

No. 54135-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

PITA DALLAS ILI,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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## **A. INTRODUCTION**

A court must ensure the accused receives a fair trial composed of impartial jurors. The presence of merely one biased juror deprives the accused of this right. At Pita Ili's trial, the court impaneled a juror who worked for the very police department that instituted the charges against Mr. Ili. Moreover, this juror was personally familiar with an officer from this department who testified at trial on behalf of the State. The court empaneled the biased juror after improperly denying Mr. Ili's for cause challenge and after Mr. Ili exhausted all of his peremptory challenges.

Mr. Ili is entitled to a new trial before an impartial jury.

## **B. ASSIGNMENTS OF ERROR**

In violation of the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington constitution, the court erred when it refused to strike a biased juror for cause, which resulted in the biased juror serving on Mr. Ili's jury.

## **C. ISSUES**

Both the federal and Washington constitutions entitle a person to an unbiased jury.

(a) A juror is biased as a matter of law if a party to the action employs him. This is because the law recognizes that such an individual has implied bias. In a criminal case, a juror's employment with the State

does not per se render him biased. However, if a substantial relationship exists between the interest of the prospective juror in his employment and the interest the government is advancing as a litigant, the juror is biased and cannot serve on the defendant's jury. Here, one of Mr. Ili's jurors worked as a chaplain in the very police department that instituted the State's claim against Mr. Ili. Moreover, he was personally familiar with the police officer from this department who testified on behalf of the State. Did the court deprive Mr. Ili of his right to a fair and impartial jury?

(b) The law also precludes a juror from serving on a jury if he has actual bias. A juror has actual bias if he exhibits a state of mind in reference to a party, which indicates the juror cannot try the issue impartially. For the same reasons articulated above, did the court deprive Mr. Ili of his right to a fair and impartial jury because the juror in question also had actual bias?

#### **D. STATEMENT OF THE CASE**

Pita Ili worked at Custom Choice Door without incident until Aaron Klien's first day at the job. RP 129, 257-58, 335, 387. After Mr. Ili told Mr. Klien how things operated at the job and after some routine "trash talking" between staff members, Mr. Klien told Mr. Ili he was not going to "take his shit anymore." RP 134-36, 259-59, 291, 310, 326-27. Mr.

Klien's statement surprised Mr. Ili, and he did not say anything in response, though Mr. Klien's response angered him. RP 137, 311, 327.

Sometime later, Mr. Klien and Mr. Ili ended up interacting once again. RP 142, 311. According to Mr. Klien, Mr. Ili "confronted him," but according to Mr. Ili, he was simply trying to once again help Mr. Klien do his job. RP 142, 311-12. Mr. Ili told Mr. Klien he should not be on his phone while they were working, but Mr. Klien claimed Mr. Ili "got in [his] face" and confronted him about his previous statement where he told Mr. Ili he would not "take his shit anymore." RP 142-43, 312. Eventually, Mr. Klien told Mr. Ili to "get the fuck out of [his] face," RP 144, 267, 312-13. Mr. Ili grabbed Mr. Klien by the neck and placed him on the ground. RP 314-16.

After coworkers separated Mr. Ili and Mr. Klien, Mr. Klien called the police, and Officer David Maclurg of the Lacey Police Department responded. RP 121-22, 151-52, 271-73. Officer Maclurg arrested Mr. Ili, and the State charged Mr. Ili with one count of assault in the second degree: strangulation. CP 1-4.

During voir dire, the court asked the prospective jurors whether they knew Officer Maclurg. RP 22. Juror 29 responded affirmatively, stating he was a former reserve officer with the Lacey Police Department and currently employed as the chaplain for the Lacey Police Department.

RP 22. Juror 29 told the court he last interacted with Officer Maclurg three weeks before trial. RP 22. The court asked juror 29 whether his familiarity with Officer Maclurg would cause him to give more weight to his testimony, and juror 29 stated it would not. RP 22-23.

Mr. Ili moved to strike juror 29 for cause, arguing that juror 29's familiarity with Officer Maclurg as the chaplain for his police department rendered him biased. RP 33. The State acknowledged juror 29's familiarity with their sole police witness was "a basis for cause." RP 34. However, the State objected to the challenge, arguing juror 29's assurance of his impartiality demonstrated he was not biased. RP 34. The court denied Mr. Ili's motion to strike juror 29. RP 34. Mr. Ili exhausted all of his peremptory challenges, resulting in juror 29 sitting as a juror at Mr. Ili's trial. <sup>1</sup>

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<sup>1</sup> Before voir dire, the court stated the selection of one alternate juror "would be prudent" for Mr. Ili's trial. RP 7. During jury selection, Mr. Ili exercised the six peremptory challenges CrR 6.4(e)(1) allotted him by the time he reached juror 26. Supp CP\_, sub no. 63, pgs. 1-2. Because the court previously excused jurors 27 and 28 due to hardship, and because the State did not exercise its remaining peremptory challenge to excuse either juror 29 and 30, the court impaneled jurors 29 and 30. RP 32-33; Supp CP\_, sub no. 63, pgs. 1-2. And since neither the State nor Mr. Ili used the peremptory challenge CrR 6.5 separately entitled them to for the selection of a potential alternate juror, the court seated juror 31 as an alternate. Supp CP\_, sub no. 63, pgs. 1-2.

At trial, Mr. Ili explained he acted in self- defense, and he described Mr. Klien’s actions made him feel threatened. RP 322-23, 381; CP 50-52.

Officer Maclurg also testified at trial, and he was the only police witness. Through his testimony, the State admitted various exhibits, including an exhibit the State introduced to demonstrate Mr. Klien’s voice was hoarse after the incident. RP 286-87. Additionally, the State also introduced several pictures Officer Maclurg took of Mr. Klien shortly after the incident, which showed Mr. Klien in a neck brace and showed an abrasion on the back of Mr. Klien’s head. RP 277-79. Furthermore, through Officer Maclurg’s testimony, the State introduced Mr. Ili’s statements where he told Officer Maclurg that he “got out of control” and “choked [Mr. Klien] for a few seconds.” RP 292.

The jury found Mr. Klien guilty. RP 396. However, they struggled with the verdict and asked various questions, but they convicted Mr. Ili because they believed that “technically [Mr. Ili’s actions] met the requirements of strangulation to justify the verdict.” CP 55-57; 9/11/19RP 14. The court imposed an exceptional sentence below the standard range downwards. 9/11/19 11-16.



## E. ARGUMENT

**This Court should reverse Mr. Ili's conviction because the court improperly refused to strike a juror for cause, depriving Mr. Ili of his right to a fair trial with impartial jurors.**

- a. Both the federal and Washington constitutions guarantee a defendant the right to an impartial jury.

The Sixth and Fourteenth Amendments of the federal constitution and article I, section 22 of our state constitution require the government to provide the accused with a fair trial composed of impartial jurors. U.S. CONST. amends. VI, XIV; Const. art. I, § 22; *Pena-Rodriguez v. Colorado*, \_\_U.S. \_\_, 137 S. Ct. 855, 860-61, 197 L. Ed. 2d 107 (2017); *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). A single juror's bias deprives the defendant of this critical right. *State v. Gonzalez*, 111 Wn. App. 276, 281-82, 45 P.3d 205 (2002).

In general, defendants ensure they will receive a jury composed of impartial jurors by exercising for-cause challenges and peremptory challenges before the court impanels the jury. *See Ross v. Oklahoma*, 487 U.S. 81, 86-88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); *see also U.S. v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (court "recogniz[ing] the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury").

A court must strike a juror for cause if he has implied bias. RCW 4.44.170(1). If a juror has implied bias, he is prohibited from serving on the jury as a matter of law. RCW 4.44.170(1). For example, a juror has implied bias if he is related to either party, if he is employed by a party, or if he has served as a juror on a previous trial in the same action. RCW 4.44.180(1), (2), and (3). Here, the State of Washington was a party to Mr. Ili's case. CP 4.

A court must also strike a juror for cause if he has actual bias. RCW 4.44.170(2); *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854-55, 456 P.3d 869 (2020). A juror has actual bias if 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). Proof must exist that the juror has such a state of mind in order to warrant the potential juror's removal. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

After a defendant challenges potential jurors for cause, the defendant can also dismiss a potential juror via a peremptory challenge. CrR 6.4(e)(1). Unlike a for cause challenge, "[a] peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude the juror." CrR 6.4(e)(1). Based on Mr. Ili's

charges, the court rules entitled Mr. Ili to six peremptory challenges. *Id.*; CP 4. “When the jury is selected the court may direct the selection of one or more additional jurors...to be known as alternate jurors.” CrR 6.5. The defendant “is entitled to one peremptory challenge for each alternate juror to be selected.” *Id.*

This Court examines whether a court violated a defendant’s right to a fair and impartial jury de novo. *See State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). When the defendant exercises all of his peremptory challenges and yet the court impanels the biased juror on the defendant’s jury, the defendant establishes prejudice that requires reversal. *Ross*, 487 U.S. at 85; *State v. Fire*, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001).

- b. Juror 29 was biased because he worked as a chaplain in the police department that prompted the State to file charges against Mr. Ili, and Juror 29 knew the testifying officer from this department.

The court erred in denying Mr. Ili’s challenge to strike Juror 29 for cause. Juror 29 was impliedly biased, as he worked for the State in the very police department that prompted the State to initiate its charge against Mr. Ili. Moreover, he was personally familiar with the police officer from this department who testified at Mr. Ili’s trial. For the same reasons, juror 29 also had actual bias, which also required the court to

strike juror 29 for cause. Mr. Ili exercised all of his peremptory challenges before the court impaneled Juror 29, thereby forcing this biased juror to serve on his jury. The court's decision to impanel Juror 29 deprived Mr. Ili of his right to an impartial jury. Accordingly, this Court should reverse.

*Johnson* is instructive, as it (1) announces the applicable standard for dismissing jurors for cause when they are State employees; and (2) exemplifies why juror 29 was biased. In *Johnson*, the defendant challenged a juror for cause due to her employment with the Department of Social and Health Services (DSHS), a state agency. 42 Wn. App. 425, 426, 712 P.2d 301 (1985). The court denied the challenge after hearing the potential juror state she could be a fair and impartial juror. *Id.* at 427. On appeal, the defendant contended the court erred in failing to strike this juror for cause because the State employed this juror, and the State was a party to his case. *Id.* at 428. Thus, the defendant argued that RCW 4.44.180(2) required the court to strike her. *Id.* at 428-29.

This Court disagreed, noting that our Supreme Court had held that “state employees are not per se disqualified from serving as jurors in a criminal proceeding.” *Id.* at 428-29 (referencing *State v. Galbraith*, 150 Wash. 664, 667, 274 P. 797 (1929)). This Court instead stated it would construe RCW 4.44.180(2) in light of its purpose, which was to prevent

the impaneling of a juror whose employment could influence the outcome of the proceedings. *Id.* at 429.

Thus, this Court held that “in order for a government employee to stand in the relation of master and servant to the adverse party or to be an employee of the adverse party under RCW 4.44.180(2), there must be a substantial relationship between the interest the prospective juror has in his employment and the interest the government is advancing as a litigant.” *Id.* (internal quotations omitted). Because it was unreasonable to expect that the State’s success or failure in prosecuting the defendant bore on the juror’s personal and financial interests in her employment with DSHS, this Court held “she did not stand in the type of relationship with the State that is contemplated by RCW 4.44.180(2).” *Id.* at 430. Accordingly, this Court affirmed. *Id.*

Here, unlike in *Johnson*, the State’s success or failure in prosecuting the defendant bore on juror 29’s personal interests. Juror 29 did not simply work for one of the many agencies under the umbrella of the State. Instead, the very police agency that initiated the State’s charges against Mr. Ili, the Lacey Police Department, employed juror 29. CP 2-3; RP 22. Juror 29 was personally familiar with the State’s only police witness from this department. Thus, it would place juror 29 in an uncomfortable position for him to acquit Mr. Ili, as he would have to

explain to his coworkers that he found the testimony of one of the officers from the very police department he serves unpersuasive and/or not credible. This is especially true for the chaplain of a police department, as he provides a unique role within the department providing counseling, training, and crises intervention for law enforcement. RCW 41.22.020. Acquitting Mr. Ili could demoralize the police department or erode trust between the officers and juror 29. This could ultimately result in juror 29's termination as chaplain from the police department.

Moreover, juror 29's acquittal of Mr. Ili would undoubtedly place a strain between Officer Maclurg and juror 29, to whom juror 29 has a duty to provide counseling and emotional support. RCW 41.22.040. Juror 29 met with Officer Maclurg at least three weeks before trial, and it was inevitable they would meet again. RP 22. All of these factors demonstrate a "substantial relationship" between the interests of juror 29 and "the interest the government is advancing as a litigant" existed. *Johnson*, 42 Wn. App. at 430.

*Kebble*, a case from Montana, is also instructive as it further illustrates why the court should have struck juror 29 for cause. In *Kebble*, the government charged the defendant with 38 misdemeanor violations for outfitting without a license. 353 P.3d 1175 (Mont. 2015). The government instituted this charge in part due to the Department of Justice's (DOJ)

Division of Criminal Investigation (DCI) investigation of the defendant's computers. *Id.* at 1178. Agent Jimmy Weg of DCI undertook the examination of the defendant's computers, and through his testimony, he introduced multiple copies of documents at trial that supported the government's allegation that the defendant conducted illicit outfitting trips. *Id.*

Before trial, a juror informed the court that DOJ DCI was his employer. *Id.* Additionally, he told the court he knew the prosecuting attorney and several wardens scheduled to testify for the State. *Id.* The parties questioned this juror regarding his ability to be impartial. *Id.* at 1178-79. The defendant asked the court to remove the juror for cause due to his employment with the DOJ. *Id.* at 1179. The court denied this request, opining the colloquy between the juror and counsel indicated no bias. *Id.*

On appeal, the defendant maintained the court should have dismissed the juror for cause because he worked in the same department and division of the DOJ as Mr. Weg, a key witness for the State. *Id.* at 1181. The defendant argued a statute required the court to excuse a juror if he stood in the relation of "master and servant" to a party or if he was "in the employment of...the person who is alleged to be injured by the offense

charge or on whose complaint the prosecution was instituted.” *Id.*; MONT. CODE ANN. § 46-16-115(2)(b) (1991).

The Montana Supreme Court agreed reversed. The court held that where the juror’s employment with the State is indirect or tangential, the parties may explore whether the juror’s employment with the State would somehow prevent the juror from being impartial. *Id.* at 1182. However, where the juror’s employment “connection is direct and the prospective juror is in the employment of the person or agency whose complaint the prosecution was instituted, the challenge for cause must be granted regardless of whether the potential juror claims he can be impartial.” *Id.*

The court reasoned this was necessary because an employer could use its position of authority over the juror to influence the juror’s decision, either directly or subtly. *Id.* Moreover, the juror might experience “an underlying concern about the prospect of returning to work after trial and having to explain to his coworkers or boss why he may have disbelieved their testimony or rendered his verdict against them.” *Id.* While a prospective juror like the juror at issue in *Kebble* might feel compelled to claim his impartiality during voir dire, and while the juror may be well intentioned, “the pressures underlying his employment relationship with a party to the case will undoubtedly color his ability to act wholly without bias.” *Id.*



Thus, although the juror delivered neutral responses during voir dire, his employment with the very entity that was instrumental in initiating the criminal complaint against the defendant required the court to strike the juror for cause pursuant to § 46-16-115(2)(b). *Keble*, 353 P.3d at 1181.

For the exact same reasons, juror 29's employment with the Lacey Police Department—again, the very police department that instituted the State's charges against Mr. Ili—rendered juror 29 biased. As in *Keble*, juror 29 asserted he could be impartial despite his current and prior position with the Lacey Police Department. RP 22. However, the very policy reasons articulated in *Keble* rendered juror 29 biased, as the police department could either subtly or directly influence juror 29 into finding Mr. Ili guilty. And juror 29, though well-intentioned in declaring his impartiality, could have felt pressured to find Mr. Ili guilty—and influence others into finding Mr. Ili guilty—to prevent himself from experiencing the awkward and uncomfortable situation of having to explain to his coworkers why he acquitted Mr. Ili.

For the reasons articulated in *Keble* and based on this Court's reasoning and ruling in *Johnson*, the court erred in failing to strike juror 29 for both implied bias and actual bias.

- c. The court's impaneling of juror 29 deprived Mr. Ili of his right to a fair trial, requiring reversal.

The presence of a biased juror cannot be harmless and requires a new trial. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (referencing *U.S. v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000)); *Ross*, 487 U.S. at 85; *Fire*, 145 Wn.2d at 165.

Juror 29 suffered from both implied bias and actual bias, and yet he sat as a juror in Mr. Ili's trial. Because this was inimical to Mr. Ili's right to a fair and impartial jury, this Court should reverse.

## **F. CONCLUSION**

Based on the foregoing, Mr. Ili respectfully requests that this Court reverse his conviction.

DATED this 7th day of May, 2020.

Respectfully submitted,

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