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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ALEXANDER RIENDEAU, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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LAWRENCE H. HASKELL  
Prosecuting Attorney

Gretchen E. Verhoef  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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## **I. APPELLANT’S ASSIGNMENTS OF ERROR**

1. The improper dismissal of a juror requires a new trial.
2. The trial court erred when it denied a defense motion for mistrial.

## **II. ISSUES PRESENTED**

1. Did the trial court abuse its discretion when it determined that Juror 18 suffered actual bias?
2. Did the defendant invite error regarding the denial of a mistrial when he repeatedly failed to object to Ms. Gibson’s testimony about his “history,” and instead waited until the end of the State’s case to request a mistrial or curative instruction?
3. Was Ms. Gibson’s ambiguous testimony regarding Mr. Riendeau’s “history” a serious irregularity in the proceedings such that no curative instruction could obviate the prejudice to the defendant?

## **III. STATEMENT OF THE CASE**

The defendant, Alexander Riendeau, was charged by amended information with one count of fourth degree assault<sup>1</sup> – domestic violence and one count of tampering with a witness – domestic violence. CP 27. The defendant pled guilty to fourth degree assault – domestic violence prior to

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<sup>1</sup> The defendant was originally charged with second degree assault – domestic violence, but the parties agreed that the defendant could plead guilty to the reduced charge prior to trial. CP 1; RP 6.

the commencement of trial, and proceeded to trial on the sole remaining count of tampering with a witness. RP 28-34.

Factual Background.

On November 9, 2018, at 8:04 a.m., Mr. Riendeau was booked into the Spokane County jail after being arrested for assaulting Correna Gibson.<sup>2</sup> RP 162. After being booked into the jail, Mr. Riendeau placed three telephone calls to Ms. Gibson within an hour – one at 9:08 a.m., one at 9:24 a.m., and one at 9:37 a.m. RP 165. Individuals placing calls from the jail are informed that their calls are monitored or recorded. RP 163. Detective Howe later listened to those recordings and identified the speakers on the recorded calls as Mr. Riendeau and Ms. Gibson. RP 166.

During the calls, Mr. Riendeau and Ms. Gibson spoke about property matters – the ownership of a phone, the payment of bills, and the division of property. RP 177-78. More importantly, the defendant made multiple requests for Ms. Gibson to seek dismissal of the charges or to not testify against him.

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<sup>2</sup> Ms. Gibson and Mr. Riendeau had been dating and living together prior to the incident. RP 234.

Exhibit 5,<sup>3</sup> includes the defendant informing Ms. Gibson: “[I]t’ll be 2, 3 years before I get out. Um, if you went down to the Prosecutor’s office today...and went in there and explained the situation to them...maybe you can talk him into something. I don’t know.” Ex. 5 at 5, ll. 145-60. Later in the conversation, Ms. Gibson told Mr. Riendeau that she would go to the prosecutor’s office. Ex. 5 at 10, ll. 372-74. To that, the defendant again stated: “talk to somebody in the Prosecutor’s Office. Or the Victim advocate’s, come to the jail. Come to the front desk, where you go to visit somebody...And say, hey, listen, I’m trying – I wanna get a restraining order uh, you know, I want to...I wanna try to get these charges, you know, dropped...Dropped or something like that. And I’ll start telling mental health here, I need help, I need help, I need help. I get it.” Ex. 5 at 10, ll. 376-92. Ultimately, Ms. Gibson stated, “I will just do what I can do.” Ex. 5 at 11, l. 449.

Exhibit 7 reflects a later conversation between Mr. Riendeau and Ms. Gibson. Mr. Riendeau asked if Ms. Gibson was “gonna be solid.” Ex. 7 at 3, l. 59. Mr. Riendeau asked if Ms. Gibson was willing to work on communication with him and “really...sit down and...work through it with [him].” Ex. 7 at 16-17, ll. 673-79. Ms. Gibson replied that they would not

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<sup>3</sup> Exhibits 5, 6, and 7 are transcripts of Exhibits 1, 2, and 3, and are referred to herein for the ease of the reader.

“be able to sit down for a long time;” Mr. Riendeau responded: “I don’t know, I guess that’s gonna depend.” Ex. 7 at 17, ll. 681-83. Mr. Riendeau said, “Basically...it works, like, this. It works, like, this...Just to put it in perspective if that...neighbor guy and you don’t...testify this will go [away].”<sup>4</sup> Ex. 7 at 17, ll. 683, 703-07. Ms. Gibson stated in reply, “I’m not going to. I’ll disappear.” Ex. 7 at 17, l. 709. However, Mr. Riendeau reminded Ms. Gibson that she also “involved the neighbor guy” and would “need to convince him not to go to court...that would be what [she’d] have to do.” Ex. 7 at 17-18, ll. 715, 727-36. At the end of the call, Mr. Riendeau again implored Ms. Gibson to “go down and to the prosecutor’s office and explain” his mental health and medication needs. Ex. 7 at 19, ll. 772, 797-98, 804-05.

During the final call, Exhibit 6, Mr. Riendeau stated, “I’ll go to prison for this,” to which Ms. Gibson responded, “I know they gave you a second degree DV.” Ex. 6 at 2, ll. 25-27. Mr. Riendeau asked Ms. Gibson if she would “do [him] the courtesy that [he] did for [her],” stating, “I don’t think you will...” Ex. 6 at 4, ll. 102, 106, 110. When asked what he meant, Mr. Riendeau specified that he wanted Ms. Gibson to “come in and fight for [him]...make ‘em take it off.” Ex. 6 at 4, ll. 114, 118. Again, the two

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<sup>4</sup> The audio recording reflects that the full statement was “this will go away.” *See* RP 269.

planned that both would say that Mr. Riendeau was in need of stronger medication and mental health treatment. Ex. 6 at 6, ll. 205-07, 213-15, 217-25; Ex. 7 at 16, ll. 671-74.

Victim Advocate, Jessica Moon, had telephone contact with Ms. Gibson prior to Mr. Riendeau's first appearance on the assault allegation. RP 219. Ms. Gibson also went to Mr. Riendeau's first appearance. RP 220. Ms. Gibson told Ms. Moon she believed Mr. Riendeau had mental health issues. RP 237. Ms. Gibson told Ms. Moon the incident was overblown. RP 237. During direct examination, Ms. Gibson testified that when she spoke to Ms. Moon "I knew [the charges] weren't going to get dropped. Look at his history. I mean, they came full force. So I'm sorry I'm not going where you want me to go with it."<sup>5</sup> RP 239. She subsequently testified that she could not remember if she told Ms. Moon that she wanted the charges dismissed:<sup>6</sup>

I was more trying to – because I know his history – and there was a confrontation. And so I was more worried about his – him having his mental health issues because that's what

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<sup>5</sup> The defendant did not contemporaneously object to this testimony. RP 239.

<sup>6</sup> Ms. Gibson later stated that she believed she said, "I didn't want to press charges personally." RP 252.

caused it all. Because he's a perfect person if he just didn't believe things that his head tells him.

RP 239-40.<sup>7</sup> Ms. Moon denied that any of her communications with the victim advocate were in response to her earlier calls with Mr. Riendeau. RP 253.

After the first appearance, however, Ms. Moon lost contact with Ms. Gibson – her letters were returned and Ms. Gibson did not respond to a voice mail message from Ms. Moon. RP 221. Ms. Moon did not hear from Ms. Gibson for approximately two months, when she received a voice mail from Ms. Gibson. RP 221. However, despite Ms. Gibson's message, Ms. Moon was unable to subsequently reach her and, ultimately, contacted a detective for help in this endeavor. RP 221-22.

Detective Howe sought to serve Ms. Gibson with a subpoena for trial. RP 171. He went to her apartment six times, talked to her neighbors and landlord to confirm she lived there, tried leaving his business card, and although it appeared someone was within the apartment, no one answered the door. RP 171. Ultimately, Detective Howe located Ms. Gibson elsewhere. RP 171. Once Ms. Gibson was successfully served a subpoena to testify at trial, Ms. Moon had increased contact with her. RP 232.

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<sup>7</sup> The defendant did not contemporaneously object to this testimony. RP 240.

Ms. Gibson denied attempting to avoid Ms. Moon or the detective. RP 257-58.

At trial, Ms. Gibson acknowledged the jail telephone conversations between Mr. Riendeau and herself, stating:

We lived together for eight months and we shared bills. So he was going to go away for a long time because he has a record as we all know. And so he wasn't trying to...coerce me in any way or nothing. We were dealing with what we were going to do with the car and the bills and house and how I was going to make it.

RP 235. The defense did not object to this testimony. RP 235-36. When asked to explain what Mr. Riendeau meant by "If you go there, explain the situation to them, maybe you can talk them into something. I don't know,"

Ms. Gibson stated:

Because we've been addressing his mental health. Like we've been talking about it, him and I. And it needed to be addressed. And I wanted to emphasize that. And I wanted that pushed because it's...if you look at his record...it's...reoccurring.

RP 260. Defendant did not contemporaneously object to this statement.

RP 263. During cross-examination, defense counsel asked about whether the telephone conversations involved dividing their property; to this question, Ms. Gibson responded:

Yeah. Well – yeah, we were talking – because his mom – his mom was coming over to grab his things, and I wanted to make sure, you know his important things, because he's got

a record and we weren't going to talk again, you know.  
That's it.

RP 253-54. The defendant did not object to this testimony. *Id.*

The prosecutor warned the court before trial that Ms. Gibson “has a habit of just bringing stuff up” and would do her best to instruct Ms. Gibson to avoid references to drug use, if the court ruled that evidence to be inadmissible. RP 143.

#### Jury Selection.

During jury selection, a number of prospective jurors were challenged for cause – Juror 12, Juror 16, Juror 17, and Juror 18. Juror 12 had a financial hardship in serving on the jury, RP 108; Juror 16 was involved in a prior domestic violence situation and did not believe he could be impartial and had a financial hardship, RP 108-09; and Juror 17 worked as a corrections officer who may have been acquainted with Mr. Riendeau, RP 115. The State challenged Juror 18 for cause because, as further discussed below, that juror's wife was schizophrenic and would become violent; Juror 18 said that he would have to know the facts of the case in order to determine whether he could be fair and impartial, and he said that under his belief system he would need two witnesses to an event. RP 110. The defense opposed Juror 18's removal for cause because “he indicated, along with everyone else, that he would follow the Court's instructions.”

RP 111. The Court excused Juror 18 for cause because “although he indicated he could follow the court’s instructions on the law, he also said that under his belief system, would be required to have at least two witnesses, which would be contrary to the instruction given to him” and “he said he could decide his case impartially depending on what facts were elicited and if the facts were similar to something that he’d been through, then he wouldn’t necessarily be able to assure the Court he’d be able to do that.” RP 111.

Motion for Mistrial.

After the State rested, the defense moved the court for a mistrial based upon Ms. Gibson’s references to Mr. Riendeau’s criminal history. RP 264. Alternatively, the defense asked the court for a curative instruction. RP 264. The State argued against a mistrial, stating that Ms. Gibson’s references to Mr. Riendeau’s criminal history were not elicited by either party, neither party did any follow-up on the references, and there was no mention of specific dates, times, types of crimes. RP 265. The State concurred that a curative instruction should be given. RP 265. The court found that Ms. Gibson’s references to Mr. Riendeau’s criminal history were not intentionally elicited by the State, and the references were vague. RP 265. The court did not find that a mistrial was warranted, but agreed to instruct the jury with a curative instruction. RP 265-66. In addition to its

other instructions, the Court instructed the jury both that it “may not consider the defendant has been convicted of any crimes for any purpose” and “if evidence was not admitted or stricken from the record, then you are not to consider it in reaching your verdict.” CP 9, 16; RP 293, 297.

The jury unanimously found the defendant guilty of tampering with a witness, and further found that Mr. Riendeau and Ms. Gibson were family or household members. CP 24-25. On that charge, the court sentenced the defendant as a “9+” to a high-end, standard range sentence of 60 months in prison; the court imposed 364 days for the fourth-degree assault to be served concurrently with the felony. CP 104, 106-07. The court specifically ordered these charges to run consecutively to a different case. CP 106. The defendant appealed.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING JUROR 18 FOR CAUSE.**

Typically, criminal defendants assign error to a trial court’s refusal to remove a juror the defendant considers to be biased against him or her. In this case, the defendant assigns error to the trial court’s excusal of a juror for cause, ostensibly because the defendant believes that the juror may have been favorable to him.

Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury. However, the defendant “has no right to be tried by a particular juror or by a particular jury.” *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). There is a well-established presumption that a juror chosen in place of a potential juror who is improperly dismissed is an impartial juror, so the constitutional right to an impartial jury is preserved. *State v. Phillips*, 65 Wash. 324, 327, 118 P. 43 (1911). If a fair and impartial jury was obtained, the defendant has no right to a new trial. *Id.*

A party may challenge a juror for cause and “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.” CrR 6.4(c)(1). One basis upon which a party may challenge a juror for cause is actual bias, i.e., the existence of a state of mind which satisfies the court that the potential juror “cannot try the issue impartially and without prejudice to the substantial rights of the party challenging” the juror. RCW 4.44.170(2).

Granting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion. *State v. Gilchrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). A trial court abuses its discretion if its “decision is manifestly unreasonable, or is

exercised on untenable grounds, or for untenable reasons.” *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290 (2014). A court acts on untenable grounds “if its factual findings are unsupported by the record,” acts for untenable reasons “if it has used an incorrect standard,” and its decision is manifestly unreasonable “if its decision is outside the range of acceptable choices given the facts and the legal standard.” *Id.* This standard of review recognizes that the trial court is in the best position to determine whether a juror can be fair and impartial because the trial court is able to observe the juror’s demeanor and evaluate the juror’s answers to determine whether the juror would be fair and impartial.<sup>8</sup> *State v. Birch*, 151 Wn. App. 504, 512, 213 P.3d 63 (2009).

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<sup>8</sup> See also L. Orland & Tegland, 14 Wash. Prac., Trial Practice § 202, at 332 (4<sup>th</sup> ed. 1986):

Considerable light will be thrown on the fairness of a juror by the juror’s character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror. The supreme court, which has not had the benefit of this evidence recognizes the advantageous position of the trial court and gives it weight in considering any appeal from its decision. Unless it very clearly appears

The trial court need not wait for the parties to challenge jurors who have biased opinions or feelings about the case they are asked to decide, as the court has an obligation independent from that of the parties to ensure a fair and impartial jury. *State v. Slert*, 186 Wn.2d 869, 383 P.2d 466 (2016). A trial court need not disqualify a juror with preconceived ideas if the juror can “put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court.” *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

*State v. Sassen Van Elsloo*, 191 Wn.2d 798, 425 P.3d 807 (2018), cited by defendant, Br. at 11, involved a mid-trial dismissal of an impaneled juror – a circumstance not present here. It is helpful, however, as it discusses the operation of various statutes and rules pertaining to the dismissal of jurors dependent on whether the juror is prospective, impaneled, or deliberating. *Id.* at 807-08. With regard to prospective jurors, the Supreme Court cited extensively from its decision in *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991):

Actual bias must therefore be established by proof. *Noltie*, 116 Wn.2d at 838, 809 P.2d 190. Equivocal answers alone are not sufficient to establish actual bias warranting dismissal of a potential juror.<sup>9</sup> *Id.* at 839, 809 P.2d 190.

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to be erroneous, or an abuse of discretion, the trial court’s decision on the fitness of the juror will be sustained.

<sup>9</sup> *Sassen Van Elsloo* loosely cites *Noltie* in this regard – *Noltie* actually stated, “We have recently and repeatedly held that equivocal answers alone

Rather, “the question is whether a juror with preconceived ideas can set them aside.” *Id.* The trial court must be satisfied that the potential juror is unable to “try the issue impartially and without prejudice to the substantial rights of the party challenging” before dismissing the juror for actual bias. RCW 4.44.170(2). Furthermore, a mere possibility of bias is not sufficient to prove actual bias; rather, the record must demonstrate “that there was a probability of actual bias.” *Noltie*, 116 Wn.2d at 838-39, 809 P.2d 190.

*Sassen Van Elsloo*, 191 Wn.2d at 808-09.

*Noltie* is instructive. In *Noltie*, a juror expressed a “degree of discomfort about listening to an alleged child victim of sexual abuse and a fear that it would be difficult for her to be impartial.” The *Noltie* Court compared its facts to those presented in *Cheney v. Grunewald*, 55 Wn. App. 807, 780 P.2d 1332 (1989), a DUI case in which a juror expressed that he was a member of Mothers Against Drunk Driving, his niece was killed by a drunk driver, and stated he did not think the defendant would get a fair trial from jurors with his frame of mind. The *Grunewald* court held that under those facts, there was sufficient actual bias to justify the juror’s removal for cause. *Id.* at 838.

The *Noltie* court acknowledged that, in its case, the trial court was in the best position to determine whether the juror’s responses “merely

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*do not require* a juror to be removed when challenged for cause, rather the question is whether a juror with preconceived ideas can set them aside.” 116 Wn.2d at 839 (emphasis added).

reflected honest caution based on her lack of prior jury experience or whether they manifested a likelihood of actual bias.” *Noltie*, 116 Wn.2d at 839-40. Concluding that the record demonstrated a mere possibility of prejudice, the Court held that it did not perceive a manifest abuse of discretion in the trial court’s failure to excuse the juror.

Here, the trial court did not manifestly abuse its discretion in dismissing Juror 18 for cause; this Court should give deference to that decision because the trial court had the opportunity to view the juror, hear his tone, and observe his mannerisms – all important factors which are not evident from a cold record. Contrary to defendant’s claims, the written record supports the trial court’s decision to excuse Juror 18 for cause.

When the court questioned the venire as to whether anyone had experiences with domestic violence,<sup>10</sup> Juror 18 and the court had the following interaction:

[THE COURT] Have any of you personally had an experience with a similar or related type of case or incident if I expand it to an issue of domestic violence? So personally been a victim, a witness, an accused, anything of that nature?

...

PROSPECTIVE JUROR NO. 18: [My wife]...was diagnosed schizophrenic several times and she became

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<sup>10</sup> The defendant’s brief indicates this exchange between the court and juror 18 was initially prompted by a question from the prosecutor. Br. at 7. This is inaccurate. The initial question was asked by the court. RP 47.

violent and destructive towards me and some other people. She's been released.

THE COURT: Would that experience or that relationship influence your consideration of this case?

PROSPECTIVE JUROR NO. 18: I -- I don't know how to answer that, Your Honor. I'm not sure.

THE COURT: Do you think you'd be able to decide this case based upon what's presented to you in this courtroom and not on any of the history between you and your wife or what she's been through?

PROSPECTIVE JUROR NO. 18: Well, I guess I would have to know the facts, like if violence is done by someone that was mentally ill or not. I --

THE COURT: All right. So whether or not you could consider this case impartially would be dependent upon the facts that come out?

PROSPECTIVE JUROR NO. 18: Right.

RP 47-48.

When the prosecutor asked the venire about its ability to follow the court's instructions – specifically pertaining to circumstantial evidence and the inferences that may be drawn from such evidence, Juror 18 expressed a distrust of circumstantial evidence and unequivocally stated that he would need to have two witnesses to an event in order to believe it occurred:

PROSPECTIVE JUROR NO. 18: With my belief system, you got to have at least two witnesses.

MS. DUGGAN: Okay.

PROSPECTIVE JUROR NO. 18: And circumstantial evidence, it could be nebulous.

MS. DUGGAN: Okay.

PROSPECTIVE JUROR NO. 18: Manipulated in such a way as to make someone look guilty and they're really not. I -- to me, it's very iffy.

RP 82.

Defendant claims that, regardless of these specific answers, Juror 18 later manifested an ability to follow the court's instructions when the entire venire was generally asked three questions:<sup>11</sup>

[MS. DUGGAN] [I]s 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.

[MR. PHELPS] Well, the prosecutor just asked you if you would follow the instructions regardless, and I think everybody in this room said they would right?

RP 89.

[MR. PHELPS] Is there anybody that, as you sit here today, you think maybe I'm not a good juror?

RP 104.

There is no indication from the record if all jurors, including Juror 18 assented, nodded, raised their hands, or otherwise responded to any of

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<sup>11</sup> See Br. at 12.

these questions. Other courts have pointed out that silence, and even answers during group voir dire “cannot substitute for individual questioning.” *State v. Irby*, 187 Wn. App. 183, 196, 347 P.3d 1103 (2015) (citing *Hughes v. U.S.*, 258 F.3d 453, 461 (6<sup>th</sup> Cir. 2001) (“Orman’s silence in the face of generalized questioning...did not constitute an assurance of impartiality”)). Similarly, silence or even answers during group voir dire should not override explicit bias that a juror has already manifested when individually questioned. Thus, notwithstanding Juror 18’s unknown, non-verbal responses to general questions, his specific, verbal responses during voir dire established not simply a possibility, but rather a probability, that the juror was actually biased.

Furthermore, as above, equivocation is insufficient cause for a trial court to determine that a juror suffers actual bias and cannot be impartial. But the scenario presented here extends beyond equivocation. Juror 18 explicitly told the court that he could not guarantee that he would be impartial until the facts were developed at trial. Based upon that representation, neither the Court nor the parties should be required to risk a juror will develop bias during trial based upon the facts that are presented.<sup>12</sup>

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<sup>12</sup> “In general, it is preferable to resolve the question of juror bias during voir dire rather than through a postverdict motion for a new trial.” *State v. Jackson*, 75 Wn. App. 537, 543, 879 P.2d 307 (1994). While it is possible that Juror 18 would have been more sympathetic to a defendant with mental

Even if this Court were to assume that his non-verbal responses to general voir dire conflicted with his earlier oral responses to pointed questions directed specifically at his unique background and beliefs, his specific answers, clearly indicative of bias, were a sufficient basis upon which for the court to excuse him for cause. There is no manifest abuse of discretion apparent on this record.

Even if the court's dismissal of Juror 18 was in error, the defendant cannot demonstrate that the jury that was actually empaneled was not impartial. The defendant is not entitled to a specific jury or juror. Thus, any error in this regard was harmless, as the defendant has failed to demonstrate any probability that the outcome of the trial would have been different had prospective Juror 18 been seated on his jury.<sup>13</sup> Additionally, Mr. Riendeau cannot demonstrate that Juror 18 would have been seated on his jury – the State had three peremptory challenges remaining at the conclusion of jury

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health issues, the converse might also have been true. Had Juror 18 been empaneled and the defendant was convicted, Mr. Riendeau would likely argue that his counsel was ineffective for failing to seek Juror 18's excusal when Juror 18 manifested bias during voir dire.

<sup>13</sup> A harmless error is an error which is trivial, formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

selection, CP 172-73,<sup>14</sup> and had the State's motion to strike Juror 18 for cause been denied, it is probable that Juror 18 would have been the subject of one of the State's remaining peremptory challenges.

The defendant's citation to *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), is unavailing. *Irby* involved the excusal of jurors for cause in an email correspondence on the first day of voir dire. No party questioned the jurors, and defense counsel stipulated to the excusal of certain jurors without consulting Mr. Irby. 170 Wn.2d at 878. The Court held that the State had failed to demonstrate the violation of the defendant's right to be present or to appear and defend was not harmless beyond a reasonable doubt – because the prospective jurors' ability to serve was never tested by questioning in the defendant's presence. *Id.* at 886. In that case, the 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, 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.

*Id.* at 886-87.

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<sup>14</sup> The final jury panel and the record of the use of for cause and peremptory challenges is being designated concurrently with the filing of the State's brief. The State anticipates these documents will be designated as CP 172-73.

The defendant claims, based upon this language, that the State must demonstrate that Juror 18's excusal had no effect on the verdict. Br. at 13. However, the holding of *Irby* should not be taken to overrule other precedent which states that a defendant has no right to a specific juror or jury. The Washington Supreme Court "will not overrule...binding precedent sub silentio." *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999), *as amended* (July 2, 1999). Therefore, this Court should not presume that in ruling upon a "right to be present case" the *Irby* court overruled, sub silentio, *Phillips, supra*, in which it long ago stated that a defendant has no right to a specific juror or jury.

The defendant received a fair trial by an impartial jury. The trial court did not abuse its discretion by removing Juror 18 for cause. Even if the removal was improper, there is no showing that the defendant did not receive a fair trial by those jurors who were ultimately empaneled. This claim fails.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. RIENDEAU'S REQUEST FOR A MISTRIAL.**

Mr. Riendeau assigns error to the trial court's decision not to grant his requested mistrial after Ms. Gibson alluded to his criminal history while testifying. Mistrials are an extraordinary remedy, and the trial court did not

abuse its discretion in denying the mistrial request. The testimony at issue includes:

[Ms. Gibson] We lived together for eight months and we shared bills. So he was going to go away for a long time because he has a record as we all know. And so he wasn't trying to...coerce me in any way or nothing. We were dealing with what we were going to do with the car and the bills and house and how I was going to make it.

RP 235.

[Ms. Gibson] I knew [the charges] weren't going to get dropped. Look at his history. I mean, they came full force. So I'm sorry I'm not going where you want me to go with it.

RP 239.

Yeah. Well – yeah, we were talking – because his mom – his mom was coming over to grab his things, and I wanted to make sure, you know his important things, because he's got a record and we weren't going to talk again, you know. That's it.

RP 253-54.

The defendant did not contemporaneously object to any of this testimony until after the state rested, despite his pretrial knowledge that “Ms. Gibson has a habit of just bringing stuff up.” RP 143. Although not assigned as error, some of Ms. Gibson's other testimony is relevant here.

[Ms. Gibson]: I was more trying to – because I know his history – and there was a confrontation. And so I was more worried about his – him having his mental health issues

because that's what caused it all. Because he's a perfect person if he just didn't believe things that his head tells him.

RP 239-240.

[Ms. Gibson]: Because we've been addressing his mental health. Like we've been talking about it, him and I. And it needed to be addressed. And I wanted to emphasize that. And I wanted that pushed because it's...if you look at his record...it's...reoccurring.

RP 260.

1. The defendant invited error by his failure to object to each instance that Ms. Gibson allegedly testified to his "history" or "record."

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). A defendant invites an error if he or she affirmatively assented to the error, materially contributed to it, or benefitted from it. *Id.* at 154.

The defendant and his attorney were made aware during a pretrial hearing that Ms. Gibson had a tendency to "just bring stuff up." RP 143. Despite this knowledge, the defense allowed Ms. Gibson to testify *without objection* three times regarding the defendant's "history" or "record." Perhaps if the defendant had objected to the first instance of allegedly improper testimony, Ms. Gibson would not have repeated that testimony two additional times, once during her cross-examination. Had the defendant truly found this testimony to be prejudicial, he should have objected

immediately, giving the court an opportunity to caution Ms. Gibson (outside the presence of the jury) against making any additional reference to Mr. Riendeau's "history" or "record." Because the alleged error could have been mitigated by the defendant early on in Ms. Gibson's testimony by timely objection, the defendant materially contributed to the repetition of the improper testimony. Thus, any claim that the trial court abused its discretion in denying the motion for a mistrial was waived or invited.

2. Law and standard of review pertaining to mistrials.

This Court reviews a trial court's decision to deny a motion for mistrial for abuse of discretion. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).

A trial court has broad discretion to rule on irregularities during the course of a trial. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court is in the best position to determine if a trial irregularity caused prejudice. *State v. Perez-Valdez*, 172 Wn.2d 808, 819, 265 P.3d 853 (2011). The court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. *Mak*, 105 Wn.2d at 701. An appellate court will reverse the trial court only if there is a substantial likelihood the trial irregularity

prompting the mistrial motion affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). Courts strongly presume juries follow a curative instruction to disregard evidence. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983); *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962).

Whether a trial court abused its discretion in denying a motion for a mistrial depends on: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of other properly admitted evidence; and (3) whether an instruction could cure the irregularity. *Perez-Valdez*, 172 Wn.2d at 818.

*a. Seriousness of irregularity*

An intentional introduction of inadmissible evidence relating to criminal history is more serious than an unintentional interjection of inadmissible testimony. *See State v. Taylor*, 60 Wn.2d 32, 36-38, 371 P.2d 617 (1962) (a member of the King County police department deliberately injected evidence that the defendant had a parole officer and repeated it immediately when the defense motion for a mistrial was denied; a new trial was ordered after posttrial reargument). The fact the witness is a “professional” witness also indicates a serious irregularity. *Id.* at 36. Here, the testimony was given by a lay witness and was not solicited by either party – the witness had a habit of “bringing stuff up.”

Although the testimony involved the defendant’s “history” and “record” it is not of the same serious degree as the testimony in *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987). The offending testimony in *Escalona*, although also unsolicited, was that “Alberto already has a record and had stabbed someone”; this testimony was particularly serious because in that case, the defendant was accused of a nearly identical stabbing. *Id.* at 255. Here, Ms. Gibson did not disclose what Mr. Riendeau’s “history” was, or of what conviction(s), if any, his “history” consisted. She did not mention prior domestic violence. In fact, Ms. Gibson did not even refer to Mr. Riendeau’s history as “criminal history.” In contrast, she referred to his mental health problems multiple times, and his need for help. The jury, even if it had not been instructed to disregard this testimony, might have assumed that Ms. Gibson was referring to his history of mental illness. In contrast to *Escalona*, Ms. Gibson’s testimony was not serious – the defendant’s lack of contemporaneous objection also indicates that, although the testimony referred to his “history” and his “record” he did not perceive the testimony to be prejudicial enough to warrant an objection – on any of the three instances when the testimony was given.

*b. Cumulative Nature of the Testimony*

As above, Ms. Gibson’s testimony was somewhat ambiguous as to what she meant in referring to Mr. Riendeau’s “history” or “record.” She spoke at length of Mr. Riendeau’s mental illness, and that his illness was “reoccurring.” Had the jury believed the references to Mr. Riendeau’s history referred not to an unspecified “criminal history” but, rather, to a lengthy history of mental illness, the testimony was cumulative to properly admitted evidence not assigned as error on review.

Further, the audio recordings of the conversations between Ms. Gibson and Mr. Riendeau reflect that Mr. Riendeau told Ms. Gibson that it would be “2 or 3 years before” he would “get out” and that they would not be able to “sit down [and talk] for a long time.” Although these statements did not refer to the defendant’s history, the jury was aware that he could face lengthy incarceration, a fact that was presented as Mr. Riendeau’s motive for requesting Ms. Gibson not testify against him.

*c. Adequacy of the curative instruction*

Mr. Riendeau relies on *Escalona*, 49 Wn. App. 251, to argue the curative instruction was inadequate to cure the irregularity. That case is distinguishable. As above, in *Escalona*, the victim violated a motion in limine by referring to the prior conviction of the defendant for *the same crime*. 49 Wn. App. at 255. The victim testified the defendant “has a record

and had stabbed someone.” *Id.* Although the trial court gave a limiting instruction and instructed the jury to disregard the testimony, the reviewing court concluded the irregularity was “extremely serious” and could not be cured by an instruction to disregard the testimony. *Id.* at 253-56. “[D]espite the court’s admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact” and conclude that the defendant “acted on this occasion in conformity with the assaultive character he demonstrated in the past.” *Id.* at 256.

By contrast, here, *State v. Condon*, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993), is more analogous. In that case, Condon successfully moved the court to exclude evidence he had been in jail. *Id.* at 648. The victim mistakenly testified Condon called her when he was getting out of jail. *Id.* Condon objected and moved to strike; the court granted his request. *Id.* Moments later, the witness made the same remark. *Id.* Condon moved for a mistrial, which the court denied, deciding instead to issue another curative instruction. *Id.* The witness then referenced jail a third time. *Id.*

The Court of Appeals affirmed the decision not to grant a mistrial. *Id.* at 649. The court determined a reference to jail was ambiguous. *Id.* The jury could easily have “concluded that Condon was in jail for a minor offense.” *Id.* Also, the fact that someone is in jail “does not necessarily mean that he or she has been convicted of a crime.” *Id.* The remarks had the

potential for prejudice, but not so serious as to warrant a mistrial. *Id.* The comments in Mr. Riendeau's case were similarly ambiguous. Ms. Gibson did not reveal the crimes the defendant had been accused of committing, she did not reveal whether he had been convicted, and, as indicated above, her statements could have equally applied to Mr. Riendeau's history of mental illness.

Mr. Riendeau did not object in any way to the timing or adequacy of the final instruction, RP 276; he asked for the instruction if the court was disinclined to grant a mistrial. The court did not abuse its discretion in denying Mr. Riendeau's motion for a mistrial, and instead, granting his alternative request for a curative instruction.

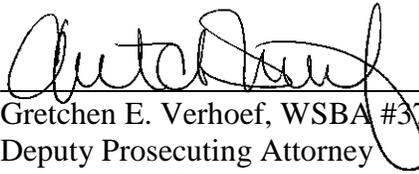
## **V. CONCLUSION**

The State respectfully requests this Court affirm the jury's verdict and the judgment. The defendant was tried by an impartial jury; no error occurred in striking Juror 18 for cause. Although Ms. Gibson should not have referred to the defendant's "history" or "record," the testimony was ambiguous at best, it was subject to no contemporaneous objection or request for the Court to instruct Ms. Gibson against referring to this information (suggesting that the defendant did not find it prejudicial), and

was the subject of a curative instruction – one the jury was presumed to follow.

Dated this 5 day of March, 2020.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Gretchen E. Verhoef, WSBA #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ALEXANDER RIENDEAU,  
  
Appellant.

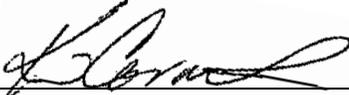
NO. 36918-8-III  
  
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 5, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David Koch  
[kochd@nwattorney.net](mailto:kochd@nwattorney.net); [sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

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Spokane, WA  
(Place)

  
(Signature)

# SPOKANE COUNTY PROSECUTOR

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