NO. 45532-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MANUS,

Appellant.

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

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by conducting peremptory challenges on paper without public oversight.

2. The trial court erred and denied appellant his right to an impartial jury when it refused to remove a juror for cause.

Issues Pertaining to Assignments of Error

1. Jury selection was not open to the public because peremptory challenges were exercised silently on a piece of paper. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important portion of voir dire in private, did the trial court violate appellant's constitutional right to a public trial?

2. Towards the end of the trial, one of the jurors recognized the arresting officer as a friend from his gym. He explained they had exercised and chatted together regularly for about five years. Did the trial court err when it denied appellant's motion to remove this juror for cause?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant William Manus with one count of failure to register as a sex offender. CP 1, 4. Manus

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

stipulated he had a duty to register during the charging period. CP 5. After a guilty verdict, the court denied Manus' new trial motion and imposed sentence at the high end of the standard range. CP 8, 31-32; 1RP[2] 421-22, 427-29. Notice of appeal was timely filed. CP 25.

2. Substantive Facts

a. Trial Testimony

Manus was charged with failing to register as a sex offender from July 22 through August 9, 2013. CP 4. During that time, Manus was registered at his mother's home. 1RP 94, 106, 112, 326. The only disputed issue was whether he, in fact, lived there. 1RP 373.

Manus testified he lived at his mother's house in exchange for doing chores and errands for her. 1RP 298. He testified all his personal effects were there and he had a key to the sliding glass door but not to the front door. 1RP 293-95. He agreed their relationship was strained by his refusal to abide by her wishes about noise and coming and going at all hours. 1RP 296, 301-02. Sometimes, she locked him out and, because of the tension, he tried not to be at home when she was awake. 1RP 308, 310, 330.

Manus' mother agreed her son lives at her house, has personal belongings there, and receives mail there. 1RP 39-40, 42, 59, 62. She testified he had not been around for about three months, which was

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[2] There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 21-24, Nov. 13, 2013; 2RP – Oct. 21, 2013 (Excerpt).

unsurprising since Manus was in custody beginning with his arrest on August 9, 2013 until her testimony on the first day of trial on October 22. 1RP 2-3, 43. She testified Manus does not pay rent but keeps the kitchen and bathroom clean. 1RP 41, 81.

She agreed she occasionally kicks Manus out because he is loud, wakes her up, and only sometimes respects her rules. 1RP 40-41. In May 2013, Ms. Manus testified, she called 911 because Manus was causing a disturbance. 1RP 42. She told the officers Manus could only come in to get his things if they accompanied him. 1RP 42-43. She testified they have not spoken since that day. 1RP 43.

In mid-July, Ms. Manus sought a restraining order to prevent Manus from coming to her home and disturbing her peace. 1RP 44-45. But the order was not effective until served on Manus after his arrest on August 10, 2013. 1RP 173-75. She was extremely frustrated with his behavior, but specified she did not mind him coming over to shower or wash his clothes. 1RP 45, 56. She testified she had not seen Manus, and he had not been back to her home, since July 22. 1RP 46, 55, 80.

On July 31, Ms. Manus testified, she told Detective Fuller Manus lived at her home at least three nights per week. 1RP 47. Her written statement that he never stayed more than one night at a time, only meant the three nights per week were not consecutive. 1RP 50, 52. When she told

Fuller Manus did not live in her home, she only meant that, "in my heart" he did not live there because she was so upset with him. 1RP 52, 69, 80. Fuller testified Ms. Manus told him Manus did not live at her home, did not have any possessions there, and was not welcome there. 1RP 167, 169. Fuller testified that, on September 24, Ms. Manus again told him Manus did not live there. 1RP 172-73. Later, Ms. Manus told the defense investigator she only said this because she was upset that the Department of Corrections had approved the address without asking her and because Manus had worn out his welcome. 1RP 277-78.

Ms. Manus denied telling community corrections officer William Sheppard that Manus did not live with her. 1RP 123. She testified she merely asked Sheppard why he was asking her about Manus' whereabouts. 1RP 66. She explained he lived with her, but she only saw him approximately three days per week and did not know where he was every minute of every day. 1RP 68. On cross-examination, Sheppard admitted Ms. Manus never specifically said Manus did not live there, and if she had, he would have had Manus arrested for violating his community custody. 1RP 148, 152. Sheppard claimed he visited Ms. Manus' home at least six times, but never found Manus there and never saw any of his personal effects. 1RP 122-23. However, he did not visit at all in July or August 2013

and could not speak to whether Manus lived there during the charging period. 1RP 142.

On August 9, Manus testified, he was at home watching Western Washington's Most Wanted on television and his name was announced. 1RP 313. Not wanting police to come to his mother's home, he rode his bicycle to a friend's campsite in a vacant lot near a church. 1RP 313. When his friend was not there, he went inside the tent because it was raining. 1RP 315. He had been there 10 to 15 minutes when police arrived. 1RP 315-16. He testified his only statement to the arresting officers was to ask that they give his wallet back after they threw it on the ground. 1RP 318, 322.

Officer Bortle testified he found Manus coming out of a tent. 1RP 216-18, 241. He and Officer Meeds testified there was a makeshift bathroom, a well-trodden path, a fire pit and a lot of garbage, indicating someone had been living there. 1RP 220, 243. There were no other tents or people in the vicinity. 1RP 221, 242. Bortle testified Manus was disheveled and unclean with a strong unpleasant odor. 1RP 244. As Manus was being arrested, Bortle claimed, Manus asked the officer to get his belongings from the tent. 1RP 245-46.

b. Jury Selection and Challenges

Before jury selection began, the court announced that challenges for cause should be brought to the court's attention at sidebar and peremptory

challenges would be done in writing. 2RP 18-19. After the court and attorneys finished questioning potential jurors, the court announced:

> The attorneys are going to be doing their final selection here in writing. It will take a few minutes for that to be accomplished. If you have a need to use the restroom, there is a men's room on the left side of the elevators on this floor and a ladies' room on the right side. We ask that you confine yourself to the fourth floor, that you not talk to anybody about the case, that you not allow anyone to talk about it in your presence, that you not seek out any evidence on your own, that would include doing any kind of internet research, Google, or any kind of posting regarding this case or any aspect of this case. So if you need to use the restroom, go out and use the restroom. Come back to your same seat position as quickly as possible, because it's important for the attorneys to be able to match up your number with your face. If you just want to stand up and stretch, feel free to do that as well.

2RP 66-67. The transcript next records "(Attorneys doing their peremptory challenges.)" followed by "(Sidebar held, but not reported.)." 2RP 67. Then the selected jurors were directed to their seats and sworn. 2RP 67-68.

The minutes provide little insight into the peremptory challenges. CP 45-46. After the second round of voir dire, they state simply, "3:05 PM Sidebar Attorneys conduct peremptory challenges 3:35 PM Sidebar. Jury is seated and sworn by the court." Id. The page showing the peremptory challenges was filed the same day in open court. CP 43. It lists the name and juror numbers of the potential jurors excused by each side on

peremptory challenges. The State excused eight of the venire; the defense excused seven. Id.

Near the end of trial, juror 11 alerted the judicial assistant that he recognized one of the arresting officers from the gym; he did not speak up earlier because he only knew his first name. 1RP 263, 269. He told the court they met five years ago, and since then they chat while working out together on occasion but do not get together outside the gym. 1RP 264-65. He informed the court they had not discussed this case and he did not believe their acquaintance would affect his ability to be fair. 1RP 264. Manus moved to excuse him for cause, arguing the importance of these contacts over five years should not be underestimated. 1RP 265-66. The court denied Manus' challenge, finding no cause to excuse him. 1RP 268.

C. ARGUMENT

1. THE COURT VIOLATED MANUS' RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PEREMPTORY CHALLENGES IN SUCH A WAY AS TO EVADE PUBLIC SCRUTINY.

a. Established Case Law Demonstrates that Private Exercise of Peremptory Challenges Violates the Public Trial Right.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling,

157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6.

The public trial requirement is for the benefit of the accused as well as the public: "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). Public trials thus represent a core safeguard in our system of justice, an "essential cog in the constitutional design of fair trial safeguards." Bone-Club, 128 Wn.2d at 259.

Therefore, court proceedings may not be closed to public view without consideration, on the record, of the factors discussed in Bone-Club.

Id. at 258-59. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Id. at 258-260; Wise, 176 Wn.2d at 12.

When the court fails to abide by this procedure, trial closure is structural error. Wise, 176 Wn.2d at 13-15. It is presumed prejudicial and not subject to harmless error analysis. Id.; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; State v. Brightman, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005); Orange, 152 Wn.2d at 801-02.

Jury selection is a critical part of the trial that must be open to the public. Wise, 176 Wn.2d at 11 (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). Before a trial judge can close any part of voir dire, it must analyze the five Bone-Club factors discussed

above. Orange, 152 Wn.2d at 806-07, 809; see also Brightman, 155 Wn.2d at 515-16 (public trial right is violated when the court orders the courtroom closed during jury selection without Bone-Club analysis). Peremptory challenges are an integral part of selecting a jury. See State v. Saintcalle, 178 Wn.2d 34, 52, 309 P.3d 326 (2013) (peremptory challenges established by Washington's first territorial legislature over 150 years ago). Therefore, peremptory challenges implicate the right to a public trial and may not be closed to the public without consideration on the record of the Bone-Club factors.

The State will likely argue the peremptory challenges, exercised by silently passing a piece of paper back and forth, were not a closed proceeding. But the effect of this procedure was to avoid the public scrutiny that the public trial right is designed to ensure. Courts may not exempt a proceeding from public view by closing the courtroom without first considering the Bone-Club factors. Nor may they achieve the same effect by conducting proceedings silently on paper. Manus' conviction must be reversed because the private exercise of peremptory challenges violated his constitutional right to a public trial.

As State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013), indicates, the public trial right attaches to a jury selection proceeding involving "the exercise of 'peremptory' challenges and 'for cause' juror

excusals." Moreover, under State v. Slert, 169 Wn. App. 766, 744 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031 (2013), dismissing jurors at side bar violates the public trial guarantee. Despite this clear precedent, Manus anticipates the State will argue Manus must first establish that the public trial right applies using the "experience and logic" test discussed in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). This Court should reject this argument because the experience and logic test only applies when it has not already been established the proceeding falls within the public trial right. Wilson, 174 Wn. App. at 335.

b. Experience and Logic Dictate that the Exercise of Peremptory Challenges Must Be Open to the Public.

However, even if it had not already been established that the process of exercising challenges falls within the public trial right, both experience and logic support this conclusion. Under the "experience" prong of the test, the court asks "whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73. The "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. When the answer to both questions is "yes," the public trial right attaches. Id.

Historically, it is well established that the right to a public trial extends to jury selection. See, e.g., Sublett, 176 Wn.2d at 71; Strode, 167

Wn.2d at 226-227. This includes "'the process of juror selection.'" Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). "For-cause" and peremptory challenges are an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Moreover, logically, openness in the process of excluding jurors clearly enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see also Orange, 152 Wn.2d at 804 (jury selection process "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

Without the ability to hear the arguments and discussions of counsel and the court as they occur, the public has no ability to assess whether "for cause" challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d

923 (1989) (jury selection primary means to "enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice.").

Similarly, open peremptory challenges are critical to guard against inappropriate discrimination. This can only be accomplished if they are made in open court in a manner allowing the public to determine whether one side or the other is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[3] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73.

Making the information part of the public record after potential jurors have been dismissed from the courtroom does not rectify the error. Generally speaking, the availability of a record of an improperly closed voir dire fails to cure the error. See State v. Paumier, 176 Wn.2d 29, 32, 37, 288 P.3d 1126 (2012) (reversing conviction due to in-chambers questioning of potential jurors despite fact that questioning was recorded and transcribed).

While members of the public could discern, after the fact, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file), the public could not tell, at the time the

[3] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

challenges were made, which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying both as protected classes); see also Saintcalle, 178 Wn.2d 34 (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

The mere opportunity to find out, sometime after the process, which side eliminated which jurors is not sufficient. Members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Moreover, members of the public would have to remember the identity, gender, and race of those individuals excused from jury service to determine whether protected group members had been improperly targeted. This is not realistic. The trial court implicitly recognized this when it asked potential jurors to return quickly to their places because "it's important for the attorneys to be able to match up your number with your face." 2RP 66-67. Members of the public, looking at the peremptory challenge sheet after the fact, would not be able to do so.[4]

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[4] In re Detention of Morgan, ____ Wn.2d. ____, ____ P.3d ____, 2014 WL 1847790 at *7 (no. 86234-6, filed May 8, 2014), the court recently held the public trial right did not apply to a competency proceeding in a civil commitment under chapter 71.09 RCW and stated, "The evidence that was eventually admitted and the decision that followed were filed in the open record. Thus, there was meaningful public access to the court

The State may also cite State v Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), where a panel of Division Three judges recently held, under the experience and logic test, that exercising "for cause" and peremptory challenges outside the public view does not violate the right to public trial.[5] This decision is poorly reasoned.

Regarding experience, the Love court noted the absence of evidence that, historically, these challenges were made in open court. Love, 176 Wn. App. at 918-919. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court cites to State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the

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proceedings that concerned involuntary medication." The opinion does not address any of the concerns raised in this brief about the inadequacy of an after-the-fact written record of peremptory challenges in a criminal proceeding.

[5] See also State v. Dunn, ____ Wn. App. ____, 321 P.3d 1283, 1285 (2014) (agreeing with Love).

defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact that Thomas challenged the practice suggests it was atypical even at the time.[6] Labeling Thomas "strong evidence" is a vast overstatement.[7]

Regarding logic, the Love court could think of no manner in which exercising "for cause" and peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn. App. at 919-920. The court failed, however, to consider that an after-the-fact record removes the public's ability to scrutinize what is occurring at a time when error can still be avoided. The court also failed to mention or consider the increased risk of discrimination against protected classes of jurors resulting from late disclosure. As discussed above, the subsequent filing of documents from which the source of a challenge might be deciphered is not an adequate substitute for simultaneous public oversight. See also Sadler, 147 Wn. App. at 116 ("Few

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[6] Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only "several counties" had used the method certainly leaves open the possibility a majority of Washington's 39 counties did not even before Bone-Club and subsequent cases requiring an open process.

[7] The State may argue the challenging party often is not revealed to prospective jurors. There is much that is not revealed to prospective jurors at trial. This is irrelevant, however, to whether the public must see and hear what is happening.

aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

There is no indication the court considered the Bone-Club factors before conducting the private peremptory challenges in this case. Appellate courts do not comb through the record or attempt to deduce whether the trial court applied the Bone-Club factors when it is not apparent in the record. Wise, 176 Wn.2d at 12-13. Because peremptory challenges were not exercised openly and in public, Manus' constitutional right to a public trial under the state and federal constitutions was violated and his conviction must be reversed.

2. THE TRIAL COURT ERRED WHEN IT REFUSED TO REMOVE A SITTING JUROR FOR CAUSE.

The second-to-last witness for the State was Officer Meeds, who, along with another officer, arrested Manus on an unrelated warrant in a vacant field the night of August 9, 2012. Meeds testified it looked as though someone had been living in the tent near where they arrested Manus. 1RP 220. The next morning, the court informed the parties that juror 11 had told the judicial assistant he knew Officer Meeds from the gym. 1RP 263.

Juror 11 revealed that he had known Officer Meeds for five years. 1RP 264. Although he would not describe him as a friend, he explained that

"when I see him we talk sports" and "I was interested in home protection and he spoke to me about it." 1RP 264. Juror 11 denied having spoken to Officer Meeds about this case and denied his acquaintance would affect his ability to be fair. 1RP 264.

Manus then moved to have juror 11 removed for cause, arguing the significance of these contacts over the course of five years should not be underestimated and that a not-guilty verdict could result in awkwardness between the two in future meetings at the gym. 1RP 265-68. The court stated that juror 11 did not even know the officer's name. 1RP 268. The judicial assistant then clarified that the juror knew only the officer's first name. 1RP 269. The State objected to removing juror 11, and the court found there was no potential prejudice that would warrant excusing him for cause. 1RP 268. This was error.

"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." State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988). Dismissal of a sitting juror is also controlled by statute:

> 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.

RCW 2.36.110; see also CrR 6.4(c) (any party may challenge a juror for cause).

"Actual bias" is defined as "the existence of a state of mind on the part of the juror in reference . . . to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "The question for the judge is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." Hough v. Stockbridge, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009) (citing Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 812 P.3d 133 (1991)), review denied, 168 Wn.2d 1043 (2010). A court's decision to remove or retain a juror is reviewed for abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015 (2001).

But an "impartial finder of fact" is the touchstone of a fair trial. Id. (discussing McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). Additionally, "a court may infer bias from underlying facts about the juror without regard to explanations offered by the juror." State v. Cho, 108 Wn. App. 315, 329, 30

P.3d 496, 503 (2001) (citing Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring). "Doubts regarding bias must be resolved against the juror." Cho, 108 Wn. App. at 329-30 (citing Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991).

While juror 11 stated his long-term acquaintance with Officer Meeds would not affect his ability to be fair, the record does not support this assertion. The two had known each other for five years. They had gone to the gym together and had chatted about topics including sports and home security. 1RP 264. Juror 11 would naturally have felt additional pressure to supporting his friend from the gym and find Manus guilty. As counsel argued, a not-guilty verdict for a person Meeds arrested would likely lead to awkwardness in future encounters. 1RP 267-68. To find otherwise is to ignore human nature.

A relationship with the government does not, in and of itself, establish bias. Cho, 108 Wn. App. at 324. However, a juror's factual circumstances may be sufficiently tied to the prosecution that implied bias is established. Id. at 325 n. 5. Although a long-term friendship with a state's witness is not one of the listed statutory bases for implied bias, the civil statute is broadly interpreted in criminal cases under the rule of lenity. RCW 4.44.180; State v. Boiko, 138 Wn. App. 256, 264-65, 156 P.3d 934 (2007). For example, the employer of a victim was disqualified as impliedly biased.

State v. Coella, 3 Wash. 99, 103, 28 P. 28 (1891). More recently, in Boiko, one juror failed to reveal during voir dire that she was married to a key prosecution witness. 138 Wn. App. at 258. The court upheld the trial court's decision granting a new trial. Id. Although the juror did not fail to make material disclosures and her husband was not a party, the court nonetheless upheld the trial court's finding of implied bias as a matter of law. Id. at 262-63.

The court erred in failing to consider juror 11's ongoing five-year relationship with a crucial state's witness as evidence of actual or implied bias. While the juror denied this relationship would impact his ability to be fair, the court should have considered that people are unlikely to recognize their own biases. See Smith, 455 U.S. at 221–22, (O'Connor, J., concurring) (noting juror bias is elusive because the juror may not be aware of it). Moreover, as the court has recognized, very few potential jurors will "fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions." State v. Fire, 100 Wn. App. 722, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152 (2001).

When a juror that should have been removed for cause remains and deliberates to a guilty verdict, the remedy is a new trial. State v. Birch, 151 Wn. App. 504, 512, 213 P.3d 63 (2009), review denied, 168 Wn.2d 1004 (2010). That is the remedy here.

D. CONCLUSION

For the foregoing reasons, Manus requests this Court reverse his conviction and remand for a new trial.

DATED this 15th day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,	)	
Respondent,	)	
v.	)	COA NO. 45532-3-II
WILLIAM MANUS,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF MAY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID JOHNSON
DOC NO. 984776
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MAY, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

May 15, 2014 - 2:10 PM

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Court of Appeals Case Number: 45532-3

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