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NO. 36918-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER RIENDEAU,

Appellant.

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

The Honorable John O. Cooney, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE IMPROPER DISMISSAL OF JUROR 18 DENIED RIENDEAU A FAIR TRIAL.

Juror 18 indicated a possibility his personal experiences with his mentally ill wife could impact his consideration of the evidence in Riendeau's case, that his "belief system" required at least two witnesses, and that circumstantial evidence can be manipulated to make the innocent look guilty. RP 48, 81-82.

At no time did the prosecutor or trial judge directly and individually ask juror 18 if – despite these views – he could nonetheless follow the jury instructions. Instead, the prosecutor chose a different tack, asking all potential jurors (including juror 18):

> So is there anyone here – and you don't know the instructions, but you might read one when you get back there and say, boy, I don't like this one. It doesn't matter if you like it. It does [sic] matter if you agree with it. You have to apply it.

RP 87. Juror 18 did not identify himself as unable or unwilling to follow the court's instructions, even where he disagreed with them. RP 87. And just to make sure this was the case, defense counsel followed up shortly thereafter with a question confirming that all jurors, including juror 18, were willing to follow the court's instructions. RP 87.

The problem here is the same identified in State v. Sassen Van Elsloo, 191 Wn.2d 798, 809, 811-812, 425 P.3d 807 (2018) – without a specific inquiry of juror 18 from the judge or prosecutor, the record is simply insufficient to establish a probability that juror 18 was both biased *and* unable to try the case impartially. Bias alone is not enough. Id. at 812 (citing RCW 4.44.190). And the prosecutor's question to Riendeau's entire venire suggests juror 18 could, in fact, put aside his personal opinions and try the case impartially based on the court's instructions.

The State correctly notes that a question to the group cannot generally substitute for individual questioning of a possibly biased juror. See BOR, at 18 (citing State v. Irby, 187 Wn. App. 183, 196, 347 P.3d 1102 (2015), review denied, 184 Wn.2d 1036, 379 P.3d 953 (2016)). But this point merely highlights the problem here: the State cannot demonstrate juror 18 was unable to put aside his opinions without individual questioning on that very subject. The State chose not to ask those questions and instead used a general question to test the entire group's ability to follow the court's instructions regardless of personal beliefs. The State should not now be heard to complain when information gleaned from its chosen method for addressing the issue actually undermines its

position.[1]

The State next argues that, even if it was error to dismiss juror 18 for cause, Riendeau cannot establish reversible error.

First, the State argues that, had its motion to strike juror 18 for cause been denied, it may have stricken juror 18 using a peremptory challenge. But had the court properly denied the State's motion without additional and more specific questioning on juror 18's ability to be impartial, that additional questioning could have satisfied the trial prosecutor that juror 18 should remain and hear the case. As the State concedes, juror 18 may actually have been more sympathetic to the prosecution. See BOR, at 18-19 n.12 (allowing for this possibility given juror 18's history of dealing with mentally ill wife).

Second, the State takes issue with Riendeau's reliance on Irby. Addressing the improper dismissal of qualified jurors, the Irby Court stated:

> It is no answer to say that the 12 jurors who ultimately comprised Irby's jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore,

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[1] The State speculates that, had juror 18 been seated, Riendeau would now be arguing that his attorney was ineffective for failing to remove him for actual bias. BOR, at 18-19 n.12. One could further speculate that, if that were the case, the State would now be arguing that juror 18 was fit to serve. The more important point, however, is that, had juror 18's ability to set aside his personal opinions been clearly established, there would be no error and no issue for appeal.

> the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence had no effect on the verdict.

State v. Irby, 170 Wn.2d 874, 886-887, 246 P.3d 796 (2011).

The State would confine the relevance of this discussion to a "right to be present case." BOR, at 21. But whether a qualified juror is improperly dismissed without the defendant's approval (Irby[2]) or improperly dismissed over the unified objection of both counsel and the defendant (Riendeau), the harm is the same. The defendant is denied the right to select the individuals who will decide his fate. And because "reasonable and dispassionate minds may look at the same evidence and reach a different result," the State cannot show beyond a reasonable doubt that dismissal of juror 18 had no effect on the verdict in Riendeau's case.

Instead of accepting the applicability of Irby, the State draws from the Irby *dissent*, citing State v. Phillips, 65 Wash. 324, 118 P. 43 (1911). See BOR, at 11, 21; Irby, 170 Wn.2d at 898-899 (Madsen, C.J., dissenting) (arguing prejudice standard inconsistent with Phillips). For the same reason Phillips did not carry the day in Irby, it should not do so here.

This Court should reverse and remand.

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[2] Irby, 170 Wn.2d at 877-878.

2. EVIDENCE OF RIENDEAU'S EXTENSIVE CRIMINAL HISTORY REQUIRED A MISTRIAL.

Although Ms. Gibson was a prosecution witness, RP 233, on appeal the State blames defense counsel for the trial deputy's inability to control her own witness on the stand, arguing defense counsel's failure to object to Ms. Gibson's improper revelations about Riendeau's criminal history invited the errors. See BOR, at 23-24. The State cites no authority equating the failure to object to invited error.

The State bears the burden to prove an error was invited. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014) (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)). "The mere failure to object is not sufficient to invite an error." In re Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014) (Madsen, C.J., concurring); see also Thomas, 150 Wn.2d at 844 (distinguishing the failure to object and invited error); State v. Hudson, 11 Wn. App. 2d. 1060, at *2 (2019) (unpublished)[3] (defense's "passive role is insufficient for applying the invited error doctrine."). Defense counsel's motion for mistrial – based on the cumulative impact of repeated references to Riendeau's criminal history – has preserved

[3] GR 14.1(a) permits citation to unpublished decisions as non-binding, persuasive authority.

the denial of that motion for appeal.

The State also argues that jurors may have mistaken Gibson's references to Riendeau's extensive criminal history for references to his history of mental illness. See BOR, at 5-8, 22-23, 27, 29.

But when the statements at issue are examined in context, it is apparent jurors would not have been confused on this point. See RP 235 ("So he was going away for a long time because he has a record as we all know."); RP 239 ("I indicated that – I knew the charges weren't going to get dropped. Look at his history. I mean, they came full force . . . ."); RP 253-254 ("he's got a record and we weren't going to talk again, you know.").

Mental illness is not usually referred to as a "record" that causes someone to go away for a long time. Nor does mental illness typically cause prosecutors to come after someone "full force" and decline to drop criminal charges. Jurors would not have been confused. Any reasonably attentive juror could discern that, in addition to a long history of mental illness, Riendeau had a substantial criminal record. The trial judge certainly recognized the distinction, ruling that – had the prosecutor intentionally elicited the improper information on Riendeau's criminal history – a mistrial would have been appropriate. See RP 265.

Ultimately, the State argues that the situation in Riendeau's case is like that in State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031, 877 P.2d 694 (1994). BOR, at 28-29. In Condon, at the defendant's trial for first-degree murder, a trial witness revealed that, on one occasion, the defendant had called her from a Seattle jail and asked her to pick him up there because he was being released. Id. at 648. The court instructed jurors to disregard references to jail. Id. In affirming the denial of a motion for mistrial, the Court of Appeals noted that, simply because someone spent some time in jail does not mean they were previously convicted of a crime, much less that they have a propensity to commit a serious offense like murder. Id. at 648-650.

Unlike Condon's jury, Riendeau's jury was told (repeatedly) that he had a significant criminal history. Evidence of prior criminal history is particularly unfair to a criminal defendant. See State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997); State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426, review denied, 133 Wn.2d 1019, 948 P.2d 387 (1997). In jurors' minds, one with a significant criminal history would be more likely to tamper with witnesses to avoid Gibson's prediction that another conviction meant Riendeau was "going away for a long time." Nothing short of a mistrial could

ensure Riendeau received a fair trial.

B. CONCLUSION

For the reasons discussed in Riendeau's opening brief and here, his Tampering conviction should be reversed.

DATED this 13th day of May, 2020.

Respectfully submitted,

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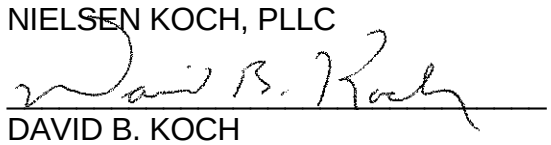

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