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DIVISION II

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STATE OF WASHINGTON
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No. 38582-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Glen Livermore

Appellant.

Grays Harbor County Superior Court Cause No. 07-1-543-1

The Honorable Judge F. Mark McCauley

Appellant's Reply Brief

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ARGUMENT

I. MR. LIVERMORE'S CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *In re Detention of Strand*, ___ Wn.App. ___, ___, 217 P.3d 1159, 1162 (2009). An error in jury selection requires reversal whenever there is lingering doubt about the bias or prejudice of even a single juror. *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998); *State v. Parnell*, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), *overruled in part on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001).

B. The court's comments during *voir dire* may have chilled disclosure of bias by some members of the venire.

A judge should not make comments during *voir dire* that chill responses to proper questions. *United States v. Rowe*, 106 F.3d 1226, 1230 (5th Cir. 1997). Reversal is required, regardless of prejudice, if the court's comments "cut off meaningful responses to critical questions." *Rowe*, at 1230. Respondent's contention—that only egregious jury selection problems like those in *Rowe* require reversal—is not based on case law. See Brief of Respondent, p. 10 ("[T]he trial court's comments

are not even close to the conduct of the judge in *Rowe*.”) *See e.g., People v. Boston*, 893 N.E.2d 677 (Ill.App. 2008) (prosecutor’s questioning about consent may have prejudiced potential jurors); *State v. Fortin*, 843 A.2d 974 (N.J.,2004) (refusal to allow questions relating to defendant’s prior misconduct required reversal). Reversal is required if, reviewing the case *de novo*, there is a lingering doubt about the bias of even a single juror. *Dyer, supra; Parnell, supra.*

Here, the judge’s comments likely discouraged some prospective jurors from disclosing bias (unless they could articulate a detailed reason for their bias). Specifically, the judge (1) excused a potential juror only after ascertaining that he’d been through a specific experience impacting his ability to be fair, and then (2) clarified (to the panel as a whole) that jurors would only be excused for bias if there was “something that would really affect you more so than the average juror.” RP (9/23/08 – jury selection) 112-113, 116-117.

When viewed together, these actions would probably have discouraged biased potential jurors from speaking up. Furthermore, by casting the inquiry in relation to the “average juror,” the judge invited each member of the venire to come up with her or his own assessment of how the average juror would evaluate bias. Finally, to overcome the

court's implicit instructions, a potential juror would have to accurately assess her or his own bias in relation to that of the average juror.

Although some potential jurors may have overcome inhibitions engendered by the court's comments, made a reasonable assessment of the "average" juror's bias, and accurately evaluated their own bias, most members of the panel were unlikely to overcome these hurdles. Respondent's contention that "numerous jurors continued to openly answer questions regarding their potential bias, whether rationally based or not..." (Brief of Respondent, p. 11) does not solve this problem; if even a single biased juror remained on the jury, Mr. Livermore's conviction was unconstitutional. *Dyer, supra*.

A judge need not criticize or punish potential jurors to silence them (as in *Rowe*). Instead, as here, a judge may chill the disclosure of bias by telling potential jurors—in a neutral and polite manner—that certain predispositions are of no interest. By asking potential jurors to articulate "something that would really affect you more so than the average juror" (RP (9/23/08 – jury selection) 116-117), the judge communicated that those who could not articulate such bias should keep quiet about their prejudices.

Because the judge's comments likely cut off the flow of meaningful responses to critical questions, Mr. Livermore's constitutional

right to an impartial jury was infringed, in violation of the Sixth and Fourteenth Amendments. *Rowe, supra*. The convictions must be reversed, and the case remanded to the trial court for a new trial. *Rowe*.

C. Juror McLean withheld information during *voir dire* and shared this information with the other jurors.

Juror McLean should have disclosed her relationship with the prosecutor during *voir dire*. Mr. Livermore was charged with sex offenses involving children; McLean's relationship with the prosecutor "was mostly in regards to [their] children." Brief of Respondent, p. 4; CP 35-41, 29. The fact that McLean did not lie in response to a direct question is irrelevant; given the nature of the case and the basis for the relationship, she should have known to disclose the information. *See, e.g., State v. Cho*, 108 Wn. App. 315, 327-328, 30 P.3d 496 (2001). Furthermore, despite Respondent's insistence that the relationship was not a "strong, trusting relationship," it is unlikely that any responsible parent would hand children over to someone with whom they had a weak relationship, or one that didn't involve trust. *See* Brief of Respondent, p. 13 (characterizing Mr. Livermore's argument as "an absolute misstatement of the facts presented.")

Any doubts about the effect of McLean's conduct must be resolved against the verdict. *State v. Johnson*, 137 Wn.App. 862, 870, 155 P.3d

183 (2007). McLean acknowledged that she mentioned her relationship with the prosecutor to other jurors and may have discussed it with them after deliberations commenced. RP (11/3/08) 244-253.

The knowledge that the prosecutor was a mother of young children may have inappropriately swayed jurors during the course of the trial. The relationship may also have influenced McLean to reflect on her own children's safety during deliberations, and thus, may have influenced her to favor conviction, regardless of the evidence. Because undisclosed information may have influenced deliberations, reversal is required. *Johnson*, at 868-869.

Mr. Livermore was deprived of his constitutional right to trial by an impartial jury, under the Sixth and Fourteenth Amendments. *Johnson, supra*. Because of this, his convictions must be reversed and the case remanded for a new trial. *Johnson, supra*.

D. Juror McLean's implied bias is conclusively presumed from facts established at the post-trial hearing.

Mr. Livermore rests on the argument made in his Opening Brief.

E. By failing to disclose her connection to Juror McLean, the prosecuting attorney committed misconduct requiring reversal of Mr. Livermore's convictions.

Mr. Livermore rests on the argument made in his Opening Brief.

II. MR. LIVERMORE'S CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

A. Standard of Review

A trial court's decision to grant or deny a challenge for cause is reviewed for an abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). The trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Id.* Any doubts regarding bias must be resolved against the juror. *United States v. Gonzalez*, 214 F.3d 1109, 113 (9th Cir. 2000); *Cho*, at 329-330.

B. The trial court's failure to excuse Juror 25 for cause forced Mr. Livermore to exhaust his peremptory challenges in violation of Wash. Const. Article I, Section 21 and Section 22.

The state constitutional right to a jury trial is broader than the federal right. Wash. Const. Article I, Section 21; Wash. Const. Article I, Section 22; *see, e.g., City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Under the state constitution, erroneous denial of a challenge for cause requires reversal if the accused person is forced to exhaust peremptory challenges. *See* Appellant's Opening Brief, at pp. 16-23, *citing State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Respondent's reliance on *State v. Rivera* is misplaced. Brief of Respondent, at pp. 24-26, *citing State v. Rivera*, 108 Wn.App. 645, 32 P.3d 292 (2001), *rev. den.* 146 Wn.2d 1006, 45 P.3d 551 (2002).

In *Rivera*, Division I concluded (after a cursory *Gunwall* analysis)¹ that Wash. Const. Article I, Section 22 provides the same protection as the Sixth Amendment. *Rivera*, at 649. Division II should not follow *Rivera* for two reasons. First, the Court in *Rivera* did not undertake a *Gunwall* analysis of Article I, Section 21. By contrast, Mr. Livermore provided *Gunwall* argument addressing both constitutional provisions. Appellant’s Opening Brief, at pp. 16-23.

Second, *Rivera*’s analysis of Article I, Section 22—in addition to being brief and cursory—was hampered by the appellant’s failure to provide any *Gunwall* briefing in that case. *Rivera*, at 649 n. 2. Relying on the state’s briefing, Division I failed to address all six *Gunwall* factors. In particular, Division I ignored pre-existing state law (factor four) and federalism (factor six), both of which strongly favor an independent application of the state constitution. See Appellant’s Opening Brief, at pp. 16-23. Furthermore, Division I misapplied factor five (differences in structure between the state and federal constitutions), which always supports an independent application. See, e.g., *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (“[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional analysis

¹ The analysis comprised a single paragraph in a footnote. *Rivera*, at 649 n. 2.

because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power.”)

In this case, Juror No. 25 twice indicated that she couldn't be fair and impartial,” and was unable to promise that she'd “listen fairly to decide the facts...” or that she'd set aside her feelings and listen to the testimony. RP (9/23/08 – jury selection) 96, 107-108, 115, 116. Contrary to Respondent's assertion, she clearly indicated that she'd be unable to “judge the testimony fairly.” Brief of Respondent, p. 23. In light of Juror No. 25's responses, the trial judge abused his discretion when he denied Mr. Livermore's challenge for cause. RCW 4.44.170(2); *City of Cheney v. Grunewald*, 55 Wn.App. 807, 780 P.2d 1332 (1989). This is so despite the superficial rehabilitation he led her through (especially given his initial remark that he wasn't “hearing it's bias one way or the other.”) RP (9/23/08 – jury selection) 116-117.

Mr. Livermore was forced to exhaust his peremptory challenges when the trial court erroneously denied a challenge for cause. This infringed his state constitutional right to a jury trial . His convictions must therefore be reversed and the case remanded for a new trial. Wash. Const. Article I, Section 21 and Section 22.

CONCLUSION

Mr. Livermore's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on December 15, 2009

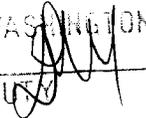
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I certify that I mailed a copy of Appellant's Reply Brief to:

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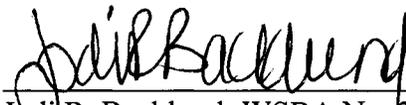
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 15, 2009.


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