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36688-0-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

HECTOR OROZCO, JR, Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:  
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## I. COUNTERSTATEMENT OF ISSUES

(1) Did defendant challenge Juror Number 32 for cause?

(2) Does anything in the record suggest bias on the part of Juror Number 32? Specifically, does an association with law enforcement, without more, show that a juror is biased?

(3) Did the trial court act within its discretion in its handling of an issue that arose during trial with respect to Juror Number 13?

## II. COUNTERSTATEMENT OF THE CASE

Hector Orozco, Jr., (hereinafter defendant) is appealing from his Judgment and Sentence entered in Franklin County Superior Court on March 8, 2019. CP 187-99. The State's allegations were summarized in a pre-trial pleading:

On February 14, 2018 at approximately 4:00 in the morning, the Defendant Orozco was in the company of Demetrius Graves, Shegow Gagow and Ariel Contreras. They had been smoking in a shed in the backyard of 616 W. Bonneville where Contreras lives. When Gagow exited the shed, Orozco struck him on

the back of the head and knocked him to his knees. Orozco then turned on Graves, knocked him to the ground, beat him severely about the face, and repeatedly stabbed him as a prone Graves called out, "What did I do, what did I do." Gagow tried to stop the attack by hitting Orozco with a stick. But Orozco turned on Gagow and came at him with a knife. Gagow ran, was captured, fell to the ground, ran again, and finally got away from Orozco. Gagow called 911 and then went to find help. He found Scott Morrison and persuaded him to return to the scene. Gagow brought a box cutter for his own protection. Gagow called police again.

Police arrived and summoned medics who determined that Mr. Graves had expired at the scene. He was lying on his back in a puddle of his own blood in an alley. His face was battered. There were stab wounds to his chest and back. Det. Smith found a court document with Defendant Orozco's name next to Mr. Graves' body.

The same morning, 82-year-old Bonnie Ross was killed inside her home on W. Washington Street, in Pasco, approximately one mile from where Graves was found deceased in the street. Orozco beat Ross badly, breaking her jaw, and he stabbed her in the back. Both Mr. Graves and Ms. Ross suffered similar wounds, beatings and stabbings. The stabbings were identical in location (close to the spine), direction (upward) and depth (2-3 inches). The stabbings resulted in slow, painful to both his victims. Ms. Ross was also strangled, her hypopharynx bone fractured. Orozco made a phone call to his mother from Ross' home phone around the time of her death. This phone call occurred approximately 20 minutes after Ross left a Valentine's Day voice message for her son using the same home phone.

Orozco stole Ms. Ross' car with a lot of Ross' personal property in the vehicle. He drove to the Roadway Inn, arriving at 10:45 a.m. He entered Room 114, which Anthony Nugent and Mary Gibson were occupying. Nugent asked if Orozco was looking for Graves. Orozco punched Nugent in the face repeatedly and prevented him from leaving. When Orozco turned his attention on Gibson, Nugent distracted Orozco allowing Gibson to run out of the room. Orozco locked the door and turned and spat on Nugent. Nugent believed he would not leave the room alive. Police knocked on the door, entered the room and arrested Orozco.

Shun Fulton, Orozco's girlfriend, was also residing at the Roadway Inn at the time. Orozco had been staying with her in violation of a restraining order. He was ordered to have no contact with Fulton after beating her about the head. Orozco beat Gagow, Graves, Ross, Nugent and Fulton in similar fashion to the head and face; all suffered similar facial injuries.

Police were able to confirm the details of Gagow's account from earlier that morning prior to the murder through other witnesses and store surveillance video.

Post-Miranda, the Defendant Orozco also confirmed some details. However, Orozco's statement differed as to the address and location where they smoked. Orozco also claimed that Graves left the group shortly after they had arrived at the residence and he denied assaulting Graves.

Defendant Orozco was the known suspect in Graves' murder and the Pasco Street Crimes Unit (SCU) was keeping the Roadway Inn under surveillance for Orozco. The SCU observed Orozco drive into the Roadway Inn parking lot and continued to surveil the motel room that Orozco entered. The

ongoing investigation determined that Orozco had actually driven Ms. Ross' vehicle into the Roadway Inn. It was unknown at the time as to any connection between Orozco and Ross. Prior to Graves' death, Orozco, Gagow, and Contreras were observed in Orozco's vehicle but Graves was the driver. Orozco's vehicle was located later in a vacant lot down the alleyway to the east of where Graves was murdered. This is consistent with the information provided by Gagow and other evidence such as video surveillance recovered from the Metro Mart and the in the area where Graves was located. Defendant did not drive his vehicle that was used earlier in the morning, a short time before Graves was killed.

When investigators searched Ms. Ross' vehicle, a near empty wallet containing only Ms. Ross' driver's license and her HAPO membership indentation card was located. Was Ross' body was discovered in her home, several wallet cards were located near her body. These items include Costco, Shopko, Fred Meyer Rewards, Safeway Club, library and voter registration cards among others. Later investigation also revealed that Ms. Ross keeps approximately \$1,000 cash at her home. When her son was going through the house, he discovered the missing money and reported it to detectives. Bank records were later reviewed showing the amount of money consistent with the son's account. When Orozco was released from jail on February 12, less than two days before the murders, he was issued a check for \$1.47 that remains uncashed. At the time of his arrest, he had over \$800 on his person. According to other witnesses, the money appeared to be newly acquired.

Such money wasn't observed at the time Graves, Orozco and Gagow were at the store and now he was offering to pay to extend the room another day immediately after returning to the same motel the

three of them departed earlier the previous night, just hours earlier. . . . The Defendant had access to his own vehicle left near the Graves' crime scene but instead took Bonnie Ross's vehicle which was parked over a mile away.

CP 27-30.

On January 14, 2019, the trial court engaged in a colloquy with counsel prior to voir dire. RP 109. The court first confirmed that both parties had an opportunity to review the completed juror questionnaires. RP 109. The court then stated, "Let's start out with those who whom the parties agree can be dismissed." RP 109. The court continued, "Let's have the defense go through those that they would agree to dismiss regardless of reason, and as you call each one, Mr. Sant (prosecutor) or Mr. Corkrum (deputy prosecutor), give us a yay or nay." RP 110. The defense counsel proceeded to list 15 jurors, with the prosecutors responding whether they would agree to the juror being dismissed; there was no argument taken or ruling made by the court where there was no agreement. RP 109-16. Defense counsel next addressed Juror Number 32:

MR. YOUNESI (defense counsel): Number 32, very dense connection with law enforcement related to

Sheriff Raymond, Detective Lee Barrowes [sic].

MR. CORKRUM (deputy prosecutor): We're not gonna agree, your Honor.

THE COURT: Okay. Next?

RP 116.

The parties continued with this process until all jurors who could be excused by stipulation had been identified. RP 116-21. The court then reviewed the juror numbers and counted 22 such jurors, plus three who had been dismissed very early in the day, for a total of 24. RP 121-22.

The court then stated, "Now, why don't each side just run through the list of those you want to see individually." RP 123. Juror Number 32 was not among those listed by the defense attorneys as requiring individual voir dire. RP 123-24. All of those requested by counsel were scheduled for individual voir dire. RP 128-29. The court next completed the voir dire of individual jurors. RP 135-277.

The court proceeded with general voir dire of the entire panel on January 16, 2019. RP 285. There was no mention of Juror Number 32 during general voir dire. RP 285-360. When the court

asked if there was any reason why any juror could not try the case impartially, there were two jurors who raised their hands but Juror Number 32 was not one of them. RP 303. After completing his general voir dire, defense counsel stated, "We would pass for cause, your Honor." RP 360.

On the morning of January 18, 2019, the court stated: "Juror Number 13 received a telephone call last night from a woman . . . who said she was a relative of one of the victims here. It sounds like the juror refused to speak with the woman anymore, but we're going to bring Juror Number 13 in so that we can find out exactly what happened." RP 655-56. Juror Number 13 explained she received a phone call from a former co-worker the previous evening who said, "I hear you're on the jury of the guy that killed my great grand - - great nephew's wife's grandma." Juror Number 13 replied, "Stop talking." The caller then said, "Oh, sorry," and the juror said, "I can't talk about this." RP 657. The court inquired, "Understanding that one of the deceased here is a relative of a friend of yours, does that impact your ability to view the evidence, consider the evidence, and be fair and impartial?" Juror Number 13

replied, "No." RP 658. After excusing Juror Number 13 from the courtroom and permitting extensive input from counsel, the court stated: "This Juror Number 13 acted perfectly with her - - the instructions given to her. As soon as she understood the topic of the conversation she said, 'Stop,' and then the conversation immediately ended." RP 627. The court left Juror Number 13 on the jury at that time. RP 673. However, the court said that defense counsel could readdress the issue if it wished to do so after further research, acknowledging, "These things get sprung upon us." RP 673.

On the morning of January 22, 2019, defense counsel advised the court that the defense investigator, Jeffrey Porteous, had obtained an audio-recorded interview with the woman who placed the phone call to Juror Number 13. RP 773. Defense counsel stated, "I can have my investigator here probably by 2:30 or at any later time that the Court wishes, to lay the foundation to play that audio or to relate what he found in his investigation. I believe the State is going to join us in our motion to have Juror 13 removed from the jury pool." RP 773. The court indicated it would take the

matter up at the end of the day when there would be adequate time to consider it. RP 774.

At the conclusion of the day, brief testimony was presented from defense investigator Jeffrey Porteous regarding the statement he took from the woman who had called Juror Number 13. RP 887.

Asked if the woman had used a “pejorative term” to refer to the defendant during the phone call, he replied affirmatively. RP 888. The witness was asked, “What did she call him?” RP 888. He answered, “A scumbag.” RP 888. The witness was further asked, “Did she also tell the juror that Mr. Orozco had committed the crime?” RP 888. He answered, “Yes.” RP 888.

Both parties concurred in Juror Number 13 being excused. RP 888-89. The court granted the motion to excuse Juror Number 13. RP 890.

Defense counsel then stated, “Judge, the only issue I had, did we ever ask if she talked to other jurors about the phone call?” RP 890. The court replied, “We did not. I have to say that I assumed that she did not because she testified that she acted so quickly to say, ‘Stop. You know, I can’t talk about it.’” RP 890. To

make certain on that point, Juror Number 13 was called back into the courtroom. RP 892-93. She testified as follows:

THE COURT: Have you - - did you disclose to any of the jurors that your friend, Vicky, called you?

JUROR NUMBER 13: No.

THE COURT: You spent some time on the witness stand last week. Did you tell any of the other jurors what the subject matter was?

JUROR NUMBER 13: No.

THE COURT: And then you, of course, haven't disclosed to any of the other jurors the subject matter of the call that Vicky placed to you?

JUROR NUMBER 13: No.

THE COURT: Okay.  
Did I miss anything?

MR. STOVERN (defense counsel): I don't believe so, your Honor.

MR. CORKRUM (deputy prosecutor): No, your Honor.

MR. YOUNESI (defense counsel): The jury didn't inquire of her either?

THE COURT: Oh yeah.  
Did any of your fellow jurors asked you?

JUROR NUMBER 13: No.

THE COURT: Oh, okay.

RP 895. The court explained to Juror Number 13 that “it’s the judgment of all of the lawyers here that having that kind of contact and during the middle of a homicide trial really disqualifies you . . . from being a juror,” and that she would be excused for that reason. RP 895. The court assured Juror Number 13 that the situation was not her fault. RP 895. The court further told Juror Number 13, “I was thrilled, I was thrilled when I heard your testimony last week that you immediately said, ‘Stop’” RP 895.

The following day before the jurors were brought into the courtroom, defense counsel asked, “Would the court be willing to individually inquire of the jurors whether or not they received any information from Juror 13?” RP 900. The court replied:

No. We’re gonna take her word for it. I just don’t want to open up that can of worms and cause them to speculate about what may or may not have happened. I think it will cause more trouble than good quite frankly.

RP 900. After the jurors were escorted back into the courtroom, the court advised them:

You were all probably a bit surprised to find there’s only 13 of you rather than the 14 we started with. Remember, a jury is comprised of 12 people. We

seated 14 because experience has shown from time to time some of the jurors just simply can't go the distance, and that's what has happened here. So, [Juror Number] 13 won't be with us anymore. So, 12 of you plus now one alternate. Hope we can make it to the end of the trial.

RP 902. The trial successfully concluded with a jury verdict on January 31, 2019. CP 187.

### III. RESPONSE TO ARGUMENT

**(a) Defendant did not challenge Juror Number 32 for cause. Nothing in the record shows that Juror Number 32 was biased.**

Defendant states, "Mr. Orozco challenged juror no. 32 for cause." Brief of Appellant, at 4. However, defendant has completely misread the record. As set forth in the Counterstatement of the Case, defendant did not challenge Juror Number 32 for cause.

The only time Juror Number 32 was mentioned by defense counsel was after the court stated, "Let's have the defense go through those they would agree to dismiss regardless of reason, and as you call each one, Mr. Sant (prosecutor) or Mr. Corkrum (deputy prosecutor), give us a yay or nay" based on the responses

to the juror questionnaires. RP 110. Defense counsel mentioned, “Number 32, very dense connection with law enforcement related to Sheriff Raymond, Detective Lee Barrows [sic].” The State did not agree to excuse Juror Number 32 by stipulation. RP 116. When the court asked which jurors defense counsel wanted brought in for individual voir dire, Juror Number 32 was not among those requested. RP 123-24. After completing his general voir dire of the entire panel, defense counsel stated, “We would pass for cause, your Honor.” RP 360. The defense attorneys obviously resolved any doubts they may have had about Juror Number 32 through their private conversations among themselves. No issue has been raised of ineffective assistance of counsel.

A challenge for cause to a juror must be expressly made. *See State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851 n.1, 456 P.3d 869 (2020) (asking to question a juror outside the presence of the rest of the jury does not preserve the issue). A defendant in a felony case has a right to be tried by an impartial, 12-person jury. *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). He or she has no right to be tried by a particular juror or by a particular

jury. *Id.* Here, the defendant was tried by an impartial jury that his attorneys in their sound professional judgment passed for cause.

Defendant's reliance on *Guevara Diaz* is misplaced. There a juror showed actual bias on the face of her questionnaire, stating "that she could not be fair to both sides in a trial for sexual assault or abuse." *Guevara Diaz*, 11 Wn. App. 2d at 846. There was no further questioning of the juror that diminished her unequivocal admission of bias. *Id.* The seating of a juror who acknowledged actual bias was manifest constitutional error that could be raised for the first time on appeal, notwithstanding the failure to challenge the juror for cause. *Id.* at 851-54.

In contrast, the questionnaire of Juror Number 32 did not show actual bias. A relationship with law enforcement, without more, does not establish bias. *State v. Cho*, 108 Wn. App. 315, 324, 30 P.3d 496 (2001). While the reference to a "very dense connection with law enforcement related to Sheriff Raymond and Detective Lee Barrowes [sic]" is not entirely clear, it would not appear to be a family relationship as both Sheriff Jim Raymond and Detective Lee Barrow were mentioned. The parties to the case

were Hector Orozco, Jr. and the State of Washington, not any individual law enforcement officer or law enforcement agency. In addition, the events of the instant case occurred within the City of Pasco and were the responsibility of that city's police department, not the Franklin County Sheriff's Office. CP 27-30. There was no obvious bias that required the trial court to intervene and question the sound professional judgment of the defense attorneys.

Moreover, *Cho*, 108 Wn. App. 315 and *United States v. Columbo*, 869 F.2d 149, 151-52 (2<sup>nd</sup> Cir. 1989), are not relevant as they involve implied bias arising from jurors not disclosing information. There was no withholding of information by Juror Number 32.

**(b) The trial court handled the situation regarding Juror Number 13 in a very sound manner.**

Defendant also complains about the trial court's resolution of the issue that arose with respect to the phone call made to Juror Number 13. A defendant suffers no prejudice when a problematic juror is removed and he or she is convicted by a jury on which no biased juror sat; an earlier failure of the trial court to remove the

juror is rendered moot. *State v. Fire*, 145 Wn.2d 152, 165, 34 P.3d 118 (2001). Defendant does not question the removal of Juror Number 13, which occurred on his own motion. He only argues, without citation to authority on point, that the trial court should have questioned each individual juror about whether Juror Number 13 made any mention of the phone call.

The trial court had sound reasons for not asking the individual jurors about the matter. As the trial court explained, “I just don’t want to open up that can of worms and cause them to speculate about what may or may not have happened. I think it will cause more harm than good quite frankly.” If the court had asked the jurors, “Did Juror Number 13 tell you about the phone call she received?” or even “Did Juror Number 13 discuss something that occurred outside the courtroom?”, it would have made the jurors aware that something had happened, which may have led to speculation on their part. The trial court prudently avoided “opening up that can of worms.”

There was every reason to assign great credibility to Juror Number 13, as she had promptly reported the incident to the court.

Contrary to defendant's argument, the trial court did not find there had been any untruthfulness on her part. The person who made the phone call did not testify before the court; there was only brief testimony from the defense investigator relating hearsay from that individual. RP 887-88. Both the caller and Juror Number 13 remembered the caller having said that defendant had committed the crime. RP 657, 888. Specifically, Juror Number 13 testified that the caller said, "I hear you're on the jury of the guy that killed my great grand - - great nephew's wife's grandma." RP 657. The only detail that the caller added which was not remembered by Juror Number 13 was that the caller had referred to defendant as being a "scumbag." RP 888. However, that could have simply been a matter of differing recollections of the phone call. Moreover, since Juror Number 13 remembered the caller having said that defendant killed an elderly woman, any use of a pejorative term made no substantive difference.

"[A] trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct." *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009). Great

deference is given to the trial court's exercise of discretion with respect to jurors; "[t]he reason for this deference is that the trial judge is able to observe the juror's demeanor and in light of that observation, to interpret and evaluate that juror's answers[.]" *Gentry*, 125 Wn.2d at 634. "Emphasis on the trial judge's discretion recognizes that the trial court is uniquely situated to make the credibility determinations that must be made in cases like this one: where a juror's motivations and intentions are at issue." *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2005) (citation and quotes omitted). Moreover:

This court applies an abuse of discretion standard in reviewing the trial court's denial of mistrial. A reviewing court will find abuse of discretion only when no reasonable judge would have reached the same conclusion. A trial court's denial of a mistrial will be overturned when there is a substantial likelihood that the error prompting the request for a mistrial affected the jury's verdict. Further, this court has held that trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.

*State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002) (citations and quotes omitted).

In the instant case, there was certainly no need for a mistrial

as a less drastic alternative was available: removal of Juror Number 13 in favor of an alternate juror. There was also no abuse of discretion in accepting Juror Number 13's assurances that she had not communicated about the matter with her fellow jurors; any other course of action would have made the other jurors aware of the situation, which may have led to speculation on their part.

*State v. Berhe*, 193 Wn.2d 647, 44 P.3d 1172 (2019) is not on point as in that case there was actual testimony by a juror as to racial bias manifested during deliberations; the trial court should have made further investigation of this claim. In contrast, here there was no substantive evidence that Juror Number 13 had discussed the phone call with her fellow jurors. Even now, defendant does not claim to have any evidence that would contradict Juror Number 13's testimony. If he had such evidence, the proper forum to present it would be through a personal restraint petition proceeding, where additional evidence may be taken. *State v. Jury*, 19 Wn. App. 256, 265 n.2, 576 P.2d 1302 (1978); *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 151 (1995).

IV. CONCLUSION

Based on the arguments set forth above, it is respectfully requested that the convictions of Hector Orozco, Jr. In Franklin County Superior Court Cause No. 18-1-50109-11 be affirmed.

DATED: July 2, 2020.

Respectfully submitted:

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<p>Oliver Davis oliver@washapp.org</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 2, 2020, Pasco, WA <u>Misty McBrearty</u> Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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**FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE**

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