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No. 36893-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO CANTU,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Judge John Antosz

APPELLANT'S **AMENDED** OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A jury found Antonio Cantu guilty of taking a motor vehicle without permission in the second degree (Count One), driving under the influence (Count Two), and bail jumping (as to a Class C felony) (Count Four).

The State failed to present sufficient evidence Mr. Cantu was guilty of bail jumping. No evidence was presented to show that Mr. Cantu was released by court order, an element required to be proven as part of the law of the case and by statute. The conviction of bail jumping (Count Four) must be dismissed with prejudice.

During voir dire, Jurors 18 and 21 expressed actual bias. The trial court did not rehabilitate the jurors and they were seated on the jury. Also during voir dire, the circumstances indicated implied bias existed as to Juror 21. Because bias of seated jurors is never harmless as it interferes with a defendant's right to a fair and impartial jury, no showing of actual prejudice is required by the appellant. The case must be remanded for a new trial on all counts.[1]

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[1] Should this Court determine sufficient evidence exists to uphold the bail jumping conviction (Count Four), Mr. Cantu respectfully requests this Court include the bail jumping conviction in a reversal and remand for a new trial based on jury bias, along with the other convictions for taking a motor vehicle without permission in the second degree (Count One) and driving while under the influence (Count Two). *See fn.* 5.

Finally, the trial court erred when it mistakenly included a prior conviction for attempted residential burglary, a class C felony, which should have washed from Mr. Cantu's offender score. The case must be remanded for resentencing to recalculate the score.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Cantu guilty of bail jumping (as to a Class C Felony).
2. Mr. Cantu did not receive a trial by a fair and impartial jury.
3. The trial court erred by counting a washed conviction for attempted residential burglary in Mr. Cantu's offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the evidence was insufficient to convict on the charge of bail jumping when the State did not prove Mr. Cantu was released by court order.

Issue 2: Whether Mr. Cantu received a trial by a fair and impartial jury when two seated jurors expressed actual bias and the circumstances indicate one juror was impliedly biased.

Issue 3: Whether the trial court erred in counting attempted residential burglary in Mr. Cantu's offender score where the offense washed.

D. STATEMENT OF THE CASE

Based on events arising from an incident that occurred September 26, 2017, to September 27, 2017, in Moses Lake, Washington, the State charged Antonio Cantu by amended information with taking a motor vehicle without permission in the second degree (Count One), driving under the influence (Count Two), and driving while license suspended in

the third degree (Count Three). (CP 104-107). The State also accused Mr. Cantu of bail jumping for failure to appear at an omnibus hearing in trial court on June 5, 2018. (CP 106-107).

Voir dire was conducted by the trial court. (6RP 3-141).

Juror 21's basic juror profile revealed he was currently a City of Moses Lake police sergeant. (CP 246; 6RP[2] 30). During voir dire, he openly informed the trial court and parties he had already heard about the incidents giving rise to the State's allegations against Mr. Cantu. (6RP 27). Despite this, Juror 21 did not think what he previously heard about the case would unduly influence his consideration of it. (6RP 27-28).

Juror 21 also admitted to knowing the prosecuting attorneys trying the case, Mr. Cantu's defense counsel, and eight of the State's listed witnesses. (6RP 27-28, 30-33). The court joked that Juror 21 won "the prize for knowing the most people." (6RP 31).

The court asked the venire the following additional questions, and to each one Juror 21 affirmatively responded:

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[2] Multiple volumes were transcribed in this case. The transcripts are referred to in this opening brief as follows:

"1RP" was transcribed by Brittingham and contains pages 1-185.
"2RP" was transcribed by Sosa and contains pages 1-86.
"3RP" was transcribed by Bartunek and contains pages 193-247.
"4RP" was transcribed by Bartunek and contains pages 1-192.
"5RP" was transcribed by Beck and contains pages 1-193.
"6RP" was transcribed by Sosa and contains pages 1-148.

> Have any of you personally been involved in a similar or related type of case or incident either as a witness, a victim, an investigator, or as one accused?
> …
> [D]o any of you have friends of family members that are involved in a similar or related type of case in any capacity?
> …
> Are any of you involved with a law enforcement agency either now or in the recent past?
> …
> Do any of you have a close friend or family members involved with a law enforcement agency?
> …
> Are any of you involved in any way with the court system?

(6RP 33-34).

The court and parties individually questioned Juror 21, outside the rest of the venire. (6RP 55-59). Juror 21 acknowledged he previously supervised, currently worked with, and would supervise again three of the law enforcement officers who were witnesses in the case. (6RP 56-58). Juror 21 also admitted he could not quite recall where he had met Mr. Cantu previously, but had run across him in the past. (6RP 58). When the trial court asked whether Juror 21 would have any prejudice against Mr. Cantu, or prejudice against Mr. Cantu relating to any prior contacts Mr. Cantu had, Juror 21 did not answer affirmatively or negatively, but rather merely stated: "Like I said, name and kind of a facial recognition, but I can't put it to any case or any of that." (6RP 58-59).

Also, while Juror 21 indicated he would be able to give "100 percent" of his attention, he did tell the court he would be working in the evenings after jury duty, be getting little to no sleep during the trial. (6RP 88-89).

During defense counsel's inquiry of the entire venire, the following exchange took place:

> [Defense Counsel]: Why do you think jury trials are important?
>
> [Juror No. 21]: I think it's important for the Defendant to get his—his time in court so the evidence is heard. If they're claiming that they're innocent of the charges, evidence needs to be presented so that the truth, I guess—or the truth is going to come out in the courtroom as it has the light of day. A plea deal doesn't get that out. It's just done down here.
>
> [Defense Counsel]: Okay. That's actually what I was looking for. Thank you.
>
> [Juror 21]: Uh-huh.
>
> [Defense Counsel]: But I do have one point. You said "claiming' there. Aren't they presumed innocent?
>
> [Juror 21]: *Well, I would say that would be the one issue for me as my role is I believe everybody is innocent, however, when I arrest somebody for a crime, I'm working off the—as soon as evidence is proved that—proves my case to me, that's why I'm arresting, right? And so coming in here, I struggle. I believe that he's innocent until proven guilty and I believe the trial has got to go forward. And if the evidence doesn't convict, I have no problem saying that he's not guilty. But it's hard for me to say once you're arrested and in that seat it's—does that make sense to you?*
>
> [Defense Counsel]: It kind of does. *So what I understand you're saying is that if you believe you have probable cause to arrest somebody, they're basically guilty and they don't get a doubt in your mind. It's very hard to get that back in your mind.*

> [Juror No. 21]: Not—*yeah*. *Yeah. I'll be honest. Yeah.*
> [Defense Counsel]: Okay. Shouldn't they continue to have that doubt no matter what?
> [Juror No. 21]: They should. They should. And—and I'm talking from my perspective from my case. I don't know in his case what he's done, so I'd have to see all that information so—but—but you understand? I'm not—yeah.
> [Defense Counsel]: Right now he hasn't done anything.
> [Juror No. 21]: Exactly.
> [Defense Counsel]: There's no evidence to that.
> [Juror No. 21]: And that's what I'm saying. That's the difficult part for me is to piece those two together so—
> [Defense Counsel]: So right now.
> [Juror No. 21]: Right now.
> [Defense Counsel]:--guilty or not guilty?
> [Juror No. 21]: He's innocent.
> [Defense Counsel]: He's innocent?
> [Juror No. 21]: Yeah. Right now.

(6RP 101-103) (emphases added). After another juror, Juror 46, revealed he was "on the fence" about the concept of innocent until proven guilty, Juror 21 added he was on the "innocent until proven guilty fence." (6RP 103-104).

Neither the court nor the parties asked Juror 21 whether he could set aside bias from his workplace experiences of arresting individuals he believed were guilty as soon as they were arrested. (6RP 3-141).

Individual questioning of Juror 18 was also pursued during voir dire. (6RP 46-55). During her interview, Juror 18 admitted she did not think she could remain neutral and would have trouble concentrating if she were to miss her stepson's graduation later that same day. (6RP 46, 49-

50). When defense counsel asked, "If you were distracted, do you think you could be fair as a juror," Juror 18 responded "I don't think so." (6RP 51). Next the trial court inquired of Juror 18, asking whether she would still be distracted if the graduation were over, to which she replied "No." (6RP 52). Defense counsel requested the trial court remove her for hardship in order to protect Mr. Cantu's right to a fair and impartial jury, but the trial court denied the request stating "I don't think she said it would make it hard for her to be impartial." (6RP 53). Defense counsel also added he was concerned Juror 18 would not exercise independent judgment because she previously indicated she would "go with the flow" if she were required to serve on the jury despite not wanting to be there. (6RP 50, 54).

Jurors 18 and 21 were seated on the jury. (6RP 145; CP 275-277). Defense counsel used 5 peremptory challenges. (CP 275-276). Alternate Jurors 26 and 29 were not challengeable for cause, but were understandably not favorable jury candidates for a defendant. (6RP 106, 116-117).

The case proceeded to jury trial. (2RP 1-86; 3RP 193-247; 4RP 1-192; 5RP 18-193).

At trial, Miranda Pratt testified for the State. (4RP 89-112). Ms. Pratt stated she once worked at the Grant County Clerk's office as a

deputy clerk, was a records custodian, and took minutes during court proceedings. (4RP 90-91). She testified that State's Exhibit 19 was a copy of an information, which reflected charges lodged against Mr. Cantu in this proceeding. (State's Ex. 19; 4RP 91-93). Ms. Pratt also identified State's Exhibit 20, which was a criminal case scheduling order dated May 8, 2018. (4RP 94). Ms. Pratt testified the scheduling order noted Mr. Cantu was to appear in court for an omnibus hearing on June 5, 2018. (4RP 94-95). State's Exhibits 19 and 20 were admitted by the trial court. (4RP 94-95). Ms. Pratt testified Mr. Cantu was not present for court on June 5, 2018. (4RP 109).

Mr. Cantu testified he was in court at around 11:00 a.m. on June 5, 2018. (4RP 186).

No evidence was presented at trial that Mr. Cantu had been released by court order. (4RP 89-112; State's Exs. 19 & 20).

The jury was given a "to-convict" instruction on bail jumping (as to a Class C felony) (Count Four):

> To convict the defendant of bail jumping, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 5, 2018 the defendant failed to appear before a court;
> (2) That the defendant was charged with a crime under RCW 9A.56.075, Taking a Motor Vehicle Without Permission in the Second Degree, a Class C Felony;

> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before the court; and
> (4) That any of these acts occurred in the State of Washington
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(Instruction No. 20, CP 336; 3RP 215).

The jury found Mr. Cantu guilty of taking a motor vehicle without permission in the second degree (Count One), driving under the influence (Count Two), and bail jumping (Count Four). (CP 339-340, 342; 3RP 241-242). The jury acquitted on driving while license suspended in the third degree (Count Three). (CP 341; 3RP 241).

At sentencing the trial court calculated Mr. Cantu's offender score as a four. (CP 346-347, 351; 1RP 156-184). The court recognized three of Mr. Cantu's prior convictions had washed from his offender score. (CP 346-347, 351). However, the trial court counted a prior conviction for attempted residential burglary in the offender score. (CP 346-347, 351). Mr. Cantu was sentenced with an offender score of four for his convictions of taking a motor vehicle without permission in the second degree (Count One) and bail jumping (as to a Class C felony) (Count

Four). (CP 348, 351). The "record agreement" as to offender score was not signed by Mr. Cantu; it was only signed by his attorney. (CP 346-347).

Mr. Cantu timely appealed. (CP 376-402).

E. ARGUMENT

Issue 1: Whether the evidence was insufficient to convict on the charge of bail jumping when the State did not prove Mr. Cantu was released by court order.

The State presented insufficient evidence to prove a required element of bail jumping—that the defendant was released by a court order. For this reason, Mr. Cantu's bail jumping conviction must be dismissed with prejudice.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

A defendant may always challenge the sufficiency of the evidence supporting his conviction for the first time on appeal. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *affirmed*, 174 Wn.2d 909,

281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (a party may raise "failure to establish facts upon which relief can be granted" for the first time in the appellate court). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest'." *Id*.

When neither party objects to the jury instructions, they become "the law of the case" and delineate the State's proof requirements. *Hickman*, 135 Wn.2d at 102.

Here, the bail jumping jury instruction required the jury to find Mr. Cantu "*had been released by court order* with knowledge of the requirement of a subsequent personal appearance before the court." (Instruction No. 20, CP 336; 3RP 215; RCW 9A.76.170(1) (emphasis added). While the State presented evidence that Mr. Cantu was informed of the June 5, 2018, hearing date for a subsequent personal appearance, no evidence was presented at trial that Mr. Cantu had been released by court order. (3RP 193-247; 4RP 1-192; 5RP 18-193). Ms. Pratt never testified as to that fact, and the information was not admitted on either of State's Exhibits 19 or 20. (4RP 89-112; State's Exs. 19 and 20).

The State may argue in response that circumstantial evidence established Mr. Cantu was released by court order, given he testified to

one fact—that he was present in court around 11:00 a.m. the morning of June 5, 2018. (4RP 186). But nothing Mr. Cantu said indicated he was released by a court order. (Instruction No. 20, CP 336). The State could have presented evidence that Mr. Cantu was out on bail, but it did not. (CP 31-32).

A similar situation occurred in *State v. Fessel*, No. 46516-7-II, 2015 WL 9594350 (Wash. App. Ct., Dec. 29, 2015)[3]. There, the State was also required to prove the defendant had been released by court order, as stated in the jury instructions on bail jumping. *Id*. at *1. The State entered into evidence clerks' minutes, a bench warrant, and a scheduling order. *Id*. at *2. While those exhibits reflected the defendant failed to appear, was not in custody, was required by the court to appear, and knew of his obligation to appear, *none* of the exhibits showed that the defendant was released by court order. *Id*. at *1-2. On appeal, the State argued the evidence implied the defendant was under release by a court order because the trial court issued warrants for his arrest, the defendant was ordered to return to court for sentencing, and the defendant's ability to be out of custody before sentencing was granted by the court and dependent upon the defendant's written promise to return. *Id*. at *3. The State argued it is

[3] GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

a reasonable inference that if a defendant is ordered to return to court then the defendant must have been released by the court's order. *Id*. at *3. However, the court of appeals rejected these arguments, stating that the evidence is only sufficient when "any rational trier of fact could have found guilt beyond a reasonable doubt" and the evidence presented at trial was insufficient to prove to a rational jury that the defendant was released by court order. *Id*. at *3 (citations & quotations omitted). The court dismissed the bail jumping convictions with prejudice. *Id.* at *3; *also State v. Clark*, No. 75121-2-I, 2017 WL 2840294, at *8 (Wash. App. Ct., Jul. 3, 2017) (reversing bail jumping conviction because State failed to present sufficient evidence to establish the defendant was released by court order or admitted to bail).[4]

Again, no evidence was presented at trial to prove Mr. Cantu was released by court order, as required by Instruction No. 20 and the bail jumping statute. (Instruction No. 20, CP 336; 3RP 215; RCW 9A.76.170(1) (emphasis added). Because the State failed to prove this element of the to-convict instruction, the evidence was insufficient to convict.

[4] GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

The conviction for bail jumping must be dismissed with prejudice for insufficient evidence. *Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: Whether Mr. Cantu received a trial by a fair and impartial jury when two seated jurors expressed actual bias and the circumstances indicate one juror was impliedly biased.[5]

Both seated Jurors 18 and 21 expressed bias during voir dire and were never rehabilitated by the trial court. The circumstances reveal Juror 21 was also impliedly biased. Mr. Cantu's case was not tried by a fair and impartial jury and structural error requires reversal of Mr. Cantu's convictions and remand for a new trial before twelve fair and impartial jurors.

Both the federal and state constitutions "guarantee a criminal defendant the right to trial by an impartial jury." *State v. Guevara Diaz*, 2020 WL 415904, at *5 (Wn. Ct. App. Div. 1, Jan. 27, 2020)[6]; *State v. Irby*, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The seating of a biased juror violates this right. *Irby*, 187 Wn. App. at 193 (citations omitted); *see United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000).

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[5] This argument is also offered as to the bail jumping charge if this Court rejects the sufficiency argument in *Issue 1*.

[6] This case is published, but at the time of filing this brief, the only available citation was the *Westlaw* citation.

Pursuant to RAP 2.5(a)(3), a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. *Irby*, 187 Wn. App. at 193; RAP 2.5(a)(3). Because seating a biased juror is never harmless, "the error requires a new trial without a showing of actual prejudice." *Gonzalez*, 214 F.3d at 1111; *Guevara Diaz*, 2020 WL 415904, at *4. Seating a biased juror is a manifest error. *Id.* at *4. A defendant cannot waive this right by failing to object at trial. *Id*. at *4. "A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant." *Irby*, 187 Wn. App. at 193; *Guevara Diaz*, 2020 WL 415904, at *6. The judge is obliged to excuse a biased juror even when neither party challenges the juror for cause. *Guevara Diaz*, 2020 WL 415904, at *6.

Actual bias means "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). If a juror makes a statement of partiality and there is no subsequent assurance of impartiality, a court should always presume juror bias. *Guevara Diaz*, 2020 WL 415904, at *5. "A juror will be excused for cause if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and

his oath." *State v. Gonzales*, 111 Wn. App. 276, 277-278, 45 P.3d 205 (2002).

A trial judge "need not excuse a juror with preconceived ideas if the juror can set those ideas aside and decide the case on the evidence presented at the trial and the law as provided by the court." *Guevara Diaz*, 2020 SL 415904, *6 (quotations omitted). The question the trial court must answer is "whether a juror with preconceived ideas can set them aside." *Id*. at *6. A juror's silence or answers during group voir dire cannot take the place of individual questioning of a biased juror. *Id*. at *8; *Irby*, 187 Wn. App. at 196. At times, attempts to rehabilitate a potential juror cannot go far enough to mitigate a categorical statement. *Gonzales*, 111 Wn. App. at 280.

Implied bias exists when a juror is "[s]tanding in the relation of . . . master and servant . . . to a party . . . or in the employment for wages[ ] of a party." RCW 4.44.180(2). Implied bias also occurs when a juror has an "[i]nterest . . . in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation." RCW 4.44.180(4). "A relationship with the government, without more, does not establish bias." *State v. Cho*, 108 Wn. App. 315, 324, 30 P.3d 496 (2001) (citations omitted). When actual bias is not demonstrated in voir dire, there are

instances where "in exceptional cases the courts will draw a conclusive presumption of implied bias from the juror's factual circumstances." *Id*. at 325 n. 5 (citing *Smith v. Phillips*, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring)). Some examples of implied bias "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." *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring).

In *Cho*, a juror may have concealed his former employment as a police officer in order to be seated on the jury. 108 Wn. App. at 324-330. The appellate court stated that in "extraordinary situations . . . a court may infer bias from underlying facts about the juror without regard to explanations offered by the juror." *Id*. at 329 (citation omitted). The court remanded for an evidentiary hearing on the issue, finding that if the juror had concealed his former employment, "the presumption of bias would not be changed by the juror's later protestations of impartiality, however sincere." *Id*. (citation omitted). The court noted that "[d]oubts regarding bias must be resolved against the juror." *Id*. at 330 (citation omitted). In *State v. Boiko*, it was determined the trial court did not abuse its discretion in ordering new trial because the facts sufficiently established implied bias

where a seated juror was an attorney, was married to a key witness, had previously applied for a job with the prosecutor, and was involved in ongoing litigation as opposing counsel to the prosecutor. *State v. Boiko*, 138 Wn. App. 256, 156 P.3d 934 (2007). The trial court did not need a full-blown evidentiary hearing to find implied bias existed. *Id*. at 263.

A trial court's denial of a for cause challenge is reviewed for manifest abuse of discretion. *Gonzales,* 111 Wn. App. at 278; *Guevara Diaz*, 2020 WL 415904, *6. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Guevara Diaz*, 2020 WL 415904, *6.

Here, Juror 21—the police sergeant—indicated that when he arrests a suspect, he believes the case against the suspect has already been proven. (6RP 102). Juror 21 agreed with defense counsel when he stated, "So what I understand you're saying is *that if you believe you have probable cause to arrest somebody, they're basically guilty and they don't get a doubt in your mind*. It's very hard to get that back in your mind." (6RP 102) (emphasis added). Neither the trial court nor the parties asked Juror 21 whether he could set that bias aside. (6RP 3-141). While defense counsel did question Juror 21 about his thoughts on the legal principle of "innocent until proven guilty," he was never asked whether he could set aside his beliefs and be fair and impartial. (6RP 3-141). Moreover, Juror

21 also never affirmatively acknowledged whether his prior contact with Mr. Cantu and Mr. Cantu's acquaintances would prejudice him against the defendant. (6RP 58-59).

Juror 21's state of mind in reference to the action and defendant showed he could not "try the issue impartially and without prejudice to the substantial rights" of the defense. RCW 4.44.170(2). Juror 21's actual bias—that an arrested individual was already proven guilty in his mind—was not rehabilitated by his comments that he supported the legal principle of "innocent until proven guilty." There needed to be more. Juror 21 was never asked if he could set aside the mindset of an arresting officer and be a fair and impartial juror. *Guevara Diaz*, 2020 SL 415904, *6 (trial court must ensure "a juror with preconceived ideas can set them aside"). Moreover, even had the trial court attempted to rehabilitate Juror 21, the court would have had difficulty mitigating this law enforcement juror's preconceived idea that when he had probable cause to arrest someone, "they're basically guilty and they don't get a doubt" in his mind. (6RP 101-103). Juror 21 admitted as much when he agreed with defense counsel's statements as such. (6RP 102). *See Gonzales*, 111 Wn. App. at 280 (sometimes rehabilitation attempts cannot mitigate categorical statements made by jurors). The trial court abused its discretion by basing

its decision on untenable reasons; the court should have removed Juror 21 when he clearly was biased and never rehabilitated.

In addition, implied bias as to Juror 21 existed. Juror 21 was a police sergeant, he knew most of the State's witnesses, supervised some of them (or would in the near future), knew the prosecuting attorneys and defense counsel, had already heard about the case against Mr. Cantu, had prior contact with Mr. Cantu, and was scheduled to work long hours during jury duty. (CP 246; 6RP 27-28, 30-33, 55-59, 88-89, 101-103). Juror 21 was standing in the shoes of a master and servant relationship with the State as a law enforcement officer, as well as had an interest in the action beyond that of an ordinary citizen as his co-workers and sometimes supervisees were witnesses of the State. (6RP 56-58). While any one of these factors may not have been enough to excuse a juror for implied bias on their own, they cumulatively support the conclusion of implied bias. *Cho*, 108 Wn. App. at 324-330; *Boiko*, 138 Wn. App. 256; *Smith*, 455 U.S. at 222 (O'Connor, J., concurring); RCW 4.44.180(2) & (4). And, despite how sincere Juror 21 may have appeared when he stated some of those factors would not affect his ability to determine the case, the standard requires that doubts "regarding bias must be resolved against the juror." *Cho*, 108 Wn. App. at 330 (citation omitted). Juror 21 was impliedly biased and should not have been seated on the jury.

Juror 18 was also erroneously seated on the jury. (6RP 145; CP 275-277). She told the court she did not believe she could be neutral and fair and would have trouble concentrating if she were to miss her stepson's graduation, held later that day. (6RP 46, 49-51). The trial court asked Juror 18 whether she would remain distracted once the graduation were over, and she said "no," but the trial court never asked her if she could be fair and impartial if she missed the graduation nor whether she could set aside her feelings in order to be fair and impartial. (6RP 3-141). Defense counsel even requested she be removed on the basis of hardship in order to preserve Mr. Cantu's right to a fair and impartial jury, but the trial court would not do so—mistakenly believing Juror 18 had not said the situation would make it hard for her to be impartial. (6RP 51, 53). The trial court abused its discretion by basing its decision on untenable grounds and untenable reasons. Juror 18 stated she did not think she could be fair were she to miss the graduation, and the trial court failed to rehabilitate her because it did not ask her whether she could set those feelings aside and be fair and impartial. (6RP 3-141). *Guevara Diaz*, 2020 WL 415904, *6 (trial court must ensure "a juror with preconceived ideas can set them aside").

The trial court abused its discretion in allowing Jurors 18 and 21 to remain on the jury when they both expressed actual bias, were not

rehabilitated, and were not asked whether they could set aside their feelings in order to be fair and impartial. Juror 21 was also impliedly biased based on a cumulative effect of several factors. Bias of a seated juror is never harmless and requires a new trial without a showing of prejudice. *Guevara Diaz*, 2020 WL 415904, at *1, 4.

Mr. Cantu is entitled to a new trial by a fair and impartial jury.

Issue 3: Whether the trial court erred in counting attempted residential burglary in Mr. Cantu's offender score where the offense washed.

The trial court incorrectly failed to designate on the judgment and sentence that Mr. Cantu's 2003 conviction for attempted residential burglary was washed from his offender score. The case must be remanded for resentencing to correct the error and recalculate Mr. Cantu's offender score.

As a threshold matter, a trial court's calculation of a defendant's offender score is reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A defendant "cannot waive a challenge to a miscalculated offender score" when the error is a legal one leading to an excessive sentence. *Id*. at 874 (remanded for resentencing where prior convictions had "washed out" and

were erroneously used to calculate defendant's offender score). Miscalculated offender scores require remand for resentencing unless the record clearly indicates the trial court would impose the same sentence. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

"In determining the proper offender score, the court 'may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.'" *State v. Zamudio*, 192 Wn. App. 503, 508, 368 P.3d 222 (2016) (quoting *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012) (quoting RCW 9.94A.530(2)). The State bears the burden of proving prior convictions by a preponderance of the evidence. *Hunley*, 175 Wn.2d at 909-910. "Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction." *Hunley*, 175 Wn.2d at 910 (citations omitted). The State's burden is not overly difficult to meet, but "constitutional due process requires at least some evidence of the alleged convictions… bare allegations are not evidence, whether asserted orally or in a written document" and "it violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions." *Hunley*, 175 Wn.2d at 915 (internal quotations omitted). Relying on the defendant's silence in these circumstances would "obviate the plain requirements of the SRA…[and] result in an

unconstitutional shifting of the burden of proof to the defendant." *Hunley*, 175 Wn.2d at 912; *see also State v. Garay*, No. 50293-3-II, 2019 WL 461567, at *8 (Wash. Ct. App., Feb. 6, 2019) (defendant neither signed his statement of criminal history nor affirmatively acknowledged the history)[7].

The trial court calculates an offender score by adding current offenses, prior convictions, and juvenile adjudications. RCW 9.9A.030(11); RCW 9.94A.589(1)(a). When calculating the offender score for a present nonviolent conviction, as is the case here[8], prior convictions add "one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction." RCW 9.94A.525(7). Conversely, a prior conviction "washes out" and is not included in the offender score calculation, as set forth below:

> (c) Except as provided in (e) of this subsection, *class C prior felony* convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full0time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent *five*

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[7] GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

[8] Mr. Cantu was found guilty of taking a motor vehicle without permission in the second degree (Count One) and bail jumping (as to a Class C felony) (Count Four), both of which are nonviolent convictions. RCW 9.94A.030(34), (56); (CP 339-340, 342; 3RP 241-242).

> *consecutive years* in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c) (emphases added). Any consecutive five-year period qualifies to "wash out" a class "C" felony, even if the crime-free period is not immediately subsequent to the conviction. *State v. Hall*, 45 Wn. App. 766, 769, 728 P.2d 616 (1986).

Residential burglary is considered a class B felony. RCW 9A.52.025(2). The "wash out" period for this class B felony conviction would be ten years. RCW 9.94A.525(2)(b). However, an attempted crime lowers the level of the class of felony. RCW 9A.28.020(3)(c). Thus, an attempted residential burglary is actually a class C felony subject to a five-year "wash out" period. RCW 9A.28.020(3)(c); RCW 9A. 52.025(2); RCW 9.94A.525(2)(b). And although Mr. Cantu was a juvenile when he committed the attempted residential burglary, the juvenile statutes recognize an attempted residential burglary is a class C felony classification. RCW 13.40.0357.

Here, a review of Mr. Cantu's criminal history in two locations in the record indicate the trial court counted Mr. Cantu's 2003 conviction for attempted residential burglary and did not consider it as "washed out." (CP 346-347, 351; 1RP 156-184). While three other prior convictions were designated, with the word "wash" next to them (a 2006 theft in the second degree, a 2006 assault in the third degree, and a 2009 riot while

armed—all class C felonies), the attempted residential burglary does not have the same designation. (CP 346-347, 351; 1RP 156-184). This is an error. Because the residential burglary was an attempted crime, the "wash out" period was five years, not ten. (CP 346-347, 351); RCW 9A.28.020(3)(c); RCW 9A. 52.025(2); RCW 9.94A.525(2)(b). And because the three other class C convictions that washed out were committed after the attempted residential burglary, the attempted residential burglary must then also wash out. (CP 346-347, 351).

The State may argue Mr. Cantu waived this argument due to agreement of his criminal history. However, Mr. Cantu never affirmatively acknowledged his criminal history—he did not sign the criminal history form. (CP 346-347). He also did not affirmatively acknowledge his history at sentencing. (1RP 156-184). Finally, the error here is of a legal nature. *See Goodwin*, 146 Wn.2d at 874 (defendant cannot waive a challenge to a miscalculated offender score when based on a legal error).

The trial court erred and the 2003 conviction for attempted residential burglary must be "washed" from Mr. Cantu's offender score. The case must be remanded for resentencing.

F. CONCLUSION

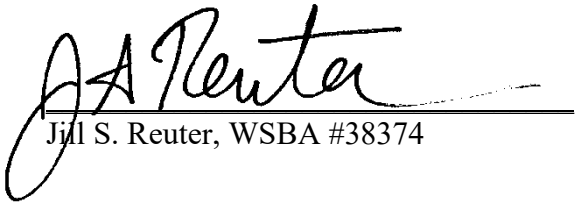
The State did not present sufficient evidence to uphold the bail jumping conviction (Count Four). The conviction must be reversed.

The trial court seated two biased jurors. Because jury bias is never harmless error, Mr. Cantu is entitled to a new trial with a fair and impartial jury. The case must be remanded for a new trial.

Finally, the trial court erred by not designating the prior conviction for attempted residential burglary as "washed out" from Mr. Cantu's offender score. The case must be remanded for resentencing for proper recalculation of his score.

Respectfully submitted this 2nd day of April, 2020.

Laura M. Chuang, WSBA #36707
Of Counsel



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

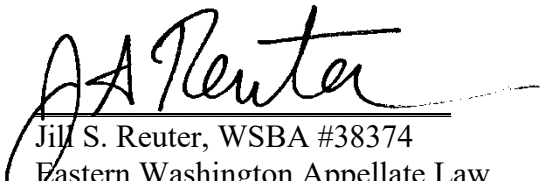
STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 36893-9-III
vs.	)	Grant County No. 18-1-00007-9
	)	
ANTONIO CANTU	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 2, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's **amended** opening brief to:

Antonio Cantu
1218 Lowry Street
Moses Lake, WA 98837

Having obtained prior permission, I also served a copy on the Respondent at kburns@grantcountywa.gov using the Washington State Appellate Courts' Portal.

Dated this 2nd day of April, 2020.



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