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COA No. 36688-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

HECTOR OROZCO, JR.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

The Honorable Bruce A. Spanner

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Orozco's Fourteenth Amendment<sup>1</sup> due process and Sixth Amendment<sup>2</sup> rights to a fair trial by an unbiased jury when it denied the defense motion to dismiss juror 32 for cause.

2. The trial court violated Mr. Orozco's due process and Sixth Amendment rights to a fair trial by an unbiased jury when it denied his request for a mistrial, and his alternative request to have the court question the remaining jurors after juror 13 was removed mid-trial.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Juror 32 stated in his jury questionnaire that he had a dense connection to two law enforcement officers, Franklin County Sheriff Jim Raymond and Detective Lee Burrowes. No additional information rehabilitated his actual and/or implied bias in favor of the prosecution. Did the trial court err in denying the defense challenge for cause?

2. Mid-trial, juror 13 revealed that she had been telephoned by

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<sup>1</sup> The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

<sup>2</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury[.]" U.S. Const. amend. VI.

Vicky Keller, who was a relative of Ms. Bonnie Ross, the victim in count 3. The trial court later concluded that juror 13 had failed to reveal all the pertinent facts about the telephone call, and properly removed her from the jury. However, the court took juror 13's "word for it" when she denied speaking about the incident with any other jurors. Did the court wrongly deny the defense motion for a mistrial, or to question the remainder of the jury members?

### **C. STATEMENT OF THE CASE**

Mr. Orozco was charged with being the person who stabbed and killed Mr. Demetrious Graves, a man with whom he and two other men, including the accuser Mr. Shegow Gagow, had been smoking methamphetamine in a shed in a Pasco back alley. CP 2-11, 12-14; RP 983-86. Police learned that Mr. Graves had been killed after Mr. Gagow called 911 and hailed an officer in the middle of the street. RP 494-95, 500-05, 520.

Mr. Gagow said that Mr. Orozco stabbed Graves in the alley, and then attacked him which led to a charge of attempted murder on which Orozco was acquitted. RP 504, 541; CP 12, 175. Mr. Gagow had lied to the police, saying that he was not on drugs. RP 1798.

It was also shown that Mr. Gagow purposefully planted papers with Mr. Orozco's name on them near Graves' body. RP 506, 807, 616-22, 1838. An officer noticed that Gagow was carrying a boxcutter in his hand, although it did not have a blade; he also dropped that next to Mr. Graves' body. RP 530, 571. He admitted throwing another knife away in the alley when police arrived. RP 1824.

Despite all this, Mr. Gagow stuck to his claim that Mr. Orozco had killed Graves, and also alleged that Mr. Orozco had attacked him, and almost beat him to death – yet officers testified he had no injuries. RP 574-75. Mr. Gagow admitted that he was in trouble with Mr. Orozco because he owed him money that he had not paid. RP 1774.

Mr. Orozco was also charged with being the person who robbed, strangled and stabbed the elderly Ms. Bonnie Ross in a Pasco neighborhood that same day. CP 13; RP 1104-10, 1121. That offense was complicated by the presence of at least one other suspect, a convicted rapist who had been found prowling around Ross's house at the time. RP 1195-96, 1760-62. Although Mr. Orozco apparently used Ms. Ross's land-line telephone, and he was later arrested driving Ms. Ross's car to the Roadway Inn motel where he had been staying, he

explained to his girlfriend that he had been helping Ross move and was using her car for that reason. RP 923, 1059, 1072, 1280, 1519-26.

The State claimed that Mr. Orozco gave an acquaintance, Anthony Nugent, an amount of cash to pay for an additional night at the motel, using money that he robbed from Ms. Ross's house. RP 883-84, 928-29, 1531-33. Police arrested him at the motel. RP 1435. Mr. Orozco was interrogated for several hours and he did not confess to any of the accusations the officers were making. RP 1442-43, 1455-57.

Mr. Orozco was convicted for first degree murder of Mr. Graves, for felony murder of Ms. Ross, and for lesser assaults and unlawful imprisonment of Nugent, and Mary Gibson, two acquaintances at the motel. RP 1032-33, 1435. Based on an agreed criminal history and offender score, Mr. Orozco was sentenced to a total of 477 months imprisonment. CP 187-201.

## **D. ARGUMENT**

**1. Mr. Orozco was denied his right to a fair and impartial jury when juror 32, who had a dense personal acquaintance with local law enforcement, sat in judgment on his case.**

**a. Appealability.**

Mr. Orozco challenged juror no. 32 for cause. RP 116. Juror 32 was seated on the jury. RP 278; RP 362-64 (seating of final jury

members); RP 1964 (pre-deliberations selection of alternate). Mr. Orozco may appeal the denial of his challenge for cause to juror 32, because the juror sat on the jury, deliberating to conclusion. See State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002) (party need not exhaust all peremptory challenges in order to appeal denial of challenge for cause), review denied, 148 Wn.2d 1012 (2003) (citing State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) and United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)).

**b. Voir dire and challenge to Juror 32.**

At the beginning of jury selection, the trial court determined that the jury questionnaires would provide the first basis for removal of potential jurors, including on the basis of challenges for cause to which the other party might agree. RP 7-9. There was a more formal process of challenges for cause held later, following individual questioning of the *venire*. RP 282-83, 2192 *et seq.* However, it was agreed that from then onward, if there was “something that arises that immediately gives cause,” a challenge by a party could be lodged. RP 9-10.

On January 14, the parties again agreed that the juror questionnaires should be the basis for both hardship removals and

substantive removals. RP 109. At that time, although the court had sought agreement by stipulation, both parties presented argument regarding for-cause challenges to several jurors. RP 110-21; see State v. Beskurt, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013) (juror questionnaires are a component part of the juror selection process).

When the defense sought to remove potential juror 32 for cause, the State refused to agree and the court did not strike the juror. RP 116. The defense had relied on juror 32's questionnaire, which indicated that he had a "very dense connection with law enforcement related to Sheriff [Jim] Raymond [and ] Detective Lee Burrowes." RP 116.

**c. Juror 32 should have been excused for cause.**

Juror 32 should have been removed because he implicitly had a bias that would "substantially impair" the performance of his duties in accordance with the court's instructions and the oath of jurors, therefore disqualifying him. State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

A defendant is entitled, under due process and the Sixth Amendment, to a panel of unprejudiced and unbiased jurors. State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000); U.S. Const. amends.

XIV, VI. Pursuant to statute, a juror must be excused for either “actual” or “implied” bias. RCW 4.44.170; Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828 (2010). Actual bias is the existence of a state of mind on the part of the juror which prevents him or her from trying the issue impartially. RCW 4.44.170(2). Thus, a favoritism or predisposition toward a category of individuals, such as police officers, establishes actual bias. Gonzales, 111 Wn. App. at 281. Absent further information, juror 32 had actual bias.

Implied bias is conclusively established from a juror’s direct or indirect relationship or connection to either the parties, the proceeding or the matter at issue. RCW 4.44.170(1); see State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). Juror 32 was also saddled with implied bias. RCW 4.44.180 list four nonexclusive circumstances which conclusively require this determination: (1) consanguinity or affinity within the fourth degree to either party; (2) any close business relationship; (3) having served on an earlier jury trying a case on substantially similar issues; and (4) a financial interest in the outcome of the suit.

Here, juror 32’s questionnaire made clear that he had some degree of potential consanguinity or affinity with lead law enforcement

officers, and similarly had a potential close business relationship with these individuals. Where the juror indicated facts amounting to a “dense connection” with the Franklin County Sherriff and another well-known law enforcement officer, he arrived as a member of the *venire* with a range of biases under the statute.

Further, the courts have held that bias may be implied by other circumstances not expressly specified in RCW 4.44.180. See, e.g., State v. Cho, 108 Wn. App. 315, 325, 329, 30 P.3d 496 (2014) (under Sixth Amendment right to a fair, unbiased jury, implied bias required remand for inquiry after evidence post-verdict indicated that juror had not volunteered that he was a retired police officer) (citing United States v. Colombo, 869 F.2d 149, 151-52 (2d Cir.1989) (implied bias where one of the jurors had a brother-in-law who was a government attorney and allegedly told another juror that she did not mention it “because she wanted to sit on the case.”)).

Juror 32 did not, of course, fail to reveal his dense connection to law enforcement. But on the face of his questionnaire, juror 32 should have been excused for cause. For example, in State v. Cho, 108 Wn. App. 315, although in a slightly different context, the Court of Appeals remanded for inquiry into the reasons a juror failed to reveal during

*voir dire* that he was a retired police officer. In statements that apply analogously to show that juror 32 must be presumed to have been impliedly biased, the Cho Court stated:

In extraordinary situations, and we consider this to be one of them, a court may infer bias from underlying facts about the juror without regard to explanations offered by the juror.

State v. Cho, at 329-30. In a similar vein, our courts have gone so far as to state that the trial court may be required to exercise its independent obligation to ensure that a particular juror is not seated, where a statement of obvious bias is never followed by further information that establishes rehabilitation. State v. Guevara Diaz, \_\_\_ Wn. App. 2d \_\_\_, 456 P.3d 869 (2020) (juror's questionnaire statements); see also State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015).

In this case juror 32's dense connections to law enforcement plainly warranted removal for cause without more. See Cho, at 330 (holding that doubts regarding bias must be resolved against the juror) (citing Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir.1991)).

The defense challenge for cause should have been granted -- wherever there is a doubt about a juror's ability to decide the case impartially and free from bias, the juror should not be seated. Morgan

v. Illinois, 504 U.S. 717, 723, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).

**d. Reversal is required.**

Here, juror 32 was seated. The error of denying a challenge for cause to a biased juror requires no showing of specific prejudice. Where a juror who should have been dismissed for cause was not, the defendant's convictions following jury trial where that juror sat in judgment upon him must be reversed. Fire, 145 Wn.2d at 158; Martinez-Salazar, 528 U.S. at 316. Mr. Orozco's convictions must be reversed.

**2. The court violated Mr. Orozco's rights to a fair trial by an unbiased jury when it declined to inquire of the remaining jurors regarding juror 13's mid-trial telephone call from a relative of the murder victim.**

**a. A new trial is necessary because juror 13 failed to reveal facts pertinent to trial by an unbiased jury, and the court subsequently failed to adequately investigate whether the prejudice affected other jurors.**

The due process clause of the Fourteenth Amendment, and the jury trial right of the Sixth Amendment, entitle a criminal defendant to a fair trial by an impartial jury, which determines guilt on the basis of the evidence at trial, as distinct from extraneous sources of decision or

influence. Patton v. Yount, 467 U.S. 1025, 1037 n.12, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984); U.S. Const. amends. XIV, VI.

These provisions protect the defendant's right to a jury capable and willing to decide the case solely in that manner, and a trial judge must ever be watchful to prevent prejudicial occurrences, and to determine the effect of such occurrences when they happen. State v. Berhe, 193 Wn.2d 647, 668, 444 P.3d 1172 (2019); Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982).

A court must fully investigate where it learns that a juror may have been subjected to extraneous sources of information or influence, or discovers that a juror did not reveal facts pertinent to a tainted or prejudiced jury process. A court's failure to properly investigate, to ensure that bias was not a factor that seeped into the jury's deliberations, violates these constitutional rights. Berhe, 193 Wn.2d at 668; Cho, 108 Wn. App. at 327.

On review, the Court of Appeals reviews *de novo* the question whether occurrences at trial below in this case violated Mr. Orozco's constitutional rights. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

**b. Juror 13 reported that when she was called by a relative of victim Bonnie Ross, she told the caller to “stop talking,” and said that she could not discuss the case until the trial was over.**

On the morning of January 18, the bailiff informed the court that juror 13 told him that she had received a telephone call the previous night “apparently from someone who said that she was a relative of one of the victims.” RP 655. While the rest of the jury waited, the bailiff retrieved juror 13 and brought her into the courtroom alone, where she took the witness stand. RP 656. The juror stated that a woman had telephoned her and said,

“I hear you’re on the jury of the guy that killed my great grand -- great nephew’s wife’s grandma [Ms. Bonnie Ross]”

RP 656-57. Juror 13 explained that the caller, Vicky Keller, was a person she had known for 20 years. Vicky used to be, or still was, juror 13’s friend and co-worker. RP 657-58 (“I work with her at the Port of Pasco, and she’s also, you know, a friend of mine.”). Juror 13 also explained that Vicky was a close friend, and someone she did things with socially, including going to each other’s houses, and periodically going out to lunch or dinner. RP 658-59.

Juror 13 said that she immediately told her friend several times to stop talking, because they could not speak about this topic. RP 657.

When asked why she had not realized earlier that one of the murder victims in the trial was related to her friend, juror 13 said that she had probably been told about Bonnie Ross's death "when it happened a year ago," but, she stated, "I honestly didn't remember. I didn't put two and two together because this lady has like 24 great-nieces and nephews, and I just didn't make the connection and I don't know any of these people." RP 657.

Juror 13 said she was "mortified" when Vicky called, because she realized that Vicky had brought up Ross's death when it happened the previous year, although Mr. Orozco's name was never mentioned at that time. RP 660-61. Juror 13 had either talked with Vicky about the homicide, or the fact that Ms. Ross had died, but she did not remember any details of their discussions. RP 658; see RP 672. At some point during the mid-trial telephone call, juror 13 thought, "Oh, my gosh. You did mention that to us." RP 658.

Juror 13 had seemed to anticipate talking about the case later, when she told Vicky, "I can't talk to you until this trial's over," and Vicky said, "Okay." RP 660. Juror 13's description of her pre-trial and mid-trial statements, that she would talk about the case later, gradually expanded until she revealed that before trial, she had

informed yet another friend that she was on Mr. Orozco's jury, and this was how Vicky, in turn, learned of it:

She heard it from another friend. I mean, I had told her about -- I had talked to her on Friday the 11th, I think it was, and I said -- I made the comment that I had to call in for jury duty, and my other friend, her name is Sue, she called me on Wednesday I think it was, and she said, "Did you get on the jury?" and I said, "Yes," and that's all we said. Then she told this -- her name is Vicky -- that I got on the jury, and then Vicky called me last night and said, "I hear you got on the jury."

RP 659. As juror 13 admitted, she confirmed this to Vicky. RP 659-60 (stating that she replied, "I just did. I got on the jury. I'm on [sic] jury." RP 659-60.

The trial court asked juror 13 if this impacted her ability to be fair and impartial, and juror 13 asserted that it did not. RP 658. The juror was escorted back to join the remainder of the jury, at which point the trial court heard argument from counsel. RP 662-73.

**c. The trial court dismissed juror 13 several days later, but denied a mistrial, and denied the defense request that the jurors be briefly questioned as to whether juror 13 had spoken to them about the incident.**

**(i). Motion to dismiss and motion for a new trial.** Mr. Orozco argued that juror 13 had plainly been tampered with by her friend, who called juror 13 knowing that she was on the jury in the trial of the man

accused of being Ms. Bonnie Ross's murderer. RP 663. Counsel made clear - and the court agreed - that if these revelations of being a close friend of someone related to the victim had arisen during *voir dire*, juror 13 would certainly not have been seated. RP 669-71.

Mr. Orozco sought a mistrial, arguing that his right to a fair trial could not be protected simply by removing juror 13 from the jury, particularly where "Vicky" had talked about the case with Ms. H. and then chose to telephone her during trial, apparently believing her to be susceptible to an appeal to sympathy. RP 663-645. This was purposeful tampering with a juror in a criminal case. RP 669-70.

The trial court denied the motion to remove juror 13, ruling that she had acted properly by telling her friend she could not talk about the case during the trial. RP 672. Further, the court reasoned, juror 13 stated that she could not recall the details of her past discussion with Vicky about the homicide. RP 672. The court also denied the defense mistrial motion, although it allowed that the defense could re-raise the issue. RP 672-73.

After juror 13 was escorted back to join the other jurors, a recess was called, and then an interpreter for the next witness was examined and qualified by the court, following which the entire jury was brought

out for the first time that morning, and the jury trial proceeded. RP 673-81. Extensive direct and cross-examination of witness Mr. Shegow Gagow followed. RP 682-759.

During this time the court also handled another situation with a juror who informed the bailiff that he recognized the clerk of the court. RP 761-62. After this was resolved, the State's next witness, Mr. Ariel Contreras, was not present in court, so the court excused the jury for a three and a half-day weekend until the court was to reconvene at 1:30 p.m. on January 22. RP 761-71.

**(ii). Denial of request to inquire of remaining jurors.** On January 22, the defense had available the testimony of its investigator, Mr. Jeffrey Porteous. RP 773. Mr. Porteous had conducted an in-person, audio-recorded interview of Ms. Keller (Bonnie Ross's relative), and had learned that "more was said than - than was admitted to by Juror Number 13" in court the previous week. RP 773-74.

The court deferred the matter, first hearing an issue regarding juror 4 asking the bailiff if she could leave the jury because of hardship; the court brought the juror in from the jury room to examine her in the courtroom. RP 776-85. Further witnesses then testified for significant court time, with juror 13 remaining, until the issue was re-addressed.

The court proceeded with trial and the testimony of a crime scene processor, Ashley Lucas of the Pasco Police Department, RP 786-99, 805-13; the testimony of Pasco Fire Department paramedic Guadalupe Almanzar, RP 815-34; motel resident and alleged assault victim Mary Gibson, RP 834-73; Roadway Inn front desk manager Stacey Hanson, RP 867-74; and motel resident and alleged victim of assault and unlawful imprisonment Anthony Nugent. RP 874-883. There was also further in-court discussion with juror 4. RP 884-86.

When defense investigator Porteous took the stand, he informed the court that during his interview of Vicky Keller, Keller stated that when she telephoned her friend juror 13, she said that Mr. Orozco was a “scumbag,” or referred to him in that manner. RP 888. She told juror 13 that Orozco “had committed the crime” while at the same time she admitted to Mr. Porteous that “she knew she probably shouldn’t be calling, but she did.” RP 888.

The prosecutor then agreed that juror 13 should be removed from the jury. RP 889-90. The court concluded that juror 13 had described the telephone call differently than it was:

Yes. This is a horse of a different color. What we heard about on Friday appeared to be an innocent inquiry, and it may still have been that, but now we stir in there Ms. Keller’s opinion

regarding the defendant in very strong language, and that, in my mind, is something different than what was described to us last week.

RP 889. The prosecutor also agreed that juror 13 should be questioned about whether she disclosed to the other jurors the reason she was called to the witness stand and, whether she talked with them about the call, “to assure the process hasn’t grown or spread.” RP 890-91. The court agreed, at the same time remarking, “I wonder if there will be a newspaper article that would come out and somehow taint the process beforehand.” RP 892.

When juror 13 was called back to the courtroom, she was asked if she had disclosed to any of the jurors that her friend, Vicky, called her. RP 894. She asserted that she had not. RP 894. She also asserted that she had not told any of the jurors about what had been discussed in the call, or talked about why she had been called into the courtroom alone and placed on the witness stand the previous week. RP 894-95.

The trial court released juror 13 from further service. RP 895-96. But the court denied the defense request that the other jurors be questioned about whether juror 13 had spoken with them about the telephone call from Ross’s relative. RP 896-97, 899-900. The court stated that it was going to take the juror’s “word for it.” RP 900.

**d. The requirement that there be “no lingering doubt” as to whether the defendant’s jury remained fair and unbiased required the court to inquire of the remaining jurors and then determine whether a new trial was required.**

Where a juror’s conduct might have injected bias into the jury trial, in whatever manner, trial courts “must tailor their approaches to account for the unique challenges presented.” See State v. Berhe, supra, 193 Wn.2d at 661 (where juror indicated post-trial that deliberations may have been tainted by juror whose racial bias did not come to light in *voir dire*, court violated due process and jury trial rights by not conducting adequate inquiry before denying new trial). In addition, a mistrial and order of new trial based on juror irregularities is required upon a strong showing of a substantial likelihood of prejudice. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (injection of information into deliberations that is outside all the evidence admitted at trial, either orally or by document, is grounds for a mistrial).

Here, juror 13 presented herself to the court, honestly, as regretful that the call with a relative of victim Ross occurred. But her representations about this mid-trial phone call with her close friend, compared to the restrictions placed on her as a juror, and compared to what investigator Porteous later discovered about the call, diverged.

The actual telephone conversation was contrary to the trial court's initial instructions, and different from how juror 13 represented it to the court, making it unreasonable for the court to simply take juror 13's "word for it" when she said she had not spoken with the other jurors about the phone call. Further inquiry was essential. The jury is not impartial if even one juror sits with a state of mind that could prevent him or her from fairly trying the case. State v. Moser, 37 Wn.2d 911, 916–17, 226 P.2d 867 (1951); RCW 4.44.170, .190.

Before the evidence phase of trial commenced, the court had directed the jurors to "not allow yourself to be exposed to any outside information about the case, including from your family and friends." RP 369. The jurors were told, "Do not permit anyone to discuss or comment about it [the case] in your presence. Do not remain within the hearing of such conversations." RP 369.

It is true that juror 13 told her friend to stop talking when she called. But the conversation apparently continued long enough, at the very least, for juror 13 to tell her friend to wait until the end of the case, when she could then talk about it. Long enough for the caller to reply, "Okay" to that statement. And long enough for the caller to describe Mr. Orozco as a "scumbag" for killing her relative Bonnie Ross.

Juror 13 withheld from the court significant details about the nature of the call she had with her close friend. She was not directly asked whether Vicky made disparaging remarks about Mr. Orozco. But neither did she reveal the glaring fact that her friend described the defendant as a “scumbag.” Further, when asked if she spoke with the other jurors about the call, juror 13 denied that she had. But this was the sort of question our courts recognize may simply produce an answer chilled by defensiveness at admitting misconduct, a factor which should further impel a court to inquire of the other jurors, who would be unhesitant to discuss that a juror had described the call to them. See Berhe, at 661-62, 665-66. It is also well known that a juror may be less than forthcoming about matters the court understands are pertinent to legal bias, because the lay juror genuinely believes that they will be fair. See United States v. Scott, 854 F.2d 697, 699 (5th Cir.1988).

Juror 13’s assertion of not having discussed the matter with other jurors was unreliable for the additional reason that the jury had also been instructed to report any and all outside information they were improperly exposed to. RP 369-70. Yet juror 13 did not report the “scumbag” remark. This was even more concerning because juror 13 had apparently been liberal in talking about her participation in the trial

with outside individuals, and may even have promised to talk about it in the future. RP 659-60. Yet the court had instructed the jurors that, “[i]f necessary, you may tell people, such as your employer, that you are a juror and let them know you need to be in court.” RP 370. Juror 13 went beyond these limitations when she told a friend about the trial, who told their friend Vicky about the trial, and then juror 13 told Vicky she would talk with her about the trial after it was over. RP 660. The only reasonable conclusion from all these circumstances was that there was an unacceptable risk that juror 13 had violated the court’s instructions to not talk about the case with other jurors.

**e. The court abused its discretion.**

These circumstances - especially juror 13’s failure to reveal a derogatory remark that was so obviously pertinent to whether she had been tainted with bias as a juror -- required that the court not simply take juror 13’s “word for it” when she denied speaking with the other jurors. There was too much doubt as to whether the court could rely on her claim that she had not done so. For example, in Cho, the defendant’s constitutional rights required that the court make a post-trial inquiry into the question whether a juror who was a retired police officer had wrongly hidden that fact during jury selection. The juror

had never specifically been asked the precise question of whether he used to be an officer, and he may have sincerely believed he could be fair nonetheless. Cho, at 33; see United States v. Scott, 854 F.2d at 700 (cited with approval in Cho, 108 Wn. App. at 330-31); see also Smith, 455 U.S. at 221 (O'Connor, J., concurring). But the circumstances strongly suggested the juror did not faithfully adhere to a basic duty of forthrightness during the jury selection process. Cho, at 330-31.

For juror 13, that duty applied to her in *voir dire* and when she took the witness stand mid-trial. See RP 173 (trial court's administration of potential jurors' oath to tell "the whole truth."). Once this real and substantial doubt arose as to the question of her forthrightness, as it did here, the juror's claims could not simply be taken at their word - not when the defendant's right to an unbiased jury is at issue. Taking juror 13's word for her statement that she had not spoken about the matter with any other jurors was manifestly unreasonable in these circumstances. See McCoy v. Goldston, 652 F.2d 654, 659 (6th Cir.1981) (discovery of a juror's divergence from their oath raises a specter of prejudice requiring a new trial).<sup>3</sup>

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<sup>3</sup> Juror 13, who had served on a Franklin County jury before, in 2012, seemed somewhat open to obtaining information that might not be provided to a jury during the evidence phase of a trial. She described in *voir dire* how the jury

Due process therefore required the trial judge, once aware of a possible injection of bias, to determine the whole circumstances, and the impact thereof on the composition of the jury as a fair unbiased fact-finder. State v. Winborne, 4 Wn. App.2d 147, 160-61, 420 P.3d 707 (2018) (citing Remmer v. United States, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). Trial judges carry an obligation to protect the defendant’s Sixth Amendment and Fourteenth Amendment Due Process rights to a fair trial that applies throughout the entire proceedings. State v. Berniard, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014)). In these circumstances, the court below did not conduct an inquiry adequate to protecting Mr. Orozco’s constitutional rights. Berhe, at 661-64.

**f. A new trial is required, or in the alternative, remand for an inquiry.**

The question whether a court conducted an adequate inquiry into a violation of the defendant’s constitutional rights is a legal issue. Cantu, 156 Wn.2d at 831; see Berhe, at 661-64. A new trial is required, or in the alternative, the case must be remanded for

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in that prior case occasionally thought of asking, and did ask the bailiff, although unsuccessfully, for more “information” pertaining to the case. RP 311, 356-58.

questioning of the remaining jury members, to determine whether the jury was infected by bias from extrinsic influence and information outside the evidence. Mr. Orozco's right to a fair trial before 12 unprejudiced and unbiased jurors demands this. When it comes to an impartial, unbiased jury, "[n]ot only should there be a fair trial, but there should be no lingering doubt about it." State v. Davis, 141 Wn.2d at 824-25. A new trial is required.

#### **E. CONCLUSION**

Mr. Orozco's Fourteenth and Sixth Amendment rights to a fair trial before an unbiased jury were violated. He asks that this Court reverse his convictions.

Respectfully submitted this 14th day of April, 2020.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36688-0-III
	)	
HECTOR OROZCO, JR.,	)	
	)	
APPELLANT.	)	

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**SIGNED IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF APRIL, 2020.**

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