SUPREME COURT NO. 101906-8
COURT OF APPEALS NO. 38265-6-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DEAN MASON,

Petitioner.

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

The Honorable Jeffrey Baker, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Kevin Dean Mason, the appellant below, seeks review of the Court of Appeals decision State v. Mason, noted at ___ Wn. App. 2d ___, 2023 WL 2531289, No. 38265-6-III (Mar. 16, 2023), the slip opinion of which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Juror 22 expressed partiality in favor of law enforcement officers in a case involving alleged assaults against law enforcement officers, like this case, noting that her brother is a sheriff's deputy. When asked directly and repeatedly whether she could put that partiality aside and be a fair and impartial juror, she responded she did not know, she would like to think she could, and she would try. She never affirmatively indicated she could. She was seated as Juror 11 and deliberated. Because Juror 22 never gave an assurance of her impartiality following her statement of partiality, did allowing her to sit on the jury violate Mr. Mason's Sixth Amendment and article I, sections 21 and 22 rights to an impartial jury?

2. Was Mr. Mason's trial counsel constitutionally ineffective by failing to challenge Juror 22 for cause given that she could not assure counsel or the court that she could be a fair and impartial juror?

3. The Court of Appeals reasoned that because Juror 22's statements were equivocal, they were not statements of bias. From this premise, the Court of Appeals declined to decide whether Juror 22 was rehabilitated, despite that she never gave any assurance of impartiality. Does the Court of Appeals decision conflict with Washington Supreme Court and Court of Appeals precedent that the central consideration when a juror expresses any statements of partiality is whether the juror can set those aside, and does the Court of Appeals decision present a significant issue of constitutional law and an issue of public importance insofar as it approves of jurors even when they are unable to give assurances of their impartiality, such that review should be granted pursuant to every RAP 13.4(b) criterion?

C. STATEMENT OF THE CASE

During voir dire, Juror 22 was asked whether her relationships with law enforcement could impair her ability to try the case impartially. Juror 22 answered, "I think they could." RP 85. She explained her "brother is a county sheriff in Spokane County." ARP[1] 86. The prosecutor asked how that would affect her ability to be fair and Juror 22 responded, "I'm very close with my brother, and we talk about the cases that he has to deal with, and I think the fact this assault included police officers, county sheriffs, I think I could be partial." ARP 86.

The conversation continued:

> Mr. Wall: [S]o . . . do you think that that would mean that in this case you'd be more inclined to believe a cop than . . . a non-law enforcement officer?
>
> Juror 22: I'd like to think that I wouldn't, but I do think it's a possibility.
>
> Mr. Wall: And bearing that possibility in mind, do you think that you could be a fair . . . and just juror in this case[?]

[1] Mr. Mason cites the agreed report of proceedings prepared by the parties and filed February 28, 2022 as "ARP."

> Juror 22: I don't know. Like I said, I don't know how -- when you reason through something that's important . . . . that you can't bring in -- outside information that [you] already know about what it means to be a police officer.
>
> Mr. Wall: Right. But we -- you know, we ask you to come here to serve as jurors and bring your common sense, common experience, and your own personal experience. And . . . so the question is can you be fair, can you be fair to the defendant, can you be fair to the state. That's really -- what it all boils down to.
>
> Juror 22: I would try.
>
> Mr. Wall: That's all we ask[.]
>
> Juror 22: Okay.

RP 87-88.

Defense counsel also asked Juror 22 a question about whether she would give a law enforcement officer an advantage over a non-law enforcement officer because of her connection to her brother, using a "head start" race analogy. RP 88; ARP 89. Juror 22 responded, "Again, I would like to think that I wouldn't. Um, and I would try to give them both a fair start, I guess, using your analogy." ARP 89.

Defense counsel also later asked whether Juror 22 was close to any other law enforcement officers; she responded it was just her brother. RP 121. Defense counsel inquired whether she was fearful for her brother's safety and Juror 22 indicated she was always worried but was happier he was now in a smaller town rather than where he used to be in California. RP 121.

Juror 22 was not challenged for cause or by peremptory. RP 137. She sat as deliberating Juror 11 on Mr. Mason's jury. Supp. CP 96.

Mr. Mason was convicted of three counts of third degree assault against three law enforcement officers. CP 59-61; RP 409-10. Mr. Mason appealed. CP 77-91. He argued that it was manifest constitutional error to seat Juror 22 on the jury given that she could give no assurance of impartiality after she herself believed she might be partial in favor of law enforcement officers. Br. of Appellant 10-27. He also asserted that he received ineffective assistance of counsel given that his attorney

acquiesced in seating Juror 22, who gave no assurance of impartiality. Br. of Appellant at 27-30.

The Court of Appeals rejected Mr. Mason's arguments, contending he "assumes Juror 22 expressed actual bias and focuses on the lack of rehabilitation." Mason, slip op. at 7. It reasoned that "[b]efore considering rehabilitation, Mason must demonstrate actual bias," which it contended Mr. Mason could not because "Juror 22's statements were equivocal answers. In addition, even after an equivocal answer, Juror 22 answered in the affirmative that she would try to be fair." Id.

D. ARGUMENT IN SUPPORT OF REVIEW

1. To honor and ensure the constitutional rights to an impartial jury, even jurors who make equivocal statements of partiality should be required to guarantee their impartiality before serving on juries

The Court of Appeals decision jettisons the central question in any case involving a juror's equivocal answers in response to questions about their ability to be impartial. "[E]quivocal answers alone do not require a juror to be removed

. . . rather, the question is whether a juror with preconceived ideas can set them aside." State v. Noltie, 116 Wn.2d 831, 839 & n.5, 809 P.2d 190 (1991) (collecting cases); accord Patton v. Yount, 467 U.S. 1025, 1036-37 & n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); State v. Guevara Diaz, 11 Wn. App. 2d 843, 855-56, 456 P.3d 869 (2020); State v. Winbone, 4 Wn. App. 2d 147, 172, 420 P.3d 707 (2018); State v. Grenning, 142 Wn. App. 518, 540, 174 P.3d 706 (2008); State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001); State v. Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

The Court of Appeals decision refuses to engage with this central question, instead reasoning that merely equivocal statements that express only the "possibility of prejudice is not enough to demonstrate actual bias." Mason, slip op. at 6. Mr. Mason does not dispute that Juror 22's statements were equivocal. She never stated with certainty that she would or would not be a fair and impartial juror but instead said she did not know, would like to think she could be fair, and would try.

However, once she called her impartiality into question, she never indicated that she could set it aside. The central question in assessing her fitness for jury service was never resolved. By approving of this juror without resolving the central question, the Court of Appeals decision conflicts with the longstanding constitutional precedent of the United States Supreme Court, the Washington Supreme Court, and the Court of Appeals, meriting review under RAP 13.4(b)(1), (2), and (3).

The Court of Appeals conflated the concepts of equivocation and bias. Mason, slip op. at 6-7. Again, there's no dispute that Juror 22 was equivocal. But this does not mean that equivocal statements need never be resolved even where, as here, the equivocal statements express partiality in favor of law enforcement. The prosecution and the defense certainly thought the equivocal statements needed to be resolved: both counsel attempted to obtain an assurance of impartiality from Juror 22, but she never gave one. Just because Juror 22 did not definitively say she could not be fair does not mean she was qualified to sit.

The Court of Appeals decision relies on Gonzales's statement that "[a] prospective juror's expression of preference in favor of police testimony does not, standing alone, conclusively demonstrate bias." Mason, slip op. at 6 (citing Gonzales, 111 Wn. App. at 281). Mr. Mason agrees with this general statement, but the Court of Appeals reads it out of context. In Gonzales, like here, the juror admitted a potential bias in favor of police and answered she did not know if she could apply the presumption of innocence. 111 Wn. App. at 281-82. But unlike in this case, "no rehabilitation was attempted." Id. The Gonzales juror should have been excused because, as here, "[a]t no time did [she] express confidence in her ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence." Id. at 282. The Gonzales juror's statements expressed actual bias that were never neutralized. Id.

Juror 22, however, did more than express a preference in favor of police testimony; Juror 22 admitted she might be unfair as a result of her personal relationship with her brother.

Rehabilitation was attempted and it failed: Juror 22 said she didn't know if she could put her bias aside and the most she stated was that she would try to do so. Gonzales conflicts with the Court of Appeals decision in this case, meriting review. RAP 13.4(b)(2).

The Court of Appeals also relied on State v. Irby, 187 Wn. App. 183, 196, 347 P.3d 1103 (2015), and State v. Griepsma, 17 Wn. App. 2d 606, 613-14, 490 P.3d 329, review denied, 198 Wn.2d 1016 (2021), for the proposition that a juror demonstrates actual basis only when she expresses preconceived opinions or beliefs on the issues. Mason, slip op. at 6. But these cases are different because they involved merely expressions of preference in favor of believing police testimony. Griepsma, 17 Wn. App. 2d at 614; Irby, 187 Wn. App. at 196. In this case, Juror 22 stated, "I think I could be partial." ARP 86. While she also said she thought it was a "possibility" that she would believe law enforcement witnesses over non-law enforcement witnesses, she also said "I don't know" or "I would try" to more general

questions about whether she could be a fair juror. RP 87-88. Juror 22's statements of potential bias were different than those at issue in Griepsma and Irby because they were not just about a predisposition to believe the police but pertained to her overall ability to be fair and impartial.

And, to the extent that Irby and Griepsma permit mere effort on the part of a juror rather than an affirmative assurance of impartiality, the cases are inconsistent with Noltie and several other cases cited above that provide that the important question is whether jurors can set aside their preconceptions and try the case impartially. In Noltie, after all, the probability of impartiality was overcome because the juror expressed rehabilitation, noting that the more she listened and participated in the voir dire process, "it seems that it would be a lot easier to be fair" and noted it would be a "terrible injustice" for Mr. Noltie not to receive a fair trial. 116 Wn.2d at 836.

The Court of Appeals also relied on State v. Lawler, 194 Wn. App. 275, 374 P.3d 278 (2016), for the proposition that Juror

22 did not express actual bias. In Lawler, the juror was asked whether he could be fair and impartial and said, "I don't see how I could be objective with all that past experience." Id. at 283. When asked if he could set his personal experiences aside and judge the case on its merits he 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. at 283. There was no attempt to rehabilitate the juror and thus he never stated he could be fair and impartial. Id. The court reasoned that because the juror had never definitely stated he could not be fair and impartial, his equivocal answers alone did not require dismissal of the juror. Id.

While Mr. Mason agrees that equivocal answers do not alone require excusal, equivocal answers followed by a failed attempt at rehabilitation must. Unlike in Lawler, the parties did try to rehabilitate Juror 22 but the most she could say is that she would try to be fair, not knowing if she could be and never affirmatively assuring that she could be. Because Juror 22 never

gave an assurance of impartiality, she should have been removed for cause. The Court of Appeals contrary decision conflicts with numerous decisions about the constitutional right to an impartial jury and should be reviewed under RAP 13.4(b)(1), (2), and (3).

Furthermore, the need for a clear rule presents a matter of public importance under RAP 13.4(b)(4). There appears to be tension between the Court of Appeals decision and the authority it cites and the rule that doubts about bias must be resolved against seating the juror. Cho, 108 Wn. App. at 330; Guevara Diaz, 11 Wn. App. 2d at 855; accord United States v. Kechedzian, 902 F.3d 1023, 1027 (9th Cir. 2018); United States v. Gonzalez, 214 F.3d 1109, 1111, 1114 (9th Cir. 2000). The tension would be best resolved by requiring a juror who has made equivocal statements regarding her potential biases to assure her impartiality or be dismissed.

Several federal cases are in accord. See Kechedzian, 902 F.3d at 1029 (stating "I might be able to," "I would want to . . . but I honestly don't know if I could," and "I would try" to be

impartial was insufficient assurance of impartiality); United States v. Nelson, 277 F.3d 165, 202-03 (2d Cir. 2002) (Sixth Amendment requires unambiguous assurance of impartiality and reversal required where most juror could say was that he would "like to think" he could be impartial but did not know); Gonzalez, 214 F.3d at 1111 ("I will try to" was insufficient because "[w]hen 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"); United States v. Sithithongtham, 182 F.3d 1119, 1121 (8th Cir. 1999) ("A juror who 'would probably give [law enforcement officers] the benefit of the doubt,' is not what we would consider impartial. Nor is a juror who 'could probably be fair and impartial.' 'Probably' is not good enough." (alterations in original) (quoting trial transcript)); Bailey v. Bd. of County Comm'rs, 956 F.2d 1112, 1127 (11th Cir. 1992) ("'Doubts about the existence of actual bias should be resolved against permitting

the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid.'" (quoting United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976))); United States v. Murray, 618 F.2d 892, 899 (2d Cir. 1980) (holding it is "crucial" that the juror "made clear that her [predisposition] would not affect her judgment, and that and that she would determine the case solely on the evidence presented" (alteration in original)).

Confidence in the jury-trial system would be increased by requiring jurors who are unsure about their ability to be impartial to state with certainty that they are impartial. If they cannot give this assurance, they should be excused. This would be an extremely easy rule for trial courts to apply and would minimize the risk that biased jurors end up serving on juries. It undermines the promise of trial by impartial jury to allow jurors who cannot guarantee their impartiality to serve, as occurred in Mr. Mason's case. In addition to the conflict- and constitution-based arguments made above in support of review, review should also

be granted to address this issue of public importance under RAP 13.4(b)(4).

2. Alternatively, this issue merits review as an ineffective assistance of counsel claim

"A trial judge has an independent obligation to protect [the jury-trial] right, regardless of inaction by counsel or the defendant." Irby, 187 Wn. App. at 193 (citing State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012)). Nonetheless, review is appropriate for the same reasons discussed above to assess the jury-trial right through the lens of ineffective assistance of counsel.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Washington has adopted Strickland v. Washington's two-pronged test for evaluating whether a defendant had constitutionally sufficient representation." Estes, 188 Wn.2d at

457. "Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Id. (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A "reasonable probability" is lower than the preponderance of the evidence standard; "it is a probability sufficient to undermine confidence in the outcome." Id.

It could never be considered reasonable for defense counsel to waive her client's right to trial by a fair and impartial jury. As the Sixth Circuit Court of Appeals in State v. Hughes put it, "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror

who should have been dismissed for cause requires reversal of the conviction." 258 F.3d 453, 463 (6th Cir. 2001) (citing United States v. Martinez Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)).

> If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury. However, if counsel cannot waive a criminal defendant's basic Sixth Amendment right to trial by jury 'without the fully informed and publicly acknowledged consent of the client,' Taylor v. Illinois, 484 U.S. 400, 417 n.24, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), then counsel cannot so waive a criminal defendant's basic Sixth Amendment right to trial by an impartial jury . . . . We find no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury.

Hughes, 258 F.3d at 463. Defense counsel's performance was objectively deficient in allowing Juror 22 to serve without challenge[2] despite her inability to state that she could be fair and impartial. The first prong of Strickland is satisfied.

---

[2] The Court of Appeals contended, "Mason does not allege the counsel was ineffective for failing to use a peremptory

The prejudice prong is also satisfied, given that the presence of a biased juror cannot be considered harmless and requires a new trial without a showing of prejudice. Irby, 187 Wn. App. at 193; Hughes, 258 F.3d at 463. "[G]iven that a biased juror was impaneled in this case, prejudice under Strickland is presumed, and a new trial is required." Hughes, 258 F.3d at 463.

The Court of Appeals rejected the ineffective assistance of counsel claim by reasoning that "Juror 22 did not demonstrate actual bias by her equivocal answers and Mason fails to demonstrate that Juror 22 would have been excused had she been challenged for cause." Mason, slip op. at 9. But, under the

---

challenge on Juror 22." Mason, slip op. at 9. On the contrary, Mr. Mason's argument was that counsel was ineffective for allowing Juror 22 to serve "without challenge" of any kind, though he acknowledges he did not specifically discuss for-cause or peremptory challenges when asserting his ineffective assistance of counsel claim. See Br. of Appellant at 27 (heading asserting ineffectiveness in acquiescing to seating Juror 22 "without challenge"), 30 ("Defense counsel's performance was objectively deficient in allowing Juror 22 to serve *without challenge* despite her inability to state that she could be fair and impartial.").

authority discussed above, the central question is whether the juror could set aside her preconceptions and be fair and impartial. Had counsel pointed out that Juror 22 could give no such assurance, the trial court would have been required to remove Juror 22 for cause. Review should be granted to address this important constitutional issue under the rubric of ineffective assistance of counsel pursuant to all RAP 13.4(b) criteria for the same reasons discussed in Part D.1 above.

E. CONCLUSION

Because Mr. Mason satisfies all RAP 13.4(b) review criteria, the petition for review should be granted.

DATED this 17th day of April, 2023.

I certify this document contains 3,651 words. RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

KEVIN A. MARCH, WSBA No. 45397
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
MARCH 16, 2023
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, Respondent, v. KEVIN DEAN MASON, Appellant.	)))))))))	No. 38265-6-III UNPUBLISHED OPINION

STAAB, J. — Following a jury trial, Kevin Dean Mason was found guilty of three counts of assault in the third degree for spitting on police officers. On appeal, Mason raises three issues. First, Mason argues he was denied his right to a fair and impartial jury because one of the jurors expressed actual bias during voir dire and his attorney did not move to challenge or strike this juror. Second, Mason contends that his attorney was ineffective for failing to strike this juror. Finally, Mason contends that his supervision fees should be struck because they are both discretionary and Mason is indigent.

We conclude that the juror's statements were equivocal and did not demonstrate actual bias, and in turn, Mason did not receive ineffective counsel for failing to challenge this juror. We also hold that a recent statutory amendment applies to the supervision fees imposed on Mason and requires vacation of the fees. We affirm Mason's convictions and remand to strike the supervision fees.

BACKGROUND

On December 11, 2019, Mason was formally charged with three counts of assault in the third degree for spitting on police officers. A jury found Mason guilty of all three counts. On appeal Mason contends that "Juror" 22 expressed actual bias during voir dire.

During vior dire, the jurors were asked whether they had close friends or relatives connected with the courts. When Juror 22 responded that her brother was a sheriff's deputy, the following colloquy took place:

> [PROSECUTOR]: And how do you think it would affect your ability to be a juror.
>
> JUROR: I'm very close with my brother, and we talk about the cases that he has to deal with, and I think the fact that this assault included police officers, county sheriffs, I think I could be partial.
>
> [PROSECUTOR]: So you think that you couldn't be open-minded and you'd give the law enforcement the benefit of the doubt? I mean, 'cause I can't believe that your brother's never lied to you or misrepresented something to you. I mean he's your brother, isn't he, he's a sibling?
>
> JUROR: No, no. Yeah. I trust my brother. I'm not saying that at all.

Agreed Rep. of Proc. (RP) (May 19, 2021) as to page 86.

Following this interaction, the prosecutor continued to ask questions to see if Juror 22 could be impartial:

> [PROSECUTOR]: . . . do you think that that would mean that in this case you'd be more inclined to believe a cop than someone—a non-law enforcement officer?
>
> JUROR: I'd like to think that I wouldn't, but I do think it's a possibility.

> [PROSECUTOR]: And bearing that possibility in mind, do you think that you could be a—a fair and just juror in this case.
> JUROR: I don't know. Like I said, I don't know how – when you reason through something that's important—
> [PROSECUTOR]: Uh-huh.
> JUROR: —that you can't bring in—outside information that already know about what it means to be a police officer.
> [PROSECUTOR]: Right. But we—you know, we ask you to come here to serve as jurors and bring your common sense, common experience, and your own personal experience. And—and so, —so the question is can you be fair, can you be fair to the defendant, can you be fair to the state. That's really—what it all boils down to.
> JUROR: I would try.
> [PROSECUTOR]: That's all we ask—
> JUROR: Okay.

RP at 87-88.

Defense counsel followed up by asking Juror 22 if she would give a police officer witness "an advantage" over a non-law enforcement witness, given her experience and relationship with her brother. Juror 22 answered, "Again, I would like to think that I wouldn't. Um, and I would try to give them both a fair start, I guess, using your analogy." Agreed RP as to Page 89. Juror 22 was not challenged for cause or by peremptory and sat as a deliberating juror for Mason's trial.

Following Mason's conviction, he was sentenced to 40 months of incarceration and 12 months of community custody. After reviewing Mason's financial situation, the court entered an order of indigency and imposed mandatory financial obligations.

However, preprinted language on the form required Mason to pay Department of Corrections (DOC) community custody supervision fees.

ANALYSIS

The primary issues on appeal are whether Juror 22 expressed actual bias and whether Mason's trial attorney was constitutionally ineffective for failing to remove her with either a challenge for cause or a peremptory challenge and whether the discretionary supervision fees should be struck.

Criminal defendants have both a federal and state constitutional right to a fair and impartial jury. *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). Seating a biased juror violates this right. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 30, 296 P.3d 872 (2013). Typically, a defendant waives the issue on appeal by failing to raise an objection to a juror at the trial court level. *State v. Tharp*, 42 Wn.2d 494, 501, 256 P.2d 482 (1953). However, a challenge based on a claim of actual bias of a juror is "an issue of manifest constitutional error" that has not been waived even if a defendant fails to use their peremptory challenges at trial. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854, 456 P.3d 869 (2020).

Although Mason did not move to strike Juror 22, a judge who observes actual bias has a corollary duty to remove the juror. "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 [or] prejudice." RCW 2.36.110. However, a trial court should be cautious of interfering with the jury selection process because of the wide variety of strategic reasons a defendant may have for not challenging certain jurors. *State v. Lawler*, 194 Wn. App. 275, 284-85, 374 P.3d 278 (2016). We review a trial court's failure to remove a juror for actual bias for manifest abuse of discretion. *State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008).

"When a juror makes an unqualified statement expressing actual bias, seating the juror is a manifest constitutional error." *State v. Irby*, 187 Wn. App. 183, 188, 347 P.3d 1103 (2015). A juror demonstrates actual bias when they exhibit "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." *Guevara Diaz*, 11 Wn. App. 2d at 855 (quoting RCW 4.44.170(2)).

On the other hand, "a juror's 'equivocal answers alone' do not justify removal for cause." *State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008) (citing *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). The party claiming bias must provide proof that shows more than a possibility of preference. *Gonzales*, 111 Wn. App. at 281. Even when a juror has formed or expressed an opinion on the action, its witnesses, or the party, the court is not required to dismiss the juror unless the court is "satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; *State v. Lawler*, 194 Wn. App. 275, 281, 374 P.3d 278 (2016).

Mason contends that Juror 22 made statements of partiality toward law enforcement witnesses that demonstrated actual bias. We disagree. After indicating that her brother was a sheriff's deputy, Juror 22 was asked if she would be more inclined to believe a law enforcement witness. She responded, "I'd like to think that I wouldn't, but I do think it's a possibility." RP at 87. When asked if she could be fair to the defendant, Juror 22 responded that she would try. The mere possibility of prejudice is not enough to demonstrate actual bias.

"A prospective juror's expression of preference in favor of police testimony does not, standing alone, conclusively demonstrate bias." *Gonzales*, 111 Wn. App. at 281. Instead, actual bias is demonstrated only when a juror expresses preconceived opinions or beliefs on the issue. *See Id*. at 278 (juror expressed actual bias when she stated, "unless [police] are proven otherwise, they are always honest and straightforward, and tell the truth. So I would have a very difficult time deciding against what the police officer says."); *Irby*, 187 Wn. App. at 196 (juror who said she was "predisposed to believe" police officers but would try to decide the case fairly did not demonstrate actual bias); *State v. Griepsma*, 17 Wn. App. 2d 606, 613-14, 490 P.3d 239, *review denied*, 198 Wn.2d 1016 (2021) (jurors who indicated they would give more weight to a witness's testimony just because they were police officers demonstrated a preference in favor of police and not an actual bias).

In his briefing, Mason assumes Juror 22 expressed actual bias and focuses on the lack of rehabilitation. Before considering rehabilitation, Mason must demonstrate actual bias. *See generally Lawler*, 194 Wn. App. at 283. As mentioned above, Juror 22's statements were equivocal answers. In addition, even after an equivocal answer, Juror 22 answered in the affirmative that she would try to be fair. The trial court is in the best position to evaluate the juror. *Lawler*, 194 Wn. App. at 287. Our review is limited to Juror 22's voir dire answers, which does not allow us to asses her tone of voice, facial expressions, or body language. The record leaves us with an equivocal answer and an affirmative response to try and be impartial.

In support of his argument, Mason cites several cases, including the unpublished decision in *State v. Talbott*, No. 80334-4-I, (Wash. Ct. App. Dec. 6, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/803344.pdf, *rev'd*, __ Wn.2d __, 521 P.3d 948 (2022). *Talbott* is easily distinguishable because the parties conceded that the juror expressed actual bias during voir dire, and the only question was whether a party can appeal on the basis a juror should not have been seated even though the party had peremptory challenges remaining. *Talbott*, 521 P.3d at 952. In both *Gonzalez* and *Talbott*, potential jurors made statements of actual bias that needed to be rehabilitated with the assurance that they could be impartial. Here, Juror 22 did not express actual bias and we do not need to decide whether she was rehabilitated.

Juror 22's statements were not statements of actual bias. Therefore, Mason's Sixth Amendment, art. I, § 21, and art. I, § 22 rights of both a fair and impartial jury were not violated when Juror 22 was allowed to sit at trial and deliberate.

Mason's second argument is that his attorney was constitutionally ineffective for failing to challenge Juror 22 for cause. This argument fails because he cannot demonstrate deficiency or prejudice. Both the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution guarantee effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). A successful claim requires the defendant to demonstrate two components: that counsel's performance was deficient, and the deficient performance caused prejudice. *Strickland*, 466 U.S. at 687. Representation is deficient if after considering all circumstances, it falls "'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *Strickland*, 466 U.S. at 688). Further, prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the trial would have been different. *Id*. at 34.

To prevail on an ineffective assistance claim, a defendant must overcome a "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "A defendant generally must demonstrate the

absence of a legitimate strategic or tactical reason for counsel's performance." *State v. Johnston*, 143 Wn. App. 1, 17, 177 P.3d 1127 (2007). "It is a legitimate trial strategy not to pursue certain matters during voir dire in order to avoid antagonizing potential jurors." *Johnston*, 143 Wn. App. at 17; *see generally State v. Alires*, 92 Wn. App. 931, 939, 966 P.2d 935 (1998) (noting that excessive questioning or a failed challenge could cause antagonism toward the defendant).

Here, neither the first nor second prong of the *Strickland* test is satisfied. Mason contends that counsel was objectively deficient in allowing Juror 22 to serve without challenge because she was unable to state she could be fair and impartial. However, for the reasons discussed above, Juror 22 did not demonstrate actual bias by her equivocal answers and Mason fails to demonstrate that Juror 22 would have been excused had she been challenged for cause.

Mason does not allege that counsel was ineffective for failing to use a peremptory challenge on Juror 22. Because Juror 22's statements were not statements of actual bias, Mason did not receive ineffective counsel when his attorney did not challenge this juror for cause.

Next, Mason challenges the imposition of DOC community supervision fees as part of his sentence. We agree that these fees should be struck from his judgment and sentence. Under former RCW 9.94A.703(2)(d) (2021), unless waived by the court, the "court shall order an offender to: (d) Pay supervision fees as determined by the

department." However, earlier this year, legislation amended this community custody statute. *See* Second Substitute H.B. 1818, 67th Leg., Reg. Sess. (Wash. 2022). This amendment had an effective date of July 1, 2022, and deleted the supervision fees provision. Likewise, in a recent case published by this court, we held that the amendment should apply to a defendant's case that was pending on appeal. *See State v. Wemhoff*, 24 Wn. App. 2d 198, 519 P.3d 297 (2022). Because Mason's case is pending appeal, his supervision fees should be struck.

We affirm Mason's convictions and remand for the trial court to strike the DOC community supervision fees.

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.

Staab, J.

WE CONCUR:

Fearing, J.

Pennell, J.

NIELSEN, BROMAN & KOCH, PLLC

April 17, 2023 - 2:56 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38265-6
Appellate Court Case Title:	State of Washington v. Kevin Dean Mason
Superior Court Case Number:	19-1-00125-1

The following documents have been uploaded:

- 382656_Petition_for_Review_20230417145553D3056068_7708.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 38265-6-III.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- davidw@klickitatcounty.org
- paappeals@Klickitatcounty.org

Comments:

Sender Name: Kevin March - Email: marchk@nwattorney.net
Address:
2200 6TH AVE STE 1250
SEATTLE, WA, 98121-1820
Phone: 206-623-2373

Note: The Filing Id is 20230417145553D3056068