282, 374 P.3d 278 (2016). We defer to the trial court because the court can observe the juror’s demeanor and therefore is in the best position to evaluate the juror’s answers and to determine whether or not the juror is biased. *See id.*

At issue here is not a challenge to a juror for cause but a mistrial motion. “ ‘A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly.’ ” *Gaines*, 194 Wn. App. at 897 (quoting *State v. Gilchrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). Prejudice occurs when a trial irregularity affects the outcome of the trial. *Gaines*, 194 Wn. App. at 897. We review for an abuse of discretion a trial court’s denial of a motion for mistrial based on a problem with a juror. *See id.* at 896 (juror misconduct).

B. IMPLIED BIAS UNDER RCW 4.44.180(1)

Olson argues that the trial court erred when it denied his motion for a mistrial because juror 9's familial relationship with Martinez and Hector constituted implied bias under RCW 4.44.180(1). Specifically, he claims that Martinez and Hector were "parties" under RCW 4.44.180(1) because they were victims of his offenses and Martinez was a prosecution witness. We hold that RCW 4.44.180(1) does not apply here because there is insufficient evidence that juror 9 was related within the fourth degree to either Martinez or Hector.

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 of one of juror 9's aunts or uncles. First cousins are considered to be in the fourth degree of consanguinity. *Immediate Family Members*, UNIV. OF ALA. AT BIRMINGHAM, https://www.uab.edu/humanresources/home/images/M_images/Relations/PDFS/FAMILY%20MEMBER%20CHART.pdf [<https://perma.cc/HR5X-96VH>].

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 be inapplicable.

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 at 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 than giving a vague answer.

Olson argues that the trial court erred in preventing him from further questioning juror nine about her relationship with Martinez and Hector. But Olson did not tell the court what more he planned to ask. He merely speculates that he would have discovered more information that would have revealed juror 9’s alleged bias. More important, Olson had the opportunity to examine juror nine when her connections to Martinez and Hector first came to light, but he believed that “she has said enough” and that he had no further questions. 1 RP at 98. Therefore, Olson was not denied a right to examine juror 9.

The record is unclear whether juror 9 was related to either Martinez or Hector to the fourth degree. Because Olson has the burden of proof, we hold that RCW 4.44.180(1) is inapplicable.²

C. CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY

Olson argues that apart from RCW 4.44.180(1), the fact that Martinez and Hector were juror 9’s “relatives” violated his constitutional right to an impartial jury. We disagree.

As noted above, criminal defendants have a constitutional right to a fair trial by an impartial, unbiased jury. *Gaines*, 194 Wn. App. at 896. The issue of implied bias implicates this right. *State v. Cho*, 108 Wn. App. 315, 329, 30 P.3d 496 (2001). We review de novo alleged

² Because of our holding, we do not address Olson’s argument that Martinez and Hector were “parties” within the meaning of RCW 4.44.180(1) on the grounds that they were victims of one of his offenses and that Martinez was a “party” because he was a prosecution witness.

violations of the right to a jury trial. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

Olson relies on Justice O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Justice O'Connor stated that "there are some extreme situations that would justify a finding of implied bias," including when a juror "is a close relative of one of the participants in the trial or the criminal transaction." *Id.* at 222 (O'Connor, J., concurring). The court in *State v. Boiko* also emphasized that the constitutional doctrine of implied bias "applies only in certain exceptional circumstances." 138 Wn. App. 256, 261, 156 P.3d 934 (2007).

Here, as discussed above, nothing in the record suggests that either Martinez or Hector was a "close" relative of juror 9. During questioning, juror 9 simply stated that Martinez was her uncle's nephew and she had no relationship with him, but that she considered him family as much as she considered Hector family. Juror 9 stated that she was related to Hector, but was not questioned about how exactly they were related.

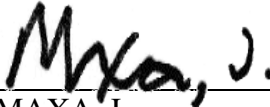
In addition, the circumstances here do not suggest that this case is one of the extreme situations to which Justice O'Connor referred in *Smith*. Juror 9's connection to Martinez was extremely tenuous. She did not even know his name. She was closer to Hector, but he did not testify. And juror 9 stated that she knew nothing about the case, would not feel differently about Martinez's testimony, and could remain fair and impartial to both sides. The trial court was in the best position to observe juror 9's demeanor and to evaluate her answers and to determine whether or not she was biased. *Lawler*, 194 Wn. App. at 282. Even in a de novo review, we defer to the trial court's credibility determination.

We hold that the trial court's failure to dismiss juror 9 did not violate Olson's constitutional right to an impartial jury.

CONCLUSION

We affirm Olson's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




MAXA, J.

We concur:



GLASGOW, A.C.J.



VELJACIC, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54547-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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