No. 100087-1
COA NO. 54135-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PITA DALLAS ILI,

Petitioner.

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

The Honorable Chris Lanese, Judge
Cause No. 18-1-01824-34

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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2. Whether this Court should accept review of the Court of Appeals' finding that Ili, in essence, waived challenge to excuse Juror 29 for cause, by failing to renew his motion, after developing additional voir dire that demonstrated a conclusion supporting the trial court's denial of the motion to excuse Juror 29 for cause.

B. STATEMENT OF THE CASE

Aaron Klein was a new employee at Custom Choice Door on October 19, 2018. RP 129-130. He started the day at a warehouse in Lakewood, Washington, loading his truck for a

delivery. RP 130. The appellant, Pita Ili, also worked at Custom Choice Door. RP 132. Klien had contact with Ili while loading a truck and noted that Ili was " a little hostile," and stated that Klien should be moving a lot quicker. RP 133-134. Klien testified that Ili made comments "getting [Klein] down for moving at a slower pace," three to four times. RP 135.

As a result of the incident, Ili was charged with assault in the second degree. CP 4. The matter proceeded to jury trial on August 20, 2019. RP 1. During jury selection, the trial court asked the entire juror panel, "Have any of you hear of this case before today?" and no juror responded. RP 20. In response to the trial court's question to the venire about whether anyone knows Officer Dave Maclurg, Juror 29 responded, "I'm former law enforcement and current chaplain for Lacey Police Department." RP 22. Juror 29 subsequently disclosed that he was previously a reserve police officer for the City of Lacey, but it had been "almost five years" since he had been a reserve officer. RP 22, 53. The trial court then asked:

> And if you were selected to serve as a juror in this case, would your current position and your prior position as it touches upon your familiarity with Officer Maclurg cause you to potentially give more weight to his testimony if he's called as a witness in this trial than another witness.

RP 22-23. Juror 29 unequivocally responded "no." RP 23.

The defense moved to excuse Juror 29 for cause based on his familiarity with Officer Maclurg and the depth of potential familiarity as the chaplain. RP 33. The trial court ruled, "I'm going to for now deny the motion as to 29. It may be renewed after voir dire if we can have a discussion then." RP 34. During subsequent questioning, Juror 29 was not asked if he received compensation for his service as a police chaplain, and in response to later questioning indicated that he was a "volunteer chaplain," though that response was not specific as to whether that included the Lacey Police Department. RP 71.

When defense counsel asked if "people ever exaggerate what happened to law enforcement," Juror 29 responded, "yeah, absolutely." When Juror 29 was asked about his prior jury service, he indicated:

I would say reaching a verdict was challenging because in the case I was on, the prosecution, law enforcement and stuff - - they didn't go a good enough job to bring something to say, hey, we can come to for a sure agreement here.

RP 66. Juror 29 continued:

So the challenge was trying to get – because you have – so you start going though the evidence and realizing, as was stated, that this is somebody's livelihood or something that's at stake here, you know. So it makes it hard because it's another person involved and we should care about. We're all human beings and we care about them.

RP 66.

After the State's case in chief, Ili testified on his own behalf. RP 308. He indicated that Klien acted aggressive toward him in the warehouse. RP 310. At the job site in Lacey, Ili testified that he confronted Klien about using his personal phone at the job site and Klien responded aggressively. RP 312. Ili indicated that Klien said "Get the fuck out of my face,"

and was within an inch of him. RP 313. Ili said he felt threatened because he was standing near a truck bumper and believed he could be pushed into it. RP 314. He reacted by grabbing Klien with one hand and putting him straight to the ground. RP 314. Ili testified that he grabbed Klien by the neck and held him down for a few seconds, "then let go." RP 315.

The jury found Ili guilty of assault in the second degree. RP 396, CP 58. Finding that an exceptional sentence was appropriate due to Ili's youth, the trial court imposed a term of incarceration of 1.5 months with the option of work release. CP 67-77, 78-79, RP 12-15.

On appeal, Ili argued that the trial court's failure to dismiss juror 29 violated Ili's right to an impartial jury because the juror's association with a witness and involvement with the investigating police department resulted in the juror harboring both actual and implied bias. State v. Ili, No. 54135-1 (unpublished opinion) slip op. at 1. The Court of Appeals held that the trial court did not abuse its discretion when it declined

Ili's motion to dismiss juror 29. *Id*. Ili now seeks review of this Court.

C. ARGUMENT

A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Ili argues that the decision of the Court of Appeals failed to correctly interpret the implied bias statute and published Court of Appeals case law, however a close reading of the decision reveals otherwise. Additionally, Ili argues that the Court of Appeals decision involves a substantial public issue that should be determined by this Court. As noted by the Court of Appeal in its decision, this is not an exceptional case

since Ili chose not to re-raise his for-cause challenge or use a peremptory challenge on juror 29. State v. Ili, at 10, footnote 3. There is no basis upon which this Court should accept review.

1. The Court of Appeals correctly determined that the implied bias statute is not implicated because the Lacey Police Department is not a party to the litigation.

Under RCW 4.44.180(2), a juror may be removed if that juror is employed for wages by one of the parties. In a criminal case, a prospective juror's employment with the State does not implicate the implied bias statute unless a substantial relationship exists between the interest of the prospective juror in his employment and the interest the government is advancing as a litigant. State v. Johnson, 42 Wn. App. 425, 429, 712 P.2d 301 (1985). A trial court's denial of a challenge for cause based on implied bias is reviewed for an abuse of discretion. *Id.* at 428.

Here, the parties to this case are the defendant, Pita Ili, and the State of Washington. In order to implicate RCW

4.44.180(2) Ili must establish that juror 29 was employed by a party to the litigation for wages or stands in the relation of master and servant. That juror 29 stated he was a chaplain for the Lacey Police Department does not amount to a "substantial relationship" between the juror's interest in his employment and the government's interest in the proceeding. Johnson, 42 Wn. App. at 429. The record is void of any further information regarding the extent of the relationship between juror 29 and the Lacey Police Department. Though, juror 29 did state later that he was a *volunteer* chaplain, that comment did not specify whether this role was specific to the Lacey Police Department or some other law enforcement agency. RP 71.

Here, the Court of Appeals decision correctly acknowledged the lack of a developed record that would permit any further analysis of the relationship between juror 29 and the Lacey Police Department. The Court of Appeals decision noted,

> At most, the record shows that juror 29 had some workplace interaction, unclear in its degree, with a witness. Ili failed to develop a record that would enable

> us to determine what type of relationship juror 29 had with Maclurg.

Unpublished Opinion, at 9. The Court of Appeals acknowledged that without more, Ili cannot establish implied bias based on the employment for wages provision of RCW 4.44.180(2). *Id.*

Ili relies on a Montana Supreme Court case, State, v. Kebble, 380 Mont. 69, 353 P.3d 1175 (2014) which implicates a Montana statute that is highly distinguishable from RCW 4.44.180. The Court of Appeals was correctly unpersuaded by Kebble. The Court of Appeals noted:

> Montana's statute prohibits a juror from serving is that juror is employed by and individual or entity "on whose complaint the prosecution was instituted." RCW 4.44.180 is not as inclusive as Montana's statute, and being employed by an investigating entity whose complaint instigated the prosecution in not within the exclusive list of acceptable grounds to remove a juror for implied bias.

Unpublished Opinion, at 10. There was no error in the Court of Appeals decision and there is no basis under RAP 13.4(b) upon which this Court should accept review.

Finally, there is nothing in the record that juror 29 exhibited a state of mind that rendered his decision making actually biased against Ili. In its decision, the Court of Appeals noted that "Ili relies solely on speculation about juror 29's employment and relationship to a witness to support his actual bias claims." Unpublished Opinion, at 6.

2. Ili's choice not to re-raise his challenge after voir dire was finished demonstrates that subsequent questioning of juror 29 did not reveal a basis to conclude that actual or implied bias existed and that this is not an exceptional case implicating issues of substantial public interest

Despite the opportunity to re-raise his challenge as to juror 29's implied bias, Ili did not elect to do so either for-cause nor did Ili use a peremptory challenge on juror 29. RP 34-94. As the Court of Appeals noted:

> This suggests that either Ili's concerns over juror 29 had been assuaged by the close of voir dire or that Ili, in fact, wanted juror 29 on his jury due to the juror's expressed sympathy for defendants.

Unpublished Opinion, at 10, footnote 3.

Indeed, in State v. Jahns, 61 Wash. 636, 638, 112 P. 747 (1911), this Court considered whether a claim of bias was waived where it had been raised by the defense and denied, and later the State withdrew opposition to the challenge and the court offered to permit the defense to challenge the juror again, but declined to do so. This Court held in Jahns that any error in the first ruling was waived and cannot be taken advantage of since the first ruling was withdrawn for the benefit of the defendant and the defendant failed to take advantage of the court's ruling. *Id*.

Here, the trial court specifically ruled, "I'm going to for now deny the motion as to 29. It may be renewed after voir dire if we can have a discussion then." RP 34. The defense never again challenged Juror 29 for cause. RP 34-94. At the end of general questioning, defense counsel challenged only juror number 18 for cause. RP 91-94. The facts of Jahns have been distinguished by subsequent case law which states that "*Jahns* does not address a situation where an appellant failed to raise

the issue below, so it does not hold that a failure to challenge a juror for actual bias results in a waiver." State v. Guevara-Diaz, 11 Wn. App. 843, 854, 456 P.3d 869 (2020). However, here, as in Jahns, the trial court allowed the defense the opportunity to further argue whether the facts supported a finding that the juror was biased, and the defense elected not to do so. The failure of defense to follow up with an additional objection suggests that the decision not to further develop the record may have been purposeful and strategic. As noted, nothing in the record supports a conclusion that juror 29 held an actual or implied bias. The Court of Appeals correctly deferred to the decision of the trial court.

Furthermore, Ili's strategic decision not to renew his motion to strike juror 29 for cause makes this case an unexceptional case such that it should not qualify for review under RAP 13.4(b)(4). Ili's strategic decision to forgo renew his motion suggests that Ili preferred to have juror 29 on his jury based on further statements elicited during voir dire. Ili's

contention that review of this case is appropriate as a matter of substantial public interest is seriously undermined by the distinct possibility that Ili strategically chose to seat juror 29 by failing to renew his motion and failing to use a peremptory strike to remove juror 29.

D. CONCLUSION

For the reasons stated herein, the State respectfully requests that this Court deny review of the decision of the Court of Appeals.

This document contains 2313 words, excluding the parts of the documents exempted from the word count by RAP 18.17.

Respectfully submitted this 7th day of October, 2021.

Robert M. Schiesser, WSBA# 49774
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 7, 2021

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

October 07, 2021 - 8:48 AM

Transmittal Information

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