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IN THE COURT OF APPEALS OF 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

Superior Court Cause No. 18-1-00007-9

The Honorable Judge John Antosz

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. THE STATE PRODUCED NO EVIDENCE OF A COURT ORDER RELEASING MR. CANTU. THE STATE CONCEDES EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR BAIL JUMPING.
- B. MR. CANTU, THE PROSECUTOR AND THE TRIAL COURT THOROUGHLY AND EXTENSIVELY QUESTIONED JURORS 21 AND 18 CONCERNING THEIR STATES OF MIND, AFTER WHICH THE TRIAL COURT CONCLUDED THEIR STATES OF MIND WERE FAIR AND IMPARTIAL. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT EMPANELED JURORS 21 AND 18?
- C. JUROR 21 WAS FORTHCOMING WITH INFORMATION ABOUT HIS RELATIONSHIPS WITH THE PARTIES AND WITNESSES. DEFENSE COUNSEL DID NOT MOVE THE TRIAL COURT TO DISMISS JUROR 21 FOR IMPLIED BIAS. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT SUA SPONTE DISMISSING JUROR 21 FOR IMPLIED BIAS?
- D. THE STATE CONCEDES MR. CANTU'S OFFENDER SCORE WAS MISCALCULATED. THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR RESENTENCING.

II. STATEMENT OF THE CASE¹

On June 10, 2019, a jury found Mr. Cantu guilty of three of the four charges on which he went to trial: taking a motor vehicle without permission in the second degree, driving under the influence (DUI), and bail jumping. Clerk's Papers (CP) at 339–40, 342. The jury acquitted Mr. Cantu of driving with a suspended license in the third degree. CP at 341.

¹ The State adopts Mr. Cantu's citation to the Record of Proceedings found in Brief of Appellant at 3 n.2. Additionally as State will cite the clerk's papers as CP at ___.

A. VOIR DIRE

During voir dire, venire jurors 21 and 18 both responded to group questions and were both individually questioned by the parties as well as the trial court. 6RP 27–28, 30–31, 33, 37–39, 46–59, 70–72, 85, 88,–89, 93–94, 97–99, 101–04, 110, 115–16, 121.

1. *Juror 21*

In response to a question to the venire, Venire Juror 21 (Juror 21) answered he had heard of the case before being called for jury duty. 6RP 27. Juror 21 was a police sergeant. 6RP 37, 56. The court then asked Juror 21 whether what he had heard would unduly influence his consideration of the case, and Juror 21 answered: “No.” 6RP 27.

Juror 21 said he was acquainted with defense counsel and the prosecutors, 6RP 28. He was also acquainted with a number of the witnesses, some of whom were his co-workers. 6RP 30–32, 56. Juror 21 did not raise his paddle in response to the court’s question about whether any juror would give more or less weight to testimony of witnesses they knew. 6RP 32.

The trial court, the defense, and the prosecutor questioned Juror 21 to ensure he, a police sergeant, could be a fair and impartial juror in a criminal case in which he knew various participants. 6RP 56. During the defense’s exhaustive questioning, Juror 21 denied that his working

relationship with the case officers would have a negative impact on his ability to assess their credibility, stating that he might hold the officers to a higher standard than that of other witnesses. 6RP 56. Juror 21 said he was not currently supervising any of the testifying officers, although he had in the past and would be again in the summer. 6RP 56–57.

Juror 21 reiterated upon further questioning he would hold the officers to a standard of truthfulness and would not give their testimony more or less weight just because he knew them. 6RP 57, 59. In another part of voir dire, defense counsel commended Juror 21's explanation of the importance of jury trials in affording a defendant his time in court to allow the truth to come out. 6RP 101. The following exchange occurred during a discussion with defense counsel regarding his beliefs concerning Mr. Cantu's guilt or innocence:

[Juror No. 21:] 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.

6RP 102. Juror 21 went on to explain that while he felt it was true in his

own cases, he would have to see all the evidence in this case. 6RP 102. To confirm what Juror 21 was thinking, defense counsel asked whether Mr. Cantu was guilty or not guilty “right now.” 6RP 103. Juror 21 responded, “He’s innocent.” 6RP 103. A little while later, Juror 21 stated, “I’m on the innocent until proven guilty fence.” 6RP 104.

Additionally, both the State and Mr. Cantu’s defense counsel discussed the meaning of beyond a reasonable doubt with the jurors, and Juror 21 engaged in the discussion. 6RP 93, 99. Defense Counsel specifically inquired as to what would create a reasonable doubt asking, “Could it be lack of evidence that creates that doubt for you?” Juror 21 agreed, responding, “Sure.” 6RP 99.

2. *Juror 18*

Juror 18 thought she might be a little distracted because her partner’s grandson, whom she had known for about a year, would be having a sixth grade graduation party that afternoon, during trial. 6RP 50–51. Juror 18 thought she might split her mind between the sixth grade party and the court proceedings, then stated she would “[g]o with the flow” if the judge required her to continue to serve as a juror. 6RP 50. Defense counsel asked, “If you were distracted, do you think you could be fair as a juror?” 6RP 51. Juror 18 responded, “I don’t think so.” 6RP 51.

The trial judge then asked clarifying questions, inquiring twice

whether Juror 18 would be able to answer questions when they started the afternoon voir dire session. 6RP 52. Juror 18 affirmed both times she would be able to answer questions. 6RP 52. The court also asked whether she would be distracted when the trial started later that day or the next day. 6RP 52. Juror 18 replied, “No.” 6RP 52. During the afternoon voir dire, Juror 18 answered questions. 6RP 122.

3. *Defense Chose Not to Use all His Peremptory Challenges*

Each party had six peremptory challenges during their choice of the first 12 jurors, and two more for the alternates. 6RP 141. Mr. Cantu used only five of his eight peremptory challenges. CP at 275–76; 6RP 141–43.

B. EVIDENCE PRESENTED TO SUPPORT THE BAIL JUMPING CHARGE

To prove Mr. Cantu had been released from custody pursuant to a court order, the State offered Mr. Cantu’s criminal case scheduling order. 4RP 94; 3RP 227; CP at 54. Additionally, Court Clerk Miranda Pratt testified regarding the hearing minute sheet from May 8, 2018, when Mr. Cantu was ordered to appear on June 5, 2018. 4RP 97. She also testified regarding the minute sheet from June 5, 2018, noting Mr. Cantu did not appear that day. 4RP 109.

C. SENTENCING

Defense counsel and the State executed a written agreement to Mr. Cantu's criminal history and offender score prior to sentencing. CP at 346–47. Mr. Cantu did not sign the agreement, but did sign a Judgment and Sentence which included both the agreed criminal history and offender score. CP at 346–64. Both documents asserted Mr. Cantu's juvenile conviction for attempted residential burglary had not "washed out." CP at 346, 351.

III. ARGUMENT

A. THE STATE PRODUCED NO EVIDENCE OF A COURT ORDER RELEASING MR. CANTU. THE STATE CONCEDES EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR BAIL JUMPING.

The State concedes the admitted evidence was not sufficient to support the crime of bail jumping. *See State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). The bail jumping criminal statute recites two ways in which a defendant could have been released from custody: pursuant to a court order or admitted to bail. RCW 9A.76.170(1). The definition jury instruction in this case stated: "A person commits the crime of bail jumping when he fails to appear as required *after having been released by court order* with knowledge of the requirement of a subsequent personal

appearance before a court.” CP at 335 (emphasis added). The elements jury instruction stated the State had to prove: “That the defendant *had been released by court order* with knowledge of the requirement of a subsequent personal appearance before that court.” CP at 336 (emphasis added). Neither the definition instruction nor the elements instruction refer to release pursuant to having been admitted to bail. The State did not produce evidence of a court order releasing Mr. Cantu. The State, therefore, concedes Mr. Cantu’s conviction for bail jumping should be reversed.

B. MR. CANTU, THE PROSECUTOR AND THE TRIAL COURT THOROUGHLY AND EXTENSIVELY QUESTIONED JURORS 21 AND 18 CONCERNING THEIR STATES OF MIND, AFTER WHICH THE TRIAL COURT CONCLUDED THEIR STATES OF MIND WERE FAIR AND IMPARTIAL. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT EMPANELED JURORS 21 AND 18?

No. Mr. Cantu urges this Court to reverse his convictions and remand for a new trial, arguing venire jurors (jurors) 21 and 18 demonstrated actual bias and were not rehabilitated. Br. of Appellant at 14.

1. *Standard of Review*

“[D]enial of a juror challenge for cause lies within the discretion of the trial court and will not constitute reversible error absent a manifest abuse of that discretion.” *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d

190 (1991). “[T]he trial court is in the best position to determine a juror’s ability to be fair and impartial.” *Id.* at 839.

2. *Legal Principles on Review*

Both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant’s right to a trial by an impartial jury. The Sixth Amendment also implicitly guarantees “the defendant’s right to control his defense.” *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). “[A] trial court should exercise caution before injecting itself into the jury selection process.” *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016). Legitimate tactical reasons can support a defense decision not to challenge a juror whose responses suggest some bias. *Lawler*, 194 Wn. App. at 285. “A trial court that sua sponte excuses a juror runs the risk of disrupting trial counsel’s jury selection strategy.” *Id.*

Despite its duty under both statute² and court rule³ to dismiss

² RCW 2.36.110 provides:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

³ CrR 6.4(1)(c) provides: “If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for

biased jurors, a trial court's legitimate exercise of discretion may include reluctance to dismiss a juror sua sponte without a for-cause challenge.

Lawler, 194 Wn. App. at 288.

“Actual bias” supports a for-cause challenge only when the trial court concludes a juror cannot set aside a pre-formed opinion, and not merely because a juror discloses the existence of such an opinion. RCW 4.44.190. Actual bias exists when the court is satisfied a potential juror's state of mind concerning the action itself or about either party is such that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the challenging party. RCW 4.44.170(2).

Once the jury is empaneled, however, “the law presumes each juror sworn is impartial and qualified to sit on a particular case, otherwise he would have been challenged for ‘cause.’” *State v. Munzanreder*, 199 Wn. App. 162, 176, 398 P.3d 1160 (2017) (citing *State v. Latham*, 30 Wn. App. 776, 781, 638 P.2d 592 (1981)).

3. Lawler Factors

The facts here are similar to the facts in *Lawler*, where a prospective juror stated he would have difficulty remaining fair and

cause.”

impartial. 194 Wn. App. at 277. In *Lawler*, after the juror at issue in the appeal had described several family experiences, the prosecutor asked whether those experiences would make it difficult for him to be fair and impartial. *Id.* at 279. The juror responded, “I don’t see how I could be objective with all that past experience.” *Id.* When the prosecutor then asked whether the juror would be able to set aside his family’s experiences and follow the judge’s instructions, the juror responded, “Honestly, I think that would be a pain in the neck, you know. I don’t think I would be able to do that with all these experiences.” *Id.* at 280. There were no further follow up questions from either party or from the trial court and the juror never expressly stated he could be fair and impartial. *Id.* at 280, 283.

Defense counsel actively questioned other jurors about potential bias and moved the court to dismiss three other jurors for cause. *Id.* at 280. Counsel used five of his six preemptory challenges but did not move to dismiss the juror at issue. *Id.* The trial court suggested removing two other jurors for cause, but never suggested removing this juror. *Id.*

Division Two of this Court held the trial court did not abuse its discretion when it did not sua sponte excuse the juror. *Id.* Six factors led to this conclusion: (1) the trial court was in the best position to evaluate whether the juror was unfit to serve as a juror; (2) the juror’s answers were slightly equivocal; (3) the record established the trial court was alert to the

possibility of biased jurors; (4) the record established defense counsel was alert to the possibility of biased jurors; (5) defense counsel had a preemptory challenge available to use; and (6) the trial court must be careful not to insert itself into the defense's trial strategy. *Id.* at 287–89.

Mr. Cantu's trial judge was also in the best position to evaluate whether any prospective juror was unfit to serve. The trial court did not dismiss Juror 21 for cause, 6RP 143–44, and denied Mr. Cantu's motion to strike Juror 18 for hardship underpinning potential bias. 6RP 53. Here, as in *Lawler*, the judge's recognition of juror bias was established by his recommendation that jurors 3, 5, and 15 be excused for bias and his subsequent dismissal of these potential jurors. 6RP 40, 43, 45. Defense counsel and the court were also alert to the bias disclosures of jurors 41 and 49, both of whom were also excused. 6RP 75–78, 95. Similar to the defense counsel in *Lawler*, Mr. Cantu's defense counsel used only five of his eight preemptory challenges. 6RP 141; CP at 275–76.

Mr. Cantu's defense counsel's use of only five of his preemptory challenges also demonstrates defense counsel may have had a legitimate trial strategy in allowing jurors 18 and 21 to remain on the jury. *See* CP at 275–76; 6RP 141–43. Sua sponte dismissal from the bench may have disrupted this strategy and violated Mr. Cantu's Sixth Amendment right of control over his defense. *Lynch*, 178 Wn.2d at 491.

A further similarity to the facts considered under the second factor in *Lawler*, is that neither Juror 21 nor Juror 18 unequivocally expressed bias.

Juror 21, a police sergeant, candidly disclosed that he thought the people he arrested were truly guilty, but he clearly left that issue open concerning those arrested by others. 6RP 102. Furthermore, Juror 21 said he would have to consider all the evidence and that Mr. Cantu was innocent until proven guilty. 6RP 102, 104. Both the prosecutor and defense counsel engaged Juror 21 in lengthy discussions about the “beyond a reasonable doubt” standard to be applied at trial. 6RP 93, 99. Juror 21 explained lack of evidence could create reasonable doubt, revealing he correctly understood the proper standard. 6RP 93, 99.

At one point Juror 21 said he might hold his co-workers, the testifying police officers, to a higher standard than he would other witnesses. 6RP 57. The judge’s follow-up questioning determined Juror 21 would not give the officers’ testimony either more or less weight simply because he knew them. 6RP 59.

Like the challenged juror in *Lawler*, Juror 21 established he could be fair and impartial. The trial court did not abuse its discretion in assessing that Juror 21 could disregard any opinion he had formed and determine Mr. Cantu’s innocence or guilt without bias.

Additionally, the facts here show that Juror 18 had no actual, unequivocal bias similar to *Lawler*. Juror 18 essentially thought she may be a bit distracted while in court during the time her partner's grandson was having a sixth grade graduation party, and that her thoughts might be split between the party and voir dire. 6RP 50–51. She ultimately promised she would “[g]o with the flow” if the judge required her to continue to serve as a juror. 6RP 50. Juror 18's concern over the possibility she would have difficulty concentrating was equivocal, as shown in her answer—“I don't think so”—to defense counsel's query about whether she could be fair when she was distracted. 6RP 50–51. Here, the court was in the best position to hear the tone of voice in which she answered.

Furthermore, the juror's comment about being willing to “go with the flow” and remain as long as the judge required her to, shows she could set aside the concerns she was having and follow the judge's instruction to concentrate on the case. Any lingering doubt was eliminated by her “Yes” answer both times the judge asked whether she would be able to answer questions during the afternoon voir dire session. 6RP 52. Additionally, she answered, “No” when asked whether she would be distracted when trial started later that day or the next day. 6RP 52. These unequivocal answers established she was not going to be distracted once the trial started and thus, Mr. Cantu would not suffer prejudice. During the afternoon voir dire,

Juror 18 answered questions as she assured the court she would. 6RP 122.

The trial court did not abuse its discretion when it denied Mr. Cantu's defense counsel's inferred motion to strike Juror 18 for bias. The trial court was well within its discretion to be satisfied Juror 18 would be fair and impartial after assessing her state of mind.

4. *Lawler aligns with this Court's Deference to the Trial Judge as Expressed in Munzandreder.*

Lawler aligns with this Court's deference to trial court judge in assessing whether jurors should be excused sua sponte for bias. *State v. Munzanreder*, 199 Wn. App. 162, 398 P.3d 1160 (2017) (evaluating whether the trial court's process violated the defendant's right to a fair and impartial jury). While not directly on point, *Munzanreder* deferred to the trial court's process in evaluating jurors and to its decision denying a for-cause motion to strike a juror. The appellant had argued the trial court's voir dire process was deficient because it empaneled four allegedly biased jurors. *Munzanreder*, 199 Wn. App. at 176. All four of these jurors had been exposed to media coverage of the case. *Id.* at 176–79. Some of the jurors stated that they had formed an opinion of the case. *Id.* One juror went as far as to say he believed the defendant guilty and that “it would be up to the evidence to change his mind.” *Id.* at 179. After defense counsel discussed the presumption of innocence, the juror said he believed he

could be fair and unbiased. *Id.* Of the four jurors, defense counsel moved to strike only the juror who said he had formed the opinion the defendant was guilty, and the court denied the motion. *Id.* at 176–79. The *Munzanreder* Court found it significant that nothing in the record supported finding three of the four jurors biased when not even the defendant moved to strike any of them for cause. *Id.* at 177–79. All four jurors were empaneled. *Id.* at 176. This Court held the process used by the trial court protected the defendant’s right to a fair and impartial jury. *Id.* at 166. It further held that the appellant waived any error when he elected not to use his preemptory challenges to strike jurors he believed demonstrated bias. *Id.* at 179–80.

A statement indicating an opinion, in and of itself, does not support removing a potential juror as “such opinion shall not of itself be sufficient to sustain the challenge.” RCW 4.44.190. Here, being in the best position to consider all the circumstances and determine the ability of the prospective jurors to be fair and impartial, the trial court concluded both Juror 21 and Juror 18 were fit to serve.

5. *Reliance on State v. Guevara Diaz and State v. Gonzalez
are Misplaced.*

Mr. Cantu’s reliance on *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 456 P.3d 869 (2020) is misplaced. *Guevara Diaz* fails to consider a

defendant's Sixth Amendment right to control his own defense, including his strategic use of for-cause and peremptory challenges during voir dire.

Regardless of whether *Guevara Diaz* was correctly decided, the facts of Mr. Cantu's case are easily distinguished. In *Guevara Diaz*, a juror wrote on her questionnaire she could not be fair to both sides in a case involving allegations of sexual assault and sexual abuse. 11 Wn. App. 2d at 846. The reviewing court found the trial court abused its discretion by seating that juror because there had been no rehabilitation following an expression of actual bias. *Id.* at 857–58.

In Mr. Cantu's case, neither juror made unequivocal statements of bias, and even had there been, their subsequent examination by defense counsel, the prosecutor, and the judge was sufficient to establish each persons' state of mind and ensure both could be fair and impartial. 6RP 27–28, 30–31, 33, 37–39, 46–59, 70–72, 85, 88,–89, 93–94, 97–99, 101–04, 110, 115–16, 121.

The facts here are also distinguishable from those in *State v. Gonzales*, where the court held that a juror demonstrated actual bias when she declared she would tend to believe a police officer's testimony over that of the defendant, even if instructed by the trial court to do the opposite. 111 Wn. App. 276, 279, 282, 45 P.3d 205 (2002). In Mr. Cantu's case, neither juror gave any indication they would hold onto their opinions

if instructed by the judge to do otherwise. 6RP 27–28. 30–31, 33, 37–39, 46–59, 70–72, 85, 88,–89, 93–94, 97–99, 101–04, 110, 115–16, 121. Conversely, the court did excuse Juror 49 for cause after he stated he would hold onto his bias regardless of whether the trial court instructed him otherwise. 6RP 75–76, 95. During the colloquy with this juror, the prosecutor asked the entire venire: “Is anybody else not going to hold the State to their burden of producing evidence to convict [Mr. Cantu]?” 6RP 76. None of the other jurors, including jurors 21 and 18, raised their paddles. 6RP 76.

C. JUROR 21 WAS FORTHCOMING WITH INFORMATION ABOUT HIS RELATIONSHIPS WITH THE PARTIES AND WITNESSES. DEFENSE COUNSEL DID NOT MOVE THE TRIAL COURT TO DISMISS JUROR 21 FOR IMPLIED BIAS. DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT SUA SPONTE DISMISSING JUROR 21 FOR IMPLIED BIAS?

1. Standard of Review

The standard of review for evaluating whether to reverse of trial court’s decision to deny a juror challenged for cause is manifest abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

2. Legal Principles on Review

Implied bias is a factual ascertainment of whether one of the reasons outlined in RCW 4.44.180⁴ applies to a juror. RCW 4.44.170.

⁴ RCW 4.44.180, provides: “A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

Implied bias may be imputed from a master-servant relationship between parties or receiving wages from a party. RCW 4.44.180(2). It may also be imputed when a juror is interested “in the event of the action, or the principal question involved therein[.]” RCW 4.44.180(4). Implied bias supports a for-cause juror challenge. RCW 4.44.170(1).

Nothing inherent in Juror 21’s relationship with the government, including his experience and status of being a police officer established bias. *State v. Cho*, 108 Wn. App. 315, 324, 30 P.3d 496 (2001). Bias must be drawn either from the juror’s voir dire responses or, in exceptional cases, from other factual circumstances, such as deliberately withholding information in voir dire in order to be seated as a juror. *Id.* at 325. Failure to disclose marriage to a key State witness, a recent application for a job

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- (1) Consanguinity or affinity within the fourth degree to either party.
 - (2) Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, to a party; or being a member of the family of, or a partner in business with, or in the employment for wages, of a party, or being surety or bail in the action called for trial, or otherwise, for a party.
 - (3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.
 - (4) Interest on the part of the juror 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.

with the prosecutor's office, or being an attorney in litigation against a prosecutor are other factual circumstances that may establish implied bias. *State v. Boiko*, 138 Wn. App. 256, 258–59, 156 P.3d 934 (2007). Nothing of that nature happened here.

Unlike the jurors in *Cho* and *Boiko*, Juror 21, was very open about his work history and his various job-related acquaintances with the prosecutors, defense counsel, law enforcement witnesses, and Mr. Cantu. 6RP 27–31, 33–34, 58. Unlike the juror in *Boiko*, he had no intimate familial relationship with any of the witnesses. 6RP 56–57; *see Boiko*, 138 Wn. App. at 258, 259. Nothing in the record, even when viewed cumulatively, suggests the type of exceptional circumstances required for imputing implied bias under RCW 4.44.180(4). These facts, especially when viewed in light of Mr. Cantu's choice not to challenge Juror 21 for cause or eliminate him through a peremptory challenge, make evident the trial court's proper exercise of discretion. Under these facts, to have sua sponte removed Juror 21 would have risked interference with Mr. Cantu's Sixth Amendment rights.

Reliance on *Boiko* and *Cho* is inapposite for an additional reason: the issue in each was whether the trial court properly decided the defendants' motions for a new trial. *Boiko*, 138 Wn. App. at 259; *Cho*, 108 Wn. App. at 320. Unlike the defendants in those cases, Mr. Cantu did not

move for a new trial based on juror bias or misconduct. As noted above, Mr. Cantu did not move to strike or otherwise eliminate Juror 21 for any reason. Deference must be given under these facts to the trial court's judgment.

This Court should find the record fails to support that the trial court abused its discretion in not sua sponte excusing Juror 21 for implied bias.

D. THE STATE CONCEDES MR. CANTU'S OFFENDER SCORE WAS MISCALCULATED. THIS CASE SHOULD BE REMANDED FOR RESENTENCING.

The State concedes the defendant's offender score was miscalculated. This Court should remand for resentencing, at which time the State may produce evidence of additional convictions. *See State v. Cobos*, 178 Wn. App. 692, 701, 315 P.3d 600 (2013).

IV. CONCLUSION

This Court should reverse Mr. Cantu's conviction for bail jumping, deny his request for a new trial based on jury bias, both actual and implied, and remand for resentencing without the bail jumping conviction and with a corrected offender score.

DATED this 20th day of May 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: May 20, 2020.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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