FILED
Court of Appeals
Division I
State of Washington
11/30/2021 3:45 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
12/1/2021
BY ERIN L. LENNON
CLERK

100423-1

NO. 81577-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JAMES GARLIED DUTCHER,

Appellant/Petitioner.

PETITION FOR REVIEW TO THE SUPREME COURT (RAP 13.4)

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A. IDENTITY OF PETITIONER

Petitioner James Dutcher asks the Washington Supreme Court to accept review of the decision of the Court of Appeals terminating review designated in Part B of this Petition.

B. DECISION OF THE COURT OF APPEALS

A copy of the unpublished opinion of the Court of Appeals (No. 81577-6-I) filed November 1, 2021 is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

I. Did the Court of Appeals below err in concluding that Juror No. 4 manifested no actual bias, where that Juror stated in his questionnaire that he could not be impartial, and then twice refused to provide an assurance of impartiality after describing his descent from a foreign justice system that held people guilty until proven innocent?

II. Did the Court of Appeals below err in concluding that Petitioner's trial counsel was not ineffective where counsel failed to challenge the juror for cause, failed to properly investigate the case and procure a key exculpatory witness for the defense, among others?

D. CONSIDERATIONS JUSTIFYING REVIEW

The decision of the Court of Appeals merits review from this Court, where it lies in conflict both with authority of this Court, as well as with published authority of other divisions of the Court of Appeals. RAP 13.4(b)(1)-(2).

In the present case, the Court of Appeals here conceded that Juror 4's "initial statement [that he could only "try" to be fair] raised a presumption of bias," but thereafter found that the subsequent answers of Juror No. 4 brought the case more in line with the decision of Division II of the Court of Appeals in *State v. Lawler*, 194 Wn.App. 275, 374 P.3d 278 (2016), which held that the trial court had discretion in failing to dismiss an allegedly biased juror. *See*, Brief of Appellant, pp. 14-15.

But the Court of Appeals' opinion ignores its own established precedent from Division I, in both *State v. Guevara-Diaz*, 11 Wn.App.2d 843, 846, 456 P.3d 869 (2020) and *State v. Irby*, 187 Wn.App. 183, 347 P.3d 1103 (2015). In *Guevara-Diaz, Irby*, and others, the Court of Appeals re-affirmed this Court's clear principle of law that "the presence of a biased juror can never be harmless and requires a new trial without a showing of

prejudice." This Court should accept review to harmonize the law relating to when actual bias is established by a prospective juror.

The question of seating an actually biased juror also involves a significant question of constitutional law under the Washington and U.S. Constitutions. The right to a trial by an impartial jury is fundamental, and seating a biased juror violates this right. RAP 13.4(b)(3). This Court should likewise accept review to provide guidance on this fundamental right as it relates to determining when a juror is actually biased, a question rarely addressed, even in cases like *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001), where this Court assumed, without deciding, that a juror was actually biased.

Because the public are the ones who are selected to sit as jurors, the issue of clarifying the law pertaining to the seating of an actually biased juror is one of significant public interest to those both inside and outside the criminal justice system. This, too, is a strong consideration governing review in the present case, and warrants this Court's consideration. RAP 13.4(b)(4).

E. STATEMENT OF CASE

A. Statement of Facts

On September 23, 2017, Officer James George of the Lynnwood Police Department responded to a report of a vehicle theft in progress occurring in Lynnwood, Snohomish County. CP I, 158.

A blue and yellow Suzuki GSXR1000 motorcycle was stolen and the reporting party/owner, Andrei Shustov, had a GPS tracker on the motorcycle. CP I, 158, RP II, 224. Mr. Shustov followed the course of the stolen motorcycle on his phone and was able to give the 911 dispatcher realtime updates on where the motorcycle was going.

After receiving precise coordinates for the motorcycle from a fellow officer, Officer George saw an older Ford truck with a blue and yellow motorcycle in the rear bed. CP I, 158. George saw a male, later identified as James Dutcher, standing near the front driver's fender. Mr. Dutcher sat on the front bumper; George made contact and detained Dutcher. CP I, 158.

Dutcher told Officer George that the truck belonged to him. But in discussing the motorcycle with Dutcher, George stated that

Dutcher told him that initially he didn't know how the motorcycle got in his truck, but later he said that a friend of his put the motorcycle in his truck, and later that it was several friends, whose "names aren't important" who put the motorcycle in his truck. CP I, 159.

Later, James Dutcher testified in his own defense. Mr. Dutcher testified that on the morning of September 23, he was contacted by an acquaintance of his, Dawn Brown, who asked him to use his truck to help a friend of hers, "Pat" to move another friend's motorcycle before the morning, when it would be towed and impounded. Mr. Dutcher was asked to help Pat and his friend to avoid impound fees associated with the tow. RP II, 254, 270-271. Pat represented to Dutcher that Pat was the one responsible for the bike and had authority to take it. RP II, 280-281.

Once the motorcycle was loaded and Dutcher was driving away, he called Pat to find out where he was supposed to be going. RP II, 282. During this conversation, Dutcher saw police lights coming his way, and asked Pat why the police were behind

him. RP II, 282. Pat advised Dutcher to "ditch the truck" and later report it stolen, which Dutcher refused to do. RP II, 284.

The police lights having alerted Dutcher that something was wrong, Dutcher pulled over and got out of the truck to wait for police. RP II, 284-285.

B. Procedure in the Trial Court and Court of Appeals

On August 6, 2018, the Snohomish County Prosecutor's Office filed a one-count Information in the Snohomish County Superior Court, No. 18-1-02128-31, charging Petitioner James Dutcher with one count of Possession of a Stolen Vehicle, alleged to have occurred on September 23, 2017. CP I, 162. Mr. Dutcher retained private counsel, John Polito, who appeared on August 20, 2018. CP I, 153.

After arraignment, the trial court continued the trial date eight times by agreement, ultimately setting trial to February 7, 2020. CP I, 131-136, 138-139, 142-149. The trial spanned three days. CP I, 121-129.

The State noted in its trial briefing that the Defense had put the State on notice that it intended to call a witness named Dawn Brown on behalf of the Defense. CP I, 117. The State wrote that

the "defense has not been able to produce Ms. Brown for an interview." CP I, 117. The State sought leave to interview Ms. Brown prior to her testimony if "defense still intends to call Ms. Brown as a witness and is able to produce her for trial." CP I, 117. The Defense did not file a witness list, and the Defense did not endorse Ms. Dawn Brown as a witness in its trial briefing. CP I, 91-92.

Before jury selection, the Court inquired with the Defense directly regarding its plans to call witness Dawn Brown. "The Court: ... You no longer intend to call Dawn Brown; is that correct? Mr. Polito: Correct. We – she's in the wind. We cannot find her. The Court: All right. So then I guess State's request to examine her is no longer an issue." RP I, 23-24.

Voir dire commenced later in the morning of February 10. CP I, 123. The jury panel consisted of 35 jurors. CP I, 123-124. The State used six of its peremptory challenges, while the Defense used all of its seven challenges. CP I, 124-125. During the jury selection process, Juror No. 4, a man named Gary Lee, who ultimately was seated on the jury, answered on his juror questionnaire form that he could not be fair or impartial. RP I,

44. During questioning by the court regarding his answer, Juror No. 4 said "Because, you know, I'm an immigrant, so I – you know, the system I used to be in it's you're proven to be guilty. I mean, you had to prove yourself. You're in the guilty. ... So it's very different here. This is a different process." RP I, 44. In response to the court's question as to whether "you feel you can follow our process of innocence until proven guilty?", Juror No. 4 said, "I will try, yes." RP I, 44.

Later in the questioning, Juror No. 4 had additional remarks on his potential duties as a juror.

> "[Prosecutor] All right. And so, Juror Number 4, I believe you stated earlier that where you come from, the – I guess, the roles are reversed. People have to prove their innocence instead of the State proving them guilty?
>
> Prospective Juror No. 4: Yes. Oh, I want to clarify that. I'm from Hong Kong. But China have a totally different system. And we – we have relatives in China, so we are totally aware of China system, yes.
>
> [Prosecutor]: Okay. But you're – you're aware of this system that we have here in the United States?
>
> Prospective Juror 4: I've been here long enough to understand the system, yes.
>
> [Prosecutor]: And you would feel comfortable acting as a juror in our system?
>
> Prospective Juror 4: Like I said earlier, I will try, yes."

RP I, 89-90.

Neither party's lawyers, nor the trial court, followed up on this answer with Juror No. 4. No one challenged the juror for cause, no one used a peremptory challenge on this juror, and Juror No. 4 was seated on Petitioner's jury.

After the jury was impaneled, sworn in and instructed, the State began its case in chief. The State called three witnesses over the course of two days. CP I, 126-127. The Defense called Defendant James Dutcher and Mr. Dutcher's mother, Beverly Myrick. CP I, 127. The jury found Mr. Dutcher guilty as charged. CP I, 64.

Mr. Dutcher timely appealed to the Court of Appeals. In an unpublished opinion filed on November 1, 2021, the Court of Appeals held that Mr. Dutcher did not establish the actual bias of Juror No. 4, nor did Mr. Dutcher demonstrate his trial counsel's deficient and prejudicial performance in failing to move for Juror No. 4's removal, failing to investigate and procure witness Dawn Brown, failing to move for the exclusion of witnesses, and failing to convey a plea offer to Petitioner. The Brief and Reply Brief of

Appellant are incorporated by reference herein as though fully set forth.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Petitioner's Right to a Fair Trial Was Violated.

I. Biased Jurors Cannot Sit on a Jury.

Petitioner, like all criminal defendants, has a right to an impartial jury under the Sixth Amendment to the U.S. Constitution and Art. I, sec. 22 of the Washington Constitution. *State v. Noltie*, 116 Wn.2d 831, 836, 809 P.2d 190 (1991). "Not only should there be a fair trial, but there should be no lingering doubt about it." *State v. Parnell*, 77 Wn.2d 503, 508, 463 P.2d 134 (1969) (abrogated by *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001)).

In order to protect this right, the trial court has a duty to excuse any potential juror whose views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985)); *see also*, RCW 2.36.110 (judge must dismiss "from

further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias...").

Biased prospective jurors have views which impair their ability to properly serve as a juror. A juror can be impliedly or actually biased. Implied bias is addressed in RCW 4.44.180 and is defined four separate ways not relevant here. Actual bias is defined in RCW 4.44.170(2) as "the existence of a state of mind on the part of the juror 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." *See also*, *State v. Salvador*, 17 Wn.App.2d 769, 784, 487 P.3d 923 (2021); CrR 6.4.

The critical inquiry in determining bias by the trial court is "whether a juror with preconceived ideas can set them aside." *Noltie*, 116 Wn.2d at 839. The trial court has discretion to determine whether to dismiss a juror based on bias. *State v. Jorden*, 103 Wn.App. 221, 229, 11 P.3d 866 (2000); *State v. Gilcrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). This discretion "allows the judge to weigh the credibility of the prospective

juror based on his or her observations." *Jorden*, 103 Wn.App. at 229.

II. Standard of Review.

Appellate courts generally defer to the trial judge's decision whether to remove a biased juror. *State v. Kloepper*, 179 Wn.App. 343, 317 P.3d 1088 (2014). Because the trial court is in the best position to determine a juror's ability to remain fair and impartial, appellate courts review a trial court's decision *not* to dismiss a juror for abuse of discretion. *Guevara-Diaz*, 11 Wn.App. 2d at 856. A trial court abuses its discretion where its judgment is "exercised on untenable grounds or for untenable reasons." *Id.* However, there are clearly limits on this discretion. Obviously, if the judge is presented with no motion to excuse the juror for cause, as in the present case, then the judge cannot be said to have abused her discretion.

But still, the trial court's judgment is "subject to essential demands of fairness." *Id.* And it is never fair for a biased juror to sit on a jury, regardless of whether trial counsel has moved to challenge the juror for cause, used a peremptory challenge after

a denied for cause challenge[1], and regardless of whether the trial court itself fails to independently remove the biased juror. To obtain relief, it is Petitioner's burden to demonstrate that Juror No. 4 was actually biased and "more than a mere possibility that the juror was prejudiced." *State v. Grenning*, 142 Wn.App. 518, 540, 174 P.3d 706 (2010). However, once that threshold demonstration is made, a new trial must be ordered without any consideration of the effect of the seating of the biased juror. "**The presence of a biased juror can never be harmless and requires a new trial without a showing of prejudice**... ." *Guevara-Diaz*, 11 Wn.App.2d at 846 (emph. added).

III. Juror No. 4 was Actually Biased.

In its Decision below, the Court of Appeals wrote:

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[1] This Court held in *State v. Fire* that a defendant who cures a trial court's improper denial of a for cause challenge by exercising a peremptory challenge on a biased juror, and who then as a result runs out of peremptory challenges, is not entitled to a new trial, so long as no biased juror actually is seated on the jury (relying on *U.S. v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)). 34 P.3d at 1221. *See also, State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001). In the present case, trial counsel below exercised all seven peremptory challenges, yet failed to exercise a challenge on Juror No. 4, so Petitioner's position here is that a biased juror was in fact seated on his jury.

" 'when the juror has expressed reservations but agrees they can set those aside to be fair and impartial, it is within the trial court's discretion to allow that juror to remain.' " Court's Decision, Appendix A, at 10 (quoting *State v. Phillips*, 6 Wn.App.2d 651, 666, 431 P.3d 1056 (2018). The Court of Appeals conceded that Juror 4's "initial statement raised a presumption of bias," but found that "his subsequent statement evinced more certainty that those of the juror in *Lawler*." App. A, at 10. *State v. Lawler.*

But the Court below is incorrect, because Juror 4 never "agreed that [he could] set those [reservations] aside to be fair and impartial." *Phillips, supra.* Juror 4 initially indicated on his juror questionnaire that he could *not* be fair and impartial. Upon initial questioning, he refused to agree that he could set his reservations aside (only going so far as to say "I will try, yes." RP I, 44). Even after a second round of questioning, the Juror refused to alter his position, giving no "assurance" of "impartiality." *State v. Irby*, 187 Wn.App. 183,196, 347 P.3d 1103 (2015); *State v. Guevara-Diaz*, 11 Wn.App.2d at 855 (quoting *Miller v. Webb*, 385 F.3d 666, 674 (6th Cir. 2004)). Juror 4 gave no assurance that he *would* strictly follow the instructions of the judge and not rely on his

past experiences with a foreign justice system, only that he would *try* ("you know, the system I used to be in it's you're proven to be guilty. I mean, you had to prove yourself. You're in the guilty... So it's very different here. ... Like I said earlier, I will try, yes." RP I, 44). The difference between the two concepts of *doing* and *trying* is vast. It is certainly true that "equivocal answers alone do not require a juror to be removed when challenged for cause," *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 808-809, 425 P.3d 807 (2018), but in the present case, the multiple, consistent answers of Juror 4 indicating the presence of actual bias towards a foreign system of justice, *combined* with that Juror's questionnaire indicating that he could not be impartial, demonstrate clear actual bias. Therefore, the Court of Appeals's rejection of Petitioner's claim of juror bias is not consistent with existing case law.

Instead, this case presents a scenario far closer to the cases of *State v. Fire*, *State v. Guevara-Diaz*, *State v. Gonzalez*, 111 Wn.App. 276, 45 P.3d 205 (2002), and *U.S. v. Kechedzian*, 902 F.3d 1023 (9th Cir. 2018), respectively.

In *Guevara-Diaz*, the Court of Appeals reversed a second degree rape conviction stemming from Snohomish County Superior Court, without any showing of prejudice, and after trial counsel failed to object or challenge the seating of a biased juror. There, Juror No. 23 answered, as Juror No. 4 did in the present case, that she could not be impartial. *Guevara-Diaz,* 11 Wn.App-.2d, at 872. The defendant's counsel sought to question the juror outside the presence of the other jurors, and that request was denied by the court. *Id.* Thereafter, neither party nor the judge individually questioned Juror No. 23, who apparently had been a victim of sexual assault herself. Neither party nor the judge exercised a for cause, or even peremptory challenge, against Juror No. 23. Juror No. 23, despite answering that she could not be impartial, made it onto the jury that unanimously convicted the defendant.

The *Guevara-Diaz* Court was explicit: "If the court has only a statement of partiality without a subsequent assurance of impartiality, a court should always presume juror bias." *Id.* at 876 (citations omitted). "All the record clearly shows is that juror 23 said she could not be fair." *Id.* at 858.

But in the present case, the Court of Appeals distinguished *Guevara-Diaz* by stating that "unlike the jurors in [*Guevara-Diaz*], juror 4's initial statement of partiality was followed by individualized questioning of the juror by the trial court and the prosecutor." App. A at 9.

To understand the logic of the Court of Appeals below, it seems to be suggesting that because the lawyers failed to talk to the clearly biased juror in *Guevara-Diaz*, her initial biased remarks stood unchallenged and that case required a new trial; whereas in Petitioner's case, because the juror was subsequently questioned and twice gave the same answer ("I will try") that Juror No. 4's "initial.. presumption of bias" was somehow cured. App. A at 10.

That is not the law as set forth by this Court, more than twenty years ago. Slavish devotion to the mere incantation "I can be fair and impartial" has never been the litmus test for actual bias. This Court of Appeals in *State v. Fire*, 100 Wn.App. 722, 729, 998 P.2d 362 (2000) (reversed by this Court on other grounds in *State v. Fire*, 145 Wn.2d 152 (2001)) stated that "appellate deference to trial court determinations of the ability of

potential jurors to be fair and impartial is not a rubber stamp" where a potential juror's initial responses indicate actual bias. In the *Fire* decision in the Court of Appeals, the juror's initial responses there clearly indicated actual bias and the Court of Appeals held that the trial court should have removed the juror for cause.

Just because Juror No. 4 got close to "the right answer" does not obviate the presence of his actual bias. The juror was just smart enough to catch on to the answers ultimately sought by the parties and trial court. But the judge here had an independent duty to critically oversee the evaluation of this juror and to discharge him for cause when it became apparent that the juror could not and would not "set... aside" his "preconceived ideas." *Noltie*, 116 Wn.2d at 839. *Guevara-Diaz* was correctly decided and the present case is not distinguishable from that decision merely because there was further questioning of an actually biased juror that confirmed and elaborated on that bias. *See also*, *State v. Girault*, No. 81224-6-I (Oct. 25, 2021)(reversing rape conviction where a juror failed to follow the presumption of

innocence upon learning of past crimes of the defendant) (cited as persuasive authority under GR 14.1).

Gonzalez, *supra*, is likewise apposite here. There, the Court of Appeals reversed a conviction for felony assault after a prospective juror, like the present case, failed to even pay lip service to the presumption of innocence and also indicated that they had a preference for the testimony of police witnesses. 45 P.3d at 208. The juror was clearly biased, the *Gonzalez* Court found.

Irby was a 2015 reversal by the Court of Appeals of a murder conviction after a juror during voir dire said she "would like to say he's guilty" during questioning. 187 Wn.App. at 188. There was no follow-up by counsel to this question, to the astonishment of the Court of Appeals. 187 Wn.App. at 197. The Court of Appeals found actual bias on the part of this juror and reversed.

A different juror in *Irby* had also been challenged, but the *Irby* Court found the trial court did not abuse its discretion where it declined to remove that juror after she had said she would "try" to put aside her personal relationships and her predisposition to

believe police testimony. The present case is a more serious iteration of actual bias where the bias arises not in believing one type of witness over another, but in manifesting a belief that it is the accused himself who must prove his innocence rather than the state. The bias in Petitioner's case, therefore, is rooted in the very structure of the justice system. *Irby* therefore, is generally favorable to Petitioner.

In the *Kechedzian* case, the Ninth Circuit reversed felony convictions, holding that "when a juror is unable to state that she will serve fairly and impartially despite being asked repeatedly for such assurances, we can have no confidence that the juror will 'lay aside' her biases or her prejudicial personal experiences and render a fair and impartial verdict." 902 F.3d at 1031 (quoting *U.S. v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000)). In that case, which concerned stolen access devices, a prospective juror who had been the victim of identity theft said she would "try to be fair" on individual questioning and later remained silent when counsel posed a general question to the venire regarding a willingness to follow the presumption of innocence. *Id.* at 1026. The *Kechedzian* Court held that silence did not establish the

juror's impartiality, similar to rulings of other federal circuit courts, such as *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992). Defense counsel there made a motion to challenge the juror for cause, which was denied by the trial judge, who said that "at the end of the day she confirmed or committed to the principles of the presumption of innocence and burden of proof." *Id.* However, the Ninth Circuit Court of Appeals disagreed.

In sum, the Court of Appeals erred when it concluded that Juror 4 did not demonstrate actual bias.

B. Petitioner Received Ineffective Assistance of Counsel

I. Trial Counsel Failed to Challenge Juror No. 4.

As a result of trial counsel's failure to challenge this juror, even electing to use all his seven peremptory challenges, an actually biased juror was seated on the jury. In affirming Petitioner's conviction below, the Court of Appeals found that trial counsel's failure to challenge Juror No. 4 may have been "tactical." App. A at 11. But there is no conceivable tactical or strategic benefit to be gained from having a juror on the jury who believes that it is the duty of the accused to prove his innocence.

"The failure of trial counsel to challenge a juror is not

deficient performance if there is a legitimate tactical or strategic decision not to do so." *State v. Alires*, 92 Wn.App. 931, 939, 966 P.2d 935 (1998).

While it is true that in reviewing a challenge of this type, courts presume that the assistance was effective. *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986), nonetheless Petitioner can show "in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

The record is clear that because trial counsel used all of his challenges, he had none left to exercise against Juror 4. This meant that the only challenge available to counsel was a for-cause challenge. The failure to make such a challenge of a biased juror who was repeatedly confronted about his views and held firm to them, without any assurance that he *would* be fair to both sides, could not have been done for any legitimately conceivable tactical reason. Opposing counsel below suggested that perhaps trial counsel would have liked a juror who was "less-impressed by the simple fact of the filing of the charge," but this is mere specula-

tion and should not be seriously entertained as a possible tactical reason. Brief of Respondent at p. 37. Failing to excuse a biased juror was deficient performance that prejudiced Petitioner's right to a fair trial, and prejudice should be presumed. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984); *Guevara-Diaz.*

II. Trial Counsel Failed to Properly Investigate.

The Court of Appeals below disposes of Petitioner's argument that trial counsel failed to investigate and procure an exculpatory defense witness, Dawn Brown, on the basis that the record is inadequate to establish deficient performance. App. A at 15.

But it is the very absence of the record, in conjunction with the testimony of Petitioner himself and the phone records produced at trial that demonstrates that Dawn Brown was in fact a real person who Petitioner had contact with on the date he was arrested. Trial counsel indicated that he wanted Dawn Brown but she was "in the wind" and trial counsel could not "find her." RP I, 23-24. Rather than seek a continuance (after eight had already occurred), counsel elected to move forward, staking the entire

defense (that Petitioner didn't know the bike was stolen) on Petitioner's own testimony, which trial counsel knew, or had to know, would be perceived by the jury as opportunistic or self-serving.

Procuring Ms. Brown was an essential component of Petitioner's defense. The failure to do so, which is established on the record below, constituted deficient performance, and the prejudice of that action is apparent on its face, after the prosecutor at closing argument attacked Petitioner's credibility, which was not backed up by a third party objective witness. RP II, 324. Here, there is a reasonable probability that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

G. CONCLUSION

This Court should grant review of the Court of Appeals decision terminating review, REVERSE the Court of Appeals below, and REMAND Petitioner's case for a new trial.

Certificate of Compliance (RAP 18.17(b)):

Word Count: 4,835

Dated this 30th Day of November, 2021.

Respectfully submitted,

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Attorney for Petitioner

FILED
11/1/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES GARLIED DUTCHER, Appellant.	No. 81577-6-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — James Dutcher appeals his jury conviction for possession of a stolen vehicle. For the first time on appeal, Dutcher claims that the trial court erred by failing to remove an allegedly biased juror and failing to issue an order excluding witnesses under ER 615. We conclude that the juror did not exhibit actual bias and that Dutcher waived his witness exclusion claim. Dutcher also argues that defense counsel was ineffective in failing to (1) challenge the allegedly biased juror, (2) move to exclude witnesses, (3) procure a key witness, and (4) convey the State's plea offer. We conclude that Dutcher failed to demonstrate that his trial counsel was deficient or that he suffered prejudice. We therefore affirm his conviction.

APPENDIX A

FACTS

On September 23, 2017, Andrei Shustov was sleeping in his office on the fourth floor of a commercial building in Lynnwood when he was awakened at about 5:30 am by the loud noise of an engine running outside. When Shustov looked out the window, he saw that his motorcycle—which had been parked outside—was now lying on its side in the bed of a light blue pickup truck that was driving away.

Shustov's motorcycle had a GPS device that allowed him to track its location using his phone. Shustov jumped in his car, called 911, and attempted to follow the pickup truck. As law enforcement vehicles converged in the area, the tracker showed the truck leaving the main road and turning into a residential neighborhood. Officer Joshua Magnussen observed Shustov parked on the side of the road and made contact. Watching the tracker, Officer Magnussen broadcast live location updates to the other responding officers. The tracker showed the truck taking multiple turns before stopping at a cul-de-sac.

A few minutes later, Officer James George intercepted an older pickup truck with a blue and yellow motorcycle lying in the rear bed. Officer George did not see anyone else in the area. Dutcher exited the truck and sat on the front bumper. Officer George observed a roll of thin green rope on the driver's seat of the truck, which appeared to be the same rope used to partially secure the motorcycle. Officer George arrested Dutcher and questioned him about the motorcycle. Dutcher initially claimed that he did not know how the motorcycle got in his truck. Dutcher then said that a friend helped him move the motorcycle. He then said

multiple friends were involved. When Officer George asked for their names, Dutcher responded that "his friends' names [weren't] important."

Officer Magnussen transported Shustov to the scene of the arrest. Shustov observed damage to the motorcycle's body and ignition, which he said was not there prior to this incident. Shustov also confirmed that he did not know Dutcher and did not give him permission to take the motorcycle.

The State charged Dutcher with one count of possession of a stolen vehicle. The court granted eight continuances prior to trial. The final continuance was granted at the defense's request due in part to "witness availability." Trial began on February 10, 2020.

Following motions in limine, voir dire commenced with a panel of jurors, one of whom would eventually be seated as juror 4. The court began by asking a series of questions regarding whether any potential jurors had personal experiences or life circumstances that might make it difficult to be fair and impartial in Dutcher's case. Several prospective jurors responded affirmatively, but juror 4 was not among them. The court then asked whether any jurors felt unable to follow the instructions or the law, or whether any felt they could not be fair and impartial for any other reason. No jurors indicated that they had an issue doing so.

The court then noted that several members of the panel, including juror 4, had written "no" in response to a question as to whether they could be fair or impartial. The court conducted an individualized inquiry with juror 4 as follows:

> COURT: Juror Number 4, your sheet indicated that you could not be fair and impartial.

JUROR 4: Because, you know, I'm an immigrant, so I -- you know, the system I used to be in it's you're proven to be guilty. I mean, you had to prove yourself. You're in the guilty.

COURT: Okay.

JUROR 4: So it's very different here. This is a different process.

COURT: Do you feel that you can follow our process of innocence until proven guilty?

JUROR 4: I will try, yes.

COURT: All right. So you heard me read the initial instruction that indicates that the defendant, as he sits here right now, is presumed to be innocent. Do you understand that?

JUROR 4: Yes.

COURT: And that that presumption continues throughout the entire trial.

JUROR 4: Yes.

COURT: All right. Do you have any problems presuming Mr. Dutcher's innocence right now?

JUROR 4: Not right now.

COURT: And do you understand that he is not required to testify or to present any evidence on his own behalf, that the burden lies with the State in this case?

JUROR 4: Yes. Yes, I do.

COURT: All right. And you feel that you can hold the State to its burden?

JUROR 4: I will try, like I said, yeah.

COURT: All right. The attorneys may have some follow-up questions. I appreciate that clarification. Thank you very much.

After the court completed its questions, the State and defense counsel began their voir dire. The State engaged juror 4 in the following exchange:

> PROSECUTOR: All right. And so, Juror Number 4, I believe you stated earlier that where you come from, the -- I guess, the roles are reversed. People have to prove their innocence instead of the State proving them guilty?
>
> JUROR 4: Yes. Oh, I want to clarify that. I'm from Hong Kong. But China have a totally different system. And we -- we have relatives in China, so we are totally aware of China system, yes.
>
> PROSECUTOR: Okay. But you're -- you're aware of this system that we have here in the United States?
>
> JUROR 4: I've been here long enough to understand the system, yes.
>
> PROSECUTOR: And you would feel comfortable acting as a juror in our system?
>
> JUROR 4: Like I said earlier, I will try, yes.
>
> PROSECUTOR: Okay. Do you think there would be anything that would keep you from acting impartially?
>
> JUROR 4: Nothing so far.

Neither the State nor the defense challenged any jurors for cause. The State used six of its peremptory challenges, while the defense used all seven. Neither side exercised a peremptory challenge to juror 4. Juror 4 was seated in the jury.

Shustov, Officer Magnussen, and Officer George testified for the State. Dutcher testified in his own defense. He said that on the day of the incident, an acquaintance named Dawn Brown contacted him at about 4:30 a.m. to ask if he would use his truck to help her friend "Pat" move another friend's motorcycle. Brown gave Dutcher Pat's phone number, and Dutcher called Pat to ask for details about the situation. Pat told Dutcher that the motorcycle belonged to a friend, and that it would be towed and impounded in the morning unless it was moved.

Dutcher agreed to help. When he arrived at the motorcycle's location, he saw a black Lexus sedan with four people inside. Pat and another individual got out of the car and loaded the motorcycle into the truck. They returned to the car and drove away, with Pat motioning Dutcher to follow. Dutcher drove behind the Lexus and called to ask where they were going. Dutcher then noticed police lights coming towards him, and asked Pat why that was happening. Pat advised Dutcher to ditch the truck and report it stolen, but Dutcher refused to do so. Instead, he pulled over and waited for police to arrive. Dutcher explained that Officer George's testimony regarding his conflicting story was the result of a misunderstanding.

The jury found Dutcher guilty of possession of a stolen vehicle. The court sentenced Dutcher to 20 days of electronic home detention and ordered him to pay restitution. Dutcher appeals his conviction.

ANALYSIS

Juror Bias

Dutcher argues that the trial court erred when it failed to sua sponte remove juror 4 based on actual bias. In response, the State contends that Dutcher failed to preserve this issue for appeal because he did not challenge juror 4 below. While appellate courts generally do not consider issues raised for the first time on appeal, a narrow exception exists for manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A party demonstrates manifest constitutional error by showing that the issue affects a constitutional right and results in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009).

Seating a biased juror violates a criminal defendant's constitutional right to a fair and impartial jury. State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020). Because the presence of a biased juror cannot be harmless, such error mandates a new trial without a showing of actual prejudice. Id. (quoting United States v. Gonzales, 214 F.3d 1109, 1111 (9th Cir. 2000)). For this reason, seating a juror who exhibits actual bias constitutes a manifest error that can be raised for the first time on appeal. Id. at 851-52 (citing State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015)). We therefore consider whether juror 4 manifested actual bias.

To protect the defendant's constitutional right to a fair and impartial jury, the trial court must excuse a juror for cause "if the juror's views would preclude or substantially hinder the juror in the performance of his or her duties in accordance with the trial court's instructions and the jurors' oath." State v. Lawler, 194 Wn. App. 275, 281, 374 P.3d 278 (2016). Either party may challenge a juror for cause based on actual bias. RCW 4.44.130; RCW 4.44.170(2). Actual bias is "the existence of a state of mind on the part of the juror 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). The trial court must dismiss a biased juror even if neither party challenges that juror. Guevara Diaz at 855.

"If the court has only a 'statement of partiality without a subsequent assurance of impartiality,' a court should 'always' presume juror bias." Id. (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004). But "[e]quivocal answers alone

are not sufficient to establish actual bias warranting dismissal of a potential juror." State v. Sassen Van Elsloo, 191 Wn.2d 798, 808-09, 425 P.3d 807 (2018)). Furthermore, "[a] trial court need not excuse a prospective juror with preconceived opinions if the juror can set those ideas aside and decide the case on the evidence at trial and the law as provided by the court." State v. Peña Salvador, 17 Wn. App. 2d 769, 785, 487 P.3d 923 (2021) (citing RCW 4.44.190). "The trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor and the like." State v. Gonzales, 111 Wn. App. 276, 278, 45 P.3d 205 (2002).

Dutcher cites Guevara Diaz and Irby to support his claim that the trial court should have dismissed juror 4 for actual bias. In Guevara Diaz, a rape prosecution, a prospective juror admitted on a juror questionnaire that she could not be fair to both sides in a trial for sexual assault or abuse. 11 Wn. App. 2d at 846. Neither defense counsel nor the court questioned the juror individually as to whether she could be fair. Id. at 857. This court held that reversal was required because the juror exhibited actual bias and the record did not show the court subsequently received any information showing that the juror could be fair to both sides. Id. at 858.

In Irby, a potential juror who had worked for Child Protective Services stated that the experience made her "more inclined towards the prosecution" and admitted that she "would like to say he's guilty." 187 Wn. App. at 190. This court held that the juror's response showed actual bias and that reversal was required even in the absence of a challenge for cause. Id. at 197.

Guevara Diaz and Irby are readily distinguishable from Dutcher's case. Unlike the jurors in those cases, juror 4's initial statement of partiality was followed by individualized questioning of the juror by the trial court and the prosecutor. In response, juror 4 subsequently clarified that he did not have any problems presuming Dutcher's innocence, that he understood Dutcher was innocent until proven guilty, that he would "try" to hold the State to its burden of proof, and that he could act impartially. Juror 4's subsequent statements of impartiality indicate that he could be fair to both sides. Moreover, unlike the biased jurors in Guevara Diaz and Irby, juror 4's initial response was based on the fact that he was raised in a country with a different legal system, rather than from personal experiences involving crime.

Dutcher asserts that juror 4's statement that he would "try" evinces an inability or unwillingness to plainly state that he could be fair and impartial, thus requiring dismissal. We disagree. In this regard, Lawler is instructive. In Lawler, a potential juror stated "I don't see how I could be objective" based on three past experiences involving family members. 194 Wn. App. at 283. When the State asked whether he could set these experiences aside and judge the case on its merits, the juror replied, "Honestly, I think that would be a pain in the neck, you know. I don't think I would be able to do that with all these experiences." Id. There was no attempt to rehabilitate the juror, and he was seated on the jury. Id.

Division Two concluded that the juror did not manifest actual bias because his answers "were at least slightly equivocal," the court and defense counsel were alert to the possibility of biased jurors, and defense counsel did not use an

available peremptory challenge. Id. at 287. The court emphasized that "the trial court is in the best position to evaluate whether a juror must be dismissed" and that the court "must be careful not to interfere with a defendant's strategic decisions regarding jury selection." Id. at 288. Here, although juror 4's initial statement raised a presumption of bias, his subsequent statement evinced more certainty than those of the juror in Lawler. "When the juror has expressed reservations but agrees they can set those aside to be fair and impartial, it is within the trial court's discretion to allow that juror to remain." State v. Phillips, 6 Wn. App. 2d 651, 666, 431 P.3d 1056 (2018). Dutcher has not shown that the trial court erred in failing to dismiss juror 4 for actual bias.

Ineffective Assistance

Dutcher also argues that defense counsel provided ineffective assistance by failing to challenge juror 4 based on actual bias. We disagree.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate: (1) representation falling below an objective standard of reasonableness and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish either element, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61,

78, 917 P.2d 563 (1996). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

We conclude that Dutcher fails to show deficient performance. First, the trial court's and the State's follow-up questioning established that juror 4 did not manifest actual bias. Second, defense counsel had ample opportunity to observe juror 4's demeanor during questioning. As in Lawler, defense counsel's decision not to use his last peremptory challenge to remove juror 4 suggests a tactical reason to retain him on the jury. And because we conclude that juror 4 was not actually biased, Dutcher has not shown that the result of the trial would have been different had defense counsel sought to remove him. Thus, he has not established prejudice.

Witness Exclusion

For the first time on appeal, Dutcher claims that the trial court should have sua sponte issued an order in limine pursuant to ER 615 excluding all witnesses from the courtroom while other witnesses are testifying and directing witnesses not to discuss the case or their testimony with other witnesses. We conclude that Dutcher waived this claim by failing to raise it below.

In relevant part, ER 615 provides, "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses." The rule's purpose is "to discourage or expose inconsistencies, fabrication, or collusion." State v. Skuza, 156 Wn. App. 886, 895-96, 235 P.3d 842 (2010) (quoting 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 615.2, at 623 (5th ed. 2007)). An order excluding witnesses may be accompanied by an order directing the witnesses not to discuss the case or their testimony with other witnesses. U.S. v. Buchanan, 787 F.2d 477 (10th Cir. 1986).

During cross-examination of Shustov, defense counsel elicited testimony that Shustov had conversations with Officer George and with Myrick in the hallway outside the courtroom while they were waiting to testify. Defense counsel then used this fact to establish that Shustov's trial testimony included details that were not mentioned in the written statement Shustov gave to police on the day of the crime. Dutcher now argues that the trial court should have prevented this from happening in the first place, and the court compounded its error by failing to conduct a fact-finding hearing to determine the content of the hallway conversations. Dutcher contends actual prejudice resulted because the hallway conversations allowed Shustov and Officer George to present testimony that was more congruent.

But this alleged error does not amount to a manifest error affecting a constitutional right and it cannot be raised for the first time on appeal. Dutcher cites no authority for the proposition that this alleged error affects a constitutional right, and we are aware of none. Moreover, Dutcher has not shown that the alleged

error gave rise to actual prejudice, as is required to raise an issue for the first time on appeal. RAP 2.5(a)(3); Kirkman, 159 Wn.2d at 926. Defense counsel cross examined Shustov regarding the hallway conversations, and advantageously used this information to develop his theme that Shustov was remembering more on the witness stand than had actually occurred that morning. Dutcher has waived this issue by failing to raise it below.

Dutcher further contends that defense counsel's failure to invoke ER 615 during motions in limine, or to take action in the face of a potential violation of his due process right to a fair trial, constituted ineffective assistance. But the record shows that defense counsel made tactical use of the witnesses' ability to discuss the case freely. We are not persuaded that the result of the proceedings would have been different had counsel taken a different approach. Dutcher has not met his burden to establish that defense counsel rendered deficient performance or that he was prejudiced thereby.

Investigate and Procure Witness

Dutcher argues that defense counsel provided ineffective assistance by failing to interview or subpoena Dawn Brown as a witness for the defense. The record does not support Dutcher's claim.[1]

Defense counsel has a duty to conduct a reasonable investigation. In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). "Failure to

[1] As Dutcher correctly notes, this court may consider only facts contained in the record when an ineffective assistance claim is raised on direct appeal. State v. Estes, 188 Wn.2d 450, 467, 395 P.3d 1045 (2017). To rely on evidence outside of the trial record, a defendant must present the claim via a personal restraint petition. State v. Grier, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011).

investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest." State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). Generally, "the decision whether to call a witness is a matter of legitimate trial tactics that will not support a claim of ineffective assistance of counsel." State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). But the presumption of competence may be overcome by demonstrating counsel's failure to investigate or subpoena necessary witnesses. Id. at 552.

Dutcher asserts that the record plainly demonstrates Brown was a critical witness for the defense because she would have corroborated his claim that he did not know that the motorcycle was stolen. He further asserts that the record demonstrates defense counsel's lack of effort in failing to interview Brown, serve her with a subpoena, or move to continue the trial to secure her presence.

But the record before us on appeal is nearly silent regarding the nature or extent of defense counsel's efforts to interview Brown or procure her trial testimony. The State's memorandum indicated that, prior to trial:

> Defense put the State on notice that it intends to call Ms. Dawn Brown as a witness in this case. The State has made numerous attempts to arrange an interview with Ms. Brown. However, defense has not been able to produce Ms. Brown for an interview.

Later, during motions in limine, the court asked defense counsel, "[y]ou no longer intend to call Dawn Brown; is that correct?" Defense counsel responded, "Correct. We – she's in the wind. We cannot find her." The court then noted that the State's request to examine her was no longer at issue.

Dutcher argues that defense counsel's failure to procure Brown was inexcusable. But the record before us contains no evidence that would establish defense counsel's acts or omissions in attempting to locate, interview, or subpoena Brown. It establishes only that any efforts defense counsel may have made to procure Brown's trial testimony proved futile. Dutcher also contends that defense counsel should have sought a ninth continuance to attempt to locate Brown. But nothing in the record suggests that such an effort might have proved fruitful.

Dutcher relies on cases holding that defense counsel's investigative efforts were constitutionally insufficient. State v. Jury, 19 Wn. App. 256, 264–65, 576 P.2d 1302 (1978) (failure to confer with prior counsel, failure to interview or subpoena witnesses, failure to research the law or facts until shortly before trial); State v. Estes, 188 Wn.2d 450, 463, 395 P.3d 1045 (2017) (failure to investigate sentencing consequences deprived defendant of the ability to make an informed decision regarding guilty plea); State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) (defense counsel's failure to investigate deprived defendant of opportunity to make a meaningful decision as to whether to plead guilty). These cases do not meaningfully support Dutcher's claim because there, unlike here, the record sufficiently documented counsel's deficiencies. On this record, we cannot conclude that Dutcher has met his burden to demonstrate that defense counsel's failure to procure Brown's trial testimony constituted deficient performance.

Similarly, Dutcher has not shown that the verdict would have been different had Brown been served with a subpoena. Dutcher asserts that Brown would have provided testimony favorable to the defense theory that he did not know the

motorcycle was stolen. Dutcher points to the text messages and calls he had with someone named "Dawn" on the morning of the crime. The evidence, a one-page screenshot from Dutcher's phone, corroborates that Dutcher exchanged several brief texts and calls with another person during the early morning hours on the day of the crime, and that the other person forwarded Dutcher the telephone number of another individual. To the extent that this sparse evidence supports an inference that Brown would testify as Dutcher claims, it equally suggests that Brown knowingly and criminally acted to assist in coordinating the theft of a motorcycle. Under such circumstances, it is probable that Brown would have asserted her constitutional right not to testify if subpoenaed. Dutcher has not established prejudice.

Plea Offer

Dutcher argues that defense counsel provided ineffective assistance by failing to keep him properly advised regarding the status of the case and plea negotiations. The record does not support this claim.

The right to effective assistance of counsel extends to the plea bargaining process. Estes, 188 Wn.2d at 463. To establish prejudice in this context, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler v. Cooper, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). "In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court." State v. Drath, 7 Wn. App. 2d 255, 267, 431 P.3d 1098 (2018) (quoting Lafler, 566 U.S. at 164). While there is no per se

rule requiring defense counsel to pursue plea negotiations in every case, failure to do so may constitute ineffective assistance if the conduct falls below an objective standard of reasonableness. State v. Holm, 91 Wn. App. 429, 437, 957 P.2d 1278 (1998).

Dutcher claims the record demonstrates defense counsel's lack of follow through regarding plea negotiations. We disagree. In fact, the record on appeal is almost entirely devoid of evidence regarding plea offer discussions or the lack thereof. The only reference to a plea offer is found in an omnibus order filed on August 7, 2019. The order—which Dutcher signed—reflects that "[t]he State has given the defendant notice that if he/she does not accept its plea offer it may take the following action: Add charges of Taking a Motor Vehicle without Permission, Possession of Stolen Property." This suggests that the only offer was to plead guilty to possession of a stolen vehicle as charged or face additional charges. Moreover, the State did not add any additional charges even though the case proceeded to trial. Dutcher has not established deficient performance or prejudice.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

THE CONOM LAW FIRM

November 30, 2021 - 3:45 PM

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Appellate Court Case Title:	State of Washington, Respondent v. James Garlied Dutcher, Appellant
Superior Court Case Number:	18-1-02128-1

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