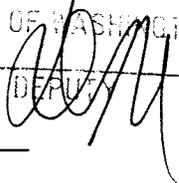


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DIVISION II

No. 38582-1-II

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

STATE OF WASHINGTON  
BY:   
DEPUTY

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STATE OF WASHINGTON,  
Respondent,

v.

GLEN A. LIVERMORE,  
Appellant.

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

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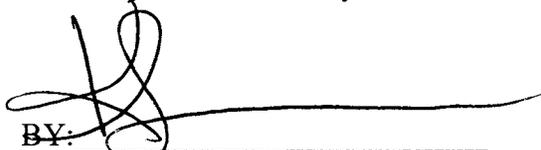
THE HONORABLE F. MARK MCCAULEY, JUDGE

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BRIEF OF RESPONDENT

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P. M. 8-20-2009

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## **COUNTER STATEMENT OF THE CASE**

### **Procedural History**

On September 23, 2008, the defendant was tried on the Second Amended Information, charging Rape of a Child in the First Degree (three counts), Child Molestation in the First Degree (three counts), Rape of a Child in the Third Degree and Child Molestation in the Third Degree. (CP at 1-5). The State elected to dismiss the Rape of a Child in the Third Degree and Child Molestation in the Third Degree prior to the case being submitted to the jury. On September 24, 2008 the jury returned verdicts of guilty to all remaining counts, and the jury returned special verdicts finding aggravating factors as to each count. (CP at 6-20).

### **Facts relating to challenges for cause**

During *voir dire*, at the end of the preliminary questioning of the panel, the trial court asked, "Is there anyone here that knows right now that they could not be fair and impartial to both the State and Mr. Livermore in this case?" (9/23/08 Jury Selection RP at 96). Eleven jurors responded affirmatively (4, 7, 10, 16, 17, 19, 21, 25, 46, 57 and 61). (9/23/08 Jury Selection RP at 96-97). Defense counsel focused much of his questions on the jurors that responded to this question from the trial court. (9/23/08 Jury Selection RP at 112-133, 137-146).

The trial court excused Juror 16 for cause, on the defendant's

motion, after the juror described going through an assault case with his stepson and his belief that he couldn't be open minded. (9/23/08 Jury Selection RP at 113). Juror 25 answered that, due to the nature of the charge and as the mother of two, she wasn't sure she could separate her emotional reaction and be fair. (9/23/08 Jury Selection RP at 115). The trial court chose not to excuse Juror 25 for cause after she ultimately answered that she was "willing to keep an open mind and listen to the testimony." (9/23/08 Jury Selection RP at 116). However, after retaining Juror 25, the trial court did excuse a number of additional jurors for cause, including 4, 10, 21, 19, 17, 46, 61, and 3. (9/23/08 Jury Selection RP at 119-120, 121, 123, 124, 125, 150).

In addressing the motion to remove Juror 16, the first to be challenged for cause by the defendant, the trial court made the following comments:

Court: Okay. Let me give you a - a little of my thinking on the case like this (Rape of a Child and Child Molestation). I - I heard you saying you felt it would be difficult to serve on this particular jury because of the nature of the charges. And I think a case like this, when the nature of the charges are difficult for everyone and - just like, you know, we've had cases where there's a murder for instance and everyone that serves on a jury in a murder case struggles with what happened. And obviously no ones' for murder and no one's for a sexual assault, you know.

So everyone generally - if it happened and these are allegations which have been denied and are at issue, I think

the key is can you set aside the emotion part of it, which is difficult for everyone, and judge the case on the testimony and the facts? ...

### **Facts relating to Juror 39 McLean**

On September 29, 2008, the Court issued a letter indicating that information had been received about a potential issue regarding an association between the deputy prosecutor and the presiding juror. The Court could not recall the issue being addressed at trial and sent a letter to alert the parties. (CP at 29).

However, at the time of jury selection, the potential jurors were asked as a group by the trial court:

I've introduced the attorneys. I'm Mark McCauley. I'll be the judge. If you know the attorneys, the court staff, or me, raise your hand at this time. We'll start in the front row and kind of work our way back. Keep your hand up until I have called your number. (9/23/08 Jury Selection RP at 89).

Ms. McLean, the presiding juror, was originally Juror 39. (CP at 26-28).

She responded in the affirmative to the Court's question and was recognized. (9/23/08 Jury Selection RP at 90). Several other jurors (17, 16, 15, 14, 36, 35, 29, 25, 50, 58 and 57) also raised their hands in response to this question. (9/23/08 Jury Selection RP at 89-90).

Out of the twelve potential jurors that stated they knew one the attorneys, judge or court staff, the Deputy Prosecutor questioned only nine of them. (9/23/08 Jury Selection RP at 99-111). Out of these nine, only

one juror, number 58, had raised her hand because she knew the Deputy Prosecutor. (9/23/08 Jury Selection RP at 109). When the Deputy Prosecutor realized she knew this juror, by a former name, that was stated on the record. (9/23/08 Jury Selection RP at 109).

Defense counsel filed a Motion for New Trial on October 22, 2008. (CP at 30-31). A hearing was held by the court on November 3, 2008 to address the motion. Ms. McLean testified at this hearing and the Deputy Prosecutor submitted a declaration. (CP at 35-41; 11/3/08 RP at 235-253).

Ms. McLean testified that her child and the Deputy Prosecutor's child attended the same daycare in 2004. (11/3/08 RP at 235). While Ms. McLean and the Deputy Prosecutor would speak in passing, it did not become a more personal relationship or involve social interaction. (11/3/08 RP at 236-238). The interaction between the two was mostly in regards to the children. (11/3/08 RP at 236). Ms. McLean watched the Deputy Prosecutor's child on two or three occasions for a short period of time and was not paid for this. (11/3/08 RP at 239-240). Ms. McLean did recall being given a bottle of wine. (11/3/08 RP at 239). This was a gift worth \$10-\$15 given as a thank you by the Deputy Prosecutor. (CP at 35-41). Ms. McLean also testified that the Deputy Prosecutor did not watch Ms. McLean's child in return. (11/3/08 RP at 241).

Ms. McLean clearly testified that the interaction with the Deputy

Prosecutor more than three years prior to the trial did not affect her ability to be fair or how she deliberated in any way. (11/3/08 RP at 246). Ms. McLean stated that “If I had felt that there was any way that I could not perform my duties for any reason, I would have brought it up.” (11/3/08 RP at 245). She also obviously understood that any personal knowledge of the Deputy Prosecutor was not relevant to her role as juror. When asked if she had shared a personal belief about the Deputy Prosecutor’s character with the other jurors, Ms. McLean responded, “Absolutely not. Because her character as a person has nothing to do with - with what our job was.” (11/3/08 RP at 246).

There is no evidence that Ms. McLean’s acquaintance with the Deputy Prosecutor in any way influenced her selection as jury foreperson. (11/3/08 RP at 244). Also, Ms. McLean testified that she might have mentioned that she had watched the Deputy Prosecutor’s child during a discussion with other jurors about the general selection process. (11/3/08 RP at 245). However, this statement was not a definite. Ms. McLean testified only that she “possibly” mentioned it, and she was not able to recall any specific conversations on this point. (11/3/08 RP at 245-247).

Ms. McLean told the court that she “[a]bsolutely” answered all questions asked of her during jury selection truthfully. (11/3/08 RP at 252). She also stated that any conversation about the general selection

process had “[a]bsolutely not” taken place during actual deliberation. (11/3/08 RP at 253). Ms. McLean testified that her acquaintance with the Deputy Prosecutor did not affect her ability to be fair and impartial as a juror. (11/3/08 RP at 252).

The trial court found that “there’s just absolutely no testimony or evidence that would support that [Ms. McLean] was actually biased...[a]nd certainly there was no - you know, no connection that would come under the statute as far as actual bias.” (11/3/08 RP at 261). Furthermore, the court found that there was “absolutely no testimony or - or evidence that would support” a conclusion that Ms. McLean gave a dishonest answer or committed misconduct. (11/3/08 RP at 261). Finally the court concluded that the casual acquaintance between the juror and the deputy prosecutor was not enough to imply bias. (11/3/08 RP at 262-264).

#### **RESPONSE TO ASSIGNMENTS OF ERROR**

The trial court has broad discretion in determining the scope and extent of voir dire. CrR 6.4(b); *State v. Frederiksen*, 40 Wash.App. 749, 752-53, 700 P.2d 369 (1985). *Voir dire* “ ‘is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.’ ” *State v. Davis*, 141 Wash.2d 798, 825, 10 P.3d 977, 994 - 995 (2000); *See Ristaino v. Ross*, 424 U.S. 589, 594-95, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976) (quoting *Connors v. United States*, 158 U.S.

408, 413, 15 S.Ct. 951, 39 L.Ed. 1033 (1895)). "The trial court is vested with discretion (1) to see that the voir dire is effective in obtaining an impartial jury and (2) to see that this result is obtained with reasonable expedition." *Frederiksen*, 40 Wash.App. at 753. The trial court's discretion is limited only by the need to assure a fair trial by an impartial jury. *Frederiksen*, 40 Wash.App. at 752.

**The trial court's comments during voir dire were not improper.**

The defendant claims that the trial court's comments to jurors were improper under *U.S. v. Rowe*. However, the facts of *Rowe* are egregious and the facts at bar are not comparable. Therefore, the defendant's reliance on *Rowe* is misplaced.

*Rowe* was drug case originally tried in the United District Court for the Southern District of Texas. *U.S. v. Rowe*, 106 F.3d 1226, 1227 (5<sup>th</sup> Circuit 1997). At the commencement of *voir dire*, the district judge made introductions and then asked which panel members had failed to appear. When she was given a name, the judge "told the U.S. Marshal, 'I will issue a warrant to have you pick up [that person], have her brought before this court, and have her show cause why she should not be held in contempt, fined, and/or imprisoned for her nonappearance.... Now, aren't you all [members of the panel] glad you appeared?'" *Rowe*, 106 F.3d at 1228.

A potential juror approached the bench and told the court she did

not think she could be fair and impartial due to her family connections to law enforcement. *Rowe* at 1228. This exchange, which was heard by the remainder of the panel, followed:

*Court:* Are you telling me that you cannot put aside, you cannot follow the order of this court and put aside your personal opinions, and listen to the evidence in this case and render a fair and impartial verdict? Is that what you're saying?

*A:* No. What I'm saying is that I don't feel that my verdict could be fair.

*Court:* That's just what I'm asking you. Why not? ... You're refusing to put aside your personal opinions? Is that what you're telling the court?

*A:* No, I'm not refusing. I'm just saying that I think that it will affect my decision as far as, you know, as the verdict is concerned.

*Court:* All right. Put her on February, March and April's panel to come back. And you will be coming back again, and again, and again.... And see if you can figure out how to put aside your personal opinions and do your duty to your country as a citizen, because this kind of answer which is clearly made up for the occasion is not really great. You are excused.

*Rowe* at 1228.

The judge then proceeded to ask if any other members of the panel had family or friends involved in law enforcement, and if that involvement would affect their ability to be fair and impartial. *Id.* A second juror answered that she had such a relationship and believed it would keep her

from being fair and impartial. *Id.* The juror stated, “I knew I was going to get myself into trouble when I said that, but, and I don't really know what I should say here, but I feel that ... if the law enforcement agency has done [enough work] on somebody to get them here in court, they know what they're talking about.” *Id.*

The court responded, in the presence of the entire panel, as follows:

It is appalling, actually, that you would come into a court, and presume that people were guilty because they were standing here charged with a crime. That's not our system. And apparently you will not, or you cannot follow the instructions of the court, so you're excused. Put her back on the jury panel for February, March and April, and perhaps you can take [sic] some remedial constitutional inquiries in the meantime. Does anyone else feel that these people are guilty, without hearing anything further? Now, I don't want to scare you into not responding. You will not be taken into custody. It is just hard, it's actually hard for me to believe somebody who stands up and says that they believe that because someone's sitting here that they're guilty already.

*Id.* at 1228-1229. When the judge asked an additional two times if any panel members would be unable to follow the court's instructions, no one responded. *Id.* at 1229.

The Circuit Court stated that “[w]e presume that potential jurors answer truthfully the questions of *voir dire*.” *Id.* at 1229, *See, e.g., United States v. Droge*, 961 F.2d 1030, 1036 (2<sup>nd</sup> Circuit), *cert. denied*, 506 U.S. 1003, 113 S.Ct. 609, 121 L.Ed.2d 544 (1992). “This assumption does not

hold, however, when jurors are given reason to fear reprisals for truthful responses.” *Id.* at 1229. In *Rowe*, each panel member that responded affirmatively to the court’s questions about bias “was accused by the court of refusing to follow instructions and attempting to avoid jury service, and then sanctioned;” therefore, the trial court’s actions “cut off the vital flow of information from venire to the court.” *Id.* at 1229-1230.

In the case at bar, the trial court’s comments are not even close to the conduct of the judge in *Rowe*. The trial court did not admonish jurors for expressing their potential biases or indicate that they would be sanctioned for doing so. The defendant argues that the “judge made clear that jurors would not be excused for bias unless there was ‘something that would really affect [that juror] more so than the average juror.’”

(Appellant’s Brief at 11 citing 9/23/08 Jury Selection RP at 116-117).

However, this comment was directed at a specific juror and the judge did not make any type of statement that would indicate the blanket decision the defendant argues.

The trial court’s comments to Juror 25 must be looked at in context. The comment to Juror 25 about whether or not her issue was something that “would really affect [that juror] more so than the average juror” came after an acknowledgment by the court that hearing sexual abuse allegations is emotionally difficult for most jurors. (9/23/08 Jury

Selection RP at 116-117).

In fact, the transcript of *voir dire* indicates that there was no chilling effect as to be avoided per *Rowe*. After the trial court's exchange with Juror 25, numerous jurors continued to openly answer questions regarding their potential bias, whether rationally based or not. Juror 4 stated that he was "likely to take a position based on one thing" that he heard and then not keep an open mind after that. (9/23/08 Jury Selection RP at 118). When the judge questioned Juror 4 about this, the juror stated "I'm likely to hear one particular issue from either side, I may just lock in on it and tune everything else out." (9/23/08 Jury Selection RP at 119). Unlike Juror 25, this juror did not state that he could keep an open mind and listen to the evidence, and he was excused for cause. (9/23/08 Jury Selection RP at 119-120).

Another juror, number 19, stated that she couldn't judge fairly because she was a school teacher and worked with kids every day. (9/23/08 Jury Selection RP at 122). This juror was excused for cause when she agreed that there was no way she could judge the case solely on its merits. (9/23/08 Jury Selection RP at 123).

The transcript shows a forthright exchange between the jury pool, counsel and the court. At least nine jurors disclosed and discussed biases that were based on various reasons ranging from their own experience with

a similar crime, or based on their working with children, to just because they may “tune everything else out” These discussions occurred after the comments complained of by the defendant. There is no evidence that the trial court’s comments in any way chilled the *voir dire* or that the comments were improper in any way.

**The trial court’s denial of the motion for new trial should be affirmed**

A trial court is afforded great discretion and deference when ordering a new trial owing to juror bias, and the decision should only be disturbed for a clear abuse of discretion or when it is predicated on an erroneous interpretation of the law. *State v. Briggs*, 55 Wash.App. 44, 60, 776 P.2d 1347 (1989). “Typically to obtain a new trial for juror bias for undisclosed information in *voir dire*, a party generally must 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. *State v. Boiko*, 138 Wash.App. 256, 261, 156 P.3d 934 (2007); *See also State v. Cho*, 108 Wash.App. 315, 321, 30 P.3d 496 (2001); *State v. Carlson*, 61 Wash.App. 865, 877, 812 P.2d 536 (1991), *review denied*, 120 Wash.2d 1022, 844 P.2d 1017 (1993); *State v. Briggs*, 55 Wash.App at 52.

**Juror 39, Ms. McLean did not withhold information during *voir dire*.**

In order to even make the argument for a new trial, the defendant

must meet the first prong that “...a juror failed to answer honestly a material question on *voir dire*...” *State v. Cho*, 108 Wash.App. at 322 citing *McDonough Power Equipment, Inc. V. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (plurality opinion). In this case, Ms. McLean alerted the Court and the parties that she knew one the attorneys, the court staff, or the judge, as asked by the Court. The defendant has not provided any evidence that Ms. McLean was asked any question that she answered falsely or in a misleading way. Therefore, the defendant cannot proceed with the analysis per *Cho* and *McDonough*..

The defendant claims that Ms. McLean failed to disclose that she “had once had a strong, trusting relationship with the prosecutor, in which each watched the other’s children after school.” (Appellant’s Brief at 12 citing 11/3/08 RP at 234-253). However, this is an absolute misstatement of the facts presented.

Ms. McLean watched the Deputy Prosecutor’s child for no more than 2-3 hours at a time on no more than three occasions. (CP at 35-41, 11/3/08 RP at 236, lines 18-22, RP at 239, line 9). Ms. McLean did this for several other parents at the daycare. (11/3/08 RP at 236). The Deputy Prosecutor never watched Ms. McLean’s child. (11/3/08 RP at 241, lines 7-13).

This was not a child care situation based on “a strong, trusting

relationship.” Instead, it was based on an acquaintance that happened because both families were involved in the same daycare and Ms. McLean’s position working with another local attorney whose child was also at that daycare. (CP at 35-41, 11/3/08 RP at 237-238). Ms. McLean did not provide any regular care, care for long periods of time, or overnight care. (11/3/08 RP at 239-241). Further, this occurred approximately three years prior to the trial date, and Ms. McLean and the Deputy Prosecutor had not had anything other than transient contact in the intervening time. (CP at 35-41).

Ms. McLean was asked, with the entire pool, if she knew the attorneys, court staff or judge, and she clearly answered in the affirmative. (9/23/08 Jury Selection RP at 89-90). Later, defense counsel inquired about Ms. McLean’s employment with the school district. (9/23/08 Jury Selection RP at 142). Ms. McLean answered all of defense counsel’s questions and answered that she believed she could judge the case solely on the facts and give the defendant a fair trial. (9/23/08 Jury Selection RP at 142-143). The fact that neither attorney nor the trial court asked Ms. McLean to clarify this answer was not within her control.

There is no evidence that Ms. McLean attempted to withhold or obscure any information during *voir dire*. A prospective juror is not obligated to volunteer information or provide answers to unasked

questions. *Cho* at 327; *See State v. Brenner*, 53 Wash.App. 367, 372, 768 P.2d 509 (juror's failure to volunteer information about his prior experience as a police officer was not misconduct where juror was not specifically asked about it), *review denied*, 112 Wash.2d 1020 (1989).

**The defendant cannot establish implied bias in regards to Juror 39, Ms. McLean.**

Even if the defendant could show that Ms. McLean failed to disclose information, the argument for a new trial would fail. The second prong of the *McDonough* test requires the defendant to show that the undisclosed information would have “provided a basis for a challenge for cause.” *Cho* at 321.

“Bias, either actual or implied, is a recognized basis for a challenge for cause.” *Cho* at 324; *See* RCW 4.44.170(1) and (2). In *Cho*, a juror failed to disclose that he was a former police officer during *voir dire*. *Cho* at 320. During questioning, the juror gave his current occupation as a security manager for Wells Fargo Bank, but he did not disclose his prior law enforcement experience. *Cho* at 319. The court found that “there is nothing inherent in the experience of being a police officer that would support a finding of bias.” *Cho* at 324.

“A relationship with the government, without more, does not establish bias.” *Cho* at 324; *See Dennis v. United States*, 339 U.S. 162, 70

S.Ct. 519, 94 L.Ed. 734 (1950) (government employees were not, solely by reason of their employment, barred from serving on a federal district court jury in the District of Columbia in a case where the allegation was willful failure to respond to a subpoena issued by the House Committee of Un-American Activities); *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *See also United States v. Salamone*, 800 F.2d 1216 (3<sup>rd</sup> Circuit 1986) (potential jurors may not be excluded for cause based solely on perceptions of their external associations, such as membership in the National Rifle Association).

There is nothing in the record to establish an actual bias in regards to Ms. McLean. The trial court made specific findings, as cited above, that there was no evidence of actual bias. The trial court is certainly in the best position to judge credibility and its ruling should not be disturbed. In fact, the defendant only argues that the Court should imply bias under *Cho*.

“Where 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.” *Cho* at 325; *See Smith v. Phillips*, 455 U.S. at 222, 102 S.Ct. 940 (O'Connor, J., concurring).<sup>1</sup> One such circumstance is when a prospective juror

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<sup>1</sup>The plurality in *Smith* holds that a post-trial hearing, in which the disfavored litigant has the opportunity to prove actual bias, is sufficient remedy when there are allegations of a juror's partiality. *Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 71

deliberately withholds information during voir dire in order to increase the likelihood of being seated on the jury. *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir.1981) (“We also hold that a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposefully incorrect answer.”).<sup>2</sup> An example of implied bias arising from a juror's deliberate concealment of material information is found in *United States v. Colombo*, 869 F.2d 149 (2d Cir.1989). In *Colombo*, evidence that came to light after the guilty verdict indicated that one of the jurors had a brother-in-law who was a government attorney. She allegedly told another juror that she did not mention it “because she wanted to sit on the case.” *Colombo*, 869 F.2d at 150.<sup>3</sup> Such misconduct, the court observed, is “inconsistent with an expectation that a prospective

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L.Ed.2d 78 (1982). But many federal courts have followed Justice O'Connor's concurring opinion, recognizing that in certain instances where a hearing may be inadequate for uncovering a juror's biases, implied bias may be found. “Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.” *Smith*, 455 U.S. at 222, 102 S.Ct. 940 (O'Connor, J., concurring). Justice O'Connor's concurring opinion in *Smith* has majority force in that it was relied upon by the five concurring judges in *McDonough*. See *McDonough*, 464 U.S. at 557, 104 S.Ct. 845 (Blackmun, J., concurring); 464 U.S. at 558, 104 S.Ct. 845 (Brennan, J., concurring).

<sup>2</sup>While *McCoy* predates *McDonough*, the *Cho* court concluded that its discussion of presumed bias remains vital as the federal courts continue to rely on it. See, e.g., *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir.1989).

<sup>3</sup>Cf. *United States v. Langford*, 990 F.2d 65, 67 (2d Cir.1993)(Juror who deliberately withheld information that she had been arrested and charged with prostitution was not biased; her motive was to avoid embarrassment, not a desire to sit on the jury.).

juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court.” *Colombo*, 869 F.2d at 151-52.<sup>4</sup> In another case, the appellate court found the record strongly suggested that a juror wanted to serve on the jury, and that he feared he would not be allowed to do so if he disclosed his brother's employment as a deputy sheriff in the office that performed some of the investigation in the defendant's case. *U.S. v. Scott*, 854 F.2d 697, 699 (5th Cir.1988). The court held there was sufficient implication of the juror's bias to require a new trial.

From the evidence presented to the trial court, Ms. McLean did not fail to disclose material facts. There is also no evidence to support a claim that she withheld information in an effort to increase her chances of being seated on the jury. In fact, the record supports the opposite assertion. Ms. McLean answered all questions asked of her, and there is nothing that would indicate she was anything less than truthful with counsel or the trial court.

Further, the nature of the acquaintance between Ms. McLean and the Deputy Prosecutor is not such that, without more, would support a challenge for cause. This was an acquaintance that had ended

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<sup>4</sup>On remand, after an evidentiary hearing, the district court found the juror did not intentionally withhold the information. The second circuit affirmed this ruling but reversed on other grounds, *United States v. Colombo*, 909 F.2d 711, 713 (2d Cir.1990)

approximately three years prior to the trial. A person who provides a small amount of brief child care does not have such a special relationship with the State that bias can be implied.

**The State had no duty to disclose any additional information regarding Juror 39, Ms. McLean.**

The defendant cites *Williams v. Netherland*, 181 F.Supp.2d 604 (E.D.Va.2002), aff'd sub nom. *Williams v. True*, 39 Fed. Appx. 830 (4th Cir. 2002), which is the district court's opinion after the remand in *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The facts in Williams are stated succinctly by the district court:

The jury forewoman, Bonnie Baker Meinhard Stinnett, failed to reveal during voir dire that one of the Commonwealth's witnesses, Deputy Sheriff Claude B. Meinhard, was her former husband and the father of her four children. Meinhard testified at Williams' trial about his investigation of the double homicide (the Keller murders) for which Williams was on trial. Juror Stinnett also failed to reveal that the prosecutor, Robert Woodson, Jr., had been her attorney during her divorce from Meinhard.

Stinnett was asked the following questions and gave the following responses during voir dire. The Court first read the name of the two prosecutors, including Robert Woodson, Jr., and the two defense attorneys and posed the following questions:

The Court: Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?

Ms. Stinnett made no response (It was understood that no

response was the equivalent of a negative response).

....

The Court: Are any of you related to the following people who may be called as witnesses ... Deputy Sheriff Claude Meinhard?

Again Ms. Stinnett made no response.

*Williams*, 181 F.Supp.2d at 606.

Unlike the juror in *Williams*, there is no evidence that the juror gave false or misleading answers. Therefore, there is no evidence that the Deputy Prosecutor knew that the juror was biased and failed to disclose that. The defendant offers no case law that requires the Deputy Prosecutor to offer further information when the juror has clearly disclosed that she is familiar with counsel, court staff and/or the judge.

**The trial court did not abuse its discretion by denying the motion to excuse Juror 25 for cause.**

Under the Sixth Amendment to the United States Constitution and article I, section 22 (amend.10) of the Washington State Constitution, “a defendant is guaranteed the right to a fair and impartial jury.” *State v. Brett*, 126 Wash.2d 136, 157, 892 P.2d 29 (1995)(citing *State v. Rupe*, 108 Wash.2d 734, 748, 743 P.2d 210 (1987)). A juror may be excused for cause when his views “ ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’ ” *Brett*, 126 Wash.2d at 157, 892 P.2d 29 (quoting *State v. Hughes*, 106

Wash.2d 176, 181, 721 P.2d 902 (1986)). A trial court's denial of challenges for cause is reviewed under an abuse of discretion standard. *Brett*, 126 Wash.2d at 158, 892 P.2d 29 (citing *Rupe*, 108 Wash.2d at 748, 743 P.2d 210).

A juror with preconceived ideas need not be disqualified if that juror can set those ideas aside and “decide the case on the basis of the evidence given at the trial and the law as given him by the court.” *Rupe*, 108 Wash.2d at 748, 743 P.2d 210 (quoting *Mak*, 105 Wash.2d at 707, 718 P.2d 407). “Equivocal answers alone” are not cause for dismissal. *Rupe*, 108 Wash.2d at 749, 743 P.2d 210. The trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial. *Rupe*, 108 Wash.2d at 749, 743 P.2d 210.

Juror 25 raised her hand when the trial court asked if there was anyone who believed they could not be fair and impartial. (9/23/08 Jury Selection RP at 95). When asked by the State about her response, Juror 25 stated that having two small children gave her concern about hearing the case. (9/23/08 Jury Selection RP at 107). When asked if she could decide the case fairly, Juror 25 replied “I could try, but I can’t promise.” (9/23/08 Jury Selection RP at 108).

When defense counsel followed up with the juror, he asked “...And

so I guess what I'm hearing you say is that because you have children - understandably, a lot of emotions come up with this nature of this case. You don't think you could separate that out and be fair to Mr. Livermore?" (9/23/08 Jury Selection RP at 115). The juror responded that counsel's statement was correct, speaking over counsel in the transcript. (9/23/08 Jury Selection RP at 115). Defense counsel moved to excuse Juror 25 for cause. (9/23/08 Jury Selection RP at 115).

At this point, the court conducted further *voir dire* of Juror 25 as follows:

Court: All right. Kind of again the same questions. I mean there's probably a lot of jurors here - probably majority [sic] of the jurors that have children, maybe not small children but have children. Is it something that you just don't think you can set aside and listen to the testimony?

Juror 25: Honestly, I don't know. I could try, but right now my opinion is that I couldn't.

Court: Is it the emotional part of just listening to the testimony or -

Juror 25: Yes.

Court: - in judging the truth or falsity of testimony?

Juror 25: I - I think listening to the testimony.

Court: All right. So I'm not hearing it's bias one way or the other. You're willing to keep an open mind and listen to the testimony?

Juror 25: Yes.

Court: ... Is there something that would really affect you more so than the average juror?

Juror 25: No.

The trial court was in the best position to evaluate this juror's possible bias. Juror 25's answers indicate that she believed it would be emotionally difficult for her to hear testimony regarding sexual abuse of children because of her own children. However, she did not state that this difficulty would affect her ability to judge the testimony fairly. In fact, when the trial court asked if her issue was with "judging the truth or falsity of the testimony" she stated that it was not.

The trial court did not abuse its discretion by denying the motion to remove Juror 25 for cause.

**If the trial court erred by denying the motion to excuse Juror 25, it was cured by the use of a peremptory challenge.**

It is well established that an erroneous denial of a challenge for cause may be cured when the challenged juror is removed by peremptory. *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 777-80, 145 L.Ed.2d 792 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988); *Rupe*, 108 Wash.2d at 749, 743 P.2d 210 (citing *State v. Latham*, 100 Wash.2d 59, 64, 667 P.2d 56 (1983)).

Here, the defendant used a peremptory to remove the juror he

unsuccessfully challenged for cause. While the defendant did use all of his peremptory challenges, he did not request additional challenges from the court. “So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.” *Ross*, 487 U.S. at 88, 108 S.Ct. 2273; *see also Martinez-Salazar*, 120 S.Ct. at 782 (rejecting due process challenge under same scenario). The State argues that because the defendant has not demonstrated that jurors who should have been removed for cause actually sat on the panel, his rights were not violated.

**A *Gunwall* analysis does not produce a different result.**

In *State v. Rivera*, the defendant was erroneously granted one peremptory challenge less, as to the alternate jurors, than he was entitled to by the trial court. *State v. Rivera*, 108 Wash.App. 645, 32 P.3d 292 (2001); *review denied State v. Rivera*, 146 Wash.2d 1006, 45 P.3d 551 (2002); *post-conviction relief denied by In re Personal Restraint of Rivera*, — P.3d —, 2009 WL 3337596 (2009). *Rivera* argued that this error violated his rights under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. *Rivera*, 108 Wash.App. at 648. The *Rivera* court reviewed the State’s *Gunwall* analysis and held that “the state constitution provides the same protection as the federal constitution.” *Rivera* at 649.

The six *Gunwall* factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *State v. Gunwall*, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986).

The *Rivera* court's *Gunwall* analysis is on point in the case at bar.

The court found as follows:

In this case, all of the *Gunwall* factors support the conclusion that the state constitution provides the same protection as the federal constitution. Art. 1, § 22 guarantees a defendant the right to a “speedy public trial by an impartial jury”. The Sixth Amendment guarantees a defendant the right to a “speedy and public trial, by an impartial jury”. There is no significant difference between the texts or the structures of the provisions. (Factors 1, 2, and 5.) Art. 1, § 22 was taken from the federal constitution. (Factor 3.) Washington courts have always relied heavily on federal interpretations of the right to an impartial jury. *See, e.g., State v. Hughes*, 106 Wash.2d 176, 181, 721 P.2d 902 (1986), *State v. Williamson*, 100 Wash.App. 248, 251, 996 P.2d 1097 (2000), *State v. Evans*, 100 Wash.App. 757, 772-74, 998 P.2d 373 (2000). The *Gunwall* analysis indicates that art. 1, § 22 does not provide any more protection than the Sixth Amendment. Accordingly, we analyze the issue under federal constitutional principles.

*Rivera* at 649, footnote 2.

The defendant's analysis of Art. 1, § 21 is misplaced. There is no

evidence that the defendant was denied a jury trial, and this section just does not apply to the argument at bar. The *Gunwall* analysis in *Rivera* is directly on point and should be applied in this case.

**The defendant's score was properly calculated, Statement of Additional Grounds Issue.**

Whenever a defendant is sentenced for two or more current offenses, the trial court determines the sentence range for each offense by adding together all other current offenses and prior convictions. Former RCW 9.94A.400(1)(a) (recodified as 9.94A.589 by Laws 2001, ch. 10, § 6); *State v. Calvert*, 79 Wash.App. 569, 577, 903 P.2d 1003 (1995). If, however, the court finds that all or some of the current offenses encompass “the same criminal conduct”, then those offenses may be counted as one crime. Former RCW 9.94A.400(1)(a); *State v. Calvert*, 79 Wash.App. At 577. “Same criminal conduct” is defined by statute as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” Former RCW 9.94A.400(1)(a). If any one of these elements is missing, the offenses must be counted separately in calculating the offender score. *State v. Maxfield*, 125 Wash.2d 378, 402, 886 P.2d 123 (1994). The trial court's determination whether two crimes involve the same criminal conduct will not be disturbed on appeal unless there is a clear abuse of discretion or a

misapplication of the law. *Maxfield; State v. Flake*, 76 Wash.App. 174, 180, 883 P.2d 341 (1994).

In this case, counts 1, 2, 6 and 7 pertained to victim A.M.; counts 3 and 8 pertained to victim J.M.F.; and counts 4 and 5 pertained to victim T.L.F. (CP at 1-5). As counts 2 and 7 were not submitted to the jury, the defendant was sentenced only on the guilty verdicts for counts 1, 3, 4, 5, 6, and 8. (CP at 6-20). The counts submitted to the jury pertaining to each victim covered the same time period, respectively. (CP at 1-5). To clarify, the charging period for all counts pertaining to A.M. was August 11, 1993–August 10, 2000; the charging period for the counts pertaining to J.M.F. was October 18, 1991–October 17, 1997; and the charging period for the counts pertaining to T.L.F. was March 30, 1993–March 29, 2000. (CP at 1-5).

Because the jury did not make a finding that their verdict for Child Rape and Child Molestation for each victim was based on separate incidents, the State conceded that the counts for each victim must merge as same criminal conduct. In section 2.1 of the Judgment and Sentence, the trial court correctly treated counts 1 and 6, counts 3 and 8, and counts 4 and 5 as the same criminal conduct. (CP at 6-20).

Because the defendant's crimes were against three separate victims, they do not fall under the definition of "same criminal conduct."

The defendant's offender was not calculated at 6 because there were six counts, but because, for each of the three counts he was sentenced for, the remaining two counts count as 3 points. Further, the trial court acted in its discretion by imposing an exceptional sentence that included consecutive sentences for each victim.

### CONCLUSION

For the reasons stated above, the State asks this Court to deny the appeal of the defendant on all grounds.

Respectfully Submitted,

  
By: \_\_\_\_\_  
KATHERINE L. SVOBODA  
Deputy Prosecuting Attorney  
WSBA # 34097

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 38582-1-II

v.

**DECLARATION OF MAILING**

GLEN A. LIVERMORE,

Appellant.

**DECLARATION**

I, MARYBETH HRANAC hereby declare as follows:

On the 20<sup>th</sup> day of November, 2009, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Attorneys at Law; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501, and Glen A. Livermore 241349; Airway Heights Corrections Center; P. O. Box 1899; Airway Heights, WA 99001, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 20<sup>th</sup> day of November, 2009, at Montesano, Washington.

[Signature]