Supreme Court No. 99689-0
COA No. 36688-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HECTOR OROZCO, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

The Honorable Bruce A. Spanner

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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Hector Orozco, Jr. was the defendant in Franklin County No. 18-1-50109-1, and the appellant in COA No. 36688-0-III.

B. COURT OF APPEALS DECISION

Mr. Orozco seeks review of the Court of Appeals decision entered March 18, 2021. Appendix A.

C. ISSUES PRESENTED ON REVIEW

During trial, juror 13 revealed she had been telephoned by Vicky Keller, a relative of Ms. Bonnie Ross, the victim in count 3 charged against the defendant and tried as joined counts. The trial court later concluded that juror 13 had failed to reveal all the pertinent facts about the telephone call, and properly removed her from the jury. However, despite subsequent revelation by a defense investigator that juror 13 had not been completely forthcoming with a precise description of incident, the trial court credited juror 13 when she denied speaking about the incident with any other jurors. Did the court wrongly deny the defense motion for a mistrial, or in the alternative, to question the remainder of the jury members? In so acting, did the trial

court violate Mr. Orozco's Fourteenth Amendment[1] due process and Sixth Amendment[2] rights to a fair trial by an unbiased jury?

D. STATEMENT OF THE CASE

Mr. Orozco was charged with being the person who stabbed and killed Mr. Demetrious Graves, a man with whom he and two other men, including the accuser Mr. Shegow Gagow, had been smoking methamphetamine in a shed in a Pasco back alley. CP 2-11, 12-14; RP 983-86. Police learned that Mr. Graves had been killed after Mr. Gagow called 911 and hailed an officer in the middle of the street. RP 494-95, 500-05, 520.

Mr. Gagow said that Mr. Orozco stabbed Graves in the alley, and then attacked him which led to a charge of attempted murder on which Orozco was acquitted. RP 504, 541; CP 12, 175. Mr. Gagow had lied to the police, saying that he was not on drugs. RP 1798.

It was also shown that Mr. Gagow purposefully planted papers with Mr. Orozco's name on them near Graves' body. RP 506, 807,

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[1] The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

[2] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury[.]" U.S. Const. amend. VI.

616-22, 1838. An officer noticed that Gagow was carrying a boxcutter in his hand, although it did not have a blade; he also dropped that next to Mr. Graves' body. RP 530, 571. He admitted throwing another knife away in the alley when police arrived. RP 1824.

Despite all this, Mr. Gagow stuck to his claim that Mr. Orozco had killed Graves, and also alleged that Mr. Orozco had attacked him, and almost beat him to death – yet officers testified he had no injuries. RP 574-75. Mr. Gagow admitted that he was in trouble with Mr. Orozco because he owed him money that he had not paid. RP 1774.

Mr. Orozco was also charged with being the person who robbed, strangled and stabbed the elderly Ms. Bonnie Ross in a Pasco neighborhood that same day. CP 13; RP 1104-10, 1121. That offense was complicated by the presence of at least one other suspect, a convicted rapist who had been found prowling around Ross's house at the time. RP 1195-96, 1760-62. Although Mr. Orozco apparently used Ms. Ross's land-line telephone, and he was later arrested driving Ms. Ross's car to the Roadway Inn motel where he had been staying, he explained to his girlfriend that he had been helping Ross move and was using her car for that reason. RP 923, 1059, 1072, 1280, 1519-26.

The State claimed that Mr. Orozco gave an acquaintance, Anthony Nugent, an amount of cash to pay for an additional night at the motel, using money that he robbed from Ms. Ross's house. RP 883-84, 928-29, 1531-33. Police arrested him at the motel. RP 1435. Mr. Orozco was interrogated for several hours and he did not confess to any of the accusations the officers were making. RP 1442-43, 1455-57.

Mr. Orozco was convicted for murder of Mr. Graves, felony murder of Ms. Ross, and for assaults and unlawful imprisonment of Nugent, and one Mary Gibson at the motel. RP 1032-33, 1435. Based on an agreed criminal history and offender score, Mr. Orozco was sentenced to a total of 477 months imprisonment. CP 187-201.

E. ARGUMENT

The court violated Mr. Orozco's rights to a fair trial by an unbiased jury when it declined to inquire of the remaining jurors regarding juror 13's mid-trial telephone call from a relative of the murder victim.

1. <u>Review is warranted</u>. Under RAP 13.4(b)(3), review is warranted because the Court of Appeals improperly affirmed the trial court's failure to declare a mistrial or act to ensure jury fairness violated Mr. Orozco's right to a fair jury trial. Mr. Orozco contends that the court's failure to act adequately violated the due process clause of the Fourteenth Amendment, and the jury trial right of the Sixth

Amendment, which entitle a criminal defendant to a fair trial by an impartial jury which determines guilt on the basis of the evidence at trial, as distinct from extraneous sources of decision or influence. Patton v. Yount, 467 U.S. 1025, 1037 n.12, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984); State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000); U.S. Const. amends. XIV, VI.

2. A new trial is necessary because juror 13 failed to reveal facts pertinent to trial by an unbiased jury, and the court subsequently failed to adequately investigate whether the prejudice affected other jurors.

The constitution and Washington Statute guarantee a fair jury. Bias on the part of a juror may also result in unfairness. RCW 4.44.180. See, e.g., State v. Cho, 108 Wn. App. 315, 325, 329, 30 P.3d 496 (2014). These provisions and principles protect the defendant's right to a jury capable and willing to decide the case solely in that manner, and a trial judge must ever be watchful to prevent prejudicial occurrences, and to determine the effect of such occurrences when they happen. State v. Berhe, 193 Wn.2d 647, 668, 444 P.3d 1172 (2019); Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982).

Wherever there is a doubt, the court should act. See Morgan v. Illinois, 504 U.S. 717, 723, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). The concern for eliminating unfairness in criminal juries is so

important that our courts have gone so far as to state that the trial court may be required to exercise an *independent* obligation to ensure that a particular juror is not seated. State v. Guevara Diaz, 11 Wn. App.2d 843, 456 P.3d 869 (2020) (removal deemed required, based on juror's questionnaire statements); see also State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015).

A court must fully investigate where it learns that a juror may have been subjected to extraneous sources of information or influence, or discovers that a juror did not reveal facts pertinent to a tainted or prejudiced jury process. A court's failure to properly investigate, to ensure that bias was not a factor that seeped into the jury's deliberations, violates these constitutional rights. Berhe, 193 Wn.2d at 668. For example, in State v. Cho, 108 Wn. App. 315, 329-30, although in a slightly different context, it was held that under the Sixth Amendment right to a fair, unbiased jury, the case should be remanded for an inquiry after evidence post-verdict indicated that a juror had not volunteered pertinent, potentially disqualifying facts.

On review, the Court of Appeals reviews *de novo* the question whether occurrences at trial violated the defendant's constitutional rights. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

3. Juror 13 reported that when she was called by a relative of victim Bonnie Ross, she told the caller to "stop talking," and said that she could not discuss the case until the trial was over.

On the morning of January 18, the bailiff informed the court that juror 13 told him that she had received a telephone call the previous night "apparently from someone who said that she was a relative of one of the victims." RP 655. While the rest of the jury waited, the bailiff retrieved juror 13 and brought her into the courtroom alone, where she took the witness stand. RP 656. The juror stated that a woman had telephoned her and said,

> "I hear you're on the jury of the guy that killed my great grand -- great nephew's wife's grandma [Ms. Bonnie Ross]"

RP 656-57. Juror 13 explained that the caller, Vicky Keller, was a person she had known for 20 years. Vicky used to be, or still was, juror 13's friend and co-worker. RP 657-58 ("I work with her at the Port of Pasco, and she's also, you know, a friend of mine."). Juror 13 also explained that Vicky was a close friend, and someone she did things with socially, including going to each other's houses, and periodically going out to lunch or dinner. RP 658-59. Juror 13 said that she immediately told her friend several times to stop talking, because they could not speak about this topic. RP 657. When asked why she had

not realized earlier that one of the murder victims in the trial was related to her friend, juror 13 said that she had probably been told about Bonnie Ross's death "when it happened a year ago," but, she stated, "I honestly didn't remember. I didn't put two and two together because this lady has like 24 great-nieces and nephews, and I just didn't make the connection and I don't know any of these people." RP 657.

Juror 13 said she was "mortified" when Vicky called, because she realized that Vicky had brought up Ross's death when it happened the previous year, although Mr. Orozco's name was never mentioned at that time. RP 660-61. Juror 13 had either talked with Vicky about the homicide, or the fact that Ms. Ross had died, but she did not remember any details of their discussions. RP 658; see RP 672. At some point during the mid-trial telephone call, juror 13 thought, "Oh, my gosh. You did mention that to us." RP 658.

Juror 13 had seemed to anticipate talking about the case later, when she told Vicky, "I can't talk to you until this trial's over," and Vicky said, "Okay." RP 660. Juror 13's description of her pre-trial and mid-trial statements, that she would talk about the case later, gradually expanded until she revealed that before trial, she had

informed yet another friend that she was on Mr. Orozco's jury, and this was how Vicky, in turn, learned of it:

> She heard it from another friend. I mean, I had told her about -- I had talked to her on Friday the 11th, I think it was, and I said -- I made the comment that I had to call in for jury duty, and my other friend, her name is Sue, she called me on Wednesday I think it was, and she said, "Did you get on the jury?" and I said, "Yes," and that's all we said. Then she told this -- her name is Vicky -- that I got on the jury, and then Vicky called me last night and said, "I hear you got on the jury."

RP 659. As juror 13 admitted, she confirmed this to Vicky. RP 659-60 (stating that she replied, "I just did. I got on the jury. I'm on [sic] jury." RP 659-60.

The trial court asked juror 13 if this impacted her ability to be fair and impartial, and juror 13 asserted that it did not. RP 658. The juror was escorted back to join the remainder of the jury, at which point the trial court heard argument from counsel. RP 662-73.

4. <u>The trial court dismissed juror 13 several days later, but denied a mistrial, and denied the defense request that the jurors be briefly questioned as to whether juror 13 had spoken to them about the incident</u>.

(i). Motion to dismiss and motion for a new trial. Mr. Orozco argued that juror 13 had plainly been tampered with by her friend, who called juror 13 knowing that she was on the jury in the trial of the man

accused of being Ms. Bonnie Ross's murderer. RP 663. Counsel made clear - and the court agreed - that if these revelations of being a close friend of someone related to the victim had arisen during *voir dire*, juror 13 would certainly not have been seated. RP 669-71.

Mr. Orozco sought a mistrial, arguing that his right to a fair trial could not be protected simply by removing juror 13 from the jury, particularly where "Vicky" had talked about the case with Ms. H. and then chose to telephone her during trial, apparently believing her to be susceptible to an appeal to sympathy. RP 663-645. This was purposeful tampering with a juror in a criminal case. RP 669-70.

The court denied the motion to remove juror 13, ruling she acted properly by telling her friend she could not talk about the case during trial. RP 672. Further, the court reasoned, she stated that she could not recall the details of her past discussion with Vicky about the homicide. RP 672. The court also denied the defense mistrial motion, although it allowed that the defense could re-raise the issue. RP 672-73.

After juror 13 was escorted back to join the other jurors, a recess was called, and then an interpreter for the next witness was examined and qualified by the court, following which the entire jury was brought out for the first time that morning, and the jury trial proceeded. RP

673-81. Extensive direct and cross-examination of witness Mr. Shegow Gagow followed. RP 682-759.

During this time the court also handled another situation with a juror who informed the bailiff that he recognized the clerk of the court. RP 761-62. After this was resolved, the State's next witness, Mr. Ariel Contreras, was not present in court, so the court excused the jury for a three and a half-day weekend until the court was to re-convene at 1:30 p.m. on January 22. RP 761-71.

(ii). Denial of request to inquire of remaining jurors. On January 22, the defense had available the testimony of its investigator, Mr. Jeffrey Porteous. RP 773. Mr. Porteous had conducted an in-person, audio-recorded interview of Ms. Keller (Bonnie Ross's relative), and had learned that "more was said than - than was admitted to by Juror Number 13" in court the previous week. RP 773-74.

The court deferred the matter, first hearing an issue regarding juror 4 asking the bailiff if she could leave the jury because of hardship; the court brought the juror in from the jury room to examine her in the courtroom. RP 776-85. Further witnesses then testified for significant court time, with juror 13 remaining, until the issue was re-addressed.

The court proceeded with trial and the testimony of a crime scene processor, Ashley Lucas of the Pasco Police Department, RP 786-99, 805-13; the testimony of Pasco Fire Department paramedic Guadalupe Almanzar, RP 815-34; motel resident and alleged assault victim Mary Gibson, RP 834-73; Roadway Inn front desk manager Stacey Hanson, RP 867-74; and motel resident and alleged victim of assault and unlawful imprisonment Anthony Nugent. RP 874-883. There was also further in-court discussion with juror 4. RP 884-86.

When defense investigator Porteous took the stand, he informed the court that during his interview of Vicky Keller, Keller stated that when she telephoned her friend juror 13, she said that Mr. Orozco was a "scumbag," or referred to him in that manner. RP 888. She told juror 13 that Orozco "had committed the crime" while at the same time she admitted to Mr. Porteous that "she knew she probably shouldn't be calling, but she did." RP 888.

The prosecutor then agreed that juror 13 should be removed from the jury. RP 889-90. The court concluded that juror 13 had described the telephone call differently than it was:

> Yes. This is a horse of a different color. What we heard about on Friday appeared to be an innocent inquiry, and it may still have been that, but now we stir in there Ms. Keller's opinion

> regarding the defendant in very strong language, and that, in my mind, is something different than what was described to us last week.

RP 889. The prosecutor also agreed that juror 13 should be questioned about whether she disclosed to the other jurors the reason she was called to the witness stand and, whether she talked with them about the call, "to assure the process hasn't grown or spread." RP 890-91. The court agreed, at the same time remarking, "I wonder if there will be a newspaper article that would come out and somehow taint the process beforehand." RP 892.

When juror 13 was called back to the courtroom, she was asked if she had disclosed to any of the jurors that her friend, Vicky, called her. RP 894. She asserted that she had not. RP 894. She also asserted that she had not told any of the jurors about what had been discussed in the call, or talked about why she had been called into the courtroom alone and placed on the witness stand the previous week. RP 894-95.

The trial court released juror 13 from further service. RP 895-96. But the court denied the defense request that the other jurors be questioned about whether juror 13 had spoken with them about the telephone call from Ross's relative. RP 896-97, 899-900. The court stated that it was going to take the juror's "word for it." RP 900.

5. The requirement that there be "no lingering doubt" as to whether the defendant's jury remained fair and unbiased required the court to inquire of the remaining jurors and then determine whether a new trial was required.

Where a juror's conduct might have injected bias into the jury trial, in whatever manner, trial courts "must tailor their approaches to account for the unique challenges presented." See State v. Berhe, supra, 193 Wn.2d at 661 (where juror indicated post-trial that deliberations may have been tainted by juror whose racial bias did not come to light in *voir dire*, court violated due process and jury trial rights by not conducting adequate inquiry before denying new trial). In addition, a mistrial and order of new trial based on juror irregularities is required upon a strong showing of a substantial likelihood of prejudice. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (injection of information into deliberations that is outside all the evidence admitted at trial, either orally or by document, is grounds for a mistrial).

Here, juror 13 presented herself to the court, honestly, as regretful that the call with a relative of victim Ross occurred. But her representations about this mid-trial phone call with her close friend, compared to the restrictions placed on her as a juror, and compared to what investigator Porteous later discovered about the call, diverged.

The actual telephone conversation was contrary to the trial court's initial instructions, and different from how juror 13 represented it to the court, making it unreasonable for the court to simply take juror 13's "word for it" when she said she had not spoken with the other jurors about the phone call. Further inquiry was essential. The jury is not impartial if even one juror sits with a state of mind that could prevent him or her from fairly trying the case. State v. Moser, 37 Wn.2d 911, 916–17, 226 P.2d 867 (1951); RCW 4.44.170, .190.

Before the evidence phase of trial commenced, the court had directed the jurors to "not allow yourself to be exposed to any outside information about the case, including from your family and friends." RP 369. The jurors were told, "Do not permit anyone to discuss or comment about it [the case] in your presence. Do not remain within the hearing of such conversations." RP 369.

It is true that juror 13 told her friend to stop talking when she called. But the conversation apparently continued long enough, at the very least, for juror 13 to tell her friend to wait until the end of the case, when she could then talk about it. Long enough for the caller to reply, "Okay" to that statement. And long enough for the caller to describe Mr. Orozco as a "scumbag" for killing her relative Bonnie Ross.

Juror 13 withheld from the court significant details about the nature of the call she had with her close friend. She was not directly asked whether Vicky made disparaging remarks about Mr. Orozco. But neither did she reveal the glaring fact that her friend described the defendant as a "scumbag." Further, when asked if she spoke with the other jurors about the call, juror 13 denied that she had. But this was the sort of question our courts recognize may simply produce an answer chilled by defensiveness at admitting misconduct, a factor which should further impel a court to inquire of the other jurors, who would be unhesitant to discuss that a juror had described the call to them. See Berhe, at 661-62, 665-66. It is also well known that a juror may be less than forthcoming about matters the court understands are pertinent to legal bias, because the lay juror genuinely believes that they will be fair. See United States v. Scott, 854 F.2d 697, 699 (5th Cir.1988).

Juror 13's assertion of not having discussed the matter with other jurors was unreliable for the additional reason that the jury had also been instructed to report any and all outside information they were improperly exposed to. RP 369-70. Yet juror 13 did not report the "scumbag" remark. This was even more concerning because juror 13 had apparently been liberal in talking about her participation in the trial

with outside individuals, and may even have promised to talk about it in the future. RP 659-60. Yet the court had instructed the jurors that, "[i]f necessary, you may tell people, such as your employer, that you are a juror and let them know you need to be in court." RP 370. Juror 13 went beyond these limitations when she told a friend about the trial, who told their friend Vicky about the trial, and then juror 13 told Vicky she would talk with her about the trial after it was over. RP 660. The only reasonable conclusion from all these circumstances was that there was an unacceptable risk that juror 13 had violated the court's instructions to not talk about the case with other jurors.

6. The court abused its discretion.

As a rule, wherever there is a doubt about a juror or the jury's ability to decide the case fairly, the court should lean toward inquiry. See, e.g., Morgan v. Illinois, 504 U.S. 717, 723, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). These circumstances - especially juror 13's failure to reveal a derogatory remark that was so obviously pertinent to whether she had been tainted with bias as a juror -- required that the court not simply take juror 13's "word for it" when she denied speaking with the other jurors. There was too much doubt as to whether the court could rely on her claim that she had not done so. For

example, in Cho, the defendant's constitutional rights required that the court make a post-trial inquiry into the question whether a juror who was a retired police officer had wrongly hidden that fact during jury selection. The juror had never specifically been asked the precise question of whether he used to be an officer, and he may have sincerely believed he could be fair nonetheless. Cho, at 33; see United States v. Scott, 854 F.2d at 700 (cited with approval in Cho, 108 Wn. App. at 330-31); see also Smith, 455 U.S. at 221 (O'Connor, J., concurring). But the circumstances strongly suggested the juror did not faithfully adhere to a basic duty of forthrightness during the jury selection process. Cho, at 330-31.

For juror 13, that duty applied to her in *voir dire* and when she took the witness stand mid-trial. See RP 173 (trial court's administration of potential jurors' oath to tell "the whole truth."). Once this real and substantial doubt arose as to the question of her forthrightness, as it did here, the juror's claims could not simply be taken at their word - not when the defendant's right to an unbiased jury is at issue. Taking juror 13's word for her statement that she had not spoken about the matter with any other jurors was manifestly unreasonable in these circumstances. See McCoy v. Goldston, 652

F.2d 654, 659 (6th Cir.1981) (discovery of a juror's divergence from their oath raises a specter of prejudice requiring a new trial).[3]

Due process therefore required the trial judge, once aware of a possible injection of bias, to determine the whole circumstances, and the impact thereof on the composition of the jury as a fair unbiased fact-finder. State v. Winborne, 4 Wn. App.2d 147, 160-61, 420 P.3d 707 (2018) (citing Remmer v. United States, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954)). Trial judges carry an obligation to protect the defendant's Sixth Amendment and Fourteenth Amendment Due Process rights to a fair trial that applies throughout the entire proceedings. State v. Berniard, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014)). The court below did not conduct an inquiry adequate to protecting Mr. Orozco's constitutional rights. Berhe, at 661-64.

7. A new trial is required.

The question whether a court conducted an adequate inquiry into a violation of the defendant's constitutional rights is a legal

[3] Juror 13, who had served on a Franklin County jury before, in 2012, seemed somewhat open to obtaining information that might not be provided to a jury during the evidence phase of a trial. She described in *voir dire* how the jury in that prior case occasionally thought of asking, and did ask the bailiff, although unsuccessfully, for more "information" pertaining to the case. RP 311, 356-58.

issue. Cantu, 156 Wn.2d at 831; see Berhe, at 661-64. A new trial is required, or in the alternative, the case must be remanded for questioning of the remaining jury members, to determine whether the jury was infected by bias from extrinsic influence and information outside the evidence. Mr. Orozco's right to a fair trial before 12 unprejudiced and unbiased jurors demands this. When it comes to an impartial, unbiased jury, "[n]ot only should there be a fair trial, but there should be no lingering doubt about it." State v. Davis, 141 Wn.2d at 824-25. A new trial is required.

F. CONCLUSION

Mr. Orozco's Fourteenth and Sixth Amendment rights to a fair trial before an unbiased jury were violated. He asks that this Court reverse his convictions.

Respectfully submitted this 19th day of April, 2021.

Respectfully submitted,

s/OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

APPENDIX A

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 36688-0-III
Respondent,	)	
	)	
v.	)	
	)	
HECTOR OROZCO JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Hector Orozco appeals his convictions of first and second degree murder and several lesser charges, contending that his rights under the United States Constitution to due process and a fair trial were violated by a biased jury. Essentially, he

asks us to find that if a trial court excuses a juror because she received extraneous information; accepts as credible her representation that she did not discuss the information with other jurors; and denies a defense request to poll the remaining jurors, it abuses its discretion. We find no abuse of discretion and affirm.

PROCEDURAL BACKGROUND

The facts underlying Mr. Orozco's convictions of one count of first degree murder, one count of second degree murder, and several lesser crimes, are almost entirely irrelevant to the jury issues on appeal. The one relevant background fact is that the victim of Mr. Orozco's first degree murder was 82-year-old Bonnie Ross, who was beaten to death in her home by Mr. Orozco, who then stole her car.

Jury selection

The week before trial, the trial court met with the prosecutors and defense lawyers to discuss the parties' proposed juror questionnaire. The record reveals that at least 102 persons were summoned as potential jurors. It was agreed that after the venire members completed the questionnaire the following Monday morning, the lawyers would review the questionnaires and identify those they wanted to call in for individual voir dire. The trial court told the lawyers it wanted them to also confer about individuals they would stipulate to excuse.

The following Monday afternoon, shortly after 3:00 p.m., the trial court and lawyers convened after the lawyers had reviewed the completed juror questionnaires.

The trial court said it would start with the venire members whom the parties agreed could be dismissed. It said it wanted the defense to "go through those that they would agree to stipulate to dismiss regardless of reason, and as you call each one, [prosecutor] or [deputy], give us a yay or nay." Report of Proceedings (RP) at 110. Early on, when one of the lawyers got too expansive, the trial court reminded him, "[A]ll I'm lookin' for is a yay or nay whether you stipulate." *Id.* It added that they needed to go through quickly because court staff needed to enter juror information into the computer that afternoon. Members of the venire had been told to call in after 5:30 p.m. to determine whether and when they needed to return to court.

When defense counsel's list of jurors he proposed to excuse reached juror 32, he evidently read a disclosure on juror 32's questionnaire:

> [DEFENSE COUNSEL]: Number 32, very dense connection with law enforcement related to Sheriff Raymond, Detective Lee Burrowes.
>
> [DEPUTY PROSECUTOR]: We're not gonna agree, your Honor.
>
> THE COURT: Okay. Next?

RP at 116.

After review was completed of the venire members that one side or the other wanted to excuse, the trial court said, "Now, why don't each side just run through the list of those that you want to see individually. I don't think we need explanation for any of 'em. Just run through the numbers." RP at 122-23. Neither the defense nor the State asked to question juror 32 individually.

After individual voir dire was completed, general voir dire was conducted. During general voir dire, juror 32 was not specifically asked any questions and did not respond to any questions posed to the group. At the conclusion of the general voir dire, Mr. Orozco's lawyer informed the court, "We would pass for cause, your Honor." RP at 360.

Trial

Upon arriving at court on the morning of the second day of testimony—a Friday—juror 13 told the bailiff she had received a phone call the night before from a relative of victim Ross. The trial court informed the parties of this development at the outset of proceedings and juror 13 was brought into the courtroom for questioning. Juror 13 reported in response to questions that a friend and former coworker of hers, Vicky, called the night before and said, "'I hear you got on the jury with the guy that killed my nephew's wife's grandma.'" RP at 660. Juror 13 said she responded, "Stop talking," and Vicky apologized. She said she told Vicky, "I can't talk to you until this trial's over," and they did not discuss the case further. RP at 660.

Juror 13 said she felt bad and Vicky also felt bad for bringing it up. She said Vicky probably told her about the death when it happened, but she did not remember the conversation and "did[no]t put two and two together because this lady has like 24 great nieces and nephews." RP at 657. Mr. Orozco's name never came up. Juror 13 said that even after sitting through the trial, she did not remember being told about it until the phone call. She acknowledged that she and Vicky were good friends. She said knowing

that one of the deceased was a relative of a friend of hers would not affect her ability to be fair and impartial.

Asked how Vicky found out she was on a jury, juror 13 said another friend, Sue, was aware she had been summoned and called to see if she had been seated on the jury. Juror 13 said she had, "and that's all we said." RP at 659. Vicky told juror 13 that she learned juror 13 was on the jury from Sue.

Invited to speak after juror 13 was excused from the courtroom, defense counsel said:

> [T]his is just an absolutely horrible situation. The defense team has talked about that juror specifically as being more receptive to our case based on her mannerisms than any other juror on the pool. That is the only juror that we have had specific discussions about being receptive to our case.[1]
>
> Now, an outside person who is a family member of one of the decedents has called to tell her—to talk about it. Clearly, they're tampering with—with the jury pool, and by "they" I'm not implying the State, of course. This woman was attempting to influence this juror, and based on the decades-long, close friendship between this woman and the juror, I can't imagine that she could still be impartial.

RP at 663. The defense moved for a mistrial. It argued that if it had known juror 13 was friends with even a distant relative of Ms. Ross, it would have struck her.

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[1] During general voir dire, juror 13 said in response to questions that she had been on a jury previously, enjoyed it, and learned a lot. She said a challenge was that during deliberations jurors are not allowed to ask questions. She recalled asking the bailiff a question and the bailiff replied they had all the information they needed.

Asked by defense counsel if a question directly relating to whether an element had been proved came up that the court did not answer, she answered that she would find the defendant not guilty.

The trial court acknowledged that the defense would have struck juror 13 had it known she was close friends with a relative of a victim. But defense counsel had said it was not accusing juror 13 of misrepresentation. The court found the defense charge of witness tampering to be speculative, because laypersons would not know they are not supposed to speak to a juror, and Vicky might have been calling to say, "'Wow, that's weird you're on that trial.'" RP at 672. It observed that the prosecutor said multiple times in opening statement that Mr. Orozco killed Ms. Ross, "So, that's nothing new." RP at 672. It added that juror 13 had followed its instructions perfectly and did not appear to have any emotional investment in the case because she could not recall any details of her conversation with Vicky a year earlier. In the absence of misrepresentation or actual bias, it saw no grounds for removing her, and said, "I certainly don't find grounds to grant your request for a mistrial." RP at 673.

The following Monday morning, the defense asked to speak with the trial court before the jury was brought in and informed the court that its investigator had recorded an interview with juror 13's friend Vicky over the weekend. Based on the additional information, defense counsel said, "I believe the State is going to join us in our motion to have Juror 13 removed from the jury pool." RP at 773. It said its investigator would be available to share what he had learned that afternoon. The prosecutor clarified that "we may not be objecting" to a defense request to excuse the juror. RP at 774.

The trial court said it was its preference to keep the trial going and take the issue up at the end of the day. The defense did not object to that procedure.

After the jurors were excused for the day, the defense investigator was sworn and testified that he had conducted a recorded interview with Vicky Keller, juror 13's friend, over the weekend. The recording was not played, but defense counsel elicited the following testimony from the investigator about what he was told by Ms. Keller:

> Q. In that recorded statement, did she use a pejorative term to refer to the defendant in this case, Mr. Orozco?
>
> A. She did.
>
> Q. What did she call him?
>
> A. A scumbag.
>
> Q. And she said that to our juror over the phone?
>
> A. Yes.
>
> Q. Did she also tell the juror that Mr. Orozco had committed the crime?
>
> A. Yes.
>
> Q. And did she, at any time, indicate that she knew that she might not be allowed to make that phone call, that it might be wrong to call and talk to the juror?
>
> A. I—I believe she told her friend, the juror, that she knew she probably shouldn't be calling, but she did.

RP at 888.

The defense renewed its motion to have juror 13 excused from the jury, and this time the State responded that it "would rather err on the side of caution" and did not object. RP at 889. The trial court granted the motion.

The trial court said it would like to inform juror 13 by phone call that she did not need to come in the following morning, but invited input from the lawyers. Defense counsel expressed an interest in determining from juror 13 whether she had talked to other jurors about her phone call, and the State agreed. The trial court accepted that proposal. Court staff was able to contact juror 13 and have her return to the courthouse for questioning that afternoon.

On juror 13's arrival, the trial court explained to her that it was extraordinary, but he had some follow-up questions for her. Asked whether she disclosed to any of the jurors that Vicky had called her, or why she had been questioned on the witness stand the prior week, or the subject matter of Vicky's call, she answered no to each question. She also said that none of her fellow jurors asked her about these things. The trial court then explained to her that she was being excused:

> THE COURT: . . . I've got something hard to say to you, and so I'll just come right out with it. An investigator went and talked to Vicky, and what Vicky told him is that she described the defendant as a scumbag in that conversation with you.
>
> JUROR NUMBER 13: Yeah.
>
> THE COURT: You know, it's—it's the judgment of all of the lawyers here that having that kind of contact and during the middle of a homicide trial really disqualifies you—
>
> JUROR NUMBER 13: Okay.
>
> THE COURT: —from being a juror.
>
> It certainly wasn't your fault, and I was thrilled, I was thrilled when I heard your testimony last week that you immediately said, "Stop."

> JUROR NUMBER 13: Yeah.
>
> THE COURT: Because you're serious about applying my instructions.
>
> JUROR NUMBER 13: Right.
>
> THE COURT: But we'll have to let you go.

RP at 895.

The next morning, defense counsel asked if the court would be willing to individually inquire of the remaining jurors whether or not they received any information from juror 13. The court responded:

> No. We're gonna take her word for it. I just don't want to open that can of worms and cause them to speculate about what may or may not have happened. I think it will cause more trouble than good quite frankly.

RP at 900. When the jurors were brought in, the court told them:

> You were all probably a bit surprised to find there's only 13 of you rather than the 14 you started with. Remember, a jury is comprised of 12 people. We seated 14 because experience has shown from time to time some of the jurors just simply can't go the distance, and that's what has happened here. So, 13 won't be with us anymore.
>
> So, 12 of you plus now one alternate. Hope we can make it to the end of the trial.

RP at 902.

The jury did make it to the end of the trial. It found Mr. Orozco guilty of most of the charges against him. He appeals.

ANALYSIS

Juror 32

Mr. Orozco makes two assignments of error, the first of which—an alleged denial of a defense motion to dismiss juror 32 for cause—mischaracterizes the proceedings. Under no reasonable reading of the record did the defense move to dismiss juror 32 for cause. In a preliminary run-through of jurors the parties would stipulate to excuse, the defense proposed to excuse juror 32 and the State disagreed. The defense did not seek to individually question juror 32, did not question him in general voir dire, and most importantly, told the trial court when voir dire was finished, "We would pass for cause, your Honor." RP at 360.

Alternatively, Mr. Orozco argues that juror 32 was actually or impliedly biased, a defect that can be raised for the first time on appeal. Both the United States and Washington State Constitutions provide a right to trial by an impartial jury in all criminal prosecutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. Seating a biased juror violates this right. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (citing *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015)), *review denied*, 195 Wn.2d 1025, 466 P.3d 772 (2020). A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant. *Irby*, 187 Wn. App. at 193.

"Both RCW 2.36.110[2] and CrR 6.4(c)(1)[3] create a mandatory duty to dismiss an unfit juror even in the absence of a challenge." *State v. Lawler*, 194 Wn. App. 275, 284, 374 P.3d 278 (2016).

A juror demonstrates actual bias when he exhibits "a state of mind . . . in reference to the action, or 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). Implied bias requires "'the existence of the facts [that] in judgment of law disqualifies the juror.'" *Kuhn v. Schnall*, 155 Wn. App. 560, 574, 228 P.3d 828 (2010) (alteration in original) (quoting RCW 4.44.170(1)). RCW 4.44.180 provides four bases for a challenge for implied bias: consanguinity to a party, certain relationships to a party such as landlord and tenant, having served as a juror in a case with substantially the same facts, and interest in the event of the action or the principal question.

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[2] "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.

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

Mr. Orozco argues that the language uttered when defense counsel proposed to excuse juror 32 by stipulation—"very dense connection with law enforcement related to Sheriff . . . Raymond, . . . Detective Lee Burrowes"—came from juror 32's juror questionnaire. Appellant's Opening Br. at 6. The questionnaire is not included in the clerk's papers, nor can we otherwise confirm this from the record on appeal. But the State does not dispute it, so we assume it to be correct. We *can* determine from the record that no "Sheriff Raymond" or "Detective Lee Burrowes"—whoever they are—were witnesses or were otherwise mentioned during Mr. Orozco's trial.[4]

Mr. Orozco argues that the statement, "very dense connection with law enforcement related to Sheriff Raymond, Detective Lee Burrowes," establishes juror 32's actual bias because it reveals "a favoritism or predisposition toward a category of individuals, such as police officers." Appellant's Opening Br. at 7. He argues it establishes his implied bias because it "made clear that he had some degree of potential consanguinity or affinity with lead law enforcement officers, and similarly had a potential close business relationship with these individuals." *Id.* at 7-8.

It establishes neither. Asking venire members about their own, their family members' or any close friend's employment by a law enforcement agency is standard in

[4] The State implies that they are with the Franklin County Sheriff's Office, which was not the law enforcement agency with responsibility for this case. Resp't's Br. at 15. That, too, is not in our record.

criminal cases. *See, e.g.*, *State v. Cho*, 108 Wn. App. 315, 327, 30 P.3d 496 (2001). "Yes" answers are not uncommon and are not disqualifying.

This court has previously determined that "there is nothing inherent in the *experience or status* of being a police officer that would support a finding of bias." *Id.* at 324 (emphasis added). Nothing inherent in *having a relationship* with a police officer supports such a finding either. "A relationship with the government, without more, does not establish bias." *Id.* Mr. Orozco does not demonstrate that juror 32 was actually or impliedly biased.

Juror 13

Mr. Orozco's second assignment of error is to the trial court's denial of his motion for a mistrial and denial of his alternative request to question jurors about any information shared by juror 13.

"A trial court's denial of a motion for mistrial will be overturned only when there is a 'substantial likelihood' that the error prompting the request for a mistrial affected the jury's verdict." *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002) (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). Our review of the effect of the court's ruling on the jury's verdict must take into consideration the fact that juror 13 was excused from the jury. Mr. Orozco does not demonstrate that extraneous information provided to juror 13, who was excused well before deliberations began, had a substantial likelihood of affecting the jury's verdict.

We review a trial court's decisions regarding investigation of jury problems for an abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 773-74, 123 P.3d 72 (2005). There is no "mandatory format" for the process and courts have discretion to "resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000). The trial court's discretion in determining the scope and manner of investigation that is most appropriate in a particular case is broad. *Elmore*, 155 Wn.2d at 773-74. We recognize that the trial court is uniquely suited to make credibility determinations that arise in the course of investigating juror issues. *Id.* at 778.

We defer to the trial court's assessment of juror 13's credibility. Mr. Orozco challenges that assessment, questioning her credibility because she did not report that Ms. Keller referred to Mr. Orozco as a "scumbag." Assuming that the word "scumbag" was used,[5] it was implicit that whoever beat 82-year-old Ms. Ross to death to steal her car *was* a scumbag. Ms. Keller's use of that word might not have been memorable to juror 13.

The potential for prejudice if juror 13 did say something is incredibly small. Juror 13 might have been biased because she received not only the information, but also a good

[5] We do not know that it was used. Perhaps Ms. Keller misremembered the words she used in the conversation. And when juror 13 said, "Yeah," in response to the trial court telling her about the investigator's interview, she might simply have been acknowledging what she was being told—as she did in response to the court's other statements. *See* RP at 895 ("Yeah," "Okay," "Yeah," "Right").

friend's strong feeling about the information. It is difficult to imagine that another juror would be biased by a second-hand report that one of Ms. Ross's granddaughter's husband's great aunt thought Mr. Orozco was the "scumbag" who killed her very distant relative, however. And as long as it complied with RPC 3.5(c), the defense could task its investigator with talking to jurors after the trial, with a view to making a new trial motion if juror 13 had in fact reported information to others.

The trial court's concern that questioning all of the jurors could present its own problems was a legitimate one. As the federal Second Circuit Court of Appeals has observed, investigation into possible juror misconduct or bias "'is intrusive and may create prejudice by exaggerating the importance and impact of what may have been an insignificant incident.'" *United States v. Peterson*, 385 F.3d 127, 135 (2d Cir. 2004) (quoting *United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998)). "'[W]hile a court looking into juror misconduct must investigate and, if necessary, correct a problem, it must also avoid tainting a jury unnecessarily.'" *Id.* (alteration in original) (quoting *United States v. Cox*, 324 F.3d 77, 88 (2d Cir. 2003)). "Thus, '[i]n this endeavor, sometimes less is more.'" *Id.* (alteration in original) (quoting *Cox*, 324 F.3d at 88). "An individualized examination of each juror . . . could . . . highlight[ ] the issue unnecessarily, disrupt[ ] the trial, and impair[ ] the ability of the jurors to deliberate with each other." *Cox*, 324 F.3d at 88.

No abuse of discretion is shown.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Pennell, C.J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36688-0-III
	)	
HECTOR OROZCO, JR.,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF APRIL, 2021, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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		(X)	E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF APRIL, 2021.

X_____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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